

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0513**

State of Minnesota,
Respondent,

vs.

Amy Kathleen Sparks,
Appellant.

**Filed April 29, 2019
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-17-16660

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Ted Sampsell-Jones, Special Assistant Public Defender, Ryan Wilson (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Slieter, Judge; and Stauber,
Judge.*

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

UNPUBLISHED OPINION

SLIETER, Judge

Appellant Amy Kathleen Sparks challenges her conviction of fifth-degree possession and fifth-degree sale of a controlled substance. Appellant argues that a search warrant lacked probable cause and that the district court erred when it denied appellant's motion to suppress evidence found during execution of the search warrant. We affirm.

FACTS

On January 13, 2017, Officer Peterson and other Minneapolis police officers uncovered a large marijuana growing operation during a search of appellant's home. Approximately two weeks later, on January 24, 2017, airport police informed Minneapolis police that a package addressed to a Minneapolis address contained young, live, marijuana plants.

Minneapolis police conducted a controlled delivery of the package. Shortly after leaving the package on the home's porch, police observed an individual exit the house, pick up the package, and hand it to appellant, who was waiting in the alley behind the house. Police then observed appellant drive to her home. Police did not investigate further at that time because "online research revealed that it can take up to [six] months for young marijuana plants" to mature.

Approximately six months later, on June 15, 2017, Officer Peterson subpoenaed the Xcel Energy electricity-usage records of appellant's home and three neighboring homes with similar square footage to appellant's home. Xcel Energy provided the records. The records showed that appellant's electricity usage dropped off after the January 13, 2017,

marijuana seizure and had increased steadily following the delivery of the marijuana plants. Appellant was using significantly more electricity than her neighbors.

On July 6, 2017, Officer Peterson applied for a search warrant of appellant's house based on the prior grow operation, the package with live marijuana plants, and the electricity-usage records. The warrant was issued. Police executed the warrant and found 32 marijuana plants, containers of marijuana, a digital scale, and marijuana-cultivating equipment.

Appellant was charged with fifth-degree possession and fifth-degree sale of a controlled substance. Prior to trial, appellant moved to suppress the evidence obtained from the search, arguing that the warrant was not supported by probable cause because the information about marijuana was stale. Appellant contended that the delay in executing the warrant "rendered it increasingly unlikely that the facts upon which the warrant were based still existed." On the day of trial, the district court denied the motion in a ruling from the bench.

The jury found appellant guilty on both counts. Appellant was sentenced to serve one year and one day in prison.

This appeal follows.

D E C I S I O N

Appellant raises on appeal, for the first time, an argument pursuant to *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018). We assume appellant did not present this argument to the district court because the *Carpenter* opinion had not yet been issued at the time of trial. "Usually, we will not decide issues which are not first addressed by the trial

court and are raised for the first time on appeal even if the issues involve constitutional questions regarding criminal procedure.” *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). The factual record on this issue, moreover, is not sufficiently developed and “[i]t is not within the province of [appellate courts] to determine issues of fact on appeal.” *Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (quoting *Kucera v. Kucera*, 146 N.W.2d 181, 183 (Minn. 1966)) (alteration in original).

An analysis under *Carpenter* would require a robust factual record regarding, among other things, what type of information is revealed by appellant’s electricity-usage records. See *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018) (concluding that the collection of digital energy meter data at 15-minute intervals was a search under the Fourth Amendment and that, under *Carpenter*, the third-party doctrine does not apply to electricity records). Therefore, we decline to consider the constitutional issue involving appellant’s electricity-usage records and address only the staleness argument raised at the district court.

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search is lawful only if it is executed pursuant to a valid search warrant issued by a neutral and detached magistrate after a finding of probable cause. Minn. Stat. § 626.08 (2018); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999).

When determining whether a search warrant is supported by probable cause, appellate courts do not engage in a *de novo* review. *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, “great deference

must be given to the issuing [magistrate's] determination of probable cause.” *State v. Valento*, 405 N.W.2d 914, 918 (Minn. App. 1987). When reviewing a decision to issue a search warrant, an appellate court limits its review to whether the issuing magistrate had a substantial basis for concluding that probable cause existed. *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014).

To determine whether the issuing magistrate had a substantial basis for finding probable cause, appellate courts look to the “totality of the circumstances.” *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). “‘The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)).

In reviewing the sufficiency of a search-warrant affidavit under the totality-of-the-circumstances test, “courts must be careful not to review each component of the affidavit in isolation.” *Id.* “[A] collection of pieces of information that would not be substantial alone can combine to create sufficient probable cause.” *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). “Furthermore, the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants.” *Wiley*, 366 N.W.2d at 268 (quotation omitted).

Appellant contends that because the information about the marijuana plants was six-months old, it is too stale to support a finding of probable cause. “Factors relating to staleness include whether there is any indication of ongoing criminal activity, whether the

articles sought are innocuous or incriminating, whether the property sought is easily disposable or transferable, and whether the items sought are of enduring utility.” *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998). “When an activity is of an ongoing, protracted nature, the passage of time is less significant.” *Id.* (citing 2 W. LaFave, *Search and Seizure*, § 3.7(a) at 344-46 (1996)). Information supporting probable cause may not be stale “even after the passage of several months where the items sought are of enduring utility to their taker.” *State v. DeWald*, 463 N.W.2d 741, 746 (Minn. 1990) (quotation omitted).

Appellant was involved in ongoing criminal activity. Marijuana cultivation is protracted and continuous in nature—the affidavit noted that marijuana takes six months to mature. The plants were also of an enduring utility. Approximately six months passed between the controlled delivery and the search; appellant would likely not have disposed of the plants before they were matured. In addition, mature plants are not easily disposed of or transferred.

Further, appellant’s electricity-usage records show that the operation was active at the time of the warrant application.¹ Following the initial seizure and arrest on January 13, appellant’s energy usage decreased, and subsequent to the delivery of the plants it had increased steadily. Appellant’s home was consuming considerably more electricity than her neighbors’ homes, and the affiant noted that increased-energy consumption can be an indication of a marijuana-growing operation.

¹ As noted above, the court does not address appellant’s constitutional challenge for the reasons described. Therefore, we do not opine whether, absent the electricity-usage records, the search warrant is stale.

We conclude, without consideration of the *Carpenter* decision's impact, that the evidence presented to the magistrate was not stale and indicated that there was a marijuana-growing operation in appellant's house. The district court did not err in denying appellant's suppression motion.

Affirmed.