STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0786

State of Minnesota,
Appellant,

vs.

Cabbott James Weyker,
Respondent.

Filed October 22, 2018
Affirmed
Ross, Judge

Dakota County District Court
File No. 19HA-CR-17-2569

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

James C. Backstrom, Dakota County Attorney, G. Paul Beaumaster, Assistant County Attorney, Hastings, Minnesota (for appellant)

Matthew J. Mankey, Mankey Law Office, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Reyes, Judge; and Florey, Judge.

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

ROSS, Judge

A police officer's drug-detection dog alerted at the threshold of Cabbott Weyker's apartment door, and police then obtained a warrant to search the apartment. The search revealed two bullets and a scale that tested positive for a trace amount of methamphetamine. After the state charged Weyker with fifth-degree controlled substance

crime and possession of ammunition as an ineligible person, Weyker successfully moved the district court to suppress the evidence, arguing that the dog sniff leading to the warrant violated his constitutional rights. We affirm the district court's decision to suppress the evidence because police lacked reasonable suspicion to believe Weyker's apartment contained methamphetamine.

FACTS

Police officer Peter Meyer brought a drug-detecting dog to Cabbott Weyker's Eagan apartment door after he heard from a St. Paul investigator that Weyker "is a methamphetamine dealer" who "has been seen" in possession of eight to ten pounds of methamphetamine. The dog alerted at the threshold of Weyker's apartment, and Officer Meyer relied on the alert to obtain a search warrant. Police executing the warrant found two rounds of rifle ammunition and three digital scales, one of which was powdered with a crystalline substance that tested positive for methamphetamine. The state charged Weyker with fifth-degree controlled substance crime and possession of ammunition by an ineligible person.

Weyker moved to suppress the evidence. The only evidence submitted for the district court's decision was the search-warrant application, the warrant, and the receipt of the items recovered.

The warrant application included the following facts. Officer Meyer had been contacted by a St. Paul Police Department investigator about Cabbott Weyker. Weyker lived in a specified Eagan apartment with his mother. Officer Meyer had "learned that Weyker is a methamphetamine dealer and has been seen in possession of between 8 to 10

LBS of methamphetamine with[in] the past month." The officer saw police reports indicating that Weyker was previously arrested for violating a no-contact order, possession of a controlled substance, and possession of a pistol as an ineligible person. The officer stated also that Weyker was a convicted felon, but he did not indicate any particular felony. Based on this information, Officer Meyer took his drug-detecting dog to Weyker's apartment door, where the dog alerted to a narcotic odor at the threshold.

The district court granted Weyker's suppression motion by relying on a holding of this court—which has since been reversed by the supreme court—that police need a warrant to conduct a dog sniff in the hallway of an apartment building. *State v. Edstrom*, 901 N.W.2d 455 (Minn. App. 2017), *aff'd in part and rev'd in part*, 916 N.W.2d 512 (Minn. 2018). The state appeals.

D E C I S I O N

The state seeks reversal on two theories. It argues first that the district court erroneously suppressed the evidence by relying on this court's holding in *Edstrom* that a dog sniff at an apartment door is unlawful if it is conducted without a warrant or an exception to the warrant requirement. It argues second that the district court erred when it failed to apply a good-faith exception to the exclusionary rule based on the officers' reliance on a facially valid warrant. Although the state accurately identifies the flaws in *Edstrom* and that case has been reversed, the state fails to establish that the officer had reasonable suspicion to justify the dog sniff or that any good-faith exception applies.

Weyker's suppression motion implicates the provisions of the United States and Minnesota Constitutions that prohibit unreasonable searches and seizures. U.S. Const.

amend. IV; Minn. Const. art. 1, § 10. Evidence unconstitutionally seized generally must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177–78 (Minn. 2007). We review a district court's factual findings in a pretrial suppression order for clear error, and we review its legal conclusions de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). Our de novo review supports the state's position in part and undermines it in part.

The state rightly contests the district court's reliance on our decision in *Edstrom*. The supreme court rejected our holding that a dog sniff in the hallway at an apartment door is a search under the Fourth Amendment and requires a warrant supported by probable cause. *State v. Edstrom*, 916 N.W.2d 512, 521–24 (Minn. 2018). But it also reaffirmed its holding in *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007), that a dog sniff at an apartment door is a search under article 1, section 10 of the Minnesota Constitution, and that the sniff is constitutional only if it is supported by reasonable suspicion of criminal activity. *Edstrom*, 916 N.W.2d at 523–24; *see also Davis*, 732 N.W.2d at 177, 180–82. We will therefore affirm the holding that the dog sniff was unconstitutional unless it was supported by reasonable suspicion of criminal activity.

