STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1794

State of Minnesota,
Respondent,

vs.

David Barrientoz,
Appellant.

Filed September 30, 2019
Affirmed
Smith, Tracy M., Judge
Concurring specially, Florey, Judge

Kandiyohi County District Court
File No. 34-CR-17-651

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Shane Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

SMITH, TRACY M., Judge

Appellant David Barrientoz appeals from his convictions for first-degree possession of a controlled substance and driving after suspension. He argues that the district court

erred (1) by denying his suppression motion, which argued that a warrant allowing police to search his vehicle for a second time, after an initial consented-to search failed to uncover any contraband, was not supported by probable cause; and (2) by sentencing him for both offenses. We affirm.

FACTS

In May 2017, a confidential informant (CI) told police that the CI had been regularly purchasing a significant amount of methamphetamine from Barrientoz. The CI said that Barrientoz got his methamphetamine from a farm near St. Cloud, that Barrientoz traveled there once a day, and that he acquired one pound of methamphetamine at a time. The CI also described Barrientoz's vehicles and gave the police phone numbers for Barrientoz's two cell phones. Police obtained GPS-tracking warrants and began surveilling Barrientoz.

One afternoon in July 2017, police determined from "ping information" from Barrientoz's cell phone that he was heading toward St. Cloud, and they began visual surveillance. While Barrientoz was driving back from St. Cloud, Deputy Swanson, an officer who recognized Barrientoz and knew that his license was suspended, conducted a traffic stop after seeing Barrientoz cross the fog line. After admitting that he had used methamphetamine earlier that day but denying that there was any methamphetamine in his car, Barrientoz gave Swanson permission to search the car. Swanson allowed a drug-detection dog to perform a sniff, and the dog, sniffing the exterior of the car, alerted at the front passenger door. Swanson then let the dog into the car, where the dog alerted at the front passenger seat. Swanson, with additional police assistance, conducted a 20-minute search of the car but did not find any contraband.

Police seized the vehicle, towed it to a local law enforcement center, and applied for a warrant to search the vehicle. The warrant application described the investigation, beginning with the information from the CI and the cell-phone warrants and ending with the traffic stop. The application noted that the dog had alerted twice and that Barrientoz's car had been fruitlessly searched; it also stated that a pen register showed that Barrientoz had sent or received 18 phone calls and text messages during the stop. The application sought permission "to conduct a more detailed search" because the affiant believed the vehicle contained "illegal drugs currently hidden where a roadside search may not find them." The district court issued the warrant. In a search based on the warrant, three plastic bags, containing what lab tests later revealed to be at least 55 grams of methamphetamine, were found in the passenger headrest of the car.

Barrientoz was charged with one count of first-degree possession of a controlled substance and one count of driving after suspension. He moved to have all evidence resulting from the stop suppressed, challenging four stages of the investigation: first, the warrant for the cell phone tracking data; second, the stop itself; third, the dog sniff; and fourth, the search warrant for the car. Following a hearing at which the officer who conducted the stop and the officer who drafted the warrant applications testified, the district court denied Barrientoz's suppression motion.

Pursuant to Minn. R. Crim. P. 26.01, subd. 4, Barrientoz stipulated to the prosecution's case to obtain appellate review of the suppression order, and the district court found him guilty on both counts. The district court convicted Barrientoz and sentenced him

to 65 months' imprisonment for possession of methamphetamine and to a concurrent 90-day jail sentence for driving after suspension.

Barrientoz appeals.

D E C I S I O N

I. The district court did not err by denying Barrientoz's suppression motion.

On appeal, Barrientoz challenges only one aspect of the district court's denial of his suppression motion: he argues that the warrant for a second search of his car was not supported by probable cause because there was "no new information in the warrant application to show that drugs would be found in the second search."

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. "When reviewing a pretrial order on a motion to suppress, [appellate courts] review the district court's factual findings" for clear error and "review 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). But when appellate courts review the decision to issue a search warrant, the "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) (quoting *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001)).

