STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0170

State of Minnesota,
Respondent,

vs.

Jesse P. Novicky,
Appellant.

Filed April 15, 2008
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. K0062084

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

Appellant challenges his convictions of ineligible-person possession of a firearm and fifth-degree controlled-substance crime, arguing that the district court abused its discretion by (1) failing to suppress evidence obtained from a cell phone without a warrant; (2) admitting the cell phone into evidence without proper chain-of-custody evidence; (3) denying appellant's request for an in camera review of personnel records of one of the arresting officers; and (4) holding that if appellant testified he could be impeached with evidence of prior convictions. Because we conclude that the district court did not abuse its discretion in any of its evidentiary rulings, we affirm.

FACTS

Minneapolis police officer Kelly O'Rourke and St. Paul police officers John McManus and Sandra Kennedy were patrolling in an unmarked vehicle as part of the Minnesota Gang Strike Force when McManus saw appellant Jesse P. Novicky sitting on the trunk of a car in the Frogtown area of St. Paul. Novicky, whom McManus knew from prior encounters, was talking to a woman later identified as Patricia Spann. The car Novicky was sitting on had Ohio license plates and did not belong to Novicky. Because McManus knew Novicky, he decided to stop and talk with him about what was going on in the neighborhood.

The officers, although not in uniform, wore clothing that identified them as police officers. As they walked toward Novicky, O'Rourke saw Novicky throw a napkin to the ground. O'Rourke said something like "that was stupid." O'Rourke picked up the

napkin and found what he suspected to be rocks of crack cocaine wrapped inside. McManus then arrested Novicky and patted him down. McManus found no weapons or narcotics in the pat-down search. But McManus noticed that as he was conducting the pat-down search, Novicky was attempting to distance himself from the car that he had been sitting on. McManus found Novicky's behavior unusual. O'Rourke observed Novicky trying to drag McManus away from the car, which made O'Rourke suspicious about the car.

O'Rourke looked into the car's open front-passenger window and saw the silhouette of a firearm wrapped inside a sock on the passenger seat. A black cell phone, attached to a plugged-in charger, was on the seat with the gun. A pink cell phone was found near the driver's seat. Kennedy brought her dog to search the car for narcotics, but found none. Photographs were taken of the gun and cell phone in the car. McManus seized the firearm, sock, black cell phone, cell-phone charger, pink cell phone, and the napkin with the suspected narcotics at the scene, and the car was impounded. Novicky, who is not eligible to possess a firearm, was charged with illegal possession of a firearm and fifth-degree controlled-substance crime.

The firearm and suspected narcotics were logged into evidence in St. Paul. The gun was examined for fingerprints, and the suspected narcotics were tested. The "rocks" were found to contain cocaine. No fingerprints were identifiable on the gun. McManus took the black cell phone and charger to the Minnesota Gang Strike Force drop safe in Shoreview. Law-enforcement officers later moved the drop safe's inventory, including

the black cell phone, to New Brighton. Spann claimed ownership of the pink cell phone and the car, and they were returned to her.

O'Rourke prepared an incident report. The report mentioned that officers found a pink cell phone belonging to Spann and a black cell phone belonging to Novicky during an inventory search of the car but did not state what was done with either cell phone. According to the report, Spann told the officers that Novicky had been a passenger in the car and that while they were driving, Novicky was charging the black cell phone. Spann told the police that the car was hers, she had just cleaned it, and there was no gun in the car before Novicky got into the car. Spann's statement was recorded, but the recording was unintelligible. Aside from the police report, which was admitted at the omnibus hearing, there is no evidence in the record of what Spann told the officers.

McManus obtained the phone number from the black cell phone and faxed an administrative subpoena to the cell-phone provider to access the subscriber records. The cell-phone provider did not return any information. The state did not disclose the location or any other information about the black cell phone to Novicky until the day before trial during a hearing on pretrial motions.

