STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1448

State of Minnesota,
Respondent,

vs.

Gilbert Anthony Castillo,
Appellant.

Filed July 22, 2013
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-10-8991

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, Ralph J. Detrick (certified student attorney), St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's denial of a motion to suppress evidence obtained during execution of a search warrant. Because the warrant was supported by probable cause and authorization for the unannounced, nighttime search was supported by reasonable suspicion, we affirm.

FACTS

On July 7, 2010, Farmington Police Detective Shawn Scovill applied for a warrant to search a residence at 171 Annapolis Street East, St. Paul and the person of R.Y. The supporting affidavit stated that in the week preceding the warrant application, a confidential informant (CI) told Detective Scovill that V.C. was selling large amounts of methamphetamine. The CI also informed Detective Scovill that V.C. regularly stayed at three different residences, including one on Annapolis Street in St. Paul. After receiving this information, Detective Scovill arranged for the CI to conduct a controlled buy of methamphetamine from V.C. The warrant application describes the controlled buy as follows:

> Within the past 72 hours, at your affiant's direction, a controlled buy of suspected methamphetamine was made by the CI from [V.C.]. Your affiant met the CI at a predetermined location where he/she and he/she's vehicle were searched for controlled substances, contraband, and large amounts of money with none found. Your affiant provided the CI with an amount of prerecorded government buy fund money to purchase the suspected methamphetamine. Your affiant followed the CI to a predetermined location. The CI did not stop or meet with any other individuals prior to arriving at the location. At this location agents of the

> Dakota County Drug Task Force observed [V.C.] get into the CI's vehicle. [V.C.] then directed the CI to drive to 171 Annapolis Street East, St. Paul MN 55107. Again agents of the Dakota County Drug Task Force had the CI under constant surveillance and the CI did not stop or meet with any other individuals prior to arriving at this address. At this location the CI and [V.C.] approached the side entrance of the residence whereupon the CI observed an unknown Hispanic male individual provide [V.C.] with an amount of suspected methamphetamine. The CI then gave [V.C.] the government buy fund money. The CI was then followed back to the predetermined location where he/she turned over to my custody a quantity of suspected methamphetamine that had been purchased from [V.C.] at 171 Annapolis Street East, St. Paul MN 55107. The CI and the CI's vehicle were then again searched for controlled substances, contraband, and large amounts of money with none found.

Detective Scovill interviewed the CI following the controlled buy. The CI stated that he/she had been to the residence at 171 Annapolis on two occasions within the previous four months, knew the owner of the residence as "RAFA," and, on one occasion, watched "RAFA" remove approximately five pounds of methamphetamine from a kitchen pan. Agents with the St. Paul Narcotics Unit identified R.Y. as a possible match for the address and nickname. The CI positively identified R.Y., from a driver's license photograph, as the individual who gave methamphetamine to V.C. during the controlled buy.

In the application to search 171 Annapolis, Detective Scovill sought authorization for "[a] nighttime search . . . to use the cover of darkness for officer safety purposes and to avoid officers being seen or compromised as well as to prevent the destruction of evidence" and "an unannounced entry to prevent the occupants of the residence from gaining access to firearms or other dangerous weapons." Detective Scovill attested that

"one of the neighbors is related to a target of the investigation and therefore may warn the occupants of the residence if law enforcement is observed approaching the residence." He also attested that V.C. had been convicted of a felony and had been arrested for first-degree murder, second-degree assault, first-degree assault, possession of an incendiary device, a fifth-degree controlled substance crime, carrying a weapon without a permit, possession of a firearm by a felon, aggravated robbery, obstructing legal process, and fleeing police in a motor vehicle. Detective Scovill further attested that R.Y. had been convicted of a felony and had been arrested for first-degree murder, aggravated robbery, a fifth-degree controlled substance crime, and obstructing legal process. The district court issued a no-knock, nighttime search warrant for the residence at 171 Annapolis, which included authorization to search R.Y.

