STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1394

State of Minnesota,
Appellant,

vs.

Arnold Everette Evans,
Respondent.

Filed April 7, 2014
Reversed and remanded
Rodenberg, Judge
Dissenting, Randall, Judge

Hennepin County District Court
File No. 27-CR-13-10594

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

William M. Ward, Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

RODENBERG, Judge

In this pretrial appeal, appellant State of Minnesota argues that the district court erred in suppressing evidence seized from respondent Arnold Everette Evans's apartment. Because the police had reasonable, articulable suspicion to conduct a narcotics-detection dog sniff of a common hallway, and because the result of that dog sniff provided probable cause to support the warranted search of Evans's apartment, we reverse the district court's suppression order and remand for trial.

FACTS

The relevant facts are undisputed. In March 2013, a confidential reliable informant (CRI), who had provided reliable information to police on several prior occasions, told police that a man was selling cocaine and marijuana from two different vehicles. The informant provided a description of the vehicles, including license-plate information, and stated that the man lived at an identified apartment building located in Bloomington.

Police checked the Minnesota DVS database and found that the license-plate number of one of the identified vehicles was registered to a woman whose address was the same address where the informant had stated the man lived. Police also found an old police report involving the woman, wherein she identified Evans as being a man with whom she lived. A photo of Evans was printed and shown to the CRI, who confirmed that Evans was the man he identified as selling drugs. Further investigation of Evans revealed that he had been previously arrested for several controlled-substance crimes.

On March 19, 2013, a detective, using a certified narcotics-detection dog, conducted a dog sniff in the common hallway of Evans's apartment building. The dog detected the odor of narcotics emanating from Evans's apartment. The dog did not alert on any other doors in the hallway.

After the dog sniff, police applied for and were granted a warrant to search Evans's apartment. On March 22, 2013, police executed the search warrant and recovered marijuana, cocaine, a digital scale, a 9-millimeter pistol, ammunition, several baggies with marijuana residue, and $2,500 in cash. Evans was arrested and charged with second-degree controlled-substance crime (possession) in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2012), fifth-degree controlled-substance crime (possession) in violation of Minn. Stat. § 152.025, subd. 2(b)(1) (2012), and prohibited person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (2012).

Evans moved to suppress the evidence found in his apartment, arguing that the search warrant was not supported by probable cause. The district court granted the motion. The district court reasoned that the dog sniff of the common hallway was unsupported by reasonable suspicion, as the informant had only indicated that contraband was being sold from vehicles. The district court further reasoned that, without evidence from the dog sniff, there was nothing to connect the alleged criminal activity to Evans's apartment. The district court concluded that, absent the narcotics-detection dog's alert, the warrant affidavit failed to establish a sufficient nexus to Evans's apartment. Therefore, because the warrant was unsupported by probable cause, any evidence obtained as a result of the search must be suppressed. The state appealed.

D E C I S I O N

The state is permitted to appeal a district court's pretrial order under Minn. R. Crim. P. 28.04, subd. 1(1), but "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) (quotations omitted). It is undisputed that the district court's suppression order will have a critical impact on the state's ability to prosecute Evans.

On appeal, the state argues that the search-warrant application was supported by probable cause because the dog sniff in the common hallway of Evans's apartment was lawful. *See State v. Carter*, 697 N.W.2d 199, 206 (Minn. 2005) (holding that without the evidence obtained from the dog sniff, the search-warrant application was not otherwise supported by probable cause); *State v. Baumann*, 759 N.W.2d 237, 241 (Minn. App. 2009) (concluding that "because the dog-sniff search was legal, its result provided probable cause for the search warrant"), *review denied* (Minn. Mar. 31, 2009). Thus, our initial inquiry focuses on the validity of the dog sniff of the common hallway.

A narcotics-detection dog sniff in a common hallway of an apartment building is a search under the Minnesota constitution. *State v. Davis*, 732 N.W.2d 173, 181-82 (Minn. 2007). To justify a warrantless dog sniff, a reasonable, articulable suspicion that a suspect is engaged in illegal drug activity is required. *Id.* at 182. The reasonable-suspicion standard is "less demanding than probable cause," but requires more than an unarticulated "hunch." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). "Reasonable suspicion must be based on specific and articulable facts which, taken

together with rational inferences from those facts, reasonably warrant that intrusion." *Davis*, 732 N.W.2d at 182 (quotation omitted). But "[t]he requisite showing is not high." *Id.* (quotation omitted). Considering the totality of the circumstances, we review whether a reasonable suspicion exists de novo. *Id.*; *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). Even if one factor alone is not "independently suspicious," several "innocent factors in their totality" may amount to reasonable suspicion of criminal activity. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998) (quotation omitted).

