STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1952

State of Minnesota,
Respondent,

vs.

Phillip Jones,
Appellant.

Filed December 11, 2017
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Hennepin County District Court
File No. 27-CR-16-3416

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and

Smith, John P., 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

JESSON, Judge

Unbeknownst to appellant Phillip Jones, his boyfriend was being investigated for suspected drug dealing. Officers arrested the boyfriend and learned that he had numerous connections to Jones's apartment. After the district court issued a search warrant for Jones's apartment, officers searched and discovered methamphetamine there. Jones was charged with aiding and abetting both first-degree sale and first-degree possession of drugs and was subsequently convicted. On appeal, Jones argues that the warrant to search his apartment lacked probable cause and that he is entitled to resentencing under the 2016 Drug Sentencing Reform Act. We affirm in part, reverse in part, and remand.

FACTS

This case starts not with appellant Phillip Jones, but with the law enforcement investigation of Benjamin Krupp. A confidential informant told officers that Krupp was a high-volume methamphetamine dealer. In February 2016 the confidential informant arranged for a methamphetamine sale with Krupp at a coffee shop. Prior to the drug deal occurring, officers set up surveillance in the surrounding area. The first person to arrive at the scene was Jones, driving a car. Krupp then arrived by foot and got in Jones's car. Officers moved in and arrested Krupp before the drug deal could occur.

The officers found approximately 110 grams of methamphetamine on Krupp, along with a firearm and Jones's apartment key. In Jones's car, officers found a paystub for Krupp with Jones's apartment address listed as the mailing address. Police detained and handcuffed Jones, who explained that he was at the coffee shop to meet his boyfriend.

Jones also explained that Krupp slept over at his apartment the night before, which is why Krupp had his keys. Jones denied that Krupp lived at his apartment and denied having knowledge of any drug-related activity. Officers believed Jones was lying and that he was involved with illegal drug activity. As a result, they arrested him.

Prior to the arrest at the coffee shop, officers had not pinned Krupp to any particular address. While Krupp's driver's license had an address listed on Blaisdell Avenue, officers did not believe it was his present address because his license was issued in 2013 and the confidential informant stated that Krupp moved around often. Law enforcement never investigated the Blaisdell Avenue address. After arresting Krupp and Jones, officers went to Jones's address and found Krupp's name listed on the mailbox for the apartment. After gathering all of this information, and on the same day as the arrest, officers obtained a search warrant for Jones's apartment.

In the affidavit in support of the search warrant, the officer stated Krupp was a known large-quantity methamphetamine dealer, and the officer believed controlled substances were at Jones's apartment because Krupp's name was on a paystub listing that address, Krupp had a key to that apartment, and Krupp's name was listed on that apartment mailbox. The search warrant did not mention the Blaisdell Avenue address. During the search of the apartment, officers found approximately 50 grams of methamphetamine and drug paraphernalia.

A few days later, Jones was charged with aiding and abetting first-degree sale of methamphetamine in violation of Minnesota Statutes section 152.021, subdivision 1(1) (2014), and aiding and abetting first-degree possession of methamphetamine in violation

of Minnesota Statutes section 152.021, subdivision 2(a)(1) (2014). *See also* Minn. Stat. § 609.05, subd.1 (2014) (setting forth aiding and abetting liability). Both of these charges were based on the drugs found at his apartment. Jones filed a motion to suppress evidence found in his apartment arguing that the search warrant lacked probable cause because there was an insufficient nexus between criminal activity and the apartment, and because the officer omitted material information in the affidavit supporting the search warrant.

An evidentiary hearing was held in June 2016. An officer testified that the search application omitted Krupp's Blaisdell Avenue address because the officer believed it was an old address and the confidential informant stated Krupp moved around frequently. In denying Jones's motion to suppress evidence, the district court found there was sufficient probable cause to search the apartment and that the omission was not material. The court determined that the officer's explanation why he omitted the second address was credible. As the court explained, drug dealers often do not live at their listed address. Finally, the court stated that the omission was not material because even if the second address had been included, police simply would have been authorized to search both addresses.

