STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1652

State of Minnesota,
Respondent,

vs.

Jeremy Lee Krier,
Appellant.

Filed August 22, 2011
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-09-60930

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, III, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Schellhas, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

In this appeal from his conviction of second-degree controlled-substance offense, possession of more than six grams of methamphetamine, appellant argues that (1) the evidence seized from him and from his residence must be suppressed because he was unlawfully seized and searched, the search warrant lacked probable cause, and the evidence seized was the fruit of an unlawful search and seizure; (2) the district court should have ordered disclosure of the identity of the "cooperating defendant" or, in the alternative, ordered an in camera review of the "cooperating defendant"; and (3) the district court should have ordered a *Franks* hearing when there was proof that the affidavit in support of the search-warrant application contained a false statement necessary for the finding of probable cause. We affirm.

FACTS

During a two-month period, Minneapolis Police Officer Jeff Carter received complaints about activity occurring at 2308 Madison Street Northeast in Minneapolis, the residence of appellant Jeremy Lee Krier and P.S. Area residents expressed concern that narcotics were being sold there and reported that people who did not live in the area were frequently visiting the residence. Based on the complaints and knowing through training and experience that such activity was consistent with drug dealing, Carter conducted surveillance of the residence and saw several people arrive in vehicles, go inside the residence for a short time, and then leave the area.

A cooperating defendant (CD) assisted Carter in the investigation. The CD stated that he purchased methamphetamine from appellant and P.S. at their residence on several occasions. The CD stated that he had seen guns in appellant's possession. The CD assisted Carter in making a controlled buy from appellant and P.S. at their residence.

Based on this information, Carter applied for a warrant to search appellant and P.S. and their residence. The search-warrant application states that in corroborating the information provided by area residents and the CD, Carter learned that appellant has a history of violent offenses, including terroristic threats, domestic assault, and first-degree burglary, and a 2005 conviction of being a prohibited person in possession of a firearm.

The district court issued the search warrant at 10:30 p.m. The warrant commanded Carter

> TO ENTER WITH OR WITHOUT ANNOUNCEMENT OF AUTHORITY AND PURPOSE IN THE DAYTIME OR NIGHT TIME TO SEARCH THE DESCRIBED PREMISES: 2308 MADISON ST NE AND THE PERSON DESCRIBED AS: JEREMY LEE KRIER AND [P.S.] FOR THE ABOVE-DESCRIBED PROPERTY AND THINGS, AND TO SEIZE SAID PROPERTY AND THINGS, AND RETAIN THEM IN CUSTODY SUBJECT TO COURT ORDER AND ACCORDING TO LAW.

Immediately before executing the warrant, police saw appellant leave the residence. Minneapolis Police Officer Lance DuPaul was stationed at an intersection one block south and two blocks west of appellant's residence. DuPaul was notified that appellant had left the residence and given a description and the license number of appellant's vehicle. DuPaul stopped appellant's vehicle at 11:12 p.m. after it slid through

a stop sign. DuPaul hand-cuffed appellant, pat-searched him for weapons, and placed him in the squad car's backseat.

Carter came to the scene and transported appellant to the residence. Appellant was detained in the squad car while his residence was searched. The warrant was executed at 11:55 p.m. Carter did not recall how long the search lasted but testified that a search of a residence typically takes one to two hours to complete. During the search, officers found an Uzi automatic weapon, ammunition for a .367-caliber weapon and a shotgun, and a baggie with suspected drug residue. When the search of the residence was completed, Carter transported appellant to the police station, where he was searched. Two plastic baggies containing methamphetamine were found inside the lining of appellant's jacket sleeve.

Appellant was arrested and charged with second-degree controlled-substance crime and being a prohibited person in possession of a firearm. Appellant made motions (1) to suppress evidence obtained during the searches of his person and residence, (2) to disclose the identity of the CD, and (3) to hold a *Franks* hearing. The district court denied the motions. A jury found appellant guilty of second-degree controlled-substance crime but not guilty of being a prohibited person in possession of a firearm. The district court sentenced appellant to an executed term of 108 months in prison. This appeal followed.

