STATE OF MINNESOTA

IN SUPREME COURT

A19-0414
A19-0714

Court of Appeals Lillehaug, J.

In re K.M.,

Petitioner,

K.M.,

Appellant,

vs.

Filed: March 11, 2020
Office of Appellate Courts

Burnsville Police Department,

Respondent,

State of Minnesota,

Respondent,

John Does 1–4,

Appellants.

Andrew S. Birrell, Ian S. Birrell, Marc E. Betinsky, Birrell Law Firm, PLLC, Minneapolis, Minnesota; and

Elizabeth R. Duel, Ryan P. Garry, Ryan Garry Attorney LLC, Minneapolis, Minnesota, for appellant K.M.

Alina Schwartz, Campbell Knutson, P.A., Eagan, Minnesota, for respondent Burnsville Police Department.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Jean E. Burdorf, John Patrick Monnens, Assistant County Attorneys, Minneapolis, Minnesota, for respondent State of Minnesota.

Christopher W. Madel, Mack H. Reed, Stephen M. Premo, Madel PA, Minneapolis, Minnesota, for appellants John Does 1–4.

Daniel J. Koewler, Ramsay Law Firm PLLC, Roseville, Minnesota, for amicus curiae Minnesota Association of Criminal Defense Lawyers.

William Ward, Minnesota State Public Defender, Cathryn Middlebrook, Chief Appellate Public Defender, Saint Paul, Minnesota, for amicus curiae Minnesota Board of Public Defense.

Deborah Ellis, Eighth Circuit Amicus Committee, Saint Paul, Minnesota, for amicus curiae National Association of Criminal Defense Lawyers.

Travis J. Smith, Murray County Attorney, Slayton, Minnesota, for amicus curiae Minnesota County Attorneys Association.

Robin M. Wolpert, Sapientia Law Group PLLC, Minneapolis, Minnesota; and

Charles F. Webber, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota, for amicus curiae Minnesota State Bar Association.

Mark J. Schneider, Gary K. Luloff, Jennifer J. Crancer, Chestnut Cambronne PA, Minneapolis, Minnesota, for amicus curiae Suburban Hennepin County Prosecutors Association.

S Y L L A B U S

1. The district court did not err in construing a motion for return of property seized from an attorney's law office in the course of a warranted search to be a petition for return of seized property under Minnesota Statutes § 626.04 (2018).

2. The district court did not abuse its discretion in denying an attorney's petition under Minnesota Statutes § 626.04, even though the district court should have required the State to return to the attorney copies of all client files seized.

Affirmed.

O P I N I O N

LILLEHAUG, Justice.

This case concerns the seizure of client files from an attorney's office, pursuant to a warrant, when the attorney is the target of an ongoing criminal investigation. After the search and seizure, the attorney filed a motion for the return of the seized property, including client files. The district court considered the motion to be a petition under Minnesota Statutes § 626.04 (2018), by which a district court may order the return of property seized by law enforcement to the property owner. The district court heard the motion and, after conducting an ex parte hearing as authorized by the statute, denied the petition on the ground that the property was being held in good faith as potential evidence in an uncharged matter. The matter is no longer uncharged; while this appeal was pending, the attorney was charged with theft by swindle.

We affirm the district court. We do so, however, without prejudice to any future challenge to the lawfulness of the search and seizure.

FACTS

The petitioner in this proceeding is a practicing attorney—K.M. The underlying law enforcement investigation arises out of K.M.'s representation of two clients in a controlled-substances investigation—M.W. and J.S. M.W.'s and J.S.'s residence was

searched pursuant to a warrant and substances were seized. They retained K.M. as their attorney.

In December 2018, M.W. and J.S. reported to law enforcement some disturbing allegations. Whether or not these allegations are true is not for us to decide now; we recite them only to set the stage for our discussion of the ensuing search of K.M.'s home office and the seizure of her client files.