At approximately 6:00 a.m. on July 13, members of the St. Paul SWAT team and Dakota County Drug Task Force made an unannounced, forced entry into the residence at 171 Annapolis. When the officers arrived to execute the warrant, appellant Gilbert Anthony Castillo was taking out the garbage. When the officers attempted to restrain him, he started yelling that his nephew was asleep on the floor in the residence. After the officers entered the residence, they brought its occupants into the dining room and kept them there while officers searched the residence. Detective Scovill presented the search warrant to the homeowner, N.C. N.C.'s daughter informed the officers that R.Y. lived next door. The police found .15 grams of methamphetamine in the residence. Castillo admitted that the methamphetamine was his.

Respondent State of Minnesota charged Castillo with fifth-degree controlled substance possession. The state also charged another resident, Robert Franco, with possession of a firearm by an ineligible person. Franco moved to suppress the evidence obtained during the search, arguing that the warrant was not supported by probable cause. At a hearing on his motion, Franco argued that the detectives had listed the wrong address to be searched in the warrant application, because R.Y. lived next door to 171 Annapolis. The district court conducted an in camera interview of the CI, who identified 171 Annapolis in a photograph as the residence where the controlled buy had occurred. The district court concluded that there was probable cause for the warrant and denied Franco's motion to suppress.[1]

Later, Castillo's case came on for a hearing. Our review of the record does not reveal a motion to suppress by Castillo. Instead, he agreed that he was bound by the district court's suppression ruling in Franco's case. The district court summarized the procedural posture of the case as follows:

> THE COURT: So just to make sure that I am clear, then, Mr. [prosecutor], it was one search warrant that was executed, and that was the search warrant at issue in the Franco case, [the] same search warrant at issue in this case. So the Court's order was actually issued in the Franco case finding that there was sufficient probable cause to support that search warrant, and both parties agree that that order is binding on the Gilbert Castillo case. Is that correct?

[1] This court affirmed the district court's probable-cause determination. *See State v. Franco*, No. A12-0222, 2013 WL 3155399, at *4 (Minn. App. June 24, 2013) ("The judge who issued the search warrant had a substantial basis for determining that probable cause existed, and the district court did not err in determining that the search warrant was supported by probable cause.").

> [PROSECUTOR]: Well, that's certainly the State's position, yes.
> THE COURT: All right. All right. Is that yours, as well, Mr. [defense attorney]?
> [DEFENSE ATTORNEY]: Yes, it is your honor.

After the state and Castillo agreed that the district court's suppression ruling in Franco's case is binding in Castillo's case,[2] Castillo preserved his right to appeal the issues regarding the legality of the search by entering a "*Lothenbach* plea."[3] The district court found him guilty of fifth-degree controlled substance possession, and this appeal follows.

D E C I S I O N

Castillo challenges the district court's denial of the motion to suppress evidence obtained during execution of the search warrant at his residence. Castillo argues that the search warrant was not supported by probable cause and that a no-knock, nighttime search was not justified. We will address each of these arguments in turn. But because the procedural posture of this case is unusual, we first clarify the record on appeal.

In his primary brief, Castillo acknowledges that in district court, "the parties agreed that because both Franco's case and [his] case involved the same search warrant and the same legal challenges, the court's order issued in Franco's case was binding and

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[2] Because the issue is not raised in this appeal, we express no opinion regarding whether the suppression ruling in Franco's case is binding in this case.

[3] A "*Lothenbach* proceeding" is a proceeding in which a defendant submits to a court trial on stipulated facts without waiving the right to appeal pretrial issues. *See State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn. 1980) (approving this procedure). "Minn. R. Crim. P. 26.01, subd. 4, effective April 1, 2007, implements and supersedes the procedure authorized by [*Lothenbach*]." *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009).

dispositive in [his] case." Nevertheless, Castillo's reply brief states that he "has not agreed to adopt Franco's arguments to the district court."

Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Technically, Castillo did not move for suppression or offer any arguments in support of suppression in the district court. He merely agreed that he would be bound by the district court's suppression ruling in Franco's case. Under these circumstances, our consideration of Castillo's challenge to the search is necessarily limited to the arguments that were made in district court in Franco's case. Moreover, because Castillo's stipulation to be bound by the suppression ruling in Franco's case did not in any way refine or limit the suppression arguments in that case, we will consider all of the arguments that were made, as well as the evidence received in support of those arguments. In sum, we reject Castillo's contention that "to the extent that Respondent's brief addresses arguments made in Franco's case, it can and should be ignored by this Court as irrelevant and a red herring."

