STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0466

State of Minnesota,
Respondent,

vs.

Brian Marcell Shaffer,
Appellant.

Filed January 14, 2013
Reversed
Cleary, Judge

Hennepin County District Court
File No. 27-CR-10-21531

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

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

CLEARY, Judge

Appellant challenges his conviction of first-degree sale of a controlled substance, arguing that the district court erred by failing to suppress evidence seized in execution of

a warrant to search his residence. Appellant contends that the search warrant was not supported by probable cause and that the unannounced entry of his residence by the police was not justified. We hold that there was probable cause to support the search warrant. However, because there was no reasonable suspicion that an unannounced entry was warranted, we reverse.

FACTS

Between March and April 2010, a confidential informant working with law enforcement conducted three controlled purchases of ecstasy from appellant Brian Shaffer. On the first two occasions, the informant and appellant met at predetermined locations, with appellant arriving driving a Buick Park Avenue, and the informant received ecstasy from appellant in exchange for money. After the second transaction, officers followed the Buick, which appellant drove to a residence located in Crystal and parked in the driveway.

On the third occasion, officers saw appellant leave the residence driving the Buick at the same time another male left the residence driving a Chevrolet Tahoe. Appellant drove to the predetermined location and met the informant. Both appellant and the informant then drove to a nearby parking lot, where the Tahoe was parked. Appellant exited the Buick, went to the Tahoe, and then went to the informant's vehicle, where the informant received ecstasy from appellant in exchange for money. Appellant commented to the informant that the Buick did not have a space large enough to hide the amount of ecstasy that the informant was purchasing on that occasion. After the third transaction,

officers followed the Buick and the Tahoe, both of which were driven back to the residence.

Officers conducted additional surveillance of the residence, during which the Buick was seen parked in the driveway at various times of the day and night, and appellant was seen leaving the residence in the Buick. Through the United States Postal Service, officers learned that appellant was receiving mail at the residence. In a controlled telephone call by the informant to appellant, appellant stated that he had all of the ecstasy that the informant wanted to purchase and more.

In May 2010, a deputy sheriff applied for a warrant to search the residence for controlled substances, packaging equipment, documentation of controlled-substance distribution, money, and firearms. The warrant application stated that a check of appellant's criminal history had revealed: (1) a 2001 arrest for a controlled-substance crime, during which a person with appellant was found to be in possession of a stolen handgun; (2) a 2001 arrest for a second controlled-substance crime, during which appellant ran from the arresting officers; (3) a 2004 conviction for unlawful possession of a firearm; and (4) a 2007 arrest for fleeing a peace officer in a motor vehicle. A district court judge granted the warrant to search the residence and found that "entry without announcement of authority or purpose is necessary to prevent the loss, destruction, or removal of the objects of said search and to protect the safety of the peace officers."

An unannounced search of the residence was conducted, and appellant was subsequently charged with first-degree sale of a controlled substance. Appellant moved to suppress the evidence discovered as a result of the search, arguing that the search

warrant was not supported by probable cause and that the search-warrant application did not establish reasonable suspicion that an unannounced entry was justified. The district court denied the motion, holding that there was probable cause to search the residence and that appellant's history of fleeing from the police and prior firearms conviction supported an unannounced entry. Appellant then waived his right to a jury trial and agreed to a trial by the district court based on stipulated facts. Appellant was found guilty, and this appeal followed.

D E C I S I O N

I.

Both the United States and Minnesota Constitutions protect people from unreasonable searches and seizures and provide that a search warrant may only be issued upon a finding of probable cause. U.S. Const. amend IV; Minn. Const. art. I, § 10. If a warrant is void for lack of probable cause, the evidence seized in execution of the search must be suppressed. *See State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989). To determine whether probable cause exists, a judge must look at the totality of the circumstances and "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). When reviewing whether a warrant is supported by probable cause, an appellate court affords an issuing judge "great deference," and the appellate court's role is "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 omitted).

Appellant contends that the search warrant was not supported by probable cause that a nexus existed between the residence and the controlled purchases. For there to be a fair probability that contraband or evidence of a crime will be found in a particular place, there must be "a direct connection, or nexus, between the alleged crime and the particular place to be searched, particularly in cases involving the search of a residence for evidence of drug activity." *State v. Souto*, 578 N.W.2d 744, 747–48 (Minn. 1998). The required nexus may be inferred from the totality of the circumstances. *State v. Ruoho*, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

In a case with facts similar to this appeal, the Minnesota Supreme Court held that there was probable cause to believe that drugs would be found in the residence to be searched. *State v. Yaritz*, 287 N.W.2d 13, 15 (Minn. 1979). In *Yaritz*, a confidential informant conducted two controlled purchases of marijuana from the defendant. *Id.* at 14 n.1. On each occasion, a surveillance team observed the defendant leave the residence in a vehicle and drive directly to the predetermined location for the purchase. *Id.* The court held that this information was "sufficient to reasonably support an inference that the marijuana would be found in a search of defendant's house." *Id.* at 15.

