STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0205

State of Minnesota,
Appellant,

vs.

Morice Laroy Dixon,
Respondent.

Filed July 12, 2021
Reversed and remanded
Hooten, Judge

Hennepin County District Court
File No. 27-CR-20-363

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jordan W. Rude, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Kassius O. Benson, Chief Public Defender, David W. Merchant, Assistant Public Defender, Office of the 4th District Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Hooten, Judge; and Bratvold, Judge.

SYLLABUS

On a motion challenging probable cause for a charge of the controlled-substance crime of fifth-degree possession of marijuana, the state is not required to obtain confirmatory testing that the plant material contains a tetrahydrocannabinol (THC) concentration exceeding the legal limit if there is other sufficient evidence to establish probable cause.

OPINION

HOOTEN, Judge

In this pretrial appeal from an order dismissing a complaint for lack of probable cause, the state argues that the district court erred by ruling that, as a matter of law, chemical testing establishing that the THC concentration in plant material exceeds the legal limit is required to establish probable cause for charging fifth-degree drug possession. Because we conclude that chemical testing of suspected marijuana is not required to establish probable cause for charging fifth-degree drug possession if there is other sufficient evidence to establish probable cause, and because the record independently establishes probable cause for this charge, we reverse and remand.

FACTS

Appellant State of Minnesota charged respondent Morice Laroy Dixon (Dixon) with felony fifth-degree possession of a controlled substance, alleging that officers conducting a traffic stop on October 31, 2019, had discovered 58.93 grams of marijuana in Dixon's vehicle. Dixon moved to dismiss the complaint for lack of probable cause, arguing that there was insufficient evidence that the plant material he had possessed was illegal marijuana and not legal hemp. This motion rested on the argument that chemical testing is required to distinguish between legal hemp and illegal marijuana, the field test used in this case merely detected the presence of THC without quantifying its concentration, and no other testing had been performed to establish that THC concentration.

In opposition to respondent's motion, the state argued that the record contained sufficient evidence that the substance at issue was marijuana, including the arresting

officer's statement that he smelled marijuana in Dixon's vehicle, the officer's observation that the plant material found in the vehicle appeared to be marijuana, a field test confirming the presence of THC in the plant material, and Dixon's stated belief that the plant material was marijuana. The state argued that although its intent was to obtain testing from the Bureau of Criminal Affairs (BCA) of the plant material's THC concentration if the case was set for trial, such test results were not required for the charge to survive a pre-trial motion challenging probable cause.

The district court granted Dixon's motion to dismiss for lack of probable cause. In doing so, the district court made a number of factual findings, which are summarized as follows. Officers initiated a traffic stop and identified Dixon as the driver of the vehicle. Dixon was slurring his words, and a check of his license revealed that it was suspended. Officers noted the smell of marijuana in the vehicle. The officers asked about marijuana, and Dixon admitted to smoking marijuana earlier and possessing a small amount of marijuana in the vehicle. Officers searched the vehicle and located two quantities of suspected marijuana with a total weight of 58.93 grams.[1] In a post-*Miranda* statement, Dixon admitted to possessing the suspected marijuana. Finally, the state did not submit any test results indicating whether the plant material was marijuana or hemp.

[1] In the statement of probable cause, the state alleges that "officers recovered two quantities of marijuana" inside Dixon's vehicle. Although there was no specific reference to a field test in the complaint, both parties appear to acknowledge that a field test was done to support the officers' suspicion that the plant material found inside Dixon's vehicle was cannabis, but that it did not support any conclusions regarding the exact THC concentration of the plant material.

On the basis of these factual findings and its view of the law, the district court drew the following legal conclusions. "The law distinguishes legal hemp from marijuana based on the concentration of [THC] contained therein." "[T]he mere presence of THC no longer is automatically criminal," and "is insufficient for the purposes of probable cause." "The [THC] concentration is now crucial to even the charging of a case involving marijuana given that there is now a legal level of THC, hemp, and an illegal one, marijuana." "As such, the suspected marijuana must be fully tested before charging to withstand a probable cause challenge." "Since the legislature drew a line at which the concentration of THC goes from the legal hemp to the illegal marijuana, without either a field test that can provide that at least the threshold concentration for marijuana exists, or a full test such as the one the BCA has developed, probable cause cannot be established." "[Dixon]'s statements, beliefs, and appearance of the suspected marijuana do not change the conclusion that the charge is not currently supported by probable cause."

