STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0122

State of Minnesota,
Respondent,

vs.

Anthony James Harrell,
Appellant.

Filed September 14, 2020
Affirmed
Reyes, Judge

Hennepin County District Court
File No. 27-CR-18-6118

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Ryan C. Young, Special Assistant Public Defender, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Frisch, Judge.

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

REYES, Judge

In this appeal following an earlier direct appeal and remand to the district court for additional findings and a determination of the validity of an unannounced-entry search warrant, appellant argues that the district court improperly concluded that the search-warrant affidavit, after removing the affiant's false statements, satisfied the reasonable suspicion required for an unannounced entry. We affirm.

FACTS

Respondent State of Minnesota charged appellant Anthony James Harrell with possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(2) (2016), and fifth-degree possession of a controlled substance, marijuana, in violation of Minn. Stat. § 152.025, subd. 2(1) (2016). The state filed these charges based on its recovery of nearly 1,200 grams of marijuana, more than $15,000 in cash, a 9mm Springfield handgun from a residence in March 2018 following the execution of an unannounced-entry search warrant.

Officers based the search-warrant application for the residence on the following information. A cooperating defendant (CD)[1] informed an officer that a white male with red hair had been selling large amounts of marijuana from a specified residence and that he had a firearm. The officer searched in CLEAR, a database that law enforcement uses for investigations, for persons associated with the address. From several pages of results,

[1] A cooperating defendant is an individual whose information has not yet proved to be reliable.

the officer identified D.B. as the suspect based on him having a 2016 utility listing for the address. The CD conducted a controlled buy at the residence. The officer thereafter showed a photograph of D.B. to the CD, who identified D.B. as the resident. The search-warrant application included D.B.'s criminal history and the fact that he cannot possess firearms. But D.B. resided in federal prison at the time and could not have been the resident. After executing the search warrant, officers learned that appellant was the resident, and he admitted that the marijuana and firearm in the home belonged to him.

Appellant moved to suppress the evidence due to the officer's misrepresentations regarding D.B. in the warrant application. The district court granted a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2674, 2676 (1978),[2] and denied appellant's motion. It expressed "serious concerns" about the officer's "cursory research" into a database on which he had not been trained, the "suggestive manner" in which the officer had the CD identify D.B., and the "misleading way" in which the officer presented the information in the affidavit as suggesting that the CD first identified D.B. and that the officer then corroborated his identity in CLEAR. Nevertheless, it determined that the warrant contained sufficient probable cause to search the residence. However, it did not rule on the challenge to the unannounced-entry warrant.

[2] Under *Franks*, the Fourth Amendment requires a district court to hold a hearing if "the 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." *Id.*

Appellant stipulated to the state's evidence to preserve his challenge to the pretrial ruling pursuant to Minn. R. Crim. P. 26.01, subd. 4. Following a court trial, the district court found appellant guilty of both possession of a firearm by an ineligible person and fifth-degree possession of a controlled substance. It sentenced him to 60 months' imprisonment on the firearm conviction.

Appellant argued in a prior direct appeal that the district court should have suppressed the evidence due to intentional or reckless misrepresentations and omissions in the warrant application that were material to both the probable cause to search the residence and the reasonable suspicion for the unannounced entry. *State v. Harrell*, No. A18-1954, 2019 WL 4164895, at *1, *6 (Minn. App. Sept. 3, 2019). We affirmed the probable-cause determination for the warrant itself, concluding that "the misrepresentation and omission stemming from the misidentification of the suspect-resident as D.B. were not material to the probable-cause determination." *Id.* at *5. But we remanded for a finding on whether the officer deliberately and recklessly made the misrepresentations for purposes of the unannounced entry provision and for a determination on whether the misrepresentations were material to the reasonable suspicion required for the unannounced entry. *Id.* at *7.

On remand, the district court determined that the misidentification of appellant as D.B. was immaterial to the reasonable suspicion for the unannounced entry, as the remaining information in the warrant application, after removing D.B.'s name and information, is "that a male resident at [the residence] was selling drugs out of that location and was in possession of a firearm" and "that the resident 'utilizes the firearm as means of protection for controlled substances sales.'" It determined that appellant therefore was

"likely to be in possession of and prepared to use firearms to protect his drug activity," which provided the basis for an unannounced entry. This appeal follows.

D E C I S I O N

Appellant argues that the search-warrant application with the information about D.B. removed lacks the particularized showing required for an unannounced entry, requiring suppression of the evidence seized in the search. We disagree.

A defendant seeking to invalidate a search warrant due to misrepresentations in the search-warrant application must show that (1) the affiant deliberately or recklessly made the misrepresentations and (2) the misrepresentations were material. *See State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (discussing misrepresentations and omissions related to probable cause to search residence).[3] We review determinations of materiality de novo and findings on deliberateness or recklessness for clear error. *See id.* If a misrepresentation is immaterial, an appellate court need not reach the issue of whether the affiant made it deliberately or recklessly. *Id.* at 329. Appellant challenges only the materiality prong.[4]

The U.S. and Minnesota Constitutions require a reasonableness inquiry into the necessity of an unannounced entry. *See Wilson v. Arkansas*, 514 U.S. 927, 931-34, 115 S. Ct. 1914, 1916-18 (1995); *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000). Officers

[3] We note that no published case has applied *Andersen* to determine whether misrepresentations in a search-warrant application invalidate reasonable suspicion for an unannounced entry. Nonetheless, because we applied it to this issue in the prior appeal, and because appellant effectively asks us to invalidate the search warrant and suppress the fruits of the search, we conclude that it is applicable here.

[4] While the state argues that we can affirm on the first prong because appellant does not challenge it, we address the dispositive second prong because the district court based its holding on it, and appellant challenges it on appeal.

