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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0469**

State of Minnesota,
Appellant,

vs.

Marcus David Jones,
Respondent.

**Filed November 19, 2012
Affirmed
Chutich, Judge**

Hennepin County District Court
File No. 27-CR-11-12884

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

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(for respondent)

Considered and decided by Chutich, Presiding Judge; Schellhas, Judge; and Cleary,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

In this pretrial appeal, the state challenges the district court's order suppressing evidence that respondent possessed narcotics. Because the credibility and reliability of the confidential informant used by the police was not sufficiently established, respondent's warrantless arrest was not supported by probable cause. Thus, we affirm the district court's order suppressing the evidence.

FACTS

In early May 2011, respondent Marcus Jones was arrested and charged with a single count of possession of a controlled substance in the second degree. Jones's arrest was based solely on a tip from a confidential informant. In early March 2012, following an in camera hearing, the district court granted Jones's motion to suppress the evidence and denied as moot his motion to disclose the confidential informant's identity. The state now appeals, seeking reversal of the district court's order.

The facts underlying Jones's arrest are as follows. Officer Kallan Nordby, an officer with the Anoka Hennepin Drug Task Force, received information that a confidential informant was willing to assist the task force in purchasing crack cocaine in Minneapolis. The informant told officers that he "could make a phone call to an unknown third party and arrange to have a quantity of crack cocaine delivered" by a "runner," to a location "somewhere on Lake Street" in Minneapolis. He explained that he had used this process during "previous dealings" with this unknown third party and that the runner was a person named "Matt." The informant said that "Matt" was a "shorter

black male,” approximately 25 years old, with a “stockier” or “chubby” build. He provided no further information on the runner.

On the day of Jones’s arrest, Officer Nordby and the confidential informant were together in an unmarked car on Lake Street, preparing to set up a narcotics purchase from the unknown third party. Other members of the task force were present in the area to assist with the operation. In an unrecorded call placed on his personal cell phone, the confidential informant called his unknown third party supplier. After a brief conversation, the informant relayed to Officer Nordby that the specific meet-up spot was at a nearby restaurant’s parking lot, and that the drugs were to be delivered in approximately four minutes. Officer Nordby did not overhear the informant use the name “Matt” and did not testify about whether he heard any specifics of the drug deal during the informant’s conversation. The task force members set up surveillance of the restaurant’s parking lot, waiting for the “runner” to arrive with the narcotics.

While waiting for the delivery, Officer Nordby noticed a white Buick Rivera slowly circling the block near the restaurant on Lake Street. He noted that the Buick’s sole occupant was a black male driver, and also noted, but did not run a check of, the Buick’s license plate. When the Buick again circled the block and pulled away from the restaurant, Officer Nordby and the confidential informant followed the car and pulled up directly next to it on Lake Street. The informant identified the driver as “Matt,” the “runner” he had dealt with previously. At that point, Officer Nordby attempted to follow the Buick but lost sight of it in the evening rush hour traffic.

The informant placed another call to have the “runner” return. A few minutes later, the same Buick returned to the restaurant. Officer Nordby verified that the license plate matched the one he had seen earlier, and the informant again identified the driver as “Matt.” Officer Nordby then signaled the other task force members to move in and arrest the driver of the Buick. The officers entered the restaurant’s parking lot with their lights flashing and stopped the Buick. The driver of the Buick fled from the car, tripped, and was caught and arrested. The officers recovered crack cocaine and a cell phone from the driver during the arrest. Jones, the driver of the Buick, was charged with second degree possession of a controlled substance (crack cocaine).

Jones moved to suppress the narcotics as the result of an illegal stop—one that was not supported by a reasonable, articulable suspicion—and an illegal arrest—one that was not supported by probable cause. In the alternative, Jones moved for disclosure of the informant’s identity. Based on the facts known to it at the time, the district court orally denied Jones’s motion to suppress the evidence and granted the motion to disclose the informant’s identity. Both parties requested reconsideration. The district court stayed its previous order denying suppression, vacated the order to disclose the informant’s identity, and scheduled an in camera hearing to review “the information surrounding the informant because . . . probable cause to arrest was solely based on the information of the [informant] . . . and the [informant]’s reliability is key to determining whether the officers had probable cause to arrest the defendant.”

Officer Nordby provided the only testimony at the in camera hearing. He testified that the day of the arrest, May 2, 2011, was the first and last time this particular confidential informant worked with the task force. He testified that the task force determined the reliability of the informant before the arrest on a “timeline basis.” He explained that they gave the informant an opportunity “to do what he says that he was going to do and until we felt that . . . he was lying to us or not being truthful we essentially kind of gave him the benefit of the doubt.” Officer Nordby clarified that it was he, not the informant, who initially spotted the white Buick, and further explained that it was not until after he pointed to the Buick that the informant claimed the driver was “Matt.” In fact, Officer Nordby testified that the confidential informant did not tell the police what kind of car the person would be driving because he “didn’t really know.”

