This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1156

State of Minnesota,
Respondent,

vs.

Rian Lynn Thibeau,
Appellant.

Filed May 20, 2019
Affirmed in part, reversed in part, and remanded
Stauber, Judge*

Hennepin County District Court
File No. 27-CR-17-25233

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Stauber, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STAUBER, Judge

In this direct appeal from final judgments of conviction and sentences for two counts of first-degree controlled substance crimes, appellant argues that (1) the district court erred in determining that only reasonable, articulable suspicion is required to conduct a dog-sniff search in a common hallway of an apartment, and that (2) the district court erred by entering convictions for first-degree sale and possession when the possession was a lesser-included offense of sale, and by considering the sentence of the possession conviction "merged" with the sentence of the sale conviction. We affirm in part, reverse in part, and remand.

FACTS

In July 2017, a detective with the Bloomington Police Department received information about a tip from an employee of an apartment complex where appellant Rian Lynn Thibeau lived and worked. The employee stated that he had observed appellant with sores on her face, constantly twitching and scratching herself, and with large sums of cash. He stated that he observed several baggies of what appeared to be methamphetamine in appellant's apartment and that appellant offered to give him methamphetamine for free but, if he wanted some in the future, he would have to pay. In August, the detective confirmed the substance of the tip. Based on this information, the detective and another officer conducted a dog-sniff search outside of appellant's apartment, which yielded a positive alert to the presence of narcotics.

Shortly after the dog-sniff search, the detective learned that, based on this court's decision in *State v. Edstrom*,[1] she needed a warrant prior to conducting the search. 901 N.W.2d 455 (Minn. App. 2017). The detective obtained a warrant and had her partner conduct a second dog-sniff search outside of appellant's apartment. Again, the search alerted to the presence of narcotics. After the second dog-sniff search, the detective obtained a search warrant to search inside appellant's apartment.

Law enforcement executed the search warrant on October 5, 2017, and found appellant alone in her apartment. Officers discovered two packages containing a substance that field-tested positive for methamphetamine. The first package weighed 454.20 grams and the second package weighed 447.01 grams. Officers located other quantities of suspected methamphetamine in the apartment, and the total weight of all recovered methamphetamine was 934.66 grams.[2] Officers also found ledgers indicating various amounts of money with notes of "owed" and "paid," a digital scale, and approximately $7,430 in currency. Officers examined appellant's three cell phones and discovered text messages indicating that appellant had been delivering quantities of methamphetamine

---

[1] The supreme court later reversed this court's decision in *Edstrom*, holding that a dog-sniff search in the hallway immediately adjacent to a person's apartment did not intrude on that person's reasonable expectation of privacy, and did not constitute a search under the Fourth Amendment of the United States Constitution. *State v. Edstrom*, 916 N.W.2d 512, 512 (Minn. 2018), *cert. denied*, 139 S. Ct. 1262 (2019).

[2] Appellant's brief states that officers found a total of 968 grams of methamphetamine. The district court's "Stipulated Facts Findings, Conclusions of Law and Order" states that officers discovered a total of 968.11 grams. The complaint states that officers discovered a total of 934.66 grams of methamphetamine.

throughout the Twin Cities and Wisconsin. Officers also found 3.27 grams of a suspected THC product.

The state charged appellant with first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2016) (count one), first-degree possession of a controlled substance in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (count two), and fifth-degree possession of a controlled substance in violation of Minn. Stat. § 152.025, subd. 2(1) (2016) (count three). Appellant moved to suppress the evidence discovered during the search, arguing that the information used to obtain the search warrant for the second dog-sniff search was stale at the time of the application. The district court granted the motion to suppress. The state filed a motion to reconsider, arguing that the district court applied the incorrect standard to review a request for a dog-sniff search, and that the state possessed the required reasonable, articulable suspicion to conduct the search.

The district court held a hearing after which it determined that, because the supreme court granted review of *Edstrom*, this essentially removed *Edstrom* from the law of the State of Minnesota until the supreme court rendered its decision. The district court stated that *State v. Davis*, 732 N.W.2d 173 (Minn. 2007),[3] controlled the matter. The district court held an evidentiary hearing on the issue of the search warrant. It denied appellant's motion to suppress, concluding that reasonable, articulable suspicion supported the dog-sniff search. At the same hearing, the state dismissed the fifth-degree possession charge

---

[3] *Davis* held that reasonable, articulable suspicion is the appropriate standard for obtaining a search warrant for a dog-sniff search in a common hallway outside an apartment door. 732 N.W.2d at 182.

