STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2118

State of Minnesota,
Appellant,

vs.

Jose Isabel Rodriguez,
Respondent.

Filed May 25, 2010
Affirmed in part, reversed in part, and remanded
Schellhas, Judge
Concurring specially, Lansing, Judge

Nobles County District Court
File No. 53-CR-09-943

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

Gordon L. Moore, Nobles County Attorney, Travis J. Smith, Assistant County Attorney, Worthington, Minnesota (for appellant)

Mark D. Nyvold, St. Paul, Minnesota; and

Michael W. Hanson, Attorney at Law, Sioux Falls, South Dakota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

SCHELLHAS, Judge

Appellant challenges the district court's pretrial dismissal of two counts of a criminal complaint charging respondent with drug-related felonies. Respondent seeks discretionary review of the district court's refusal to dismiss count 4. We affirm in part, reverse in part, and remand.

FACTS

The facts in this case are undisputed. On August 11, 2009, the Nobles County district court issued a warrant to search a Worthington residence for, among other things, controlled substances including methamphetamine and drug paraphernalia. Respondent Jose Isabel Rodriguez, his wife, and three minor children resided at the Worthington residence. The search warrant did not authorize a search of any person.

On August 12, Agent Shawn Elsing of the Buffalo Ridge Drug Task Force and other officers executed the search. Elsing entered an attached garage, which appeared to be part of the living space, and found respondent lying on the floor at the direction of another officer. Elsing knew that respondent lived at the residence. Elsing handcuffed respondent and conducted a pat-down of him. During the pat-down, Elsing felt in respondent's pants pocket a package that had a granular consistency. Based on his training and experience, Elsing believed the item to be crystalline methamphetamine and retrieved it from respondent's pants pocket. The item consisted of a plastic bag that contained a substance that Elsing believed was methamphetamine. In the coin pocket within that same pants pocket, Elsing discovered a plastic bag that also contained what he

believed to be methamphetamine. The material in both plastic bags field-tested positive for methamphetamine.

After discovering the drugs, but without advising respondent of his *Miranda* rights, Elsing asked respondent, who remained handcuffed, whether there were more "narcotics" in the house. Respondent answered that there was a meth pipe behind a speaker in the garage. Elsing retrieved the pipe, which field-tested positive for methamphetamine.

Appellant State of Minnesota charged respondent with drug-related crimes in a four-count complaint. The state dismissed count 1 because the substance underlying that count, which field-tested positive for methamphetamine, subsequently tested negative by the BCA lab. The officers found the substance underlying count 1 in a plastic bag floating in a toilet in the residence. The charges that are the subject of our review are: second-degree possession of controlled substance, a felony, in violation of Minn. Stat. § 152.022, subd. 2(1) (2008) (count 2); methamphetamine-related crime involving children, a felony, in violation of Minn. Stat. § 152.137, subd. 2(a)(4) (2008) (count 3); and possession of drug paraphernalia, a petty misdemeanor, in violation of Minn. Stat. § 152.092 (2008) (count 4).

Respondent moved to suppress his statements made at the scene and of the controlled substances seized from his pocket and the garage. After a contested omnibus hearing, the district court concluded that the pat-down of respondent was unconstitutional because the search of respondent was not authorized in the search warrant, Elsing had no reason to believe that respondent was armed and dangerous prior to the pat-down, and

Elsing had no lawful basis to arrest and search respondent before the items in his pants pocket were discovered. Reasoning that respondent's possession of the meth pipe was a petty misdemeanor, the court concluded that the custodial arrest of respondent for possession of the meth pipe "was not authorized." The court therefore suppressed respondent's statements made at the scene and the drugs retrieved from respondent's pants pockets, concluding that respondent's statements were made without a required *Miranda* warning and that, because the custodial arrest of respondent was unlawful, any evidence seized as a result of the pat-down search required suppression. Having suppressed the evidence, the district court dismissed counts 2 and 3 of the complaint, concluding that there was no lawful basis for the charges.

