STATE OF MINNESOTA
IN COURT OF APPEALS
A10-282

State of Minnesota,
Respondent,

vs.

Bradley Robert Bohlman,
Appellant.

Filed December 21, 2010
Affirmed
Peterson, Judge

Isanti County District Court
File No. 30-CR-07-1753

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

Jeffrey R. Edblad, Isanti County Attorney, Stacy A. St. George, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Gerald J. Magee, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

PETERSON, Judge

In this appeal from a conviction of attempt to manufacture methamphetamine, appellant argues that the district court (1) erred in finding that the search of the garbage at

appellant's business provided independent probable cause for a search warrant when the garbage receptacle was outside in an unsecured area and appellant testified that he often found others' garbage in it, and (2) clearly erred in holding that a no-knock, nighttime search warrant for appellant's business was justified. We affirm.

FACTS

In November 2007, Isanti County sheriff's deputies went to the residence of appellant Bradley Robert Bohlman's brother J.B. to arrest J.B. on outstanding warrants. J.B. was not there, but officers saw a methamphetamine lab in plain view. Items seized from J.B.'s residence included a business card for appellant's business, Brad's Tree Services (BTS).

Isanti County Sheriff's Investigator Chris Janssen made arrangements to do a garbage search at BTS. One week later, Janssen rode along to collect the garbage from BTS. Janssen watched as the garbage was loaded from the container in front of BTS into the garbage truck. The garbage from BTS was kept separate from the other garbage in the truck. Found in the garbage from BTS were two coffee filters that tested positive for methamphetamine and a handwritten note addressed to "Brad" that said, "P.S I took a couple puffs off your pipe."

On December 7, 2007, Janssen applied for a warrant to search the building where BTS operated. In addition to information about the discovery of the methamphetamine lab at J.B.'s residence on November 29 and the garbage search at BTS, the search-warrant application states:

> In September 2007 your affiant received information from a confidential informant who stated that they could purchase Methamphetamine from [J.B.] Your affiant knew through other investigations that [J.B.] had been known to be in the area of [BTS] . . . . [J.B.'s] brother [appellant] is the owner of the company. Both [appellant] and [J.B.] have numerous contacts with law enforcement related to drug charges. During the summer and fall of 2007 your affiant discovered that there were numerous traffic stops made in the area of [BTS] by Isanti County Deputies during the late evening and early morning hours. Both [appellant] and [J.B.] had been arrested as well as other parties with known drug connections and drug involvements in the area of [BTS]. During contacts at the location deputies report seeing both a video camera on the outside of the building and a video monitoring screen inside the business.

The search-warrant application also states that J.B. was a confirmed member of a criminal gang.

A search warrant was issued authorizing an unannounced, nighttime entry. The search warrant was executed on December 14, 2007, at 6:53 a.m. Items seized from BTS included numerous coffee filters with white powder that tested positive for methamphetamine, a pipe, two baggies of a type commonly used to distribute methamphetamine, a scale, and a jar with liquid and crystal separations that tested positive for methamphetamine.

Appellant was charged by amended complaint with first-degree manufacturing of methamphetamine and first-degree attempt to manufacture methamphetamine. Appellant moved to suppress the evidence discovered during the search of BTS. The district court denied the motion. The district court determined that although the search-warrant application contained reckless misrepresentations, the items found in the garbage from

BTS and the earlier arrest of appellant[1] established probable cause for the search warrant. The district court also determined that an unannounced, nighttime entry was justified.

The state dismissed the manufacturing charge, and the remaining charge was submitted to the district court for decision on stipulated facts. The district court found appellant guilty of first-degree attempt to manufacture methamphetamine. This appeal followed.

D E C I S I O N

"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).

I.

The United States and Minnesota Constitutions provide that a search warrant may not issue unless it is 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); *State v. McCloskey*, 453 N.W.2d 700,

[1] In the order denying appellant's motion to suppress evidence found during the search of BTS, the district court (1) notes that appellant and others were arrested on June 5, 2007; and (2) cites district court file number 30-CR-07-733. The appendix to respondent's brief includes a copy of the complaint filed in district court file number C7-07-733, which indicates that appellant was arrested at BTS on June 5, 2007, and that controlled substances and drug paraphernalia were seized incident to the arrest. But it is not clear from the record whether information about the June 5 arrest was presented to the district court before the warrant to search the BTS premises was issued.