I.

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search is lawful only if it is executed pursuant to a valid search warrant issued by a neutral and detached judge based on a finding of probable cause. *See* Minn. Stat. § 626.08 (2008); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). "When determining whether a search warrant is supported by probable cause, we do not engage

in a de novo review." *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, "when reviewing a district court's probable cause determination made in connection with the issuance of a search warrant, an appellate court should afford the district court's determination great deference." *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). This court limits its "review to ensuring that the issuing judge had a substantial basis for concluding that probable cause existed." *McGrath*, 706 N.W.2d at 539.

To determine whether the issuing judge had a substantial basis for finding probable cause, we look to the "totality of the circumstances." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985).

> The task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). In reviewing the sufficiency of a search-warrant affidavit under the totality-of-the-circumstances test, "courts must be careful not to review each component of the affidavit in isolation." *Id.* "[A] collection of pieces of information that would not be substantial alone can combine to create sufficient probable cause." *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). "Furthermore, the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants." *Wiley*, 366 N.W.2d at 268 (quotation omitted).

"When the request of the court is for the issuance of a warrant to search a particular location, there must be specific facts to establish a direct connection between the alleged criminal activity and the site to be searched." *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998).

> [T]he required nexus between the place to be searched and the items to be seized need not rest on direct observation; instead, the nexus may be inferred from the totality of the circumstances, including the type of crime involved, the nature of the items sought, the extent of an opportunity for concealment, and reasonable assumptions about where a suspect would likely keep that evidence.

State v. Ruoho, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Four Corners of the Warrant Application

Castillo first argues that "[t]he district court erroneously relied on facts outside the four corners of the warrant application to determine probable cause." He contends that "[a]ny information that was introduced [in Franco's case] during the in-camera examination of the informant or during the *Rasmussen* hearing testimony of Detective Scovill, but that was not contained in the warrant application, cannot be considered by this Court when determining probable cause."

Generally, "[i]n determining whether probable cause exists, both the district court and the reviewing court may consider only the information in the application for the search warrant." *State v. Secord*, 614 N.W.2d 227, 229 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). But if a defendant challenges the accuracy of material facts in a facially valid search warrant, the district court is permitted to look beyond the

four corners of the warrant application. *State v. Luciow*, 308 Minn. 6, 6-7, 240 N.W.2d 833, 835 (1976). "Once defendant makes a sufficient prima facie showing that an affidavit executed to obtain a search warrant contains material false statements, the [district] court shall, in accordance with principles endorsed in decisions of the United States Supreme Court and prior decisions of this court, require disclosure of the identity [in camera or otherwise] of a confidential informant whose information is relied upon in the affidavit." *Id.* Thus, defendants are "entitled to challenge the truthfulness and accuracy of statements in an affidavit in support of a petition for a search warrant." *Id*. at 10, 240 N.W.2d at 837. "A search warrant may be deemed void and the fruits of the search suppressed when it is demonstrated by a preponderance of the evidence that the affiant knowingly or with reckless disregard for the truth included a false statement in the affidavit." *McGrath*, 706 N.W.2d at 540.

The district court's order finding probable cause in Franco's suppression proceeding does not refer to or rely on Detective Scovill's testimony; nor does this court. The district court based its probable cause determination on information provided by the CI during the court's in camera inquiry, "along with the information in the search warrant." As to the information provided by the CI during the in camera inquiry, Franco argued, in part, "that the address on the search warrant was a mistake." In essence, Franco argued that because R.Y. lived in the residence next door to 171 Annapolis, "[a] typographical error brought the officers to the wrong house" and the warrant was not supported by probable cause. Franco asked "the [district] court [to] order a disclosure of the confidential informant as well as order a deposition of the confidential informant in

order to resolve the issue of whether the search warrant affidavit had sufficient probable cause."

