STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0499

State of Minnesota,
Respondent,

vs.

Machelle Jean Frisbie,
Appellant.

Filed April 15, 2019
Affirmed
Bratvold, Judge

Winona County District Court
File No. 85-CR-17-363

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Karin L. Sonneman, Winona County Attorney, Christina M. Galewski, Assistant County Attorney, Winona, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

David M. Robbins, Special Assistant Public Defender, Meyer Njus Tanick, PA, Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

In this appeal from the final judgment of conviction and sentence for fifth-degree controlled-substance crime, appellant Machelle Jean Frisbie challenges the district court's denial of her motion to suppress evidence that was seized as a result of a search of her home. Frisbie argues that (1) the affidavit submitted in support of the warrant had material omissions, and (2) the search warrant lacked probable cause. Because the omission of certain facts from the supporting affidavit was not material, and because the record supports the district court's conclusion that the warrant was based on a fair probability that drugs would be located in Frisbie's home, we affirm.

FACTS

In January 2017, law enforcement received a tip from a confidential informant (CI) that the "occupants of [Frisbie's] residence are up at all hours of the night and that there are vehicles coming and going from the residence." Investigator Walch, a sheriff with the Winona County Sheriff's Office, investigated further, surveilled the home, and received additional information from the CI. Walch identified the residents of the home as Frisbie and J.B., both of whom were known drug users on probation for controlled-substance crimes. During surveillance of the home, Walch saw other known "drug users . . . frequenting the residence" throughout the day and night, including D.B. Walch also observed that methamphetamine users are often "awake and active for days at a time." And Walch saw Frisbie make "frequent visits" to vehicles parked in the driveway between the hours of 11:00 p.m. and 5:00 a.m.

On February 13, 2017, the CI reported to Walch that a "Buick passenger car was parked in the driveway" of Frisbie's home. Walch identified the Buick's owner as T.P., who was "currently on probation for a controlled substance conviction." Later that day, "at approximately 10:44 p.m.," deputies stopped the Buick, found over 25 grams of controlled substances, and arrested the driver, D.B., whom Walch had previously observed visiting Frisbie's home on several occasions. D.B. was charged with a controlled-substance offense for his February 13 arrest. On February 14, Walch received a "tip from the online reporting system" that drug trafficking was taking place in Frisbie's home.

Walch applied for a search warrant for Frisbie's home on February 17, 2017. In addition to the facts described above, Walch's affidavit included Frisbie's criminal history and stated that Walch believed "there [was] illegal drug activity ongoing" at Frisbie's home.

The same day, the district court signed the search warrant. On February 20, police officers executed the warrant at Frisbie's home, in her presence. In her bedroom, officers found a "plastic baggie" which "field-tested positive for the presence of cocaine, but [was] believed to be 'turbo' – a street name for Alpha-PVP."[1] Police also found "a burnt piece of tinfoil believed to be drug paraphernalia; a pink metal box containing drug paraphernalia; one pill identified as morphine under the dresser; and pieces of burnt

[1] "Alpha-PVP" or "Alpha-pyrrolidinopentiophenone" is a controlled substance, commonly referred to as "turbo." Turbo was identified in the warrant application, which stated that turbo users "are often awake for days at a time due to the stimulant effect of the drug."

tinfoil." B.K. was also present and was arrested after police found drug paraphernalia in her duffle bag.

On February 21, 2017, the state charged Frisbie with two counts: (1) fifth-degree controlled-substance crime under Minn. Stat. § 152.025, subd. 2(1) (2016), and (2) possession of drug paraphernalia under Minn. Stat. § 152.092(a) (2016).

Frisbie filed a motion to suppress "any and all evidence" that was obtained by law enforcement during the search of her home "on the grounds that the search violated [her] rights as guaranteed by the 4th and 14th amendments to the United States Constitution and correlate[d] provisions of the Minnesota Constitution." In support of her suppression motion, Frisbie argued that material facts were omitted from the warrant application. Specifically, Frisbie contended that the location and circumstances of D.B.'s arrest were missing from the application. Frisbie asserted that these omissions were material because D.B. was stopped approximately ten miles from Frisbie's home, and no facts established that D.B. had recently left Frisbie's home before he was stopped. Frisbie also argued that probable cause did not support the warrant.

The state opposed Frisbie's motion and argued that "the signing judge had two grounds for authorizing the search of Frisbie's residence: 1) reasonable articulable suspicion that felony-level probationers were violating conditions of probation, and 2) probable cause to believe that evidence of controlled substance offenses would be at Frisbie's residence."