"must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Wasson*, 615 N.W.2d at 320 (quotation omitted). This involves "a strong showing that an unannounced entry is a necessity." *State v. Martinez*, 579 N.W.2d 144, 147 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). Even so, the required showing "is not high." *Wasson*, 615 N.W.2d at 320. It must be based on "more than an unarticulated hunch." *Id.* The warrant application must "point to something that objectively supports the suspicion at issue." *Id.* Boilerplate language is insufficient. *Id.* at 320, 322.

To determine if the misrepresentations here are material, we review whether the search-warrant application without them provides reasonable suspicion for an unannounced entry. The search-warrant application, with the misrepresentations removed,[5] states the following to justify the unannounced entry:

> Your affiant knows from experience that parties involved in the distribution of controlled substances often possess firearms and ammunition as a means to protect themselves and their drug distribution business. *During the course of this investigation your affiant received information that the resident . . . has been observed in possession of a firearm.*
>
> . . . .
>
> An unannounced entry is necessary to prevent the loss, destruction, or removal of the objects of the search, or to

[5] In reviewing materiality in the prior appeal, we determined that the misrepresentations in the search-warrant application involved the information identifying D.B. as the suspect-resident and D.B.'s criminal history, but not information regarding the suspect-resident's activities. *Harrell*, 2019 WL 4164895, at *4.

> protect the safety of the searches or the public because, *[t]he cooperating defendant in this case indicated that the target of this investigation, [] is in possession of a firearm*. *The cooperator further went on to indicate that [resident] utilizes this firearm as a means of protection for his controlled substance sales*. . . . Your affiant knows that an unannounced entry allows officers executing the search warrant the element of surprise while making entry to the residence. This element of surprise allows the target of the investigation and other person(s) less time to arm themselves. This makes the entry safer for officers, person(s) inside of the residence, and the general public.

(Emphases added.)

While the information from the CD lacks detail on when and where the CD saw appellant possessing the firearm, the statement from the CD that "[resident] utilizes this firearm as a means of protection for his controlled substance sales" suggests that the firearm would be in the home, where the sales were taking place.

The statements here provide a similar amount of information regarding weapons or the potential for violence as those in *Wasson* and *State v. Barnes*, 618 N.W.2d 805, 808 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001), in which the unannounced searches were upheld. In *Wasson*, officers had information about weapons specifically in the home, even though the officers had seen the weapons there three months earlier. 615 N.W.2d at 322-23. In *Barnes*, which appellant cites, we concluded that the appellant's gang affiliation and prior record together with the level of suspected drug trafficking provided reasonable suspicion for an unannounced-entry warrant, even without specific information about weapons in the residence. 618 N.W.2d at 812. Here, the information from the CD created a link between the residence and the firearm that provided "more than

an unarticulated hunch" of appellant using a weapon to protect drug sales in the home. *Wasson*, 615 N.W.2d at 320. The warrant application without the information about D.B. therefore contained sufficient detail to meet the reasonable-suspicion standard, making the misrepresentations in the application immaterial. *See Andersen*, 784 N.W.2d at 327.

Appellant nonetheless argues that the search-warrant application is insufficient because neither the presence of drugs nor firearms alone can satisfy the reasonable-suspicion standard, citing to *Garza v. State*, 632 N.W.2d 633, 638 (Minn. 2001), and *State v. Botelho*, 638 N.W.2d 770, 778 (Minn. App. 2002).[6] Appellant correctly cites caselaw holding that drugs alone do not provide reasonable suspicion to justify an unannounced entry. *See Wasson*, 615 N.W.2d at 320; *see also Garza*, 632 N.W.2d at 638 (concluding general statement that "[p]ersons involved in Drug trafficking will destroy evidence . . . [and] will use violence," without "factual nexus to particularized facts of dangerousness" related to residence does not justify no-knock warrant). But both drugs and weapons were involved, and a connection exists between the two and the residence.

Further, *Botelho* involved a general statement in a search-warrant application that drug dealers have a practice of being armed with weapons and that "people frequenting the

[6] Appellant also relies on an unpublished case from this court and a decision from the Tenth Circuit, but these cases are not precedential. *See State v. McClenton*, 781 N.W.2d 181, 191 (Minn. App. 2010) (stating federal court decisions may be persuasive but are not precedential), *review denied* (Minn. June 29, 2010); *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (stating unpublished opinions from this court are not precedential). Appellant further cites to *State v. Amundson*, 712 N.W.2d 560, 565 (Minn. App. 2006), *vacated* (Minn. Jan. 15, 2008) (mem.), but the supreme court vacated this court's holding in that case and remanded for us to reconsider it in light of recent supreme court cases. We do not find *Amundson* precedential.

address having [sic] dangerous weapon criminal histories as well as histories reflective of obstructing legal process." 638 N.W.2d at 774 (alteration in original). The affiant based that statement on the criminal histories of registered owners of the vehicles visiting the residence, but the affiant had "no specific knowledge that the individuals entering appellant's residence, or appellant, possessed weapons on their person." *Id.* at 774-75. We concluded that this information was "not sufficiently particularized to support reasonable suspicion of a threat to officer safety." *Id.* at 779. In contrast, the warrant application here contained information that the resident had a firearm that he used to protect his drug sales, which occurred in the residence.

Because we conclude that the warrant application provides sufficient detail to meet the reasonable-suspicion standard,[7] we need not reach the state's argument that an improper unannounced entry does not require suppression.

Affirmed.

[7] Although we conclude that the warrant application without the misrepresentations provides reasonable suspicion for an unannounced entry, we share the district court's "serious concerns" about the misrepresentations in it and caution officers to provide accurate information to magistrates.