STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1007

State of Minnesota,
Respondent,

vs.

Mark Thomas Mastin,
Appellant.

Filed July 13, 2010
Affirmed
Muehlberg, Judge[*]

Hubbard County District Court
File No. 29-CR-07-341

Lori Swanson, Attorney General, Matthew G. Frank, Eric P. Schieferdecker, Assistant Attorneys General, St. Paul, Minnesota; and

Donovan Dearstyne, Hubbard County Attorney, Park Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellant Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MUEHLBERG, Judge

Appellant challenges his conviction of a controlled-substance crime, arguing that the district court erred by refusing to suppress drug evidence seized from his residence during the execution of a search warrant because there was no basis for a nighttime, unannounced entry. Because there were specific circumstances to demonstrate a reasonable suspicion that a nighttime, unannounced entry was necessary to protect officer safety, we affirm.

FACTS

On March 22, 2007, Hubbard County Sheriff's Deputy J.T. Harris applied for a warrant to search appellant Mark Thomas Mastin's residence, person, and motor vehicle for controlled substances, drug paraphernalia, and firearms. A police informant had notified Deputy Harris on the previous day that there was methamphetamine in appellant's residence and vehicle, and that appellant had several long guns and handguns at his residence, including a Smith & Wesson .40-caliber handgun that had been reported stolen by a Hubbard County resident. This informant had successfully worked with law enforcement in the past in making controlled purchases of drugs and stolen property. Deputy Harris's warrant application included the informant's tip and information that the deputy had received from two other individuals, N.M. and Z.F.

N.M. and Z.F. were both cooperating with law enforcement because they had been arrested for drug possession. Deputy Harris stated in his affidavit supporting the warrant application that N.M. and Z.F. gave recorded statements that appellant sells

methamphetamine from his residence and that they had both observed the stolen .40-caliber handgun at his residence.

The warrant application asserted that "Mastin has easy access to firearms in the residence" and requested a nighttime, unannounced-entry search warrant because it would "assist the officers to approach the residence under the cover of darkness for officer safety, avoiding early detection and reducing the probability of evidence being destroyed before officers can enter the residence."

A judge issued a search warrant authorizing a nighttime, unannounced entry, and around 9:00 p.m., police executed the warrant. The police used a "flash-bang" device and did not announce their entry. The police seized firearms, including the stolen .40-caliber handgun, and 28 grams of methamphetamine.

Appellant moved to suppress the evidence, arguing that the search-warrant application lacked sufficient specificity to justify a no-knock, nighttime warrant. The district court denied the motion, finding that the application established a legally sufficient basis for the issuing magistrate to authorize a nighttime and unannounced execution of the search warrant.

Appellant later discovered that Deputy Harris's warrant application contained inaccurate statements, moved to reopen the omnibus hearing, and renewed his argument for suppression. The district court heard testimony from Deputy Harris who acknowledged that the warrant application included inaccurate information. The deputy did not actually have *recorded* statements from N.M. and Z.F. stating that they had observed the .40-caliber handgun in appellant's residence. Deputy Harris had

approximately 20 conversations with Z.F. and 10 with N.M., but only three were recorded. Deputy Harris stated that he did not intend to mislead the judge with his description of the recorded statements and explained that he neglected to review the transcripts of the recorded conversations and instead based his affidavit on his memory. He asserted that N.M. and Z.F. mentioned the handgun in unrecorded conversations, but he also acknowledged that Z.F. later denied ever seeing the handgun.

The district court found that the application included inaccurate information: the statements attributed to N.M. and Z.F. were not obtained in recorded statements and Z.F. did not observe the stolen handgun in appellant's residence. The district court stated that the false information would be redacted from the search-warrant application, but concluded that even after the redaction, the search warrant was valid. The district court again denied the suppression motion. Appellant waived his right to a jury trial and agreed to submit the matter to the district court on a stipulated record pursuant to Minnesota Rule of Civil Procedure 26.01, subdivision 3. The district court considered the stipulated evidence and found appellant guilty of second-degree controlled-substance crime. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by denying his pretrial motion to suppress evidence seized during the search of his residence because the warrant application lacked sufficient information to justify execution of the warrant at night and without knocking and announcing. When reviewing pretrial suppression orders, we "independently review the facts to determine whether, as a matter of law, the [district]

court erred in its ruling." *State v. Jackson*, 742 N.W.2d 163, 168 (Minn. 2007). We accept the district court's factual findings unless they are clearly erroneous, but we review the district court's legal determinations de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

The United States and Minnesota constitutions prohibit the government from conducting unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Inquiry into the need for an unannounced, nighttime entry is part of the reasonableness inquiry under the Fourth Amendment. *Jackson*, 742 N.W.2d at 177; *Garza v. State*, 632 N.W.2d 633, 638 (Minn. 2001). If the circumstances do not warrant an unannounced, nighttime entry, the evidence seized should be suppressed. *Jackson*, 742 N.W.2d at 178–80; *Garza*, 632 N.W.2d at 638.

Unannounced, nighttime execution of a search warrant requires additional justification beyond the probable cause required to obtain an announced, daytime search warrant. Warrant applications requesting an unannounced entry must demonstrate reasonable suspicion that knocking and announcing the entry would be dangerous, futile, or would inhibit the effective investigation of the crime. *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000). Similarly, applications for a nighttime warrant "must establish reasonable suspicion that a nighttime search is necessary to preserve evidence or to protect officer or public safety." *Jackson*, 742 N.W.2d at 167–68; *see also* Minn. Stat. § 626.14 (2006) (stating that a warrant must be served between 7:00 a.m. and 8:00 p.m. unless the affidavit demonstrates that a nighttime search "is necessary to prevent the loss, destruction, or removal of the objects of the search or to protect the searchers or the

public"). Unlike the probable-cause standard applied to justify a search warrant in general, courts apply a reasonable-suspicion standard to justify a no-knock or nighttime entry. This is not a high standard, but it requires something more than "an unarticulated hunch"; officers must have objective support for their suspicion. *Wasson*, 615 N.W.2d at 320.

