STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2144

State of Minnesota,
Respondent,

vs.

Jerry Castillo,
Appellant.

Filed February 2, 2010
Affirmed
Johnson, Judge

Ramsey County District Court
File No. 62-K6-07-003573

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Eric L. Newmark, Birrell & Newmark, Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Lansing, Judge; and Johnson, Judge.

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

JOHNSON, Judge

After a police officer learned that Jerry Castillo's middle-school-aged daughter distributed methamphetamine to other students at her school, the officer obtained a warrant for a search of Castillo's residence, where they found methamphetamine.

Castillo moved to suppress the evidence, and the district court denied the motion. Castillo later was found guilty of fifth-degree possession of a controlled substance. We conclude that the warrant application provided probable cause for the search of Castillo's residence and that the officer seeking the warrant did not make material misrepresentations or omissions of fact in the warrant application. Therefore, we affirm.

FACTS

On October 2, 2007, several students at Hazel Park Middle School in St. Paul became ill because they ingested methamphetamine. Five students were taken to area hospitals for treatment. A.M.C., who is Castillo's daughter, was among the students who were taken to a hospital. School staff spoke with and obtained written statements from seven students who were not taken to a hospital.

At approximately 1:15 p.m., Sgt. Timothy McCarty of the St. Paul Police Department was summoned to the school. He spoke with an assistant principal, who told him that a female student had distributed methamphetamine to several students and that five children had been transported to area hospitals. School staff allowed Sgt. McCarty to review the written statements obtained from the seven students who were not transported to a hospital. Six of the written statements mentioned A.M.C. by name. One of those statements indicated that A.M.C. brought the drugs to school but did not indicate when, where, or how A.M.C. came into possession of the drugs. Sgt. McCarty took notes throughout his visit to the school, but he was not given copies of the statements.

After returning to the police station, Sgt. McCarty drafted an application for a warrant to search A.M.C.'s residence. Sgt. McCarty relied on his memory and the notes

he prepared while at the school. The statement of facts in the affidavit accompanying the warrant application states:

> I (Sgt. Timothy M. McCarty) am your affiant in this matter. I am a police sergeant with the City of St. Paul and have been with the police department for the past 23 years. I am currently assigned as an investigative supervisor in the Narcotics Unit of the Police Department. I am responsible for supervising a group of officers tasked with investigating a wide variety of drug related offenses within the City of St. Paul. In addition, I initiate numerous follow-up investigations based on arrests by patrol officers, assist outside agencies as necessary and conduct sensitive investigations at the direction of the Chief of Police.
>
> Today (10-2-2007) a female student at Hazel Park Middle School in St. Paul came into the office area complaining of physical symptoms of sickness she had never experienced before. She told the school nurse that she could not feel her legs and that she was dizzy and nauseous. The nurse interviewed the girl and made the decision to summon the St. Paul Fire Paramedics to the scene to evaluate her condition.
>
> At the same time, another student was in the office and witnessed this scene. This student confided to one of the office staff that she knew what was going on. This student was interviewed and it was learned that some kind of unknown substance had been brought into the school and was given to several students by a single person. Ultimately, 12 students were brought to the office and interviewed by school staff about their knowledge of this event. As a result of these interviews, multiple St. Paul Fire Department ambulances were dispatched to the school to evaluate these children. As a result of the evaluations, 5 of the children were found to have symptoms consistent with having ingested methamphetamine and were transported to Regions or Children's Hospital.
>
> The remaining 7 students were asked by school staff to write statements about their knowledge of this event. I was notified of the scene at the school at approximately 1300 hrs and went to the school to interview the assistant principal. He showed me the 7 written statements and I read all of them.

> All of them stated that a student hereinafter identified as AMC had brought a bottle of some kind of substance to school and that several students had ingested some of the substance. AMC was one of the students transported to the hospital. The substance AMC brought to the school was confiscated by Sgt. Rudie of the SPPD Juvenile Unit and brought to our Crime Lab. The substance was positively identified as methamphetamine. I have determined that AMC resides at [street address omitted] in St. Paul and I am seeking the authority of the Court to search that residence for any other methamphetamine or other contraband in furtherance of this case.