At the pretrial hearing, in response to Novicky's complaint that the state had failed to disclose any information about the black cell phone, the district court asked the state if it planned to offer anything about the cell phone to the jury. The state responded that it did not know anything about the cell phone aside from the fact that it is black, was plugged in when it was found in the car, was next to the gun, and that Spann said it belonged to Novicky. Novicky's counsel expressed surprise that the state had the cell

phone and moved to exclude evidence of the cell phone as a discovery-violation sanction. The state then indicated that it did not intend to introduce the cell phone into evidence, but would be introducing the previously disclosed photographs that showed the cell phone in the car. The state noted that Novicky had notice of the photographs and of Spann's statements about the cell phone.[1] The district court denied Novicky's motion to suppress evidence about the cell phone.

On the first day of trial, McManus contacted the cell-phone provider and was told that it could not find a subpoena for the cell-phone records. The provider told McManus that it could produce the records within four hours at a cost of $50. The state authorized McManus to procure the records, but McManus instead retrieved the cell phone from the drop safe, accessed the voicemail menu on the cell phone, and hit "enter." The screen displayed "calling Loc J." McManus later testified that Novicky's street name is "J Loc," and he has "J Loc" tattooed on his arm.

The state received McManus's report of this discovery by fax at 1:22 p.m. on the afternoon of the first day of trial. On learning of this evidence, Novicky's attorney argued that a search warrant was required to access information in the cell phone, renewed his objections to chain of custody and failure to timely disclose, and again moved to have all references to the cell phone excluded. The district court denied the motion. The cell phone was admitted, and McManus testified about how he discovered a version of Novicky's street name on the cell phone.

[1] For reasons not explained in the record, Spann did not testify at Novicky's trial.

Novicky also made pretrial motions requesting an in camera review of all personnel records pertaining to officers O'Rourke, McManus, and Kennedy. Only records pertaining to O'Rourke existed at the time of the motions, and those records were subpoenaed into district court. Novicky believed that review of complaints against O'Rourke would support his defense theory that O'Rourke planted the drugs and firearm. The district court denied the motion based on Novicky's failure to articulate a specific basis for the review, but also stated that it had looked at the documents in order to determine that in camera review was not necessary. At trial, Novicky renewed his motion for in camera review of O'Rourke's records, and the motion was again denied.

The district court ruled that if Novicky testified at trial he could be impeached with four of his six prior felonies, which included three controlled-substance-crime convictions and a prior ineligible-person-firearm-possession conviction. Novicky did not testify. A jury found Novicky guilty of both charges, and he was sentenced to 60 months in prison for the firearm conviction and a concurrent 23 months for the controlled-substance-crime conviction. This appeal followed.

D E C I S I O N

I. Warrantless search of cell phone[2]

Novicky argues that the warrantless search for information contained in the black cell phone months after it was seized and secured in police custody violated his Fourth

[2] Novicky has not asserted any challenge to the search of the automobile on which he was seated, nor does he challenge seizure of the black cell phone from the automobile. This opinion assumes without discussion that the officers legally searched the automobile.

Amendment rights and that the district court erred by failing to suppress evidence obtained from that search. Because the evidence obtained from the cell phone is the only evidence presented at trial linking Novicky to the cell phone, and the cell phone is the primary evidence linking Novicky to the gun, Novicky argues that the evidence is insufficient to support his conviction of possession of a firearm by an ineligible person, and the conviction should be reversed.

A district court's decision concerning the admission of evidence is reviewed for an abuse of discretion. *State v. Williams*, 586 N.W.2d 123, 126 (Minn. 1998). Absent a clear abuse of that discretion, an evidentiary ruling will not be reversed. *Id.* But a district court's ruling on constitutional challenges to searches and seizures is reviewed de novo. *State v. Wiegand*, 645 N.W.2d 125, 129 (Minn. 2002). This court may independently review the undisputed facts to determine, as a matter of law, whether evidence should have been suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

The Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution prohibit unreasonable searches and seizures. *State v. Burbach*, 706 N.W.2d 484, 487-88 (Minn. 2005). "Warrantless searches 'are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *State v. Hardy*, 577 N.W.2d 212, 216 (Minn. 1998) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). If police conduct a warrantless search, "[t]he state bears the burden of showing that at least one exception applies, or evidence seized without a warrant will be suppressed." *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988).