The district court concluded that "[i]n fairness to [Franco], and in order to confirm probable cause," an in camera examination of the CI should occur "to verify which house was entered for the controlled buy." During the in camera examination, the CI identified—to the district court's satisfaction—171 Annapolis as the residence where the controlled buy had occurred. Because Franco challenged the veracity of the facts in the supporting affidavit, it was appropriate for the district court to look beyond the four corners of the warrant application. *See Luciow*, 308 Minn. at 6-7, 240 N.W.2d at 835. And because Castillo unconditionally agreed that he is bound by the district court's suppression ruling in Franco's case, we reject his argument that the district court erred by relying on information outside of the four corners of the warrant application.

Reliability of the CI

Castillo next argues that "[t]he warrant application did not establish that the [CI] was reliable." "Where a probable cause determination is based on an informant's tip, the informant's veracity and the basis of his or her knowledge are considerations under the totality test." *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998). However, because the police in this case observed the CI's controlled buy at 171 Annapolis within the 72 hours preceding the warrant request, the CI's reliability is less relevant. *See State v. Kochendorfer*, 304 N.W.2d 336, 338 (Minn. 1981) (stating that "there is no need to determine whether the informant's tip was reliable or whether it was sufficient to establish probable cause by itself because the affidavit revealed that the police had

sufficient information obtained by independent police observation of controlled buys, one within the previous 4 days, to establish probable cause to believe that the residence in question was being used in the continuing business of selling marijuana").

Regardless, the search-warrant application shows that the CI was reliable. "Recent personal observation of incriminating conduct has traditionally been the preferred basis for an informant's knowledge." *Ward*, 580 N.W.2d at 71 (quotation omitted). "Additionally, an informant's statement that the event was observed first-hand entitles his tip to greater weight than might otherwise be the case." *State v. Holiday*, 749 N.W.2d 833, 840 (Minn. App. 2008) (quotation omitted). And "veracity can be proven by showing that details of the tip have been sufficiently corroborated so that it is clear the informant is telling the truth on this occasion." *Id.* (quotation omitted). In sum, the CI's reliability is established because the CI's report regarding the presence of controlled substances at 171 Annapolis was based on the CI's recent first-hand observation and the police corroborated that information by conducting a controlled buy at 171 Annapolis.

Target of the Investigation

Lastly, Castillo argues that "[t]he warrant application did not establish that the target of the investigation, [R.Y.], lived at the residence sought to be searched." We disagree that a probable-cause finding requires a showing that R.Y. lived at 171 Annapolis. According to the warrant application, a CI, whose reliability is established, made a controlled buy of methamphetamine at 171 Annapolis within the 72 hours preceding the warrant application. The CI identified R.Y. as the person who provided the methamphetamine at 171 Annapolis. These facts established a fair probability that

contraband or evidence of a crime would be found at that particular location. *See Kochendorfer*, 304 N.W.2d at 338; *McGrath*, 706 N.W.2d at 538 n.4 (stating that "the controlled buy of cocaine provided an independent basis for probable cause to search" the residence where the controlled buy had occurred). Whether or not R.Y. lived at 171 Annapolis does not impact the probable-cause determination.

In sum, exercising the deference that is required, we determine that the issuing judge had a substantial basis to conclude that there was probable cause to search 171 Annapolis.

II.

Castillo next argues that "[b]ecause the search warrant affidavit did not establish a reasonable suspicion that under the particular circumstances of this case authorization of a no-knock nighttime warrant was justified, the district court's suppression ruling, and [his] resulting conviction, must be reversed." Minnesota law generally prohibits unannounced, nighttime searches. *See* Minn. Stat. § 626.14 (2008) ("A search warrant may be served only between the hours of 7:00 a.m. and 8:00 p.m. unless the court determines on the basis of facts stated in the affidavits that a nighttime search outside those hours is necessary . . . ."); *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000) ("Given the constitutional dimension to the method of entry into a residence, evidence should be suppressed when the circumstances do not warrant an unannounced entry.").

A request by police for an unannounced, nighttime search must be supported by reasonable suspicion to believe that such a search is necessary to preserve evidence or to protect officer or public safety. *State v. Bourke*, 718 N.W.2d 922, 926 (Minn. 2006);

Wasson, 615 N.W.2d at 320-21. "[T]he showing required for a reasonable suspicion is not high." *Wasson*, 615 N.W.2d at 321 (quotation omitted). But reasonable suspicion "requires something more than an unarticulated hunch, . . . the officer must be able to point to something that objectively supports the suspicion at issue." *Bourke*, 718 N.W.2d at 927 (quotation omitted).

