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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2030

State of Minnesota,
Appellant,

vs.

Jason Paul Hirman,
Respondent.

Filed May 28, 2013
Reversed and remanded
Schellhas, Judge

Dakota County District Court
File No. 19HA-CR-12-2604

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

James C. Backstrom, Dakota County Attorney, Tricia A. Loehr, Assistant County Attorney, Hastings, Minnesota (for appellant)

Mark D. Nyvold, Special Assistant State Public Defender, Fridley, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's (1) conclusion that probable cause did not support a search warrant, (2) suppression of all evidence seized under the search warrant,

and (3) dismissal of the state's complaint. Because the district court clearly and unequivocally erred, we reverse and remand for trial.

FACTS

On July 26, 2012, Eagan Police Department Detective Brian Gunderson submitted to the district court a search-warrant application and affidavit, seeking permission to search a storage locker used by respondent Jason Hirman at an Eagan storage facility where more than 160 items had been stolen during 19 burglaries and 3 thefts between May 24, 2011, and July 19, 2012. The value of the stolen items exceeded $45,000. Detective Gunderson alleged in his affidavit that video-surveillance footage revealed that Hirman and an accomplice committed a burglary on July 19, 2012, and stole a cracked, flat-screen television; blankets; padlocks; and a weed whacker. The district court issued the requested search warrant on July 26, finding that "probable cause exists to believe" that the items listed in the warrant application were in Hirman's storage locker. The same day, Detective Gunderson executed the search warrant and signed a "Receipt, Inventory and Return" document, stating that he took custody of a "stolen" "Green Lee Gang Box" tool container that contained "numerous misc tools [and] other property."[1]

Appellant State of Minnesota charged Hirman on July 27, 2012, with one count of receiving stolen property under Minn. Stat. §§ 609.53, subd. 1, .52, subd. 3(3)(a) (2010). The probable-cause statement in the complaint describes the stolen items as "numerous large tool boxes[;] . . . at least two Joboxes, which are large metal tool boxes used at construction sites to contain large construction tools"; and tools within the Joboxes and

[1] The gang box is referred to in the record and by the parties on appeal as a "Jobox."

identifies the victims of the Jobox thefts as a South Dakota construction site and a "South Dakota victim" associated with construction sites. Although the July 26 search warrant listed numerous construction-related items, it did not list Joboxes. After execution of the July 26 search warrant, police sought two additional warrants, including one to search the contents of a large green Jobox found during the initial search of Hirman's storage locker.

Hirman moved to suppress all evidence obtained as a result of the July 26 search warrant "because the warrant application contained omissions and misrepresentations that were material to the issue of probable cause"; "all evidence obtained as a result of the search warrant in relation to this case, as the search warrant was not supported by probable cause"; and "all evidence . . . deemed 'fruit of the poisonous tree.'" Hirman requested suppression of any evidence resulting from execution of the subsequent two warrants, including the Jobox, arguing that the evidence was "fruit[] of the poisonous tree."

Noting that execution of the July 26 search warrant revealed "[n]one of the items enumerated in the Warrant" but rather revealed property reported stolen from "a [South Dakota] construction site," the district court suppressed all evidence for lack of probable cause in the search warrant. The court stated that the circumstances in the case were "clearly suggestive of a pre-textual basis for seeking the Search Warrant," and dismissed the state's complaint. The court did not address Hirman's omissions-and-misrepresentations argument except to say that its probable-cause finding would stand "even if the omissions and misrepresentations raised by [Hirman] were resolved." The

court denied the state's motion for reconsideration in which the state, for the first time, argued against suppression on the basis of the good-faith exception.

This appeal follows.

D E C I S I O N

The state challenges the district court's suppression of evidence and pretrial dismissal of its complaint. "The State may appeal pretrial orders of the district court when the State can [clearly and unequivocally] show that 'the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial.'" *State v. Zais*, 805 N.W.2d 32, 35–36 (Minn. 2011) (quoting Minn. R. Crim. P. 28.04, subd. 2). Here, the suppression and consequent dismissal clearly and unequivocally critically impacted the outcome of the trial. *See State v. Holmes*, 569 N.W.2d 181, 184 (Minn. 1997) ("The dismissal of the charge following a suppression of all the evidence clearly meets the critical impact element . . . ."). The remaining issue in a critical-impact appeal is whether the state "clearly and unequivocally" shows that the district court erred. *Zais*, 805 N.W.2d at 36.

