DA 17-0335

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 40N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JORGE CARLOS ARIAS-MIRENDA,

Defendant and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDC 2017-9
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Deborah S. Smith, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Brad Fjeldheim, Assistant Attorney General, Helena, Montana

Leo J. Gallagher, Lewis and Clark County Attorney, Katie Jerstad, Deputy County Attorney, Helena, Montana

Submitted on Briefs: December 19, 2018

Decided: February 12, 2019

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Defendant Jose Carlos Arias-Mirenda appeals from a First Judicial District order denying his motion to suppress drugs and drug paraphernalia discovered and seized as evidence during a search, pursuant to a warrant, of the vehicle Arias-Mirenda was driving. We affirm Arias-Mirenda's conviction, but remand this case to the District Court with instructions to conform the written judgment to the oral pronouncement of sentence.

¶3 On December 21, 2016, at 6:50 a.m., dispatch requested Montana Highway Patrol Trooper, Nathaniel Boespflug, to assist with a situation involving two people pushing a broken-down white 1998 Ford Ranger pickup with Utah license plates on Highway 12 near East Helena, Montana. The facts pertinent to this case come from Trooper Boespflug's application for the warrant to search the vehicle.

¶4 Trooper Boespflug arrived on scene and saw the vehicle located in the center restricted lane. Motor Carrier Service Officer Merlyn Schatz was already present and informed Trooper Boespflug that the male driver (Arias-Mirenda) was not being

forthcoming with information, the vehicle appeared to be out of gas, and the other occupant had walked away from the scene.

¶5 Arias-Mirenda was in the driver's seat of the vehicle. Trooper Boespflug approached the vehicle and knocked on the passenger-side window. Trooper Boespflug requested Arias-Mirenda roll down the window. Arias-Mirenda briefly looked up at Trooper Boespflug, then looked back at his phone. Trooper Boespflug attempted to open the passenger-side door, but it was locked. He walked around to the driver's side and began to ask Arias-Mirenda some questions.

¶6 Arias-Mirenda told Trooper Boespflug that he was twenty-three years old, that his name was Kevin Romero, and that he did not have any form of identification, including a driver's license, state identification card, or social security number. When asked his country of citizenship, Arias-Mirenda stated he was from Mexico, but had lived in the United States since he was seven months old. Trooper Boespflug told Arias-Mirenda that he should have some sort of identification after living in the United States for such a long period of time. Arias-Mirenda responded that he had a Mexican driver's license, but it was not with him. Trooper Boespflug asked Arias-Mirenda what his birth date was, to which Arias-Mirenda replied he was now going to be honest with Trooper Boespflug, that he was nervous because he had misdemeanor warrants, and that his real name was Jorge Arias, but he went by Kevin.

¶7 Trooper Boespflug requested Arias-Mirenda exit the vehicle and leave his cell phone and keys inside. Arias-Mirenda locked the keys in the vehicle. Trooper Boespflug noticed the vehicle's interior was in disarray. He patted Arias-Mirenda down for

weapons, found none, and instructed him to sit on the tailgate while he spoke with dispatch, which informed him that Arias-Mirenda had a Montana extradition warrant for driving while suspended and obstructing a peace officer in Bozeman, Montana. Trooper Boespflug placed Arias-Mirenda under arrest.

¶8 The female occupant who had previously walked away from the scene returned in a vehicle driven by her younger brother. While the woman identified herself as Melissa Tucker-Alvarado and stated she had a valid driver's license, Trooper Boespflug later learned her name was Malorie Rosalie Tucker-Alvarado and that she did not have a valid driver's license. Tucker-Alvarado stated she had Christmas presents for her kids in the vehicle. When questioned, she indicated to Trooper Boespflug that she had shopped at Target, whereas Arias-Mirenda indicated they had shopped together at K-Mart. Tucker-Alvarado did not have a key to the vehicle.

¶9 During the investigation, Arias-Mirenda "continued to request to see his vehicle and requested to return to it." The vehicle was towed pending proof of ownership. Trooper Boespflug subsequently learned that Arias-Mirenda had a suspended license and a criminal record with positive drug history, including previous drug convictions on March 28, 2014, in South Dakota, and July 18, 2013, in Utah. Tucker-Alvarado had a $1,700 warrant in Helena, Montana, two previous convictions for falsely reporting information to the police on August 5, 2015, and June 13, 2012, two criminal possession of paraphernalia charges on February 27, 2012, and June 21, 2010, in Arizona, and a pending obstruction of justice charge on August 27, 2016, in Helena.

¶10 Arias-Mirenda was then transported to Lewis and Clark Detention Facility. Trooper Boespflug applied for a warrant to search the vehicle and seized the vehicle pending his application. Trooper Boespflug had a clear right to impound the vehicle, because the keys were locked inside the vehicle, the vehicle was in an unsafe location, and Arias-Mirenda could not prove ownership of the vehicle. The Justice Court issued Trooper Boespflug the warrant to search the vehicle. His search revealed a blue glass pipe of the type commonly used to ingest drugs, an Apple iPhone, "a false or concealed compartment made to conceal and transport illegal contraband," and a clear plastic bag containing a clear crystalline material, which tested positive for methamphetamine.

