**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1705**

State of Minnesota,
Respondent,

vs.

Carl Lee Tanner,
Appellant.

**Filed October 13, 2009**
**Affirmed in part and remanded**
**Larkin, Judge**
**Concurring in part, dissenting in part, Johnson, Judge**

Clay County District Court
File No. CR-07-2223

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Brian Melton, Clay County Attorney, 807 North 11th Street, P.O. Box 280, Moorhead, MN 56561 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, Megan Gallagher (certified student attorney) 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

**LARKIN**, Judge

Appellant challenges his conviction of first-degree sale of a controlled substance, which resulted from a proceeding under Minn. R. Crim. P. 26.01, subd. 4. Appellant argues that the district court erred by determining that there was probable cause for his arrest and by denying appellant's motion to suppress evidence obtained during a search incident to his arrest. Appellant also argues that the district court erred by failing to make findings of fact as to each element of the conviction offense. We affirm the district court's conclusions that appellant's arrest was supported by probable cause and that the search incident to his arrest was legal. But because the district court failed to make the specific findings required under rule 26.01, subd. 4, we remand.

## FACTS

On October 15, 2007, Detective Schmidt of the West Fargo Police Department received a tip from a confidential informant (CI) that two individuals were transporting controlled substances through the Fargo-Moorhead area. The CI reported that the night before, he had seen two individuals with a large amount of methamphetamine and a small amount of heroin and that the individuals were en route to Minot from Denver with methamphetamine in their possession. The CI also indicated that the individuals were currently headed to the Village Inn restaurant in Moorhead.

Detective Schmidt contacted Detective Larson of the Moorhead Police Department, who went to the Village Inn along with Detective Stuvland. The officers arrived at the Village Inn and observed two individuals, later identified as appellant Carl

Lee Tanner and Jerry Benjamin Carroll, getting out of a car with North Dakota license plates. The individuals entered the restaurant. The officers ran the license plate and determined that the car was registered to Daisha Carroll of Minot.

Detective Larson contacted the Minot Police Department and was informed by Minot Police Detective Brown that Daisha Carroll was a known methamphetamine user. Based on the descriptions that Detective Larson provided, Detective Brown said that one of the individuals who exited the car might be Daisha Carroll's brother, Jerry Benjamin Carroll (Carroll). Detective Brown informed Detective Larson that Carroll was a known user and distributer of methamphetamine.

When Tanner and Carroll left the restaurant and returned to their vehicle, Detectives Larson and Stuvland approached the vehicle. Detective Larson approached the driver's door and informed Tanner of the reason for the police contact. Detective Larson asked Tanner to get out of the vehicle and to speak with him. Tanner complied and told Detective Larson that he and his companion were traveling from Denver, to Minot, via Fargo, where they had stopped to visit a friend. Detective Larson asked Tanner if there were any drugs in the car, and Tanner stated, "Not to my knowledge."

As Detective Larson and Tanner spoke, Carroll got out of the car. Detective Stuvland asked him to stay and speak to the officers. At this point, Moorhead Police Officers Heltemes and Asfeld arrived. Carroll appeared nervous; he fidgeted and chain-smoked, taking a few long puffs on each cigarette. And he would not look at Detective Stuvland. Detective Stuvland suspected that Carroll might be under the influence of methamphetamine.

Detective Larson eventually approached Carroll and asked him if there were any drugs in the car. Carroll denied that there were drugs in the car. Detective Larson repeated the question and indicated that a canine unit was on the way to sniff the car for drugs. At this point, Carroll admitted that there were drugs in the car. Tanner and Carroll were then secured in a squad car. The detectives searched the vehicle, found a small amount of heroin, and placed Tanner and Carroll under arrest. A subsequent search of the vehicle at an impound garage yielded 2.8 ounces of methamphetamine.

The state charged Tanner with one count of controlled-substance crime in the first degree and one count of controlled-substance crime in the fifth degree. Tanner moved to suppress the evidence against him and dismiss the charges, arguing that the evidence was obtained as the result of an illegal seizure and interrogation. The district court found that the detectives' on-the-scene investigation lent sufficient credence to the CI's tip such that the detectives could reasonably believe that Tanner and Carroll were in possession of methamphetamine.[1] The district court therefore ruled that there was probable cause to arrest Tanner and that the vehicle search was a permissible search incident to arrest. The district court denied Tanner's motion to suppress evidence obtained during the vehicle search and his motion to dismiss.

