This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0935

State of Minnesota,
Respondent,

vs.

Corey Duane Warner,
Appellant.

Filed June 5, 2023
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Lyon County District Court
File No. 42-CR-21-314

Keith Ellison, Attorney General, Lisa Lodin Peralta, Assistant Attorney General, St. Paul, Minnesota; and

Abby Wikelius, Lyon County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Johnson, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal, appellant argues that the district court erred by (1) determining the search warrant was supported by probable cause and (2) imposing multiple sentences for offenses that arose out of a single behavioral incident. First, because appellant

challenges the search warrant on grounds not raised below, he forfeited those challenges, and we decline to consider the four arguments raised for the first time on appeal. Second, on the sentencing issues, the state fails to show appellant's marijuana-sale and methamphetamine-possession offenses are separate behavioral incidents. Because appellant's possession of drug paraphernalia is a petty misdemeanor, the statutory prohibition of multiple sentences for the same behavioral incident does not apply. Thus, we reverse and remand to vacate the sentence for count three, and we affirm the fine imposed for count five. We therefore affirm in part, reverse in part, and remand.

FACTS

On October 23, 2020, a drug-task-force agent applied for a search warrant to search appellant Corey Warner, his home in Balaton, his detached garages, and his car. The district court issued the warrant the same day. The search warrant alleged the following facts, among others: in July 2020, law enforcement found methamphetamine, marijuana, and items "consistent with packaging for sales of narcotics" in a car driven by another person but registered to Warner; in August 2020, law enforcement observed a vehicle parked in front of Warner's home, and a later search of the vehicle revealed methamphetamine and marijuana; and on October 10, 2020, law enforcement stopped Warner in his car and found marijuana, THC vape cartridges, and $11,096 in cash.

On October 27, law enforcement executed the search warrant, locating 334 grams of marijuana, 27.6 grams of methamphetamine, drug paraphernalia, scales, packaging material, and a ledger, among other things. Law enforcement also interviewed Warner and recorded the statement.

Respondent State of Minnesota charged Warner with five counts: first-degree controlled-substance crime (sale) under Minn. Stat. § 152.021, subd. 1(1) (2020) (count one); third-degree controlled-substance crime (possession) under Minn. Stat. § 152.023, subd. 2(a)(1) (2020) (count two); fifth-degree controlled-substance crime (sale) under Minn. Stat. § 152.025, subd. 1(1) (2020) (count three); fifth-degree controlled-substance crime (possession) under Minn. Stat. § 152.025, subd. 2(1) (2020) (count four); and possession of drug paraphernalia under Minn. Stat. § 152.092(a) (2020) (count five). The state sought a statutory minimum sentence under Minn. Stat § 609.11, subd. 5(a) (2020), for possessing a firearm at the time of the offenses in counts one, two, three, and four.

In May 2021, Warner moved to dismiss the case and suppress "the evidence seized from the . . . search of [his] residence." Warner's motion identified one issue: "The search warrant application contained evidence from an unconstitutional stop and search of [his] motor vehicle on October 10, 2020." In June 2021, the district court held an omnibus hearing, and in August 2021, the district court issued a written order denying Warner's motion. The district court found that the stop of Warner's vehicle "was lawful," and therefore, "probable cause existed to issue the search warrant."

Warner's case proceeded to a jury trial in February 2022. The state called the following witnesses: a drug-task-force agent who searched Warner's home, the forensic scientist who tested the drugs found in Warner's home, and the special agent who interviewed Warner during the execution of the search warrant. Warner did not testify or call witnesses.

The jury found that Warner was not guilty of count one; that he was guilty of counts two, three, four, and five; and that he did not possess a firearm in a manner that substantially increased the risk of violence in counts two, three and four. The district court sentenced Warner to 27 months in prison on count two and 12 months and one day in prison on count three. The district court stayed execution of both sentences for five years and placed Warner on probation. For count five, the district court imposed a $50 fine.

Warner appeals.

DECISION

I. Warner forfeited the probable-cause challenges he raises on appeal.

In his brief to this court, Warner argues that the search warrant was not supported by probable cause for four reasons. The state argues that "[b]ecause Warner raises for the first time on appeal new theories to challenge the validity of the search warrant, he forfeited this issue."[1] We agree with the state.

Appellate courts "generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also State v. LaBarre*, 195 N.W.2d 435, 441 (Minn. 1972) (stating that issues "raised for the first time on appeal . . . are not properly presented under soundly based and settled rules limiting [appellate courts'] scope of review to issues raised at trial"); *State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985)

[1] The state relies on two nonprecedential cases: *State v. Eady*, No. A19-2009 (Minn. App. Jan. 11, 2021), *rev. denied* (Minn. Mar. 30, 2021), and *State v. Waters*, No. A14-1266 (Minn. App. Apr. 20, 2015), *rev. denied* (Minn. June 30, 2015). We consider the precedential authority cited in both opinions.