D E C I S I O N

I.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing--or not suppressing--the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). This court reviews the district court's findings of fact to determine whether they are clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

"A search pursuant to a warrant may not exceed the scope of that warrant." *State v. Soua Thao Yang*, 352 N.W.2d 127, 129 (Minn. App. 1984). "The test for determining whether a search has exceeded the scope of the warrant is one of reasonableness." *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 235-36, 103 S. Ct. 2317, 2331 (1983)). In determining whether the conduct of the officers executing a search pursuant to the warrant was reasonable, this court must look at the totality of the circumstances. *State v. Thisius*, 281 N.W.2d 645, 645-46 (Minn. 1978).

Detention

Appellant argues that the district court's reliance on *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595 (1981), as authority for seizing him within blocks of his residence before the search began and detaining him for hours until the police completed the search of the residence, is misplaced. We agree that the district court's reliance on *Michigan v. Summers* was misplaced, but we nevertheless conclude that seizing and detaining appellant was reasonable.

In *Summers*, the defendant was walking down the front steps of his house just as officers approached to execute a warrant to search the house for narcotics. *Id.* at 693, 101 S. Ct. at 2589. The officers asked Summers for assistance in gaining entry to the house and detained him, along with eight other occupants of the house, while they searched the premises. *Id.* The officers arrested Summers after finding illegal drugs in the basement. *Id.* The Court held that detaining Summers during the search was proper, reasoning that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705, 101 S. Ct. at 2595 (footnote omitted).

Unlike the warrant in *Summers*, which authorized only a search of Summers' house for narcotics, *id.* at 693, 101 S. Ct. at 2589, the warrant to search appellant's residence also commanded Carter to search appellant's person. A warrant that authorizes the search of a person necessarily authorizes the detention of the person. Therefore, appellant's detention was not based on implicit limited authority to detain the occupants of his residence while the residence was searched, but was based on the warrant's explicit command to search appellant. DuPaul testified that he stopped appellant because he left the residence before the warrant, which had been issued and was being brought to the residence, arrived. Because the warrant commanded Carter to search appellant, it was reasonable to stop appellant as he left his residence and detain him so that the command to search appellant could be executed.

Appellant argues that the officers had no authority to detain him for the duration of the search of his residence. But the warrant authorized searches of both appellant and his

residence. An occupant of a residence may be able to assist in a search of the residence (for example, in *Summers*, the officers asked Summers for assistance in gaining entry to the house, 452 U.S. at 693, 101 S. Ct. at 2589), and it was reasonable for the officers to complete the search of the residence before searching appellant.

Probable cause

Both the United States and Minnesota Constitutions require that a search warrant be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. In determining whether a warrant is supported by probable cause, this court gives great deference to the issuing court's probable-cause determination. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). This court's review is limited to ensuring "that the issuing judge had a 'substantial basis' for concluding that probable cause existed." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quoting *Gates*, 462 U.S. at 238-39, 103 S. Ct. at 2332).

A substantial basis means a fair probability, "given the totality of the circumstances set forth in the affidavit before the issuing judge, including the veracity and basis of knowledge of persons supplying hearsay information . . . that contraband or evidence of a crime would be found in a particular place." *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004), *review denied* (Minn. Apr. 20, 2004). In reviewing the sufficiency of a search-warrant affidavit under the totality-of-the-circumstances test, "courts must be careful not to review each component of the affidavit in isolation." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). "[A] collection of pieces of information that would not be substantial alone can combine to create sufficient probable cause."

State v. Jones, 678 N.W.2d 1, 11 (Minn. 2004). Appellate courts resolve marginal cases in favor of the issuance of the warrant. *State v. McCloskey*, 453 N.W.2d 700, 704 (Minn. 1990).

The search-warrant affidavit states that during a two-month period, Carter received reports from area residents that people who did not live in the area were frequently visiting appellant's residence. Through training and experience, Carter knew that such activity was consistent with drug dealing, so he conducted surveillance on the residence and saw several people arrive in vehicles, go inside the residence for a short time, and then leave the area. The CD stated that he had purchased methamphetamine from appellant and P.S. at their residence on several occasions, and he assisted Carter in making a controlled buy from appellant and P.S. at their residence.

