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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A17-0610

A17-1623

State of Minnesota,
Respondent,

vs.

Leslie Paul Johnson,
Appellant.

Filed May 21, 2018
Affirmed in part and remanded
Rodenberg, Judge

Watonwan County District Court
File Nos. 83-CR-15-490, 83-CR-15-465

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Stephen Lindee, Watonwan County Attorney, St. James, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Proulx, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Cleary, Chief Judge;
and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In these consolidated appeals, appellant Leslie Paul Johnson challenges his
convictions for criminal sexual conduct and possession of pornographic work. He argues

that the district court erred by finding that the search warrant, which enabled police to obtain the child-pornography evidence, was supported by probable cause. He also argues that, ancillary to that probable-cause finding, the district court erroneously denied his motion to suppress evidence seized from his apartment.¹ Appellant also argues that the district court erred by not making a factual finding concerning which offense occurred first before sentencing. Appellant also argues in a pro se brief that he received ineffective assistance of trial counsel in file A17-1623. We affirm appellant's convictions in both appeals, and remand to the district court for additional findings in appellate file A17-1623.

FACTS

An employee with Brown County Family Service Center contacted Madelia Police Officer Travis Bottelson on May 15, 2015 regarding a report of sexual abuse alleged to have occurred between 2010 and 2012. T.B., age 15 at the time, told his therapist that appellant sexually molested him during those years, when T.B. was between 10 and 12 years old. Officer Bottelson interviewed T.B. on May 16, 2015.

T.B. told the officer that he knew appellant from the Younger Brothers organization, and that T.B. often spent the night at appellant's home. T.B. reported that appellant would tell T.B. that T.B. was "dirty" and would help T.B. shower, which included washing T.B.'s hair and body. He reported that appellant grabbed T.B.'s backside, fondled T.B.'s genitals, tried to convince T.B. to sleep in appellant's bed with appellant, laid on the couch behind T.B. in a "spoon" position, stroked T.B.'s side, "place[d] his hands in the back of T.B.'s

¹ The evidence that appellant sought to suppress in both cases resulted from the same search warrant.

pants and digitally penetrate[d] T.B.'s rectum." T.B. also told Officer Bottelson that appellant would grab his backside while they wrestled. T.B. estimated that appellant touched him inappropriately about 30 times.

Officer Bottelson spoke with appellant on June 8, 2015 at the police station. The officer read the *Miranda* warning to appellant and asked appellant about the incidents that T.B. had reported. Appellant admitted that T.B. would spend the night at his house and admitted that he helped T.B. shower, but appellant denied any inappropriate touching. Officer Bottelson noted that appellant seemed "nervous as he was stammering his words when answering [the officer's] questions."

Officer Bottelson arrested appellant after the interview. Appellant asked if he could retrieve his medications from his apartment. Officer Bottelson took appellant to his apartment, but appellant changed his mind and told the officer that he did not need to go inside the apartment and would have someone else get the medications instead. As of the next day, appellant had not arranged for anyone to retrieve his medications or to care for the pets that he told Officer Bottelson were in his apartment. Officer Bottelson later took the keys for appellant's apartment building to return them to the building owner. While Officer Bottelson was returning the keys, an officer from the jail called Officer Bottelson to tell him that appellant had, on learning that Officer Bottelson was going to appellant's apartment with the keys, become "visibly upset and nervous" and spilled his coffee.

In his affidavit accompanying a search-warrant application, Officer Bottelson stated that he learned through his investigation that appellant "carries a camera on his person at all times," that appellant "likes to use his video recorder," and that appellant "had access

to children previously while babysitting.” Officer Bottelson had found a camera in a pouch on appellant’s belt when appellant was booked into jail. He included in the affidavit that appellant had been investigated about 25 years earlier for sexual misconduct with a child, but that there was insufficient evidence to file charges then. Officer Bottelson also explained that, from his training and experience, he “knows that computers and the internet ha[ve] become a common tool for those who get sexual gratification from viewing images of children, and/or interacting with minors,” and that those who have access to minors may exploit them through photographs or video.