The Supreme Court has declined to precisely define probable cause, stating that it is "not possible" to do so and describing probable cause as a "commonsense, nontechnical conception[]." *Ornelas v. United States*, 517 U.S. 690, 695-96, 116 S. Ct. 1657, 1661 (1996). But a general standard exists: "A warrant is supported by probable cause if, on the

totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Holland*, 865 N.W.2d 666, 673 (Minn. 2015) (quotation omitted). In evaluating this probability, a court may "consider the type of crime, the nature of the items sought, the extent of the suspect's opportunity for concealment, and the normal inferences as to where the suspect would keep the items." *Id.* (quotation omitted). While review of the issuing judge's decision "is limited to the information presented in the warrant application and supporting affidavit," *Fawcett*, 884 N.W.2d at 384-85, the "judge is entitled to draw common-sense and reasonable inferences from the facts and circumstances set forth in an affidavit," *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Apr. 20, 2004).

Barrientoz relies on two cases, *State v. Fort* and *State v. Zanter*, to argue that the police were required to provide the judge who issued the warrant with "new" information—that is, information beyond what they knew before conducting the consented-to roadside search—in order to establish probable cause. *See State v. Fort*, 768 N.W.2d 335, 342-43 (Minn. 2009) (holding that a warrant was supported by probable cause when the application stated that police had new equipment that could allow them to find evidence, namely traces of blood, that was not revealed by a previous search); *State v. Zanter*, 535 N.W.2d 624, 633-34 (Minn. 1995) (holding that a third warrant for the search of a home was not supported by probable cause to the extent that the application failed to provide new information suggesting that police would now find what was not found during the

execution of the previous two warrants). The state agrees that these cases provide the proper framework within which to analyze the warrant in this case.[1]

"Once the police have engaged in an exhaustive search of a particular place, they cannot expect to re-search that area at a later date without providing the issuing judge with new information sufficient to indicate that items sought, but not found, during prior searches will now be found." *Zanter*, 535 N.W.2d at 633; *see also Fort*, 768 N.W.2d at 342 (explaining that *Zanter* holds that "a warrant to search the same location for new evidence is valid so long as there is new probable cause"). The rule against consecutive searches is an application of the principle that probable cause is a "commonsense, nontechnical" determination of whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Ornelas*, 517 U.S. at 695-96, 116 S. Ct. at 1661; *Holland*, 865 N.W.2d at 673 (quotation omitted). Once police have exhaustively searched a place, there is not a fair probability that the object of their search will be found there—if it was there, the police should have found it.

Consistent with this reasoning, to search the place again, police must give the issuing magistrate sufficient reason to believe that, despite the previous search, the object of the search is there. One such reason is that the first search was not thorough enough to

[1] We note that, in both *Fort* and *Zanter,* the search-warrant application at issue followed an earlier warranted search, *see Fort*, 768 N.W.2d at 342; *Zanter*, 535 N.W.2d at 632-34, whereas, here, it followed a consented-to search. Nevertheless, those cases and this case all involve a search followed by a warrant application for a search of the same location. Given that factual similarity and, as we further describe in this opinion, the reasoning underlying the supreme court's decisions, we conclude that the analysis in *Fort* and *Zanter* applies here.

dispel probable cause. *See Fort*, 768 N.W.2d at 342-43 (holding that subsequent search was supported by probable cause because evidence-gathering equipment was unavailable during prior search). A second reason is that, even if the search was thorough, there is new information, not known to the police at the time of the first search, reestablishing probable cause. *See Zanter*, 535 N.W.2d at 634 (concluding that subsequent search was not supported by probable cause when warrant application did not contain sufficient new information). Thus, police can obtain a warrant to conduct a second or subsequent search of a place if they demonstrate to the issuing judge's satisfaction either (a) that the first search was not "exhaustive" or (b) that new evidence establishes probable cause to believe that police can now find what they were looking for. *Id.* at 633.

Here, the key issue is whether the roadside search was exhaustive.[2] Barrientoz makes two arguments for why it was exhaustive.

