STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1403

State of Minnesota,
Respondent,

vs.

Gary Michael Stillwell,
Appellant.

Filed November 2, 2020
Affirmed in part, reversed in part, and remanded
Johnson, Judge

St. Louis County District Court
File No. 69HI-CR-19-21

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

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Susan M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

JOHNSON, Judge

A St. Louis County jury found Gary Michael Stillwell guilty of burglary and criminal damage to property. His primary argument on appeal is that the district court erred by not conducting a *Franks* hearing. We conclude that Stillwell forfeited his

argument for a *Franks* hearing by not raising it at the omnibus hearing but that, in any event, he would not have been entitled to a *Franks* hearing because the alleged misstatements are not material. We also conclude that, under the amelioration doctrine, Stillwell is entitled to be resentenced pursuant to the 2019 modification of section 2.B.2 of the sentencing guidelines. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

On a Saturday morning in December 2018, when it was closed to the public, the Chisholm Range Center, a community center for adults with disabilities, was burglarized. An employee who was working in her office saw someone in a hallway, noticed that the alarm system had been disabled, and called 911. Law-enforcement officers responded promptly and reviewed a security video-recording. The officers quickly determined that two men had entered the building, stolen cash, vandalized the office of the executive director, and left the building. One of the suspects was apprehended in a vehicle at a nearby gas station shortly thereafter. A sergeant followed footprints from the community center to a wooded area, where he found a backpack containing three laptop computers, one of which had a label associated with the Chisholm Range Center. The sergeant continued following footprints through residential neighborhoods and eventually to Stillwell's home. When officers knocked on his door, Stillwell initially greeted them but then closed the door and refused to reopen it.

Five days after the burglary, Captain Hager of the Chisholm Police Department applied for a warrant authorizing a search of Stillwell's home. In the application, Captain

Hager stated, among other things, that the first suspect was in a vehicle registered to Stillwell when the suspect was apprehended. Captain Hager also stated that a sergeant followed footprints in the snow that led away from the community center and "was able to follow the same footprints to the back door" of a home near Stillwell's home, and then "continued to follow the footprints and located a matching set of footprints which [led] him to" Stillwell's home. Captain Hager further stated that the sergeant and a police captain "attempted to make contact with Stillwell at his residence" but that "Stillwell would not open the door to speak with officers."

The district court approved the application and issued the warrant. Officers executed the warrant that same day. They found, among other things, clothing that resembled the clothing seen on the second suspect in the security video-recording and boots that matched the footprints leading from the community center to Stillwell's home.

In January 2019, the state charged Stillwell with aiding and abetting second-degree burglary, in violation of Minn. Stat. §§ 609.05, subd. 1, 609.582, subd. 2(a)(4) (2018), and aiding and abetting first-degree criminal damage to property, in violation of Minn. Stat. §§ 609.05, subd. 1, 609.595, subd. 1(4) (2018).

At the omnibus hearing in late February 2019, Stillwell moved to suppress evidence of the items seized during the execution of the search warrant on the ground that the warrant application did not support a finding of probable cause. The parties agreed that neither party would introduce any witness testimony and that the motion would be decided based on the documents that the state had disclosed to Stillwell and the security video-recordings. In a post-hearing memorandum, Stillwell argued that probable cause was lacking on the

grounds that the footprints were not continuous between the community center and Stillwell's home and that the information in the warrant application was stale. In April 2019, the district court filed an order denying Stillwell's motion to suppress.

The case was tried to a jury on three days in May 2019. Stillwell represented himself. Near the end of trial, Stillwell informed the district court that he might want to challenge the validity of the search warrant on the ground that Captain Hager made misstatements concerning the footprints in the snow and the officers' interactions with him at the door to his home. The district court responded by stating that the search warrant already had been ruled valid and that evidence arising from the search already had been introduced.

The jury found Stillwell guilty of both offenses. In June 2019, the district court imposed concurrent prison sentences of 27 months and 21 months. Stillwell appeals. The state has not filed a responsive brief. "If the respondent fails or neglects to serve and file its brief, the case shall be determined on the merits." Minn. R. Civ. App. P. 142.03.

