STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1730

State of Minnesota,
Respondent,

vs.

Calvin Bruce Johnson,
Appellant.

Filed July 15, 2013
Reversed and remanded
Rodenberg, Judge

Mille Lacs County District Court
File No. 48-CR-11-1280

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

Janice S. Jude, Mille Lacs County Attorney, Daniel N. Rehlander, Assistant County Attorney, Milaca, Minnesota (for respondent)

Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Rodenberg, Judge; and Klaphake, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

RODENBERG, Judge

Appellant challenges the district court's denial of his motion to suppress the evidence obtained during a search of his residence, arguing that the warrant authorizing the search failed to establish a sufficient nexus between his residence and any suspected criminal activity. We reverse and remand.

FACTS

On June 15, 2011, officers with the North Central Minnesota Drug Task Force executed a search warrant (Search Warrant I) at the property of James Peterson in rural Princeton, Mille Lacs County. The search revealed a marijuana-growing operation consisting of 211 marijuana plants, together with items used in the cultivation of the plants. During the search, the officers found appellant Calvin Bruce Johnson, who was driving a truck and trailer carrying two 275-gallon watering containers, in close proximity to the marijuana field. No one else was found on the property. Appellant was arrested for possession of marijuana.

That same day, the officers obtained another search warrant (Search Warrant II) for appellant's residence in Milaca, Mille Lacs County, based on the stated belief that "[appellant] is growing marijuana on his property or is in conspiracy with [Peterson] and items of evidence will be located at [appellant's] residence."[1] The applications for both

[1] At oral argument, the state indicated that the search warrants and applications were prepared by police and not by the County Attorney. Among other things, the application for Search Warrant II omitted that the officers had observed appellant wearing work gloves when Search Warrant I was executed.

search warrants recited that a confidential informant (CI) told law enforcement officers that Peterson "and other unknown individuals [had] been cloning marijuana plants" on Peterson's property and were "going to be trafficking marijuana when the . . . plants matured." Neither search warrant application identified any criminal activities known to the CI to be carried on at appellant's home in Milaca. Search Warrant II was executed at appellant's home and the search yielded, among other things, marijuana, a handgun and ammunition, a large quantity of cash, and potting soil.

Appellant was charged with, among other things,[2] felony fifth-degree controlled substance crime under Minn. Stat. § 152.025, subd. 2(b)(1) (2010) based on his proximity to the growing marijuana on Peterson's property. He was also charged with unlawful possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subds. 1(2), 2(b) (2010) based on the handgun found at his residence. Appellant moved to suppress the evidence obtained as a result of Search Warrant II, executed at his property in Milaca, arguing that the "warrant application did not state [a] legally sufficient nexus between averments in the application and the residence of the [appellant]." The district court found that, "[i]nasmuch as [appellant] was working the field [on Peterson's property when Search Warrant I was executed], the issuing judge could have inferred that [appellant] had been involved in the early stages of the growing operation and evidence

[2] Six other counts were dismissed by the state pursuant to a plea agreement. Only appellant's conviction for the firearm-possession charge is implicated in this appeal. The marijuana-possession conviction was based on appellant's possession of marijuana at the time of his arrest on the Peterson property and not on the marijuana located during the execution of Search Warrant II at appellant's Milaca property.

of his involvement would likely be found at [appellant]'s residence." The district court concluded that Search Warrant II was supported by probable cause. Appellant pleaded guilty to a fifth-degree controlled-substance charge based on his presence at the grow operation on the Peterson property, and was convicted of the charge of possession of a firearm by an ineligible person following a bench trial on stipulated facts under rule 26.01, subd. 4. This appeal followed.

D E C I S I O N

The United States and Minnesota Constitutions provide protection from unreasonable searches and seizures and require that no search warrant issue except upon a finding of probable cause. U.S. Const. amend IV; Minn. Const. art. I, § 10. When a warrant is void for lack of probable cause, the evidence seized in execution of the search is suppressed. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961); *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989).

In determining whether probable cause for a search warrant exists, the issuing judge must look at the totality of the circumstances and "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." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)) (quotations omitted).