Here, the police had reasonable, articulable suspicion to conduct a narcotics-detection dog sniff in the common hallway of Evans's apartment building. Police relied on information they received from a confidential informant who had been reliable on previous occasions. *See State v. Wiley*, 366 N.W.2d 265, 269 (Minn. 1985) (determining that language indicating police had used a confidential informant successfully in the past gave the magistrate reason to credit the confidential informant and find probable cause). The informant told police that a man was selling drugs out of two identified vehicles, and police investigation verified that one of the identified vehicles was registered to a woman who lived at the apartment where the CRI had said the man selling drugs lived. The police also had information that Evans had, in the past, resided with the registered owner of the vehicle. Evans had been previously arrested for controlled-substance violations, including first-degree sale of cocaine. *See State v. Ruoho*, 685 N.W.2d 451, 457 (Minn. App. 2004) ("Generally, evidence that a defendant is a long-time drug dealer contributes to an inference that a likely place to seek to find incriminating items would be [his] residence, even though the probable-cause affidavit does not describe drug activity in the

residence." (alteration in original) (quotation omitted)), *review denied* (Minn. Nov. 16, 2004). And the search-warrant affiant attested to professional awareness that individuals who sell controlled substances typically separate, weigh, and package the drugs before their sale. Taken together, these facts provided reasonable, articulable suspicion for the police to believe that evidence of drug possession and sale would be located at Evans's apartment. We conclude that the dog sniff was justified.

The district court did not grant the motion to suppress based on any credibility determinations. Rather, it accepted the information provided by the informant as true, but relied on caselaw that is inapplicable in the present context. The district court relied on three cases to support its conclusion that the police did not have a reasonable, articulable suspicion to conduct the dog sniff: *State v. Souto*, 578 N.W.2d 744 (Minn. 1998); *State v. Braasch*, 316 N.W.2d 577 (Minn. 1982); and *State v. Yaritz*, 287 N.W.2d 13 (Minn. 1979). While these cases require a nexus between the alleged crime and the particular place to be searched, the discussion in those cases relates to the standard required for establishing *probable cause*. The issue here is whether the police had met the lower threshold required for *reasonable suspicion*.

We conclude that the police conducted a valid narcotics-detection dog sniff in the common hallway outside Evans's apartment because the officers had reasonable, articulable suspicion to conduct the dog sniff in the common hallway. And because there has been no showing that the dog sniff was not properly conducted, the dog's alert to an odor of narcotics emanating from Evans's apartment provided probable cause supporting the warrant issued for the search of that apartment. Accordingly, we conclude that the

district court clearly and unequivocally erred. We therefore reverse the district court's suppression order and remand for trial.[1]

Reversed and Remanded.

[1] We do not reach the state's alternative argument that, even without evidence from the dog sniff, the search-warrant application was supported by probable cause.

RANDALL, Judge (Dissenting)

The state failed to show that the district court clearly and unequivocally erred. I dissent.

On appeal from a pretrial order, the district court's decision will not be reversed unless it has a critical impact on the prosecution and it is "*clearly and unequivocally*" erroneous. *State v. Webber*, 262 N.W.2d 157, 159 (Minn. 1977) (emphasis added). Clear and unequivocal error has been the standard for nearly the last four decades and has never been touched or modified. *See State v. Robb*, 605 N.W.2d 96, 99 (Minn. 2000); *Webber*, 262 N.W.2d at 159; *State v. Gerard*, 832 N.W.2d 314, 317 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013); *State v. Blacksten*, 507 N.W.2d 842, 846 (Minn. 1993); *State v. Kim*, 398 N.W.2d 544, 547 (Minn. 1987). The first prong is not an issue. The district court's suppression order does impact the prosecution of respondent. The issue, the significant question, is whether the district court's suppression of the evidence was a clear and unequivocal error.