703 (Minn. 1990). 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 *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). A "substantial basis" means that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332.

The issuing court determines probable cause based on the totality of the circumstances:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. "[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. *McCloskey*, 453 N.W.2d at 704.

"A search warrant is void . . . if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause. A misrepresentation is 'material' if when set aside there is no longer probable cause to issue the search warrant." *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989) (citations omitted). "Contraband seized from a garbage search can provide an independent and substantial basis for a probable-cause determination." *State v. McGrath*, 706 N.W.2d

532, 543 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006) . A party who deposits trash in an area open to public inspection for the purpose of collection does not have a reasonable expectation of privacy in the discarded items. *California v. Greenwood*, 486 U.S. 35, 40-41, 108 S. Ct. 1625, 1629 (1988). Further, the expectation of privacy in commercial premises is less than that in a person's home. *Minnesota v. Carter*, 525 U.S. 83, 90, 119 S. Ct. 469, 474 (1998).

Appellant argues that the items found in the garbage picked up at BTS do not establish independent probable cause because "[t]he unsecured garbage container was located in the parking lot adjacent to [BTS] in an area clearly visible from Highway 65 and is accessible from the highway by a frontage road" and because there are "other means of access from within the complex which made it accessible to the other businesses." Appellant testified:

> I think I was the only one that had pickup up there with the other businesses because they would always just turn around, pull in, back up, and then back up into -- to dump mine. But a lot of times they'd come on Thursday, and by Monday when I'd come back to work, it would be full.

Although the district court found that the search-warrant application contained misrepresentations, including that both appellant and J.B. had had numerous contacts with police related to drug charges and that both appellant and J.B. had been arrested near BTS along with others with known drug connections, the district court concluded that independent probable cause existed based on "[t]he two coffee filters testing positive for methamphetamine tied to [appellant] by the note addressed to him" and the "prior arrest of [appellant] at the [BTS] premises and controlled substances were found at the scene of

that arrest." The district court also found that "[t]he fact that [appellant] has other explanations as to other possible sources of the garbage does not vitiate the finding of probable cause."

We agree that the fact that the garbage container was accessible to other businesses does not demonstrate that there was no independent probable cause. Probable cause exists when there is a fair probability that evidence of a crime will be found in a particular place. *Gates*, 432 U.S. at 238, 103 S. Ct. at 2332. The possibility that other businesses placed garbage in the container does not mean that there is not a fair probability that the garbage in the BTS container came from BTS, especially when one of the items found in the garbage was a note addressed to "Brad," which is appellant's name. We also note that, on cross-examination, appellant admitted that he leased the garbage container and that it was located on BTS's property.

The district court did not err in determining that the search warrant was supported by independent probable cause. *See McGrath*, 706 N.W.2d at 544 (concluding that residual amounts of marijuana found in garbage searches supported reasonable expectation that more marijuana or other evidence of criminal activity would be found on premises); *State v. Papadakis*, 643 N.W.2d 349, 356 (Minn. App. 2002) (finding that spoon with burn marks and plastic bag containing cocaine residue were sufficient to establish probable cause for search).

Appellant cites no facts or authority to support his claim that Janssen should have personally inspected the garbage truck's box to determine whether it was free of any garbage or debris before the search and that it was insufficient to inspect it using a

camera in the truck's cab. An assignment of error based on "mere assertion" and unsupported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Wilson*, 594 N.W.2d 268, 271 (Minn. App. 1999), *review denied* (Minn. Aug. 18, 1999). Because no error is obvious on mere inspection, the claim is waived.

II.

Nighttime Execution

The statute governing search warrants states, "A search warrant may be served only between the hours of 7:00 a.m. and 8:00 p.m. unless the court determines on the basis of facts stated in the affidavits that a nighttime search outside those hours is necessary. . . ." Minn. Stat. § 626.14 (2006). The district court did not address whether the affidavit included facts that made a nighttime search necessary. Instead, the district court determined that execution of the search warrant at a place of business at 6:53 a.m. was a de minimis statutory violation that did not justify suppression of evidence.