During her representation, K.M. advised M.W. that the case agent and prosecuting attorney in the controlled-substances investigation had proposed a deal by which M.W. would not be charged. She told him that he had two options to avoid charges. He could donate $35,000 to the police union and become a confidential informant. Or he could make a larger donation—$50,000—without becoming an informant.

M.W. allegedly chose the second option, but said he could only pay $15,000. In response, K.M. purported to make a telephone call to the case agent, out of M.W.'s earshot. K.M. then told M.W. that the case agent had agreed to the $15,000 payment if made that day with more money to follow. M.W. agreed to the case agent's terms.

K.M. drove M.W. to his bank. M.W. withdrew $15,000 in a cashier check payable to K.M., who directly deposited it into her bank account, and drove M.W. home. M.W. assumed K.M. would pay the case agent.

Eventually, through another attorney retained by M.W. and J.S., law enforcement learned about, and began to investigate, the deal allegedly brokered by K.M. The Burnsville police applied for a warrant to search K.M.'s home, where she operated her law

office. The search warrant application detailed the allegations M.W. had made against K.M. and provided further support for them.

A judge in Washington County issued the requested warrant. It authorized named police officers to enter K.M.'s home to search for, and seize, eight categories of items. Relevant here, the warrant authorized the seizure of: "Computers such as laptops, desktops, and or towers"; "Electronic devices which could contain or access files held remotely"; and "Any files, invoices, or Documents associated with representation of M.W. and J.S."

On February 27, 2019, the Burnsville police executed the warrant and seized a personal computer, a computer tower, a laptop, two external hard drives, two thumb drives, a paper document, and a paper file folder. According to K.M's attorneys, the electronic devices seized contained approximately 1,500 to 2,000 files about K.M.'s current and former clients, including both civil and criminal matters.

On March 5, 2019, the Burnsville police applied for a second warrant, this time in Dakota County, to perform searches of the electronic devices seized under the authority of the first warrant. The application represented that law enforcement was "sensitive to the fact that" K.M. is an attorney, and that "during the search" of her devices "other client records may be encountered." The application represented that the search would be performed by the Dakota County Electronic Crimes Task Force, which would transmit to other officers only data "pertaining to M.W. and J.S."

The district court issued the second warrant as requested. The warrant authorized not only the Electronic Crimes Task Force to search the devices, but also named Burnsville

police officers and "any other authorized person." They were authorized to search for four categories of specified files and documents related to M.W. and J.S.[1] The district court sealed the application and the search warrant.

The same day the second warrant was issued, March 5, 2019, K.M. filed a pleading in Dakota County District Court captioned "Motion for Return of Seized Property or Other Relief." The motion was not accompanied by a complaint, was not captioned as one for a temporary restraining order or a temporary injunction, and was not supported by affidavits or other sworn evidence.

In the motion, K.M. sought "relief from the search of the lawyer's office and seizure of perhaps a thousand client files." K.M. requested an immediate hearing "given the confidential nature of the records seized and the irreparable potential harm presented." The motion was based primarily on our decision in *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979), and asserted that *O'Connor* stood for the proposition that a warrant authorizing the search of an attorney's office is unreasonable and invalid absent a showing of criminal wrongdoing by the lawyer or a threat that the documents will be destroyed. The motion observed that the holding of *O'Connor* was "in accord with" the Fourth and Sixth Amendments to the U.S. Constitution, provisions of the Minnesota Constitution, the attorney-client privilege under Minnesota Statutes § 595.02 (2018), and Minnesota Statutes

[1] At oral argument, the State represented that, notwithstanding the breadth of the warrant, only one IT person from the Electronic Crimes Task Force had searched the seized devices. Using search terms, the IT person identified documents responsive to the warrant and conveyed them to the investigating officers. The seized electronic devices remain in the custody of the Electronic Crimes Task Force.

ch. 626 (2018). K.M. requested: (1) that the court declare the search warrant[2] invalid and return the seized property; and (2) such other and further relief as may be appropriate.