At a contested omnibus hearing, which Walch did not attend, Frisbie elicited additional evidence about D.B.'s arrest by way of written questions to Walch. Walch

responded that police did not conduct a traffic stop of the Buick on February 13, rather, an officer did a welfare check after finding the Buick on the side of a highway with D.B. "passed out" in the driver's seat. The officer's supplemental report was also filed as an exhibit and further described D.B.'s arrest, explaining that drugs were found on D.B.'s person and in the Buick, and that the arrest occurred in Stockton.

In a written order, the district court denied Frisbie's motion to suppress the evidence from the search. The court determined that the warrant application was not deliberately false or made in reckless disregard of the truth, even though it did not completely describe the circumstances of D.B.'s arrest. The district court concluded that "the failure to include more precise details . . . was an innocent or negligent misrepresentation. Such a misrepresentation is not enough to invalidate the warrant." The district court also concluded that, despite the warrant's deficiencies in "certain areas," the issuing court had a substantial basis for concluding that probable cause existed.

The parties agreed that the pretrial suppression order was dispositive of the case and stipulated to facts, pursuant to Minn. R. Crim. P. 26.01, subd. 4, to preserve the issue for appellate review. Based on the stipulated facts, the district court found Frisbie guilty of fifth-degree controlled-substance crime, stayed imposition of her sentence, and placed her on supervised probation for five years. Frisbie appeals.

D E C I S I O N

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 reviews a district court's decision to issue a search warrant to see if there was a

"substantial basis for concluding that probable cause existed." *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). This court limits its review to the information contained in the warrant application and its supporting affidavit. *Id.* at 384-85. And we apply the totality-of-the-circumstances test articulated by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332 (1983), which explained that:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

462 U.S. at 238-39, 103 S. Ct. at 2332 (quotation omitted); *see also State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998) (applying *Gates*).

When reviewing a pretrial order on a motion to suppress, this court reviews the district court's factual findings for clear error, and the district court's legal determinations, including a determination of probable cause, de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). We afford great deference to the district court's decision to issue a search warrant. *State v. Rochefort*, 631 N.W.2d 802, 804-05 (Minn. 2001). Thus, close cases should be "largely determined by the preference to be accorded to warrants." *Fawcett*, 884 N.W.2d at 385 (quotation omitted).

I. The affidavit supporting the warrant application did not contain material omissions.

Frisbie argues that Walch's affidavit contained material omissions, and therefore, that the warrant was void in its entirety. Specifically, Frisbie contends that the application omitted details concerning D.B.'s arrest, "namely that it occurred nearly ten miles away from [Frisbie's] residence," and it happened later in the evening, much after D.B. had left Frisbie's home.

In order for a search warrant to be invalidated due to misrepresentations or omissions in the supporting affidavit, appellant must show under the *Franks* test that (1) the officer deliberately or recklessly made false statements or omissions and (2) the statements or omissions were material. *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (citing *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 2684 (1978)). An omission is material if the warrant would lack probable cause if it were included. *Id.*

Appellate courts review "a district court's findings on the issue of whether the affiant deliberately made statements that were false or in reckless disregard of the truth" under the clearly erroneous standard, and "a district court's determination of whether the alleged misrepresentations or omissions were material to the probable cause determination" is reviewed under the de novo standard. *Id*. When reviewing an affidavit, we look at it as a whole rather than "each component of the affidavit in isolation." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985).

We consider both steps of the *Franks* test. Regarding the first step, a defendant has the burden of showing by a preponderance of the evidence that the affiant knowingly or recklessly included a false statement in the affidavit. *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). "[I]nnocent or negligent

misrepresentations will not invalidate a warrant." *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989). Frisbie argues that by omitting the facts that D.B.'s arrest took place approximately ten miles from Frisbie's home and occurred later in the evening, Walch falsely implied in his affidavit that D.B. was "in route from [Frisbie's] residence—or at least still nearby the residence—at the time [he] was stopped by law enforcement."[2] She argues, therefore, that the warrant failed to include information that would contradict "inferences in the affidavit," and "reasonably lead a reader to infer something that the affiant knew not to be true." *See Novak v. State*, 349 N.W.2d 830, 832-33 (Minn. 1984) (providing that a failure to include information that would contradict "inferences in the affidavit . . . would constitute reckless or intentional omission of material facts").

