

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0506**

State of Minnesota,
Appellant,

vs.

Johnathon Jay Kruse,
Respondent.

**Filed August 27, 2012
Reversed and remanded
Stoneburner, Judge**

Nobles County District Court
File No. 53-CR-12-28

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

Kathleen A. Kusz, Nobles County Attorney, Kimberly Pehrson, Assistant Nobles County Attorney, Worthington, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Charles F. Clippert, Special Assistant State Public Defender, Clippert Law Firm, P.L.L.C., St. Paul, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant State of Minnesota challenges the district court's pretrial ruling suppressing evidence found during a warranted search of respondent's home as the fruit of a statement taken in substantial violation of the recording requirement contained in *State v. Scales*, 518 N.W. 2d 587 (Minn. 1994). We reverse and remand because we conclude that the recording-requirement violation was not substantial. The district court therefore erred in suppressing the challenged statement, vacating the warrant, and suppressing the evidence discovered during the search.

FACTS

Respondent Johnathon Jay Kruse was arrested for the sale of a controlled substance in a Shopko parking lot in Worthington. While in custody, Kruse was interviewed by Ryan Kruger and Chris Lewis, agents of the Buffalo Ridge Drug Task Force, about the incident for which he was arrested. The interview was recorded.

Kruger testified that it is his practice, after concluding a recorded interview about a specific incident, to turn off the recorder and engage in a "conversation" with the suspect to determine whether the suspect is willing to cooperate with law enforcement by identifying drug sellers and suppliers. Kruger testified that he does not record these conversations "[b]ecause anyone could get . . . a copy of the interview and hear who he's talking about," implying that the practice is designed to protect a prospective informant. In this case, during Kruger's unrecorded conversation with Kruse, Kruger asked Kruse

about drugs or paraphernalia at his home. Kruse told Kruger that there was a methamphetamine pipe and maybe a scale in his basement.

Detective David Hoffman applied for a warrant to search Kruse's home, stating, in relevant part:

Your affiant is aware that on [the day of the arrest, Kruse] was arrested for 2nd Degree controlled substance Crime, sale in the City of Worthington. Kruse is currently in custody in the Nobles County Jail.

Your affiant is aware that in an interview with Buffalo Ridge Drug Task Force Agents, Kruse admitted that there was a glass methamphetamine pipe and possibly a scale in the couch at . . . his current residence.

Your affiant is aware that Kruse admitted in a recorded Mirandized interview to smoking methamphetamine daily.

Your affiant is aware that in June 2005 Kruse was convicted of 5th Degree controlled substance.

Your affiant is aware that in June 2007 Kruse was arrested for 5th Degree Possession of a controlled substance.

The warrant was issued, and, during the warranted search of Kruse's home, officers found a tin box containing a methamphetamine pipe, a scale, a gun, and property that was identified as stolen during burglaries in Worthington. Two days later, in a recorded interview, Kruse confirmed the prior statement that he had a scale and the pipe in his home and revealed the possible location of some marijuana.

Kruse was subsequently charged with two counts of illegal possession of a firearm, one count of receiving stolen property, and one count of possession of drug paraphernalia. Kruse challenged use of the unrecorded statement to support the warrant.

He moved to vacate the warrant for lack of probable cause, suppress the evidence obtained in the search, and dismiss the complaint for lack of probable cause. The district court concluded that the statement should be suppressed under *Scales* and that, absent the information from the unrecorded statement, the warrant application lacked probable cause to support issuance of the warrant, mandating vacation of the warrant, suppression of the evidence discovered in the search, and dismissal of the complaint for lack of probable cause. This appeal by the state followed.

D E C I S I O N

A. Critical impact

The state can appeal a district court’s pretrial order under Minn. R. Crim. P. 28.04, subd. 1(1), only if it can “clearly and unequivocally” show that the order will have a “critical impact” on the state’s ability to successfully prosecute the defendant and that the district court’s order constituted error. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). Because the order resulted in dismissal of the complaint, the critical-impact requirement is met in this case.