D E C I S I O N

I. Validity of Search Warrant

Stillwell first argues that the district court erred by not conducting a *Franks* hearing to determine whether the search-warrant application contained material misstatements that require the exclusion of the evidence obtained in the execution of the warrant.

In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), the United States Supreme Court stated that a search-warrant application is presumptively valid if, on its face, it provides probable cause to justify a search. *Id.* at 164-65, 171, 98 S. Ct. at 2681,

2684. But a defendant may seek to invalidate a search warrant by challenging the truthfulness of factual statements made in the application for the warrant. *Id.* at 155-56, 98 S. Ct. at 2676. If a defendant seeks to invalidate a search warrant under *Franks*, the defendant must show that "(1) the affiant deliberately made a statement that was false or in reckless disregard of the truth, and (2) the statement was material to the probable cause determination." *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (quotation omitted); *see also State v. Doyle*, 336 N.W.2d 247, 250 (Minn. 1983).

Not every *Franks* motion requires an evidentiary hearing. If a defendant makes "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676. But if a defendant cannot make such a showing, a district court may deny a *Franks* motion without an evidentiary hearing. *Id.* at 171, 98 S. Ct. at 2684. This court applies a clear-error standard of review to a district court's findings with respect to the first requirement of *Franks* and a *de novo* standard of review to a district court's determination of the second requirement. *Anderson*, 784 N.W.2d at 327.

Stillwell contends that the search-warrant application contains two misstatements. First, he contends that the application falsely stated that the sergeant followed footprints all the way from the community center to Stillwell's home, even though the sergeant twice lost the trail of footprints before finding it again. Second, Stillwell contends that the

application falsely stated that Stillwell "would not open his door" when officers knocked, even though he initially opened the door before shutting it and refusing to reopen it.

Stillwell's argument has not been properly preserved. He did not make a *Franks* challenge when he moved to suppress evidence found during the execution of the same search warrant. He never actually filed a *Franks* motion; he merely informed the district court, mid-trial, that he was interested in doing so or would like to do so. The district court responded by stating that the validity of the search warrant already had been determined. The district court did not attempt to determine whether the search warrant is invalid under *Franks*. With the assistance of appellate counsel, Stillwell acknowledges this procedural history but nonetheless urges this court to construe the district court's response to Stillwell's mid-trial statement "as a denial of a *Franks* hearing."

If a criminal defendant wishes to assert a Fourth Amendment challenge to the admissibility of the state's evidence, the defendant must raise the issue at the omnibus hearing. *See State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 13-14 (Minn. 1965); *see also* Minn. R. Crim. P. 11.02(b), (g). If a defendant does not raise such an issue at the omnibus hearing, the defendant may not do so for the first time on appeal. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). This rule applies with special force if the state did not have an opportunity to introduce evidence that would be relevant to an issue that is argued for the first time on appeal. *See State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996). In the circumstances of this case, evidence would be necessary to analyze the first requirement of *Franks*: whether "the affiant deliberately made a statement that was false or in reckless disregard of the truth." *See Andersen*, 784 N.W.2d at 327. But

Stillwell's failure to make a *Franks* challenge before trial deprived the state of an opportunity to introduce any evidence on the subject. Thus, Stillwell's *Franks* argument has been forfeited.

Even if the argument were not forfeited, it would be without merit. To satisfy the second requirement of *Franks*, Stillwell would need to establish that "the statement was material to the probable cause determination." *See id.* Stillwell contends that the two misstatements are material "because they falsely established a direct, unbroken chain from the Range Center to Mr. Stillwell's house and created a misleading narrative that Mr. Stillwell refused to open the door . . . as if he had something to hide." We need not determine whether the first requirement is satisfied if we can determine that the second requirement is not satisfied. *See id*. at 329.

An appellate court may determine whether the second requirement of *Franks* is satisfied by removing or correcting the alleged misstatements and asking whether the "sanitized" application supports a finding of probable cause. *See Lieberg*, 553 N.W.2d at 54-55. Probable-cause determinations involve a practical, common-sense decision whether, given all the circumstances set forth, there is a fair probability that evidence of a crime will be found in a particular place. *Id.* at 55 (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). In conducting this inquiry, "courts do not examine the bits and pieces of a probable cause showing in isolation, but must consider the totality of circumstances." *Id.* (quotations omitted). "Probable cause exists if the judge issuing a warrant determines that '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 *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332).