But the district court suppressed the statements that Tanner made between the time that Detective Stuvland told Carroll that he could not leave and the time that Tanner was

[1] The district court specifically referenced the following facts in support of its probable cause determination: the observation of a car with North Dakota plates that was registered to a Minot resident, who was a known methamphetamine user. The district court did not rely on Carroll's admission that there were drugs in the vehicle.

read his Miranda rights. The district court reasoned: "At the point when Detective Stuvland indicated that Mr. Carroll should not leave, it would be reasonable for both [Tanner] and Mr. Carroll to believe that they were neither free to disregard the police questions nor free to terminate the encounter," and that a *Miranda* warning was required before any additional interrogation.

Tanner waived his rights to a trial and agreed to allow the district court to determine his guilt or innocence on a stipulated record, preserving his right to appeal the denial of his motion to suppress evidence and dismiss the complaint, pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980).[2] After reviewing the record, the district court found Tanner guilty of first-degree sale of controlled substance and set forth its findings in a memorandum. This appeal follows.

## D E C I S I O N

*Probable Cause to Arrest and Search Incident to Arrest*

Tanner argues that because the police were acting on the tip of an informant of unknown reliability and verified only easily obtainable information, the district court erred by determining that there was probable cause for his arrest. Tanner asserts that he was arrested on nothing more than mere suspicion of drug possession. Tanner contends

[2]A "*Lothenbach* proceeding" is a proceeding in which a defendant submits to a court trial on stipulated facts without waiving the right to appeal pretrial issues. *See State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980) (approving this procedure). "Minn. R. Crim. P. 26.01, subd. 4, effective April 1, 2007, implements and supersedes the procedure authorized by [*Lothenbach*]." *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009). Because rule 26.01, subdivision 4, now governs proceedings in which a defendant stipulates to the prosecution's case in order to obtain review of a pretrial ruling, the rule, rather than *Lothenbach*, will be referred to where appropriate.

that "his warrantless arrest was invalid and the search conducted incident to that arrest was also invalid." Tanner limits his argument to whether there was probable cause to support his arrest. He does not advance any other argument in support of his challenge to the legality of the vehicle search. Because the facts of this case are largely undisputed, the district court's ruling presents a question of law, which this court may independently review. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

"Police officers may arrest a felony suspect without an arrest warrant in any public place . . . provided they have probable cause." *State v. Walker*, 584 N.W.2d 763, 766 (Minn. 1998) (citing *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820 (1976)). "The test of probable cause to arrest is whether the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Johnson*, 314 N.W.2d 229, 230 (Minn. 1982) (quotation omitted). "Each case must be determined on its own facts and circumstances, and the facts present must justify more than mere suspicion but less than a conviction." *State v. Carlson*, 267 N.W.2d 170, 173-74 (Minn. 1978). The lawfulness of an arrest is determined by an objective standard that takes into account the totality of the circumstances. *State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998). Courts

> must decide each case on its own facts, guided not by any magic formula but by the standard of reasonableness. In applying this standard [they] should not be overly technical and should accept the officer's probable-cause determination if reasonable and prudent men, not legal technicians, would under the same circumstances make the same determination.

*State v. Cox*, 294 Minn. 252, 256, 200 N.W.2d 305, 308 (1972).

The detectives' initial investigation into Tanner's activities was prompted by the CI's tip. Police may rely on an informant's tip if the tip has sufficient indicia of reliability. *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997). When assessing reliability, courts examine the credibility of the informant and the basis of the informant's knowledge in light of all the circumstances. *Id.* The fact that an informant is not anonymous enhances the informant's credibility. *State v. Lindquist*, 295 Minn. 398, 400, 205 N.W.2d 333, 335 (1973). "Recent personal observation of incriminating conduct has traditionally been the preferred basis for an informant's knowledge." *State v. Wiley*, 366 N.W.2d 265, 269 (Minn. 1985). And independent corroboration of some of the CI's information lends credence to the tip. *State v. McCloskey*, 453 N.W.2d 700, 704 (Minn. 1990). Police should verify more than easily ascertainable facts, such as an address, but need not verify "key" details included in the tip. *Compare Walker*, 584 N.W.2d at 768 (stating that verification of address was insufficient to support reliability of tip because the address was an easily ascertainable fact) *with Wiley*, 366 N.W.2d at 269 (concluding police verification of the name of a person who resided at a particular address and the vehicle parked at that address lent credence to a tip although the details were not "key" details).