First, he argues that the warrant application does not contain information about the limits of a roadside search. He contends that it was not enough for the warrant application to state a belief that "Barrientoz's vehicle contains illegal drugs currently hidden where a roadside search may not find them." Rather, he argues, the warrant should have explained *why* a roadside search might not have been able to reveal the hiding place of the suspected drugs.

[2] The only new evidence in the application was the fact that Barrientoz had sent or received 18 text messages and phone calls during the stop—everything else was known to the officers when they conducted the roadside search. Without more, that evidence does not establish new probable cause.

It is true that appellate courts' "consideration [of probable cause] is limited to the information presented in the affidavit, rather than to the information actually possessed by the police." *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998). But an issuing judge may draw commonsense inferences from the warrant application. *Brennan*, 674 N.W.2d at 204. And the issuing judge may "consider the type of crime, the nature of the items sought, the extent of the suspect's opportunity for concealment, and the normal inferences as to where the suspect would keep the items." *Holland*, 865 N.W.2d at 673 (quotation omitted).

Here, a number of facts would have allowed the issuing judge to infer from the warrant application that the roadside search was not exhaustive. The application noted that the stop was initiated on a highway at 5:30 in the late afternoon. It stated that the drug-sniffing dog alerted twice, indicating the presence of illegal drugs, and that the alerts were "strong." It sought authorization for "a more detailed search of the vehicle" and stated a belief that illegal drugs may have been "hidden where a roadside search [would] not find them." Further, the warrant gave an in-depth description of the facts suggesting that Barrientoz was frequently transporting significant amounts of methamphetamine on public highways.

From those facts, the judge could reasonably infer that the roadside search was not exhaustive. It is reasonable to infer that a complete search of a car—which may permissibly include any place the searched-for item could be hidden, *United States v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 2173 (1982)—along the side of a highway, during a time of day in which high traffic is to be expected, is unwise or even impossible. The issuing judge could also have inferred that a person who was regularly transporting large amounts of

methamphetamine on public highways likely had both a strong motive and a significant opportunity to thoroughly conceal the drugs, making it even more likely that they would be hidden in such a way as to defeat a roadside search. In sum, the fact that the first search was a roadside search that failed to turn up any contraband, despite two strong alerts from a drug-sniffing dog, meant that there continued to be a "fair probability" that there were drugs in the car that could be discovered by another search. *See Holland*, 865 N.W.2d at 673.Second, Barrientoz argues that the officers did in fact conduct an exhaustive search because squad video shows that the search lasted for 20 minutes and included officers looking in the engine compartment and under the car. But our evaluation of probable cause is limited to the four corners of the warrant application. *Souto*, 578 N.W.2d at 747. Thus, we cannot consider the squad video.[3]

In sum, the issuing magistrate could reasonably infer from the warrant application that there continued to be probable cause that police would find methamphetamine in Barrientoz's car. The district court did not err in denying appellant's suppression motion.

II. The district court did not err by imposing separate sentences.

Barrientoz argues that he should not have received separate sentences for his possession-of-controlled-substance offense and his driving-after-suspension offense

[3] Barrientoz did not argue to the district court, and does not argue here, that the warrant's lack of a description of the search constituted a material omission. We therefore do not address whether excluding that information could have been a material omission. *See Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 2684-85 (1978) (holding that a court may declare a warrant void if it is based on a reckless or deliberate material misrepresentation); *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (indicating that the *Franks* test applies equally to material omissions).

because the two offenses arose out of a single behavioral incident. *See* Minn. Stat. § 609.035 (2016). "Whether an offense is subject to multiple sentences under Minn. Stat. § 609.035 is a question of law, which [appellate courts] review de novo." *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012).