In this case, the exceptions advanced by the state to justify the warrantless search of the cell phone are searches incident to arrest and the automobile exception. As a preliminary matter, however, the state argues that Novicky lacks standing to challenge the cell-phone search.

a. Standing

Standing to object to a search or seizure "exists only if the person protesting the search has a justifiable or reasonable expectation of privacy in the area searched or the item seized." *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). The state argues that because Novicky did not attempt to conceal the cell phone in the car, programmed the phone to display his street name when voicemail was accessed, and failed to password-protect voicemail access, Novicky did not have a reasonable expectation of privacy in the information on the cell phone and lacks standing to assert a constitutional challenge to the search of the cell phone.

The state relies on a supreme court holding that a defendant who was using another person's cell phone did not have a right to challenge the search and seizure of the provider's records from the cell phone because the defendant was a stranger to the provider. *State v. Gail*, 713 N.W.2d 851, 860 (Minn. 2006). But *Gail* does not reach the question of a person's expectation of privacy in the person's own cell-phone records, and *Gail* does not involve a cell-phone user's privacy interest in information contained in the cell phone itself. *Id.* The state has not cited any authority holding that because a person leaves a cell phone in view of others and fails to password-protect it, the person abandons any expectation of privacy in information contained in the phone. We conclude that the

state's assertion that Novicky owned the cell phone gave Novicky standing to challenge the warrantless search for information contained in the cell phone.

b. Search of the cell phone was not incident to arrest

Novicky argues that the cell-phone search conducted on the first day of trial was too remote in time to be justified as incident to his arrest. Under the search-incident-to-arrest exception, police may conduct a warrantless search of an arrestee's person and the area within the person's immediate control when the search is incident to a lawful arrest. *Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040 (1969); *United States v. Robinson*, 414 U.S. 218, 236, 94 S. Ct. 467, 477 (1973) (upholding search of closed cigarette package on arrestee's person). The rationale behind the search-incident-to-arrest exception is to ensure officer safety by removing weapons and to prevent the destruction or concealment of evidence. *Chimel*, 395 U.S. at 763, 89 S. Ct. at 2040.

The police may, incident to lawful arrest of an occupant of an automobile, also examine the contents of any containers found within the passenger compartment of the automobile. *New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864 (1981). Warrantless examination of containers in an automobile is permissible even when an officer does not make contact with the arrestee until after the arrestee has left the vehicle. *Thornton v. United States*, 541 U.S. 615, 617-18, 124 S. Ct. 2127, 2129 (2004) (involving arrest of person whose driving aroused officers' suspicions but who parked and left his car before the officer stopped him); *see also State v. White*, 489 N.W.2d 792, 794-96 (Minn. 1992) (holding that search of a car for a driver's identification was incident to arrest even though the search occurred after the driver had been placed in the squad car).

But warrantless searches of property "seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest, or no exigency exists." *United States v. Chadwick*, 433 U.S. 1, 15, 97 S. Ct. 2476, 2485 (1977) (quotation omitted), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982 (1991). Courts have upheld warrantless searches of cell phones and other electronic devices found on or near an arrestee's person when exigent circumstances justified the search and/or the search was contemporaneous with, or very soon after, the arrest. *See, e.g.*, *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir.), *cert. denied*, *Finley v. United States*, 127 S. Ct. 2065 (2007) (holding that searches of a cell phone's contents conducted before completion of the administrative processes incident to the arrest was incident to arrest); *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1277 (D. Kan. 2007) (stating that the propriety of a search of a cell phone incident to arrest depends on the lawfulness of the arrest and the contemporaneity of the search); *United States v. Cote*, No. 03CR271, 2005 WL 1323343, at *6 (N.D. Ill. May 26, 2005) (upholding seizure of defendant's cell phone incident to arrest and immediate accessing of the phone's call log, phone book, and wireless web box), *aff'd*, 504 F.3d 682 (7th Cir. 2007).