Appellant argues that probable cause was lacking because the search-warrant application failed to establish the CD's reliability. In *State v. Barnes*, this court noted that "[t]he supreme court has expressed a preference for providing the past accuracy rate of the informant in the warrant application" but concluded that the failure to include the informants' accuracy rates did not invalidate probable cause when the affidavit included information provided by a controlled buy and police corroboration of key details. *State v. Barnes*, 618 N.W.2d 805, 810 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Jan. 16, 2001). Here, the information provided by the CD was corroborated by a controlled buy, by the information provided by area residents, and by Carter's observations of the activity occurring at appellant's residence.

Appellant also argues that the search-warrant application lacked probable cause to search his person because it did not state when appellant possessed a firearm. *See State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984) (stating that stale information cannot be used to establish probable cause for search), *review denied* (Minn. Jan. 14, 1985). But the search warrant also authorized searching appellant's person for drugs, and there is no basis for concluding that information about drug possession was stale.

II.

> In rare cases a criminal defendant's interest in learning the identity of a police informant outweighs the state's privilege not to disclose the identity. A defendant seeking to learn the identity of an informant may argue that the informant's identity is needed to establish that the police committed perjury in obtaining a search warrant or that the informant's identity is needed because the informant was a material witness and may provide testimony that will be helpful to the defendant. These cases draw a distinction between the defendant's ultimate burden of establishing the need for disclosure and the defendant's lesser burden of establishing a basis for inquiry by the court in an in camera hearing. Disclosure of an informant's identity in order to establish police perjury or recklessness in obtaining a search warrant is permitted when the defendant has sufficiently challenged the veracity of the affidavit of the applicant for the search warrant and disclosure is necessary to complete the evidentiary attack on the affidavit. Disclosure then depends on the court's weighing of competing interests: the defendant's interest in a fair assessment of probable cause free of police perjury or recklessness and the state's interest in protecting the anonymity of informants. The defendant has the burden of establishing the need for disclosure of the informant's identity. A lesser showing by the defendant is needed to justify an in camera inquiry by the court, outside the presence of the defendant and his counsel, at which the court considers the affidavits or interviews the informant personally. All that is needed to justify an in camera inquiry is a minimal showing of a basis for inquiry but something more than mere

> speculation by the defendant that examination of the informant might be helpful.

State v. Moore, 438 N.W.2d 101, 106 (Minn. 1989) (citations omitted). Whether to require the state to disclose the identity of an informant is within the district court's discretion. *State v. Martinez*, 270 N.W.2d 121, 122 (Minn. 1978).

The district court stated the following reasons for not requiring disclosure of the CD's identity or an in camera hearing:

> [Appellant] is charged with the possession of a firearm and narcotics recovered by police at his residence and on his person. The CD was not a material witness to either of the crimes for which [appellant] is now charged. Furthermore, the CD's testimony would provide no material information as to [appellant's] guilt or innocence for possessing the firearm and narcotics. Finally, there has been no showing that the officer[']s testimony regarding the investigation and arrest of [appellant] was suspect.

Appellant argues that the CD was a material witness because he participated in the controlled buy and reported seeing appellant in possession of firearms. But appellant was charged with a possession-of-a-controlled-substance offense, not a sale offense. The charged offense arose out of the methamphetamine found on appellant when he was searched at the police station. Similarly, the charge of being an ineligible person in possession of a firearm arose out of weapons discovered during the search of appellant's residence, not the information provided by the informant. The district court, therefore, did not err in finding that the CD was not a material witness. *State v. Marshall*, 411 N.W.2d 276, 280 (Minn. App. 1987) (affirming denial of disclosure when information

provided by informants was used only to obtain search warrants), *review denied* (Minn. Oct. 26, 1987).