In this case, the search-warrant application would support a finding of probable cause even if it had not contained the alleged misstatements identified by Stillwell. Despite the first alleged misstatement, the application nonetheless states that the footprints that led to Stillwell's home matched the footprints that led from the community center to Stillwell's neighborhood. The application also states that one of Stillwell's neighbors told the officer that she saw a man walking through her backyard wearing and carrying clothes similar to the clothes seen on the second suspect in the security video-recording. More importantly, the application stated that one of the two suspects was using Stillwell's vehicle when the suspect was apprehended. With respect to the second alleged misstatement, which concerns whether Stillwell opened a door to his home after officers knocked, the implication of the corrected statement is nearly the same as the actual statement. Accordingly, if the application had not included the alleged misstatements, it nonetheless would have allowed the issuing judge to find that there was a fair probability that evidence of the burglary would be found at Stillwell's home.

Thus, the district court did not err by not conducting a *Franks* hearing when Stillwell alluded to the issue in the middle of trial.

II. Sentencing

Stillwell also argues that, in light of the amelioration doctrine, he is entitled to be resentenced on both of his convictions on the ground that a recent modification to the

sentencing guidelines would reduce his criminal-history score and, thus, reduce the applicable presumptive sentences.

Under the common-law amelioration doctrine, a law that mitigates punishment applies to acts committed before the effective date of the law if final judgment has not yet been entered. *State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017); *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979). The amelioration doctrine is grounded in the principle that if the legislature has amended a statute to mitigate criminal punishment in a particular situation, "the legislature has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient." *Coolidge*, 282 N.W.2d at 514. In that situation, "[n]othing would be accomplished by imposing a harsher punishment, in light of the legislative pronouncement, other than vengeance." *Id.* at 514-15. Consequently, a defendant or offender whose criminal case has not yet reached final judgment may receive the benefit of the new, more lenient law, so long as there is no "contrary statement of intent by the legislature." *Edstrom v. State*, 326 N.W.2d 10, 10 (Minn. 1982). Thus, the amelioration doctrine applies if three conditions are satisfied: "(1) there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered as of the date the amendment takes effect." *Kirby*, 899 N.W.2d at 490.

Under the sentencing guidelines in effect at the time of Stillwell's offenses, Stillwell's criminal-history scores would include a custody-status point because he was within a three-year term of probation for a prior conviction. *See* Minn. Sent. Guidelines 2.B.2.a(4) (2018). But the sentencing guidelines commission modified the applicable

guideline, effective August 1, 2019, to provide that a custody-status point does not apply if a defendant was discharged from probation before committing the subsequent offense. *See* Minn. Sent. Guidelines 2.B.2 (2019). As it happened, Stillwell was discharged from probation before he committed the burglary. As a consequence, the 2019 modification would reduce the presumptive sentence on Stillwell's burglary conviction from 23-32 months to 21-28 months and would reduce the presumptive sentence on his damage-to-property conviction from an executed sentence of 18-25 months to a 19-month stayed sentence. *See* Minn. Sent. Guidelines IV.A (2019).

Stillwell contends that he satisfies each of the three requirements of the amelioration doctrine, as stated in *Kirby*. We agree. The second requirement plainly is satisfied because the presumptive sentences after the 2019 modification are more lenient. The third requirement plainly is satisfied because Stillwell's conviction is still on direct appeal and, thus, has not yet reached final judgment. The first requirement requires an analysis of legislative intent, but this court already has conducted that analysis. In *State v. Robinette*, 944 N.W.2d 242 (Minn. App. 2020), *review granted* (Minn. June 20, 2020), we determined that the legislature did not express any intention to abrogate the amelioration doctrine with respect to the same 2019 modification of section 2.B.2 of the guidelines. *Id.* at 251. Stillwell has satisfied all three requirements of the amelioration doctrine.

Thus, Stillwell is entitled to be resentenced pursuant to the 2019 modification of section 2.B.2 of the sentencing guidelines.

Affirmed in part, reversed in part, and remanded.