The state challenges the suppression of drugs and dismissal of counts 2 and 3. The state does not challenge the court's suppression of respondent's statements made at the scene. Although respondent did not file a notice of review, he asks this court to review and reverse the district court's refusal to dismiss count 4. This appeal follows.

D E C I S I O N

Critical Impact and Review of Pretrial Suppression Orders

On review, this court will not overturn the district court's pretrial order unless "the state demonstrates clearly and unequivocally that the trial court has erred in its judgment and that, unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Webber*, 262 N.W.2d 157, 159 (Minn. 1977). Respondent does not dispute that the district court's dismissal of counts 2 and 3 will have a critical impact on any trial. Having established a critical impact, the state must demonstrate clearly and

unequivocally that the district court erred when it suppressed the drugs that the police found in respondent's pockets.

When reviewing a pretrial order suppressing evidence where the facts are not in dispute and the district court's decision is a question of law, "the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State. v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). We independently review the facts and determine, as a matter of law, whether the district court erred in suppressing the evidence. *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The Fourth Amendment requires that a search warrant contain a description of the place to be searched and the person or things to be seized. U.S. Const. amend. IV. When executing a search warrant for a residence, probable cause must exist to enable the search of any person present on the premises. *State v. Wynne*, 552 N.W.2d 218, 221 (Minn. 1996) (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342 (1979)) (stating that requirement of probable cause to search a person cannot be avoided because there exists probable cause to search premises).

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); *State v. Harris*, 590 N.W.2d 90, 97 (Minn. 1999) (suppressing evidence obtained after unlawful seizures); *State v. Olsen*, 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 exclusionary rule does not apply when the police inevitably would have discovered the evidence absent any misconduct. *Nix v. Williams*, 467 U.S. 431, 449, 104 S. Ct. 2501, 2511 (1984); *Harris*, 590 N.W.2d at 105.

Count 4: Meth Pipe

We begin by addressing the district court's refusal to dismiss count 4, the petty misdemeanor of possession of drug paraphernalia, on the basis that the meth pipe was admissible pursuant to the inevitable-discovery doctrine. Respondent asks us to review the district court's ruling. Appellant argues that because respondent did not file a cross-appeal, he cannot argue on appeal that the district court erred by concluding that the meth pipe was inevitably discovered. We review respondent's argument in the interests of justice. Minn. R. Civ. App. P. 103.04 (stating that appellate courts "may review any other matter as the interest of justice may require").

Under the inevitable-discovery doctrine, "[i]f the state can establish by a preponderance of the evidence that the fruits of a challenged search . . . inevitably would have been discovered by lawful means, then the seized evidence is admissible." *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (quotation omitted). The inevitable-discovery doctrine "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Id.* (quoting *Nix v. Williams*, 467 U.S. at 444-45 n.5; 104 S. Ct. at 2509 n.5) (quotation marks omitted). The question presented here is whether, setting aside respondent's statements at the scene to Officer Elsing

regarding the location of the meth pipe, an officer executing the search warrant at the Worthington residence would inevitably have found the pipe.

When Elsing submitted the search-warrant application to the district court on August 11, 2009, he stated that based on evidence obtained during a "controlled buy" on May 14, 2009, and a "trash pull" on August 10, 2009, he had good reason to believe that unlawfully possessed controlled substances, dispensing equipment, and drug and smoking paraphernalia, among other things, would be found at respondent's residence. Respondent does not dispute the validity of the search warrant. The meth pipe was not covered and was located partially behind a speaker on a shelf in the garage. Elsing testified that when he searches homes, he opens drawers and moves things that might be lying on floors, counters, or cupboards.

We conclude that the district court did not err by concluding that the meth pipe would inevitably have been discovered and by denying respondent's motion to suppress and to dismiss count 4.