Here, the CI's identity was known, thereby enhancing the CI's credibility. And the CI's knowledge was based on recent personal observation of incriminating conduct. Moreover, the detectives corroborated several details of the CI's tip, and their on-the-scene investigation yielded information that further supported the tip. The detectives

discovered two males in a vehicle with North Dakota plates at the Village Inn, consistent with the CI's tip. Tanner told Detective Larson that he and his companion were traveling from Denver to Minot, consistent with the CI's tip. At that point, the detectives had already learned that the vehicle that Tanner was driving was registered to a known methamphetamine user from Minot. The detectives had also learned that the registered-owner's brother was a known methamphetamine distributer whose physical appearance matched that of Tanner's companion. These objective facts were such that under the totality of the circumstances, a person of ordinary care and prudence would have entertained an honest and strong suspicion that a crime had been committed by Tanner. We hold that these facts established probable cause for Tanner's arrest. We therefore affirm the district court's denial of Tanner's motions to suppress and dismiss.

*Findings as to Elements of Conviction Offense*

Minn. R. Crim. P. 26.01, subd. 4, provides that when a defendant stipulates to the prosecution's evidence to preserve a pretrial ruling for appeal, "[t]he court after consideration of the stipulated evidence shall make an appropriate finding, and if that finding is guilty, the court shall also make findings of fact, orally on the record or in writing, as to each element of the offense." "Construction of a rule of procedure is a question of law subject to de novo review." *State v. Nerz*, 587 N.W.2d 23, 24-25 (Minn. 1998).

Tanner argues that the district court failed to make a finding of fact regarding the second element of first-degree sale of a controlled substance: that Tanner knew or

believed that the substance sold was a mixture containing methamphetamine.[3] *See* Minn. Stat. § 152.021, subd. 1(1) (2008) (defining first-degree controlled-substance crime); *State v. Kuhnau*, 622 N.W.2d 552, 558 (Minn. 2001) (holding that the exclusion of the words "knew or believed that the substance sold was methamphetamine" from the instruction relating to the substantive crime of first-degree sale of a controlled substance was confusing and that the omission of this "element" of the offense did not fairly and adequately explain the law of the case); *State v. Papadakis*, 643 N.W.2d 349, 354 (Minn. App. 2002) (stating that a defendant's knowledge of the nature of the substance is an essential element of the crime of possession of a controlled substance).

The state does not dispute that the district court failed to make an explicit finding regarding the knowledge element of the conviction offense. But the state argues that the express terms of rule 26.01, subdivision 4, preclude Tanner from challenging the sufficiency of the district court's findings. The crux of the state's argument is that the rule only allows appeal of pretrial issues. The relevant portion of the rule states, "[t]he defendant shall also acknowledge that appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial." Minn. R. Crim. P. 26.01, subd. 4. Thus, the rule precludes review of the "defendant's guilt, or of other issues that could arise at a contested trial." But Tanner does not claim that the

[3] Tanner cites the patterned jury instruction for first-degree sale of a controlled substance in support of his claim. *See* 10A *Minnesota Practice* CRIMJIG 20.02 (2006) (listing as an element of the crime that "the defendant knew or believed that the substance sold was a mixture containing methamphetamine"). We note that the jury instruction guides merely provide guidelines; they are instructive but not precedential or binding. *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

evidence is insufficient to sustain a finding of guilt. Tanner's claim concerns the district court's failure to comply with the procedural requirements of a stipulated-facts trial under subdivision 4; this is not an issue that "could arise at a contested trial." *Id.* (stating that "[t]he defendant shall stipulate to the prosecution's evidence in a trial to the court"). There is a clear distinction between a challenge based on a claim that the evidence is not sufficient to support the district court's findings—which is not allowed under the rule—and a claim that the district court failed to make the findings required under the rule. Tanner's claim falls in the latter category and is procedural, not substantive. We hold that rule 26.01, subdivision 4, does not preclude Tanner from challenging on appeal the district court's failure to comply with the procedural requirements of the rule.