A Ramsey County District Court judge signed the search warrant at 3:50 p.m. that afternoon. Shortly thereafter, officers executed the search warrant at A.M.C.'s residence. The officers found methamphetamine in the drawer of a nightstand in the bedroom of A.M.C.'s parents. Castillo later admitted that the methamphetamine found in the nightstand belonged to him.

Meanwhile, another St. Paul police officer, Sgt. Pamela Barragan, went to Regions Hospital to obtain information from the students being treated there. When being interviewed by Sgt. Barragan, A.M.C. denied that she had brought the drugs to school from her home. Instead, she claimed that she had found the drugs on the floor in a school bathroom. Sgt. McCarty was unaware of A.M.C.'s statement to Sgt. Barragan when he was preparing the warrant application and presenting it to a district court judge.

In October 2007, the state charged Castillo with fifth-degree possession of a controlled substance in violation of Minn. Stat. § 152.025, subd. 2(1) (2006). In November 2007, Castillo moved to suppress the evidence obtained during the search of his residence. In December 2007 and March 2008, the district court conducted an evidentiary hearing on the motion. In June 2008, the district court denied Castillo's

motion in a four-page order and memorandum. In July 2008, the case was submitted to the district court on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 3. The district court found Castillo guilty. The district court imposed a stayed prison sentence of one year and one day and placed Castillo on probation. Castillo appeals.

D E C I S I O N

Castillo argues that, for two reasons, the district court erred by denying his motion to suppress the evidence seized during the search of his residence. First, Castillo argues that the application for the search warrant that was submitted by Sgt. McCarty lacked probable cause. Second, Castillo argues that Sgt. McCarty made misrepresentations and omissions of material fact in the warrant application. We will address each argument in turn.

A. Probable Cause

Castillo first argues that the district court erred because the warrant application submitted by Sgt. McCarty did not provide probable cause for the search.

A warrant for a search of a home may be issued only upon "probable cause . . . , particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. A court determines whether probable cause for a search exists by examining the totality of the circumstances:

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

State v. Souto, 578 N.W.2d 744, 747 (Minn. 1998) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). If a warrant is void for lack of probable cause, the evidence seized in the search must be suppressed. *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989).

"Our review of a district court's probable cause determination is limited, with great deference afforded to the issuing court." *Souto*, 578 N.W.2d at 747. "Rather than considering the issue *de novo*, this court's task on appeal is to ensure that the issuing judge had a substantial basis for concluding that probable cause existed." *Id.* (quotation omitted). "To determine whether the issuing court had a substantial basis for finding probable cause . . . we look to the 'totality of the circumstances.'" *Id*. A "totality-of-the-circumstances approach permits us to find probable cause among several factors when one factor standing alone does not provide a substantial basis for supporting a search warrant." *State v. Carter*, 697 N.W.2d 199, 206 (Minn. 2005) (citing *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004)). If a district court's ruling on a motion to suppress is based on a credibility determination, that determination will not be overturned unless it is clearly erroneous. *State v. Smith*, 448 N.W.2d 550, 555 (Minn. App. 1989), *review denied* (Minn. Dec. 29, 1989). To the extent that a pretrial ruling on a motion to suppress is based on undisputed facts, "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).

In denying Castillo's motion to suppress, the district court reasoned as follows:

> It is highly unlikely that children of middle school age would be buying controlled substances on the street, and it is

> just as unlikely that such children would have the funds with which to buy them. Children of this age are normally not employed, and their daily lives are centered around either home or school.
>
> Based upon the totality of these circumstances a reviewing magistrate could determine that there was a fair probability that a search of A.M.C.'s residence would produce some quantity of controlled substance.

Castillo challenges this part of the district court's reasoning. Castillo implicitly acknowledges that the application for the warrant contained probable cause of criminal activity, but he contends that the application did not establish a nexus between that criminal activity and his residence. Castillo contends that Sgt. McCarty provided the issuing district court judge with "absolutely no explanation or basis to believe that methamphetamine or other contraband would be found in A.M.C.'s home." Castillo also contends that Sgt. McCarty "failed to state why, based on his training and experience, more drugs would be located at her residence."

Minnesota courts have "historically required a direct connection, or nexus, between the alleged crime and the particular place to be searched, particularly in cases involving the search of a residence for evidence of drug activity." *Souto*, 578 N.W.2d at 747-48. To establish probable cause for "the issuance of a warrant to search a particular location, there must be specific facts to establish a direct connection between the alleged criminal activity and the site to be searched." *Id.* at 749. In determining whether this requirement has been satisfied, the issuing judge should consider "the type of crime, the nature of the items sought, the extent of the suspect's opportunity for concealment, and

the normal inferences as to where the suspect would normally keep the items." *State v. Pierce*, 358 N.W.2d 672, 673 (Minn. 1984).

Castillo's argument implicates well-established caselaw concerning the manner in which a probable cause determination is made. It is not a rigid or "technical" test but, rather, is a matter of "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Gates*, 462 U.S. at 231, 103 S. Ct. at 2328 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310 (1949)). As stated above, the issuing judge must "'make a practical, common-sense decision'" based on "'all the circumstances set forth in the affidavit.'" *Souto*, 578 N.W.2d at 747 (quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332). The issuing judge should consider "the normal inferences as to where the suspect would normally keep the items." *Pierce*, 358 N.W.2d at 673. In fact, the Fourth Amendment requires that "the usual inferences which reasonable men draw from evidence" be "drawn by a neutral and detached magistrate instead of . . . the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 369 (1948). Thus, an issuing judge may -- in fact, must -- use his or her common knowledge of matters that are typically part of everyday life.

In this case, the district court judge who denied Castillo's suppression motion used practical, common sense by considering the likelihood that a middle-school-aged child would obtain methamphetamine at her residence rather than elsewhere. For that reason, it was unnecessary for Sgt. McCarty to include information in the warrant application concerning the likelihood that a middle-school-aged child would have obtained

methamphetamine at her residence. Although an officer submitting a warrant application may rely on his or her training and experience when stating the facts on which probable cause may be based, *see Herring v. United States*, 129 S. Ct. 695, 703 (2009); *Ornelas v. United States*, 517 U.S. 690, 700, 116 S. Ct. 1657, 1663 (1996), it is unnecessary for the officer to state facts that are part of the issuing judge's knowledge and experience. Thus, the warrant application established a "direct connection, or nexus, between the alleged crime and the particular place to be searched." *Souto*, 578 N.W.2d at 747.

Castillo further contends that the district court's denial of his motion to suppress is inconsistent with this court's opinion in *State v. Kahn*, 555 N.W.2d 15 (Minn. App. 1996). In *Kahn*, the defendant was arrested in Hennepin County after purchasing one ounce of cocaine. *Id.* at 16-17. Law enforcement officers then obtained a warrant to search his residence in Olmstead County. *Id.* This court held that there was not probable cause for the search of the residence because the warrant application lacked any "evidence linking [defendant's] alleged possession in Minneapolis and the likelihood of evidence or contraband being found at his residence 75 to 85 miles away." *Id.* at 19. The circumstances in *Kahn*, however, are different from the circumstances of this case. It was significant that Kahn's residence was a long distance from the place of his arrest, which made it inappropriate to infer that evidence of criminal activity probably would be found at his residence. *Id.* In addition, we reasoned that the quantity of drugs found on Kahn's person was not enough to demonstrate probable cause that he was a dealer, which was the basis of the officer's belief that Kahn's home might "contain[] evidence or contraband." *Id.* at 18. This case is different because there is a closer connection between A.M.C.'s

possession of methamphetamine at school and the residence she shared with Castillo. A.M.C.'s residence is in the same city as her school, and it was reasonable to assume that she was at her residence before going to school on the day of the incident. As the district court reasoned, an issuing magistrate could have inferred that a child of that age would be more likely to obtain illegal drugs at her residence than on the street.

Thus, we agree with the district court that the warrant application in this case reflected "'a fair probability that contraband or evidence of a crime'" would be located at A.M.C.'s residence. *Souto*, 578 N.W.2d at 747 (quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332). Accordingly, the issuing magistrate "had a substantial basis for concluding that probable cause existed." *Id.* (quotation omitted).

B. Alleged Misrepresentation and Omission

Castillo next argues that the district court erred because Sgt. McCarty's affidavit supporting the warrant application contained material misrepresentations and omissions of fact, which, when corrected, deprive the warrant application of probable cause.

In *Moore*, the supreme court stated:

> A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause. A misrepresentation is "material" if when set aside there is no longer probable cause to issue the search warrant. If so, then the court must determine that the police deliberately or recklessly misrepresented facts, because innocent or negligent misrepresentations will not invalidate a warrant.

438 N.W.2d at 105 (citations omitted); *see also Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 2684-85 (1978). Under this test, "a defendant challenging a search

warrant must show that the officer deliberately made a statement that was false or in reckless disregard of the truth, and that the statement was material to the probable cause determination." *State v. McDonough*, 631 N.W.2d 373, 390 (Minn. 2001); *see also Smith*, 448 N.W.2d at 555 (applying *Franks* test to material omissions). "If the material that is not false is sufficient to sustain the search warrant, however, the search warrant is not voided." *Smith*, 448 N.W.2d at 555 (citing *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684-85).

1. Alleged Misrepresentation

Castillo contends that Sgt. McCarty made a material misrepresentation when he stated that all seven students had provided written statements to the effect that A.M.C. had brought the methamphetamine to school. Castillo correctly points out that only one student specifically stated that A.M.C. had brought the drugs to school.

The district court found that Sgt. McCarty was "negligent with respect to his representation that *all* seven children stated A.M.C. brought the drugs to school" but that he did not intentionally or recklessly misrepresent the number of students who provided that information. That finding is based on Sgt. McCarty's testimony that he did not intentionally misstate the number of students and did not intend to mislead the issuing judge. Sgt. McCarty testified that he drafted the warrant application based on his "memory of what [he] had read in the seven statements and [his] notes that [he] had taken." At the time that Sgt. McCarty prepared the warrant application, he did not possess copies of the students' written statements. Sgt. McCarty also testified that he was working urgently to obtain and execute a search warrant because "drugs in homes have a

tendency to disappear." We must defer to the district court's credibility determinations. *See id.* In light of that deference, we conclude that the district court's finding concerning the lack of intent or recklessness is not clearly erroneous.

In addition, the district court also reasoned that, even if Sgt. McCarty's misstatement was intentional or reckless, "there would still be sufficient probable cause to issue the search warrant based upon the inclusion of the statement of the one child indicating that A.M.C. brought the drugs to school." We agree. One person's statement making a connection between the methamphetamine and A.M.C.'s residence would have provided the required nexus to the place to be searched. Thus, even if Sgt. McCarty's misstatement was intentional or reckless, it was not material.

2. Alleged Omission

Castillo also contends that Sgt. McCarty made a material omission by not including in the warrant application any mention of A.M.C.'s statement to Sgt. Barragan that she did not bring the drugs to school from her residence. This contention fails for two reasons. First, there is no evidence that Sgt. McCarty was aware of A.M.C.'s statement to Sgt. Barragan when he submitted the warrant application. Thus, there is no evidence to support a finding that Sgt. McCarty intentionally or recklessly omitted A.M.C.'s statement. Second, A.M.C.'s statement would not be material because her denial would not be dispositive. The district court reasoned that "a magistrate is not required to take such statements as truth." The district court is correct. "When determining whether there is probable cause, the ultimate inquiry is not whether there is some hypothesis of . . . innocence which is reasonably consistent with the circumstances

shown." *State v. McGrath*, 706 N.W.2d 532, 543 (Minn. App. 2005) (quotations omitted), *review denied* (Minn. Feb. 22, 2006). Thus, even if the warrant application had included A.M.C.'s statement to Sgt. Barragan, the application nonetheless would have provided the issuing judge with probable cause to issue the warrant.

In sum, the warrant to search Castillo's residence was supported by probable cause, and the district court did not err by denying Castillo's motion to suppress evidence.

Affirmed.