The hearing on K.M's motion was held three days later, on March 8, 2019. K.M.'s counsel started the hearing by describing the execution of the warrant and what property had been seized. He asserted that the warrant violated constitutional particularity requirements, and stated that he was trying "to get this matter in front of the court as fast as we can to try to initially, if you will, stop the bleeding." He asked the court to order that no one look at the seized information because the law does not permit it.

The court then asked K.M.'s counsel if he was asking for "basically a temporary restraining order." K.M.'s counsel responded, "Yes, I'll take an order in any form." The judge said, "I'm just trying to understand what you're requesting." K.M.'s counsel responded, "Well, you could call it a temporary restraining order. You could call it a writ of prohibition request."

In response, the assistant city attorney, representing the Burnsville police department, advised the court that one of K.M.'s attorneys had made a written demand under section 626.04 for return of the seized property. He further stated that the city was waiving the timelines in that statute so that the matter could be heard on an expedited basis as K.M. had requested. He asked the court for an ex parte hearing as authorized by

[2] At the time of the motion and the subsequent hearing, law enforcement had provided to K.M. only the first warrant. The second warrant and the applications for both warrants were under seal.

section 626.04 so that law enforcement could summarize the status of an ongoing investigation.

Responding to the city, K.M.'s counsel objected to an ex parte hearing, and said: "I believe that we have raised more than this statute as a reason for the requested relief . . . ." He argued that it was unfair and a violation of due process for K.M.'s attorneys to be excluded from the law enforcement summary.

The district court granted the city's request and conducted some of the hearing without K.M. or her counsel present. Ex parte, the investigating detective testified under oath that K.M. was the target of a criminal investigation and summarized the evidence collected to that point. The court received copies of the search warrant applications and the warrants issued in Washington County and Dakota County.

After the ex parte portion of the hearing concluded, K.M.'s counsel asked the district court to order that the Burnsville Police Department not look at the seized materials until the court ruled on K.M.'s motion. The court declined, saying "I'm going to leave everything as it is now."

On March 11, the district court issued findings of fact and an order denying K.M.'s motion. In response to K.M.'s argument that an ex parte hearing should not have been held, the court cited section 626.04 and stated, "The court determined that the procedure outlined in the statute was the best way for the court to get the information it needed to make a decision on this matter." Based on the testimony and exhibits received ex parte, the court concluded that "the circumstances of this case [are] distinguishable from those in *O'Connor v. Johnson*." The court decided that "the seized property is being held in good

faith as potential evidence in a matter that is uncharged at this time," referring to section 626.04(a)(1).

The district court did not address the issue of K.M.'s access to her client files. At oral argument before us, counsel for K.M. and the State agreed that copies of K.M.'s files from the seized electronic devices had been returned to her.

Two days after the district court denied relief, K.M. filed a petition for a writ of prohibition in the court of appeals. K.M. argued that the seizure of confidential and privileged file materials presents "immediate, irreparable harm both to [K.M.] and to her current and former clients." K.M. requested: (1) a writ of prohibition requiring the city to return all seized property, including all client files, to K.M., and to destroy any and all copies of all seized property; and (2) whatever further orders are necessary to uphold the constitutional and statutory protections due to K.M. and her clients.

The court of appeals denied K.M.'s request for a writ of prohibition. *K.M. v. Burnsville Police Dep't* (*In re K.M.*), No. A19-0414, Order at 4 (Minn. App. filed Mar. 26, 2019). Construing K.M.'s motion in the district court to have been made under section 626.04, the court of appeals decided that K.M. had not demonstrated that an appeal from the district court's order would be an inadequate remedy. *Id.* at 3–4.

K.M. sought, and we granted, review of the court of appeals' decision denying a writ of prohibition. K.M. also appealed the district court's order to the court of appeals, and we ordered accelerated review. *See* Minn. Stat. § 480.10, subd. 2(b) (2018). We consolidated the matters for briefing, oral argument, and decision. We granted leave to John Does 1–4, clients of K.M., to intervene as appellants. We granted leave to the State

of Minnesota to intervene as a respondent. We also granted leave to numerous organizations to participate as amici curiae.