When reviewing whether a warrant is supported by probable cause, we afford an issuing judge "great deference" and "simply . . . ensure that the issuing judge had a

substantial basis for concluding that probable cause existed." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotations omitted). The affidavit must provide sufficient detail for the issuing judge to "independently discern whether probable cause exists." *State v. Yarbrough*, 828 N.W.2d 489, 491 (Minn. App. 2013), *review granted* (Minn. July 3, 2013). We are "restricted to consider[ing] only the information presented at the time of the application for the search warrant." *State v. Gabbert*, 411 N.W.2d 209, 212 (Minn. App. 1987). We resolve doubtful or marginal cases in favor of the issuance of the warrant. *State v. McCloskey*, 453 N.W.2d 700, 704 (Minn. 1990).

Appellant argues that the evidence obtained as a result of the search of his home should be suppressed because the application for Search Warrant II did not state sufficient facts to demonstrate a nexus between the averments of criminal activity and his residence in Milaca. We agree. A direct connection, or nexus, is required between the alleged crime and the particular place to be searched, especially in cases involving the search of a residence for evidence of drug activity. *State v. Souto*, 578 N.W.2d 744, 747–48 (Minn. 1998). The required nexus may be inferred from the totality of the circumstances. *State v. Ruoho*, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

> Among the factors considered in determining whether there is a sufficient showing of probable cause to believe that items will be found in a particular place are the type of crime, the nature of the items sought, the extent of the suspect's opportunity for concealment, and the normal inferences as to where the suspect would keep the items.

State v. Pierce, 358 N.W.2d 672, 673 (Minn. 1984). An issuing judge may not base a probable cause finding on an investigator's wholly conclusory statement, but is allowed to draw reasonable and common-sense inferences from the facts and circumstances outlined in an affidavit. *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004), *review denied* (Minn. April 20, 2004).

In *Novak v. State*, our supreme court found that the application for a search warrant presented a sufficient link between drug activity and the place to be searched because "[t]he fact that petitioner dealt in large quantities increased the likelihood that police would find marijuana in a search of his residence." 349 N.W.2d 830, 832–33 (Minn. 1984). The affidavit in support of the warrant recited that Novak was involved in the drug business as a wholesaler, that police had recorded his telephone conversation from his home with an undercover narcotics agent, and that during the conversation, Novak agreed to deliver six pounds of marijuana to the agent. *Id.* at 832. Shortly thereafter, police observed Novak leaving his home to drive to the drug deal, where he was arrested. *Id.* On these facts, the nexus between criminal activity and the place to be searched was held adequate. *Id.* at 832–33.

In *State v. Kahn*, we determined that a search warrant was not supported by probable cause where the search warrant application failed to "provide sufficient facts to infer a reasonable nexus linking the drug possession in Minneapolis to the [defendant's] home in Elgin [75 to 85 miles away]." 555 N.W.2d 15, 18 (Minn. App. 1996). The *Kahn* affidavit recited that the defendant was arrested for possession of one ounce of cocaine in Minneapolis; that the affiant believed that, because an ounce of cocaine is

considered more than an amount for personal use, there was a likelihood that the possessor would sell the drug in smaller quantities; and that the defendant resided at the residence to be searched. *Id.* We held that the affidavit in support of the search warrant was not supported by probable cause and noted that "Minnesota requires the state to provide more facts than were provided here in order to link drug activity to an individual's home and to support issuance of a warrant." *Id.* We also noted that *Novak* "did not rule that possession alone provided conclusive evidence for a probable cause determination," and we distinguished *Novak* as "provid[ing] significantly more evidence linking Novak's drug activity on the street to his home" than had been provided in the warrant application in *Kahn*. *Id.* at 19.

More recently, in *Yarbrough*, we determined that there was probable cause supporting an application for a search warrant which stated that defendant had threatened another person with a gun; that defendant had been arrested three months earlier for drug crimes; that a CI had recently stated that she knew that defendant sold cocaine and had a gun; and that defendant lived at a certain address. 828 N.W.2d at 492. We distinguished *Kahn* as it "pertained to search warrants that sought the recovery of only drugs," and recognized that "the issue is close as to whether the search-warrant affidavit established a sufficient nexus between respondent's alleged drug activities and the place to be searched." *Id.* But we concluded that "where the evidence in the search-warrant affidavit establishes that a defendant possessed a gun, it is common sense and reasonable to infer that the defendant would keep the gun at his residence." *Id.* at 493.

