STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1672

State of Minnesota,
Respondent,

vs.

Larry Joseph Burt,
Appellant.

Filed December 8, 2009
Affirmed
Peterson, Judge

Ramsey County District Court
File No. K5-08-335

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

PETERSON, Judge

In this appeal from a conviction of possession of a firearm by an ineligible person, appellant argues that (1) the search-warrant application was insufficient to show probable cause to believe that evidence of methamphetamine manufacturing would be found at appellant's parents' residence, and (2) the district court erred in failing to consider whether substantial and compelling circumstances existed for imposing a downward durational departure from the 60-month mandatory minimum sentence. We affirm.

FACTS

Appellant Larry Burt lived on-and-off with his parents at their residence in New Brighton (appellant's residence). A confidential reliable informant (CRI) reported to Brooklyn Center Police Officer Terry Olson that he had been to appellant's residence within the previous two weeks and that appellant purported to have methamphetamine for sale. The CRI had seen chemicals, rubber tubing, and glassware, which appellant said were for manufacturing methamphetamine. Appellant also told the CRI that he had anhydrous ammonia and only needed ephedrine to complete the production of methamphetamine.

Within a few days after Olson received the information from the CRI, appellant was arrested for driving a stolen vehicle. During a search of the vehicle, officers found a package that contained 5.08 grams of methamphetamine and three packages that contained a total of 24.8 grams of MSM, which is a substance used by methamphetamine dealers to increase the volume and dilute the purity of methamphetamine. In a statement

to officers after he was arrested, appellant admitted that the substance found in the vehicle was methamphetamine and "also admitted that the recovered substances were his but that they were 'cut.'" Officers ran a criminal-history check on appellant and learned that he had eleven prior arrests and six convictions for fifth-degree controlled-substance offenses.

Based on the above information, East Metro Narcotics Task Force Officer Paul Bartz applied for and obtained a warrant to search appellant's person and residence. East Metro Narcotics Task Force Officer Aaron Craven and Sergeant Charles Youngquist then located appellant, searched his person, arrested him, and interviewed him in a squad car. In response to the officers' statement that they were looking for a meth lab at his residence, appellant said that they would not find a meth lab but would find a shotgun hidden in the back of a couch in the basement and a box of ammunition on a desk right next to the couch.

When appellant's residence was searched, officers found a 12-gauge, sawed-off shotgun in the back of a couch in the basement and a box of shotgun shells on the desk next to the couch. Officers also found a homemade pipe of a type used for smoking drugs and a pop bottle suspected to have been used for smoking drugs.

Appellant was charged with possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(b) (2006). He moved to suppress the shotgun, arguing that the search warrant was not supported by probable cause. Based on the totality of the circumstances, the district court concluded that the search warrant was supported by probable cause and denied appellant's motion. The case was tried to a jury,

which found appellant guilty as charged. Appellant moved for a dispositional departure from the 60-month mandatory minimum sentence. The district court denied the motion. This appeal challenging the conviction and sentence followed.

D E C I S I O N

I.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We accept the district court's underlying factual determinations bearing on a motion to suppress on Fourth Amendment grounds unless they are clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

Both the United States and Minnesota Constitutions require that a search warrant be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. In determining whether a warrant is supported by probable cause, this court gives great deference to the issuing court's probable-cause determination. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). This court's review is limited to ensuring "that the issuing judge had a 'substantial basis' for concluding that probable cause existed." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332 (1983)).

A substantial basis means a fair probability, "given the totality of the circumstances set forth in the affidavit before the issuing judge, including the veracity and basis of knowledge of persons supplying hearsay information . . . that contraband or

evidence of a crime would be found in a particular place." *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004). In reviewing the sufficiency of a search-warrant affidavit under the totality-of-the-circumstances test, "courts must be careful not to review each component of the affidavit in isolation." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). "[A] collection of pieces of information that would not be substantial alone can combine to create sufficient probable cause." *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). Appellate courts resolve marginal cases in favor of the issuance of the warrant. *State v. McCloskey*, 453 N.W.2d 700, 704 (1990).

Citing *State v. Kahn*, appellant argues that probable cause was lacking because there was no nexus between the methamphetamine found in the stolen vehicle and the suspected meth lab at appellant's residence. 555 N.W.2d 15, 18 (Minn. App. 1996). In *Kahn*, an ounce of cocaine, an amount known by the officer to be greater than the amount for personal use, was found on the driver of a vehicle. *Id.* at 17. The supreme court concluded that there was an insufficient nexus between the cocaine and appellant's residence because "[m]ore than mere possession of an ounce of cocaine is required to demonstrate probable cause that an individual is a dealer and that his home contains evidence or contraband." *Id.* at 18.

Unlike *Kahn*, appellant possessed both 5.08 grams of methamphetamine and 24.8 grams of MSM, a substance used to dilute the purity of methamphetamine. Appellant describes Bartz's statement in the search-warrant application that MSM is used to increase the volume and dilute the purity of methamphetamine as an "unsupported assumption." But police officers may rely on training and experience to draw inferences

in their affidavits. *State v. Richardson*, 514 N.W.2d 573, 579 (Minn. App. 1994). Also, in addition to possessing the methamphetamine and MSM in the vehicle, there was the information provided by the CRI about seeing items associated with manufacturing methamphetamine at appellant's residence within the previous two weeks and appellant's statement to the CRI that the items belonged to him and were for manufacturing methamphetamine.

