STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1865

State of Minnesota,
Respondent,

vs.

Virgil Timothy Pouliot,
Appellant.

Filed September 10, 2018
Affirmed
Johnson, Judge

Benton County District Court
File No. 05-CR-16-1246

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Philip K. Miller, Benton County Attorney, Foley, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and Rodenberg, Judge.

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

JOHNSON, Judge

The district court found Virgil Timothy Pouliot guilty of a fourth-degree controlled-substance crime. Pouliot's conviction is based on evidence that he sold methamphetamine to a confidential informant in his home. Before trial, Pouliot moved to suppress evidence

arising from the informant's visit to his home. The district court denied the motion. We conclude that there was no search for purposes of the Fourth Amendment when the informant visited Pouliot's home while carrying an audio-recording device that surreptitiously recorded their conversation. Therefore, we affirm.

FACTS

On January 11, 2016, a person who had been arrested for possession of controlled substances contacted the Sherburne County Sheriff's Drug Task Force and informed a deputy sheriff that Pouliot was willing to sell one gram of methamphetamine for $100. The informant made arrangements to meet Pouliot for that purpose. Pouliot told the informant to meet him at his home in the city of St. Cloud. A deputy sheriff provided the informant with five $20 bills and an audio-recording device, which the informant put in a pocket. The informant went to Pouliot's home and purchased approximately one-half gram of methamphetamine from Pouliot for $40. Two deputy sheriffs saw the informant enter the multi-unit apartment building when Pouliot opened an exterior door, and they saw the informant exit the building shortly thereafter. After leaving Pouliot's home, the informant gave a deputy three $20 bills and a baggie containing a substance that later was tested and determined to be 0.482 grams of methamphetamine. The informant was shown a photograph of Pouliot and confirmed that he was the person who had sold the methamphetamine. The recording device carried by the informant recorded the conversation between Pouliot and the informant while they were inside Pouliot's apartment.

The state charged Pouliot with third-degree controlled-substance crime, in violation of Minn. Stat. § 152.023, subd. 1(1) (2014). In December 2016, Pouliot moved to suppress "[a]ny evidence obtained as a result of" the informant's visit to his home, including the surreptitious audio-recording of the conversation between him and the informant. Pouliot argued that the informant was a government agent who made a "warrantless entry" into his home that should be deemed an unreasonable search in violation of the Fourth Amendment. The parties stipulated to the facts contained in the police reports and other documents possessed by the state. Neither party called any witnesses. In January 2017, the district court denied Pouliot's motion to suppress on the ground that the informant's visit to Pouliot's home was not a search for purposes of the Fourth Amendment.

In May 2017, Pouliot waived his right to a jury trial and stipulated to the prosecution's evidence, and the parties agreed that the district court's ruling on the pre-trial suppression motion would be dispositive of the case. *See* Minn. R. Crim. P. 26.01, subd. 4. At the same time, the state agreed to amend the complaint to allege a fourth-degree controlled-substance crime, in violation of Minn. Stat. § 152.024, subd. 1(1) (2014). The district court found Pouliot guilty and sentenced him to 18 months of imprisonment but stayed execution of the sentence for 30 years. Pouliot appeals.

D E C I S I O N

Pouliot argues that the district court erred by denying his motion to suppress evidence. He renews the argument he presented to the district court: that the informant, acting on behalf of the state, made a "warrantless entry" into his home, thereby violating his right to be free from unreasonable searches. This court applies a clear-error standard

of review to a district court's findings of fact relevant to a motion to suppress evidence. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). If the underlying facts are not in dispute, we apply a *de novo* standard of review to a district court's denial of a motion to suppress evidence. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The United States Supreme Court has stated that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court*, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134 (1972). Thus, as a general rule, the state must obtain a warrant before a law-enforcement officer may conduct a search of a person's home. *State v. Lohnes*, 344 N.W.2d 605, 610 (Minn. 1984); *State v. Morin*, 736 N.W.2d 691, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