Count 3: Methamphetamine Crime Involving Children

The district court dismissed count 3 for lack of probable cause to arrest respondent for a felony offense. "To establish probable cause, the police must show that they reasonably could have believed that a crime has been committed by the person to be arrested." *State v. Riley*, 568 N.W.2d 518, 523 (Minn. 1997) (quotation omitted).

> We apply an objective standard for determining the lawfulness of an arrest or a search by taking into account the totality of the circumstances to determine whether the police have probable cause to believe that a crime has been committed, and if the objective standard is met, we will not

> suppress evidence or invalidate an arrest even if the officer making the arrest or conducting the search based his or her action on the wrong ground or had an improper motive.

State v. Perkins, 582 N.W.2d 876, 878 (Minn. 1998) (quotation omitted); *see also State v. Johnson*, 314 N.W.2d 229, 330 (Minn. 1982) ("The fact that it later turns out that the officers were wrong does not mean that they did not have probable cause at the time they made their assessment.").

In count 3, the state alleged that respondent violated Minn. Stat. § 152.137, subd. 2(a)(4), which provides:

> No person may knowingly engage in any of the following activities in the presence of a child or vulnerable adult; in the residence of a child or a vulnerable adult; in a building, structure, conveyance, or outdoor location where a child or vulnerable adult might reasonably be expected to be present; in a room offered to the public for overnight accommodation; or in any multiple unit residential building:
> . . .
> (4) storing any methamphetamine paraphernalia.

Methamphetamine paraphernalia is defined as "all equipment, products, and materials of any kind that are used, intended for use, or designed for use in manufacturing, injecting, ingesting, inhaling, or otherwise in introducing methamphetamine into the human body." Minn. Stat. § 152.137, subd. 1(d) (2008).

Evidence at the omnibus hearing showed that Elsing found a meth pipe behind a speaker during the search of the garage, that residue in the pipe field-tested positive for methamphetamine, and that BCA lab testing confirmed that the residue contained methamphetamine. The evidence also showed that three minor children resided at the residence that was searched and were present during the execution of the search warrant,

as alleged by the state in count 3. The district court dismissed count 3 without specifically addressing the alleged statutory violation under Minn. Stat. 152.137, subd. 2(a)(4), stating, "Because the illegally-seized evidence provides the basis for the charges contained in Counts [2] and [3], those charges have been dismissed."

We conclude that the district court erred by dismissing count 3, because based on Elsing's reasonable belief that the meth pipe constituted methamphetamine paraphernalia and that three minor children resided at the residence searched, Elsing had probable cause to believe that respondent had violated Minn. Stat. § 152.137, subd. 2(a)(4). This probable cause remained to support the complaint, since it was not affected by the issues surrounding the other evidence.

Count 2: Methamphetamine in Respondent's Pockets

In its order suppressing admission of the methamphetamine found in respondent's pockets, the district court stated:

> The State's reliance on the "inevitable discovery" doctrine is . . . unavailing because there was no basis on which to arrest the Defendant before the controlled substance in his pocket was discovered. Indeed, the controlled substance found in Defendant's pocket *was* the basis for his arrest. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification . . . . The State argues, nonetheless, that the discovery of the methamphetamine in Defendant's pocket would have been "inevitably discovered" because the defendant would have been searched incident to his arrest which would have resulted from the discovery of the methamphetamine pipe.
>
> "A search incident to an arrest" is appropriate only when the "crime for which there is probable cause to arrest [is] a crime for which a *custodial* arrest is authorized." *Possession of a methamphetamine pipe is a petty*

> *misdemeanor. Defendant's "custodial arrest" for possession of drug paraphernalia was not authorized.*

(Citation omitted; emphasis added; modification in original.) And, in a footnote, the district court stated, "Apparently any controlled substance observed in the meth pipe was insufficient to charge Defendant with a felony offense."

