STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0282

David William Reynolds, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 7, 2021
Affirmed
Reyes, Judge

Otter Tail County District Court
File No. 56-CR-18-1322

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michelle Eldien, Otter Tail County Attorney, Benjamin G. A. Olson, Assistant County Attorney, Fergus Falls, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from the postconviction court's denial of his petition for postconviction relief, appellant argues that (1) he did not validly waive his constitutional right to counsel and (2) either probable cause did not support the search warrant to obtain

his DNA, or police did not validly execute the search warrant, such that the district court erred by not suppressing the DNA evidence. Appellant also makes several arguments in his pro se brief. We affirm.

FACTS

Appellant David William Reynolds kept 40 to 60 cats around his property near Deer Lake in Otter Tail County, Minnesota. Neighbors complained of excess feces from the cats on their properties and on the beach. The Otter Tail County Public Health Department worked with the Otter Tail County Humane Society (Humane Society) to set live traps on appellant's neighbors' properties, including near the cabin of M.L. and J.L., to remove the cats. Appellant strenuously objected to these efforts.

The Humane Society received an anonymous letter around July 5, 2017, objecting to its interference with "the Reynolds' cats." The letter stated essentially that the cats should roam free and threatened that "[i]f any of our cats don't come home, it will take 5 fire departments to put out the fire." A few weeks later, M.L. and J.L. returned to Deer Lake to find their deep fat fryer's propane tank next to their cabin with a char mark from the tank going up the side of the cabin.

A police detective investigated and hypothesized that appellant tried to burn down M.L.'s and J.L.'s cabin. As part of the investigation, the detective spoke with appellant who used the word "roam" when describing that he had heard of a federal law allowing cats to roam to hunt. The detective obtained and executed a search warrant for appellant's DNA for comparison to DNA from the propane tank. The detective collected insufficient DNA from the propane tank for testing, but DNA collected from the envelope containing

the anonymous letter matched appellant's DNA. Based on this and other evidence, respondent State of Minnesota charged appellant in an amended complaint with first-degree arson (count I), second-degree arson (count II), and three counts of felony animal cruelty (counts III-V).

Appellant appeared before five different district court judges in the course of this matter. At each proceeding, the district court asked appellant if he would represent himself. Each time, appellant indicated that he would. The district court advised him several times that he might benefit from having a lawyer. The prosecutor also discussed the risks of self-representation with appellant at least twice.

At a hearing early in the proceedings, the prosecutor expressed concern that count I could involve commitment to prison. The prosecutor discussed this with appellant and suggested that the district court appoint standby counsel. Appellant confirmed that he did not want an attorney "unless [the district court] can find a common law attorney." The district court responded that it cannot find him an attorney. It did not appoint standby counsel. The district court then explained appellant's offenses and the maximum penalties and suggested that appellant would benefit from having a lawyer given those offenses and penalties.

Appellant also completed two written waiver-of-counsel forms. On both forms, he stated that he never received or read the complaint and did not understand his charges. He listed no crimes where he could list his charges. However, on the first form, he checked answer boxes stating that he "read and understood" the benefits of representation, the disadvantages of self-representation, and other pretrial rights. Also on the first form, he

wrote question marks by questions asking whether he understood the benefits of representation and his other pretrial rights. He wrote at the bottom of both forms that he is a freeborn, sovereign citizen.

Appellant represented himself at a jury trial in November 2018. The district court warned that he must follow the rules of court and that it would not give him much leeway. He said he understood, "so long as you understand that I'm a common law citizen and not . . . an equity court or corporation citizen." The state presented its witnesses and evidence, and appellant testified in his own defense. The jury found him guilty of all charges.

The district court convicted appellant and sentenced him to 48 months in prison on count I, 13 months on count III, 15 months on count IV, and 17 months on count V, but stayed execution of the sentences.[1] Appellant later violated the conditions of the stay, and the district court executed the sentences. Appellant did not file a direct appeal. In January 2021, he filed a timely petition for postconviction relief, which the postconviction court, the same judge who presided over appellant's trial, denied. This appeal follows.

DECISION

A convicted person may seek postconviction relief by filing a petition claiming that the conviction "violated the person's rights under the Constitution or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1(1) (2020). The petitioner bears the burden of establishing entitlement to relief by a preponderance of evidence. *Crow v. State*,

[1] The district court determined that count II was a lesser-included offense of count I.

923 N.W.2d 2, 10 (Minn. 2019). We review the denial of a postconviction petition for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). In doing so, we review legal issues de novo and the postconviction court's factual findings for clear error. *Id.*

I. Appellant made a knowing, voluntary, and intelligent waiver of his right to counsel.

Appellant argues that he did not knowingly, voluntarily, or intelligently waive his right to counsel because the district court did not advise him of the risks of self-representation. We are not persuaded.

The United States and Minnesota Constitutions guarantee criminal defendants the right to counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. A criminal defendant's waiver of the right to counsel must be knowing, voluntary, and intelligent. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). Before waiving the right to counsel, defendants should be advised of the risks of self-representation to ensure "[they] know what [they are] doing and [their] choice is made with eyes open." *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997) (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)).