We now turn our analysis to the proper remedy when a district court fails to make findings as required by rule 26.01, subdivision 4. Tanner contends that his conviction must be reversed. In support of this contention, Tanner argues that rule 26.01, subdivision 4, is analogous to rule 27.03, subdivision 4(C), which requires the district court to make findings of fact regarding the reasons for any felony sentencing departure. Minn. R. Crim. P. 27.03, subd. 4(C). Tanner reasons that since both rules require the district court to make findings of fact, the remedy for violation of both rules should be the same and notes that "if no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed." *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). Tanner also notes that when no reasons for departure are stated on the record at the time of sentencing, "it [is] error for the court of appeals to remand to allow reasons for the departure to be given after the fact." *State v. Geller*, 665 N.W.2d 514,

517 (Minn. 2003). But Tanner offers no argument to demonstrate that the adjudicatory and sentencing proceedings governed by these distinct procedural rules are so similar that application of sentencing-departure precedent to a rule 26.01, subdivision 4, proceeding is warranted. We therefore reject this argument.

The state contends that the district court's failure to make findings of fact as to each element of the offense is not fatal to its general finding of guilt. The state urges us to read subdivision 4 of rule 26.01 in light of subdivisions 2 and 3, which relate to trials without a jury and trials on stipulated facts. The state notes that subdivision 2, which governs trials without a jury, also requires the district court to make a general finding on the issue of guilt and to specifically find the essential facts. Subdivision 2 provides that "[i]f 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." *Id.* The state urges us to read a similar savings provision into subdivision 4. We decline to do so for the reasons that follow.

Subdivision 4 of rule 26.01 is a relatively recent addition to the rules. *See Antrim*, 764 N.W.2d at 69 (noting that rule 26.01, subdivision 4, became effective on April 1, 2007). Subdivision 2, on the other hand, has been in effect since 1975. *See* Minn. R. Crim. P. 26.01, subd. 2 (1976); *In re Proposed Rules of Criminal Procedure*, No. 45517 (Minn. Feb. 26, 1975) (order). Thus, the savings provision in subdivision 2 is well established. And the savings provision within subdivision 2 is incorporated by reference in subdivision 3, which governs trials on stipulated facts. Minn. R. Crim. P. 26.01, subd. 3 ("Upon submission of the case on stipulated facts, the court shall proceed as on

any other trial to the court pursuant to subdivision 2 of this rule."). Clearly, the drafters know how to include a savings provision if they intend one, either expressly or by reference. *See Mastakoski v. 2003 Dodge Durango*, 738 N.W.2d 411, 414-15 (Minn. App. 2007) (stating that inclusion of particular language in one part of statute demonstrated that the legislature knew how to use such language "when it intended to"), *review denied* (Minn. Nov. 21, 2007). Yet subdivision 4 does not include a savings provision, either expressly or by reference. Contrary to the state's suggestion, a reading of subdivision 4 in light of subdivisions 2 and 3 indicates that the drafters did not intend to subject the subdivision 4 findings requirements to a savings provision. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *State v. Adickes*, 741 N.W.2d 904, 906 (Minn. App. 2007) ("we will not add to the statute what the legislature has intentionally or inadvertently omitted"); *see also State v. Williams*, 568 N.W.2d 885, 888 (Minn. App. 1997) (applying rule of statutory construction to a rule of general practice), *review denied* (Minn. Nov. 18, 1997); *but see Vandenheuvel v. Wagner*, 690 N.W.2d 753, 755 n.1 (Minn. 2005) (stating that the supreme court has "not explicitly set out a framework for interpreting the rules of court," that "certain principles of statutory construction, e.g., plain language, may be helpful when interpreting court rules" but that "other principles have no application," and declining to "set out a detailed method of analysis to be used in the interpretation of court rules").