A jury trial began in June 2016 and the jury convicted Jones of both aiding and abetting first-degree sale of methamphetamine and aiding and abetting first-degree possession of methamphetamine. The presumptive sentencing range for his conviction was 74 to 103 months, with a presumptive duration of 86 months and a presumptive commitment to prison. Minn. Sent. Guidelines 4.A (Supp. 2015). Jones moved for a dispositional departure, to be placed on probation instead of going directly to prison. In

September 2016, the court sentenced Jones to 86 months, but granted the requested departure and stayed the sentence for 5 years. This appeal follows.

D E C I S I O N

On appeal Jones raises two separate and independent issues. He argues (1) the district court erred by denying his motion to suppress evidence because the search warrant lacked probable cause, and (2) he is entitled to resentencing in light of the 2016 Drug Sentencing Reform Act (DSRA). We address each issue in turn.

I. The Search Warrant was Supported by Probable Cause.

The United States and Minnesota Constitutions provide that search warrants must be supported by probable cause. *See* U.S. Const. Amend. IV; Minn. Const. Art. I, § 10. This court gives great deference to the district court's determination, and reviews only whether the issuing judge had a substantial basis for concluding there was probable cause. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). To determine if there was a substantial basis, this court looks to the "totality of the circumstances." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). Jones makes two arguments attacking the basis for probable cause: an insufficient nexus between the criminal activity and his apartment, and material omissions in the affidavit supporting the search warrant.

The nexus between Jones's apartment and the criminal activity

When a search warrant specifies a location to be searched, the facts must establish a direct connection between that location and the alleged criminal activity. *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998). This required nexus can be inferred from the totality

of the circumstances and does not require direct observation of evidence of a crime at the specified location. *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014).

Here there was a substantial basis to support the district court's determination that a nexus existed between the criminal activity and Jones's apartment: Krupp was arrested with a large amount of methamphetamine on his person; Krupp had the key to Jones's apartment; Krupp's name was on the mailbox at that apartment; and Krupp's paystub listed the apartment address.

Jones argues that there was an insufficient nexus because there was no evidence in the affidavit that Krupp was seen leaving the address before attempting to conduct the February drug deal, nor was there any evidence of drug transactions taking place at the address. But while Jones is correct that there was a lack of direct evidence, circumstantial evidence alone can provide the basis for the required nexus. *See Yarbrough*, 841 N.W.2d at 622 ("a nexus may be inferred from the totality of the circumstances"). Because Krupp was arrested with methamphetamine and had many links to that specific apartment, the issuing judge had a substantial basis to believe that the requisite nexus existed.

The omitted address

Jones further contends that the search warrant was invalid because it omitted the fact that officers knew Krupp had a different address listed on his driver's license, officers never investigated that address, and officers were having trouble pinning an address to Krupp prior to his arrest. Under *Franks v. Delaware*, warrants supported by deliberately falsified or misrepresented material facts lack probable cause. 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676 (1978); *see also State v. Doyle*, 336 N.W.2d 247, 250, 252 (Minn. 1983)

(including omissions as a form of misrepresentation). Courts use a two-prong test to determine if the warrant is invalidated on these grounds: (1) whether the affiant deliberately made statements that were false or in reckless disregard of the truth; and (2) whether the omission was material. *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010). An omission is material if, when the omitted facts are included, the warrant would lack probable cause. *Id.* This court reviews the first prong of deliberate misrepresentations under the clearly erroneous standard, and the second prong of materiality de novo. *Id.*

Here, the omitted information about the Blaisdell address did not rise to the level of a material omission. Even if the information about Krupp's other address were included in the search warrant application, probable cause to search Jones's apartment would still remain. Direct connections between Krupp and Jones's apartment would not vanish. Nor would recent links to the Blaisdell address suddenly appear. The only thing that may have changed, as the district court astutely pointed out, is if these omissions were supplied in the warrant application, officers may have "had a right to search two residences, not one." This fails the materiality standard which states an omission is only material if it destroys probable cause when supplied. *See Andersen*, 784 N.W.2d at 327.

