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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0936**

State of Minnesota,
Respondent,

vs.

Nathan Kenneth Kmetz,
Appellant.

**Filed May 14, 2018
Affirmed
Reilly, Judge**

Hennepin County District Court
File No. 27-CR-15-4623

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges the probable cause providing the basis for the search warrant for his apartment. Appellant also argues that the search warrant for his apartment did not

provide a basis for law enforcement to arrest him three blocks away from his home and that any evidence seized from him during his arrest should be suppressed. Because there was probable cause for the district court to issue the search warrant, and any admission at trial of evidence seized from him was harmless beyond a reasonable doubt, we affirm.

FACTS

In early 2015, the Southwest Hennepin Drug Enforcement Taskforce sought a search warrant for appellant Nathan Kmetz's apartment. The search warrant application and affidavit were based on the following information.

Police received information from a concerned citizen that appellant was using and selling methamphetamine out of his Hopkins apartment. The concerned citizen provided appellant's address and apartment number, and police verified it using the department of motor vehicles' website. After reviewing police records, the search warrant affiant located an information report from 2010 that "an individual reported to police that [appellant] was selling methamphetamine out of his apartment" The affiant also spoke to a "law enforcement source that was familiar with Kmetz" who knew appellant's address and that appellant was currently in possession of three shotguns. The affiant spoke to yet another law enforcement source who reported that appellant was "considered to be hostile towards law enforcement." The affiant learned that appellant's criminal history included an arrest in 2004 for drug possession and several driver's license violations. Finally, the officers used a narcotics detection dog that positively alerted at the door of appellant's apartment, indicating the presence of a drug odor.

The district court issued the warrant, permitting officers to search appellant's apartment and "[a]ny person(s) currently occupying the residence . . . , any vehicles associated with the residence, or the person(s) found therein." The district court authorized police to seize evidence of controlled substances, packaging equipment, mobile phones and their contents, documents, firearms, and other evidence.

Police, after obtaining a search warrant for appellant's apartment, waited outside the building for appellant to leave. Appellant left in his car, and officers performed a traffic stop a few blocks away and arrested appellant. Incident to the arrest, officers seized a phone carried by appellant. Police also seized appellant's keys, and used them to access his apartment. Inside the apartment, officers discovered baggies containing controlled substances and two glass pipes.

At trial, the state introduced text messages from appellant's cell phone. The text messages showed appellant discussing the sale of a "teen" with another person. An officer explained to the jury that "teen" is slang for an ounce of methamphetamine. Appellant did not testify. The jury found appellant guilty of a fifth-degree controlled substance possession crime and appellant appealed.

D E C I S I O N

I. There was a substantial basis for the district court to conclude that probable cause existed to search appellant's apartment.

Appellant argues the search warrant application and affidavit did not establish probable cause to support the issuance of a search warrant for his apartment. The United States and Minnesota Constitutions require that probable cause support a search warrant.

U.S. Const. amend. IV; Minn. Const. art. I, § 10. When reviewing a district court's probable-cause determination made in connection with the issuance of a search warrant, this court's task is to determine whether the issuing judge "had a substantial basis for concluding that probable cause existed." *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). This court grants great deference to an issuing court's probable cause determination. *Id.* The deference is not boundless, and this court may reverse if an issuing court's "probable-cause determination reflected an improper analysis of the totality of the circumstances." *State v. Gabbert*, 411 N.W.2d 209, 212 (Minn. App. 1987) (quotation omitted). Likewise, this court may determine a search warrant is void and suppress the fruits of the search if "it is demonstrated by a preponderance of the evidence that the affiant knowingly or with reckless disregard for the truth included a false statement in the affidavit." *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006).

Appellant first argues the application and affidavit did not show the concerned citizen's veracity, reliability, and basis of knowledge for the information. Appellant then argues that other information in the warrant affidavit did not support a finding of probable cause. Next, appellant argues that the warrantless dog sniff outside his apartment door is unconstitutional and cannot be used to show probable cause. Finally, appellant argues that, considering the totality of the circumstances, the warrant application and affidavit did not establish probable cause, and the district court's decision to issue the warrant was not harmless error.

A. The Concerned Citizen

If a concerned citizen provides information, law enforcement is not required to verify the person's credibility and veracity through independent corroboration. *State v. Davis*, 732 N.W.2d 173, 182-83 (Minn. 2007); *McGrath*, 706 N.W.2d at 540. Courts presume concerned citizens are believable and reliable because they do not seek immunity from prosecution or leniency in sentencing, and therefore, unlike informants, they are distinct from other people who provide information to police. *McGrath*, 706 N.W.2d at 540. To qualify a concerned citizen as a source of information, a search warrant affidavit should provide some details regarding the person that demonstrates their credibility and pure motive to cooperate with the investigation, though such information is not explicitly required. *See State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978) (stating in dicta that, where a concerned citizen wishes to remain anonymous, it behooves law enforcement to provide peripheral information establishing the informant's status as a concerned citizen). Concerned citizens are especially trustworthy because their identity is known to the police, and, if the information provided is ultimately false, the person could face criminal charges for providing false information to police.¹ *See* Minn. Stat. § 609.505, subd. 1 (2016).

