STATE OF MINNESOTA
IN COURT OF APPEALS
A10-754

State of Minnesota,
Respondent,

vs.

Sir Charles McCurtis,
Appellant.

Filed April 5, 2011
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-09-20420

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Hudson, Judge.

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

PETERSON, Judge

In this appeal from a conviction of possession of a firearm by an ineligible person, appellant argues that (1) the warrantless search of the vehicle he was driving was illegal

because there was not probable cause to believe that the vehicle contained evidence of a crime or contraband, and (2) the district court erred by denying his request to disclose the identity of the confidential informant or to conduct an in camera review of information about the informant. We affirm.

FACTS

On the night of April 20, 2009, Minneapolis Police Officer Jeff Carter received a tip from a confidential informant. The informant reported that appellant "Sir Charles McCurtis would be taking part in a funeral at Crystal Lake Cemetery, which is located at Dowling Avenue North and Penn Avenue North, and that he would be in possession of a semiautomatic handgun and he would be driving a Chevy Tahoe." The informant also provided a description of the vehicle appellant would be driving and its license-plate number, and indicated that the gun would be located "inside the driver door, under the armrest, where the control panel for the windows and locks is located." The informant told Carter that the funeral would start at 10:00 a.m. and that appellant would arrive at the cemetery around 11:00 a.m.

Carter had previously dealt with appellant on multiple occasions and was aware that he was a known drug dealer. Carter also knew from his prior dealings with appellant that his driver's license had been revoked.

The next morning, Carter and his partner, Officer Kerry Mraz, attempted to corroborate the informant's information. Carter drove an unmarked squad car to the Crystal Lake Cemetery and verified that the employees were preparing a burial plot. Mraz checked the local mortuaries and, at Estes Mortuary, found a vehicle that matched

the vehicle described by the informant. After receiving this information, Carter drove to Estes Mortuary where he saw a black Chevy Tahoe as described by the informant, and he verified the vehicle's license-plate number. Carter also ran a check of appellant's driver's license, which confirmed that the license was still revoked. Based on this information, the officers placed the Tahoe under surveillance.

The funeral service lasted longer than the informant said it would. When the funeral service ended around noon, Mraz saw appellant and another party get into the Tahoe and join the funeral procession. Carter maintained surveillance on the vehicle during the procession and saw that appellant was driving. Following the burial, Carter again saw appellant driving the Tahoe, and it made a left turn on Dowling without signaling. Because Carter and Mraz were not in full uniform and wanted to maintain their undercover status, they contacted Officers Peter Olaf Hafstad and Adrian Infante, who were patrolling nearby in a marked squad car, to initiate a traffic stop.

After the vehicle was stopped, Hafstad approached the driver's side and told appellant that he was under arrest for driving without a valid license. Hafstad handcuffed appellant and placed him in the back of his squad car. Infante approached the passenger side of the vehicle to speak with the two passengers. As he approached, Infante noticed a strong odor of unburnt marijuana coming from the vehicle. Officers removed the two passengers from the vehicle and placed them in different squad cars. None of the occupants was the registered owner of the vehicle.

Infante started a search of the vehicle by looking at the driver's door, which is where he usually starts his searches, and saw "that the armrest of the driver's side door,

where the electrical panel is, where the—where you would roll down your windows or lock your door, seemed to have been tampered with." Infante noticed that the control panel was not flush with the rest of the armrest and that the way it was sticking out made it seem like it had been pried open. Infante popped open the panel using very little force and discovered a handgun. Infante notified Carter of his findings and then continued his search.

As Carter approached the vehicle, he "noticed the odor of marijuana coming from the vehicle." Carter recovered a nine-millimeter semiautomatic handgun from the control panel of the driver's door. The gun had a round of ammunition in the chamber, and the magazine was loaded with hollow-point ammunition. Officers also recovered 1.25 grams of marijuana, but it is not clear from the record where the marijuana was located.

Appellant was charged by complaint with possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subds. 1(2), 2(b) (2008). Appellant moved to suppress evidence of the handgun, arguing that it was discovered as a result of an illegal search and seizure. Appellant also moved for an order requiring the state to disclose the identity of the confidential informant. Following a Rasmussen hearing, the district court denied appellant's motions. Appellant waived his right to a jury trial, and the case was submitted to the district court on stipulated facts. The district court found appellant guilty as charged and imposed an executed sentence of 60 months. This appeal followed.

D E C I S I O N

I.

"When reviewing pretrial orders on motions to suppress evidence, 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). We accept the district court's underlying factual determinations bearing on a motion to suppress on Fourth Amendment grounds unless they are clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

The Fourth Amendment to the United States Constitution and Article I of the Minnesota Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A warrantless search is per se unreasonable unless it fits within one of the recognized exceptions to the warrant requirement. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). One of the exceptions to the warrant requirement is that police may conduct a warrantless search of an automobile when they have probable cause to believe that the vehicle contains evidence of a crime or contraband. *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014 (1999) (contraband); *State v. Search*, 472 N.W.2d 850, 852-53 (Minn. 1991) (evidence of crime). Probable cause to search exists when, based on the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983). Probable cause may be based on reasonable inferences from the circumstances. *See State v. Holiday*, 749 N.W.2d 833,

843 (Minn. App. 2008) (stating that probable cause for issuance of search warrant may be based on reasonable inferences from facts and circumstances).

"[T]he detection of odors alone, which trained police officers can identify as being illicit, constitutes probable cause to search automobiles for further evidence of crime." *State v. Pierce*, 347 N.W.2d 829, 833 (Minn. App. 1984). Specifically, the odor of marijuana emanating from a vehicle is enough to establish probable cause to search the vehicle. *State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978); *State v. Hodgman*, 257 N.W.2d 313, 315 (Minn. 1977). If probable cause justifies a search of the vehicle, "it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *United States v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 2173 (1982).

