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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0565**

State of Minnesota,
Appellant,

vs.

Cole Earl Thompson,
Respondent.

**Filed November 13, 2017
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Dakota County District Court
File No. 19HA-CR-16-3581

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Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this pretrial appeal, appellant State of Minnesota challenges the district court's
suppression of evidence resulting from a warranted search of respondent Cole Thompson's

residence and recycling bin. The state contends that (1) the district court erred in determining that the search warrant, which was not signed prior to execution of the search, was invalid under the United States Constitution, the Minnesota Constitution, and Minnesota statute; (2) the district court abused its discretion in denying the state's motion to reopen the omnibus hearing; and (3) the district court erred in suppressing evidence found in Thompson's recycling bin because the court did not determine whether Thompson had an expectation of privacy in the bin.

We conclude that the district court did not err in determining that the search warrant was constitutionally and statutorily invalid or abuse its discretion in declining to reopen the omnibus hearing. However, we conclude that the district court erred in suppressing evidence found in the recycling bin without determining whether Thompson had a reasonable expectation of privacy in it. Therefore, we affirm in part, reverse in part, and remand.

FACTS

On September 14, 2016, Scott County Deputy Sheriff Shawn Mahaney applied for a search warrant for Thompson's residence. The deputy submitted the application, supporting affidavit, and proposed search warrant in person to a district court judge. The judge placed the deputy under oath and took his sworn testimony; reviewed, dated, and signed the application; but did not sign the search warrant itself. The judge returned the application and the unsigned warrant to the deputy, who left without inspecting the documents but believing that the judge had signed the search warrant.

Six days later, the deputy and other officers executed the search warrant. In addition to searching inside Thompson's residence, officers also searched a recycling bin located in the alleyway behind the residence. In the recycling bin, they found approximately 130 grams of a substance that later tested positive for methamphetamine.

After most of the search was completed, including the search of the recycling bin, the officers realized that the judge had not signed the warrant. The deputy stopped all search activity and phoned the judge, who instructed him to electronically forward a scanned copy of the unsigned warrant. The judge signed the search warrant without any additions or changes, leaving the same September 14 signature date that had been previously typed on the warrant.

Thompson was charged with first-degree controlled-substance crime. He moved to suppress all evidence from the search, and the district court held an omnibus hearing. The judge who reviewed the application and ultimately signed the warrant did not testify. The deputy testified about his phone conversation with the judge and, in response to a question asking whether the judge had given an explanation for not signing, stated, "I believe she just said it was her mistake." The district court granted Thompson's motion to suppress, concluding there was insufficient evidence to find that the judge, at the time of the application, had found probable cause and intended to issue the warrant. The district court refused to except the evidence from the recycling bin from its suppression order.

The state simultaneously filed a notice of appeal with the court of appeals and a motion to reopen the omnibus hearing with the district court. Because of the pending appeal, the district court initially canceled its hearing on the state's motion. After this court

gave the state permission to stay its appeal, the state proceeded with its motion to reopen, seeking to introduce testimony from the reviewing judge. The district court denied the state's motion. The state's appeal was reinstated.

D E C I S I O N

In a pretrial appeal by the state, we will reverse only if the state has demonstrated “clearly and unequivocally” that the district court’s order constituted error and that the order will have a “critical impact” on the state’s ability to prosecute the defendant successfully. *See State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quoting *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995)). “When reviewing a pretrial order on a motion to suppress, we review the district court’s factual findings under our clearly erroneous standard. We review the district court’s legal determinations, including a determination of probable cause, de novo.” *See State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012) (citation omitted); *see also State v. Lugo*, 887 N.W.2d 476, 483-85 (Minn. 2016) (holding same standard applies to state’s pretrial appeals). The parties agree that the “critical impact” element is satisfied, as suppression of the evidence here would lead to the effective dismissal of criminal charges. We thus turn to the state’s argument of error.

I. The district court did not err in determining that the search warrant did not satisfy constitutional and statutory requirements.

The state argues that the district court erred in determining that the search warrant was constitutionally and statutorily invalid.

A. The district court did not err in determining the warrant was constitutionally invalid.

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures and provide that search warrants shall be issued only upon probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Probable cause is determined by the reviewing judge based on the totality of the circumstances. *Zanter*, 535 N.W.2d at 633 (quotation omitted). As a general rule, evidence seized in violation of the Constitution must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007).