("Because appellant did not raise these issues at the omnibus hearing, it has waived them and their appeal is not properly before this court."), *rev. denied* (Minn. Oct. 11, 1985).

In *State v. Lieberg*, the appellant challenged his second-degree-burglary conviction by arguing that the search warrant for his house lacked probable cause. 553 N.W.2d 51, 53 (Minn. App. 1996). At the omnibus hearing, the appellant challenged the information in the warrant's affidavit on four grounds: (1) a photograph showing the tread of his shoes came from an unlawful search; (2) the omission of a recent letter written by his probation officer would have offset the officer's earlier statement; (3) his criminal history was too stale to be relevant; and (4) none of the victims' neighbors correctly described the color of his car or could identify him with precision. *Id.* at 54. For the first time on appeal, the appellant challenged the warrant by arguing that information about the sighting of his car and the relative proximity of his house to the victims' homes "contain[ed] material misstatements and omissions." *Id.* at 56. We concluded that by "failing to raise these issues at the omnibus hearing, [the appellant] waived his right to challenge their inclusion in the determination of probable cause." *Id.*

Like the appellant's challenges in *Lieberg*, Warner's challenges to the search warrant on appeal differ from his challenge to the warrant during the omnibus hearing. The only issue Warner raised in his motion was that "[t]he search warrant application contained evidence from an unconstitutional stop and search of [his] motor vehicle on October 10, 2020," and the evidence obtained from the stop should not have been used in determining probable cause for the warrant. At the omnibus hearing, Warner's attorney stated that he was "preserv[ing] the record" for appeal. The district court asked Warner's attorney

whether there were “any other omnibus issues” he wanted to raise, to which he responded, “[N]o.” In Warner’s brief to this court, however, he argues probable cause does not support the search warrant because the affidavit (1) did not indicate Warner possessed a criminal amount of marijuana; (2) included stale information; (3) provided no nexus to Warner’s home; and (4) alleged his child’s backpack smelled of marijuana, but did not link Warner to the backpack.

In his brief to this court, Warner contends that his district court challenge to the warrant was not limited to the October 2020 traffic stop. Warner relies on a statement in the district court’s August 2021 order that “[t]he sole issue raised at the hearing was whether there was probable cause for the issuance of the search warrant.” But the district court’s order also stated that the “[s]pecific[]” challenge Warner raised concerned the alleged “unlawful” nature of the October 2020 traffic stop and that it “should not be considered for probable cause purposes.” Further, the district court’s findings of fact focused only on whether the October traffic stop was lawful.[2]

Warner also asserts that he challenged the entire warrant, as demonstrated by the district court’s statement at the omnibus hearing that it would address the issue “on the four corners of the warrant.” We disagree. As detailed above, neither Warner’s motion, nor his attorney’s arguments at the omnibus hearing, nor the district court’s order suggests Warner

[2] To be clear, the district court reviewed and adopted the omnibus ruling from a different criminal case against Warner after finding the ruling involved the same October traffic stop. In court file 42-CR-876, Warner moved to suppress evidence from the October traffic stop for the same reason he repeated in this case. The district court in the other criminal file conducted an evidentiary hearing and rejected Warner’s challenge, determining that the stop was lawful.

preserved the issue he now raises on appeal. Thus, Warner forfeited the probable-cause challenges to the search warrant that he now raises in this appeal. *See Lieberg*, 553 N.W.2d at 56 (determining appellant waived issues not raised at the omnibus hearing).

Without a district court decision analyzing the four arguments Warner sets out in his brief, we decline to consider for the first time whether the search warrant was supported by probable cause. *See State v. Schmitz*, 559 N.W.2d 701, 704-05 (Minn. App. 1997) (declining to address a due-process challenge to criminal procedure raised for the first time on appeal), *rev. denied* (Minn. Apr. 15, 1997). Thus, we affirm the district court's decision denying Warner's motion to suppress.

II. The district court erred by imposing multiple sentences for offenses arising from a single behavioral incident.

Warner argues that the district court "erred when it imposed sentences for counts three and five, because those offenses arose out of the same behavioral incident as count two." Warner did not raise this issue at the time of sentencing, but Warner's "failure to raise this issue at the time of sentencing does not constitute a waiver barring him from later raising the issue and obtaining relief." *Ture v. State*, 353 N.W.2d 518, 523 (Minn. 1984).

A Minnesota statute generally prohibits multiple sentences for crimes arising out of a single behavioral incident.[3] Minn. Stat. § 609.035, subd. 1 (2020) ("[I]f a person's conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses . . . ."); *see State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020)

[3] Subdivision one of the statute has not been amended in relevant part since its enactment in 1963.