It is true that the warrant application made no mention of the location of D.B.'s arrest or the time that the Buick was seen at Frisbie's home. But we disagree with Frisbee's claim that Walch's affidavit implied that D.B. had recently left Frisbie's home. In fact, Walch's affidavit stated that D.B.'s arrest took place "[l]ater in the day," meaning, at some point after the Buick was spotted at Frisbie's home. Accordingly, the record supports the district court's finding that the affidavit did not make a false statement, and the omission of details surrounding D.B.'s arrest was an "innocent or negligent misrepresentation" which does not invalidate the warrant. *Moore*, 438 N.W.2d at 105. Thus, the district court's

[2] Frisbie's addendum to this court included two maps depicting the distance from Frisbie's home to the location of D.B.'s arrest. These maps are not part of the record and we do not consider them. *See* Minn. R. Civ. App. P. 110.01. The district court relied on officer testimony and determined in its order that D.B.'s arrest took place "eight to eleven miles away" from Frisbie's home. Frisbie does not challenge this finding on appeal.

finding that Walch's statements and omissions were not deliberate or made in reckless disregard of the truth is not clearly erroneous.

Even assuming that Walch deliberately or recklessly omitted information, Frisbie fails on the second step of the *Franks* test because the omissions were not material. Frisbie argues that the "traffic stop of [D.B.] is the single most-important piece of evidence in the warrant as it is the only credible direct evidence of illegal activity" and without the connection of D.B.'s arrest to Frisbie's home, the assertion of drug activity at the home is "dubious." But even if the affidavit had stated that D.B.'s arrest took place "eight to eleven miles" from Frisbie's home, the affidavit also attested that D.B. "was arrested after deputies located over 25 grams of what field-tested positive as a controlled substance" in a vehicle that had been at the residence earlier in the day. And Walch's affidavit also averred that D.B. is a "known drug user[]" who Walch had observed making frequent visits to Frisbie's home. Thus, we agree with the district court's determination that the omissions are "not enough to invalidate the warrant."

II. The district court did not err in denying Frisbie's suppression motion because the warrant was supported by probable cause.

Frisbie also argues that probable cause did not support the warrant because a sufficient nexus did not exist between illegal drug use and Frisbie's home, and because law enforcement did not sufficiently corroborate the CI. We discuss both arguments in turn.

A. Nexus

Probable cause requires "that there is a fair probability that the evidence will be found at the specific site to be searched." *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn.

2014). In other words, there must be a sufficient nexus between the evidence of a crime and the place to be searched. *Id.* This nexus can be inferred from the totality of the circumstances. *Id.* Circumstances to be considered in making this determination "are the type of crime, the nature of the items sought, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would usually keep the items." *Id.* at 623.

Although the district court commented that the "warrant application was perhaps not the strongest in certain areas," we conclude that it established a sufficient nexus based on a totality of the circumstances. First, Walch knew the CI. This bolsters the CI's credibility, and the credibility of the CI's tip that drug-related activity was taking place at Frisbie's home. An informant "who voluntarily comes forward and identifies herself is more likely to be telling the truth because she presumably knows that the police could arrest her for making a false report." *State v. Lindquist*, 205 N.W.2d 333, 335 (Minn. 1973).

Second, Walch surveilled the home and saw ongoing drug-related activity. Walch observed frequent night-time visits from known drug users, including visitors who were on probation for controlled-substances crimes. Walch saw the visitors parked in the driveway at Frisbie's house, and Frisbie "go[ing] to and from [these] vehicles" at all hours of the day and night. In his affidavit, Walch stated that he believed "there [was] illegal drug activity ongoing" at the residence.

Third, Walch knew Frisbie as a drug user, knew that she was on probation for a controlled-substance offense, and described her criminal history in the affidavit. Frisbie had numerous convictions for controlled-substance and drug-paraphernalia crimes. A

signing court may rely on an occupant's criminal history in issuing a search warrant. *See State v. Carter*, 697 N.W.2d 199, 205 (Minn. 2005) ("A person's criminal record is among the circumstances a judge may consider when determining whether probable cause exists for a search warrant.").

Fourth, D.B.'s arrest for possession of controlled substances increased the probability of finding drug evidence in Frisbie's home because D.B. was a "frequent" visitor of Frisbie's home, and was known to Walch as a drug user. In addition, the Buick that D.B. was driving at the time of his arrest was seen by the CI at Frisbie's home on February 13. "Later in the day," law enforcement found a "container containing more than 25 grams of a controlled substance" in the Buick. Finally, a tip from an online reporting system stated that Frisbie's home was involved in drug trafficking. Thus, we conclude, based on a totality of the circumstances, that the warrant application established a sufficient nexus between Frisbie's home and drug activity.

