**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1116**

State of Minnesota,
Respondent,

vs.

Mitchell Avila,
Appellant.

**Filed August 19, 2008**
**Affirmed**
**Hudson, Judge**

Polk County District Court
File No. K5-06-0054

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, 816 Marin Avenue, Suite 125, Crookston, Minnesota 56716 (for respondent)

Mary M. McMahon, McMahon & Associates Criminal Defense, Ltd., 670 Commerce Drive, Suite 110, Woodbury, Minnesota 55125 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

**HUDSON,** Judge

After waiving his right to a jury trial and submitting the matter to the district court for a *Lothenbach* proceeding, appellant Mitchell Avila was convicted under an amended

complaint of first- and third-degree controlled substance crime for possession and sale of methamphetamine and failure to affix tax stamp. On appeal, appellant challenges the district court's denial of his pretrial motion to dismiss the original complaint filed against him, which charged only possession, for lack of probable cause. Because probable cause can be supported by reliable hearsay and by evidence in a form that is not necessarily admissible at trial, we affirm.

## FACTS

Appellant was charged with first-degree controlled substance crime (possession) and failure to affix tax stamp, after the vehicle in which he was riding was stopped and police found a large amount of methamphetamine on one of the other passengers, Veronica Elana Mata-Woodruff. Appellant moved to suppress the evidence, arguing that the police impermissibly expanded the scope of the stop in violation of the Fourth Amendment and moved to dismiss the complaint for lack of probable cause.

A joint omnibus hearing was held to consider the issues raised by appellant and two other occupants of the vehicle: the driver and Mata-Woodruff. A substantial number of documents were received into evidence and considered at the omnibus hearing, including evidence of appellant's prior convictions, and evidence of convictions and investigations of others. Appellant objected to admission of some of the documents on the basis of "relevance" and to the admission of at least one document as based on hearsay. But he did not object to the admission of transcripts of statements made to investigators by Mata-Woodruff and another witness, B.L. In her statement, Mata-Woodruff stated that appellant was the front seat passenger in the vehicle when it was

stopped and that just prior to the stop someone in the front seat tossed the bag of methamphetamine into the back seat and told her to take it. In his statement, B.L. claimed that earlier on the day of the stop, he had seen appellant at Mata-Woodruff's home and that appellant had one-quarter pound of methamphetamine in his possession.

The district court denied appellant's suppression motion, concluding that the stop and subsequent search and seizures were permissible under the Fourth Amendment. The district court also denied appellant's motion to dismiss for lack of probable cause, concluding that:

> The State has enough evidence to present a question to the jury regarding [appellant's] alleged illegal possession of methamphetamine. The facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that [appellant] is guilty of a crime. [] Mata-Woodruff has stated that someone in the front seat of the Jeep threw the bag of methamphetamine during the traffic stop. She has also alleged that two voices, one in Spanish and one in English, told her to take the bag of methamphetamine. [Appellant] was sitting in the front seat of the vehicle at the time of the traffic stop; [appellant] speaks English, while . . ., the driver of the vehicle during this traffic stop, speaks only Spanish. Additionally, the State has a witness, [B.L.], who claims [appellant] possessed about one-quarter pound of methamphetamine when he was present at Mata-Woodruff's home on January 15, 2006. It is not inherently incredible that [appellant] possessed methamphetamine in light of the state's evidence against [appellant].
>
> The state has presented enough evidence to support a finding of probable cause to charge [appellant] with Controlled Substance Crime in the First Degree and Failure to Affix Tax Stamp.

Within days of the district court's order, the state filed an amended complaint adding one count of first-degree controlled substance crime for appellant's alleged sale of

methamphetamine to Mata-Woodruff and two counts of third-degree controlled substance crime for appellant's alleged sale of methamphetamine to B.L.

Appellant waived his right to a jury trial and submitted the matter to the district court under *Lothenbach*, based on the record generated at the omnibus hearing and on additional materials that were to be submitted by the state. Based upon that record, the district court made detailed findings and concluded that the evidence was sufficient to prove beyond a reasonable doubt that appellant was guilty on all counts.

On appeal, the sole issue raised by appellant involves the admissibility of the evidence considered at the omnibus hearing; he does not challenge the district court's denial of his suppression motion or the district court's determination that the stop and subsequent search were reasonable under the Fourth Amendment.[1]

## D E C I S I O N

### I

The state initially raises a number of waiver-type arguments based on appellant's failure to raise specific objections to most of the evidence presented at the omnibus hearing. The state asserts that the arguments raised by appellant were not ruled on by the district court and are being raised for the first time on appeal.