ANALYSIS

We have never articulated our scope of review of proceedings held under Minnesota Statutes § 626.04. But there is useful guidance in decisions addressing motions to suppress evidence. *See, e.g.*, *State v. deLottinville*, 890 N.W.2d 116, 119 (Minn. 2017) (reviewing factual findings for clear error and legal determinations de novo). Therefore, we will review the district court's factual findings for clear error and its legal conclusions de novo.

I.

K.M. contends that the district court erred in not granting her motion to return the property that law enforcement seized. To determine whether the district court erred, we must first determine the nature of the proceeding K.M. initiated in the district court. When K.M. filed her motion, she had not yet been charged with a crime. There was no pending civil action, and K.M. did not commence one by service of a summons and complaint. *See* Minn. R. Civ. P. 3.01–.02.

In this procedural posture, K.M.'s motion signaled that she was seeking relief under Minnesota Statutes § 626.04. To do so would be logical. Section 626.04 creates a remedy for the return of property seized by law enforcement with or without warrant. The owner may make a written request to the law enforcement agency for return of the property. Minn. Stat. § 626.04(a). If the property is not returned within 48 hours, the owner may file a petition for its return. *Id.* The district court must decide the petition after a hearing "without jury trial and by a simple and informal procedure." *Id.* Evidence at the hearing

need not be admissible under the Minnesota Rules of Evidence. *Id.* On an ex parte basis, law enforcement may "summarize the status and progress of an ongoing investigation that led to the seizure." *Id.* The court shall not order the return of the property if it finds any one of four circumstances; one, relevant here, is that "the property is being held in good faith as potential evidence in any matter, charged or uncharged[.]" Minn. Stat. § 626.04(a)(1).

In this case, K.M.'s motion was styled as one "for return of seized property or other relief." Section 626.04 refers to requests and petitions "for return of the property." Minn. Stat. § 626.04(a). K.M. submitted no sworn evidence, indicating that she viewed the procedure to be simple and informal. The motion cited chapter 626. And K.M.'s actions leading up to filing the motion—making a written request for return of the property and obtaining the city's waiver of the time requirements in section 626.04—suggested that K.M. was seeking relief under that statute.

Based on all of these facts and circumstances, it was reasonable for the district court to construe K.M.'s motion as a petition under section 626.04, and then to decide the motion based on that statute. To the extent that K.M. contends that she also asserted separate constitutional claims, her motion did not make that clear. She relied on *O'Connor*, but alleging that *O'Connor* was "in accord with" constitutional principles does not constitute a plain statement of a constitutional claim. We cannot say that the district court erred in failing to decide constitutional claims at this stage.

To be sure, we can well understand that K.M. wanted to proceed quickly—all of her client files, apparently including attorney-client privileged communications and work

product, had just been seized. Indeed, section 626.04 provides a speedy and informal remedy, and the district court and the parties proceeded expeditiously. Now, with the benefits of time and access to documents previously under seal, K.M. and her intervenor clients have capably articulated and briefed multiple constitutional arguments. But these arguments were not squarely before the district court in the expedited proceeding. Under the circumstances, we cannot fault the district court for construing the motion as a petition under section 626.04, hearing law enforcement testimony and receiving exhibits ex parte, and deciding the motion expeditiously.

II.

With the nature of the district court proceeding firmly in mind, we consider whether the district court erred in its application of section 626.04 to deny K.M. the return of her seized property. The statute provides,

> [T]he court shall not order the return if it finds that:
>
> (1) the property is being held in good faith as potential evidence in any matter, charged or uncharged;
> (2) the property may be subject to forfeiture proceedings;
> (3) the property is contraband or may contain contraband; or
> (4) the property is subject to other lawful retention.