Appellant argues that the information in the search-warrant application and Carter's testimony was suspect because the affidavit contained a misstatement and because Carter relied almost exclusively on information provided by the CD. But the district court found that the misstatement that appellant had a 2005 conviction of being a prohibited person in possession of a firearm was merely careless, noting that appellant was charged with being a prohibited person in possession of a firearm in 2005 but ultimately pleaded guilty to terroristic threats. Regarding reliance on the CD, contrary to appellant's argument, the information provided by the CD was corroborated by a controlled buy and the information provided by area residents and Carter's observations of the activity occurring at appellant's residence. Appellant argues that the controlled buy was suspect because the CD participated in it. But Carter searched the CD for contraband before the controlled buy and watched the CD enter and exit appellant's residence and maintained surveillance of the CD until meeting him at a designated location.

The district court did not abuse its discretion in not requiring disclosure of the CD's identity or in not conducting an in camera inquiry.

III.

Appellant argues that the district court should have ordered a *Franks* hearing because there was evidence that the affidavit in support of the search-warrant application contained a false statement necessary for the finding of probable cause. In reviewing an

alleged *Franks* search-warrant-application deficiency, the court reviews for clear error the district court's findings on whether there was a statement or omission that was false or in reckless disregard of the truth. *State v. Anderson*, 784 N.W.2d 320, 327 (Minn. 2010). The court reviews de novo whether the alleged misrepresentations or omissions were material to the probable-cause determination. *Id.*

"Although a presumption of validity attaches to a search-warrant affidavit, this presumption is overcome when the affidavit is shown to be the product of deliberate falsehood or reckless disregard for the truth." *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005) (citing *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684 (1978)), *review denied* (Minn. Feb. 22, 2006). "A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause." *Moore*, 438 N.W.2d at 105.

A misrepresentation is material if, once it is factored into the analysis, there is no longer probable cause to support the warrant. *Id.* But even a material misrepresentation must be deliberate or reckless before a warrant will be invalidated; innocent or negligent misrepresentations will not invalidate a warrant. *Id.* When determining whether an affiant knowingly, or with reckless disregard for the truth, included false representations in an affidavit, courts apply a preponderance-of-the-evidence standard. *McGrath*, 706 N.W.2d at 540 (citing *Franks*, 438 U.S. at 156, 98 S. Ct. at 2676). If it is determined that the affiant deliberately falsified or recklessly disregarded the truth in his affidavit, the district court should set aside the false statements, supply any omissions, and then

determine whether the affidavit still establishes probable cause. *State v. Doyle*, 336 N.W.2d 247, 250 (Minn. 1983) (citing *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676).

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Franks, 438 U.S. at 171-72, 98 S. Ct. at 2684.

The district court found:

> There has been no preliminary showing that the false statement presented in this case was necessary to the ultimate finding of probable cause. (Officer Carter's affidavit stated that [appellant] was convicted of Prohibited Person in Possession of a Firearm in 2005. However, he was formally charged with Prohibited Person in Possession of a Firearm, but he ultimately pled guilty to Terroristic Threats pursuant to a plea bargain.) Here, the search warrant was supported by Officer Carter's thorough affidavit which outlined information from multiple informants, an independent investigation by police corroborating the alleged criminal activity, and a successful controlled buy which further corroborated the existence of illegal activity. Certainly Officer Carter could have been more careful in reciting [appellant's] 2005 conviction, but regardless of the inaccurate

> statement the totality of the circumstances still sufficiently provide probable cause to issue the warrant.

Appellant presented no evidence indicating that the misstatement about the 2005 conviction was deliberate or reckless, rather than merely careless. Also, the misstatement was not related to the finding of probable cause to search for methamphetamine and items related to its sale. Although relevant to the determination of probable cause to search for firearms, appellant's history of violent offenses and Carter's statement that guns are frequently possessed by those involved in drug sales provided independent probable cause to search for firearms. *State v. Carter*, 697 N.W.2d 199, 205 (Minn. 2005) ("A person's criminal record is among the circumstances a judge may consider when determining whether probable cause exists for a search warrant."). The district court did not err in declining to conduct a *Franks* hearing.

Affirmed.