Appellant argues that the district court "erred by finding there was probable cause to search the vehicle for contraband drugs based on the odor of marijuana." He contends that there was not probable cause for the search because the amount of marijuana found weighed 1.25 grams with packaging, which is less than the amount required for criminal possession. *See* Minn. Stat. § 152.027, subd. 3 (2008) (criminalizing possession of more than 1.4 grams of marijuana in a motor vehicle).

Appellant relies on *State v. Ortega*, in which the supreme court explained "that probable cause to suspect that a person possesses a non-criminal amount of marijuana, in and of itself, does not trigger the search-incident-to-arrest exception to the warrant requirements of the Fourth Amendment." 770 N.W.2d 145, 149 n.2 (Minn. 2009). Appellant argues that because one of the officers testified that even 1.25 grams of

marijuana would have an odor about it and that "[a] lot of times that smell remains hours, even days after someone has either been in contact with marijuana or has smoked marijuana," it undermines "a claim that the circumstances established probable cause to believe the vehicle then contained marijuana." But the odor of marijuana establishes a fair probability that there is a criminal amount of marijuana present in a vehicle. The officers had no evidence indicating merely that someone had recently been in contact with marijuana or that only a noncriminal amount of marijuana was present in the vehicle. Also, this court has rejected the argument "that small, noncriminal amounts of marijuana cannot establish a fair probability that evidence of a crime or contraband will be found in a particular place." *State v. McGrath*, 706 N.W.2d 532, 544 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006).

The officer who initiated the search testified that he noticed the odor of unburnt marijuana as he approached the vehicle. Appellant points out that another officer testified that he did not smell marijuana and argues that the conflicting testimony means that the odor of marijuana did not establish probable cause for the search. But two of the three officers, including the officer who initiated the search, testified that they smelled the odor of marijuana. *See Schultz*, 271 N.W.2d at 837 (stating that whether officer smelled odor of marijuana emanating from a vehicle was credibility issue). Thus, the odor of marijuana gave the officers probable cause to search the vehicle.

Appellant also challenges the district court's determination that the informant's tip was sufficient to establish probable cause to search the vehicle. Because we conclude that the odor of marijuana established probable cause to search the vehicle under the

automobile exception and appellant is not challenging the legality of the stop, we decline to address this issue.

II.

"The state has a legitimate interest in protecting the identity of persons who provide information to law enforcement." *State v. Litzau*, 650 N.W.2d 177, 184 (Minn. 2002) (citing *Roviaro v. United States*, 353 U.S. 53, 59-60, 77 S. Ct. 623, 627 (1957)). "The privilege is not unlimited, however, and it gives way when 'the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" *State v. Rambahal*, 751 N.W.2d 84, 90 (Minn. 2008) (quoting *Roviaro*, 353 U.S. at 60-61, 77 S. Ct. at 628). "We review a district court order regarding disclosure of a confidential informant's identity for an abuse of discretion." *Id.*

The defendant has the burden of proving the need for disclosure of the informant's identity. *State v. Smith*, 448 N.W.2d 550, 556 (Minn. App. 1989), *review denied* (Minn. Dec. 29, 1989). When a defendant fails to meet the burden but can establish a basis for inquiry, the district court should hold an in camera hearing to consider affidavits or interview the informant in person. *State v. Ford*, 322 N.W.2d 611, 614 (Minn. 1982). When deciding whether a confidential informant's identity should be disclosed, courts should consider (1) whether the informant was a material witness, (2) whether the informant's testimony will be material to the issue of guilt, (3) whether the testimony of police officers is suspect, and (4) whether the informant's testimony might disclose entrapment. *Syrovatka v. State*, 278 N.W.2d 558, 561-62 (Minn. 1979). Disclosure is not

required if the informant was merely a tipster and was neither a participant in nor a witness to the crime. *State v. Marshall*, 411 N.W.2d 276, 280 (Minn. App. 1987), *review denied* (Minn. Oct. 26, 1987). The parties agree that only the first two *Syrovatka* factors are relevant here.

Appellant argues that the record "adequately established a basis for the court to conduct an in camera review of the information about the informant before deciding whether to order the informant's identity to be disclosed." "All that is needed to justify an in camera inquiry is a minimal showing of a basis for inquiry but something more than mere speculation by the defendant that examination of the informant might be helpful." *State v. Moore*, 438 N.W.2d 101, 106 (Minn. 1989). "The defendant's showing must be supported by the defendant's testimony or other evidence." *State v. Wessels*, 424 N.W.2d 572, 575 (Minn. App. 1988), *review denied* (Minn. July 6, 1988).

The district court determined that appellant did not make the minimal showing for an in camera inquiry or satisfy any of the factors to warrant disclosure of the informant's identity. The record demonstrates that appellant simply asserted that an in camera hearing should be held because it "would allow the court to hear testimony from the informant and to decide whether he or she has knowledge relevant to the [appellant]." Because a defendant must provide more than "mere speculation" to establish the need for an in camera review, the district court did not err by denying appellant's request for disclosure without conducting an in camera review.

Also, because appellant failed to make the lesser showing to support his argument that the district court should have held an in camera hearing, appellant cannot satisfy the

"ultimate burden of proving that disclosure of the informant's identity is necessary." *Id.* at 574-75 (noting that defendant's burden of establishing the need for an in camera hearing "is somewhat lighter than the defendant's ultimate burden of proving that disclosure of the informant's identity is necessary"). Consequently, the district court did not abuse its discretion by denying appellant's request for disclosure of the informant's identity.

Affirmed.