**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-1883**

State of Minnesota,
Respondent,

vs.

Michael Lee Morgan,
Appellant.

**Filed August 6, 2018**
**Affirmed**
**Reyes, Judge**

Hennepin County District Court
File No. 27-CR-16-24379

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes, Judge.

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

**REYES**, Judge

Appellant challenges his convictions of first-degree sale of a controlled substance and second-degree possession of a controlled substance, arguing that the district court erred

in denying his motion to suppress drug evidence found on his person during a search incident to his arrest. Appellant also argues that the district court abused its discretion by imposing a $20,000 fine when sentencing him. We affirm.

## FACTS

On September 12, 2016, a cooperating informant (CI) told a law enforcement officer that appellant Michael Lee Morgan had dealt large quantities of methamphetamine and had sold methamphetamine to the CI on multiple occasions. The CI had not previously worked with law enforcement. The CI gave the officer appellant's name and cell-phone number and identified appellant when shown his driver's-license photo. At the officer's direction, the CI called appellant's cell phone while two officers monitored the call. The CI confirmed that the recipient's voice was that of appellant. During the call, the officers heard the CI and appellant discuss the purchase of one ounce of methamphetamine from appellant. They also heard the CI and appellant agree to meet at a designated address in Minneapolis at around 9:00 to 9:45 p.m. to conduct a drug transaction.

Law-enforcement officers subsequently established surveillance at the designated address of the drug transaction. At around the designated time, the officers observed a vehicle driven by a person suspected to be appellant approach the location and park on the side of the street. An officer drove an unmarked police car toward the front of the parked vehicle and visually identified appellant as the driver. The officer then activated his emergency lights.

The officer saw appellant immediately move his hands toward his waistband and appear to shove something down the front of his pants, which led the officer to believe that

appellant had concealed a weapon or drugs. The officer exited his car and approached appellant's vehicle, at which point he observed that appellant was sweating and appeared jittery and nervous. The officer then placed appellant under arrest. When appellant exited his vehicle, the officer observed that the front of appellant's pants was unzipped.

The officer handcuffed appellant, and then proceeded to search appellant's vehicle while a second officer searched appellant's person incident to his arrest. The second officer indicated that he felt a hard object concealed near appellant's groin. The first officer conducted a second search of appellant's person and felt a hard granular substance near appellant's groin, which he testified that he "immediately recognized to be methamphetamine." The officers then transported appellant to the police station where they searched him and discovered approximately 27 to 28 grams of suspected methamphetamine concealed within his pants.

Respondent State of Minnesota charged appellant with first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd.1(1) (2016), and second-degree possession of a controlled substance in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2016). The district court initially appointed a public defender to represent appellant after determining him to be eligible. Approximately three weeks later, appellant retained private counsel.

Appellant filed a motion to suppress the evidence discovered on his person, arguing, in part, that the officers lacked probable cause to lawfully arrest him before searching his person. Following a contested hearing, the district court denied the motion to suppress, concluding that the officers had probable cause to arrest appellant based on the information

provided by the CI and corroborated by the officers, or in the alternative, that they had reasonable suspicion to stop appellant based on the CI's information and developed probable cause to arrest him upon observing his furtive movements and his sweaty and nervous demeanor.

Appellant subsequently waived his right to a jury trial, stipulated to the state's evidence, and agreed to submit the case to the district court pursuant to Minn. R. Crim. P. 26.01, subd. 4, to preserve for appellate review the pretrial suppression ruling. The district court found appellant guilty of both charges, entered convictions on both charges,[1] and sentenced appellant to 125 months imprisonment and imposed a $20,000 fine. This appeal follows.

## D E C I S I O N

### I. The officers had probable cause to arrest appellant.

Appellant argues that the district court erred in denying his motion to suppress the drug evidence discovered on his person on the grounds that the officers lacked probable cause to arrest him because (1) they did not adequately corroborate the CI's accusations or establish the CI's reliability and (2) their observations at the scene failed to establish probable cause.[2] We disagree.

In reviewing a district court's pretrial suppression ruling, "we may independently review the facts and determine, as a matter of law, whether the district court erred in

[1] Appellant does not challenge the district court's entry of judgment of conviction on both charges.