Novicky urges this court to consider the reasoning in an unpublished opinion from the northern district of California, *United States v. Park*, No. CR05375SI, 2007 WL 1521573, at *5-*6 (N.D. Cal. May 23, 2007). In *Park*, the federal district court suppressed evidence obtained from the warrantless search of a cell phone's contents that took place approximately an hour and a half after the owner's arrest, concluding that the

search was not incident to arrest and not supported by any exigencies. *Id.* at *9. The court additionally expressed concern that because cell phones have the capacity to store large amounts of private information, cell-phone searches may be substantially more intrusive than searches of other physical property. *Id.* at *8. The court noted that such a search goes "far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence." *Id.* (citing *Chimel*, 395 U.S. at 752, 89 S. Ct. at 2034).

We agree that, consistent with the reasoning in *Park*, the search of Novicky's cell phone was not incident to arrest due to remoteness in time from the arrest and the lack of exigencies. But because Novicky has not made any claim that the limited search for ownership identity in this case implicated any amount of private information such that it was more intrusive than a similar search of any other physical property, we do not reach that concern expressed in *Park*. No exigencies justifying search incident to arrest existed at the time McManus accessed the voicemail feature of the cell phone. To the extent that the district court held that the information obtained from the cell phone was legally obtained in a search incident to arrest, the district court erred. Nonetheless, as outlined below, we conclude that the search was valid under the automobile exception to the warrant requirement.

c. Search of the cell phone was valid under the automobile exception

The state argues that the automobile exception justified the cell-phone search in this case. We agree. In 1925, the United States Supreme Court held that a warrantless

search of an automobile by police officers who had probable cause to believe that the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132, 156, 45 S. Ct. 280, 286 (1925). *Carroll* did not define the scope of such a search, but *United States v. Ross*, 456 U.S. 798, 824, 102 S. Ct. 2157, 2172 (1982), squarely presented the issue of the scope of the automobile exception to the warrant requirement. In *Ross*, the United States Supreme Court held that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." 456 U.S. at 825, 102 S. Ct. at 2173. The Supreme Court further concluded that:

> The scope of a warrantless search of an automobile [] is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.

Ross, 456 U.S. at 824, 102 S. Ct. at 2172.

Subsequently, in *Acevedo*, 500 U.S. 565, 580, 111 S. Ct. 1982, 1991 (1991), the Supreme Court eliminated the distinction, developed in caselaw, between the scope of a search based on probable cause to believe that an automobile contained contraband and probable cause to believe that a particular container observed to have been placed in an automobile contained contraband. *Acevedo* answered the question deferred in *Ross*: "whether the Fourth Amendment requires the police to obtain a warrant to open [a container] in a movable vehicle simply because they lack probable cause to search the entire car," concluding that it does not. 500 U.S. at 573, 111 S. Ct. at 1988. The

Minnesota Supreme Court applied *Acevedo* in *State v. Search*, 472 N.W.2d 850, 853 (Minn. 1991), reversing the district court's suppression of evidence obtained from the search of a suspected bag of stolen property located in an automobile.

The officers searched the automobile in this case after seeing, through an open window, a gun on the passenger seat. McManus later searched the cell phone for confirmation of Novicky's ownership in order to prove his constructive possession of the gun found next to the cell phone. We conclude that the police had probable cause to believe that the cell phone contained evidence of a crime and therefore could be reasonably searched as a container in an automobile under the automobile exception to the warrant requirement.

Unlike a search incident to arrest, a search under the automobile exception is not dependent on exigent circumstances to justify the search; therefore, it need not occur contemporaneously with or close to the time of seizure of the automobile or container. *See Johns*, 469 U.S. at 484-85, 105 S. Ct. at 885-86 (rejecting the argument that *Ross* suggested any time limitation on an automobile-exception search). "[W]here police officers are entitled to seize the container and continue to have probable cause to believe that it contains [evidence of a crime], . . . delay in the execution of the warrantless search is [not] necessarily unreasonable." *Id.* at 487, 105 S. Ct. at 886-87. We therefore agree with the state that, in this case, the long delay between seizure of the black cell phone and the search is immaterial.

