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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0878**

State of Minnesota,
Respondent,

vs.

Brendon Scott Vagle,
Appellant.

**Filed April 22, 2019
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-17-1696

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

Kate M. Baxter-Kauf, Arielle S. Wagner, Lockridge Grindal Nauen, PLLP, Minneapolis, Minnesota (for appellant)

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

UNPUBLISHED OPINION

LARKIN, Judge

In this direct appeal from a stay of adjudication, appellant argues that the district court erred by denying his motion to suppress drugs found during the execution of a search warrant at his apartment. He argues that the underlying search-warrant application was based, in part, on an unconstitutional dog sniff and that without the information regarding the dog sniff, the warrant was not supported by probable cause. Because the dog sniff did not violate appellant's rights under the United States or Minnesota Constitutions and there was probable cause for the search warrant, we affirm.

FACTS

Respondent State of Minnesota charged appellant Brendon Scott Vagle with first-degree sale of a controlled substance and third-degree possession of a controlled substance after police executed a search warrant at his apartment and found 21.11 grams of methamphetamine, a small amount of marijuana, one suspected lysergic acid diethylamide (LSD) strip, scales, and \$550 in cash. Vagle moved to suppress the evidence, arguing that the search warrant was not supported by probable cause. The relevant facts, which are undisputed on appeal, are as follows.

A confidential informant told law-enforcement officers that Vagle was selling methamphetamine out of his apartment at #3N 4545 Valley View Road, Edina.¹ Deputy

¹ Although the record does not indicate the date of this communication, on January 18, 2017, a law-enforcement officer requested a search warrant based on the communication and swore that the information from the informant had been obtained “[w]ithin the last month.”

Arturo Lopez obtained a photograph of Vagle and showed it to the informant, and the informant confirmed that Vagle was the male who had been selling the methamphetamine at apartment #3N. Deputy Lopez confirmed, through the Minnesota Department of Vehicle Services website and contact with a United States postal inspector, that Vagle lived at #3N 4545 Valley View Road. Deputy Lopez went to 4545 Valley View Road and viewed the rear-entrance directory; the line for #3N displayed “B. Vagle.” In addition, Deputy Lopez learned that a vehicle with license plate number 383-PRT was registered to Vagle and observed that vehicle in the underground parking garage at 4545 Valley View Road.

Deputy Lopez reviewed Vagle’s criminal history and learned that he had been cited for traffic violations and possession of drug paraphernalia. Deputy Lopez also learned the Drug Enforcement Agency (DEA) had received a tip from a DEA confidential informant that “a person by the name Brendon Scott Vagle” was selling methamphetamine out of apartment #3N 4545 Valley View Road, Edina.

On or about January 11, Deputy Lopez spoke with the manager of the apartment building at 4545 Valley View Road. The manager informed Deputy Lopez that Vagle used to live in apartment #3P and later moved to apartment #3N, after a domestic dispute with his roommate. The manager also informed Deputy Lopez that law enforcement had conducted a dog sniff at apartment #3P when Vagle lived there. The manager granted

permission for the police to enter the building to conduct a dog sniff and provided Deputy Lopez with an access code to enter the apartment building.²

On or about January 18, Deputy Lopez and canine Officer Sean Young conducted a dog sniff in the common hallway in front of Vagle's apartment door, and the narcotics-detection dog alerted to the presence of methamphetamine at Vagle's apartment.³ The officers also swabbed the door handle on Vagle's apartment door for purposes of an Ionscan analysis.⁴ That analysis indicated the presence of methamphetamine. Following the dog sniff, Deputy Lopez obtained a warrant to search Vagle's apartment, relying on the information above, which was set forth in an affidavit submitted in support of the search warrant. The officers executed the search warrant the day after they obtained it and found drugs, scales, and cash in Vagle's apartment.

² Although the building is secured and the officers had an access code, the record indicates that, on the day of the dog sniff, officers entered through an unsecured door and did not need to use the access code.

³ The search-warrant affidavit in this case noted that within the same week, another dog sniff had been conducted by Airport Police K-9 officers and that the narcotics-detection dog had alerted to the presence of "a drug odor" at apartment #3N.