[2] Appellant does not challenge the manner of the officers' search of his person following his arrest; he challenges only whether the officers had probable cause to arrest him.

suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). "When the facts are not in dispute, our review is de novo . . . ." *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007).

The United States and Minnesota Constitutions protect individuals from unreasonable searches and seizures, and any evidence obtained in violation of an individual's constitutional rights must be suppressed. U.S. Const. amend. IV; Minn. Const. art. I, § 10; *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 416 (1963); *State v. Askerooth*, 681 N.W.2d 353, 370 (Minn. 2004). Generally, warrantless searches are "per se unreasonable" and unconstitutional "unless one of the well-delineated exceptions to the warrant requirement applies." *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001) (quotations omitted). "A search incident to a lawful arrest is a well-recognized exception to the warrant requirement under the Fourth Amendment." *State v. Bernard*, 859 N.W.2d 762, 766 (Minn. 2015), *aff'd sub nom. Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

An arrest is lawful if an officer has probable cause to believe that a person has committed a crime. *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997). The probable-cause standard we apply is "whether the totality of the facts and circumstances known would lead a reasonable officer to entertain an honest and strong suspicion that the suspect has committed a crime." *State v. Koppi*, 798 N.W.2d 358, 363 (Minn. 2011) (quotation omitted). "[T]he facts present must justify more than mere suspicion but less than a conviction. In applying this test, a court should not be unduly technical and should view the circumstances in light of the whole of the arresting officer's police experience as of the time of the arrest." *State v. Carlson*, 267 N.W.2d 170, 174 (Minn.1978).

"Whether the information provided by a confidential informant is sufficient to establish probable cause is determined by examining the totality of the circumstances, particularly the credibility and veracity of the informant." *State v. Ross*, 676 N.W.2d 301, 303-04 (Minn. App. 2004) (quotation omitted). Minnesota courts consider several factors in reviewing the reliability of a CI who is not anonymous, including:

> (1) a first-time citizen informant is presumably reliable; (2) an informant who has given reliable information in the past is likely also currently reliable; (3) an informant's reliability can be established if the police can corroborate the information; (4) the informant is presumably more reliable if the informant voluntarily comes forward; (5) in narcotics cases, "controlled purchase" is a term of art that indicates reliability; and (6) an informant is minimally more reliable if the informant makes a statement against the informant's interests.

*Id*. at 304. The CI's "[v]eracity can be established . . . 'by showing that details of the tip have been sufficiently corroborated so that it is clear the informant is telling the truth on this occasion.'" *State v. Holiday*, 749 N.W.2d 833, 840 (Minn. App. 2008) (quoting *State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978). "Even corroboration of minor details lends credence to an informant's tip and is relevant to the probable-cause determination." *Id*. at 841.

Here, the CI identified appellant by name, phone number, photo identification, and voice.[3] The officers corroborated this information when the CI contacted appellant using appellant's cell-phone number and discussed purchasing methamphetamine from him

[3] We note that factors one, two, four, and six are not present because the CI was a first-time informant who did not voluntarily offer information on appellant, but rather, provided information to avoid being charged for a drug crime.

during a monitored call. The officers further corroborated this information when they observed appellant arrive at the time and location designated for the drug transaction. When evaluating probable cause based on an informant's tip, an informant's detailed prediction of a suspect's future behavior is a "key distinguishing characteristic" from situations in which an informant shares only "easily obtained information and not inside information." *Ross*, 676 N.W.2d at 305. Under the totality of the circumstances, the information provided by the CI and corroborated by the officers establishes both the CI's reliability and probable cause to arrest appellant for controlled-substance crime.

We also observe that, as the district court concluded, the circumstances known to the officer at the time he identified appellant at the designated location for the drug buy would lead a reasonable officer to entertain, at minimum, a reasonable, articulable suspicion that appellant was involved in a drug transaction, sufficient to justify an investigatory stop. *See State v. Diede*, 795 N.W.2d 836, 842-43 (Minn. 2011) (providing that a stop is justified if specific, articulable facts lead officer to reasonably suspect person of criminal activity and that the reasonable-suspicion standard is "not high"). The officer's subsequent observations of appellant's furtive movements, which would be reasonably interpreted as an attempt to conceal a weapon or drugs, and his nervous demeanor would lead the officer to form probable cause to believe that appellant had committed a crime, and, provides an alternative basis to justify his arrest. Accordingly, we conclude that the district court did not err in denying appellant's motion to suppress the evidence discovered on his person during a search incident to his arrest.