Moreover, subdivision 4 differs from subdivisions 2 and 3 in an important respect. Subdivision 2 does not restrict the issues that may be raised on appeal from a conviction after a trial without a jury. Minn. R. Crim. P. 26.01, subd. 2. Likewise, subdivision 3 provides that "the defendant may appeal from the judgment of conviction and raise issues on appeal the same as from any trial to the court" if the defendant is found guilty after a trial on stipulated facts. *Id.*, subd. 3. Thus, a defendant may appeal the sufficiency of the evidence to sustain a finding of guilt in a proceeding under subdivision 2 or 3. But a defendant may not challenge the sufficiency of the evidence on appeal from a conviction under subdivision 4. *See id.*, subd. 4 (stating that there will be no review of the defendant's guilt). In a proceeding that waives many of a defendant's constitutional rights, abbreviates the trial process, and places limitations on appellate review—including the right to challenge the sufficiency of the evidence to support a conviction—strict compliance with the findings requirement of subdivision 4 ensures that the stipulated record is adequate to support a conviction. This is an important concern when a defendant waives the right to appeal the issue of his or her guilt.

It is important to note that when proceeding under subdivision 4, the defendant's guilt is not a foregone conclusion. The rule provides that "[t]he defendant shall maintain the plea of not guilty." *Id.* The rule also states that after the district court considers the stipulated evidence, it "shall make an appropriate finding, and *if* that finding is guilty, the court shall also make findings of fact, orally on the record or in writing, as to each element of the offense(s)." *Id.* (emphasis added). The clear language of the rule allows for a scenario in which the district court enters a finding *other* than guilty. But once the

district court has made a finding of guilty, there is no appellate review of that finding. *Id.* ("appellate review will be of the pretrial issue, but not of the defendant's guilt"). Because a district court's guilty finding under rule 26.01, subdivision 4, is not subject to appellate review, strict compliance with the rule's mandatory findings requirements is an appropriate means of safeguarding against guilty findings that are not supported by the evidence. We therefore conclude that strict compliance with the findings requirements of rule 26.01, subdivision 4, is appropriate.

Because the district court failed to make a finding regarding the knowledge element of the conviction offense, we are compelled to remand to the district court for the findings mandated by rule 26.01, subdivision 4. Any other action would render the plain language of the rule meaningless. And we will not abrogate the district court's fact-finding function by substituting our own written findings. *See State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002) ("Appellate courts have no more business finding facts after a court trial than after a jury trial.").

We reject the state's argument that the district court's failure to make findings is harmless beyond a reasonable doubt because "the evidence of appellant's guilt was abundant." In *In re R.J.E.*, 642 N.W.2d 708, 712-13 (Minn. 2002), the supreme court held that appellate courts may not apply harmless-error analysis in reviewing adjudications of delinquency arising from cases submitted to the district court on stipulated facts in accordance with *State v. Lothenbach*. The supreme court reasoned that harmless-error review requires a thorough examination of the evidence, which cannot occur when the evidence goes unchallenged. *R.J.E.*, 642 N.W.2d. at 712.

We also reject the state's contention that the district court's failure to comply with the findings requirement of rule 26.01, subdivision 4, is not properly before us because it is raised for the first time on appeal. *See State v. Grunig*, 660 N.W.2d 134, 136 (Minn. 2003) (explaining that appellate courts generally will not decide issues that were not raised in the district court and that one of the purposes of the rule is "to allow the trial court to correct any alleged errors before a jury verdict"). The cases cited by the state in support of its contention are factually distinguishable in that they concern application of the waiver rule in cases involving challenges to pretrial rulings or evidentiary rulings at trial. The state cites no legal authority holding that a challenge to the district court's findings of fact after a court trial in a criminal case is waived unless a defendant objected to the findings in district court or filed post-verdict motions.

In summary, because the district court correctly determined that there was probable cause to support Tanner's arrest and that the search incident to his arrest was lawful, we affirm in part. But because Minn. R. Crim. P. 26.01, subd. 4, requires the district court, upon finding the defendant guilty, to make findings of fact as to each element of the offense, which the district court failed to do, we remand for findings in accordance with this opinion.

**Affirmed in part and remanded.**

Dated: _____

_____
The Honorable Michelle A. Larkin

**JOHNSON**, Judge (concurring in part, dissenting in part)

I concur in part I of the opinion of the court but respectfully dissent from part II. In my view, an appellate court may not review the adequacy of a district court's findings of fact following a proceeding conducted pursuant to subdivision 4 of rule 26.01 of the Minnesota Rules of Criminal Procedure, which is commonly known as a *Lothenbach* proceeding.