Whether multiple crimes, at least one of which is nonintentional,[4] are part of the same behavioral incident depends on whether the offenses arise "out of a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors [in] judgment." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) (quotation omitted). Caselaw suggests that the ultimate question is whether there is some essential relationship between the crimes. *See State v. Kooiman*, 185 N.W.2d 534, 536-37 (Minn. 1971) (holding that a defendant's convictions for drunkenness and criminal negligence were "independent of each other except for [an] approximate unity of time and the possible effect of [defendant]'s drinking on the quality of his driving"); *State v. Johnson*, 141 N.W.2d 517, 525 (Minn. 1966) (stating that the test is whether there is "a substantial relationship between the conduct constituting the violations"). As a recent opinion of this court phrased it, the question is whether each offense "can be explained without reference to" the other. *State v. Black*, 919 N.W.2d 704, 713 (Minn. App. 2018).

[4] Barrientoz's driving-after-suspension offense did not require the state to prove intent. *See* Minn. Stat § 171.241 (2016) (requiring the state to prove willful violation of the chapter unless the violation is elsewhere declared to be a misdemeanor); Minn. Stat. § 171.24, subd. 1 (2016) (declaring it a misdemeanor to drive after suspension, with no requirement of willfulness).

Barrientoz fails to identify any essential connection between his two crimes. Though they were discovered by the police at the same time and place, more than a unity of time and place is required. *See State v. Sailor*, 257 N.W.2d 349, 352-53 (Minn. 1977). And no other connection between the offenses is apparent: Barrientoz's decision to drive without a license began the first time he drove after suspension and continued every time he drove after that, while his possession of methamphetamine occurred only when he was in possession of that drug. *See State v. Meland*, 616 N.W.2d 757, 759-60 (Minn. App. 2000) (applying a comparable analysis to driving with expired tabs and driving while impaired). Similarly, the fact that the methamphetamine was hidden in the car Barrientoz was driving while his license was suspended does not create a substantial relationship between his crimes, because each "can be explained without reference to" the other. *See Black*, 919 N.W.2d at 713. There is no necessary logical connection between the fact that Barrientoz was driving on a suspended license and the fact that he had methamphetamine in the car at the same time. Thus, the district court did not err by concluding that the offenses did not constitute a single behavioral incident.

Affirmed.

FLOREY, Judge (concurring specially)

While I concur with the result in this matter, I write separately because I do not believe that *Fort* and *Zanter* provide the proper framework for analyzing the warrant in Issue I of the majority opinion as argued by appellant and conceded by the state.

Both *Fort* and *Zanter* address the propriety of issuing a search warrant for a premises, previously searched with a warrant, when the later warrant seeks the same or similar items, and is based on the same or similar probable cause, as the prior warrant. *See Fort*, 768 N.W.2d at 342-43; *Zanter*, 535 N.W.2d at 632-34. In *Zanter*, the supreme court stressed, "In such situations, the issuing judge must take particular care to separate the information that supported previous warrants from the new information that supports the current warrant application." 535 N.W.2d at 633. The *Zanter* court concluded that "the police failed to provide the issuing judge with sufficient new information that could have led the judge to conclude that a fair probability existed that other enumerated items not discovered during the two previous, exhaustive searches of the Zanter home would now be discovered during a third search." *Id.* at 634.

This case, which does not involve successive warrants, is distinguishable from *Fort* and *Zanter*. The police conducted a roadside search of appellant's vehicle based on his consent. Probable cause is not required for a valid consent search. *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999). The issue in a consent search is whether, under the totality of the circumstances, voluntary consent was given, and appellant does not challenge his voluntary consent. *Id.* Because a finding of probable cause was neither required nor relevant for the consent search, and the issuing judge was, therefore, not presented with a

case in which probable cause was previously exhausted, the holdings in *Zanter* and *Fort* are not applicable. Analyzing this case under *Fort* and *Zanter* is an unnecessary extension of those cases.

While I agree with the majority's holding that the roadside consent search was not exhaustive, and the issuing judge could reasonably infer the same from the search-warrant application, I would conclude, under these facts, that the issuing judge could decide the issue of probable cause based on what was contained in the warrant application without having to consider what information was available to the police when they conducted the roadside search.