## II. The district court did not abuse its discretion by imposing a $20,000 fine when sentencing appellant.

Appellant argues that the district court abused its discretion by imposing a $20,000 fine because the court failed to consider appellant's indigent status or whether the fine would impose an undue hardship, in light of his initial qualification for a public defender. We disagree.

We review the district court's imposition of a fine for an abuse of discretion. *See State v. McLaughlin and Schultz, Inc.*, 397 N.W.2d 9, 11 (Minn. App. 1986) (concluding district court did not abuse its discretion in imposing a criminal fine).

Under Minnesota law, the maximum fine for a first-degree controlled-substance conviction is $1,000,000. Minn. Stat. § 152.021, subd. 3 (2016). The district court is required to impose a minimum of 30% of the maximum fine. Minn. Stat. § 609.101, subd. 3(a) (2016). However, under Minn. Stat. § 609.101, subd. 5(b) (2016), the district court may reduce the minimum fine to not less than $50 for specific reasons, including the defendant's indigent status. The statute provides:

> If the defendant qualifies for the services of a public defender or the court finds on the record that the convicted person is indigent or that immediate payment of the fine would create undue hardship for the convicted person or that person's immediate family, the court *may* reduce the amount of the minimum fine to not less than $50.

Minn. Stat. § 609.101, subd. 5(b) (emphasis added). Under the language of the statute, the district court's decision to reduce the fine if the defendant qualifies for a reduction is discretionary. *See* Minn. Stat. § 645.44, subd. 15 (2016) ("'May' is permissive.").

Here, appellant was convicted of first-degree controlled substance crime carrying a maximum fine of $1,000,000 and a minimum 30% fine of $300,000. The district court initially stated that it would impose a $40,000 fine, which represented a $260,000 reduction from the statutory minimum. Appellant's counsel replied, "[I]s the fine necessary at this point with the fact that he's going to go to prison?" The district court responded by reducing the fine by another $20,000, but noted that appellant was able to afford private counsel. The district court's statement shows consideration of appellant's status as non-indigent, which appellant's counsel did not challenge. Moreover, "the district court need not determine if a defendant is able to pay a fine that has been reduced below the statutory minimum." *State v. Lambert*, 547 N.W.2d 446, 448 (Minn. App. 1996). Accordingly, we conclude that the district court did not abuse its discretion in imposing a $20,000 fine.

Appellant seeks remand to the district court for reconsideration of his fine and relies on *State v. Rewitzer*, in which the Minnesota Supreme Court concluded that imposition of $273,600 in fines and surcharges for convictions of second-, third-, and fifth-degree controlled-substance crime created an undue hardship on the defendant. 617 N.W.2d 407, 408 (Minn. 2000). However, in *Rewitzer*, the defendant challenged the fines under the Excessive Fines Clause of both the United States Constitution and the Minnesota Constitution. *Id*. The supreme court applied the *Solem* factors for determination of

excessive fines and held that the fines violated both federal and state constitutions.[4] *Id*. at 415. Here, appellant argues only that the district court abused its discretion in imposing the fine. He does not challenge the fine under the Excessive Fines Clauses of either the United States Constitution or the Minnesota Constitution. Moreover, the Minnesota Supreme Court's statement in *Rewitzer* that the fines also imposed an undue hardship under Minn. Stat. § 609.101, subd. 5(b), is unsupported by analysis or application of the statute and does not address whether the district court must consider indigent status or an offender's ability to pay in every circumstance. 617 N.W.2d at 415. Appellant's argument is unavailing.

**Affirmed.**

[4] "In *Solem*, the [United States Supreme] Court provided three factors to consider in determining proportionality: (1) the gravity of the offense and the harshness of the penalty, (2) comparison of the contested fine with fines imposed for the commission of other crimes in the same jurisdiction, and (3) comparison of the contested fine with fines imposed for commission of the same crime in other jurisdictions." *Id*. at 413 (citing *Solem v. Helm*, 463 U.S. 277, 290-92, 103 S. Ct. 3001, 3010-11 (1983)).