(interpreting Minn. Stat. § 609.035, subd. 1 (2018), as providing that "a person may be punished for only one of the offenses that results from acts committed during a single behavioral incident and that did not involve multiple victims"). Crimes arise from the same behavioral incident if they "occurred at substantially the same time and place and were motivated by a single criminal objective." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014); *see, e.g.*, *State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002) (concluding that the defendant's simultaneous possession of different drugs in his home was a single behavioral incident resulting in only one sentence). "The State bears the burden of establishing by a preponderance of the evidence that the conduct was not a single behavioral incident." *State v. Degroot*, 946 N.W.2d 354, 365 (Minn. 2020). Whether Warner's sentence violates Minn. Stat. § 609.035, subd. 1, is a question of law that appellate courts review de novo. *Branch*, 942 N.W.2d at 713.

A. Count Three

The district court sentenced Warner to 27 months in prison on count two, third-degree controlled-substance crime involving possession of methamphetamine, and 12 months and one day in prison on count three, fifth-degree controlled-substance crime involving sale of marijuana. The district court then stayed both sentences and placed Warner on probation.

Warner argues that the offenses underlying counts two and three "arose out of the same behavioral incident" because they "occurred at the same time (October 27, 2020) and in the same location (his house)" and "were spurred by the same objective—to possess controlled substances for personal use and with the intent to sell to pay for his personal

use.” Warner compares his case to that in *State v. Barnes*, in which we concluded that the defendant’s offenses of possession of two different drugs with intent to sell “were part of the same behavioral incident.” 618 N.W.2d 805, 813 (Minn. App. 2000), *rev. denied* (Minn. Jan. 16, 2001). In *Barnes*, marijuana and cocaine were “both found in the bedroom, packaged for sale,” and we determined that the “criminal objective in possessing them [was] the same” because there was “no evidence indicating the marijuana was to be sold at different times or places than the cocaine.” *Id.* Warner argues that in his case, as in *Barnes*, the two drugs were discovered in the same location and “the state did not present evidence of separate sales.”

The state argues that “*Barnes* is distinguishable because the defendant was charged with two sale offenses,” while Warner was “convicted of different criminal violations”: possession and sale. The state contends that Warner “manifest[ed] a divisible state of mind” because he obtained methamphetamine to *use*, whereas he obtained marijuana to *sell*. Warner’s reply brief asserts that he possessed both drugs with intent to sell and that he “admitted to possessing methamphetamine with the intent to sell.”

Although Warner was convicted of marijuana sale and methamphetamine possession, he was charged with possession of both marijuana and methamphetamine with intent to sell. In Warner’s October 27 interview with law enforcement, Warner told law enforcement that he “use[s] most of [the methamphetamine]” or “give[s] it away” to “[s]moke with friends” and that he once traded methamphetamine for a rifle. Because Warner admitted to giving methamphetamine away and bartering with it, Warner’s conduct meets the statutory definition of “sell.” “Sell” means “to sell, give away, barter, deliver,

exchange, distribute or dispose of to another, or to manufacture," or to "possess with intent to perform" one of these acts. Minn. Stat. § 152.01, subd. 15a (2020). Though Warner was acquitted of selling methamphetamine, this acquittal does not show that Warner lacked the intent to sell methamphetamine. *See State v. Montermini*, 819 N.W.2d 447, 461 (Minn. App. 2012) (stating that jury acquittals "only demonstrate that the jury believed the state failed to establish the elements" of the crime charged).

The state has failed to satisfy its burden of establishing by a preponderance of the evidence that Warner's conduct was not a single behavioral incident. *See Degroot*, 946 N.W.2d at 365 (holding that the state "bears the burden" of establishing by a preponderance of the evidence that defendant's conduct was not a single behavioral incident). Thus, the district court erred by sentencing Warner on both counts two and three. "[S]ection 609.035 contemplates that a defendant will be punished for the 'most serious' of the offenses arising out of a single behavioral incident because 'imposing up to the maximum punishment for the most serious offense will include punishment for all offenses.'" *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quoting *State v. Johnson,* 141 N.W.2d 517, 522 (Minn. 1966)). Thus, we reverse and remand to vacate the sentence for count three.

B. Count Five

The district court imposed a $50 fine on count five, possession of drug paraphernalia. Warner argues that counts two and five also "arose out of the same behavioral incident." The state argues that Warner's challenge to count five fails because

the statutory prohibition of multiple sentences for crimes arising out of a single behavioral incident does not apply to petty misdemeanors.

"[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1. The supreme court has stated that section 609.035 does not apply to petty misdemeanors because petty misdemeanors are not "offenses" under the statute. *State v. Krech*, 252 N.W.2d 269, 272 n.2 (Minn. 1977). Warner's conviction under Minn. Stat. § 152.092(a) on count five is for a petty misdemeanor. Thus, the district court did not err in imposing a fine for Warner's conviction for possession of drug paraphernalia.

Affirmed in part, reversed in part, and remanded.