We further note, however, that as cautioned by the court in *Johns*:

> We do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search. Nor do we foreclose the possibility that the owner of a vehicle or its contents might attempt to prove that delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest.

Id.,105 S. Ct. at 887 (citations omitted). But in this case, Novicky has not proved that the delay adversely affected a privacy or possessory interest in the cell phone. Because the search of the cell phone for ownership identity was reasonable under the automobile exception, the district court did not err in denying Novicky's motion to suppress evidence of the cell phone and its contents.

II. Chain of custody

Novicky objected to introduction of the cell phone based on a lack of evidence of the chain of custody. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). When evidence is not unique or readily identifiable, it must be authenticated by means of evidence of the chain of custody. *State v. Hager*, 325 N.W.2d 43, 44 (Minn. 1982). To establish a proper chain of custody, the proponent must offer testimony of continuous possession by each person having possession, with testimony by each that the object remained in substantially the same condition while in his or her possession. *Id.* The state need not eliminate all possibility of tampering or substitution, but must only show that it is

reasonably probable that the evidence has not suffered tampering or substitution. *State v. Bailey*, 677 N.W.2d 380, 394 (Minn. 2004).

McManus testified that he delivered the cell phone to the Gang Strike Force drop safe, where it remained until he retrieved it for trial. Although the location of the drop safe was moved, McManus testified that the items in the drop safe were always in the control and custody of law-enforcement officers who moved the items. McManus testified that he accessed the cell phone once to get the number for the administrative subpoena and once to look at the voicemail message. McManus and O'Rourke positively identified the cell phone as the one seized from the car Novicky was sitting on at the time of his arrest. Kennedy testified that the cell phone was the same one she saw in the car. Photographs of the cell phone taken at the scene were in evidence. Based on this record, we conclude that the cell phone was adequately authenticated, and the district court did not err in admitting the cell phone.

III. Sufficiency of evidence

In order to convict Novicky of illegal possession of a firearm, the state had to prove that he had been previously convicted of a crime of violence and that he possessed a firearm. Minn. Stat. § 624.713, subd. 1(b) (2006). A person may be convicted under section 624.713, subdivision 1(b), if he actually or constructively possessed a firearm. *State v. Loyd*, 321 N.W.2d 901, 902 (Minn. 1982). "[T]he constructive possession doctrine permits a conviction where the state cannot prove actual possession, but the inference is strong that the defendant physically possessed the item at one time and did not abandon his possessory interest in it." *State v. Smith*, 619 N.W.2d 766, 770 (Minn.

App. 2000), *review denied* (Minn. Jan. 16, 2001); *see also State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001); *State v. Willis*, 320 N.W.2d 726, 728-29 (Minn. 1982) (stating that constructive possession is established when defendant "consciously exercised dominion and control over the firearm"). Constructive possession need not be exclusive and may be shared. *Id.* "Proximity is an important consideration in assessing constructive possession." *Id.* And "a defendant may constructively possess a firearm if he placed the firearm where it was discovered." *Id.*

Novicky stipulated that his prior convictions made him ineligible to possess a firearm. Because Novicky did not have actual possession of the gun when he was arrested, the state had to prove beyond a reasonable doubt that Novicky constructively possessed the gun. Because the gun was not found in a place that was under Novicky's exclusive control and inaccessible to others, the state had to prove there was a strong probability, inferable from the evidence, that Novicky was consciously exercising dominion and control over the gun at the time it was found.

The state's proof of constructive possession consists of evidence that: (1) Novicky was sitting on the trunk of the car in which the gun and cell phone were found; (2) the cell phone found with the gun belonged to Novicky; and (3) as McManus attempted to search Novicky, Novicky tried to distance himself from the car. We conclude that this evidence, though minimal, is sufficient to support the inference that Novicky possessed the gun and had not abandoned his possessory interest in it at the time it was found.