Minn. Stat. § 626.04(a).

Here, applying paragraph (1), the district court found that the seized files were being held as potential evidence in a pending investigation. This finding is well-supported by the evidence. In the ex parte portion of the hearing, the district court heard sworn testimony and received exhibits about the ongoing criminal investigation of K.M. for theft by swindle.

The property seized, including the electronic devices, was potential evidence in that investigation.

The district court also did not clearly err in deciding that the property was being held in good faith. The term "good faith" means " '[a] state of mind consisting in (1) honesty in belief or purpose [or] (2) faithfulness to one's duty or obligation.' " *J.E.B. v. Danks*, 785 N.W.2d 741, 749 (Minn. 2010) (first alteration in original) (quoting *Good Faith, Black's Law Dictionary* (9th ed. 2009)). The district court had the opportunity to hear the testimony of the investigating detective, to observe his demeanor, and to consider the search warrants issued by two other district court judges. The district court's finding that the law enforcement officers were proceeding in good faith is not clearly erroneous.

Finally, the district court did not err in declining to order the immediate return of the property on the authority of *O'Connor*. That case involved a search warrant for an attorney's office issued for the purpose of seizing a client's business records as part of a criminal investigation into the *client's* activities. 287 N.W.2d at 401. We noted specifically that there was "no claim of wrongdoing by the attorney[.]" *Id.* at 402. Although we acknowledged the importance of protecting all clients' confidences, *id.* at 404, our holding that the warrant was unreasonable was carefully limited to the search of an attorney's office "when the attorney is not suspected of criminal wrongdoing and there is no threat that the documents sought will be destroyed," *id.* at 405.

In this case, by contrast, the warrant for the search of K.M.'s office was issued for the purpose of seizing the attorney's records as part of a criminal investigation into the *attorney's* activities. Certainly searches of offices of attorneys targeted in criminal

investigations raise many concerns,[3] and we share these concerns. We may have occasion to announce guidelines for such warrants, including how client files—paper and digital—may be searched. But the expedited proceeding in this case, with a petition under section 626.04 based on only the *first* warrant, unsupported by affidavit or testimony, and with a limited factual record, is not the appropriate occasion.

In the meantime, there are other avenues by which the important issues regarding *both* search warrants may be litigated. K.M., the Doe intervenors, and amici have raised constitutional and privilege issues that were not squarely presented to, or fully litigated in, the district court. These issues include the breadth of the warrants, precisely who was authorized to search and seize, and when, how, and by whom client files were actually searched. Our decision today is without prejudice to those issues as they may be developed in the pending criminal case. Nor does our decision prejudice potential civil claims. Today we decide only a narrow issue under section 626.04.

Although we affirm the decision of the district court, we do so with a caveat. The district court should have ordered that copies of the seized client files be immediately returned to K.M. It is vital to any attorney that she have access to her files to fulfill her

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[3] As we recognized in *State v. Poole*, the privacy rights of a professional's clients (in that case, patients protected by the doctor-patient privilege) "are potentially subject to invasion any time [warranted] searches" of the professional's office are conducted. 499 N.W.2d 31, 35 (Minn. 1993). The Justice Manual, formerly known as the United States Attorneys' Manual, specifically directs that prosecutors maintain "close control" over searches of "the premises of an attorney who is a subject of an investigation . . . [b]ecause of the potential effects of this type of search on legitimate attorney-client relationships . . . ." Dep't of Justice, Justice Manual § 9-13.420 (Jan. 2020).

professional responsibilities. This includes not just advising her clients in ongoing matters, but also notifying clients that their open and closed files have been seized by law enforcement so that those clients can take timely steps to protect their rights.

We understand from counsel that law enforcement eventually provided to K.M. electronic copies of her files. Therefore, at this juncture, the issue is moot and no further action is required. *See Dean v. City of Winona*, 868 N.W.2d 1, 9 (Minn. 2015).

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.