In *Richards v. Wisconsin*, the United States Supreme Court rejected a blanket exception to the knock-and-announce rule for felony drug cases. 520 U.S. 385, 391–95, 117 S. Ct. 1416, 1420–22 (1997). The Court disagreed with the Wisconsin Supreme Court's conclusion that exigent circumstances are always present in felony drug cases and therefore police do not need specific information about dangerousness or the possible destruction of evidence in order to make an unannounced entry. *Id.* at 390, 395, 117 S. Ct. at 1419-20, 1422. The Court acknowledged that drugs are typically linked to violence and drug dealers will often try to dispose of their drugs before they can be seized, but the circumstances of each case must be analyzed to determine whether the police have shown a reasonable suspicion that a no-knock entry is necessary for safety reasons or to preserve evidence. *Id.* at 391, 394, 117 S. Ct. at 1420–22.

The Minnesota Supreme Court applied *Richards* in *Wasson* and affirmed a controlled-substance conviction after police executed a no-knock search warrant at a residence where the defendant was staying. 615 N.W.2d at 318, 322. The court held that the unannounced entry was justified because the search warrant affidavit pointed to a specific, objective piece of information supporting a reasonable suspicion that knocking and announcing police presence would be dangerous: that weapons were likely present in

the house because numerous weapons had been seized from that location three months previously. *Id.* at 320–21. The court declined to follow pre-*Richards* cases from other jurisdictions that held that the mere presence of firearms is insufficient and that required an objectively reasonable belief that the suspect might respond with violence. *Id.* at 321. The court observed that an objectively reasonable belief is a higher showing than what *Richards* requires, a reasonable suspicion, and therefore declined to apply the higher standard:

> As the *Richards* court noted, the showing required for a reasonable suspicion is "not high." In this case, the officer could point to a particular fact about this particular residence—that coupled with ongoing drug activity numerous weapons were found there three months previously—that led him to suspect that officer safety might be jeopardized. We think that is all *Richards* requires.

Id. (citation omitted).

Here, the district court stated in its first order denying suppression that "[t]he issues at hand are resolved by application of the holding and analysis of the Minnesota Supreme Court in *State v. Wasson* . . . ." We agree that *Wasson* is controlling. Unlike this case, the appellant in *Wasson* challenged only the officers' unannounced entry even though the warrant was also executed at night. *See id.* at 318. Although appellant here challenges both the unannounced entry and the nighttime execution, the requisite showing to justify both actions is identical.

There is no material difference between the information contained in the *Wasson* warrant affidavit and Deputy Harris's affidavit. An unannounced entry was justified in *Wasson* for officer safety reasons because there was drug activity and guns had

previously been seized at the location. The warrant affidavit in this case states that a confidential, reliable informant told police that appellant had methamphetamine and several firearms in his residence.[1] Appellant does not challenge the credibility of this informant. The showing of reasonable suspicion is actually stronger in this case than in *Wasson*. Here, an informant expressly told police that the suspect kept guns on the premises; in *Wasson*, the police's belief that guns were present was based merely on their seizing guns from that location three months earlier. Deputy Harris's warrant application contained sufficient information to establish a reasonable suspicion that an unannounced, nighttime entry was necessary to protect officer safety.

Appellant argues that the presence of a firearm alone is insufficient to justify a no-knock, nighttime entry, and that upholding the search would violate the holding in *Richards* that rejected a per se rule. He contends that the presence of a firearm is not a "particular circumstance" indicating that it would be dangerous for police to execute the warrant during the day or to knock and announce their presence. Appellant argues that the affidavit needed additional information, such as prior convictions of violent crimes, past instances of violent or threatening behavior towards police, membership in a gang, or the use of surveillance devices. These arguments are similar to the dissent's analysis in *Wasson*. *See id.* at 326 (Gilbert, J., dissenting) ("This affidavit had no specific facts to indicate danger, such as the severity of the resident's prior convictions, the particular

[1] On review, we do not consider any of the information provided by N.M. and Z.F. that Deputy Harris included in the warrant application. The district court found that *some* of the information attributed to N.M. and Z.F. in the application was inaccurate and that the false information would be redacted, but did not specify what information was redacted. We therefore rely only on the information provided by the confidential informant.

danger of the alleged facilitating [the sale of drugs], or the type or use of weapons found in the prior search."). But the majority opinion in *Wasson* rejected this "rigid" approach and concluded that there does not need to be an objectively reasonable belief that the suspect might respond with violence. *Id.* at 321–22.

Appellant cites a string of unpublished opinions from this court and argues that, as the *Wasson* dissent feared, the application of the *Wasson* holding has led to a per se rule allowing no-knock and nighttime searches where the affiant can point to the presence of a firearm. The unpublished cases that appellant cites applied the holdings in *Richards* and *Wasson* and upheld no-knock or nighttime search warrants after finding that specific information provided a reasonable, articulable suspicion of a risk to officer safety. While all of these cases involved the suspected presence of a firearm, none of them announced a per se rule allowing no-knock and nighttime searches where the affiant can point to the presence of a firearm.

Finally, we have reviewed appellant's pro se supplemental brief and conclude that because there is no evidence in the record to support his arguments, they do not warrant reversal or call for further discussion.

Affirmed.