STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0373

State of Minnesota,
Respondent,

vs.

Joshua Jerome O'Brien,
Appellant.

Filed December 27, 2016
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CR-14-15523

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

Michael O. Freeman, Hennepin County Attorney, Cheri A. Townsend, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Daniel P. Repka, Repka Law, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Reilly, Judge.

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

REILLY, Judge

Appellant challenges his conviction of fifth-degree possession of a controlled substance, arguing that the district court erred by denying his motion to suppress evidence

discovered during a search of his home. Because we determine that the plain-view exception to the search warrant requirement applies, we affirm.

FACTS

The state charged appellant Joshua Jerome O'Brien with fifth-degree possession of a controlled substance following a search of his home. Appellant moved to suppress evidence of a firearm discovered during the search, arguing that the seizure violated the particularity requirement of the Fourth Amendment to the United States and Minnesota Constitutions and did not fall within the plain-view exception to the warrant requirement.[1] At the suppression hearing, a Richfield police officer testified to the following events.

A confidential reliable informant reported to the police that appellant sold controlled substances out of his home and that he possessed a firearm. Acting on this information, the officers conducted a "trash pull" at appellant's home and discovered evidence of narcotics, including "tear-off" baggies used for packaging narcotics and Q-tips that field-tested positive for methamphetamine. The following day, the officers applied for, and received, a search warrant to enter appellant's home to search for controlled substances, items showing constructive possession of controlled substances, profits from the sale of

[1] The discovery of the firearm with the methamphetamine triggered a mandatory 36-month minimum commitment to the commissioner of corrections pursuant to the sentencing enhancement provision of Minnesota Statutes section 609.11, subdivisions 5, 9 (2014) ("[A]ny defendant convicted of an offense [, including controlled substance crimes,] in which the defendant . . . at the time of the offense, had in possession or used, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm, shall be committed to the commissioner of corrections for not less than three years, nor more than the maximum sentence provided by law.").

controlled substances, and data storage devices. The officer requested an unannounced nighttime entry, reasoning that "[b]ecause of [appellant] being in the possession of a pistol the cover of darkness will allow officers a tactical advantage which will increase officer safety." Despite his suspicion that appellant possessed a firearm in the home, the officer did not include firearms in the search warrant application list of items believed to be in the home.

Officers executed a search warrant at appellant's home and discovered methamphetamine, suspected steroids, and a prescription pill. During the course of the search, an officer lifted a cushion from a couch and discovered a loaded semi-automatic firearm. The defense cross-examined the officer about the discovery:

> Q: . . . [W]hy were you looking under the couch cushion?
>
> A: One, I believe there was a person immediately that got up from the couch in the execution of the search warrant, so we often look in areas where any contraband could have been hidden by persons, and also it's an area that narcotics could also fit, which we were looking for in the search warrant.
>
> Q: Okay. And in prior search warrants . . . have you recovered contraband from couch cushions before?
>
> A: Yes.
>
> Q: And in prior search warrants . . . have you recovered firearms along with narcotics?
>
> A: Yes.

The district court subsequently denied appellant's suppression motion on the ground that the plain-view exception applied. Appellant waived his right to a jury trial and agreed

to a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court found appellant guilty, and this appeal follows.

D E C I S I O N

When reviewing a pretrial ruling on a motion to suppress evidence, an appellate court "review[s] the facts to determine whether, as a matter of law, the [district] court erred when it failed to suppress the evidence." *State v. Flowers*, 734 N.W.2d 239, 247 (Minn. 2007). The district court's factual findings are reviewed for clear error and legal determinations are reviewed de novo. *State v. Diede*, 795 N.W.2d 836, 849 (Minn. 2011). A district court's ultimate ruling on a constitutional question involving a search or seizure is reviewed de novo. *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007).

The United States and Minnesota Constitutions guarantee an individual's right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are presumed unreasonable unless they fall within an exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); *State v. Johnson*, 813 N.W.2d 1, 14 (Minn. 2012). "Generally, evidence seized in violation of the constitution must be suppressed." *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007).