But the state need not obtain a warrant before a confidential informant may enter a person's property with a recording device. This principle is evident from a line of Supreme Court opinions that begins no later than *On Lee v. United States*, 343 U.S. 747, 72 S. Ct. 967 (1952). In that case, a government informant visited a small business with a hidden microphone and a transmitter, which allowed a nearby federal agent to overhear a conversation between the informant and the business owner, On Lee, who made incriminating admissions. *Id.* at 749-50, 83 S. Ct. at 969-70. On Lee argued that the agent's testimony concerning the overheard conversation was introduced at trial in violation of his Fourth Amendment rights. *Id.* at 750-51, 83 S. Ct. at 970. The Supreme

Court rejected On Lee's arguments, reasoning, in part, that there was no search for Fourth Amendment purposes because the law-enforcement tactics used in that case had "the same effect on [On Lee's] privacy as if [the agent] had been eavesdropping outside an open window." *Id.* at 754, 83 S. Ct. at 972.

The state also need not obtain a warrant before a government agent may enter a person's property with a recording device. In *Lopez v. United States*, 373 U.S. 427, 83 S. Ct. 1381 (1963), a federal revenue agent recorded a conversation with a business owner, Lopez, who attempted to bribe the agent. *Id.* at 429-32, 83 S. Ct. at 1382-84. The Supreme Court reasoned that there was no search because Lopez consented to the agent's presence on his property and because the agent did not seize any personal property. *Id.* at 438, 83 S. Ct. at 1387. The Court reasoned further that no "eavesdropping" had occurred and that the recording device "was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." *Id.* at 439, 83 S. Ct. at 1388.

The state also need not obtain a warrant before a government agent may enter a person's home for the purpose of purchasing controlled substances. In *Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424 (1966), an undercover narcotics officer visited Lewis at his home, was allowed inside, and purchased a package of marijuana for $50. *Id.* at 207-08, 87 S. Ct. at 425. The Supreme Court noted that, "in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents." *Id.* at 209, 87 S. Ct. at 426. The Supreme Court also noted that "the home is accorded the full range of Fourth Amendment protections" but is not entitled to special treatment if it

"is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business." *Id.* at 211, 87 S. Ct. at 427. Accordingly, even though the government agent did not have a warrant, he was permitted to testify at trial about Lewis's actions and statements while inside his home. *Id.* at 212, 87 S. Ct. at 428.

A straightforward application of *On Lee*, *Lopez*, and *Lewis* leads to the conclusion that the informant who visited Pouliot's home to purchase methamphetamine while carrying and using a recording device did not conduct a search for purposes of the Fourth Amendment. The Supreme Court has made clear that a law-enforcement officer or a person cooperating with law-enforcement does not need a search warrant to enter a person's business premises or home, so long as the officer or informant has permission to enter and does not inspect or seize personal property. *See On Lee*, 343 U.S. at 753, 83 S. Ct. at 971-72; *Lopez*, 373 U.S. at 438-39, 83 S. Ct. at 1387-88; *Lewis*, 385 U.S. at 209-12, 87 S. Ct. at 426-28. In such a case, the state may introduce evidence about what occurred when the officer or informant was on the business premises or inside the home, in the form of oral testimony, a surreptitious audio-recording, or a written transcript of such a recording. *See On Lee*, 343 U.S. at 755-56, 83 S. Ct. at 973; *Lopez*, 373 U.S. at 439-440, 83 S. Ct. at 1388; *Lewis*, 385 U.S. at 211-12, 87 S. Ct. at 427-28. Accordingly, Pouliot's Fourth Amendment rights were not violated in this case because there was no search of his home when the informant visited him with his permission while carrying an audio-recording device.

