STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2012

State of Minnesota,
Respondent,

vs.

Monty Marcell Prow,
Appellant.

Filed August 24, 2010
Affirmed
Harten, Judge*

Dakota County District Court
File No. 19-K8-07-2891

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

James C. Backstrom, Dakota County Attorney, Ann M. Offermann, Phillip D. Prokopowicz, Assistant County Attorneys, Hastings, Minnesota (for respondent)

Robert M. Christensen, Robert M. Christensen P.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Stauber, 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

HARTEN, Judge

Appellant challenges his conviction on three counts of controlled-substance crime, arguing that the affidavit supporting the search warrant for appellant's home failed to provide probable cause to issue the warrant; appellant also argues that alleged misrepresentations in the affidavit should have been suppressed. Because we find that the judge issuing the warrant had a substantial basis for concluding that probable cause existed, we affirm.

FACTS

R.P., the son of appellant Monty Prow and Tricia Ball, was born in November 2002. His parents share his custody.

In August 2007, Ball reported to Dakota County Child Services that R.P., then age four, had said that his father had abused him when he visited his father at his father's home. A child protection worker interviewed Ball, and R.P. was interviewed at the Minnesota Children's Resource Center (MCRC). A Burnsville Police Department investigator, after listening to the recorded interviews of Ball and R.P., applied for, and received, a search warrant for appellant's home.

The investigators executing the search warrant saw suspected cocaine, marijuana, and ecstasy in appellant's house. They notified the Dakota County Drug Task Force, which obtained another search warrant. About 60 grams each of cocaine and marijuana and four doses of ecstasy were found in appellant's house.

Appellant was charged with one count of first-degree controlled-substance crime and two counts of fifth-degree controlled-substance crime. The district court denied appellant's motion to suppress the evidence obtained from the execution of the first search warrant, and a jury convicted him on all three counts.

Appellant challenges his conviction, arguing that the investigator's affidavit did not provide the district court with a substantial basis for concluding that probable cause existed and that the district court erred in not suppressing alleged misrepresentations in the affidavit.

D E C I S I O N

1. Probable Cause

> Minnesota has adopted a totality of the circumstances test for determining whether a search warrant is supported by probable cause. Determinations of probable cause by the issuing judge are afforded great deference by [an appellate] court and are not reviewed de novo. . . . As the reviewing court, we are simply to ensure 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) (quotations and citations omitted).

The application for a search warrant set forth that the investigator believed items of property, including a video camera, a digital camera, floppy discs, compact discs, DVD discs, vaseline, and documents of home ownership, would be found at appellant's home. The application went on to indicate that the home was used as the means of committing a crime, and the property constituted evidence tending to show that a crime had been committed, or that a particular person, namely appellant, committed the crime, or that the possession of the property was itself a crime.

In his affidavit, the investigator said he had listened to the tape of Ball's interview with the child protection worker in which Ball said that R.P. "tells her that [appellant] videos [R.P.] when [appellant] 'poops and pees on [R.P.]'" and that "when [R.P.] is at [appellant's] house in Burnsville he sleeps with [appellant] and [appellant] urinates on him in bed making [R.P.'s] bed wet." The investigator said he also watched the video of R.P.'s interview at MCRC and "[R.P.] does disclose that [appellant] 'poops and pees on his head and it hurts his eyes.'"

The affidavit also reported that the investigator talked to the child protection worker who interviewed Ball and that Ball said "[R.P.] told [Ball] that [appellant] would put a cream on [R.P.'s] butt and would put 'a stick' in his butt" and "that once at a store [R.P.] pointed to Vaseline on the counter and told [Ball] that is the cream [appellant] uses on [R.P.'s] butt." The district court noted that Ball's interview was the primary basis for finding probable cause.

Appellant claims that the affidavit was based on multiple hearsay. But the investigator watched the video of R.P.'s MCRC interview and listened to the tape of Ball's interview with the child protection worker. Thus, he had personal knowledge of what R.P., Ball, and the child protection worker said on those occasions; his report was not based on multiple hearsay.

Some of the investigator's affidavit was derived from what he heard from the child protection worker, who said what she heard from Ball, who said what she heard from R.P. "In the hearsay-hearsay situation, as where an informant of established reliability tells police what someone else has told him, there is a need to establish veracity with

respect to each person in the hearsay chain." *State v. Wiberg*, 296 N.W.2d 388, 396 (Minn. 1980).

The investigator and the child protection worker are public servants who would have no reason to lie when reporting information, and statements from investigators and child protection workers are routinely accepted as the basis for judicial decisions. Their veracity may be assumed.

The district court classified Ball as a "citizen witness" entitled to a presumption of credibility absent a special circumstance. Appellant relies on *State v. Lindquist*, 295 Minn. 398, 400-01, 205 N.W.2d 333, 335 (1973) (setting out five factors supporting credibility of informant) to argue that Ball was not credible. But appellant misreads parts of *Lindquist*, and parts are irrelevant here.