The issue presented in this case is whether the district court erred by determining that evidence of the firearm was admissible under the plain-view exception to the search warrant requirement. The plain-view exception permits a police officer to seize an object believed to be the fruit or instrumentality of a crime without a warrant if "(1) the police are legitimately in the position from which they view the object; (2) they have a lawful right

of access to the object; and (3) the object's incriminating nature is immediately apparent." *State v. Milton*, 821 N.W.2d 789, 799 (Minn. 2012). The district court determined that the plain-view exception applied because the police officers satisfied each of the three *Milton* prongs. Appellant does not challenge this determination. Instead, appellant argues that Minnesota continues to recognize an inadvertent-discovery requirement to the plain-view exception, which cannot be satisfied here because the officer suspected appellant had a firearm in the home and referenced the firearm in the search warrant application.

We are not persuaded. In federal jurisprudence, the plain-view doctrine does not require an officer's discovery of incriminating evidence to be inadvertent. *See Horton v. California*, 496 U.S. 128, 130, 110 S. Ct. 2301, 2304 (1990) ("We conclude that even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition."); *PPS, Inc. v. Faulkner Cty., Ark.*, 630 F.3d 1098, 1106 (8th Cir. 2011) ("Neither exigency nor inadvertence is an element of the plain view doctrine."). However, appellant relies on *State v. Bradford* for the principle that Minnesota continues to recognize an inadvertent-discovery requirement. 618 N.W.2d 782 (Minn. 2000). In *Bradford*, the supreme court stated that evidence is admissible when it is "in plain view, there was a prior justification for an intrusion, the discovery was inadvertent, and there was probable cause to believe that the items seized were immediately apparent evidence of crime." *Id*. at 795 (quotation omitted).

Post-*Bradford* cases issued by the Minnesota Supreme Court do not contemplate an inadvertent-discovery requirement. As stated above, *Milton* articulated only three criteria for the plain-view exception to the warrant requirement. 821 N.W.2d at 799. And citing

to the three *Milton* factors, the Minnesota Supreme Court noted in *State v. Holland* that "[u]nder the plain-view exception to the warrant requirement, police may seize an object without a warrant if *three* criteria are met," citing to the three *Milton* factors. 865 N.W.2d 666, 671 (Minn. 2015) (citing *Milton*, 821 N.W.2d at 799) (emphasis added). Neither *Milton* nor *Holland* recognizes inadvertent-discovery as a necessary factor in Minnesota's plain-view analysis, 865 N.W.2d at 671; 821 N.W.2d at 799, and it is not the role of this court to alter or modify existing law. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (noting that setting forth the principle that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"), *review denied* (Minn. Dec. 18, 1987).

In sum, because inadvertent-discovery is not a required element of a plain-view analysis under current Minnesota law, and because appellant concedes that the three *Milton* factors are satisfied, we conclude that the firearm was lawfully seized under an exception to the search warrant requirement. Thus, the district court did not err by denying appellant's motion to suppress evidence.[2] In light of that conclusion, we do not consider

[2] Even if inadvertent-discovery applied, the facts indicate that the evidence was inadvertently discovered by the police officer because someone had recently been sitting on the couch when the officer entered the room, the officer had recovered contraband from couch cushions before, and it was in an area where narcotics could have been discovered. *See Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S. Ct. 2022, 2038 (1971) (stating that "extension of the original justification [for a search] is legitimate only where it is immediately apparent to police that they have evidence before them" and they are not engaged in a "general exploratory search from one object to another until something incriminating at last emerges"). We likewise reject appellant's argument that the officer should have secured a second search warrant upon discovering the firearm. *See id*. at 467-68, 91 S. Ct. at 2039 ("Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience,

appellant's argument that the particularity requirement of the Fourth Amendment invalidated the search.[3]

Affirmed.

and sometimes dangerous–to the evidence or to the police themselves–to require them to ignore it until they have obtained a warrant particularly describing it.").

[3] Appellant argues that the officer violated the particularity requirement of the Fourth Amendment by failing to adequately describe the items to be seized. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The officer suspected that appellant owned a firearm, but failed to include it in the search warrant application. As a result, the particularity requirement was not satisfied with respect to the firearm. *See Coolidge*, 403 U.S. at 467, 91 S. Ct. at 2038-39 (requiring a search warrant to particularly describe the items to be seized). However, because the seizure of the firearm fell within an exception to the warrant requirement and was not unconstitutional, we affirm.