Officer Nordby confirmed that, at the time of Jones’s arrest, the task force had not investigated whether the informant had a prior criminal record, but police did know that the informant was “actively trying to work off” a recent arrest in Anoka County for possession of a controlled substance. The officer did not know when the confidential informant had last purchased drugs from the unknown third party who sent a runner named “Matt.” Moreover, Officer Nordby testified that, at the time of the arrest, the extent of the confidential informant’s history with “Matt” was unknown, Jones had not been connected with the nickname “Matt,” and no connection had been made between Jones’s cell phone and the numbers of the third-party drug dealer or the confidential informant.

On March 5, 2012, the district court issued an order granting Jones’s motion to suppress the narcotics evidence, and dismissing his motion to disclose the identity of the confidential informant as moot. The written order concluded that, considering the additional and clarifying testimony provided at the in camera hearing, probable cause to arrest Jones had not been established. Specifically, the district court found that “[t]here was insufficient evidence to support the reliability of the [confidential informant] or [his] veracity.” This appeal of the March 5 order followed.

D E C I S I O N

“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). If the state appeals pretrial suppression orders, it “must 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. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted).

I. Critical Impact

“When the likelihood of a successful prosecution is significantly reduced by the unavailability of the suppressed evidence, the critical-impact standard is met.” *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Here, where suppression of all narcotics in a possession of narcotics case will result in an inability to prosecute the case, critical impact is easily established.

II. Probable Cause to Arrest

We must next decide whether the district court erred in concluding that Jones's warrantless arrest was not supported by probable cause. As a threshold matter, we note that the reasonableness of the stop of Jones's car is *not* before this court. While Jones's initial motion challenged both the legality of the stop and the arrest, the district court's March 5 order addressed solely whether probable cause existed to support Jones's arrest. In briefs to this court, each party addressed only this issue – whether probable cause existed to arrest Jones. Accordingly, we do not consider the issue of the legality of the stop of the car. See *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (holding that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

An arrest of a felony suspect without a warrant is lawful in any public place so long as the police have probable cause to arrest. *State v. Walker*, 584 N.W.2d 763, 766 (Minn. 1998). Whether probable cause exists depends on findings of fact that are reviewed for clear error, but the validity of the arrest is ultimately a question of law to be reviewed de novo. *State v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000).

Probable cause to arrest exists when the facts are such that “a person of ordinary care and prudence, viewing the totality of circumstances objectively, would entertain an honest and strong suspicion that a *specific* individual has committed a crime.” *State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009). When determining the legality of a warrantless arrest, courts assess the information that police took into consideration when making the arrest, not what they uncovered thereafter. *Walker*, 584 N.W.2d at 769.

Information provided by a confidential informant may establish probable cause. Whether such information is sufficient to establish probable cause, however, is determined by examining the totality of the circumstances, particularly “the credibility and veracity of the informant.” *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999). Six factors aid in evaluating the credibility and reliability of a confidential informant:

(1) a first-time citizen informant is presumably reliable; (2) an informant who has given reliable information in the past is likely also currently reliable; (3) an informant's reliability can be established if the police can corroborate the information; (4) the informant is presumably more reliable if the informant voluntarily comes forward; (5) in narcotics cases, “controlled purchase” is a term of art that indicates reliability; and (6) an informant is minimally more reliable if the informant makes a statement against the informant's interests.

State v. Ross, 676 N.W.2d 301, 304 (Minn. App. 2004) (citing *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998)).

The record shows that the first, second and fifth factors provide no basis to conclude that the confidential informant is credible. This confidential informant was actively trying to “work off” charges of possession of controlled substances, making him more akin to a “stool pigeon” or to a member of the “criminal underworld” than to a believable first-time citizen informant. *See Ward*, 580 N.W.2d at 71–72 (noting that courts “remain reluctant to believe the typical stool pigeon who is arrested and who, at the suggestion of the police, agrees to cooperate and name names in order to curry favor with the police”) (quotation omitted). Moreover, he had no proven track record with the police to show his veracity; the police had never worked with him before or after the

arrest of Jones and they offered no evidence to support his veracity. No controlled buy occurred here that would have demonstrated his reliability.