Probable Cause

The state argues that, in suppressing the evidence, the district court failed to afford "great deference" to the issuing judge's probable-cause determination and, instead, erroneously engaged in "de-novo review of the warrant application." In part, the state bases its argument on "[t]he totality of the facts and circumstances outlined in the affidavit to search [Hirman]'s storage unit." The state's argument is persuasive.

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *accord* Minn. Const. art. I, § 10. Probable cause sufficient to support a search warrant requires only "a fair probability that contraband or evidence of a crime will be found in a particular place," *State v. Fort*, 768 N.W.2d 335, 342 (Minn. 2009) (quotation omitted), "not . . . a showing that the inference is correct or more likely true than false," *State v. Ruoho*, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004), and "not an actual showing of [criminal] activity," *State v. Harris*, 589 N.W.2d 782, 790–91 (Minn. 1999) (quotation omitted). A district court issuing a search warrant renders that determination by "'simply . . . mak[ing] a practical, common-sense decision'" in light of "'all the circumstances set forth in the affidavit before him.'" *State v. Jenkins*, 782 N.W.2d 211, 223 (Minn. 2010) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). A district court must suppress evidence seized pursuant to a search warrant unsupported by probable cause. *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005).

In reviewing the district court's suppression of evidence, an appellate court reviews the court's legal determinations de novo and the court's factual findings for clear error. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). The court's factual findings "are clearly erroneous if, on the entire evidence, [an appellate court is] left with the definite and firm conviction that a mistake occurred." *State v. Diede*, 795 N.W.2d 836, 846–47 (Minn. 2011). "In reviewing an issuing judge's probable cause determination, [an appellate court] give[s] great deference to the judge's decision." *Fort*, 768 N.W.2d at 342

(quotation omitted). Likewise, a district court reviewing an issuing judge's probable-cause determination must afford that same great deference to the issuing judge's probable-cause determination. *See State v. Holiday*, 749 N.W.2d 833, 837, 843 (Minn. App. 2008) (disagreeing with district court's conclusion that a confidential-informant report was not corroborated for reasons including the district court's failure to "afford 'great deference' to the issuing magistrate"); *State v. Martinez*, 579 N.W.2d 144, 146 (Minn. App. 1998) ("Similar to reviewing whether a warrant was supported by probable cause, the district court should generally give great deference to a magistrate's decision to include a no-knock provision in a search warrant."), *review denied* (Minn. July 16, 1998). Failure to afford great deference to the issuing judge's probable-cause determination would "eliminate the incentive for police to obtain a warrant before conducting a search and thereby eliminate that safeguard against unreasonable searches and seizures." *State v. Rochefort*, 631 N.W.2d 802, 805 (Minn. 2001).

An appellate court's "only consideration" "[w]hen reviewing a district court's decision to issue a search warrant . . . is whether the judge issuing the warrant had a substantial basis for concluding that probable cause existed," based on "the totality of the circumstances." *Jenkins*, 782 N.W.2d at 222–23 (quotation omitted). In doing so, an appellate court "look[s] only to information presented in the affidavit." *Carter*, 697 N.W.2d at 205 (quotation omitted). "Elements bearing on this probability determination include information establishing a nexus between the crime, objects to be seized and the place to be searched." *Jenkins*, 782 N.W.2d at 223. "[T]he resolution of doubtful or

marginal cases should be largely determined by the preference to be accorded warrants." *Harris*, 589 N.W.2d at 791 (quotations omitted).

