STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1760

State of Minnesota,
Appellant,

vs.

Robert Lee Fettig,
Respondent.

Filed June 24, 2019
Reversed and remanded
Schellhas, Judge

Kandiyohi County District Court
File No. 34-CR-18-909

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

Shane Baker, Kandiyohi County Attorney, Aaron P. Welch, Assistant County Attorney, Willmar, Minnesota (for appellant)

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

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Tracy M. Smith, Judge; and Cochran, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's suppression of evidence and dismissal of charges against respondent on the basis that probable cause was stale when law enforcement executed a search warrant. We reverse and remand.

FACTS

In May 2018, after Kandiyohi County police officers stopped a car, driven by T.W., to arrest respondent Robert Fettig, a passenger, on an outstanding warrant. During the stop, officers found three grams of methamphetamine in the car. On September 14, officers from a local drug task force conducted a garbage search at T.W.'s residence (the residence), where Fettig also resided, and found a "snort tube pen" that field-tested positive for methamphetamine, documents that contained Fettig's name and the address of T.W.'s residence, and other items unrelated to Fettig. On September 17, task-force commander, Sergeant Ross Ardoff, obtained a warrant to search the residence. Task-force officers executed the search warrant on September 20 and found multiple drug-paraphernalia items, multiple baggies of methamphetamine, a digital scale with methamphetamine residue on it, a bag of psilocybin mushrooms, a "small amount of marijuana," numerous surveillance cameras, multiple boxes of miscellaneous ammunition, and four firearms. Task-force officers then arrested T.W., her daughter, who lived with T.W., and Fettig.

Appellant State of Minnesota charged Fettig with one count of third-degree controlled-substance crime (sale), one count of fifth-degree controlled-substance crime (possession), and three counts of prohibited person in possession of a firearm. Fettig moved

to suppress the evidence obtained from the search of the residence and dismiss all counts for lack of probable cause. The judge who presided at the suppression hearing was not the same judge as the judge who issued the search warrant. At the hearing, Fettig argued that probable cause did not exist both when the search warrant was issued and when officers executed it. The district court concluded that probable cause existed when the search warrant was issued but that probable cause had become stale and did not exist when task-force officers executed it. The court therefore granted Fettig's motion to suppress all evidence obtained from the search and dismissed all charges against him.

This appeal follows.

D E C I S I O N

Critical-impact requirement

As an initial matter, to proceed with a pretrial appeal, the state must first demonstrate that a district court's error "will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subd. 2(1). "Dismissal of a complaint satisfies the critical impact requirement." *State v. Gerard*, 832 N.W.2d 314, 317 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013). Here, the state has met the critical-impact test because the district court dismissed the complaint against Fettig, who concedes this point.

Probable-cause when task-force officers executed the search warrant

The United States and Minnesota Constitutions protect citizens from unreasonable searches and seizures, providing that no warrant shall be issued without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found."

State v. Yarbrough, 841 N.W.2d 619, 622 (Minn. 2014) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). A district court's factual findings are reviewed for clear error. *State v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000).

"When reviewing a judge's decision to issue a search warrant, [an appellate court's] only consideration is whether the issuing judge had a substantial basis for concluding that probable cause existed." *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). A substantial basis means a "fair probability," given the totality of the circumstances, "that contraband or evidence of a crime will be found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted). We "defer to the issuing magistrate, recognizing that doubtful or marginal cases should be largely determined by the preference to be accorded to warrants." *Fawcett*, 884 N.W.2d at 385 (quotations omitted). And we "afford the district court's determination great deference" when reviewing its "probable cause determination made in connection with the issuance of a search warrant." *State v. King*, 690 N.W.2d 397, 400 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. Mar. 29, 2005). "In reviewing pretrial orders on motions to suppress evidence an appellate court may independently examine the facts and determine whether as a matter of law the district court's determination was erroneous." *Id.*

On appeal, Fettig did not file a cross-appeal and therefore does not challenge the district court's determination that probable cause existed when the court issued the search warrant. We therefore consider only whether probable cause for the search still existed when the warrant was executed. *See* Minn. R. Crim. P. 28.04, subd. 3 (stating that when

prosecution appeals, defendant may obtain review of any adverse pretrial order by filing notice of cross-appeal).

An appellate court's review "is limited to the information presented in the warrant application and supporting affidavit." *Fawcett*, 884 N.W.2d at 384–85. "[T]he critical question is whether the totality of facts and circumstances described in the affidavit would justify a person of reasonable caution in believing that the items sought were located at the place to be searched. *State v. Ruoho*, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

The state challenges the district court's conclusion that probable cause was stale when officers executed the search of the residence. A staleness claim involving a delay in executing a search warrant raises statutory and constitutional issues. *State v. Yaritz*, 287 N.W.2d 13, 15 (Minn. 1979). Minnesota law provides that "a search warrant must be executed and returned to the court which issued it within ten days." Minn. Stat. § 626.15(a) (2018). Fettig concedes, and we agree, that the execution of the search warrant complies with section 626.15(a).