In a suppression hearing, the state bears the burden of proving by a preponderance of the evidence that its actions conformed to pertinent constitutional provisions. *See State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013) (applying preponderance-of-the-evidence burden of proof in Fourth Amendment warrantless-search case); *State ex rel. Rasmussen v. Tahash*, 272 Minn. 534, 554, 141 N.W.2d 3, 13-14 (1965) (explaining that the state has the obligation to show that the circumstances under which evidence was obtained was consistent with constitutional requirements).

The parties cite no Minnesota case addressing whether the absence of a signature necessarily renders a warrant constitutionally invalid. In *State v. Andries*, discussed by the parties, the supreme court concluded that a warrant satisfied constitutional requirements when the judge—in a recorded telephone conversation with a deputy—reviewed the application and warrant, made a substantive determination that probable cause existed and the warrant should issue, and delegated to the deputy the task of signing his name. 297 N.W.2d 124, 125 (Minn. 1980). The district court here assumed, without deciding, that an

unsigned search warrant may be constitutionally valid as long as the reviewing judge actually made a probable cause determination and intended to sign the warrant prior to the search. The district court found, however, that the state did not prove those circumstances. We decline to decide whether the absence of a judge's signature renders a warrant constitutionally invalid in every case because we conclude that the district court properly decided that the state failed to meet its burden of proof in this case.

1. The district court did not apply the wrong burden of proof.

The state argues that the district court erroneously held the state to a higher, “clear or direct evidence” burden of proof, rather than the applicable preponderance-of-the-evidence standard, in evaluating whether the state had proved that the reviewing judge made a probable cause determination and intended to sign the warrant at the time of application.

Error is never presumed on appeal. *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949). “It must be made to appear affirmatively before there can be reversal. Not only that, but the burden of showing error rests upon the one who relies upon it.” *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (quotation omitted). We assume that the district court used the correct standard of law. *Clark v. Clark*, 288 N.W.2d 1, 8 n.10 (Minn. 1979) (“The record . . . does not indicate which standard was applied by the district court. We believe that it is fair to presume . . . that the trial court applied the correct standard in reaching its decision.”).

We see no reason to doubt this presumption here. In its order, the district court did not state that the state's burden of proof was “clear or direct evidence.” In fact, the order

does not specify the burden of proof. The state argues that the order indicates a higher burden of proof because it refers to the lack of “clear evidence” that the reviewing judge made a probable cause determination at the time of the application. We disagree that this reference indicates that the district court held the state to a higher burden of proof.

First, the district court did not use the phrase “clear or direct evidence.” Second, “direct” does not reference a burden of proof, but rather a method of proof. Finally, the district court, in using the word “clear,” was distinguishing the present case from the two federal cases relied upon by the state in opposing the suppression motion. The district court distinguished *United States v. Lyons*, in which the judge signed a warrant the day after the search, adding a note that his failure to sign initially had been inadvertent. 740 F.3d 702, 724 (1st Cir. 2014). The First Circuit wrote, “Given the clear and contemporaneous evidence that the state justice made a proper probable cause determination and approved the issuance of a warrant for execution, we decline to find in the lack of a signature a reason for suppression.” *Id.* at 726. The district court here explained that the judge’s note in *Lyons* “made clear” that the judge unintentionally failed to sign the warrant before the search was conducted.

The district court also distinguished *United States v. Cruz*, in which the judge who signed a warrant one month after it was initially issued noted underneath the initial date line “Nunc Pro Tunc” (meaning “now for then”). 774 F.3d 1278, 1281 (10th Cir. 2014). In *Cruz*, the Tenth Circuit explained that the judge’s note was “clear and contemporaneous evidence” showing that the judge made a proper probable cause determination and approved the issuance of a warrant for execution, despite the lack of a signature. *Id.* at

1286 (quotation omitted). In discussing *Cruz*, the district court explained that the evidence in that case “show[ed] the issuing judge’s clear intention that he previously made a probable cause determination and intended to sign the warrant.” The district court distinguished Thompson’s case, explaining that *Cruz* and *Lyons* “involve[d] a situation where the evidence is clear that all constitutional requirements were met, and it was just the signature that was lacking. That is not the case here.”