(count three). The parties agreed to proceed under stipulated evidence pursuant to Minn. R. Crim. P. 26.01, subd. 4, to preserve for appellate review the issue of whether the district court employed the correct standard to evaluate the constitutionality of the dog-sniff search. Appellant waived her right to a jury trial.

The district court found appellant guilty of counts one (sale) and two (possession). The warrant of commitment indicated that the district court entered convictions for both counts. It also indicated that appellant was sentenced to 65 months in prison for count one, and that the sentence for count two "merged" with count one.[4] This appeal follows.

D E C I S I O N

I. The district court did not err in denying appellant's motion to suppress evidence obtained pursuant to a dog-sniff search based on reasonable articulable suspicion.

Appellant challenges the district court's holding that a dog-sniff search requires only reasonable, articulable suspicion. While appellant acknowledges the supreme court's holdings in *Edstrom* and *Davis*, she makes her argument for the sole purpose of preserving her right to benefit from a possible reversal of *Edstrom* by the United States Supreme Court, which, at the time appellant filed her brief, was pending for certiorari. But the Supreme Court has since denied *Edstrom's* petition for writ of certiorari. *Edstrom v. Minnesota*, 139 S. Ct. 1262, 1262 (2019). Therefore, the supreme court's holding in *Edstrom* stands, and

[4] Based on the sentencing order in the district court register of actions, it appears that, by virtue of "merging" the sentencing conditions with count one, the district court effectively imposed a sentence for count two.

the district court did not err by holding that, under *Davis*, reasonable, articulable suspicion supported the dog-sniff search, and a search warrant was unnecessary.

II. The district court erred by entering convictions and sentences for both counts.

Appellant argues, and respondent agrees, that the district court violated Minn. Stat. §§ 609.04, subd. 1(4) and 609.035, subd. 1 (2016), by entering convictions for violations of two subdivisions of the same statute when the record shows that both convictions are based on appellant's possession of 934.66 grams, and by entering a "merged" sentence for count two when only one sentence can be imposed for multiple offenses arising from the same underlying conduct. Although the parties are in agreement, it is the responsibility of this court to decide cases in accordance with law. *State v. Hannuksela*, 452 N.W.2d 668, 673, n. 7 (Minn. 1990). After considering the applicable law, we agree.

Under Minn. Stat. § 609.04, subd. 1, a person may be convicted of either the crime charged or an included offense, but not both. An offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense. *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986). This court reviews de novo a determination of what constitutes a lesser-included offense of a crime charged. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). Under Minn. Stat. § 609.035, subd. 1, if a person is charged with multiple offenses arising from the same behavioral incident, punishment may be imposed for only one of the offenses.

Here, the warrant of commitment reflects that the district court formally convicted appellant of one count of first-degree sale of a controlled substance and one count of first-degree possession of a controlled substance. This is conclusive evidence of the convictions. *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (noting that written judgment of conviction provides "conclusive evidence of whether an offense has been formally adjudicated"). Because a person must possess something before they can sell it, it is impossible to commit a sale crime without also committing a possession crime. *See State v. Traxler*, 583 N.W.2d 556, 562 (Minn. 1998) (reversing conviction for first-degree sale and remanding for resentencing on lesser-included offense of fifth-degree possession of methamphetamine); *see also State v. Berstch*, 707 N.W.2d 660, 666 (Minn. 2006) (holding that possession of pornography can be an included offense of dissemination of pornography). Therefore, the district court violated Minn. Stat. § 609.04, subd. 1, by entering convictions for both offenses when appellant's possession offense is a lesser-included offense to her sale offense. Accordingly, we reverse and remand for the district court to vacate appellant's conviction for count two. As a result, the sentence for count two is also vacated. We note that, while the warrant of commitment indicates that the sentence for count two is "merged" with count one, the law does not recognize a "merged" sentence. *State v. Walker*, 913 N.W.2d 463, 466 (Minn. App. 2018). The warrant of commitment should reflect a formal adjudication and imposition of sentence on count one only. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

Affirmed in part, reversed in part, and remanded.