We note that the district court relied primarily on *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122 (1971). Similarly, the state relies extensively on *White* in its responsive brief. The facts of *White* closely mirror the facts of this case. Government agents

overheard eight conversations between an informant and White (including one conversation occurring in White's home) by way of a radio transmitter carried by the informant. *Id.* at 746-47, 91 S. Ct. at 1123-24. The government agents testified at trial about the substance of the conversations between the informant and White. *Id.* After White was found guilty of drug-trafficking, the United States Court of Appeals for the Seventh Circuit reversed his conviction on the grounds that *On Lee* had been overruled by *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967), and that *Katz* does not allow "the introduction of the agents' testimony in the circumstances of this case." *White*, 401 U.S. at 747, 88 S. Ct. at 1124 (summarizing *United States v. White*, 405 F.2d. 838 (7th Cir. 1969)). The Supreme Court reversed the Court of Appeals for two reasons. *Id.* at 750-54, 91 S. Ct. at 1125-27. In part I of the opinion of the Court, four justices reasoned that *Katz* did not overrule *On Lee* and *Lopez* and that *On Lee* and *Lopez* permit the law-enforcement tactics at issue. *Id.* at 750-52, 91 S. Ct. at 1125-26. In part II of the opinion of the Court, five justices reasoned that *Katz* did not apply because it applies only prospectively. *Id.* at 754, 91 S. Ct. at 1127 (citing *Desist v. United States*, 394 U.S. 244, 89 S. Ct. 1030 (1969)). The five-justice majority set *Katz* to the side and concluded that, "as *On Lee* clearly holds, the electronic surveillance here involved did not violate White's rights to be free from unreasonable searches and seizures." *Id.* In the present case, we do not rely on the *White* opinion because the reasoning in part I reflects the views of only a plurality of the Court and because the reasoning in part II does not apply to the facts of this case, which occurred in 2016.

Pouliot contends that the informant's "warrantless entry" into his home and use of an audio-recording device to surreptitiously record their conversation should be deemed a search on the ground that it was an unreasonable intrusion on his legitimate expectation of privacy. He does not cite *On Lee*, *Lopez*, or *Lewis*, let alone attempt to distinguish them. Rather, he relies primarily on *Katz*. In essence, he re-asserts the argument that did not prevail in *White*. He does not cite any post-*Katz* caselaw to support his argument, and we are not aware of any such caselaw. Our research reveals that *On Lee*, *Lopez*, and *Lewis* remain good law and permit the state, without obtaining a search warrant, to surreptitiously record a conversation between a suspect and a law-enforcement officer or cooperating informant and thereafter introduce evidence obtained by the officer or informant. *See United States v. Thompson*, 811 F.3d 944, 947-50 (7th Cir. 2016); *United States v. Wahchumwah*, 710 F.3d 862, 866-68 (9th Cir. 2013); *United States v. Brathwaite*, 458 F.3d 376, 379-81 (5th Cir. 2006); *United States v. Lee*, 359 F.3d 194, 199-203 (3d Cir. 2004) (Alito, J.).

Pouliot also contends that, even if there was no search under the Fourth Amendment, there was a search under article I, section 10, of the Minnesota Constitution. In response, the state argues that Pouliot has forfeited his state constitutional argument because he did not preserve it by presenting it to the district court. In the memorandum he filed in support of his motion to suppress, Pouliot cited only opinions applying the Fourth Amendment. In one clause of one sentence of his six-page memorandum, he stated, "certainly the Minnesota State Constitution can afford greater protections than the United States Constitution." But he did not cite any caselaw interpreting article I, section 10, of the state

constitution, and he did not develop the argument in any way. Pouliot's reference to the state constitution was so brief that the district court did not expressly consider whether Pouliot's state constitutional rights were violated. The district court reasonably construed Pouliot's memorandum as making an argument based only on the Fourth Amendment. Thus, Pouliot did not adequately preserve an argument based on the state constitution and, thus, has forfeited the argument. *See State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015).

In sum, the district court did not err by denying Pouliot's motion to suppress evidence.

Affirmed.