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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0441**

State of Minnesota,
Respondent,

vs.

Luis Miguel Gallegos,
Appellant.

**Filed March 4, 2019
Affirmed
Reyes, Judge**

Kandiyohi County District Court
File No. 34-CR-17-622

Keith Ellison, Minnesota Attorney General, Peter Magnuson, Assistant Attorney General,
St. Paul, Minnesota; and

Shane D. Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

REYES, Judge

On appeal from his convictions of first-degree controlled-substance sale and first-
degree controlled-substance possession, appellant argues that the search warrant lacked

probable cause to support a search of his residence for evidence of illegal drugs, drug sales, or drug distribution. Appellant argues that, as a result, the district court erred in failing to suppress evidence obtained during the search-warrant execution and in failing to vacate his convictions. We affirm.

FACTS

In June 2017, officers went to appellant Luis Miguel Gallegos's residence to execute an arrest warrant for him after he failed to appear in court. After the officers made contact with appellant, he told them that he believed he had a court hearing that Friday and had paperwork reflecting that. He told the officers that he wanted them to review the paperwork and that he wanted to collect some of his personal items before going to jail. The officers agreed and escorted appellant upstairs. Officers eventually took him outside and conducted a search of appellant incident to his arrest. One of the officers discovered a syringe in the pocket of appellant's pants. The syringe had a brownish substance on the tip of the needle. The officer asked appellant what the needle was but appellant did not respond. Appellant eventually claimed that the syringe was a rabies shot for his dog.

The officers transported appellant to jail and conducted a Narcotics Identification Kit (NIK) test on the brownish substance found on the needle. The test indicated a positive result for methamphetamine. The officers then applied for a warrant to search appellant's residence. The issuing court signed the search-warrant application, and officers executed the search warrant on the same day as appellant's arrest. Pursuant to the execution of the search warrant, officers seized several items from appellant's bedroom, including three quart-size bags and four small bags containing a white crystal substance which field-tested

positive for methamphetamine with a total weight of 71.6 grams. The search also yielded three digital scales and a mirror¹, all of which contained residue that field-tested positive for methamphetamine. Based upon the evidence seized, the state charged appellant with first-degree controlled-substance sale, in violation of Minn. Stat. § 152.021, subd. 1(1) (2016), and first-degree controlled-substance possession, in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (2016).

Appellant filed several pretrial motions, including omnibus motions to suppress evidence and to dismiss, arguing that the search warrant lacked probable cause to search his residence because the search-warrant application was based solely on the existence of the methamphetamine-laced syringe found on appellant's person. Following a hearing, the district court issued an omnibus order denying both motions. The district court held that there was no basis for suppression of evidence or statements because, under the totality of the circumstances, the issuing court had a substantial basis for determining that probable cause supported the search warrant.

Appellant submitted the case to the district court on stipulated evidence, pursuant to Minn. R. Crim. P. 26.01, subd. 4, to appeal his motions to suppress evidence and to dismiss. The district court found appellant guilty of both counts. The district court sentenced appellant to 65 months in prison on count one, but imposed no sentence on count two. This appeal follows.

¹ Officers discovered two of the three digital scales in the same location as the small bags containing the white crystal substance. Officers found the mirror with residue on top of appellant's dresser.

DECISION

Appellant argues that, because the search-warrant application was based solely on the discovery of a small amount of methamphetamine found on his person, the warrant lacked probable cause to search his residence for evidence of illegal drugs, drug sales, or drug distribution. Appellant argues, in the alternative, that, even if this court finds that his pretrial motions failed to preserve an overbreadth argument for appeal, we may nevertheless address the argument in the interests of justice. We are not persuaded.

Generally, litigants are bound on appeal to the theory upon which they tried the action in district court, and we will not consider matters not argued to and considered by the district court. *State v. Bakken*, 871 N.W.2d 418, 422 (Minn. App. 2015), *aff'd* (Minn. Aug. 3, 2016). In district court, appellant argued in his pretrial motions that the discovery of a methamphetamine-laced syringe on his person “[did] not mean there [was] evidence of ongoing criminal activity inside [his] residence.” At the omnibus hearing, appellant referred to his pretrial motions and argued that the warrant lacked probable cause to search his residence because it was based solely on the methamphetamine-laced syringe. Appellant argues on appeal that the warrant lacked probable cause to support a search of his residence for evidence of illegal drugs, drug sales, or drug distribution based on the small amount of methamphetamine found on his person. The state contends that appellant is attempting to advance a new theory on appeal that the search warrant was overly broad, which is forfeited.

Typically, an issue not raised at an omnibus hearing is forfeited. *State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996). However, while a pretrial motion to suppress

should provide the state with reasonable notice of issues raised by the defendant, “[i]n practice, the defense counsel at the outset of an omnibus hearing often makes a rather general statement of the issues.” *State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992).

In *Balduc*, the state contended that defendant had forfeited a lack-of-particularity challenge to a search warrant by failing to raise the issue with specificity prior to the omnibus hearing. 514 N.W.2d 607, 609 (Minn. App. 1994). This court held that defense counsel provided the prosecutor with sufficient notice of a particularity challenge through a letter indicating that “all usual omnibus hearing issues” would be contested. *Id.* at 610. Here, although appellant’s pretrial argument is more general than the argument he makes on appeal, the two arguments are not meaningfully different. We have stated that we do not believe the supreme court intended to require a detailed defense omnibus hearing in all circumstances. *Balduc*, 514 N.W.2d at 609-10. Because we conclude that appellant preserved an overbreadth argument on appeal, we need not address appellant’s in-the-interest-of-justice argument.

We turn now to the pretrial issue preserved for appeal. Minn. R. Crim. P. 26.01, subd. 4(f). Our deferential review of the issuing judge’s conclusion of probable cause is limited to determining that a substantial basis supports that conclusion. *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). A substantial basis for a probable cause determination exists if, under the totality of circumstances set forth in the search-warrant affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct.

2317, 2332 (1983)). A court may sever invalid portions of a warrant and properly admit evidence seized pursuant to the valid portions. *United States v. Fitzgerald*, 724 F.2d 633, 636–37 (8th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984); *see also United States v. LeBron*, 729 F.2d 533, 537 n. 2 (8th Cir. 1984) (infirmity of part of warrant requires suppression of evidence seized pursuant to that part, but not suppression of anything described in valid portions of warrant or lawfully seized—on plain view grounds, for example—during their execution).

The discovery of a single methamphetamine-laced syringe on appellant’s person did not provide the issuing judge with probable cause to authorize a search of appellant’s residence for evidence of drug sales and drug distribution. *See Souto*, 578 N.W.2d at 751 (determining there was little reason to believe appellant had evidence of drug dealing absent establishment of ongoing activity or that appellant was a drug dealer). However, absent the deficient portions of the search warrant relating to evidence of drug sales and drug distribution, the record provides a substantial basis to support a search of his residence for drugs. Here, the search-warrant affidavit stated that, during a lawful search of appellant incident to his arrest, police found a single methamphetamine-laced syringe on his person. Immediately prior to the arrest, appellant had been alone inside his residence. Given the totality of the circumstances, these facts indicate a fair probability that additional evidence of drugs would be found in appellant’s residence and established the required “direct nexus” between possession of illegal drugs and a search of appellant’s residence. *McGrath*, 706 N.W.2d at 539.

Affirmed.