¶11 On January 9, 2017, the State charged Arias-Mirenda with five counts: count one, obstructing a peace officer or other public servant, a misdemeanor, in violation of § 45-7-302(1), MCA; count two, failing to carry proof or exhibit insurance in vehicle (first offense), a misdemeanor, in violation of § 61-6-302(2), MCA; count three, driving a motor vehicle while privilege to do so is suspended and/or revoked, a misdemeanor, in violation of § 61-5-212(1)(a)(i), MCA; count four, criminal possession of dangerous drugs (methamphetamine), a felony, in violation of § 45-9-102(1), MCA; and count five, criminal possession of drug paraphernalia, a misdemeanor, in violation of § 45-10-103, MCA.

¶12 On February 24, 2017, Arias-Mirenda filed a motion to suppress the evidence seized from the vehicle, arguing that sufficient probable cause did not exist to issue a search warrant. On March 3, 2017, the District Court denied Arias-Mirenda's motion to

dismiss. The District Court concluded the judge reasonably issued the search warrant because the search warrant application contained a sufficient basis to find probable cause.

¶13 At an April 19, 2017 hearing, in accordance with a plea agreement, Arias-Mirenda pleaded guilty to obstructing a police officer, in violation of § 45-7-302(3), MCA, and criminal possession of dangerous drugs, in violation of § 45-9-102(5), MCA, and reserved his right to appeal the District Court's order denying his motion to suppress. The State dismissed the remaining charges.

¶14 The District Court then sentenced Arias-Mirenda to six months, suspended, for obstructing a police officer, to run consecutively with the sentence imposed for criminal possession of dangerous drugs, and "a court surcharge of $85." With respect to criminal possession of dangerous drugs, the court deferred imposition of sentence for a period of three years if Arias-Mirenda followed the conditions specified.

¶15 On April 28, 2017, the District Court signed a written judgment against Arias-Mirenda inconsistent with the court's oral pronouncement of sentence. The written judgment imposed mandatory surcharges of $75 for count one, and $85 for count four, and an additional condition prohibiting Arias-Mirenda from entering any bars, casinos, or establishments where alcohol is the principal item for sale.

¶16 Arias-Mirenda argues on appeal that there was insufficient probable cause for the Justice Court to issue the search warrant and that the District Court erred in denying his motion to suppress. In addition, he argues that his written judgment should conform to the oral pronouncement of sentence and plea agreement.

¶17 "The integrity of the search warrant is essential for protecting the people against unreasonable searches." *State v. Kasparek*, 2016 MT 163, ¶ 12, 384 Mont. 56, 375 P.3d 372 (citing U.S. Const. amend. IV and Mont. Const. art. II, § 11). Section 46-13-302(1), MCA, states: "A defendant aggrieved by an unlawful search and seizure may move the court to suppress as evidence anything obtained by the unlawful search and seizure."

¶18 Section 46-5-221, MCA, states:

> A judge shall issue a search warrant to a person upon application, in writing, by telephone, or electronically, made under oath or affirmation, that:
>
> (1) states facts sufficient to support probable cause to believe that an offense has been committed;
>
> (2) states facts sufficient to support probable cause to believe that evidence, contraband, or persons connected with the offense may be found;
>
> (3) particularly describes the place, object, or persons to be searched; and
>
> (4) particularly describes who or what is to be seized.

"Probable cause must be determined solely from the information contained within the four corners of the search warrant application." *State v. Barnaby*, 2006 MT 203, ¶ 30, 333 Mont. 220, 142 P.3d 809. "The issuing judicial officer must make a practical, common sense determination, given all the evidence contained in the application for a search warrant, whether a fair probability exists that contraband or evidence of a crime will be found in a particular place." *Barnaby*, ¶ 29. Under the totality of the circumstances, factors with little probative value alone can provide a basis for probable cause when viewed in combination with other factors in the search warrant application. *State v. Rinehart*, 262 MT 204, 211, 864 P.2d 1219, 1223 (1993).