IV. Denial of in camera review of O'Rourke's personnel records

Novicky asserts that he was denied his due-process right to present a complete defense because the district court denied his request for in camera review and potential discovery of documents in O'Rourke's personnel file to support his defense theory that O'Rourke planted the evidence. A district court's denial of a discovery request is reviewed for a clear abuse of discretion. *State v. Renneke*, 563 N.W.2d 335, 337 (Minn. App. 1997). A district court must conduct an in camera review of information sought by a criminal defendant when the defendant makes a "plausible showing" that the information would be "both material and favorable to his defense." *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (quotation omitted).

From a website, Novicky obtained information about 13 complaints against O'Rourke recorded by the Citizen Review Authority (CRA). One complaint had been sustained. Novicky also learned that of six complaints filed against O'Rourke by Internal Affairs (IA), two had been sustained, with one resulting in discipline. Based solely on this information, Novicky sought in camera review of O'Rourke's personnel information, including the CRA and IA complaints, and disclosure of any evidence from the review that would support Novicky's assertion that O'Rourke planted the drugs and/or the gun. Novicky subpoenaed the relevant documents, and the documents were delivered to the district court.

O'Rourke's personnel documents are protected by the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.90 (2006). Under the Act, information other than the existence or status of a complaint or disciplinary action against a police officer is

considered nonpublic information until a final disposition sustaining the complaint or action. Minn. Stat. §§ 13.03, .43, subd. 2(a). When a defendant requests disclosure of confidential records, Minn. Stat. § 13.03, subd. 6, requires a two-step process: (1) the district court must determine whether the records are discoverable under applicable rules, including the rules of evidence and criminal procedure and (2) if the records are discoverable under the rules, the district court must conduct an in camera review to weigh the interests involved. *Renneke*, 563 N.W.2d at 338. District-court determinations following in camera review are subject to judicial review. *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987).

The district court stated on the record that it had reviewed the documents, but nonetheless denied Novicky's request for in camera review based on Novicky's failure to articulate why the confidential records were discoverable. The district court held that the documents were not discoverable and could not be used to establish prior acts of conduct and subsequent acts in conformity therewith. The district court also declined to make the documents part of the record.

Novicky asserts that he articulated a sufficient basis for the district court to conduct a complete in camera review of all of the documents and argues that the documents may have been admissible as "reverse-*Spreigl*" evidence, tending to show that a third person committed the crimes charged against him. *See State v. Valentine*, 630 N.W.2d 429, 433 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Because the record reflects that the district court reviewed the documents, we find no merit in Novicky's argument and conclude that the district court did not abuse its discretion by

failing to further review the confidential information contained in the documents or make them part of the record.

V. Prior felony convictions as impeachment evidence

Novicky argues that the district court erred by ruling that the state could impeach him with evidence of prior felony convictions. A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Admission of a felony conviction for impeachment purposes is permitted if ten or fewer years have elapsed since the later of the dates of conviction or release from confinement for that conviction and if the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a), (b). To make this determination, the district court must balance five factors: "(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the prior crime with the charged crime, (4) the importance of the defendant's testimony, and (5) the centrality of the credibility issue." *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978).

At the conclusion of the state's case, the district court considered the state's request to impeach Novicky with his prior felony convictions if he chose to testify. Novicky had previously been convicted of: (1) fifth-degree possession of cocaine in October 1995; (2) simple robbery in September 1995; (3) fifth-degree possession of cocaine in October 1996; (4) fifth-degree possession of cocaine in July 1998; (5) fifth-

degree possession of cocaine in October 1998; and (6) possession of a firearm by an ineligible person in August 2002. The district court engaged in the five-part *Jones* analysis on the record. Based on this analysis, the district court held that the 1995 convictions were too remote in time and could not be used for impeachment, but that the remaining convictions could be used for impeachment despite their similarity to the crimes for which Novicky was being tried.