"Clear" is not an unclear modifier. But like the modifier "very," it is overused and denigrates any emphasis it is entitled to. On the other hand, "unequivocal" is not "unclear"; it is not "equivocal"; it states "a high standard." *See* Black's Law Dictionary 1698 (rev. 4th ed. 1968) (defining "unequivocal" as "capable of being understood in *only one way*, or as clearly demonstrated; *free from uncertainty*, or *without doubt*; and, when used with reference to the burden of proof, it [is] proof of the highest possible character and . . . . imports proof of the nature of mathematical certainty") (emphasis added). To me, it is the equivalent of "proof beyond a reasonable doubt" in a criminal case, and

beyond. Unequivocal means that there is no doubt. The earth revolves around the sun, not the sun around the earth. We do not debate that anymore; it is an unequivocal truth.

For years, in suppression appeals by the state, the state has argued, and we have fallen into the trap of reviewing the district court's credibility determinations and inferences to be drawn from the facts. Until we acknowledge that, and make the seismic shift, the sea-change so to speak, and follow established law, "find unequivocal error" or "affirm," we will continue to make the mistake the state in this appeal wants us to. When you read the state's brief and dissect the state at oral argument, they were challenging the trial court's credibility determination and weight to be given to the facts on, among other things, the weight to be given to the "dog sniff." Respondent's attorney pointed out the lack of any collateral corroboration for the hearsay statement the dog "is a certified narcotic detector dog." The state just argues that the dog should have been found to be highly reliable. The state argues that the trial court did not give proper weight to the informant's description and correct license-plate numbers of cars with the nexus to respondent's home, yet the authorities were never told that respondent was selling drugs in his home.

The state's evidence included some information about respondent's criminal background including some charges that did not result in convictions. The state "surmised" that it was reasonable to assume that respondent would have evidence of the alleged drug-dealing at his residence, including but not limited to, drugs, paraphernalia, scales, and packaging equipment. The inference to be drawn from the state's suggestion, although not invalid, is for the district court.

The district court, in weighing the evidence from the facts in the record, made credibility determinations to the written and oral testimony of the state. The district court wrote a memorandum suppressing the evidence. This is the only reason the state appealed. They did not like the district court's discretionary evaluation of their case.

It is not that the state's case was as thin as cold soup or that it could have perhaps, gone the other way, leading to a post-trial appeal by respondent if there was a conviction. That is not the issue; that is not even close to the issue. In examining the majority's decision, they discuss weight and inference and credibility determinations in assessing the decision to reverse, even if those exact words are not used.

Once again, as in all state-appealed suppression orders going back through the years, the state ends up urging us to sit as "a jury of three" and retry the facts and make inferences and assess credibility and decide the trial judge was wrong in those areas. Reviewing weight and credibility and inference from the facts in a contested suppression hearing is beyond the purview of an appellate court.

Here is an example of an unequivocal error. A district court decides that any testimony as to a "dog sniff," in what the dog indicated, and where it was found, will be totally inadmissible, because "dog sniffs" are not evidentiary. That would be unequivocal error. Dog sniffs are not per se inadmissible. *See State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005) (holding that evidence obtained from the use of a dog sniff is permissible if police articulate reasonable grounds for believing drugs may be present in the place sought to be searched). Here would be another unequivocal error. A district court rules that the strict rules of evidence, including those pertaining to hearsay,

will be enforced in a suppression hearing, and therefore Officer Stanger would have been prohibited from testifying that Officer Heinzmann told him over the phone that "the dog is certified." (That is all Heinzmann told Stanger. There was no evidence offered as to the dog's background, training, years in service, or record of successful sniffs as to various kinds of drugs.) On issues of articulable suspicion and probable cause, law enforcement is allowed to submit information provided through law-enforcement communications and the "collective knowledge" of the law-enforcement agency. *State v. Conaway*, 319 N.W.2d 35, 40 (Minn. 1982). Neither of these errors of law were made. No unequivocal errors of law were made.

The state's appeal is not unlike after a guilty verdict in a criminal case the defendant, on appeal, wants to rehash credibility determinations and fact finding by the jury. That is what the state is doing on this pretrial suppression appeal.

The standard is clear error. The standard is unequivocal error. I find nothing even close to unequivocal error on this record. All I find is the state's dissatisfaction with the weight and credibility that the district court gave to its evidence. I respectfully dissent. With no unequivocal error in the record, respondent is entitled to an affirmance.