Based on the language in *Lyons* and *Cruz*, as well as the district court’s discussion of these cases, and giving the district court the presumption to which it is entitled, we conclude that the district court applied the proper burden of proof.

2. The district court did not clearly err in finding that the state failed to meet its burden of proof.

The state argues that it proved by a preponderance of the evidence that the reviewing judge found probable cause to issue the search warrant and intended to issue the warrant when it was first presented to her. The state points to a number of factors, including that the judge reviewed and signed the application, did not indicate rejection of the application, and signed the warrant later submitted to her without changes; and that the deputy testified that the judge said it was “her mistake.”

The district court determined that this evidence did not satisfy the state’s burden. In deciding to suppress the evidence, the district court “refuse[d] to uphold the validity of a search warrant with only the applying officer’s testimony that the judge made a probable cause determination and intended to sign it previously.” The court found the deputy’s testimony alone “insufficient” and noted that, unlike *Lyon* and *Cruz*, there was “nothing

written on the second search warrant that was sent back by [the reviewing judge] that would indicate an earlier finding of probable cause or a previous intention to sign it.”

The district court’s finding was not clearly erroneous. Here, there is no contemporaneous record of the reviewing judge’s substantive decision-making at the time of the application. *Cf. Andries*, 297 N.W.2d at 125 (relying on recorded phone conversation in which the reviewing judge determined probable cause and approved a search warrant). In addition, although the deputy testified that the judge did not reject the warrant, not rejecting the warrant is different from evidence affirmatively demonstrating that the judge intended to sign the warrant. *Cf. id.* And the judge’s statement that it was “her mistake,” as testified to by the deputy, may give rise to the inference that the judge determined probable cause and intended to sign the warrant, but another inference could be that the mistake was not making the determination and decision to sign at the time. On the basis of the record before it, the district court did not clearly err in finding that the state failed to meet its burden of proving that the judge found probable cause and intended to issue the warrant at the time of the application. Based on this finding, the district court correctly concluded that the warrant was constitutionally invalid.

B. The district court did not err in determining that the unsigned warrant constituted a serious and substantial violation of Minnesota statute.

The state argues that the district court erred in determining that the judge’s failure to sign the warrant constituted a serious and substantial violation of Minnesota statute. On established facts, a district court’s interpretation and application of a statute is a question

of law, subject to de novo review. *State v. Carufel*, 783 N.W.2d 539, 542 (Minn. 2010); *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Minnesota statutory law defines a search warrant as “an order in writing, in the name of the state, signed by a court . . . directed to a peace officer, commanding the peace officer to make a search as authorized by law and hold any item seized, subject to the order of a court.” Minn. Stat. § 626.05, subd. 1 (2016). The statute provides that, upon a determination of probable cause, “the judge must issue a signed search warrant, naming the judge’s judicial office,” to a peace officer, directing the place to be searched. Minn. Stat. § 626.11(a) (2016).

The exclusionary rule may be invoked for nonconstitutional, statutory violations in the warrant process. *State v. Jordan*, 742 N.W.2d 149, 151 (Minn. 2007). Suppression is required when “the violation of the statute was a serious one that subverted the purpose of the statute.” *Id.* However, mere technical violations do not require suppression. *State v. Goodwin*, 686 N.W.2d 40, 41 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

The state argues that suppression of evidence should be limited to circumstances where it is necessary to deter law enforcement from engaging in conduct contrary to constitutional requirements. It contends that the district court’s decision “allows the form of the search warrant [to] control over substance by preventing the State from rebutting a suppression motion . . . [with] testimony that constitutional provisions for the issuance of the search warrant had been complied with.”

The state’s concerns are misplaced in this case. As the district court pointed out, Thompson’s case is distinct from other cases where evidence sufficiently established that

a judge had found probable cause despite the judge's failure to sign a warrant. *Cf. Andries*, 297 N.W.2d at 125 (finding signature requirement "purely ministerial" where judge, in a recorded phone conversation, delegated the signing of the warrant to officer after determining that probable cause was present over the phone in recorded conversation). Here, the district court determined that a prior probable cause determination was not established and that the unsigned warrant was therefore constitutionally invalid. In these circumstances, the district court did not err in concluding that the absence of a judge's signature on the warrant was a serious and substantial statutory violation.