Subdivision 4 of rule 26.01 applies "[w]hen the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling otherwise makes a contested trial unnecessary" and the defendant wishes "to preserve the [pretrial] issue for appellate review." Minn. R. Crim. P. 26.01, subd. 4 (first sentence). To obtain appellate review of a pretrial ruling without going through a contested trial, a defendant must "stipulate to the prosecution's evidence." *See* Minn. R. Crim. P. 26.01, subd. 4 (fifth sentence). In this case, the parties stipulated to the evidence contained in several police reports and a laboratory report concerning the controlled substances that were seized. During the stipulated-evidence trial (which lasted only eight minutes), Tanner's trial counsel conceded that "if the facts contained in the police report are true, . . . the Court would find Mr. Tanner guilty." In part I of the opinion of the court, we have affirmed the district court's denial of Tanner's pretrial motion to suppress evidence. Our ruling on that issue should be dispositive of the case, without any consideration of the adequacy of the district court's findings of fact on the issue of Tanner's guilt.

This conclusion is confirmed by other language in subdivision 4 stating that "appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other

issues that could arise at a contested trial." Minn. R. Crim. P. 26.01, subd. 4 (sixth sentence). The first phrase of this clause is sufficiently clear in stating that *only* pretrial issues may be raised on appeal, even though the word "only" is not used. If the first phrase is not clear in itself, the second phrase makes it so by adding that the issue of "defendant's guilt, or . . . other issues that could arise at a contested trial" may *not* be raised on appeal from a proceeding conducted pursuant to subdivision 4. *Id.* Tanner's argument that the district court failed to make specific findings on each element of the offense is an argument concerning his guilt. Tanner seeks the remedy of outright reversal, which would result in a judgment of acquittal. We instead have remanded for additional findings. But if, on remand, the district court does not specifically find that Tanner knew that the substance he possessed was methamphetamine, Tanner surely would be entitled to have his conviction reversed. Tanner's ultimate objective in challenging the adequacy of the district court's specific findings is to obtain a general finding of not guilty. And if the adequacy of the district court's findings is not a matter of "guilt," it must be among the "other issues that could arise at a contested trial."

The limited scope of appellate review following a stipulated-evidence trial conducted pursuant to subdivision 4 is further confirmed by the caselaw that informed the promulgation of the rule. Subdivision 4 was intended to "implement[] the procedure authorized by *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980)." Minn. R. Crim. P. 26 cmt. In *Lothenbach*, the supreme court approved a procedure in which a defendant "wishing to obtain appellate review of pretrial decisions to suppress evidence" may "enter a plea of not guilty, waive his right to a jury trial, and then stipulate to the

prosecution's case." *Lothenbach*, 296 N.W.2d at 857. The *Lothenbach* procedure is akin to a "conditional guilty plea." *Id.* But the district court's "'inevitable entry of a judgment of conviction'" is based on the defendant's plea of not guilty, *id.* at 858 (quoting *Lefkowitz v. Newsome*, 420 U.S. 283, 290 n.7, 95 S. Ct. 886, 890 n.7 (1975)), thereby avoiding the rule that a guilty plea "operates as a waiver of all nonjurisdictional defects" in a criminal proceeding, *id.* at 857 (citing *McLaughlin v. State*, 291 Minn. 277, 190 N.W.2d 867 (1971)). Only three months ago, the supreme court reaffirmed the basic purpose of *Lothenbach* and subdivision 4 by noting that, because an appellant had "stipulated to the evidence against him using the procedure approved in *State v. Lothenbach*, our review is . . . limited to the pretrial order that denied [his] motion to suppress." *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

The majority's conclusion that Tanner may obtain review of the adequacy of the district court's findings of fact is inconsistent with the supreme court's opinion in *State v. Busse*, 644 N.W.2d 79 (Minn. 2002), in which the appellant challenged a pretrial ruling and, in addition, argued that the state had failed to prove all the elements of the charge against him. *Id.* at 88. The supreme court refused to consider the second argument concerning the sufficiency of the evidence. *Id.* at 88-89. As an alternative basis for its decision, the supreme court reasoned that "the *Lothenbach* plea procedure is one used for submitting a case to the court for decision while reserving *pretrial* issues for appeal," and is not "a means for obtaining an appellate sufficiency of the evidence review." *Id.* at 88 (quotation omitted). The *Busse* court further explained that if the appellant had been convicted in a *Lothenbach* proceeding, he "would not have preserved his claim that the