¶19 This Court reviews a district court's denial of a motion to suppress "to determine whether the court's findings of fact are clearly erroneous and whether its interpretation and application of the law are correct." *State v. Griffin*, 2004 MT 331, ¶ 11, 324 Mont. 143, 102 P.3d 1206 (citing *City of Cut Bank v. Bird*, 2001 MT 296, ¶ 9, 307 Mont. 460, 38 P.3d 804). "[T]his Court's function is to ultimately ensure the issuing judge had a 'substantial basis' to determine probable cause existed before issuing the search warrant." *Griffin*, ¶ 11. "'Substantial basis for probable cause' means the same thing as 'sufficient probable cause.'" *State v. St. Marks*, 2002 MT 285, ¶ 18, 312 Mont. 468, 59 P.3d 1113. A reviewing court "assesses the totality of the circumstances to determine whether a search warrant is based upon probable cause," and gives great deference to the issuing judge's determination. *Muir v. Bilderback*, 2015 MT 180, ¶ 12, 379 Mont. 459, 353 P.3d 473 (citing *Barnaby*, ¶ 30); *Griffin*, ¶ 11. This Court draws every reasonable inference possible to support that determination, and evaluates probable cause "in light of a trained officer's knowledge." *Griffin*, ¶ 11; *State v. Frasure*, 2004 MT 242, ¶ 15, 323 Mont. 1, 97 P.3d 1101 (quoting *State v. Williamson*, 1998 MT 199, ¶ 12, 290 Mont. 321, 965 P.2d 231).

¶20 Trooper Boespflug's application for the warrant to search Arias-Mirenda's vehicle, in addition to the facts detailed above, stated:

> Based on [Arias-Mirenda] and Tucker[-Alvarado] providing fictitious information, [Arias-Mirenda's] behavior of avoiding eye contact and being overly concerned with the location of his vehicle, [Arias-Mirenda] purposefully locking his keys in his vehicle to possibly prevent access, and [Arias-Mirenda's] and Tucker[-Alvarado]'s prior drug convictions, the totality of the circumstances lead me to believe illegal contraband is being concealed in the vehicle.

In reviewing Trooper Boespflug's application, the District Court concluded,

> When each fact in Boespflug's warrant application is viewed in conjunction with the other evidence in the application in a practical, common-sense manner, this Court concludes that the Justice Court had a substantial basis for determining probable cause existed to search [Arias-Mirenda]'s vehicle.

¶21 We agree. The totality of the circumstances described in Trooper Boespflug's application reasonably supports the Justice Court's decision to issue the search warrant. While Arias-Mirenda argues that the District Court "applied an inaccurate, nationality-based profile that if [Arias-Mirenda] was Mexican, it was more likely that he had drugs in the truck," this contention is unsupported. The warrant application stated that Arias-Mirenda was from Mexico, had lived in the United States since he was seven months old, yet had no driver's license or social security number. Nothing in the warrant application suggests Trooper Boespflug wanted to search the vehicle for drugs based on Arias-Mirenda's Mexican descent. The application shows that Arias-Mirenda was driving and had lived in the United States for most of his life, yet Arias-Mirenda stated he had no American driver's license or social security number. Viewed with Arias-Mirenda's misrepresentation of his name, suspended driver's license, lack of eye contact, strange behavior, and positive criminal drug history, the Justice Court made a practical, common sense determination to issue the warrant. This Court draws every reasonable inference possible to support the Justice Court's determination. *See Griffin*, ¶ 11.

¶22 Arias-Mirenda further argues that the four corners of the warrant application did not affirmatively state Tucker-Alvarado wanted to re-enter the vehicle, and that this fact cannot be used to infer that Tucker-Alvarado wanted to re-enter the vehicle to retrieve

drugs. The Justice Court did not base its conclusion to issue the search warrant on this fact alone, but on a totality of the circumstances. The four corners of the search warrant application reasonably support the judge's determination that a substantial basis for probable cause existed and merited issuance of the search warrant. The District Court did not err in denying Arias-Mirenda's motion to suppress.

¶23 Arias-Mirenda next argues, and the State concedes, that this Court should remand the case to the District Court with instructions to conform the written judgment to the oral pronouncement of sentence.

¶24 This Court reviews a district court's imposition of a sentence for legality. *State v. Thompson*, 2017 MT 107, ¶ 6, 387 Mont. 339, 394 P.3d 197 (citing *State v. Johnson*, 2000 MT 290, ¶ 13, 302 Mont. 265, 14 P.3d 480). This Court reviews the legality of a sentence de novo. *Johnson*, ¶ 13. The oral sentence pronounced from the bench in a defendant's presence is the legally effective sentence and valid, final judgment. *State v. Lane*, 1998 MT 76, ¶ 40, 288 Mont. 286, 957 P.2d 9.

¶25 The written judgment against Arias-Mirenda included a $75 surcharge for count one, and an $80 surcharge for count two, inconsistent with his oral sentence and plea agreement. The oral sentence included an $85 surcharge for count one, and no surcharge for count four, consistent with the plea agreement. Similarly, the written judgment included an additional condition prohibiting Arias-Mirenda from entering any bars, casinos, or establishments where alcohol is the principal item for sale. This condition was not included in the oral sentence or plea agreement. Accordingly, this Court holds that the written judgment should be revised to reflect the oral sentence.

¶26 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶27 This Court affirms Arias-Mirenda's conviction and remands this case to the District Court to conform the written judgment to the oral pronouncement of sentence.

/S/ MIKE McGRATH

We Concur:

/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE