STATE OF MINNESOTA
IN COURT OF APPEALS
A09-156

State of Minnesota,
Respondent,

vs.

Daniel Paul Daberkow,
Appellant.

Filed February 2, 2010
Affirmed
Wright, Judge

Jackson County District Court
File No. 32-CR-06-183

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Robert O'Connor, Jackson County Attorney, Jackson, Minnesota (for respondent)

Michael P. Kircher, Sunde, Olson, Kircher & Zender, St. James, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

WRIGHT, Judge

Appellant challenges the district court's denial of his motion to suppress evidence seized by investigating officers, arguing that the district court erred by concluding that

the evidence supporting his conviction of first-degree methamphetamine manufacture would have been inevitably discovered. We affirm.

FACTS

On May 2, 2006, a local pharmacist reported to the chief of police for Lakefield that appellant Daniel Daberkow had purchased a large quantity of pseudoephedrine pills at several pharmacies in Jackson County during the previous two months. The pharmacist also reported that another individual, whom police knew to be one of Daberkow's friends, had purchased pseudoephedrine pills during the same time period. Motor vehicle records demonstrated that Daberkow and his friend shared the same address.

Ten days later, the manager of a pharmacy in adjacent Cottonwood County notified law enforcement that she believed that an individual had been purchasing pseudoephedrine pills using two different names. After police showed the pharmacy manager a photograph of Daberkow's driver's license, the manager confirmed that Daberkow was the person who had made the purchases. The pharmacy's log of pseudoephedrine sales confirmed that Daberkow, using two different names, purchased eight packages of pseudoephedrine pills during March through May 2006.

Another local pharmacist advised Windom police that Daberkow had recently purchased pseudoephedrine pills with his Minnesota identification card out, demonstrating that Daberkow was prepared to identify himself. The pharmacist reported that this was noteworthy because customers purchasing pseudoephedrine pills are never prepared to identify themselves. Daberkow's purchase also raised suspicion because he

"seemed really nervous." The pharmacist reported that he contacted another pharmacy in the area to warn about Daberkow's suspicious behavior, and the other pharmacy's staff indicated that Daberkow was attempting to purchase additional pseudoephedrine pills at that time. Windom police determined that, from April 15, 2006, through May 9, 2006, Daberkow purchased at least 24.12 grams of pseudoephedrine in Cottonwood County. Additionally, on March 24, 2006, Daberkow's friend purchased at least 7.2 grams of pseudoephedrine.

Lakefield and Windom police reported the results of their investigations to the Jackson County sheriff's deputy in charge of drug investigations, Deputy Brandon Haley. In addition to these reports, Deputy Haley had received reports of heavy traffic at night at Daberkow's residence, which indicated to him that drug trafficking or manufacturing likely was occurring there. According to Deputy Haley, although he had not yet obtained a search warrant, he was "[d]efinitely" prepared to do so based on the information available to him.

On May 18, 2006, Daberkow rode with a group of people to a roadside location to pick up an abandoned vehicle. Police arrived at the scene and, after another person in the group admitted being under the influence of a controlled substance, police ordered Daberkow out of the vehicle he arrived in and conducted a pat-down search. During the search, a film canister, which contained a substance later confirmed to be a controlled

substance, was retrieved from Daberkow's pocket. Daberkow was arrested, advised of his *Miranda*[1] rights, and questioned by police.

Daberkow admitted purchasing pseudoephedrine pills and participating in the manufacture of methamphetamine. Based on Daberkow's admissions, police obtained a warrant to search Daberkow's residence. Daberkow was advised of his *Miranda* rights a second time and questioned specifically about his recent purchases of pseudoephedrine pills. Daberkow admitted purchasing pseudoephedrine pills using two different names and having his friend purchase pseudoephedrine pills for him. During the ensuing search, police recovered several items used in the manufacture of methamphetamine.

Daberkow was charged in Cottonwood County with fifth-degree possession of a controlled substance, based on the substance found in his possession during the pat-down search on May 18, 2006. Daberkow moved to suppress the evidence obtained during the pat-down search. The Cottonwood County District Court granted the motion, finding that police did not have probable cause to believe that Daberkow had committed a crime when he was arrested during the roadside investigation. The Cottonwood County case was subsequently dismissed.

Daberkow also was charged in Jackson County, where his residence was located, with first-degree manufacture of a controlled substance, a violation of Minn. Stat. § 152.021, subds. 2a, 3(a) (Supp. 2005); possession of substances with the intent to manufacture methamphetamine, a violation of Minn. Stat. § 152.0262 (Supp. 2005); and fifth-degree possession of a controlled substance, a violation of Minn. Stat § 152.025,

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

subd. 2(1) (2004). Daberkow moved the Jackson County District Court to suppress the evidence, arguing that he had been unlawfully seized on May 18, 2006, and that any evidence obtained during the subsequent interrogations and search of his residence was thereby tainted. At a January 2007 omnibus hearing, the state argued that suppression was unnecessary because certain evidence would have been inevitably discovered and other evidence had been obtained through an independent source. In support of the state's position, Lakefield and Windom police officers testified regarding their investigations of Daberkow's purchases of pseudoephedrine pills, and Deputy Haley testified regarding the reports of heightened nighttime activity at Daberkow's residence. These investigations and reports predated the roadside arrest.

After taking judicial notice of the Cottonwood County suppression order, the Jackson County District Court denied Daberkow's motion to suppress, finding that police would have inevitably discovered the evidence by lawful means and that police had probable cause to arrest Daberkow for crimes other than the offense for which he had been arrested in Cottonwood County. In November 2006, Daberkow agreed to a trial on stipulated facts, thereby preserving the suppression issue for appeal. The district court found Daberkow guilty of first-degree manufacture of a controlled substance and dismissed the remaining two charges. This appeal followed.

D E C I S I O N

Daberkow contends that the district court erred by applying the inevitable-discovery doctrine, arguing that "for inevitable discovery to apply, the State would have to show that the police had a plan in place at the time of [his] arrest that would have le[d]

inexorably to a valid Warrant to search [his] residence." Whether the district court erred by declining to suppress evidence presents a question of law, which we review de novo. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Evidence obtained during an unlawful search or seizure is inadmissible to support a conviction, unless an exception to this exclusionary rule applies. *James v. Illinois*, 493 U.S. 307, 311, 110 S. Ct. 648, 651 (1990) (stating that Supreme Court has carved out exceptions to exclusionary rule); *Harris*, 590 N.W.2d at 97 (stating that evidence obtained after unlawful seizure must be suppressed); *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001) (citing *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963)) (stating that fruit of illegal conduct is inadmissible), *review denied* (Minn. Dec. 11, 2001).

The Fourth Amendment's exclusionary rule does not apply when the police would have obtained the evidence absent any misconduct. *Nix v. Williams*, 467 U.S. 431, 448-50, 104 S. Ct. 2501, 2511-12 (1984); *Harris*, 590 N.W.2d at 105. The inevitable-discovery doctrine applies when officers "possess[ ] lawful means of discovery and [are], in fact, pursuing those lawful means prior to their illegal conduct." *State v. Hatton*, 389 N.W.2d 229, 233 (Minn. App. 1986), *review denied* (Minn. Aug. 13, 1986). That a search warrant could have been obtained, however, is insufficient to avoid the exclusionary rule. *Id.* at 234. The inevitable-discovery doctrine likewise does not apply absent a separate investigation that would have inevitably led police to discover the evidence. *State v. Richards*, 552 N.W.2d 197, 203 n.2 (Minn. 1996).

The district court considered the evidence submitted at the omnibus hearing and made two principal findings: (1) several law-enforcement agencies were investigating Daberkow's recent purchases of pseudoephedrine pills, a precursor to the manufacturing of methamphetamine, and suspicious activity in the late-night hours at Daberkow's residence; and (2) these law-enforcement agencies "would have continued to actively pursue [those] investigations." Based on these findings, the district court concluded:

> By a preponderance of the evidence: 1) there is a reasonable probability that evidence of methamphetamine manufacturing at defendant's residence would have been discovered by lawful means in the absence of the illegal arrest . . . and 2) at the time of defendant's arrest Jackson and Cottonwood Counties were actively pursuing . . . investigation into defendant's illegal purchases of pseudoephedrine . . . and of suspicious late night activities at his residence that would ultimately and inevitably have led to obtaining evidence of methamphetamine manufacturing from defendant's residence . . . .

Citing *State v. Licari*, 659 N.W.2d 243, 255 (Minn. 2003), and *Nix*, 467 U.S. at 443 n.4, 104 S. Ct. at 2509 n.4, Daberkow asserts that the lengthy delay between the initial investigations and the officers' written reports weighs against the district court's finding that there is a reasonable belief that police would have lawfully obtained the evidence within a reasonable period of time. Daberkow's assertion is unavailing for two reasons. First, when police arrested Daberkow on May 18, 2006, the investigations of Daberkow's illegal purchases of pseudoephedrine pills and the suspicious nighttime activity at his residence naturally ceased. Investigating officers were under no obligation at that time to draft reports detailing their investigations in order to establish that their investigations would have continued had the arrest not occurred.

Second, contrary to Daberkow's assertion, the inevitable-discovery doctrine does not set a time frame during which the evidence must be "ultimately or inevitably . . . discovered by lawful means." *Nix*, 467 U.S. at 444, 104 S. Ct. at 2509. Rather, the inevitable-discovery doctrine requires an ongoing investigation and a showing that there is a reasonable probability that the ongoing investigation would have lawfully led to the discovery of the evidence within a reasonable time period. *See id.*; *United States v. Feldhacker*, 849 F.2d 293, 296 n.4 (8th Cir. 1988) ("While the hypothetical discovery by lawful means need not be reached as rapidly as that actually reached by unlawful means, the lawful discovery must be inevitable through means that would actually have been employed."). Determining what constitutes a reasonable time period requires us to consider the nature of the crime and the investigation.

Because of Daberkow's recent purchases of large quantities of pseudoephedrine pills, police suspected him of manufacturing methamphetamine. A person may not acquire more than six grams of pseudoephedrine, a critical component of methamphetamine, within a 30-day period. Minn. Stat. § 152.02, subd. 6(d)(1), (f) (Supp. 2005). Unlike *Nix* and *Licari*, which involved investigations of violent crimes in which prompt recovery of the victim and discovery of evidence were critical, *see Nix*, 467 U.S. at 449, 104 S. Ct. at 2512 (stating that homicide investigation would have led to evidence within three to five hours absent police misconduct); *Licari*, 659 N.W.2d at 256 (remanding for determination of whether missing-person investigation would have inevitably pursued and uncovered evidence absent police misconduct), the manufacturing of methamphetamine and the illegal purchase of more than six grams of pseudoephedrine

are less time sensitive, require investigation into suspected unlawful conduct over a period of time, and do not require, and reasonably may not receive, immediate and constant investigative attention. As such, the state need not demonstrate that, absent the unlawful arrest, police would have discovered the evidence within a few hours or even within a few days to establish that there is a reasonable probability that the ongoing investigation would have lawfully led to the discovery of the evidence within some reasonable time period.

It is undisputed that police officers in two different counties began investigating Daberkow's purchases of pseudoephedrine pills before Daberkow's arrest. The early stages of the investigations produced evidence that (1) in March and April 2006, Daberkow purchased large quantities of pseudoephedrine pills at several pharmacies in Jackson County; (2) Daberkow's friend and housemate purchased pseudoephedrine pills during the same time period; (3) using two different names, Daberkow purchased at least 24.12 grams of pseudoephedrine from April 15 through May 9, 2006, in Cottonwood County, which is more than four times the legal limit; and (4) there was suspicious nighttime activity at Daberkow's residence. When Daberkow was arrested, Deputy Haley was "[d]efinitely" prepared to obtain a search warrant.

After reviewing the record and giving due weight to the district court's credibility determinations and reasonable inferences, there is ample support for the district court's findings that several law-enforcement agencies were investigating Daberkow's recent purchases of pseudoephedrine pills, the investigations would have continued, and "there is a reasonable probability that evidence of methamphetamine manufacturing at

defendant's residence would have been discovered by lawful means." Accordingly, the district court did not err by denying Daberkow's motion to suppress based on the inevitable-discovery doctrine.

In light of our decision, we need not address the district court's alternative holding that, based on *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640 (1990), suppression of the evidence was unwarranted because there was probable cause to arrest Daberkow for crimes other than the one for which he was arrested.

Affirmed.