On review, the issuing judge's finding of reasonable suspicion for an unannounced, nighttime warrant is given "great deference." *Id.* at 927-28; *State v. Martinez*, 579 N.W.2d 144, 146 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). "The issuing judge's determination must be based on the factual allegations contained in the affidavit in support of the warrant application and the reasonable inferences to be drawn therefrom." *Bourke*, 718 N.W.2d at 928. The primary rationale for giving the issuing judge "great deference" is to avoid setting such a high standard for unannounced, nighttime warrants that the police would be discouraged from seeking permission for these warrants in the first place. *See id.* at 927-28.

The warrant here contains adequate specificity to show that the police reasonably suspected that they could be at risk of harm and that evidence could be at risk of destruction. The warrant application identified the two suspects who were involved in the controlled buy at 171 Annapolis by name. It stated that they were both convicted felons.[4] It listed their arrest histories, both of which included arrests for first-degree murder and aggravated robbery. It explained each suspect's connection to 171 Annapolis. It noted that a relative of one of the suspects lived nearby and might alert the

[4] The offenses of conviction were not disclosed.

residents if the police were observed approaching in day light. This showing is adequate to establish a basis for an unannounced, nighttime entry. *See State v. Barnes*, 618 N.W.2d 805, 812 (Minn. App. 2000) (holding that an unannounced entry was justified because there was evidence of drug dealing and gang affiliation, and because defendant "had a prior criminal record and . . . the level of drug trafficking was very high"), *review denied* (Minn. Jan. 16, 2001).

We disagree with Castillo's assertion that the application in this case merely presents the type of boilerplate, vague assertions that have been found inadequate in other cases. Moreover, this court has stated that a rule requiring "specific information about conditions inside the house would virtually impose a probable-cause standard" on unannounced, nighttime searches. *See Barnes*, 618 N.W.2d at 811-12. The particularized facts in the search-warrant affidavit in this case are sufficient to establish reasonable belief that an unannounced, nighttime search was necessary to protect officer safety and to preserve evidence. *See State v. Botelho*, 638 N.W.2d 770, 778 (Minn. App. 2002) (stating that "police must have reasonable suspicion of a threat to officer safety or the likelihood of destruction of evidence, and this reasonable suspicion must be supported by a *particularized* showing of dangerousness, futility, or likelihood of destruction of evidence").

Lastly, Castillo argues that "the officers' failure to make a threshold reappraisal of the need to execute an unannounced entry was unreasonable." We are not persuaded. First, officers "should" but are not required to reassess the situation. *See Wasson*, 615 N.W.2d at 322 ("While we have stated that officers 'should' make this reappraisal, we

have not announced a hard and fast rule that the reappraisal is required in every case."); *see also Barnes*, 618 N.W.2d at 812 ("Police should reassess the need for a no-knock entry at the scene, and may even execute a no-knock entry based on an assessment at the scene when a no-knock request has been rejected by a [judge]."). Second, if officers reassess the need for an unannounced entry, the standard is whether the circumstances have changed since they requested and obtained permission for an unannounced, nighttime entry. *See Botelho*, 638 N.W.2d at 782 ("If there is no affirmative change in circumstances to suggest that officers need not conduct an unannounced entry, *Wasson* mandates that officers need not abandon their original plan for an unannounced entry.").

When the police arrived to execute the warrant and encountered Castillo outside of the residence, he started screaming that his nephew was sleeping on the floor. The district court reasoned that Castillo "being outside the home screaming" supported the no-knock, forced entry. Castillo's yelling increased the risk that individuals in the home would be alerted and might try to harm the police or destroy evidence. Thus, the record does not suggest that the circumstances had changed since the police obtained permission for an unannounced entry.

In sum, exercising the level of deference that is owed to the issuing judge's determination that a no-knock, nighttime entry was justified, we conclude that the request for an unannounced, nighttime search was supported by reasonable suspicion. We further conclude that the district court did not err by denying the motion to suppress.

Affirmed.