Here, the issuing judge authorized a search of Hirman's storage locker, determining that "probable cause existed to believe" that the more-than 160 items listed in the warrant application—including the items Hirman stole during the July 16, 2012 burglary—would be found in Hirman's locker. The judge also determined that the property had been "stolen or embezzled"; "possession of the property . . . constitutes a crime"; and the property "constitutes evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime." The search-warrant application informed the issuing judge of the burglary and theft history at the storage facility; that Hirman was storing items inside a locker at the storage facility; that Hirman once attempted to leave the storage facility after its gate closed at 10:00 p.m.; that Hirman was "well known to the police officers in both Eagan and in Bloomington, where [Hirman] resides"; that Detective Gunderson suspected that Hirman "could possibly be involved in [the storage-facility] burglaries because of his lengthy past criminal history," which included burglary, theft, and "time in prison for various felony level offenses"; that Hirman was arrested on January 8, 2012, for possessing stolen property; that Detective Gunderson installed a video-surveillance camera "directly across" from Hirman's storage locker and the storage facility had surveillance cameras to protect its premises against burglary and theft; and that after a July 19 burglary of the storage facility's locker located next to Hirman's locker, Detective Gunderson reviewed surveillance footage and observed Hirman and an accomplice transfer from the storage

facility's locker to their car a cracked flat-screen television, blankets, padlocks, and a weed whacker.[2]

Detective Gunderson explained in the search-warrant application that, based on his experience "investigating property crimes," which included 22 years as a police officer, "working both people and property crimes" and "execut[ing] in excess of 200 search warrants," "many suspects will keep property that they have stolen, move the items between vehicles that they have access to, intermingle [their] own personal property with stolen items and place stolen items in their homes, garages and storage sheds." Detective Gunderson applied for the search warrant of Hirman's locker seven days after the July 19 burglary.

Hirman argues that his criminal history does not support the issuing judge's probable-cause determination because the affidavit did not disclose Hirman's specific convictions or their dates. We disagree. "A person's criminal record is among the circumstances a judge may consider when determining whether probable cause exists for a search warrant," although the person's criminal record, regardless of length, "is best used as corroborative information and not as the sole basis for probable cause." *Carter*, 697 N.W.2d at 205 (quotation omitted). Although the search-warrant application did not disclose whether Hirman's criminal history for theft and burglary resulted in convictions, Hirman cites no legal authority that requires that the search-warrant application do so, and "[c]ourts . . . occasionally consider arrests not resulting in conviction" when

[2] Before placing the weed whacker in the car, Hirman temporarily placed it in his storage locker.

"determining whether probable cause exists for a search warrant." *Id.* (citing with approval *United States v. Conley*, 4 F.3d 1200, 1207 (3d Cir. 1993) ("The use of prior arrests . . . to aid in establishing probable cause is not only permissible but is often helpful. This is especially so where . . . the previous arrest . . . involves a crime of the same general nature as the one which the warrant is seeking to uncover." (citations omitted)), *cert. denied*, 114 S. Ct. 1218); *cf. State v. Jones*, 846 A.2d 569, 584 (N.J. 2004) ("[I]t was logical for Agent Shelton to premise his application for a no-knock provision . . . on an arrest that required probable cause to effectuate." (emphasis omitted)); *but see State v. Eason*, 629 N.W.2d 625, 634 (Wis. 2001) (agreeing that "the information in Officer Fahrney's affidavit was not sufficiently particularized to establish reasonable suspicion," rejecting out-of-state arrest as support for affidavit, stating that arrest "was just that—an arrest, not a conviction"). The age of matters reported in Hirman's criminal history would not disqualify them from supporting the issuing judge's probable-cause determination. *See Carter*, 697 N.W.2d at 205 ("Convictions that are several years old are [only] *less reliable* in providing a 'fair probability' that contraband will be found in a place to be searched." (emphasis added)).

Hirman argues that his arrest on January 8, 2012, for possession of stolen property does not support the issuing judge's probable-cause determination because the warrant sought evidence of a burglary, not possession of stolen property. We disagree. The difference between Hirman's alleged burglaries and thefts at the storage facility and his January 2012 stolen-property-possession arrest is immaterial because "[c]ourts . . . occasionally consider arrests not resulting in conviction, as when the arrest involves a

crime of the *same general nature* as the one which the warrant is seeking to uncover." *Id.* (emphasis added) (quotation omitted).

