STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0917

State of Minnesota,
Respondent,

vs.

Michael Robert Jonnes,
Appellant.

Filed July 29, 2013
Affirmed
Halbrooks, Judge

Stearns County District Court
File No. 73-CR-10-11296

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Kristian L. Oyen, Savage, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of two counts of fifth-degree possession of a controlled substance while in possession of a firearm, in violation of Minn. Stat.

§§ 152.025, subd. 2(a)(1), 609.11, subd. 5(a) (2010), arguing that the district court erred in finding that the search warrant was supported by probable cause and that the firearm-enhancement statute applies to his case. We affirm.

FACTS

The Stearns County Sheriff's Office received a tip that, while attending a house party, an individual saw marijuana plants growing in the basement and was offered marijuana by an occupant of the house. The individual was known to law enforcement, but requested to remain anonymous for fear of retaliation. The individual advised police that she or he recognized the marijuana based on previous training in the detection and identification of illegal or controlled substances. A background check revealed that the individual had no criminal history.

In response to the tip, Investigator Dan Miller drove past the house and checked the license-plate number of a car that was parked outside. The car was registered to Levi Bo Dean Donson with that address as his residence. Investigator Miller ran a criminal-history check on Donson and found that he had a 2005 felony conviction for fifth-degree possession of a controlled substance.

Investigator Miller applied for a search warrant, supported by an affidavit stating that the tip came from a "concerned citizen" who was "fully identified by [Investigator Miller], but wishes to remain anonymous for fear of retaliation." It stated that Investigator Miller was "aware that the concerned citizen has attended training for the detection and identification of illegal or controlled substances" and that Investigator Miller had reviewed the criminal history of the concerned citizen and found no criminal

history. The affidavit further stated that within the last seven days, the concerned citizen "observed marijuana plants growing at [the residence]" and that "residents of the house offered marijuana to [the concerned citizen] to 'get high.'" Based on the affidavit, the district court granted the search warrant.

Two residents were present during the search—Donson and Jacob Bruce Erickson—as well as two minors. Erickson advised the officers that appellant Michael Robert Jonnes had recently moved into the basement and that he probably had firearms in a safe in his bedroom. Among other items, officers removed the following from Jonnes's room: approximately 60.7 grams of marijuana from the top of a cabinet; a loaded .40 handgun located approximately six inches away from the marijuana; a loaded .357 magnum revolver located inside of another cabinet; drug paraphernalia; ammunition; approximately 9.9 grams of psilocybin mushrooms; and a driver's license in the name of Michael Jonnes. Officers also found drugs in Donson and Erickson's bedrooms and in the kitchen.

Jonnes was charged with two counts of fifth-degree possession of a controlled substance while in constructive possession of a firearm and one count of aiding and abetting fifth-degree possession of a controlled substance. Jonnes moved to suppress the evidence gained by the search, but the district court denied the motion. Following a bench trial on stipulated facts, the district court found Jonnes guilty of two counts of fifth-degree possession of a controlled substance while in possession of a firearm and not guilty of aiding and abetting possession of a controlled substance. The district court sentenced Jonnes to 36 months in prison. This appeal follows.

D E C I S I O N

I.

Jonnes argues that the district court erred in finding that the search warrant was supported by probable cause because (1) the affidavit did not establish the informant's reliability and (2) the affidavit did not include sufficient corroboration of the informant's tip. In general, a search is only lawful if executed pursuant to a valid search warrant issued by a neutral and detached judge based on a finding of probable cause. *See* Minn. Stat. § 626.08 (2010); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999).

Probable cause is determined under a totality-of-the-circumstances test. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). The judge issuing the warrant must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). The affidavit accompanying an application for a search warrant should not be conclusory, but instead "must provide the magistrate with adequate information from which he can personally assess the informant's credibility." *State v. Siegfried*, 274 N.W.2d 113, 114 (Minn. 1978).