In sum, the district court concluded *as a matter of law that chemical testing establishing that the THC concentration in* plant material exceeds the legal limit is required to survive a motion challenging probable cause. In reaching this conclusion, the district court acknowledged that while "this may not be the perfect test case for this issue, it is impossible not to be troubled by the lack of ability to distinguish between hemp and marijuana even at the probable cause stage." The state appeals.

ISSUE

Did the district court err in granting Dixon's motion to dismiss for lack of probable cause on the basis that the state did not obtain a definitive scientific test establishing that the plant material contained a criminal level of THC?

ANALYSIS

We limit our review to the narrow issue of whether the district court erred by concluding that the state was required to obtain a definitive scientific test establishing that the plant material contains a criminal level of THC in order to survive a motion to dismiss for lack of probable cause.

In a prosecution pretrial appeal of the district court, an appellate court will reverse if the state can "clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotation omitted). "We view critical impact as a threshold issue and will not review a pretrial order absent such a showing." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotations omitted). We agree with the parties that the district court's dismissal of the sole charge has a critical impact on the outcome of the state's prosecution of Dixon. Accordingly, we must decide whether the district court erred as a matter of law in dismissing the charge against Dixon for lack of probable cause. Because this issue involves statutory construction, it is a probable-cause dismissal based on a legal determination. *State v. Linville*, 598 N.W.2d 1, 2 (Minn. App. 1999). "We review de novo the district court's dismissal for lack of probable cause based on a legal determination." *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016).

If a defendant brings a motion to dismiss for lack of probable cause, the district court "must determine whether probable cause exists to believe that an offense has been committed and that the defendant committed it." Minn. R. Crim. P. 11.04, subd. 1(a). "It

is not necessary for the state to prove the defendant's guilt beyond a reasonable doubt." *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976) (quotation omitted). Proof beyond a reasonable doubt may be defined as "such proof as ordinarily prudent men and women would act upon in their most important affairs." *State v. Sap*, 408 N.W.2d 638, 641 (Minn. App. 1987) (quoting 10 *Minnesota Practice*, CRIMJIG 3.03 (1985)).[2] And reasonable doubt may be defined as "a doubt based on reason and common sense; it does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt." *Id.* "Unlike proof beyond a reasonable doubt or preponderance of the evidence, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Harris*, 589 N.W.2d 782, 790–91 (Minn. 1999) (quotation omitted). "A motion to dismiss for lack of probable cause should be denied where the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a [judgment] of acquittal if proved at trial." *State v. Lopez*, 778 N.W.2d 700, 703–04 (Minn. 2010) (quotation omitted).

"A person is guilty of controlled substance crime in the fifth degree . . . if . . . the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount[3] of marijuana." Minn. Stat. § 152.025, subd. 2(1) (2018). "Marijuana" is classified in Schedule I, Minn. Stat. § 152.02, subd. 2(h) (2018), and is defined as

---

[2] The language in the most recent version of 10 *Minnesota Practice*, CRIMJIG 3.03 (2015), is exactly the same as the language in 10 *Minnesota Practice*, CRIMJIG 3.03 (1985).

[3] "'Small amount' as applied to marijuana means 42.5 grams or less." Minn. Stat. § 152.01, subd. 16 (2020).

> all parts of the plant of any species of the genus Cannabis, including all agronomical varieties, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks, except the resin extracted therefrom, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

Minn. Stat. § 152.01, subd. 9 (2018).

Following amendments to Minnesota law that became effective in 2019, "marijuana" is now defined to exclude "hemp." Minn. Stat. § 152.01 subd. 9 (Supp. 2019). Under Minn. Stat. § 152.22, subd. 5(a) (Supp. 2019), "'Hemp' has the meaning given to industrial hemp in section 18K.02, subdivision 3," which in turn defines hemp as "the plant Cannabis sativa L. and any part of the plant . . . with a [THC] concentration of not more than 0.3 percent on a dry weight basis." Minn. Stat. § 18K.02, subd. 3 (Supp. 2019). Accordingly, the only thing differentiating legal "hemp" from illegal "marijuana" in Minnesota is the THC concentration present in the plant material: Cannabis sativa L. plant material with a THC concentration of 0.3% or less on a dry weight basis is legal "hemp," while Cannabis sativa L. plant material with a THC concentration of greater than 0.3% on a dry weight basis, and plant material from any other species within the genus Cannabis, is illegal "marijuana."