⁴ In *United States v. Williams*, 865 F.3d 1328, 1335 (11th Cir. 2017), the court described Ionscan analysis as follows:

IonScan technology is designed to detect trace amounts of illicit materials—often amounts so small as to be imperceptible to the human eye. Samples, or "swipes," are taken of areas and objects thought to contain contraband. The samples are then run through the IonScan machine, which measures the amount of time it takes for ions from vaporized molecules to drift from one side of a tube into a collector. Because every substance has a unique, predictable drift time, the machine can identify a substance on a sample based on the amount of time it takes for the vaporized molecules to drift into the collector.

The district court ruled that the warrant was supported by probable cause and denied Vagle's motion to suppress. Later, the district court denied Vagle's request for reconsideration.

Vagle stipulated to the prosecution's case to obtain review of the district court's pretrial ruling. The district court found Vagle guilty of third-degree possession of a controlled substance and granted a stay of adjudication. Vagle appeals, challenging the district court's pretrial ruling.

D E C I S I O N

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. 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. *See* Minn. Stat. § 626.08 (2018); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). No warrant shall issue absent a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10.

When determining whether a search warrant is supported by probable cause, this court does 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, "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). 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). In doing so, the appellate court

considers 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, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, 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)). “[T]he resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants.” *Id.* (quotation omitted).

Vagle’s primary argument on appeal is that the dog sniff conducted by Deputy Lopez and Officer Young was unconstitutional and that “[w]ithout the unconstitutional dog sniff, the search warrant in this case was not properly issued.” *See State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005) (holding that information obtained from an unlawful dog sniff could not be used to support a search warrant).

The Minnesota Supreme Court’s most recent decision regarding the constitutional validity of a dog sniff in a common hallway of an apartment building is *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018). A majority of the Minnesota Supreme Court held, “Because the police did not intrude upon the curtilage of respondent’s apartment or his reasonable expectation of privacy when they conducted a narcotics-dog sniff in the hallway immediately adjacent to respondent’s apartment door, a search did not occur under the Fourth Amendment of the United States Constitution.” *Edstrom*, 916 N.W.2d at 514. The majority further held, “Because police were lawfully present in the hallway outside

respondent's apartment and had a reasonable, articulable suspicion of criminal activity, the narcotics-dog sniff of the hallway immediately adjacent to respondent's apartment door did not violate Article I, Section 10 of the Minnesota Constitution." *Id.*

Vagle contends that the Minnesota Supreme Court should have followed *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013), and held that the dog sniff at his apartment door was a search under the Fourth Amendment requiring a warrant supported by probable cause. In *Jardines*, the United States Supreme Court considered "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." 569 U.S. at 3, 133 S. Ct. at 1413. The Supreme Court held that the dog sniff was a search governed by the Fourth Amendment, reasoning, in part, that the front porch was curtilage and therefore a constitutionally protected area. *Id.* at 7, 133 S. Ct. at 1415. The Minnesota Supreme Court majority in *Edstrom* distinguished *Jardines*, reasoning, "The area immediately adjacent to Edstrom's apartment door is not analogous to the front porch in *Jardines* because it is located in an internal, common hallway that other tenants and the police jointly use and access with Edstrom. *Jardines*, therefore, does not control the curtilage question presented in this case." *Edstrom*, 916 N.W.2d at 520.

"The court of appeals is bound by supreme court precedent." *State v. Curtis*, 921 N.W.2d 342, 342 (Minn. 2018). We therefore follow the majority opinion in *Edstrom* and hold that the dog sniff in this case was not a search under the Fourth Amendment of the United States Constitution. As to the validity of the dog sniff under the Minnesota Constitution, we consider whether the police were lawfully present in the hallway outside

Vagle's apartment and whether they had a reasonable, articulable suspicion of criminal activity. See *Edstrom*, 916 N.W.2d at 514.

Vagle does not dispute that the officers were legally present in his apartment building when they conducted the dog sniff. But Vagle contends that the dog sniff was not supported by reasonable, articulable suspicion. The state counters that Vagle "forfeited the reasonable, articulable suspicion argument" because that "fact-specific argument . . . was not raised to the district court." An appellate court "generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

In district court, Vagle relied on this court's opinion in *Edstrom*, in which we held,

The use of a narcotics-detection dog at the door of an apartment inside a secured, multi-unit apartment building implicates a legitimate expectation of privacy and is a search for purposes of the Fourth Amendment to the United States Constitution and article I, section 10, of the Minnesota Constitution that is unlawful absent a warrant or an exception to the warrant requirement.