The state challenges the district court's dismissal of count 2, arguing that because the residue in the meth pipe field-tested positive for methamphetamine, and because methamphetamine is a schedule II controlled substance under Minn. Stat. § 152.02, subd. 3(3)(b) (2008), the officer had probable cause and authority to make a custodial arrest of respondent and to search him incident to that arrest. Respondent counters that no evidence was produced by appellant at the omnibus hearing to show that "the police were able to determine, while at Rodiguez's house, that the pipe residue was methamphetamine."

Upon discovering the meth pipe, Elsing had probable cause to arrest respondent for the felony offense of storing methamphetamine paraphernalia in the residence of a child under Minn. Stat. § 152.137, subd. 2(a)(4). Incident to that arrest, Elsing would have inevitably discovered the methamphetamine in respondent's pants pockets. Additionally, we agree with the state that the residue in the meth pipe that field-tested positive for methamphetamine provided Elsing with probable cause to arrest respondent on the felony offense of fifth-degree controlled-substance crime under Minn. Stat. § 152.025, subd. 2(1) (2008). Had Elsing arrested respondent on probable cause for that offense, he would have inevitably discovered the drugs in respondent's pants pockets.

Respondent's argument that unless the pipe residue was first field-tested, Elsing lacked probable cause to believe that respondent had committed a felony, is unpersuasive. In *Harris*, 590 N.W.2d 90, a case involving the inevitable-discovery doctrine, the supreme court reversed the district court's suppression ruling.

> Had [Officer] Bratsch then proceeded to search Harris' jacket via a permissible pat-down search, he would have felt a plastic bag containing a suspicious substance. Even if Bratsch may not have been able to positively identify the substance in the plastic bag as marijuana by his sense of touch alone, under the totality of the circumstances surrounding such a discovery, the presence of a plastic bag containing a substance consistent with marijuana hidden on Harris likely would have given Bratsch probable cause to believe that the bag contained a controlled substance. With probable cause, Bratsch could have permissibly seized the plastic bag. . . .
>
> Because legal discovery of the marijuana was inevitable, the intervening illegality of performing a search of Harris' jacket sleeve from the inside of his jacket sleeve pursuant to Harris' apparent, but involuntary, consent cannot operate to invalidate the search.

Harris, 590 N.W.2d at 105 (citations omitted).

At the omnibus hearing, Elsing testified that he had worked for the Worthington Police Department since 1994 and had been assigned to the Buffalo Ridge Drug Task Force since January 2006. The district court received Elsing's investigation report in which Elsing itemized the evidence seized, including a description of item # SE-A1: "Glass pipe with residue which field-tested positive for methamphetamine from behind speaker." At the hearing, Elsing expressed no confusion about the nature of the pipe or that he lacked sufficient training or experience to accurately identify the pipe as a meth pipe or to form a reasonable belief that the residue in the pipe was methamphetamine

residue. Even absent a field test, based on the residue in the meth pipe, Elsing had sufficient probable cause to arrest respondent for the felony offense of fifth-degree possession under Minn. Stat. § 152.025, subd. 2(a)(1) (Supp. 2009).

Based on the evidence adduced at the omnibus hearing, we have no reason to conclude that the pipe residue was not field-tested at the scene. In the absence of conflicting evidence, we construe "field-tested" according to its plain and ordinary meaning—tested in the field. And respondent has provided no legal authority, and we have found none, to support the proposition that a trained law-enforcement officer must conduct a field test of a substance before he or she has probable cause to believe that a felony controlled-substance offense has been committed.

Moreover, the totality of the circumstances in this case includes that, during the execution of the search warrant, Elsing discovered a plastic bag containing white powder residue floating in a toilet in the residence, and another officer field-tested the substance and found that it tested positive for methamphetamine. The officers therefore had probable cause for a felony arrest of respondent before they concluded their search. When more than one officer is involved in an investigation, Minnesota uses the collective knowledge approach to determine whether probable cause existed and, under this approach, the entire knowledge of the police force is pooled and imputed to the arresting officer for the purpose of determining if sufficient probable cause existed. *Riley*, 568 N.W.2d at 523. Under the collective knowledge approach, the discovery of methamphetamine in the residence provided Elsing with probable cause to arrest

respondent for the felony of fifth-degree controlled-substance crime under Minn. Stat. § 152.025, subd. 2.