state had not proved all of the elements of the crime charged because, as we have developed the *Lothenbach* procedure thus far, it is for obtaining appellate review of pretrial decisions." *Id*. at 88-89. The majority opinion also is inconsistent with this court's opinion in *State v. Mahr*, 701 N.W.2d 286 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005), in which we refused to consider an appellant's argument that, following a *Lothenbach* proceeding, a district court erred by not issuing its written findings within seven days of trial, as required by subdivision 2 of rule 26.01. 701 N.W.2d at 292. We reasoned that "[t]he *Lothenbach* proceeding is a concession that the state's facts are accurate, with the primary purpose of permitting the defendant to appeal a pretrial ruling, while avoiding a trial for reasons of judicial economy." *Id.*

Furthermore, the majority's holding that an offender may obtain appellate review of the adequacy of a district court's findings following a subdivision 4 proceeding is without precedent in the supreme court's caselaw. In its prior opinions arising from *Lothenbach* proceedings, the supreme court has confined its review to pretrial rulings and never has considered issues arising from the trial itself.[4] Nothing in the text of

[4]*See, e.g.*, *Ortega*, 770 N.W.2d at 149; *State v. Mohs*, 743 N.W.2d 607, 613 (Minn. 2008); *State v. Jackson*, 742 N.W.2d 163, 177-79 (Minn. 2007); *State v. Henning*, 666 N.W.2d 379, 385-86 (Minn. 2003); *State v. Munson*, 594 N.W.2d 128, 143-44 (Minn. 1999); *State v. Tibiatowski*, 590 N.W.2d 305, 311 (Minn. 1999); *State v. George*, 557 N.W.2d 575, 581 (Minn. 1997); *State v. Paul*, 548 N.W.2d 260, 263 (Minn. 1996); *State v. Hince*, 540 N.W.2d 820, 823-24 (Minn. 1995); *State v. Cripps*, 533 N.W.2d 388, 390-91 (Minn. 1995); *State v. Beckman*, 354 N.W.2d 432, 437 (Minn. 1984); *State v. Jungbauer*, 348 N.W.2d 344, 346-47 (Minn. 1984); *State v. Faber*, 343 N.W.2d 659, 660 (Minn. 1984); *State v. Koziol*, 338 N.W.2d 47, 47-48 (Minn. 1983); *State v. Mallory*, 337 N.W.2d 391, 393-94 (Minn. 1983); *State v. Pleas*, 329 N.W.2d 329, 334 (Minn. 1983); *State v. Hunner*, 328 N.W.2d 448, 449 (Minn. 1983); *State v. Alesso*, 328 N.W.2d 685,

subdivision 4 or the comments to the rule indicates any intent to expand the scope of appellate review following a stipulated-evidence trial conducted pursuant to subdivision 4.

Because I conclude that the rule does not allow any appellate review of a district court's findings in a subdivision 4 proceeding, I do not share the premises on which the majority bases the remainder of its analysis. But even if I were to assume that Tanner is entitled to appellate review of the district court's findings, I nonetheless would conclude that the district court should be affirmed without a remand based on the savings provision in subdivision 2, which requires this court to assume that the district court made a specific finding consistent with its general finding. *See* Minn. R. Crim. P. 26.01, subd. 2 (last sentence); *State v. Holliday*, 745 N.W.2d 556, 562-63 (Minn. 2008). As its heading indicates, subdivision 2 applies to a "trial without a jury." A stipulated-evidence trial conducted pursuant to subdivision 4 is a trial without a jury. There is no need for a separate savings provision in subdivision 4 because the savings provision in subdivision 2 applies. That subdivision 3 refers to subdivision 2 is immaterial because the reference is not to the savings provision but, rather, to other provisions within subdivision 2 that are directed to the district court, not to this court.

For these reasons, I would affirm the district court in all respects.

---

690 (Minn. 1982); *State v. Braasch*, 316 N.W.2d 577, 579 (Minn. 1982); *State v. Miller*, 316 N.W.2d 23, 27-28 (Minn. 1982); *see also Lothenbach*, 296 N.W.2d at 858-59.