Noting the district court's statement that "[t]he facts clearly establish that the four items removed by [Hirman] from management's locker on July 19, 2012 were immediately transported off [the storage facility's] property," Hirman argues that "nothing in the warrant affidavit shows that Hirman later brought any of the . . . items to his locker, only [Detective] Gunderson's conjecture based on his experience." And embracing the district court's statement that "[t]he Application does not contain any information, aside from mere speculation and suspicion, to sufficiently connect those crimes to [Hirman] or to [his] locker," Hirman argues that the search-warrant application was insufficient to support the issuing judge's finding that probable cause existed to believe that the property and things described in the search warrant would be in Hirman's storage locker. Hirman challenges the issuing judge's finding of probable cause, relying on *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998), and *State v. Kahn*, 555 N.W.2d 15, 18 (Minn. App. 1996), for the proposition that "Minnesota does not consider" "boilerplate statements about what an affiant's training and experience have shown" to be "relevant to showing an object-place nexus." But neither *Souto* nor *Kahn* stands for that proposition.

In *Souto*, the supreme court stated that the "officer's statement that 'he [knew]' that Souto was involved in the possession and/or distribution of drugs on a wide scale was too vague and conclusory to bolster the state's position that Souto was a drug dealer." 578 N.W.2d at 749. But, in *Souto*, the officer based his statements on hearsay

"from Federal, State and local law enforcement officers and a number of Confidential Reliable Informants." *Id.* at 746. Unlike *Souto*, in this case, Detective Gunderson based his statement on his experience. *See State v. Brennan*, 674 N.W.2d 200, 206 (Minn. App. 2004) ("Basing his conclusions on experience, rather than merely making conclusory statements, the affiant provided evidence that contributed to the district court's finding that a fair probability existed that police would find child pornography in Brennan's house."), *review denied* (Minn. Apr. 20, 2004).

In *Kahn*, this court concluded that probable cause did not support the search warrant issued in connection with a drug-sale crime, even though the totality of the circumstances included the search-warrant applicant's statement that "he knew 'through training and experience that an ounce of cocaine is considered more [than] that for personal use and indicates that the person possessing that quantity normally sells the drug in small quantities.'" 555 N.W.2d at 16, 18. But, in *Kahn*, the only other circumstances on which the judge issued the search-warrant were that Kahn (1) was arrested for possession of one ounce of cocaine in Minneapolis and (2) "resided at the residence to be searched," which was 75–85 miles from where he was arrested. *Id.* at 18.

Here, Hirman's storage locker was located at a storage facility where numerous burglaries and thefts had occurred. The totality of the circumstances, including Hirman's criminal record, his July 19 burglary participation, and his unexplained presence at the storage facility beyond closing time and after the burglaries and thefts had begun, support the issuing judge's probable-cause determination. "[T]he required nexus between the place to be searched and the items to be seized need not rest on direct observation."

Ruoho, 685 N.W.2d at 456; *see Rosillo v. State*, 278 N.W.2d 747, 748–49 (Minn. 1979) ("All that is required is that the affidavit, interpreted in a common-sense and realistic manner, contain information which would warrant a person of reasonable caution to believe that the articles sought are located at the place to be searched."). Detective Gunderson described in the search-warrant application his surveillance-tape observation of Hirman stealing from a storage-facility locker on July 19.

"A search warrant is supported by probable cause if there is a fair probability that contraband or evidence of a crime will be found in a particular place," *Fort*, 768 N.W.2d at 342 (quotation omitted), based on the issuing judge's "practical, common-sense decision," *Jenkins*, 782 N.W.2d at 223 (quotation omitted), to which reviewing courts give "great deference," *Fort*, 768 N.W.2d at 342 (quotation omitted). We conclude that the issuing judge properly relied on Detective Gunderson's experience-based theory that suspects "intermingle [their] own personal property with stolen items and place stolen items in their homes, garages and storage sheds" to support the judge's probable-cause determination, and we conclude that the search-warrant application contained substantial evidence to support a probable-cause determination. *See State v. Yarbrough*, 828 N.W.2d 489, 494 (Minn. App. 2013) (reversing district court's suppression of evidence seized in connection with search-warrant execution, reasoning in part that "it is both common sense and reasonable to infer that respondent would keep his gun at his residence"), *pet. for review filed* (Minn. May 10, 2013); *State v. Miller*, 666 N.W.2d 703, 714 (Minn. 2003) (concluding that district court did not err by finding "probable cause to support the seizure," reasoning in part that the district court's probable-cause determination was

