STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0003

State of Minnesota,
Respondent,

vs.

Kareem Antoine McCray,
Appellant.

Filed March 3, 2009
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-07-0006779

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stauber, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

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

PETERSON, Judge

On appeal from a conviction of first-degree controlled-substance crime following a stipulated-facts trial, appellant argues that (1) the search of his home was unreasonable because he had a legitimate expectation of privacy in the stairwell leading to his duplex unit and the warrant did not authorize the search of that area; and (2) his conviction must be reversed because the evidence does not lead inescapably to the conclusion that he is guilty, or, alternatively, the matter should be remanded for additional findings. We affirm.

FACTS

A warrant was issued "to search the hereinafter described premises . . . 403 Queen Avenue N Apt#2 upper unit, and any associated storage lockers." This location was the upstairs unit of a duplex where appellant Kareem Antoine McCray was living with his wife and children. The front door of the duplex opens into an entryway with an inside entry door to the first-floor unit and a stairwell leading up to the second-floor unit. Officers executing the search warrant discovered 32 grams of crack cocaine in the stairwell leading up to the second-floor unit. In a garbage can on the stairwell landing, officers found a .44-caliber handgun with appellant's fingerprint on it. Ammunition for the gun was also found in the stairwell.

Police interviewed the first-floor tenant, who stated that he did not use the front door or entryway to access his unit. The tenant's statement to police indicated that he had previously used the entryway and front door to get to his mailbox, which was located

on the outside of the duplex, but could no longer do so because the door had been blocked from the entryway side. When the search warrant was executed, there was a snow blower in the entryway that had been placed against the door to the first-floor unit, preventing access from the first-floor unit into the entryway. The first-floor tenant had put blankets against the entryway door from the inside of his unit to block noise coming from the entryway. The tenant stated that all of the items in the entryway belonged to the people in the second-floor unit.

Appellant was charged with one count of first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 2(1) (2006). Appellant moved to suppress the cocaine found in the stairwell, arguing that the search warrant did not extend to the stairwell area where the cocaine was found. At the hearing on appellant's motion, the district court orally denied the motion on the ground that "there is no expectation of privacy in a common stairwell." The parties submitted the case to the district court for decision on stipulated facts, and the district court found appellant guilty as charged. The district court sentenced appellant to an executed term of 71 months in prison. This appeal followed.

D E C I S I O N

I.

In reviewing pretrial orders on motions to suppress evidence, this court independently reviews the facts and determines, as a matter of law, whether the district court erred in suppressing—or failing to suppress—the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We accept the district court's factual findings unless they

are clearly erroneous, but the district court's legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

The district court denied appellant's motion to suppress based on the conclusion that appellant had no expectation of privacy in the common stairwell. But the state, alternatively, argues that even if appellant had a reasonable expectation of privacy in the stairwell, the stairwell was part of the premises described in the search warrant and, therefore, within the search warrant's scope.

Citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), appellant argues that the state waived the issue of whether the stairwell was part of the premises by failing to raise it before the district court. Under *Thiele*, a party seeking reversal of a district court's decision may not "obtain review by raising the same general issue litigated below but under a different theory." 425 N.W.2d at 582. The state, however, is seeking affirmance, not reversal, of the district court's decision. Even if the rule applies, "[a]n exception arises if the issue is dispositive of the entire controversy, and there is no advantage or disadvantage to the parties in not having a prior decision by the [district] court." *State v. Coleman*, 661 N.W.2d 296, 299 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Aug. 5, 2003).

The Fourth Amendment provides that a search warrant shall not issue unless it "particularly describ[es] the place to be searched." U.S. Const. amend. IV; *accord* Minn. Const. art. 1, § 10; Minn. Stat. § 626.08 (2006). "A search pursuant to a warrant may not exceed the scope of that warrant." *State v. Soua Thao Yang*, 352 N.W.2d 127, 129 (Minn. App. 1984) (citing *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961)). The

purpose of the particularity requirement is to prevent general exploratory searches and to "minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate." 2 Wayne R. LaFave, *Search and Seizure* § 4.5, at 562 (4th ed. 2004).

"The test for determining whether a search has exceeded the scope of the warrant is one of reasonableness." *Soua Thao Yang*, 352 N.W.2d at 129 (citing *Illinois v. Gates*, 462 U.S. 213, 235-36, 103 S. Ct. 2317, 2331 (1983)). In determining whether the conduct of the officers executing a search pursuant to a warrant was reasonable, this court must look at the totality of the circumstances. *State v. Thisius*, 281 N.W.2d 645, 645-46 (Minn. 1978).