Jones argues the omissions were material because the presence of a second address would significantly weaken the probable cause needed to search Jones's apartment. We disagree. Jones points to *Novak v. State*, where the supreme court upheld the district court's probable cause finding, based in part on an affidavit establishing that the defendant was a drug wholesaler with a residence in Austin. 349 N.W.2d 830, 832-33 (Minn. 1984). The court noted that the fact the defendant dealt in large drug quantities increased the likelihood

that drugs would be found in his home. *Id.* This inference was supported because there was no indication that the defendant had access to a separate business address or second home, capable of storing large quantities of drugs. *Id.* at 833. The court explained that if law enforcement omitted information that would contradict these inferences, then it would constitute a material omission. *Id.*

But the existence of a three-year-old address, in and of itself, does not contradict the reasonable inference that a wholesale drug dealer would likely store drugs in the home where he currently resided, as evidenced by possessing a key and having his name on the mailbox. As a result, *Novak* supports the district court's conclusion that the omission of the old address was not material. There was no information that Krupp continued to have access to the Blaisdell Avenue address. Rather, the officer testified that until the arrest, law enforcement had been unable to tie Krupp to any location because the Blaisdell Avenue address was from an old driver's license and the confidential informant stated Krupp moved around often. The district court found this testimony credible. And we defer to the district court's credibility assessments. *State v. Guy*, 409 N.W.2d 248, 252 (Minn. App. 1987), *review denied* (Minn. Sept. 18, 1987). Therefore, similar to *Novak*, there was no contradictory material information omitted. Because the omissions were not material, we do not need to reach the issue of whether the omissions were made in reckless disregard of the truth. *Andersen*, 784 N.W.2d at 329.

The totality of the circumstances establish that there was a substantial basis for the district court to issue a search warrant for Jones's apartment. There was a strong nexus

between Krupp's criminal activity and Jones's apartment, and the omission of Krupp's Blaisdell Avenue address was immaterial.

II. Jones is Entitled to Resentencing Pursuant to the 2016 Minnesota Sentencing Guidelines.

Jones argues that he should be resentenced under the DSRA-amended sentencing guidelines, through the application of the amelioration doctrine. This doctrine allows an amended statute to apply to non-final convictions for the purpose of mitigating punishment for an offense. *State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017). Whether to apply the amelioration doctrine to Jones's conviction is a question of statutory interpretation that this court reviews de novo. *State v. Basal*, 763 N.W.2d 328, 332, 335 (Minn. App. 2009).

Jones is entitled to resentencing because his judgment was not yet final when the DSRA went into effect, and his sentence would be lower under the DSRA-amended sentencing guidelines. In *Kirby*, the Minnesota Supreme Court held that the amelioration doctrine requires resentencing of a defendant whose judgment was not final when the DSRA went into effect, and whose sentence was lessened under the DSRA. *Kirby*, 899 N.W.2d at 496. Those circumstances are present here. Jones's judgment was not final when the DSRA went into effect on May 23, 2016, as he was not sentenced until September 2016. 2016 Minn. Laws ch. 160, § 18 at 590-91 (stating it is effective the day following final enactment); *see also State v. Losh*, 721 N.W.2d 886, 893-94 (Minn. 2006) (stating that a case is pending until the availability of direct appeal has been exhausted). Additionally, the amended sentencing grid under the DSRA would decrease the presumptive sentencing range for Jones. At the time of his original sentencing, Jones's

presumptive sentencing range was 74 to 103 months with a presumptive duration of 86 months. Minn. Sent. Guidelines 4.A (Supp. 2015). Under the DSRA-amended sentencing guidelines, the presumptive sentencing range for Jones is 56 to 78 months with a presumptive duration of 65 months. *See* Minn. Sent. Guidelines 4.C (2016). Therefore Jones is entitled to be resentenced.

The state argues that Jones's amelioration-doctrine argument was waived because it was not raised before appeal. This is incorrect. First, the amelioration doctrine set forth in *Kirby* explicitly states the requirements for the doctrine to apply, and it simply requires that the defendant's conviction was not final at the time the DSRA went into effect. *Kirby*, 899 N.W.2d at 490. Second, in both *Kirby* and its companion case, *State v. Otto*, sentencing occurred in 2014 and 2015 respectively, well before those appellants could have raised the issue before appeal, and the court remanded each case for resentencing.[1] *Kirby*, 899 N.W.2d at 487, and *State v. Otto*, 899 N.W.2d 501, 502 (Minn. 2017).

Because judgment was not final at the time the DSRA became effective, and because the amended guidelines would decrease his presumptive sentence, Jones is entitled to be resentenced consistent with the DSRA.

Affirmed in part, reversed in part, and remanded.

[1] In both *Kirby* and *Otto*, the DSRA issue was raised for the first time in their petitions for review to the Minnesota Supreme Court, and neither raised the issue in their appeals to this court.