The police may arrest a person based on probable cause for one offense, even if the person is later charged with a different offense. *See In re Welfare of T.L.S.*, 713 N.W.2d 877, 881 (Minn. App. 2006) (holding that police officers had probable cause to arrest a juvenile for disorderly conduct, even though probable cause was based in part on an uncharged trespass violation). As in *Harris*, under the totality of the circumstances, Elsing's discovery of the methamphetamine in respondent's pants pockets was inevitable because Elsing would have had probable cause to arrest respondent for at least one felony before the officers concluded their search. Had Elsing arrested and searched respondent, based on felony probable cause, he would have inevitably discovered the methamphetamine in respondent's pants pockets. The district court erred by suppressing the methamphetamine found in respondent's pants pockets.

We therefore reverse the district court's suppression of the drugs and the dismissal of counts 2 and 3, and we remand counts 2 and 3 to the district court.

Affirmed in part, reversed in part, and remanded.

LANSING, Judge (concurring specially)

I agree with the determination of critical impact, and I also agree that the district court properly relied on the inevitable discovery doctrine to deny Jose Rodriguez's motion to dismiss count 4, misdemeanor possession of drug paraphernalia. On that count, the district court concluded that the pipe with residue was admissible as evidence, despite improper police procedures, because it would have been inevitably discovered in the course of executing the search warrant. Although I agree with the majority's conclusion to reinstate count 2, second-degree possession of controlled substance; and count 3, prohibited drug-related conduct in the residence of a child; I would analyze the propriety of these counts on different grounds. Similar to the district court's analysis of the drug-paraphernalia count, the propriety of these counts rests on the execution of the lawful search warrant and the application of the inevitable-discovery doctrine.

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) (citing *United States v. Apker*, 705 F.2d 293, 307 (8th Cir. 1983)), *review denied* (Minn. Aug. 13, 1986). The burden is on the state to show that inevitable discovery applies, which "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003).

According to the record, police obtained a search warrant based on information that methamphetamine had been sold at Jose Rodriguez's home and that methamphetamine residue had been discovered in garbage from that home. Several

people, including Rodriguez, were present when the warrant was executed, and the police took steps to detain everyone at the house during the search. *See Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595 (1981) (permitting limited detention of those present during execution of search warrant); *State v. Wynne*, 552 N.W.2d 218, 222 (Minn. 1996) (stating that "a search warrant to search for contraband carries with it the limited authority to detain the occupants of the premises while the search is conducted").

Inside the house, among other items, police found a small amount of crystals in a plastic bag that was floating in a toilet. Based on the information contained in the affidavit supporting the search warrant, the police officers, after discovering the crystals, would have had probable cause to arrest Rodriguez for a fifth-degree, controlled-substance crime under Minn. Stat. § 152.025, subd. 2 (2008). And, based on the police's authority to detain Rodriguez during the execution of the warrant, he would still be present and would still have the controlled substance in his pocket when the crystals in the toilet were discovered. Consequently, a lawful search, incident to arrest, would have resulted in the inevitable discovery of the drugs in Rodriguez's pocket. Because this evidence is sufficient to provide probable cause for counts 2 and 3, it is unnecessary to speculate on undeveloped facts relating to the character of the pipe or the time of the field testing. Speculation on these facts runs the risk of impermissibly shifting the burden to the defense to show that the arrest was unlawful. *See State v. Merrill*, 274 N.W.2d 99, 108 (Minn. 1978) (stating that prosecution has the burden to show that "at the time of the arrest, the police had factual information from reliable sources from which they could conclude the defendant had participated in the felony").