First, like the *Lindquist* informant, Ball identified herself when she reported the matter to the authorities. *See id*. at 400, 205 N.W.2d at 335. Second, again like the *Lindquist* informant, Ball had not previously provided information to authorities, and "a first-time private citizen informer not involved in the criminal event he reports should be presumed to be telling the truth." *Id.* Third, unlike the *Lindquist* informant, Ball knew the suspect. *See id.* But a mother reporting possible abuse of her four-year-old child would likely be acquainted with the alleged abuser; this fact does not destroy the parent's credibility.[1] Fourth, the report of the *Lindquist* informant was "quite detailed," *id.* at 401,

[1] In arguing that Ball not only knew him but was at the time disputing R.P.'s custody with him, appellant refers to a matter not mentioned in the affidavit and therefore outside the scope of review of both the district court and this court. *See State v. Organ*, 263 N.W.2d 627, 631 (Minn. 1978) (quoting district court statement that, in issuing search

205 N.W.2d at 335, and Ball's report in her interview with the child protection worker was also detailed both as to what R.P. had told her about appellant's acts and about acts occurring during her own relationship with appellant. Fifth, the police corroborated parts of the *Lindquist* informant's report. *Id.* Here, Ball's statement of what R.P. told her was partly corroborated by R.P. during his own interview at MCRC. "An informant's reliability on a particular occasion can also be established if the statements of the informant can be at least partially corroborated independently." *Wiberg*, 296 N.W.2d at 396.

As to R.P., his age automatically makes his reliability suspect. But some of the statements Ball reported that he said were corroborated, as to their general purport if not their specific detail, by what he said in his MCRC interview. A lack of absolute consistency is also a hallmark of a four-year-old's statements to different people, at different times, in different contexts: expecting R.P. to say exactly the same things to the child protection worker that he had said to his mother would be an unreasonable expectation.

Appellant also argues that the affidavit provided only Ball's hearsay evidence of R.P.'s statements that appellant took videos of his acts with R.P. as the basis for assuming video equipment and videos would be in appellant's house. The affidavit said that Ball told the child protection worker that R.P. said "[appellant] 'poops and pees on

---

warrants, "we look at the affidavit and the facts that are stated therein and we don't go beyond the four corners of it . . . . [T]hat is an old standard rule . . ."); *Zanter*, 535 N.W.2d at 633 (noting that an appellate court's duty is "simply to ensure that the issuing judge had a 'substantial basis' for concluding that probable cause existed").

[R.P.'s] head and makes [R.P.] eat the poop'" and that "[appellant] videos this at [appellant's] house." A nexus between the creation of child pornography and the suspect's home can be created by the fact that child pornographers generally store materials in a secure place. *State v. Brennan*, 674 N.W.2d 200, 205 (Minn. App. 2004) (finding probable cause to search house of individual known to have viewed child pornography on his laptop at work).

Moreover, the affidavit included information that would reasonably dispel the view that it was based on no more than the imaginings of a four-year-old. It stated that "[Ball] told [the child protection worker] [that] when she lived with [appellant], he would urinate on her when she would be bathing." The investigator had listened to the tape in which Ball told the child protection worker that, when she was pregnant, "[appellant] wanted to like, poop on me, and pee on me, and actually, when I . . . I would take a bath . . . . [a]nd he'd come in and pee on me, and I'd get so mad, and he would just laugh." Thus, the investigator had first-hand knowledge of what Ball had said and based his statement in the affidavit on that knowledge.

The affidavit lawfully furnished probable cause to search appellant's home.

2. Misrepresentations and Omissions

Appellant asserts that the investigator deliberately misrepresented some facts and omitted other facts from the affidavit. A reviewing court must set aside any material misrepresentations and supply any omissions in a defective affidavit and then determine whether the affidavit provides probable cause. *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005), *review denied* (Minn. 22 Feb. 2006).

Appellant challenges the affidavit statements that concern videos: "[R.P.] told [Ball] that [appellant] videos this at [appellant's] house" and "[Ball] tells [the child protection worker] that [R.P.] tells [Ball] that [appellant] videos [R.P.] when [appellant] 'poops and pees on [R.P.].'" The first sentence was reported by Ball to the child protection worker, who relayed it to the investigator; the second occurred in a statement about the audio tape of Ball's interview with the child protection worker. The audiotape does not mention appellant making videos of his acts, but the audiotaped interview was not the only conversation Ball had with the child protection worker. Ball could have told the child protection worker about the videos in another, unrecorded, conversation, which the child protection worker also reported to the investigator. As the district court noted, "Given [the child protection worker's] position . . . , with no apparent motive to fabricate, her credibility and veracity can be presumed by the court." The affidavit statements concerning videos do not demonstrate a "reckless disregard for the truth" on the part of the investigator and do not preclude a finding of probable cause.[2] *See Elec. Fetus Co. v. City of Duluth*, 547 N.W.2d 448, 452 (Minn. App. 1996), *review denied* (Minn. 4 Aug.

[2] When R.P. was asked if he had ever seen movies or pictures he was not supposed to see, he said he saw a "really really funny movie . . . It was Jackass. Funny." Appellant asserts that R.P.'s failure to mention the videos he claimed appellant took was a significant fact in assessing the existence of probable cause and implies that the omission of this from the affidavit was the result of the investigator's deliberate or reckless disregard for the truth. But this is a hypertechnical reading of a four-year-old's mention of a funny movie in response to a question about movies. *See State v. Holiday*, 749 N.W.2d 833, 842 (Minn. App. 2008) (holding that "[c]ourts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner") (quoting *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983)).

1996) (search warrant may be held void if affiant, *with reckless disregard for the truth*, included a false statement).

Appellant also objects to the statement that R.P. said in his interview "that his dad 'poops and pees on his head and it hurts his eyes.'" R.P. actually said in his interview that appellant touched R.P.'s forehead and hair with appellant's "pee and poop." But the substance of the two statements is the same: neither contradicts the other. "[C]ourts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *State v. Holiday*, 749 N.W.2d 833, 842 (Minn. App. 2008) (quoting *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983)). Finding that the investigator misrepresented what R.P. said would be hypertechnical.

The affidavit was free of deliberate or reckless misrepresentations or omissions and provided probable cause for the search warrant.

Affirmed.