Defendants ordinarily must complete a written waiver of their right to counsel. Minn. R. Crim. P. 5.04, subd. 1(4) (stating that defendant must enter written waiver); Minn. Stat. § 611.19 (2020) ("[W]aiver shall in all instances be made in writing, signed by the defendant, except . . . if the defendant refuses to sign the written waiver."). Before accepting a waiver of counsel, the district court must advise the defendant of the following:

(a) nature of the charges;
(b) all offenses included within the charges;
(c range of allowable punishments;
(d) there may be defenses;
(e) mitigating circumstances may exist; and
(f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Minn. R. Crim. P. 5.04, subd. 1(4); *see also State v. Rhoads*, 813 N.W.2d 880, 885-86 (Minn. 2012). However, whether the defendant's waiver is valid depends on the facts of each case and context of the entire record. *Rhoads*, 813 N.W.2d at 889. Even if the district court fails to conduct an on-the-record waiver inquiry, we will not reverse when the circumstances, including the "background, experience, and conduct of the accused," demonstrate a valid waiver. *Id.* We review the postconviction court's finding of a valid waiver of counsel for clear error. *Jones*, 772 N.W.2d at 504; *Pearson*, 891 N.W.2d at 596.

Here, while the district court's on-the-record inquiry covered much of the Minn. R. Crim. P. 5.04, subd. 1(4), advisory, the inquiry did not discuss that "there may be defenses" or that "mitigating circumstances may exist" or some other "consequences of the waiver." Minn. R. Crim. P. 5.04, subd. 1(4)(d)-(f); *see Rhoads*, 813 N.W.2d at 885-86 (requiring "comprehensive" inquiry). However, other circumstances show that appellant knowingly, voluntarily, and intelligently waived counsel, including appellant's background, experience, and conduct, *Rhoads*, 813 N.W.2d at 886, 889, and his opportunities to discuss waiving counsel with the prosecutor. Here, appellant has a college education. He has some experience with the justice system, including four criminal traffic matters and several civil property disputes. He has been represented by an attorney in prior matters and appears to

have represented himself in a jury trial. Further, appellant engaged in disruptive conduct during several proceedings. He asserted that the district court lacked jurisdiction over him because he is a "sovereign citizen." He also interrupted and talked over the district court. This made it difficult for the district court to advise him comprehensively of his rights. Finally, although appellant never had independent counsel advise him regarding waiver, *see State v. Garibaldi*, 726 N.W.2d 823, 828 (Minn. App. 2007) (considering appellant's opportunity to discuss waiver with independent counsel in determining validity of waiver), the prosecutor twice discussed self-representation with appellant. These facts show that appellant knew of the disadvantages of self-representation.

Additionally, appellant completed two waiver-of-counsel forms. These forms cover the relevant warnings of Minn. R. Crim. P. 5.04, subd. 1(4). And we interpret appellant's indications that he did not understand certain aspects of those forms, such as writing question marks and failing to list his charges, as an assertion of his sovereign-citizen philosophy rather than confusion about the nature of the charges and risks of self-representation. Further, none of the cases on which appellant relies involve a defendant who filed a written waiver, distinguishing them from this case.

Appellant argues that his case is similar to *Garibaldi*. There, we concluded that Garibaldi provided an invalid waiver because he did not make a written waiver, never discussed waiver with a nonprosecutor, and no one comprehensively examined him regarding the factors set out in rule 5.04. *Garibaldi*, 726 N.W.2d at 825-26. While there are similarities between this case and *Garibaldi*, a significant difference is that, here, appellant waived his right to counsel *in writing*. Further, unlike Garibaldi, who never fired

his attorney or affirmatively stated he didn't want one, appellant consistently stated he wanted to proceed without counsel. Appellant's comparison to *Garibaldi* is not persuasive.

Appellant argues that his statement that he did not want an attorney "at this point" and his request for a "common law attorney" show he did not validly waive counsel. But we review this statement and request in the context of the entire record, which shows that appellant said he had been "skinned" by other attorneys and wished to proceed on his own. Further, the postconviction court noted that appellant's request for a common law attorney appeared to be a request for an attorney who would agree with and present his legal arguments, rather than a request for representation generally. Additionally, throughout these proceedings, the district court strongly recommended that appellant find a lawyer, explained the seriousness of the potential penalties, stated that appellant could apply for a public defender, and warned that appellant must follow the same rules as a lawyer. Appellant nevertheless declined representation.

Although the district court's inquiries of appellant could have been more comprehensive, the record supports the postconviction court's finding that appellant provided a knowing, voluntary, and intelligent waiver of counsel.

II. Although appellant forfeited his argument that probable cause did not support the search warrant, it fails on the merits.

Appellant argues that probable cause did not support the search warrant for his DNA because law enforcement did not have a DNA sample to compare to appellant's DNA, and the warrant did not show a "fair probability" that DNA evidence would be found on the propane tank. We disagree.