More difficult than the question of whether a search warrant was executed in compliance with statutory requirements is the question of whether a delay in execution constituted a constitutional violation. *See King*, 690 N.W.2d at 401 ("A more difficult question, however, is whether the delayed execution constituted a constitutional violation."). "Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit still exists at the time of execution of the warrant—that is, whether it is still likely that the items sought will be found in the place

to be searched." *Yaritz*, 287 N.W.2d at 16. The United States Supreme Court has said that a search-warrant application must contain proof "of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States*, 287 U.S. 206, 210, 53 S. Ct. 138, 140 (1932). But "[c]ourts have refused to set arbitrary time limits or to establish a rigid formula in making the determination of whether the probable cause underlying a search warrant has grown stale." *King*, 690 N.W.2d at 401. The existence of probable cause "must be determined by the circumstances of each case," using a flexible analysis and "common sense." *Id*. (quotation omitted). "A number of factors may be examined in determining whether the information supporting a search warrant is stale." *State v. DeWald*, 463 N.W.2d 741, 746 (Minn. 1990). "Among those factors are the age of the person supplying the information, whether there is any indication of ongoing criminal activity, whether the items sought are innocuous or incriminating, and whether the property sought is easily disposable or transferable." *Id*.

In this case, the search-warrant application sought to obtain: controlled substances; items associated with use, possession, distribution, or manufacturing of a controlled substance, including records and assets from sales, possession, and use of a controlled substance; weapons; surveillance equipment; and electronic records regarding the residence and its occupants. To show probable cause for the warrant, the warrant application sets forth the following facts: in May 2014, task-force officers received information that T.W. was a methamphetamine supplier and living with Fettig; in December 2014, task-force officers received information that T.W. was buying and selling methamphetamine daily; in February 2015, task-force officers received information that

T.W. was selling methamphetamine; in February 2018, task-force officers received information that T.W. was dealing methamphetamine; in May 2018, officers arrested Fettig, who was a passenger in a car driven by T.W. from the residence, and the car contained three grams of methamphetamine; and on September 14, 2018, task-force officers conducted a garbage search at the residence of T.W. and Fettig and found a snort-tube pen that field-tested positive for methamphetamine, along with documents that contained Fettig's name and the address of T.W.'s residence. A district court found that probable cause existed and issued a search warrant.

Based on the May 2018 discovery of methamphetamine in T.W.'s car and the evidence obtained from the garbage search at T.W.'s residence, the suppression-hearing judge found that probable cause supported issuance of the search warrant. But the judge also found that the information in the September 17, 2018 search-warrant application, pertaining to information received between May 2014 and February 2015, was "uncorroborated, anonymous, and stale." Because the state does not challenge that finding, we need not address whether the suppression-hearing judge gave the issuing judge the required deference. *See State v. Holiday*, 749 N.W.2d 833, 843 (Minn. App. 2008) (addressing district court's failure to "afford great deference to the issuing magistrate" (quotation omitted)); *State v. Martinez*, 579 N.W.2d 144, 146 (Minn. App. 1998) ("Similar to reviewing whether a warrant was supported by probable cause, [a] district court should generally give great deference to a magistrate's decision to include a no-knock provision in a search warrant."), *review denied* (Minn. July 16, 1998).

As to probable cause for execution of the search warrant on September 20, 2018, the suppression-hearing judge found because "[f]ive days and 20 hours had passed between the garbage pull on September 14, 2018 and the execution of the search warrant on September 20, 2018," probable cause for the search on September 20 was stale. Citing *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998), the court reasoned that the "evidence obtained from the garbage pull [did] not rise to the level of ongoing criminal activity." The court also noted that "drugs are disposable"; that the "evidence obtained . . . was not [of] an enduring utility"; and that the "snort tube pen was located in the garbage because it is disposable." The court did not address the fact in the search-warrant application that, in February 2018, task-force officers received information that T.W. was selling methamphetamine.

The state argues that probable cause was not stale at the time of the execution of the warrant because the suspected criminal activity forming the basis for the search warrant was not a single incident but, instead, was Fettig's and T.W.'s ongoing drug use over several months. The state argues that its search-warrant application showed "a long history of corroborated drug usage by . . . Fettig and [T.W.]," and that the probable cause for the location of drugs did not become stale "after only three days or, at worst, six days from the date of the garbage pull to the execution of the search warrant."

Fettig argues that the state waived this argument because it argued at the suppression hearing that the search warrant was based on suspected sale, not use, of a controlled substance. We reject Fettig's waiver argument because we discern no significant difference between the state's argument at the suppression hearing and its argument on appeal. Both

use and sale of a controlled substance inevitably involve illegal possession of a controlled substance. *See State v. Traxler*, 583 N.W.2d 556, 562 (Minn. 1998) (noting that controlled-substance possession crime is lesser-included offense of controlled-substance sale crime).