based on "[t]he officer's theory . . . based on her training" and that the theory "was supported by the facts of the case known at the time"); *see also Brennan*, 674 N.W.2d at 206 ("Basing his conclusions on experience, rather than merely making conclusory statements, the affiant provided evidence that contributed to the district court's finding that a fair probability existed that police would find child pornography in Brennan's house."); *cf. Harris*, 589 N.W.2d at 788 ("The proximity of Harris' apartment to the crime scene also increases the probability that some of the items stolen . . . would be found in Harris' apartment."); *Rosillo*, 278 N.W.2d at 749 (concluding that the defendant could be expected to store stolen property in his home in part because its volume was too great for him to carry on his person).

The district court clearly and unequivocally erred by suppressing the evidence obtained through the search-warrant execution because, in light of the great deference afforded to an issuing judge's probable-cause determination, the issuing judge had a substantial basis on which to conclude that probable cause supported the search warrant.

Search-Warrant Exception

Hirman argues that, even if the district court clearly and unequivocally erred by concluding that the issuing judge lacked a substantial basis on which to issue the search warrant, this court should affirm the district court's suppression of the two Joboxes because they were beyond the scope of the search warrant and the state failed to allege a valid exception to the search-warrant requirement. We describe the Joboxes and their contents in the facts section and do not repeat that description here. The district court found, and the state does not contest, that the police found "[n]one of the items

enumerated in the Warrant" during execution of the search warrant; instead, the police found property reported stolen from "a [South Dakota] construction site." "[T]hose items seized which are beyond the permissible scope of the warrant are subject to suppression." *State v. Monsrud*, 337 N.W.2d 652, 661 (Minn. 1983). "[A] warrantless seizure is presumptively unreasonable unless one of a few specifically established and well-delineated exceptions applies. . . . The State bears the burden of proving any [warrant-requirement] exception." *Milton*, 821 N.W.2d at 798–99 (quotations omitted).

Hirman is correct that the state failed to assert a valid warrant-requirement exception in the district court or on appeal.[3] But Hirman did not challenge the scope of the search warrant in his pretrial suppression motion. A defendant's "[f]ailure to include any" "defenses, objections, issues, and requests then available" in a pretrial "motion to dismiss or to grant appropriate relief . . . constitutes waiver." Minn. R. Crim. P. 10.01, subd. 2. Because Hirman did not raise his beyond-the-scope-of-the-search-warrant argument in district court, the state lacked notice that it would need to satisfy its burden to prove a warrant exception and made no attempt to do so. We conclude that Hirman

[3] The state requested that the district court and this court adopt and apply the good-faith exception to the search-warrant requirement. The good-faith exception provides that "the exclusionary rule does not apply when the police conduct a search in 'objectively reasonable reliance' on a warrant later held invalid." *State v. Davis*, 131 S. Ct. 2419, 2427–28 (2011) (quoting *United States v. Leon*, 468 U.S. 897, 922, 104 S. Ct. 3405, 3420 (1984)). But the Minnesota Supreme Court has "consistently declined to adopt, much less even address, the . . . 'good faith' exception." *State v. Jackson*, 742 N.W.2d 163, 180 n.10 (Minn. 2007). We do not analyze or adopt the good-faith exception because "[i]t is not the province of this court to adopt a good-faith exception to the exclusionary rule when the state supreme court has not done so." *Minn. State Patrol Troopers Ass'n on Behalf of Pince v. State, Dep't of Pub. Safety*, 437 N.W.2d 670, 672 (Minn. App. 1989), *review denied* (Minn. May 24, 1989).

waived the beyond-the-scope-of-the-search-warrant argument and we therefore decline to affirm the district court on that ground. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court "generally will not decide issues which were not raised before the district court"); *see also State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985) (stating that "[a] motion to suppress based on objections to an unannounced, nighttime search must be raised at the omnibus hearing" "to give the State the opportunity to present evidence to refute appellant's claims"), *review denied* (Minn. Oct. 11, 1985).