Frisbie asserts that relevant caselaw supports her position and cites *State v. Kahn*, where this court upheld the district court's finding of no probable cause to search appellant's home after appellant was arrested for possessing a large quantity of drugs found in his car at least 75 miles from his home. 555 N.W.2d 15, 16-19 (Minn. App. 1996). But *Kahn* is distinguishable. Here, Walch observed drug-related activity in the driveway of Frisbie's home, not 75 miles away. In addition, Walch's observations of drug-related activity in Frisbie's driveway were corroborated by other sources, including the CI's tip, the online tip, and D.B.'s arrest for possession of drugs.

Frisbie also argues that *State v. Yarbrough* supports her position because Walch's affidavit did not aver that Frisbie was involved in drug sales. *Yarbrough* stated that Minnesota courts have "drawn a distinction between a 'drug wholesaler' and a 'casual user.'. . . It may be reasonable to infer that drug wholesalers keep drugs at their residences, but such an inference, without more, is unwarranted for casual users." 841 N.W.2d at 623 (quotations and citations omitted). We agree that the criminal activity described in Walch's affidavit was drug use, not drug sales. But the warrant application did not infer that drugs would be found at Frisbie's home because she was a drug user. Walch's affidavit included his observations of drug-related activity at Frisbie's home, Frisbie's probation and criminal history for drug use crimes, her association with people involved with drug use, D.B.'s arrest for drug possession, and the CI's tips.

This court considers the sufficiency of the warrant application based on the totality of the circumstances and does not view any fact in isolation. *Fawcett*, 884 N.W.2d at 384-85. We conclude that the warrant application established a sufficient nexus between Frisbie's home and illegal drug activity.

B. Lack of corroboration

Frisbie contends that the CI was not sufficiently corroborated. "Where a probable cause determination is based on an informant's tip, the informant's veracity and the basis of his or her knowledge are considerations under the totality test." *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998). Minnesota caselaw provides several considerations in reviewing the reliability of a CI, including: (1) a "first-time citizen informant who has not been involved in the criminal underworld is presumed to be reliable"; (2) a CI that has

previously given police correct information; (3) sufficient corroboration of the information supplied by a CI; (4) whether the CI voluntarily came forward; (5) the CI's involvement in a "controlled purchase"; and (6) a CI's statement against their penal interest. *Id.*

Frisbie argues that the warrant application did not corroborate the CI's reliability. We disagree. While not all six considerations supporting a CI's reliability are present in this record, three considerations bolstered the CI's reliability. First, the CI was known to Walch, enhancing the CI's reliability. *See Lindquist*, 205 N.W.2d at 335. Second, Walch's affidavit also attested that he believed the CI had no criminal history, which also adds to the informant's reliability. *See Ward*, 580 N.W.2d at 71 ("A first-time citizen informant who has not been involved in the criminal underworld is presumed to be reliable, but the affidavit must specifically aver that the informant is not involved in criminal activity."). While Walch's affidavit did not state that the CI is a first-time citizen informant, the affidavit sufficiently established the CI's reliability.

Third, Walch corroborated the CI's statements through his investigation and surveillance. The affidavit averred that, after the CI stated that "occupants of [Frisbie's] residence are up at all hours of the night and that there are vehicles coming and going from the residence," Walch observed the exact same behaviors in Frisbie's driveway by individuals known to be drug users. *See State v. Holiday*, 749 N.W.2d 833, 841 (Minn. App. 2008) ("Even corroboration of minor details lends credence to an informant's tip and is relevant to the probable-cause determination."). The record also shows that, after the CI reported the Buick in Frisbie's driveway, Walch saw the Buick, performed a registration check, and identified the vehicle's owner, who was on probation for a drug conviction.

Because Walch's affidavit corroborated the CI's statements, the CI was known to Walch, and the CI did not have a known criminal history, we conclude that the CI was reliable.[3]

We conclude that the issuing court had a substantial basis to conclude that probable cause existed to search Frisbie's home. We affirm the district court's denial of Frisbie's motion to suppress.

Affirmed.

[3] The state argues, in the alternative, that, because Frisbie was "subject to search to ensure compliance with her probationary conditions," only reasonable articulable suspicion, rather than probable cause, was required to authorize the search. We do not consider or decide the state's alternative argument.