In this case, officers observed appellant leave from the residence in the Buick and drive directly to the predetermined location before one of the controlled purchases. Appellant and the informant then drove to the location where the Tahoe was parked and where the purchase of ecstasy took place. The Tahoe had also just left the residence, and

appellant commented to the informant that the Buick did not have a space large enough to hide the amount of ecstasy being purchased. Officers also observed appellant drive back to the residence after two of the controlled purchases. Appellant used the same vehicle during all three of the controlled purchases, and this vehicle was seen parked in the driveway of the residence at various times. Under the totality of the circumstances, there was a fair probability that controlled substances and evidence of controlled-substance distribution would be found at the residence. The district court judge who issued the search warrant had a substantial basis for concluding that probable cause existed to connect the alleged crime to the place to be searched.

II.

Appellant argues that the search-warrant application did not establish a sufficient basis for the issuance of a no-knock search warrant. The requirement that the police must generally knock and announce their presence at the time of execution of a search warrant is part of the protection against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution. *Wilson v. Arkansas*, 514 U.S. 927, 930–34, 115 S. Ct. 1914, 1916–18 (1995). Evidence seized in execution of an unannounced search must be suppressed when the circumstances do not warrant an unannounced entry. *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000). An appellate court independently determines as a matter of law whether an unannounced entry was justified. *See id.*

"Important purposes are served by the knock and announce requirement, including preventing the unnecessary destruction of property and mistaken entry into the wrong premises, protecting against unnecessary shock and embarrassment, and decreasing the

potential for a violent response." *Id.* at 319–20. "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1421 (1997). While the reasonable-suspicion standard is not high, it requires more than an unarticulated hunch, and the police must be able to point to something that objectively supports their suspicion. *Wasson*, 615 N.W.2d at 320.

A blanket exception to the knock-and-announce requirement in all felony drug cases violates the Fourth Amendment. *Richards*, 520 U.S. at 391–95, 117 S. Ct. at 1420–22; *see also Garza v. State*, 632 N.W.2d 633, 638 (Minn. 2001) (holding that an unparticularized statement that people involved in drug trafficking will destroy evidence and use violence if given prior warning is insufficient to support an unannounced entry); *State v. Martinez*, 579 N.W.2d 144, 147–48 (Minn. App. 1998) (holding that a general observation that people who traffic in controlled substances are often armed with firearms and other dangerous weapons and willing to use those weapons is insufficient to support an unannounced entry), *review denied* (Minn. July 16, 1998). Minnesota courts have upheld the issuance of no-knock search warrants where specific, objective factors in addition to suspected drug activity were present. *See, e.g.*, *Wasson*, 615 N.W.2d at 320–21 (affirming the issuance of a no-knock warrant to search a residence where drug activity was believed to occur, when the residence had been searched three months prior and numerous weapons had been found); *State v. Barnes*, 618 N.W.2d 805, 811–12

(Minn. App. 2000) (affirming the issuance of a no-knock warrant to search a residence where drug dealing was believed to occur, when some of the suspected dealers were known gang members), *review denied* (Minn. Jan. 16, 2001).

Appellant's criminal history as reflected in the application for search warrant and supporting affidavit is insufficient to justify the unannounced entry of the residence. That history shows only one conviction—for unlawful possession of a firearm—that occurred approximately six years prior to the issuance of the search warrant in this case. There is no indication that drug activity was involved in the incident that led to that conviction, such that a connection between appellant's weapon possession and drug activity could be made. Moreover, there is nothing else to indicate that appellant may have been a danger to police, such as a history of violence against a person, routine possession of a weapon, or gang membership. There is no evidence that weapons have previously been found in the residence. Appellant's criminal history also shows three incidents that merely resulted in arrests. The 2001 incident involved appellant being arrested while with someone who had possession of a stolen handgun, but there is nothing to suggest that appellant himself had possession of a weapon. And while the state argues that the incidents of fleeing from the police in 2001 and 2007 support the unannounced entry, the warrant issued was to search the residence for controlled substances and evidence of controlled-substance distribution, not to arrest appellant.

Although the reasonable-suspicion standard is not high, there must be objective circumstances, beyond suspected drug activity, that justify an unannounced entry of

premises. Here, there was no reasonable suspicion that knocking and announcing police presence would be dangerous or futile or would inhibit the investigation of the crime.

Reversed.