II. The district court did not abuse its discretion in declining to reopen the hearing.

The state challenges the district court's refusal to reopen the suppression hearing to permit testimony from the reviewing judge.

As an initial matter, Thompson argues that this court lacks jurisdiction to consider this issue because the state did not file a notice of appeal from the district court's order denying the state's motion to reopen. "The interpretation of the rules of criminal procedure is a question of law subject to de novo review." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005); *see also State v. Coles*, 862 N.W.2d 477, 479 (Minn. 2015) (holding same).

Thompson contends that the state was required to file a notice of appeal of the district court's denial of its motion to reopen within the timeframe specified in Minn. R. Crim. P. 28.04. Under subdivision 2(1) of that rule, a prosecutor must appeal from a pretrial order within five days after entry of the order staying the proceedings. Here, following the suppression order, the state simultaneously filed a notice of appeal with the

court of appeals and a motion to reopen the omnibus hearing with the district court. The state then obtained from this court a stay and a remand to pursue its motion before the district court. After the district court denied the state's motion, the state, having received a final determination, reinstated its previous appeal. Because we granted the state's motion to stay and remand the case to the district court to pursue its motion to reopen the omnibus hearing, and because the state reinstated its appeal after that motion was decided, the issue about reopening the hearing is properly before us. *Cf. In re Marriage of Rettke*, 696 N.W.2d 846, 850 (Minn. App. 2005) (holding that when a civil appeal is properly taken from the underlying judgment, the appellate court has discretion to review a subsequent, nonappealable order denying a motion).

We turn to the merits of the state's argument. "Although the rules of criminal procedure do not specifically authorize motions for reconsideration of omnibus rulings, the district court has the inherent authority to consider such a motion." *State v. Papadakis*, 643 N.W.2d 349, 356-57 (Minn. App. 2002); *see also State v. Needham*, 488 N.W.2d 294, 297 (Minn. 1992) (remanding for reopened omnibus hearing). The state argues that, by denying its motion, the district court did not give it a full and fair opportunity to develop a complete evidentiary record. In particular, the state sought to introduce testimony from the reviewing judge, and submitted as an offer of proof an affidavit that it obtained from the judge following issuance of the suppression order.

In *Needham*, the Minnesota Supreme Court held that the state did not have sufficient notice that the adequacy of a *Miranda* warning was at issue and remanded to the district court for reopening of the omnibus hearing to give the state an opportunity to meet its

burden of proof. *Id.* at 296-97. Reopening of the omnibus hearing was “justified in order to give [a party] a full and fair opportunity to meet its burden of [proof]” in an omnibus hearing when new issues are raised posthearing. *Id.* at 297.

Here, unlike in *Needham*, the state had notice of the issue to be addressed at the omnibus hearing. And, as Thompson points out, “[t]he State, as with any witness, could have subpoenaed [the reviewing judge] to testify, but chose not to.” Only after the suppression order issued did the state seek to introduce previously available testimony that the reviewing judge found probable cause and intended to issue a warrant on September 14. Denying the state’s motion to reopen was within the district court’s discretion.

III. The district court erred in suppressing the recycling-bin evidence without first determining whether Thompson had a reasonable expectation of privacy.

The state argues that the district court erred in suppressing the recycling-bin evidence without determining whether Thompson had a reasonable expectation of privacy in the bin.

As a threshold issue, Thompson argues that the state forfeited the expectation-of-privacy argument because it did not raise the argument before or at the omnibus hearing.¹ The United States Supreme Court has made clear that “[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were

¹ Thompson uses the term “standing” rather than the phrase “reasonable expectation of privacy.” The search was of Thompson’s residence, and Thompson was the target of the search. In such a case, “the inquiry is not one of ‘standing,’ but whether the disputed search has infringed on the privacy interest of a homeowner that the Fourth Amendment was designed to protect.” *Jordan*, 742 N.W.2d at 155-56.

violated by the challenged search or seizure.” *Rakas v. Illinois*, 439 U.S. 128, 131 n.1, 99 S. Ct. 421, 424 n.1 (1978). Thompson contends, however, that the state was required to raise the expectation-of-privacy argument at the omnibus hearing in order to give Thompson notice that he must meet his burden of proving that expectation.