In addition, factors four and six are of little use in predicting credibility in this case where the record does not establish that the confidential informant voluntarily approached the police. To be sure, he was willing to meet face-to-face with the officers to arrange a deal, and he made statements concerning previous drug dealings that were against his interest. These actions do not markedly bolster his credibility because the police already knew his name and who he was from his recent arrest for possession of a controlled substance, and he offered no specifics as to how recently, how often, or in what quantity he used drugs in the past, details that could have established the basis of his knowledge, and also potentially exposed him to new charges. *See id.* (noting that statements against interest alone are not sufficient to establish an informant's reliability).

The state relies on *State v. Filipi*, 297 N.W.2d 275 (Minn. 1980), to contend that the confidential informant's prediction of future events and real-time corroboration by the police proved that the informant was reliable, providing the necessary probable cause to arrest Jones. In particular, the state stresses that the confidential informant correctly predicted the precise location and arrival time of "Matt," not once but twice.

While this contention has some appeal, analysis of *Filipi* shows that the quantity and quality of detail in the informant's report that the police independently verified was far greater than present here. In *Filipi*, the police actually saw their informant first engage in a consummated drug deal with the targeted dealer, Filipi. *Filipi*, 297 N.W.2d at 276. The police noted that the dealer drove a "late 1960s model tan Pontiac

automobile” with a specific license number. *Id.* In police presence, the informant then called the dealer and arranged for the “delivery of ten pounds of marijuana in St. Paul at 3:45 that afternoon.” *Id.* at 276–77.

Before the police intercepted Filipi en route to the drug deal, they personally observed Filipi place a duffel bag in the trunk of his Pontiac before leaving at the right time to make the St. Paul rendezvous. *Id.* at 277. They had also verified the following facts that the informant relayed to them: the informant’s source was a man named Ken; Ken lived in Lakeville with a man named David Chambers; and Chambers’s phone number was the one the informant called to arrange the drug deal. *Id.* In addition, the police had run a check of the license plate of the dealer’s Pontiac and confirmed that the owner’s name was indeed Ken. *Id.* at 276–77.

To be sure, Filipi does not establish the minimum level of corroboration that is necessary to show probable cause to arrest. Here, however, a marked difference exists in the level of corroboration of key details than was present in *Filipi*. The task force did not verify that the confidential informant had recently engaged in illegal drug transactions with anyone, let alone with the unknown third party or with “Matt.” The informant provided only a very general description of “Matt’s” appearance, a description that could apply to many men in that Minneapolis neighborhood. The informant did not provide the task force with any information regarding where “Matt” lived or what type of car he would be driving. Before the arrest occurred, the police never linked the driver of the Buick with the name “Matt” and never verified that the white Buick was registered to anyone named “Matt.”

Moreover, it was Officer Nordby, not the informant, who initially spotted the white Buick. It was not until after Officer Nordby pointed to and pulled up to the Buick, on its second time around the block, that the informant identified the driver as “Matt.” The police never heard the informant mention the name “Matt” on the phone and did not testify that they heard any specifics of a drug deal. At the time of the arrest, the police had not in any way connected the driver of the Buick with the nickname “Matt” or with having communicated with either the unknown third party or the confidential informant.

While corroboration of even the smallest details may be sufficient to show a confidential informant is reliable enough to support probable cause in some cases, *see State v. Wiley*, 366 N.W.2d 265, 269 (Minn. 1985), on the facts of this case we conclude that the details corroborated here were not sufficiently complex, difficult to obtain, or predictive such that they, on their own, establish the reliability of this informant. *See State v. Cook*, 610 N.W.2d 664, 667–69 (Minn. App. 2000) (concluding no probable cause to arrest because tip from an “undeniably credible” confidential informant failed to provide sufficient detail to establish link between defendant and illegal activity); *State v. Albrecht*, 465 N.W.2d 107, 109 (Minn. App. 1991) (concluding that an anonymous tip describing the inside of the defendant’s house and stating that the defendant drove a red-and-white pickup did not provide probable cause to arrest even though officer verified these details). Accordingly, no probable cause existed to support the arrest of Jones.

III. Suppression of the narcotics

Warrantless arrests not supported by probable cause are unlawful. *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135 (1993). Where an arrest is

unlawful, confessions, admissions, evidence and information subsequently obtained will be suppressed. *See Walker*, 584 N.W.2d at 769 (concluding that narcotics found during an arrest without probable cause should be suppressed as fruit of an illegal search) (citing *Wong Sun v. United States*, 371 U.S. 471, 484–85, 83 S. Ct. 407, 415–16 (1963)).

Because the information provided by the informant was not sufficiently credible or reliable to allow a conclusion that Jones had committed a crime, his warrantless arrest was not supported by probable cause. The district court did not err in suppressing the narcotics.

Affirmed.