The stipulated facts in the record demonstrate that the dog sniff did not arise from reasonable suspicion of criminal activity. We review de novo whether stipulated facts establish reasonable suspicion. *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011). Reasonable suspicion cannot exist without specific and articulable facts that reasonably justify the sniff. *Davis*, 732 N.W.2d at 182. The warrant application indicates only that police obtained information that connected Weyker to drug possession and activity. It says nothing of the source of this information. It hides the source behind the passive voice,

declaring unrevealingly that Weyker "has been seen" in possession of eight to ten pounds of methamphetamine. This foggy declaration gives no officer reason to suppose that St. Paul police are the original source since, presumably, the St. Paul police investigator would have arrested Weyker on the spot if the investigator had seen Weyker with the methamphetamine. A reasonable officer would therefore infer that the information originated from someone else's report to the investigator.

We are not suggesting that the information had to originate with police to be reasonably relied upon. But reasonable suspicion may stand on an informant's tip only if the tip has sufficient indicia of reliability. *Matter of Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997). And again, the record contains no such indicia, which must, at a minimum, include "information suggesting the informant is credible and obtained the information in a reliable way." *Id.* An anonymous tip is constitutionally unreliable unless it contains at least some specific and articulable facts, rather than conclusory assertions, to justify a constitutionally significant intrusion. *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 556 (Minn. 1985). Construing the warrant application in the best light possible on this record, a tipster told the St. Paul investigator, who in turn told Officer Meyer, that "Weyker is a methamphetamine dealer." So construed, the tip was conclusory and not sufficiently reliable to create reasonable suspicion of criminal activity inside Weyker's apartment.

The remaining information in the warrant application also falls short of creating reasonable suspicion. This other information describes Weyker's criminal history. Federal appellate courts discussing the issue have consistently agreed that a suspect's criminal history alone cannot establish reasonable suspicion. *See United States v. Mathurin*, 561

F.3d 170, 177 (3d Cir. 2009); *Burrell v. McIlroy*, 464 F.3d 853, 858 n.3 (9th Cir. 2006); *United States v. Jerez*, 108 F.3d 684, 693 (7th Cir. 1997); *United States v. Sandoval*, 29 F.3d 537, 542 (10th Cir. 1994). Because the only apparently reliable information considered by Officer Meyer was Weyker's criminal history, the officer lacked reasonable suspicion to conduct the dog sniff. The dog sniff therefore violated Weyker's rights under the Minnesota Constitution.

Our conclusion that the dog sniff violated Weyker's constitutional rights informs our consideration as to whether the warrant was properly issued. It was not. A warrant must rest on probable cause. U.S. Const. amend. IV. We pay great deference to the district court's decision to issue a warrant, reversing only if the issuing judge did not have a substantial basis to conclude that probable cause existed. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). Probable cause requires particularized suspicion that criminal activity is afoot based on facts observed firsthand or from reliable sources. *See Illinois v. Gates*, 462 U.S. 213, 230–35, 103 S. Ct. 2317, 2328–30 (1983). Because a constitutional violation led to the dog's alert, the alert cannot supply the probable cause to justify the warrant. *See State v. Carter*, 697 N.W.2d 199, 206, 212 (Minn. 2005). The facts described in the warrant application apart from the dog sniff—the same facts we have already held to be insufficient to establish even reasonable suspicion—cannot establish probable cause for the same reasons. The warrant should not have been issued, and the evidence discovered under the invalid warrant presumably must be suppressed.

The state argues against that presumption, contending that, even if the apartment search was unconstitutional because of the infirm warrant, the consequent evidence should

nevertheless be admitted under the good-faith exception to the exclusionary rule as established in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984). *Leon* establishes a good-faith exception to the exclusionary rule, allowing a trial court to admit unlawfully obtained evidence if the officers who obtained it did so executing a warrant that they reasonably believed to be valid. 468 U.S. at 922–23, 104 S. Ct. at 3420–21. But Minnesota has never adopted the *Leon* exception. The Minnesota Supreme Court has adopted only the federally announced exception for officers who act in objectively reasonable reliance on binding appellate precedent, and it has instructed Minnesota courts not to construe that exception to encompass any others. *See State v. Lindquist*, 869 N.W.2d 863, 876–77 (Minn. 2015) (noting the "narrowness" of the binding-appellate-precedent exception and declining to decide whether *Leon* should apply in Minnesota courts). We will not reverse based on the alleged *Leon* exception. (We say *alleged* exception because a *Leon* exception applies only to evidence collected by an officer who acted in objectively reasonable reliance on a facially valid warrant, 468 U.S. at 922, 104 S. Ct. at 3420, and requires an assessment of the reasonableness of the conduct of the officer "who originally obtained [the warrant] or who provided information material to the probable-cause determination," *id.* at 923 n.24, 104 S. Ct. at 3420 n.24. And we have established that the officer did not act on reasonable suspicion when he conducted the dog sniff based on conclusory information.)

Because the officer conducted the dog sniff without reasonable suspicion and obtained a warrant without probable cause, and because we will not apply the *Leon* good-faith exception, we affirm the district court's decision to suppress the evidence.

Affirmed.