State v. Edstrom, 901 N.W.2d 455, 457 (Minn. App. 2017), review granted (Minn. Nov. 14, 2017), *aff'd in part, rev'd in part*, 916 N.W.2d 512 (Minn. Aug. 15, 2018).

The state countered that this court's decision in *Edstrom* was not binding on the district court because the Minnesota Supreme Court had granted the state's petition for review. The state argued that under prior precedent, the police needed only reasonable suspicion to lawfully conduct the dog sniff in this case. For example, in *State v. Davis*, the Minnesota Supreme Court stated, "Based on the balance between the minimal intrusion on appellant's privacy interest and the government's interest in effective law enforcement, the

police needed reasonable, articulable suspicion to use [a] narcotics-detection dog in the common hallway outside appellant's apartment." 732 N.W.2d 173, 175 (Minn. 2007). And in *State v. Luhm*, this court stated, "The dog sniff conducted immediately outside the door of appellant's condominium unit in a secured, multi-unit condominium building was lawful under article I, section 10, of the Minnesota Constitution because the dog sniff was supported by a reasonable, articulable suspicion of criminal activity." 880 N.W.2d 606, 609 (Minn. App. 2016). Thus, in district court, the state argued that the "police had reasonable, articulable suspicion to conduct a dog sniff."

The district court adopted the state's reasoning and ruled,

Given the procedural posture of the *Edstrom* matter, this [c]ourt concludes that the rule created by [the court of appeals'] decision is not current precedent and thus not applicable to the instant case.

Therefore, this court finds that based on the information obtained from the CI, following *Davis* and *Luhm*, precedent[] *officers had reasonable articulable suspicion* to conduct a narcotics-detection dog sniff in the hallway of [Vagle's] apartment.

(Emphasis added.)

In sum, regardless of whether Vagle himself raised the reasonable-articulable-suspicion issue in district court, the issue was raised and decided. Moreover, the factual record is adequately developed, the relevant facts are undisputed, and both parties have fully briefed the issue. We therefore consider it.

We review de novo the district court's conclusion that the police had reasonable, articulable suspicion justifying the dog sniff. See *Davis*, 732 N.W.2d at 182 (stating that

the standard of review is de novo). “[T]he reasonable suspicion standard is not high.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). Although the reasonable-suspicion standard is “obviously less demanding than . . . probable cause,” *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990) (quotation omitted), it requires more than an unarticulated “hunch,” *Timberlake*, 744 N.W.2d at 393. In determining whether reasonable suspicion exists, Minnesota courts “consider the totality of the circumstances and acknowledge that trained law enforcement officers are permitted to make inferences and deductions that would be beyond the competence of an untrained person.” *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001).

Reasonable suspicion “need not arise from the personal observations of the police officer but may be derived from information acquired from another person.” *Magnuson v. Comm’r of Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005). “The reasonable suspicion standard can . . . be met based on information provided by a reliable informant. But information given by an informant must bear indicia of reliability that make the alleged criminal conduct sufficiently likely . . .” *Timberlake*, 744 N.W.2d at 393-94.

A totality-of-the-circumstances approach is used to determine whether an informant’s tip establishes reasonable suspicion. *White*, 496 U.S. at 328, 110 S. Ct. at 2415. The following factors are “highly relevant in determining the value” of a tip: the informant’s veracity, reliability, and basis of knowledge. *Id.* (quotation omitted). When applying these factors, allowance must be made for the lesser showing that is required to meet the reasonable-suspicion standard as compared to the probable-cause standard. *Id.* at 328-29, 110 S. Ct. at 2415.

Vagle argues that “there is no record that would support that the informant [in this case] was credible, or that the informant obtained the information in a reliable way” and that “[t]here is no basis for presuming that a [confidential informant] is somehow a presumptively reliable citizen informant absent a specific averment in the affidavit that the informant is not involved in criminal activity.” *See Davis*, 732 N.W.2d at 182 (“We presume that tips from private citizen informants are reliable.”). Vagle concludes that the tip in this case “was conclusory and insufficiently reliable to create reasonable suspicion of criminal activity inside Vagle’s apartment.” The state counters that “[t]he informant’s tip combined with police corroboration and investigation established reasonable, articulable suspicion that Vagle was engaged in narcotics activities.”