A district court judge signed the search warrant on June 9, 2015, authorizing the search of appellant’s apartment for evidence of child pornography. Law enforcement officers executed the search warrant and recovered “multiple hard drives, computers, camera recording equipment, digital cameras, multiple CDs [and] DVDs.” Forensic analysis of the recovered devices revealed “several hundred” photographs and 18 videos of children who were partially or fully naked, including some photographs that were cropped to highlight the children’s private parts.

The state charged appellant, in what is now appellate case file A17-1623, with three counts of second-degree criminal sexual conduct, one count of using minors in sexual performances or pornographic work, one count of possessing child pornography, one count of malicious punishment of a child, and one count of indecent exposure to a minor. In a separate complaint, now appellate case file A17-0610, the state charged appellant with three counts of second-degree criminal sexual conduct, two counts of using minors in sexual performances or pornographic work, two counts of possessing pornographic work

on a computer disc or electronic storage system, and one count of malicious punishment of a child.

Appellant challenged the validity of the search warrant and moved to suppress all evidence obtained from it. The challenge to the search warrant was heard by a different judge than the one who signed the warrant. This second judge found that the warrant was supported by probable cause, and denied appellant's motion to suppress.

Later, the charges of using minors in sexual performances or pornographic works and the charge of malicious punishment in both files, and the indecent-exposure charge in file A17-1623, were dismissed on statute-of-limitations grounds. One count of second-degree criminal sexual conduct in each file was dismissed because the child's age did not qualify as a mental impairment under the statutory provision charged. None of these dismissed charges are significant to this appeal.

Appellant waived his right to a jury in file A17-0610. After trial to the court, the district court found appellant guilty of two counts of second-degree criminal sexual conduct and two counts of possessing pornographic work. Appellant appealed, arguing that the search warrant was unsupported by probable cause and that the resulting evidence should therefore have been suppressed.

In file A17-1623, appellant submitted the charges to the court for a stipulated-facts trial, and the parties agreed that the dispositive issue in that case was the validity of the search warrant. The district court described in detail the rights that appellant would be waiving by agreeing to a stipulated-facts trial, including the right to testify at trial. Appellant indicated that he understood the rights that he was giving up, and the district

court found that appellant had validly waived those rights. The district court found appellant guilty of two counts of second-degree criminal sexual conduct and one count of possession of pornography in that file.

The presentence investigation (PSI) in file A17-1623 recommended that the district court sentence appellant to 119 months in prison on the first criminal-sexual-conduct conviction, 300 months in prison on the second criminal-sexual-conduct conviction, and 60 months in prison on the pornography conviction. The state asked the district court to follow that recommendation. Appellant's attorney did not object. The district court then sentenced appellant to 142 months in prison on the first criminal-sexual-conduct conviction, 300 months in prison on the second criminal-sexual-conduct conviction, and 60 months in prison on the pornography conviction, to be served concurrently. Appellant appealed.

This court issued an order consolidating the two appeals. Both appeals challenge the probable cause supporting the search warrant, and the appeal in file A17-1623 challenges appellant's sentence. Appellant separately filed a pro se brief in file A17-1623 alleging ineffective assistance of counsel.

D E C I S I O N

I. The district court had a substantial basis for concluding that probable cause existed to support the search warrant.

Appellant argues that the district court erroneously denied his motion to suppress the evidence seized from his apartment because the search warrant lacked probable cause.

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. A search warrant may be issued by a neutral and detached magistrate only upon a finding of probable cause. *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). When determining whether probable cause supports the issuance of a search warrant, we do not engage in de novo review. *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, our “only consideration is whether the issuing judge had a substantial basis for concluding that probable cause existed.” *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). A substantial basis in this context means a “fair probability,” given the totality of the circumstances, “that contraband or evidence of a crime will be found in a particular place.” *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted). We afford “great deference” to the issuing judge’s finding of probable cause. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985).

Our review “is limited to the information presented in the warrant application and supporting affidavit.” *Fawcett*, 884 N.W.2d at 384-85. “[Appellate courts] must consider the totality of the circumstances alleged in the supporting affidavit and must be careful not to review each component of the affidavit in isolation.” *Id.* at 385 (quotation omitted). “[T]he critical question is whether the totality of facts and circumstances described in the affidavit would justify a person of reasonable caution in believing that the items sought were located at the place to be searched.” *State v. Ruoho*, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). We recognize “that doubtful or

marginal cases should be largely determined by the preference to be accorded to warrants.” *Fawcett*, 884 N.W.2d at 385 (quotation omitted).