Appellant argues that the concerned citizen's information cannot be used to show probable cause because the affiant did not provide information showing the person's veracity, reliability, or basis of knowledge. But appellant's argument is based on the

¹ Appellant conflates concerned citizens and informants throughout his brief. Concerned citizens and informants are distinct sources of information, and there are distinct legal standards for evaluating information provided by each source when determining probable cause.

standard applied to confidential informants, which is quite different from the one we use to analyze information provided by a concerned citizen. A confidential informant's information is *not* presumed to be reliable. When using information supplied by a confidential informant to determine whether probable cause supports the issuance of a search warrant, the issuing judge considers the confidential informant's veracity and basis of knowledge when deciding how much weight to give the information. *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998). A concerned citizen's information, on the other hand, is presumed to be reliable and can support a probable-cause determination without showing their veracity or basis of knowledge. *McGrath*, 706 N.W.2d at 540.

Here, the warrant affidavit does not include any information about the concerned citizen. But an affiant is not required to provide additional information to afford a concerned citizen the presumption of veracity and reliability. *Davis*, 732 N.W.2d at 182-83. The affiant stated that the concerned citizen's identity is known to him and that they wished to remain anonymous. We presume that the concerned citizen is reliable without further information. *McGrath*, 706 N.W.2d at 540.

Next, appellant claims that the concerned citizen's knowledge of appellant's address cannot on its own support a finding of probable cause. Appellant is correct that easily obtained facts and conditions, like a person's address, are by themselves inadequate to support a finding of probable cause. *State v. Albrecht*, 465 N.W.2d 107, 109 (Minn. App. 1991). However, the concerned citizen's knowledge of appellant's address was not the sole piece of information the district court used to find probable cause. The district court

also relied on the concerned citizen's information that drug activity occurred at the address, appellant's criminal history, and information provided by three informants.²

There was no conflicting evidence to rebut the affiant's statements, and appellant has not alleged that the information contained in the affidavit was knowingly false or made with a reckless disregard for the truth. *See McGrath*, 706 N.W.2d at 541 (determining that an affiant knowingly omitted a would-be concerned citizen's criminal record from the warrant affidavit). The district court did not err by relying on the concerned citizen's information when determining there was probable cause to search appellant's apartment.

B. Appellant's Criminal History

Appellant argues that appellant's criminal record cannot support the district court's probable-cause determination. Caselaw clearly instructs otherwise. An issuing judge may consider arrest and charge records when determining if probable cause exists, but probable cause cannot be sustained on arrest records alone. *See State v. McCloskey*, 453 N.W.2d 700, 702, 704 (Minn. 1990) (holding that an eight-year-old DWI arrest, a probation violation warrant, a warrant for expired plates, and a warrant for speeding constituted "relatively minor trouble with the law [that] was perhaps of some slight probative value" toward a probable-cause determination). The district court properly considered appellant's arrest and charge record as part of its probable-cause determination.

² The district court did not rely heavily on the information provided by the three informants.

C. The Dog Sniff

Appellant argues the warrantless dog sniff outside his apartment door was unconstitutional and could not be used to establish probable cause. *See State v. Edstrom*, 901 N.W.2d 455, 464 (Minn. App. 2017) (holding that a dog sniff at an apartment door inside a secured building was unconstitutional), *review granted* (Minn. Nov. 14, 2017). *Edstrom* was decided after the district court issued the search warrant but before this case was heard. Appellant argues that this court should apply *Edstrom* to the present case as it is currently good law. However, even if we disregard the positive alert from the dog sniff, there is a substantial basis for the district court to determine there was probable cause. Accordingly, we need not consider whether *Edstrom* should apply in this case or whether the dog sniff itself was unconstitutional.

D. Probable Cause Exists

To determine whether the issuing judge had a substantial basis for finding probable cause, we consider the totality of the circumstances. *State v. Holiday*, 749 N.W.2d 833, 839 (Minn. App. 2008). We are careful not to review each component of the warrant affidavit in isolation and note that pieces of information that would not be substantial alone can combine to provide probable cause. *Id.* The search warrant affidavit provided a substantial basis for the judge to determine that probable cause existed. The concerned citizen's information was corroborated by the affiant's independent investigation and information provided by the three informants. Appellant's criminal history provided another component to assess whether probable cause existed to search appellant's apartment. Based on the foregoing information contained in the warrant affidavit, the

district court had a substantial basis to determine that probable cause existed to issue the search warrant for appellant's apartment.

II. Admission of evidence obtained from appellant's cell phone was harmless error.

The United States and Minnesota Constitutions guarantee a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, evidence seized in violation of the Constitution must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007). "A constitutional error does not mandate reversal and a new trial if we determine that the error was harmless beyond a reasonable doubt." *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006). Whether an error is harmless "is not a matter of analyzing whether a jury would have convicted the defendant without the error, but rather whether the error reasonably could have impacted . . . the jury's decision." *Id.* (citation and quotations omitted).

Appellant argues police lacked probable cause to arrest him and that all evidence resulting from his arrest, including data obtained from his cell phone, should have been suppressed. At trial, the state presented evidence of appellant's text messages that showed appellant discussing the sale of methamphetamine with another person. The state also introduced the drugs and drug pipes found in appellant's bedroom. Appellant lived alone in the apartment, so the presence of drugs in his living space is very strong evidence of his possession of them. *See, e.g., State v. Lorenz*, 368 N.W.2d 284, 287-88 (Minn. 1985) (holding that cocaine discovered in defendant's dresser in his bedroom in apartment he shared with another was sufficient to establish defendant's constructive possession of

cocaine). At best, the text messages on appellant's phone were cumulative of the overwhelmingly incriminating drug evidence found in appellant's apartment. The jury did not need the text message evidence to conclude appellant possessed the drugs, and the erroneous admission of the text message evidence could not have reasonably impacted the jury's decision. Any error in admitting evidence obtained from appellant's cell phone and its data was harmless beyond a reasonable doubt.

Affirmed.