The probable cause standard, the felony fifth-degree possession statute, and the statutory definition of "marijuana," together provide the following legal standard, applicable in the present case: when a defendant is charged with felony fifth-degree

possession of marijuana and brings a motion challenging probable cause, the district court should deny the motion if the facts in the record, when proved at trial, would permit the jury to reasonably conclude that the state had proved beyond a reasonable doubt that the defendant knowingly and unlawfully possessed more than 42.5 grams of plant material from any species of the Cannabis genus, excluding Cannabis sativa L. plant material with a THC concentration less than or equal to 0.3% on a dry weight basis, on the date in question and within the jurisdiction bringing the charge.

"Minnesota law requires proof of the actual identity of the substance." *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979). "Where the identification of the drug is in question, [the Minnesota Supreme Court] ha[s] not prescribed any minimum evidentiary requirements." *State v. Olhausen*, 681 N.W.2d 21, 26 (Minn. 2004). However, when a "substance was not scientifically tested, circumstantial evidence and officer testimony may be presented to the jury to attempt to prove the identity of the substance" at trial. *Id.* at 28–29. If circumstantial evidence can be used at trial to prove the identity of a substance beyond a reasonable doubt, it can certainly also be used at the pretrial stage to determine whether probable cause exists to believe that the plant material is marijuana.

This court, and the Minnesota Supreme Court, have repeatedly refused to adopt a bright-line rule requiring chemical testing in order to establish that a substance is a controlled substance. *See State v. Knoch*, 781 N.W.2d 170, 180 (Minn. App. 2010) (methamphetamine), *review denied* (Minn. June 29, 2010); *Olhausen*, 681 N.W.2d at 22, 29 (methamphetamine); *State v. Gruber*, 864 N.W.2d 628, 641 (Minn. App. 2015) (prescription drugs). In *Knoch*, two defendants were charged with fifth-degree possession

of methamphetamine. 781 N.W.2d at 172. The defendants moved to dismiss their cases for lack of probable cause on the ground that the state only had evidence from a field test, and not a confirmatory test, to prove that the substances seized were methamphetamine. *Id*. After an evidentiary hearing, the district court denied the joint motion to dismiss. *Id*. At the defendants' request, the district court then certified two questions for a decision by this court. *Id*. We reformulated these certified questions as a single question: whether, in a prosecution for possession of a controlled substance, the state may ever establish probable cause based on evidence of a field test of a substance alleged to be a controlled substance, without evidence of a confirmatory test of the substance. *Id*. at 176. We held in the affirmative. *Id*. at 172. In doing so, we refused to adopt a bright-line rule requiring confirmatory chemical testing to establish the identity of a controlled substance. *Id.* at 180.

In *Olhausen*, the defendant was convicted of three offenses relating to the possession and attempted sale of methamphetamine. 681 N.W.2d at 22–23. These convictions were based solely on circumstantial evidence. *Id*. at 28. The defendant challenged his convictions on the ground that there was insufficient evidence that the substance at issue was methamphetamine. *Id*. at 25. The Minnesota Supreme Court determined the evidence presented at trial to be sufficient to support a conviction for possession of methamphetamine, even though no chemical testing had been performed, because the defendant "prevented scientific testing of the alleged substance by disposing of it while fleeing the crime scene." *Id*. at 22, 29. The evidence held to be sufficient included (1) defendant's agreement to sell one pound of methamphetamine, (2) defendant's phone calls to arrange the sale, (3) defendant's representation of a small sample to an

undercover agent, a sample that the agent believed to be authentic methamphetamine, (4) defendant's various statements, including an offer to sell "ten for one," or one pound of methamphetamine for $10,000, (5) defendant's indications that the package he obtained from a third party was one pound of methamphetamine, (6) the third party's representations to the police that he furnished the defendant with one pound of methamphetamine, and (7) defendant's dramatic flight from the scene of the incident. *Id*. at 22–26, 29.