Thompson cites *Garza v. State*, in which the state challenged the defendants’ standing to contest the need for an unannounced-entry warrant because they were not home at the time the search was conducted. 632 N.W.2d 633, 637 (Minn. 2001). The Minnesota Supreme Court concluded that “the state waived the issue of standing by failing to raise it in an omnibus hearing in the trial court.” *Id.* However, in *Garza*, the state did not raise the issue of standing at either the omnibus hearing or the postconviction hearing, instead raising the issue for the first time on appeal. *Id.*

Here, at the omnibus hearing, the state offered testimony that directly related to the question of Thompson’s reasonable expectation of privacy. The deputy and the officer who conducted the search of the recycling bin both testified to the bin’s location, including pointing out the alley’s position on an aerial photograph. And the officer who conducted the search testified that the bin contained recyclables. In its posthearing response brief, the state challenged Thompson’s expectation of privacy in the recycling bin. Citing *California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625 (1988), the state argued that, irrespective of the validity of the search warrant, “an individual does not have a reasonable expectation of privacy in garbage and other items left at the curb and a warrantless search of such garbage does not violate the Fourth Amendment to the United States Constitution.”

Thompson argues that lack of notice diminished his opportunity to rebut the expectation-of-privacy argument. But Thompson was able to cross-examine the witnesses regarding the location and contents of the recycling bins, and he identifies no evidence he would have offered at the omnibus hearing to otherwise establish an expectation of privacy in the bin. Therefore, we conclude that the state did not forfeit its challenge to Thompson's expectation of privacy and that the suppression issue is properly before this court.

Turning to that issue, this court “independently review[s] the facts and determine[s], 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) (citing *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992)). The state argues that the district court's rejection of the expectation-of-privacy argument was erroneous because, even if the search warrant was invalid, suppression is not justified if Thompson had no reasonable expectation of privacy in the recycling bin. The state cites both United States and Minnesota Supreme Court cases holding that there is no reasonable expectation of privacy in garbage left out on the curb. See *Greenwood*, 486 U.S. at 39-40, 108 S. Ct. at 1628; *State v. McMurray*, 860 N.W.2d 686, 694-95 (Minn. 2015).

Thompson argues that, because the search of the bin occurred during execution of an invalid warrant, and because there is no evidence that the bin would have been searched independently of execution of that warrant, the evidence recovered from it is “tainted” and must be suppressed. The district court agreed, ordering suppression because the search of the recycling bin “was done while executing the invalid warrant.”

Generally, a warrantless search of garbage left for collection outside of the curtilage of a home does not violate the Fourth Amendment. *Greenwood*, 486 U.S. at 37, 108 S. Ct. at 1627 (concluding that a person does not have a reasonable expectation of privacy in garbage left at the curb). The Court in *Greenwood* explained that it is “common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.” *Id.* at 40, 1628-29. Therefore, there is no reasonable expectation of privacy in garbage adjacent to a public street.

The Minnesota Supreme Court has determined that Minnesota’s state constitution provides no greater protection for garbage set out for collection in a publicly accessible area. *McMurray*, 860 N.W.2d at 693. “[T]he critical inquiry in claims of unlawful search and seizure is whether or not the person who claims the protection of the fourth amendment has a justifiable or reasonable expectation of privacy in the invaded place or the seized items.” *State v. Oquist*, 327 N.W.2d 587, 589 (Minn. 1982) (finding no reasonable expectation of privacy in contents of the plastic bags placed in or near defendant’s open garbage can).

In this case, the officers’ testimony addressed the location of the recycling bin outside in the public alley, in the same location where officers had previously conducted a lawful warrantless trash sweep. However, the district court did not make any finding as to whether Thompson had a reasonable expectation of privacy in the recycling bin. If Thompson had no reasonable expectation of privacy in the bin, his Fourth Amendment rights were not violated by the search and suppression is not warranted. *Id.* We conclude

that the district court erred in rejecting the state's argument and remand the issue to the court to determine whether Thompson had a reasonable expectation of privacy in the recycling bin.

Affirmed in part, reversed in part, and remanded.