When determining whether a search warrant is supported by probable cause, a reviewing court's only consideration is "whether the judge issuing the warrant had a substantial basis for concluding that probable cause existed." *State v. Jenkins*, 782 N.W.2d 211, 222-23 (Minn. 2010) (quotation omitted). We consider "only the

information presented at the time of the application for the search warrant." *State v. Gabbert*, 411 N.W.2d 209, 212 (Minn. App. 1987). In doubtful or marginal cases, our conclusion "should be largely determined by the preference to be accorded warrants." *Wiley*, 366 N.W.2d at 268 (quotation omitted).

Minnesota courts will presume the reliability of a concerned citizen. *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005). A concerned citizen "provides information in his or her capacity as a witness to a crime, for whom a law enforcement officer is relieved of having to establish credibility and veracity independently through corroboration or a history of providing reliable information." *Id.* We distinguish concerned citizens from informants "who are motivated by a desire for leniency or immunity from prosecution" because a concerned citizen "acts with an intent to aid law enforcement out of concern for society or for personal safety." *Id.*

Jonnes argues that the affidavit failed to establish the concerned citizen's reliability because it stated that the concerned citizen has no "criminal history," but does not address whether the concerned citizen has engaged in criminal activity. He contends that this omission overrides the presumptive credibility granted to citizen informants. But Jonnes offers no support for the assertion that "the statement in the affidavit [that the concerned citizen has no criminal history] is simply not sufficient to establish the presumption of first-time informant reliability."[1] Jonnes does not suggest what kind of investigation would be necessary to ensure that a concerned citizen has never engaged in

[1] Minnesota case law is unclear as to the distinction, if any, between a "concerned citizen" and a "first-time citizen informant." The affidavit here characterized the individual providing the tip as a "concerned citizen."

criminal activity of any kind, and this record contains no evidence that would imply that the person reporting was "motivated by a desire for leniency or immunity from prosecution." *See id.*

Jonnes asserts that because the concerned citizen was "on friendly terms with the individuals at the house" and "had an intimate familiarity with the marijuana plants," we should conclude that the concerned citizen is not entitled to a presumption of reliability. But if the definition of a "concerned citizen" is an individual who "provides information in his or her capacity as a witness to a crime," *see id.*, it would be counterintuitive to argue that an individual's mere presence at the scene of criminal activity, without more, is contrary to the presumption of reliability. And "[r]ecent personal observation of incriminating conduct has traditionally been the preferred basis for an informant's knowledge." *Wiley*, 366 N.W.2d at 269. Further, familiarity with marijuana plants could be gained in any number of ways that do not imply criminal activity, including the training that the concerned citizen in this case received.

Jonnes also argues that the affidavit did not include sufficient corroboration of the concerned citizen's tip, comparing the facts of this case to *State v. Ward*, 580 N.W.2d 67 (Minn. App. 1998). But the issue in *Ward* was "whether a statement against interest, standing alone, can render an informant credible." 580 N.W.2d at 73. Because the concerned citizen in *Ward* admitted to purchasing marijuana, this court affirmed the district court's determination that he was not entitled to a presumption of reliability. *See id.* at 71, 73. Corroboration is not necessary if the tip comes from a concerned citizen. *McGrath*, 706 N.W.2d at 540. And there is no indication here that the concerned citizen

obtained or purchased marijuana, that the police "recklessly disregarded the truth" when applying the term "concerned citizen" to the person providing the tip, or that there is any other reason to suspect a motive other than "an intent to aid law enforcement out of concern for society or for personal safety." *See id.*

The concerned citizen had personal, first-hand knowledge regarding the presence of marijuana in the residence, was trained in identifying illegal or controlled substances, and relayed this information just a few days before the execution of the search warrant. Under a totality-of-the-circumstances test, the district court did not err when it determined that probable cause existed to support a search warrant.

II.

Jonnes argues that the district court erred when it found that he had constructive possession of a firearm. Jonnes also contends that the district court failed to make the requisite findings to trigger application of the firearm-enhancement statute because it did not specifically find that he was in conscious possession of the firearms and because there was no increased risk of violence, given the fact that he was away from the residence at the time the search warrant was executed.

When reviewing the sufficiency of the evidence in a criminal case, this court is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction" is sufficient to allow the finder of fact to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict if the finder of fact, "acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a

reasonable doubt, could reasonably conclude that [the appellant] was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). This standard applies to both bench and jury trials. *State v. Hughes*, 355 N.W.2d 500, 502 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985).

