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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-791**

State of Minnesota,
Respondent,

vs.

Marlo Deshawn Jiles,
Appellant.

**Filed March 30, 2010
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27CR0845401

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges his conviction of first-degree controlled substance crime and prohibited person in possession of a firearm, arguing that use of a drug-detection dog in

the common hallway outside of his apartment door to gather evidence to support a search warrant violated his rights and that the district court therefore erred in denying his motion to suppress evidence. We affirm.

FACTS

In June 2008, members of the Northwest Metro Drug Task Force were working on a narcotics investigation involving appellant Marlo Deshawn Jiles. A confidential informant (CI) told law-enforcement officers that Jiles sold crack cocaine, that the CI had purchased crack cocaine from Jiles in the past, and that the CI could arrange a purchase from Jiles with a phone call. The CI stated that Jiles kept the drugs at his girlfriend's apartment (the apartment) in Brooklyn Center and that he kept drugs in his "butt" when he traveled to sell drugs. The officers confirmed that Jiles was living at the apartment and that he drove a vehicle routinely parked at the apartment complex.

The officers and the CI set up a controlled buy. The CI contacted Jiles and arranged to purchase .6 grams of crack cocaine from him for \$100. The CI was searched and provided \$100 in pre-recorded buy money. The CI and an undercover police officer arrived at the designated location. The officer observed Jiles give the CI what later tested positive as .6 grams of crack cocaine in exchange for the money.

On September 8, 2008, the CI informed the police that within the past 72 hours he saw Jiles retrieve drugs from the apartment. The same day, police stopped Jiles in his vehicle shortly after he left the apartment. The stop was based on the June controlled buy, officers' knowledge that Jiles's driver's license was suspended, and the fact that the vehicle had a cracked windshield. The police arrested Jiles and, during a search incident

to arrest, found crack cocaine in Jiles's "butt area." After Jiles was arrested, the officers brought a certified drug-detecting dog to sniff under doors in the common hallway of the apartment building where Jiles lived. The dog alerted to the presence of drugs in the apartment in which Jiles was known to live.

Police then obtained a search warrant for the apartment and all storage lockers and garages associated with the apartment. Police recovered narcotics and \$1,600 in cash from the apartment and a firearm from the storage locker assigned to the apartment.

Jiles was charged with first-degree controlled substance crime and prohibited person in possession of a firearm. Jiles moved to suppress the evidence, arguing that the warrant was not supported by probable cause. The district court denied the motion, finding that there was probable cause to support the warrant based on the totality of circumstances, including the CI's report of seeing Jiles take drugs from the apartment within the past 72 hours and the results of the dog sniff.

A jury found Jiles guilty of both offenses charged. He was convicted and sentenced to 48 months for the first-degree controlled substance offense and a consecutive 60 months for the prohibited-person-in-possession offense. This appeal followed, in which Jiles argues that there was not reasonable suspicion to justify the dog sniff.

DECISION

We first address the state's argument that because Jiles did not challenge the dog sniff in district court he has waived this issue on appeal. A motion to suppress evidence must be raised at an omnibus hearing so that the state has an opportunity to present

evidence to refute a defendant's claims. *State v. Bruner*, 373 N.W.2d 381, 386 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985); *see also State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992) (stating that a "motion to suppress should specify, with as much particularity as is reasonable under the circumstances, the grounds advanced for suppression in order to give the state as much advance notice as possible as to the contentions it must be prepared to meet at the hearing"). A suppression issue not raised at the omnibus hearing is generally considered waived. *See State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996) (stating that failure to raise constitutional challenges to evidence at omnibus hearing generally operates as a waiver of those challenges); *see also Bruner*, 373 N.W.2d at 386 (concluding that the appellant's issues were waived because he had not raised them at the omnibus hearing).

Jiles's motion to suppress asserted that evidence found during the search was "seized in violation of [Jiles's] constitutional and statutory protections against unreasonable searches and seizures." At the hearing on his motion, Jiles argued that the search warrant lacked probable cause in part because the dog sniff was unreliable. In response to this argument, the state produced evidence that the dog was a "USPCA-certified" narcotic detecting dog, and did not "hit" on any apartment except Jiles's, supporting probable cause for the search warrant. In denying Jiles's motion to suppress, the district court did not consider whether a reasonable, articulable suspicion supported use of the dog because Jiles did not raise that issue in the district court. Therefore, we conclude that the issue is waived on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court will not consider matters not raised before

the district court). But in the interest of judicial economy, we further conclude that, even if Jiles's challenges to the search warrant could be construed to have preserved the specific issue of a sufficient basis to use the dog, use of the dog was based on reasonable, articulable suspicion that drugs would be located in Jiles's residence.

Under the Minnesota Constitution, police must have a reasonable, articulable suspicion that a person is engaged in illegal drug activity before they may conduct a dog sniff in the common hallway outside the person's apartment door. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). This court reviews de novo whether reasonable suspicion justifies a dog sniff. *State v. Baumann*, 759 N.W.2d 237, 240 (Minn. App. 2009), *review denied* (Minn. Mar. 31, 2009).

The reasonable-suspicion standard is "less demanding than probable cause" but requires more than an unarticulated hunch. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). But "[t]he requisite showing is not high." *Davis*, 732 N.W.2d at 182 (quotation omitted). In determining whether the dog sniff was justified, this court considers "the totality of the circumstances." *Baumann*, 759 N.W.2d at 240 (citing *Davis*, 732 N.W.2d at 182).

In this case, before using the dog, the police had information from the CI that within the past 72 hours he had seen Jiles retrieve drugs from the apartment. Jiles argues that the CI was not credible. But officers had corroborated the CI's information about where Jiles lived, that he sold drugs, and that he transported drugs in his "butt." The CI's information that he had recently seen Jiles take drugs from the apartment was corroborated by the discovery of drugs on Jiles's person soon after he left the apartment.

In the probable-cause context, this court has identified six factors relevant to the reliability of a known confidential informant:

(1) a first-time citizen informant is presumably reliable; (2) an informant who has given reliable information in the past is likely also currently reliable; (3) an informant's reliability can be established if the police can corroborate the information; (4) the informant is presumably more reliable if the informant voluntarily comes forward; (5) in narcotics cases, "controlled purchase" is a term of art that indicates reliability; and (6) an informant is minimally more reliable if the informant makes a statement against the informant's interests.

State v. Ross, 676 N.W.2d 301, 304 (Minn. App. 2004). These same factors bear on the reliability of a confidential informant when police rely on information from the informant to establish reasonable suspicion. *See Alabama v. White*, 496 U.S. 325, 328–29, 110 S. Ct. 2412, 2415 (1990) (stating that factors regarding an informant's reliability that are relevant in the probable-cause context "are also relevant in the reasonable-suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard"). Here, the record demonstrates that at least three of the reliability factors are present. The record does not contain any evidence that detracts from a determination of reliability.

Under the totality of the circumstances, including the information from the CI, the controlled buy, the information gathered on surveillance, and the discovery of drugs on Jiles immediately after he left the apartment, there was sufficient evidence to create a reasonable, articulable suspicion that drugs would be located in the apartment and to support the use of the dog sniff in the common hallway.

Affirmed.