Here, the application for Search Warrant II authorizing the search of appellant's residence set forth the same facts as those in the application for Search Warrant I concerning Peterson's property, to which was added the facts of appellant's presence on the Peterson property when Search Warrant I was executed, that appellant was found 20 yards from the marijuana crop at the Peterson property on the day that Search Warrant II was executed, and that appellant had been driving a truck to which was attached a utility trailer carrying large watering tanks. The affidavit established that a CI had observed that marijuana was being cultivated on Peterson's property. The CI indicated to police that the growing site had been tilled up recently, that black dirt had been hauled in (as a soil amendment), and that Peterson and "other unknown individuals ha[d] been cloning the marijuana plants on [Peterson]'s property." Additionally, the CI "believe[d] that [Peterson] and other unknown individuals [were] going to be trafficking marijuana when the marijuana plants . . . matured in the fall." Other than identifying the Milaca property as appellant's residence, the application for Search Warrant II set forth no facts relating to that property. The application set forth the opinions and beliefs of the officer who signed the application, including that he

> believes that [appellant] was going to use these watering tanks to attend to the 211 marijuana plants that were seized during the execution of the search warrant. Your Affiant knows that [appellant] was there to use these watering tanks for future use for the care and tender [sic] of the marijuana plants. Your Affiant knows that known drug traffickers and users will keep growing equipment, heat lamps, bulbs for the use to grow marijuana plants at [their] residence and on their property. Your Affiant knows that most of these marijuana plants were approximately 6 to 18 inches in height. Also recovered from the marijuana grow site was potting

> containers, fertilizer, buckets, and plastic totes. Your Affiant knows that individuals who grow marijuana will grow the starter plants of marijuana inside of their residence and or garage or outbuildings that are located on their property. Your Affiant believes that [appellant] is growing marijuana on his property or is in conspiracy with [Peterson] and items of evidence will be located at [appellant's] residence.

But there is no information in the affidavit, other than the police officer's conclusory statements, linking appellant's property to the marijuana-growing operation. Whereas police officers may rely on their experience in drawing inferences in search warrant applications, "mere suspicion does not equal probable cause." *Kahn*, 555 N.W.2d at 18. The information contained in the warrant application and received from the CI in this case referred only to Peterson and other "unknown individuals" who had been "cloning the marijuana plants on the [Peterson] property," but the CI did not identify appellant as one of those individuals. The information available to the district court was sufficient to conclude that activities related to the marijuana-growing operation, including cloning, were being performed on Peterson's property. Search Warrant I uncovered potting containers, fertilizer, buckets, and plastic totes, all of which were being used on the Peterson property. The CI neither witnessed any plants at appellant's Milaca home, nor provided any facts from which it could be inferred that marijuana plants at the Peterson property had ever been at appellant's residence.

The application for Search Warrant II established that appellant was likely involved in maintaining the marijuana-growing operation on the Peterson property. He was found near the marijuana crop, near a truck and watering containers, and he was the only person on the Peterson property at the time of the search. But the application

contained no showing that marijuana-growing activities were being carried out elsewhere. As in *Kahn*, the property authorized to be searched by Search Warrant II was remote from the place where appellant was arrested. And, unlike *Yarborough*, the warrant here was not issued to search for a gun, which might reasonably be expected to be kept at a person's residence. The search here was exclusively for drugs, the location being searched was remote from the location where appellant had been observed apparently tending to growing marijuana, and there were no facts set forth in the warrant application connecting that criminal activity to the property to be searched beyond it being appellant's residence. Simply stated, the application for Search Warrant II set forth no facts tending to show that criminal drug activity was taking place anywhere but on Peterson's property.[3]

All of the circumstances recited in the application for Search Warrant II indicate that maintenance and cultivation of marijuana were performed entirely on Peterson's property. Search Warrant II was not supported by probable cause to believe that evidence of the growing operation would be found at appellant's Milaca property, and the fruits of the search must therefore be suppressed.

As noted above, the search and seizure issues in this appeal relate only to the firearm-possession charge. The conviction of that charge is reversed for the reasons set forth herein. It is unclear to us from review of the district court file whether the firearm-possession conviction affected the sentence on the controlled-substance charge, and we

[3] As noted above, some facts in the possession of the police were omitted from the application for Search Warrant II. We limit our examination of probable cause, as we must, to the facts actually set forth in the application. *Gabbert*, 411 N.W.2d at 212.

therefore remand to the district court for further proceedings with respect to that conviction as may be appropriate in light of this opinion.

Reversed and remanded.