A. Appellant forfeited this argument.

Defendants forfeit their right to challenge a search warrant by failing to raise the issue in the district court. *State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996) (citing *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 11 (Minn. 1965)); *see also State v. Lindquist*, 869 N.W.2d 863, 866-67 (Minn. 2015) (stating that defendant may forfeit constitutional errors if defendant fails to object timely). This rule ensures that a record is developed in the district court. *Johnson v. State*, 673 N.W.2d 144, 147 (Minn. 2004) (*Johnson I*). In determining forfeiture, we also consider whether the party had an opportunity to raise the issue below. *Id.*[2]

Here, appellant failed to object to the search warrant in the district court, despite having the opportunity to do so at the omnibus hearing and at trial. The parties did not develop a record on this issue before the district court. We therefore conclude that appellant forfeited this argument.

However, it does not appear that this issue unfairly surprised the state because it requires a limited record, consisting solely of the warrant application and legal argument. *Cf. Johnson I*, 673 N.W.2d at 148 (addressing issue constituting primarily issue of law in interests of justice because it would not unfairly surprise other party). We therefore address the probable-cause issue in the interests of justice. Minn. R. Civ. App. P. 103.04 (stating that we may review any other matter as the interest of justice may require).

[2] Appellant relies on factors discussed in *State v. Johnson*, 851 N.W.2d 60, 64 (Minn. 2014) (*Johnson II*). But that case is inapposite because it arose in the context of the Minnesota Supreme Court's authority to hear issues first raised in a direct sentencing appeal.

B. Probable cause supports the warrant.

Probable cause exists if there is "a fair probability that contraband or evidence of a crime will be found in a particular place" based on the totality of the circumstances. *State v. Carter*, 697 N.W.2d 199, 204-05 (Minn. 2005) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). In reviewing whether probable cause exists, we look to the four corners of the warrant application. *Carter*, 697 N.W.2d at 205. We afford great deference to the issuing judge's probable-cause determination but ensure that the issuing judge had a substantial basis for finding that probable cause existed. *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004).

Here, the warrant application reflects the following facts. Appellant knew about and objected to the Humane Society trapping cats on his neighbors' property. Traps on M.L.'s and J.L.'s property were visible from the public road. The Humane Society received an anonymous letter in early July 2017, threatening that "it will take 5 fire departments to put out the fire" if any of the cats "don't come home." The letter used the word "roam" in reference to the cats. Appellant also used the word "roam" while speaking to the detective to describe the federal protections he believed cats possessed. M.L. and J.L. came to their cabin in late July 2017, finding a char mark on their cabin due to a fire from their propane tank which had been moved near their cabin. The affiant planned to compare appellant's DNA to DNA that "may be" found on M.L.'s and J.L.'s propane tank.

The totality of the circumstances described in the warrant application show a fair probability that evidence of the arson, namely, the identity of the perpetrator, might be

found through obtaining appellant's DNA and comparing it to any DNA found on the propane tank. *See Carter*, 697 N.W.2d at 204-05.

Appellant cites to *State v. Gathers*, 190 A.3d 409, 412 (N.J. 2018) for the proposition that, in order to obtain a search warrant, the state must establish a fair probability that DNA would be found on other evidence for comparison to the DNA to be obtained through the search warrant. This argument is not persuasive. First, *Gathers* is a New Jersey state case and is therefore not binding authority. *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984). Second, appellant cites no authority, and we are aware of none, adopting the *Gathers* rule in Minnesota. We therefore conclude that probable cause supports the search warrant and that the postconviction court did not abuse its discretion by denying appellant relief on this claim.

III. Appellant forfeited his argument that law enforcement exceeded the scope of the search warrant.

Appellant also argues that law enforcement exceeded the scope of the search warrant for his DNA by entering his curtilage and home to obtain his DNA. Appellant forfeited this argument.

Defendants may forfeit their right to challenge the execution of a search warrant by failing to raise the issue in the district court. *State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). Here, appellant failed to make this challenge in the district court, and the parties did not develop this issue in the district court. *Johnson I*, 673 N.W.2d at 147. And, unlike the probable-cause issue, the record for this issue is more complex than a single document.

Appellant asserts that the parties agreed to use a police report describing the warrant execution and states that the facts are "largely not in dispute." But we are unable to confirm this assertion because the parties did not develop this issue below. It is not our role to develop the record, find facts, or assess credibility. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990) (stating that we are error-correcting court that does not try case de novo); *see also State v. McCormick*, 835 N.W.2d 498, 510 (Minn. App. 2013). We therefore conclude that appellant forfeited this issue and decline to address it.

IV. Appellant's pro se arguments lack merit.

In his pro se supplemental brief, appellant appears to argue that (1) the DNA evidence was contaminated; (2) the prosecutor committed prosecutorial misconduct; and (3) the county is retaliating against him for being a whistleblower. We are not persuaded.

A party may forfeit a claim by failing to support it with argument or authority. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017), *review denied* (Minn. Apr. 26, 2017). Except for one case cited for the proposition that individuals have constitutional rights as citizens, appellant cites to no legal authority for his arguments. Additionally, this court generally does not consider issues neither presented to nor considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellant raised none of these arguments before the district court. Appellant therefore has forfeited these arguments. We have nevertheless carefully reviewed his arguments in light of the record and conclude that they are without merit.

Affirmed.