Franks Inquiry

Hirman requests that this court instruct the district court to "decide the *Franks* issue" if this court reverses based on a conclusion that the search warrant was adequately supported by probable cause. Under *Franks*, "a search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause." *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (quotation omitted); *accord Franks v. Delaware*, 438 U.S. 154, 171–72, 98 S. Ct. 2674, 2684 (1978). Hirman argued in the district court that the search-warrant application omitted three items and contained one misrepresentation.

Regarding the first two alleged omissions, Hirman argues that Detective Gunderson's search-warrant application failed to state that the surveillance-video footage showed Hirman's car leaving the storage facility after the July 19 burglary and that the post-July 19 surveillance-video footage, had it been viewed, would have revealed that Hirman did not return to his locker. He argues that these facts "would have made clear to

the [issuing] judge that there was no real possibility of finding the items taken during the July 19 [burglary] in . . . Hirman's storage locker." But, considered as a whole, Detective Gunderson's testimony implies that Hirman's car left the storage facility after the July 19 burglary, and, as to the post-July 19 surveillance-video footage, Hirman failed to submit any evidence to the district court to meet his *Franks* burden regarding an essential factual predicate to this claim—the video-surveillance footage following the July 19 burglary. To prevail on a *Franks* claim, a defendant must satisfy his burden to prove by a preponderance of the evidence that the warrant application's affidavit contained an intentional or reckless misrepresentation of fact material to the findings of probable cause. *Franks*, 438 U.S. at 155–56, 98 S. Ct. at 2676. Here, the record casts doubt on the existence of such evidence in light of Detective Gunderson's testimony that he retained only the footage "that shows the alleged crime."

Regarding the third alleged omission, Hirman argues that Detective Gunderson's search-warrant application failed to state that Hirman told Detective Gunderson on or after July 25, 2012, that he "had consent to enter the management locker [on July 19] to use the dumpster and that the items he removed were located in the dumpster." Indeed, Detective Gunderson testified that Hirman relayed this information to him, but the storage-facility management reported the removal of the items as theft, thereby refuting Hirman's claim. We therefore consider this omission to be immaterial.

Regarding the alleged misrepresentation, Hirman argues that Detective Gunderson's search-warrant application erroneously stated that *Detective Gunderson's* surveillance-camera footage recorded all four items being removed from the storage

facility's container when, in fact, it revealed only three items being removed from the container. Even if Hirman's allegation is true, we conclude that the misrepresentation is immaterial because the search-warrant application disclosed that *the facility's* surveillance-camera footage recorded all four items being removed from the storage-facility's container.

As to the *Franks* issues raised by Hirman in the district court, the district court stated that its finding that "there was not 'a fair probability that evidence of a crime would be found' in [Hirman's] locker . . . when the Warrant issued" "would stand even if the omissions and misrepresentations raised by [Hirman] were resolved." Although the court did not address whether resolution of the *Franks* issues might result in a conclusion that the search warrant was void, we decline to remand for the district court to resolve the *Franks* issues because, based on our analysis, if the court concluded that the search warrant was void under *Franks*, it would clearly and equivocally err by doing so. *See Milton*, 821 N.W.2d at 798 (stating that supreme court, in reviewing district court's evidence suppression, reviews legal determinations de novo); *Andersen*, 784 N.W.2d at 327 (stating that, in *Franks* inquiry, "whether the alleged misrepresentations or omissions were material to the probable cause determination" is subject to "the de novo standard"); *see also Zais*, 805 N.W.2d at 36 (noting that clear-and-unequivocal review applies to critical-impact appeal); *cf. Kirsch v. Comm'r of Pub. Safety*, 440 N.W.2d 147, 152 (Minn. App. 1989) (declining to remand for district court to address probable-cause issue when court "did not explicitly rule on the issue," "determin[ing] [on appeal] . . . that the facts demonstrate the existence of probable cause"), *overruled on other grounds by State v.*

Victorsen, 627 N.W.2d 655 n.2 (Minn. App. 2001). We therefore decline to instruct the district court on remand to perform a *Franks* inquiry.

We reverse and remand for trial.

Reversed and remanded.