It is true, as Dixon points out, that testing of the substance in question was not performed in *Olhausen* only because the defendant had "prevented scientific testing of the alleged substance by disposing of it while fleeing the crime scene." *Id*. at 22. And the Minnesota Supreme Court explicitly noted that this disposal and the resulting inability to test the substance at issue were what distinguished the case from others where "the state had possession of the entire amount of controlled substance at issue but failed to use adequate procedures to scientifically test [the] substance." *Id*. at 28. Nevertheless, *Olhausen* stands for the proposition that chemical testing is not required to establish the identity of methamphetamine beyond a reasonable doubt. *See id*. at 28–29.

Whether the facts in the record are sufficient to establish probable cause is, of course, a different question than whether the facts in the record are sufficient to establish proof beyond a reasonable doubt at trial. But that is precisely the point: the proper question, at both the time of arrest and when deciding a motion challenging probable cause, is whether probable cause exists to believe that the plant material is marijuana—a lower threshold than the proof beyond a reasonable doubt required to prove the identity of a substance at trial. *See Harris*, 589 N.W.2d at 790–91. Adopting a bright-line rule requiring

chemical testing of suspected marijuana to establish probable cause would essentially require conclusive proof that the plant material is marijuana at the probable cause stage in criminal proceedings. Consistent with our decision in *Knoch*, we decline to adopt such a bright-line rule. 781 N.W.2d at 180. Instead, we conclude that in a motion challenging probable cause for a charge of fifth-degree possession of marijuana, chemical testing establishing that the plant material is marijuana rather than hemp is not required if there is other sufficient evidence to support a finding of probable cause.

Here, the district court concluded, as a matter of law, that "without either a field test that can provide that at least the threshold concentration for marijuana exists, or a full test such as the one the BCA has developed, probable cause cannot be established." The district court erred by drawing that legal conclusion.

As noted above, if the facts in the record would permit a jury to reasonably conclude that the state had proved beyond a reasonable doubt that the defendant knowingly and unlawfully possessed more than 42.5 grams of illegal marijuana on the date in question and within the jurisdiction bringing the charge, Dixon's motion challenging probable cause should be denied.

Although the incomplete record lacks any police reports or transcripts, the record supports the following undisputed alleged facts. Police officers stopped Dixon for a traffic violation. At the time of the stop, officers observed that he was slurring his words and noted the smell of marijuana in the vehicle. The officers also determined that Dixon had a suspended license and several prior controlled substance convictions. The officers recovered two quantities of plant material, one weighing 36.70 grams and one weighing

22.23, which they suspected, ostensibly after field testing, to be marijuana. Later, after Dixon had been given his rights, the officers asked him about the marijuana. Dixon admitted to possessing marijuana in the vehicle. Additionally, although not supported by evidence in the record, the district court found that Dixon admitted to smoking marijuana earlier that day.

If these alleged facts are proven at trial, a jury could reasonably infer that the plant material in Dixon's vehicle was marijuana based on the circumstantial evidence that Dixon, who had prior drug convictions, had smoked what he believed to be marijuana earlier that day and that the marijuana had caused him to commit a traffic violation and slur his words. Because there may be sufficient evidence to survive a motion for a judgment of acquittal, we conclude, as a matter of law, that the alleged facts in the record are sufficient to support a finding of probable cause. *See State v. Plummer*, 511 N.W.2d 36, 38 (Minn. App. 1994) ("Where the facts are not in dispute, the reviewing court may independently review the facts and determine, as a matter of law, whether the pretrial order was correct."). The district court therefore erred as a matter of law by granting Dixon's motion to dismiss because of the state's lack of confirmatory chemical testing of the plant material's THC concentration.

DECISION

For the foregoing reasons, we conclude that in a motion challenging probable cause for a charge of fifth-degree possession of marijuana, chemical testing establishing that plant material contains a THC concentration greater than 0.3% on a dry-weight basis is not required if there is other sufficient evidence to support a finding of probable cause.

Because of that, and because we conclude that the alleged facts in the record are sufficient to show probable cause as a matter of law, we reverse the district court's dismissal of the complaint, reinstate the complaint, and remand this matter to proceed to trial.

Reversed and remanded.