The firearm-enhancement statute applies when "any defendant convicted of an offense listed in subdivision 9 . . . at the time of the offense, had in possession or used . . . a firearm." Minn. Stat. § 609.11, subd. 5(a). Subdivision nine includes a felony conviction for possession of controlled substances. *Id.*, subd. 9 (2010). The phrase "had in possession" in subdivision 5(a) has been interpreted to include both actual possession and constructive possession. *State v. Royster*, 590 N.W.2d 82, 83-84 (Minn. 1999). In order to establish constructive possession, the state must prove either that the item was found "in a place under defendant's exclusive control to which other people did not normally have access" or that "there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over [the firearm]." *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (Minn. 1975).

Based on this record, there is sufficient evidence for the district court to have reasonably concluded that Jonnes was in constructive possession of the firearms. Minnesota courts have repeatedly found that constructive possession is established when police find a controlled substance in a defendant's bedroom or near the defendant's personal effects, even when other people have occasional access to the room. *See, e.g.*, *Wiley*, 366 N.W.2d at 270; *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000).

Here, the district court found that the police discovered the firearms in a room that Jonnes resided in at the time of the search and in close proximity to his personal effects. Jonnes's argument that the district court failed to make the requisite findings for constructive possession is unpersuasive.

But constructive possession alone is not sufficient to trigger application of the firearm-enhancement statute. *See Royster*, 590 N.W.2d at 85. If we determine that there was sufficient evidence for the district court to conclude that Jonnes was in constructive possession of the firearm, we must then determine whether there was sufficient evidence to conclude that the constructive possession increased the risk of violence. *Id.* This inquiry includes

> examin[ing] all aspects of the firearm in possession to determine whether it was reasonable to assume that its presence increased the risk of violence and to what degree the risk is increased: the nature, type and condition of the firearm, its ownership, whether it was loaded, its ease of accessibility, its proximity to the drugs, why the firearm was present and whether the nature of the predicate offense is frequently or typically accompanied by use of a firearm, to name a few of the considerations.

Id. These factors are not exclusive, and we will consider the totality of the evidence to determine whether the requirements of the firearm-enhancement statute have been satisfied. *Salcido-Perez v. State*, 615 N.W.2d 846, 848 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000).

Jonnes contends that there was no increased risk of violence because he was not at the residence at the time that the search was executed. This court addressed a similar argument in *Salcido-Perez*. In *Salcido-Perez*, the appellant was stopped in his car, placed

in police custody, and brought back to his house where officers executed a search warrant. 615 N.W.2d at 847. Officers found a loaded Colt .357 pistol in a kitchen closet, two unloaded shotguns in the garage, and two unloaded assault rifles in a car parked in the yard. *Id.* The officers also found eight-and-a-half pounds of marijuana in the garage, and a quarter pound of marijuana behind the license plate of a car parked in the garage. *Id.*

The appellant in that case argued that there was no threat of violence because he was apprehended away from his residence and was under police control when the firearms where discovered. *Id.* at 848. We noted that it was irrelevant where the appellant was actually arrested because "the statute does not require possession of a firearm at the time of arrest; it merely requires possession of a firearm 'at the time of the offense.'" *Id.* (citing Minn. Stat. § 609.11, subd. 5). We concluded that the loaded pistol increased the risk of violence related to the drug offenses because "[t]he pistol was inherently dangerous, easily accessible to appellant, and, according to the state's evidence, a type of weapon commonly used by drug dealers in the course of their business." *Id.*

The fact that Jonnes was away from the residence at the time the search was executed is not sufficient to conclude that the district court erred in finding that Jonnes's constructive possession of firearms increased the risk of violence related to the drug offense. Here, as in *Salcido-Perez*, Jonnes "had constructive possession of the loaded pistol when he possessed the marijuana." *See id.* at 848-49. The state presented evidence that the firearms were loaded, easily accessible, located in a room controlled by Jonnes,

and in close proximity to both drugs and ammunition. Viewing that evidence in a light most favorable to the verdict, it was reasonable for the district court to conclude beyond a reasonable doubt that the requirements of the firearm-enhancement statute were satisfied.

Affirmed.