Appellant waived his right to a jury trial and stipulated to the record generated at the omnibus hearing. In *State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980), the

[1] In a recent unpublished opinion, this court rejected Mata-Woodruff's challenge to the legality of the stop as it applied to her but granted her a new trial based on a violation of the Confrontation Clause. *State v. Mata-Woodruff*, No. A07-0117 (Minn. App. June 17, 2008).

supreme court concluded that a defendant does not waive the right to appeal pretrial issues despite stipulating to facts. This court has held that a defendant cannot challenge the sufficiency of the evidence on appeal from a conviction entered following a *Lothenbach* proceeding. *State v. Riley*, 667 N.W.2d 153, 157–58 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003). Because *Lothenbach* is intended to preserve a defendant's right to appeal pretrial issues, we conclude that appellant's challenge to the admissibility of evidence to support the district court's pretrial probable cause determination is reviewable on appeal.[2]

**II**

The Fourth Amendment protects against "unfounded invasions of liberty and privacy" and requires that a complaint be supported by probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 112, 95 S. Ct. 854, 862 (1975). The purpose of a probable cause hearing is to protect a defendant who has been "unjustly or improperly charged from being compelled to stand trial." *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (quoting *State v. Florence*, 306 Minn. 442, 454, 239 N.W.2d 892, 900 (1976)). "On appeal, we will accept the district court's findings of fact unless clearly erroneous." *Id.*

[2] Citing cases from other jurisdictions, the state also argues that the issues raised by appellant are moot given the district court's subsequent finding of guilt. *See, e.g.*, *In re Doe*, 73 P.3d 29, 32 (Haw. 2003). But the Minnesota Supreme Court recently reviewed a challenge to the admissibility of evidence presented in a grand jury proceeding, even though the defendant had been found guilty at trial. *State v. Goelz*, 743 N.W.2d 249, 259 (Minn. 2007). Thus, the fact that appellant has been found guilty following a *Lothenbach* proceeding may not render moot his current challenge to the admissibility of the evidence presented at the omnibus hearing.

In Minnesota, a motion to dismiss a complaint for lack of probable cause is considered at a pretrial omnibus hearing:

> The court shall hear and determine all motions made by the defendant or prosecution, including a motion that there is an insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint, and receive such evidence as may be offered in support or opposition. Each party may cross-examine any witnesses produced by the other. A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part. Evidence considered on the issue of probable cause shall be subject to the requirements of Rule 18.06, subd. 1.

Minn. R. Crim. P. 11.03. Rule 18.06 describes the kind and character of evidence admissible at grand jury proceedings and allows consideration of evidence that would be admissible at trial, with six exceptions: (1) hearsay evidence offered only to lay the foundation for the admissibility of otherwise admissible evidence; (2) a report prepared by an expert; (3) unauthenticated copies of official records; (4) written, sworn statements to prove title or ownership; (5) written, sworn statements of people who are unable to testify but will be available for trial; and (6) oral or written summaries made by investigating officers provided the documents would be admissible at trial. Minn. R. Crim. P. 18.06, subd. 1. "In determining whether probable cause exists, the district court may consider evidence in a form that is not necessarily admissible at trial." *State v. Ortiz*, 626 N.W.2d 445, 451 n.1 (Minn. App. 2001) (citing Minn. R. Crim. P. 11.03), *review denied* (Minn. June 27, 2001).

Appellant complains that one of the investigating officers was called at the hearing merely to introduce a number of documents involving other people who were not

involved in appellant's case and that many of the incidents referred to by the officer occurred after appellant was arrested and incarcerated. Appellant also complains that the transcript of Mata-Woodruff's statement fails to support the district court's finding that one person spoke English and the other spoke Spanish. Appellant asserts that admission of "all of this irrelevant material" was prejudicial to his omnibus hearing specifically because reliance on the statements made about one English speaker and one Spanish speaker suggest that appellant possessed and abandoned his interest in the contraband.

But probable cause determinations can be made based on reliable hearsay. Minn. R. Crim. P. 11.03. A probable cause determination can be made based solely on sworn allegations in the complaint, on the testimony of the investigating officers, and on the representations of the prosecutor, who is an officer of the court. *State v. Rud*, 359 N.W.2d 573, 579 (Minn. 1984). Even if some of the evidence was not properly admitted at appellant's omnibus hearing, the district court's finding that probable cause existed to charge appellant with possession of methamphetamine based solely on the detailed allegations set out in the initial complaint and on the testimony of the investigating officers was not clearly erroneous. The state presented sufficient evidence to provide probable cause to believe that appellant possessed methamphetamine, given the fact that he was in the front seat of the vehicle when it was stopped, that Mata-Woodruff told officers that someone in the front seat threw the bag of methamphetamine into the back seat and told her to take it, and that B.L. told police that he had seen appellant earlier that day with one-quarter pound of methamphetamine. Therefore, we affirm the district court's denial of appellant's motion to dismiss for lack of probable cause.

**Affirmed.**