Appellant also argues that the information provided by the CRI was stale. Although stale information cannot be used to establish probable cause for a search, there are no rigid or arbitrary timelines for determining when information is stale. *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). Rather, this court examines whether there is "any indication of ongoing criminal activity, whether the articles sought are innocuous or incriminating, whether the property sought is easily disposable or transferable, and whether the items sought are of enduring utility." *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998).

Within two weeks of the search warrant being issued, the CRI saw at appellant's residence items associated with manufacturing methamphetamine. Appellant's statement to the CRI that he needed ephedrine to complete the production process indicated his intent to carry out the operation in the future. When stopped within 72 hours of the search warrant being issued, appellant possessed a substance used to dilute methamphetamine. Considered together, this information indicates an ongoing criminal enterprise.

Appellant next argues that the search-warrant application failed to establish the CRI's credibility. In determining probable cause, the issuing judge must consider the informant's basis of knowledge and veracity. *Id*. (citing *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332). "All of the facts relating to the informant should be considered in weighing reliability." *Id*.

Based on the following information, we conclude that the warrant application was sufficient to establish the CRI's reliability. Within two weeks of the search warrant being issued, the CRI was at appellant's residence and saw items associated with manufacturing methamphetamine. *See Wiley*, 366 N.W.2d at 269 (stating that recent personal observation of incriminating conduct is preferred basis for informant's knowledge). Also, the search-warrant application stated that the CRI had "given reliable information in the past" that "led to a felony narcotics search warrant and furtherance of felony investigations." *See State v. Siegfried*, 274 N.W.2d 113, 114-15 (Minn. 1978) (stating that veracity can be established by showing track record of providing accurate information to police). Finally, without knowing the exact address, the CRI provided detailed information about the location and appearance of appellant's residence that officers were able to match to appellant's registered address. *See State v. Holiday*, 749 N.W.2d 833, 841 (Minn. App. 2008) (stating that even corroboration of minor details lends credence to informant's tip) (citing *Wiley*, 366 N.W.2d at 269 (stating that corroboration of defendant's name, residence, and make of vehicle lent credence to CRI's tip")).

In a pro se supplemental brief, appellant raises additional issues relating to the CRI's credibility. Appellant argues that the warrant application failed to establish the CRI's reliability because Bartz never met the CRI. But an officer may rely on information from another officer based on a tip from an informant. *See State v. Camp*, 590 N.W.2d 115, 119 n.8 (Minn. 1999) (concluding that a tip from a reliable informant to a police officer that was communicated to another police officer could be used to support probable cause). Appellant has failed to make the requisite showing to support his argument that the state should have been required to disclose the CRI's identity. *See State v. Ford*, 322 N.W.2d 611, 614 (Minn. 1982) (stating factors to consider when determining whether disclosure is warranted); *see also State v. Luciow*, 308 Minn. 6, 13-14, 240 N.W.2d 833, 839 (1976) (stating that disclosure may be required upon a prima facie showing by defendant that affidavit contained materially false statements).

Considered as a whole, the information in the search-warrant application provided a substantial basis to support the issuing court's probable-cause determination, and the district court did not err in denying appellant's motion to suppress.

II.

When sentencing an offender, the district court must impose the presumptive sentence unless "substantial and compelling circumstances" justify a downward departure. Minn. Sent. Guidelines II.D. Even when a mitigating factor is present, the district court's decision not to depart rests within its discretion and will not be reversed absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). A reviewing court will reverse the

imposition of a presumptive sentence only in a "rare" case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Although appellant's motion for a sentencing departure did not specify whether he was seeking a dispositional or durational departure, his argument at the sentencing hearing and letters supporting his motion all focused on a dispositional departure. On appeal, he does not challenge the denial of a dispositional departure. Instead, he argues that the district court erred by failing to consider a durational departure. Because the authority relied on by appellant does not support the position that the district court errs by failing to consider factors that might support a durational departure when a dispositional departure was requested, there is no basis for this court to reverse the district court's imposition of the presumptive sentence.

III.

In his pro se supplemental brief, appellant argues that the prosecutor improperly focused on methamphetamine during trial, thereby causing him prejudice. Appellant did not object to the evidence on prejudice grounds at trial. At trial, appellant objected to some evidence of methamphetamine on foundation and relevance grounds but not prejudice. Other drug-related evidence was admitted over no objection.[1]

Because appellant did not object on prejudice grounds at trial, the plain-error standard of review applies. *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007); *see* Minn. R. Evid. 103(a)(1) (error may not be predicated on erroneous admission of

[1] Appellant did object on prejudice grounds once, but the objection only went to the labeling used on an exhibit. When the exhibit was relabeled, appellant had no further objection.

evidence unless a party makes a timely objection stating the specific ground of objection.). To establish plain error, the defendant must prove (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The evidence regarding methamphetamine was admitted in the context of explaining the reasons for the search, laying foundation for exhibits, and showing appellant's presence in the area where the gun was located. Appellant has cited no authority showing that the admission of drug-related evidence for these purposes was improper. Accordingly, appellant has failed to show plain error.

Appellant also makes an ineffective-assistance claim based on questions that he wanted his counsel to ask of his witnesses and issues that he wanted raised at trial. Appellant's ineffective-assistance claim fails because these are matters of trial strategy, which generally do not provide a basis for a claim of ineffective assistance of counsel. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999); *see also State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (stating that matters of trial strategy, including what witnesses to call and what defenses to raise, will not be reviewed later for competency); *Scruggs v. State*, 484 N.W.2d 21, 26-27 (Minn. 1992) (rejecting claim that defense counsel's failure to call three potential defense witnesses constituted ineffective assistance).

Affirmed.