The search warrant authorized officers "to search the hereinafter described premises, vehicles, and person(s): 403 Queen Avenue N Apt#2 upper unit, and any associated storage lockers." Appellant correctly argues that the meaning of the term premises depends on the context in which it is used. *See Larson v. City of Minneapolis*, 262 Minn. 142, 146, 114 N.W.2d 68, 71 (1962); *Black's Law Dictionary* (6th ed. 1990) (stating that meaning of premises is determined by context and the circumstances in which it is used). But that does not end our inquiry. "The test for determining the sufficiency of the description of the premises is whether the description is sufficient so that the executing officer can locate and identify the premises with reasonable effort with no reasonable probability that other premises might be mistakenly searched." *In re Welfare of T.L.K.*, 487 N.W.2d 911, 914 (Minn. App. 1992) (quotation omitted).

Relying on the following facts in *State v. Bates*, this court rejected the argument that a search warrant lacked sufficient particularity:

> (a) the warrant described the premises as "a duplex located at 2806 Pleasant Avenue, S., on the lower level," and continued, "if it is found that suspect lives in the upper level instead of the lower, a search of that be made instead;" (b) Bates told the booking officers that he was living in the lower level of the duplex for only one week; (c) when the officers executed the warrant, Bates' roommate and landlord said that Bates occupied the first-floor bedroom and basement room; (d) the officers easily located Bates' room; (e) the warrant listed the correct address; and (f) the description did not confuse the officers.

507 N.W.2d 847, 853 (Minn. App. 1993), *review denied* (Minn. Dec. 27, 1993).

Here, upon executing the search warrant, officers saw personal possessions in the entryway and stairwell and a snow blower in the entryway that had been placed so that it prevented access from the first-floor unit into the entryway. A reasonable inference from these observations is that the tenants of the second-floor unit had exclusive use of the entryway and stairwell. Under these circumstances, the officers acted reasonably when they included the stairwell in the search of the premises of the second-floor unit. *Cf. State v. Lorenz*, 368 N.W.2d 284, 286 (Minn. 1985) (discussing general rule that search warrant for multi-unit building is invalid unless it describes particular unit to be searched and exception that applies "when police, acting reasonably, do not learn until executing the warrant that the building is a multiple occupancy building").

II.

Appellant argues that the evidence was insufficient to prove constructive possession of the cocaine.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

"[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). But circumstantial evidence "is entitled to as much weight as other kinds of evidence." *Webb*, 440 N.W.2d at 430. "The circumstantial evidence must form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the [defendant] as to exclude, beyond a reasonable doubt, any reasonable inference other than . . . guilt." *Id.* (quotation omitted).

A person is guilty of first-degree controlled-substance crime if he unlawfully possesses one or more mixtures of a total weight of 25 grams or more containing cocaine. Minn. Stat. § 152.021, subd. 2(1) (2006).

"A person is guilty of possession of a controlled substance if [he or] she knew the nature of the substance and either physically or constructively possessed it." *State v. Denison*, 607 N.W.2d 796, 799 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). When the controlled substance is not in a place under defendant's exclusive control to

which other people did not normally have access, constructive possession requires a showing that "there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it." *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). "[C]onstructive possession need not be exclusive but may be shared." *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000) (citing *State v. LaBarre*, 292 Minn. 228, 237, 195 N.W.2d 435, 441 (1972)), *review denied* (Minn. Jan. 16, 2001). This court looks to the totality of the circumstances when determining whether constructive possession has been proved. *Denison*, 607 N.W.2d at 800.

The evidence, including the first-floor tenant's statement to police and the snow blower blocking that tenant's access to the entryway from his apartment, supports the district court's finding that there is a strong probability that appellant exercised dominion and control over the stairwell leading up to his residence where officers located the cocaine and firearm. Although appellant's wife presumably also used the stairwell, constructive possession can be shared. The evidence is sufficient to prove constructive possession. *See State v. Wiley*, 295 Minn. 411, 412 n.2, 422, 205 N.W.2d 667, 670 n.2, 675-76 (1973) (affirming finding of constructive possession in house shared with girlfriend who pleaded guilty to possession of controlled substance); *Denison*, 607 N.W.2d at 799-800 (affirming finding of constructive possession of a controlled substance found in close proximity to appellant's personal effects and in areas of residence over which she likely exercised at least joint dominion and control); *State v. Lozar*, 458 N.W.2d 434, 441 (Minn. App. 1990) (holding that evidence was sufficient to

support finding that appellant constructively possessed marijuana where large quantities of it were found in common areas of home that appellant jointly possessed with her husband), *review denied* (Minn. Sept. 28, 1990).

Alternatively, appellant argues that the case should be remanded for further findings because the district court misapplied the constructive-possession doctrine. Appellant argues that the district court found appellant guilty based on a "strong probability" that appellant exercised dominion and control over the stairwell without finding that the state proved beyond a reasonable doubt that appellant exercised dominion and control over the cocaine. The district court correctly applied the constructive-possession definition set forth in *Florine*. A remand is not required by the district court's failure to specifically find that the state proved constructive possession beyond a reasonable doubt. *See* Minn. R. Crim. P. 26.01, subd. 2 ("If the court omits a finding on any issue of fact essential to sustain the general finding, it shall be deemed to have made a finding consistent with the general finding.").

Affirmed.