Appellant argues that the information from T.B. that Officer Bottelson included in the search-warrant affidavit was stale because of the passage of time between the alleged incidents and the search-warrant application. Appellant also argues that the information in the search-warrant affidavit was insufficient to provide the district court a substantial basis supporting a nexus between T.B.’s allegations and the stated belief that evidence of child pornography would be found at appellant’s apartment.

Stale information cannot be used to establish probable cause. *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). “[T]he freshness of the information provided by the witness is an important factor for determining the probability that contraband or evidence of a crime will be found in a particular place.” *State v. Carter*, 697 N.W.2d 199, 206 (Minn. 2005) (quotation omitted). The United States Supreme Court has said that a search-warrant application must contain proof “of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.” *Sgro v. United States*, 287 U.S. 206, 210, 53 S. Ct. 138, 140 (1932). Courts have declined “to set arbitrary time limits in obtaining a warrant or to substitute a rigid formula for the judge’s informed decision,” but rather evaluate the facts based on the circumstances of each case. *Jannetta*, 355 N.W.2d at 193. This approach is flexible and allows the courts to apply common sense. *Id.* Factors to be considered in determining whether information contained in a search-warrant affidavit is stale include: “the age of the person giving the information; whether there is any indication of ongoing criminal

activity; whether the items sought are innocuous or incriminating; whether the property sought is easily disposable or transferable; . . . and whether the property would have enduring utility.” *Id.* at 193-94 (citations omitted).

Additionally, “a sufficient ‘nexus’ must be established between the evidence sought and the place to be searched.” *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014). “[D]irect observation of evidence of a crime at the place to be searched is not required.” *Id.* “A nexus may be inferred from the totality of the circumstances.” *Id.* A number of circumstances inform a judge’s determination of whether such a nexus exists, including “the type of crime, the nature of the items sought, the extent of [a defendant’s] opportunity for concealment,” and normal inferences about where a defendant would usually keep such items. *State v. Pierce*, 358 N.W.2d 672, 673 (Minn. 1984).

The affidavit attached to the search-warrant application here contained information that can be broken into five categories which, taken together, amount to a substantial basis upon which the district court could find probable cause and issue the warrant. First, the affidavit gave a detailed description of appellant’s alleged abuse of T.B. over a two-year period. Second, the affidavit referenced law enforcement’s suspicion that appellant had engaged in similar conduct with other children in the past and had continuous access to other children from his involvement in the Younger Brothers organization. These first two circumstances support a conclusion of repeated and ongoing criminal behavior by appellant.

Third, Officer Bottelson had observed that appellant carried a camera when he was arrested, and reportedly carried it with him at all times and used it quite frequently. These

facts alleged in the search-warrant affidavit provide a link between the allegations and the officer's stated belief that appellant may have taken and may possess sexually explicit images of minors.

Fourth, Officer Bottelson stated in the affidavit that his training and experience informed him that persons with criminal sexual propensities toward minors and who have access to minors may exploit the minors through photographs or video recordings, and that computers and the internet may be used by persons who get sexual gratification from such exploitation. "[A] police affiant's training and experience can be a proper factor to consider in making a probable-cause determination." *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004) (citing *State v. Miller*, 666 N.W.2d 703, 714 (Minn. 2003)). Officer Bottelson's training and experience here provided a common-sense link between T.B's allegations against appellant and the electronic devices in appellant's apartment.

Finally, and we think significantly, appellant's conduct after his arrest evidenced his desire that law enforcement not enter his apartment. While appellant was of course not required to consent to law enforcement entering his apartment, it seems highly unusual that appellant asked law enforcement to bring him to his apartment to retrieve his medications after his arrest only to decide that he did not need the medications once he realized that the officer, having arrested him earlier, would accompany him inside to retrieve it. Appellant also became "visibly upset and nervous," spilling his coffee, when he thought that Officer Bottelson might enter his apartment while he was jailed. There were pets in appellant's

apartment, and yet appellant made no effort for their care after his arrest.² Appellant's conduct and demeanor demonstrate a peculiar level of concern with what was in his apartment—and that police not enter the apartment, even at the expense of appellant's health and his pets' well-being.