Novicky contends that in conducting its analysis under the *Jones* factors, the district court abused its discretion by overemphasizing the impeachment value of the evidence without giving proper weight to the importance of Novicky's testimony in this case. Novicky asserts that the district court should not have allowed his three prior controlled-substance convictions as impeachment evidence because they were not crimes of dishonesty and do not relate to credibility. Novicky relies on *State v. Norregaard*, in which we stated that:

> [U]sing prior drug convictions . . . to impeach an accused is not favored. This type of conviction does not directly relate to an accused's truthfulness and honesty. They contain the potential for unfairness inherent in all evidence of prior convictions used for impeachment, namely the real and substantial risk that the jury will view a defendant with prior convictions a fit candidate for punishment for the pending offense regardless of the weight of the substantive evidence.

380 N.W.2d 549, 554 (Minn. App.), *aff'd as modified*, 384 N.W.2d 449 (Minn. 1986). Novicky also argues that the prior firearm conviction was not a crime of dishonesty and did not relate to credibility, and would therefore have little impeachment value. Novicky

cites the Advisory Committee comments to the rules of evidence to bolster his point. The comments provide that:

> In cases where a conviction is not probative of truthfulness the admission of such evidence theoretically on the issue of credibility breeds prejudice. The potential for prejudice is greater when the accused in a criminal case is impeached by past crimes that only indirectly speak to character for truthfulness or untruthfulness.

Minn. R. Evid. 609(a), comm. cmt. (1989).

But "the fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). And as the district court stated in this case, "impeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted). The supreme court has applied the "whole person" rationale as recently as 2006. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (assigning impeachment value to prior convictions under the "whole person" analysis). Therefore, although it is not determinative of the *Jones* analysis, the "whole person" analysis remains a valid consideration weighing in favor of admitting Novicky's prior convictions. Additionally, the record demonstrates that the district court appropriately analyzed the other *Jones* factors, as outlined below, and focused equally on the centrality of Novicky's credibility in this case:

a. Date of conviction and subsequent history

Novicky does not dispute that the district court properly determined that the 1995 convictions were inadmissible and does not argue that the remaining four convictions were too remote in time to be admissible.

b. Similarity of crimes

Novicky argues that his prior controlled-substance and firearm convictions should not have been allowed as impeachment evidence because, due to the similarity between the prior offenses and the charged offenses, the prior-conviction evidence was inherently prejudicial. Novicky contends that any purported probative value of the prior-conviction evidence was far outweighed by its prejudicial effect. The district court found that this factor weighed against admitting the prior-conviction evidence but did not preclude admission.

c. Importance of appellant's testimony

Courts must also "consider whether the admission of the evidence will cause the defendant not to testify." *Gassler*, 505 N.W.2d at 66. If the ruling on the admissibility of prior convictions prevents a jury from hearing a defendant's version of events, this factor weighs in favor of excluding the evidence. *Id.* at 67. In this case, the district court's decision to permit introduction of Novicky's prior fifth-degree possession and firearm convictions discouraged Novicky from testifying, and therefore this factor would seem to weigh in favor of excluding his prior convictions. But just as it was important for Novicky to testify, it was important for the jury to be able to fully evaluate his credibility. As such, this factor must be considered in conjunction with the final *Jones* factor.

d. The centrality of appellant's credibility

"If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Swanson*, 707 N.W.2d at 655. Novicky acknowledges that he would have testified that he did not possess the crack cocaine or firearm. Novicky's credibility would have been a central consideration; therefore, the district court properly weighed the fourth and fifth *Jones* factors in favor of admitting the prior convictions.

We conclude that the district court did not abuse its discretion in holding that four of Novicky's six felony convictions could be used to impeach him if he testified. Because the district court did not abuse its discretion, we do not reach Novicky's argument that the ruling denied him his constitutional right to testify. *See Gassler*, 505 N.W.2d at 68 (stating that "it is only when a trial court has abused its discretion under Rule 609(a)(2) that a defendant's right to testify may be infringed by the threat of impeachment evidence"). In this case, the district court did not prevent Novicky from testifying; Novicky decided not to testify to prevent the jury from hearing about his prior convictions.

Affirmed.