The supreme court has held that executing a search warrant one hour after the permitted statutory period did not require suppression of evidence seized during the search. *See State v. Lien*, 265 N.W.2d 833, 841 (Minn. 1978) (reversing suppression order when executing warrant just after 9:00 p.m. was technical statutory violation but warrant "was executed at a reasonable hour when most people are still awake" and "the intrusion was not the kind of nighttime intrusion—with people being roused out of bed and forced to stand by in their night clothes while the police conduct the search—that our statutory rule against nighttime execution of search warrants is primarily designed to

prevent"), *overruled on other grounds by Graza v. State*, 632 N.W.2d 633, 638 n.1 (Minn. 2001); *see also State v. Goodwin*, 686 N.W.2d 40, 44 (Minn. App. 2004) (concluding that execution of daytime warrant at 6:58:53 a.m. was de minimis statutory violation that did not justify suppression of evidence), *review denied* (Minn. Dec. 14, 2004). Based on these precedents, we conclude that even if the affidavit did not justify a nighttime search, executing a search warrant at BTS's commercial building seven minutes before the statutory period began does not require suppression of evidence seized during the search.

No-knock Entry

The showing required for a no-knock entry "is not high." *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1422 (1997). "'In order to justify a "no-knock" entry, the police 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.'" *State v. Martinez*, 579 N.W.2d 144, 146 (Minn. App. 1998) (quoting *Richards*, 520 U.S. at 394, 117 S. Ct. at 1421), *review denied* (Minn. July 16, 1998). Establishment of reasonable suspicion requires something "more than an unarticulated hunch" but less than an "objectively reasonable belief." *State v. Wasson*, 615 N.W.2d 316, 321 (Minn. 2000). This court "may accept evidence of a threat to officer safety of a less persuasive character when the officer presents the request for a no-knock warrant to a magistrate." *Id.* But general observations regarding an officer's experiences with drug dealers, alone, are insufficient to justify an unannounced search.

State v. Anhalt, 630 N.W.2d 658, 661 (Minn. App. 2001). When the material facts are undisputed, this court independently reviews the facts to determine whether a no-knock entry was justified. *State v. Barnes*, 618 N.W.2d 805, 810 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001).

The facts stated in the search-warrant application that supported the request for an unannounced entry were that many dangerous products are used in manufacturing methamphetamine, those products can create a hazardous situation or be used as a weapon, and there was a video surveillance system at BTS. The district court determined that these facts were sufficient to justify an unannounced entry. The district court explained that the hazardous materials used in manufacturing methamphetamine "are dangerous in and of themselves and could be used as weapons" and that, if the officers were required to announce their entry, the video surveillance system could give those inside the opportunity to destroy evidence and flee.

The presence of surveillance equipment and the fact that appellant was suspected of dealing with hazardous materials that could be used as weapons established a reasonable suspicion that knocking and announcing the officers' presence before entering would inhibit effective investigation or compromise officer safety. *See Richards*, 520 U.S. at 396, 117 S. Ct. at 1422 (considering "the easily disposable nature of the drugs" in considering the reasonableness of the search); *Wasson* 615 N.W.2d at 321 (allowing consideration of the fact that there was "ongoing drug activity" at the residence in considering the reasonableness of the suspicion). The district court did not err in determining that a no-knock entry was justified.

Appellant argues that the no-knock entry was not justified because Janssen omitted from the search-warrant application the fact that police went to BTS on November 29 looking for J.B. and found no sign of contraband or criminal activity. But the transcript pages cited by appellant do not indicate how extensively police searched the premises that day, and Janssen testified that manufacturing methamphetamine consists of many steps and the various steps can be done at different locations. Thus, it is not apparent why the fact that police found no sign of contraband or criminal activity at BTS on November 29 should have dispelled the reasonable suspicion needed to support a "no-knock" warrant.

Affirmed.