Given the totality of the circumstances, the preference accorded to warranted searches, and considering the deference owed to a district court's probable-cause determinations, we see no reversible error in the district court's finding of a substantial basis that probable cause supported the search warrant. *Fawcett*, 884 N.W.2d at 385.

II. Appellant has failed to establish an ineffective-assistance-of-counsel claim.

Appellant argues in a pro se supplemental brief that he received ineffective assistance of trial counsel in file A17-1623.

When a “brief contains no argument or citation to legal authority in support of the allegations[,] . . . we . . . deem [the issues] waived.” *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). Because appellant's pro se brief does not contain legal argument or citations to legal precedent, we deem appellant to have waived his ineffective-assistance-of-counsel claim.

Moreover, appellant's ineffective-assistance-of-counsel claim is wholly lacking in merit in any event. We analyze ineffective-assistance-of-counsel claims under the two elements of the *Strickland* test. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App.

² The record is unclear as to exactly what types of animals were in appellant's apartment, and we recognize that immediate care is a less-pressing matter for some animals. However, it is significant that appellant made no effort at all after his arrest to arrange any type of care for those animals.

2017). “The defendant must affirmatively prove that his counsel’s representation ‘fell below an objective standard of reasonableness’ and ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). But “[w]e will generally not review an ineffective-assistance-of-counsel claim that is based on trial strategy.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Trial-strategy decisions include what evidence is presented to the factfinder. *Id.*; *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003).

Appellant identifies a number of questions that he believes his trial counsel could have asked at trial that may have bolstered his defense, and states that his attorney could have presented other evidence. The presentation of evidence and what questions to ask of witnesses falls squarely within the category of trial-strategy decisions that we do not review.

Appellant also seems to argue that he was forced to submit the case to the district court for a stipulated-facts trial because he knew that his attorney would not help him. But “[t]he U.S. Supreme Court has ‘recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.’” *Erickson v. State*, 725 N.W.2d 532, 536 (Minn. 2007) (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983)). From the record on appeal, it is evident that appellant made the ultimate decision of whether to proceed with a jury trial or to waive that right. The district court thoroughly

discussed appellant's rights with him and concluded that appellant "validly waived his right to the jury trial with a unanimous verdict." The district court specifically asked appellant if he had talked through the decision with his attorney and if his attorney "fully advised [him] and represented [his] interests." Appellant responded in the affirmative to both questions. There is no basis on this record to conclude that appellant received ineffective assistance from his trial counsel.

III. Appellant is entitled to further findings concerning the order of his offenses in file A17-1623.

Appellant argues that the district court erred by not making findings regarding the order of the offenses for which he was sentenced and asks that the matter be remanded to the district court for further factual findings. The state agrees that the district court did not make such findings and that further proceedings in the district court are required.

When a district court sentences a defendant for multiple offenses at the same time, the offenses "must be sentenced in the order in which they occurred" and each sentenced offense is included "in the criminal history on the next offense to be sentenced" unless the offenses arise from a single course of conduct. Minn. Sent. Guidelines 2.B.1.e (Supp. 2015); *See State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981) (providing that a district court, when sentencing multiple felony offenses at the same time, should include earlier-sentenced offenses in calculating a criminal-history score for each subsequent offense). Generally, "[t]he district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). But "a district court 'must use accurate criminal history scores.'"

State v. Provost, 901 N.W.2d 199, 201 (Minn. App. 2017) (quoting *State v. Maurstad*, 733 N.W.2d 141, 142 (Minn. 2007)).

Because the record here contains no finding concerning the order in which appellant's offenses were committed, it is unclear in which order the convictions should have been sentenced and what criminal-history scores should have been used for the sentences in appellate file A17-1623. Therefore, we remand file A17-1623 to the district court to make factual findings concerning the order in which the offenses occurred. *See State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (stating that appellate courts may remand for findings when necessary to review the district court's order).

In sum, we affirm appellant's convictions in both appeals and remand in file A17-1623 for additional findings as set forth in this opinion.

Affirmed in part and remanded.