B. Standard of review

In reviewing pretrial suppression orders, this court independently “review[s] the facts and determine[s], as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence.” *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). This court accepts the district court’s underlying factual determinations unless they are clearly erroneous. *State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007).

C. Recording requirement

In *Scales*, the supreme court, exercising its supervisory power to insure the fair administration of justice, held that “all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.” 581 N.W.2d at 592. “If law enforcement officer[s] fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation *may be suppressed at trial.*” *Id.* (emphasis added). “[S]uppression will be required of any statements obtained in violation of the recording requirement if the violation is deemed to be ‘substantial.’” *Id.*

“Whether an officer’s failure to record a custodial interrogation is a substantial violation of the *Scales* recording requirement is a legal question, subject to de novo review.” *State v. Inman*, 692 N.W.2d 76, 79 (Minn. 2005). A two-step procedure is used to address alleged violations of the recording requirement. *Id.* at 80. The reviewing court first determines whether *Scales* applies to the facts of the particular case, and if applicable, then determines whether the violation is substantial. *Id.* Factors relevant to determining whether a violation is substantial include

the extent to which the violation was willful, the extent to which the exclusion will tend to prevent future violations, the extent to which the violation is likely to have influenced the defendant’s decision to make the statement, and the extent to which the violation prejudiced the defendant’s ability to support his motion to suppress or to defend himself at trial.

Id. at n.3 (citing *Scales*, 518 N.W.2d at 592; *Model Code of Pre-Arrest Procedure* § 150.3 (1975)).¹

The state made a tepid argument to the district court that the *Scales* recording requirement does not apply to post-recorded-interview conversations to explore a suspect's willingness to become an informant. But that argument has not been raised or briefed on appeal, and therefore is not addressed. For purposes of this appeal, it is not disputed that the *Scales* recording-requirement applied to Kruger's questioning of Kruse about drugs and drug paraphernalia in his home and that the recording-requirement was violated.

The district court found that the violation was substantial because Kruger willfully turned off the recorder and that only "exclusion of this evidence will cause Officer Kruger to change his current practice." We disagree.

The supreme court imposed the *Scales* requirement in an effort to avoid factual disputes underlying an accused's claims that the police violated his constitutional rights. *Scales*, 518 N.W.2d at 591-92. We are not persuaded that the circumstances of this case support a conclusion that the violation was substantial. Kruse received a *Miranda* warning and waived his right to remain silent and right to counsel. "If it is undisputed that the *Miranda* warning was administered, or that the accused waived his or her right to remain silent, the lack of a recording creates no prejudice to the accused." *Inman*, 692

¹ Respondent has not argued on appeal that the circumstances of this case meet the conditions *requiring* a determination of a substantial violation set out in the Model Code of Pre-Arrest Procedure, § 150.3(2), (3), adopted by the supreme court in *Scales*. See *Scales*, 518 N.W.2d at 592, n.5.

N.W.2d at 81. And nothing in the circumstances of this case indicates that the violation was likely to have influenced Kruse's decision to make the statement. Kruse admitted in the recorded statement that, immediately before the incident that led to his arrest, he had been smoking methamphetamine at his home and that the pipe he used to smoke it belonged to him. The recorded interview is replete with references to Kruse's personal use of methamphetamine, and there is no reason to believe that Kruse's response to the question about whether there were drugs or paraphernalia in his home would have been different had the recording continued. Kruse does not dispute the substance or validity of the unrecorded statement as reported in the warrant application. *See id.* (stating that a *Scales* violation that does not raise a factual dispute about the existence and validity of a *Miranda* waiver and was not asserted to be prejudicial at omnibus hearing is not substantial). And Kruse does not allege that any of his constitutional rights were violated in obtaining the statement. The violation in this case did not result in any prejudice to Kruse. We therefore conclude that the district court erred in finding that the violation was substantial.

Because we conclude that the violation of the *Scales* recording requirement in this case was not substantial, we further conclude that the district court erred in suppressing use of the statement to support the warrant application. We reverse the order suppressing Kruse's unrecorded statements, vacating the warrant, suppressing the evidence obtained from execution of the warrant, and dismissing the complaint for lack of probable cause and remand for further proceedings.

Reversed and remanded.