"Factors relating to staleness include whether there is any indication of ongoing criminal activity, whether the articles sought are innocuous or incriminating, whether the property sought is easily disposable or transferable, and whether the items sought are of enduring utility." *Souto*, 578 N.W.2d at 750 (citing *DeWald*, 463 N.W.2d at 746). In *Souto*, the supreme court considered a ten-month lapse between the attempted delivery of a package and the execution of a search warrant to be stale information in a search-warrant application and concluded that "mere telephone calls were inadequate to show the continuation of a drug-trafficking conspiracy, especially when the dates of the calls, the identities of the callers, and the substance of the calls were unknown." *Id*. The court stated that "even in cases of an ongoing enterprise, evidence of more than generally suspicious activities is necessary to show continuation of the activity after a significant period of time has elapsed." *Id*. The court concluded that no probable cause supported a belief that drugs or evidence of drug crimes would be found at Souto's residence at the time it was searched. *Id*. But "[w]hen an activity is of an ongoing, protracted nature, the passage of time is less significant," *id*., whereas "[i]n general, a single incident of criminal activity . . . will support a finding of probable cause only for a few days at best," *State v. Ward*, 580 N.W.2d 67, 72 (Minn. App. 1998) (quotation omitted).

Here, in finding that the search warrant was supported by probable cause at the time of its issuance on September 17, 2018, the district court stated that "[a]ll the information

obtained by [Fettig]'s arrest in May of 2018 was corroborated by independent police work," and that the garbage search "further confirmed that methamphetamine was previously located at the residence." The court's conclusion that probable cause was stale at the time of execution of the warrant ignores its own findings, as well as the facts in the search-warrant application that task-force officers received information in February 2018 that T.W. was selling methamphetamine, the discovery of methamphetamine in the car in which Fettig was a passenger during his May 18 arrest, and the garbage-search evidence. In concluding that probable cause was stale at the time of execution, the court cited only the "snort tube pen" found during the garbage search.

Moreover, we can find no published Minnesota state or federal caselaw that supports a conclusion that probable cause at the time of issuance of a search warrant becomes stale after only three days from issuance of the warrant and only five days and 20 hours after discovery of incriminating evidence in a garbage search. *See United States v. Robinson*, 536 F.3d 874, 877 (8th Cir. 2008) (concluding that probable cause existed despite 12-day delay between time of controlled buy and execution of search warrant); *see also United Stated v. Jeanetta*, 533 F.3d 651, 655 (8th Cir. 2008) (concluding that probable cause was not stale because of two-week delay between receipt of information and issuance of search warrant); *DeWald*, 463 N.W.2d at 746–48 (concluding, in murder case, that three-week-old information contained in affidavit supporting search warrant was not stale); *State v. Cavegn*, 356 N.W.2d 671, 673–74 (Minn. 1984) (concluding that probable cause was not stale when search warrant stated that "within the past week" a controlled buy from defendant occurred); *Gerdes v. State*, 319 N.W.2d 710, 712–13 (Minn. 1982) (concluding

that probable cause was not stale after gap of four weeks between observation of stolen traffic signs and search); *Yaritz*, 287 N.W.2d at 17 (concluding that six-day delay between issuance of search warrant and execution was reasonable based on information of drug sales); *State v. Flom*, 285 N.W.2d 476, 477 (Minn. 1979) (concluding that probable cause was not stale even after passage of several months when items sought were of "enduring utility to their taker"); *King*, 690 N.W.2d at 401–02 (concluding that probable cause was not stale because of seven-day delay between issuance of search warrant and execution); *State v. Hochstein*, 623 N.W.2d 617, 623 (Minn. App. 2001) (concluding that probable cause was not stale because of three-day delay between provision of information by informant and issuance of search warrant); *State v. Velishek*, 410 N.W.2d 893, 896 (Minn. App. 1987) (concluding that probable cause was not stale because of six-week delay between officers' receipt of information that defendant was growing marijuana and execution of search warrant); *State v. Jannetta*, 355 N.W.2d 189, 194 (Minn. App. 1984) (concluding that probable cause was not stale in "narrow circumstances" of child-abuse case because of two-year delay between time information was received and time of search-warrant application), *review denied* (Minn. Jan. 14, 1985).

Based on the totality of the circumstances in this case, and based on the deference that reviewing courts afford to search warrants, we conclude that probable cause for the search warrant in this case was not stale when task-force officers executed it on September 20, 2018. *See State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (stating that "the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants" (quotation omitted)). We therefore reverse the district court's order

suppressing the evidence obtained during execution of the search warrant and dismissing the charges against Fettig, and we remand for further proceedings consistent with this opinion.

Reversed and remanded.