“An informant’s reliability may be established by sufficient police corroboration of the information supplied, and corroboration of even minor details can ‘lend credence’ to the informant’s information where the police know the identity of the informant.” *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998). The informant in this case reported that Vagle was selling methamphetamine out of his apartment at #3N 4545 Valley View Road, Edina. The informant identified Vagle in a photograph. The police confirmed that Vagle’s address was #3N 4545 Valley View Road through several sources. The police observed that Vagle’s name was listed on the directory at 4545 Valley View Road, which indicated that Vagle lived in apartment #3N. The police learned the license plate number for a vehicle registered to Vagle and observed that vehicle parked in the underground garage at 4545 Valley View Road. The police spoke to the manager of the apartment building at 4545 Valley View Road, who told police that Vagle lived in apartment #3N and that law

enforcement had previously conducted a dog sniff at Vagle's prior apartment in the building. Lastly, the police learned that the DEA had also received a report that Vagle was selling drugs out of apartment #3N.

The state argues that under these circumstances, *Edstrom* supports a conclusion that the police had reasonable, articulable suspicion to conduct the dog sniff. In *Edstrom*,

a confidential informant told police that respondent Cortney John Edstrom was selling methamphetamine out of a Brooklyn Park apartment building. The informant also said that Edstrom lived on the third floor of the building, drove a black Cadillac sedan, and that the informant had seen Edstrom with a pistol in the past 3 months. Police showed the informant a photo of Edstrom, and the informant confirmed that the man in the photo was the man selling methamphetamine.

Police corroborated the informant's tip. Specifically, using vehicle registration records, police confirmed that Edstrom owned a black Cadillac, and they determined the license plate number that belonged to that Cadillac. Police later saw Edstrom's black Cadillac with the matching license plate number parked in the parking lot of the apartment building the informant described. When police reviewed the resident directory for that building, they learned that a person Edstrom had listed as an emergency contact lived in apartment 305.

916 N.W.2d at 515.

Based on that information described above, the police in *Edstrom* conducted a warrantless dog sniff at the apartment building. *Id.* As to the adequacy of reasonable suspicion for the dog sniff, the supreme court stated: "Edstrom concedes, *and we agree*,

that the police had a reasonable, articulable suspicion of criminal activity when they conducted the narcotics-dog sniff.” *Id.* at 523 (emphasis added).⁵

The circumstances in this case are very similar to those in *Edstrom*. The informant here reported that a named individual was selling drugs from an identified location in a particular apartment building. The police showed the informant a photo of Vagle, and the informant confirmed that the man in the photo was the man who was selling the drugs. The police confirmed that Vagle lived in the apartment where the drugs were being sold. In addition, the police learned that the DEA had received a report that Vagle was selling drugs from his apartment in the building. If the circumstances in *Edstrom* were adequate to create reasonable, articulable suspicion of criminal activity justifying a dog sniff, it is difficult to conclude that the circumstances in this case were inadequate. We therefore conclude, based on *Edstrom*, that the dog sniff in this case was lawful.

Because the dog sniff did not violate Vagle’s constitutional rights, information regarding the dog-sniff is properly considered when determining whether the issuing

⁵ We recognize that unlike Vagle, *Edstrom* conceded the reasonable-articulable-suspicion issue. However, an appellate court is not bound by a party’s concession and is obligated to decide cases in accordance with law. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (“[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.” (quotation omitted)). We also note that the supreme court occasionally “assume[s] without deciding” issues. *See State v. Kates*, 610 N.W.2d 629, 631 (Minn. 2000) (“The state concedes that the district court erred when it denied the motion to sever and therefore does not challenge the court of appeals’ decision on that basis. As a result, we assume without deciding, that the district court’s denial of the motion to sever the unrelated charges was error.”). But the supreme court did not do so here. For those reasons, we treat the supreme court’s statement regarding the existence of reasonable suspicion in *Edstrom* as precedential. *See Curtis*, 921 N.W.2d at 342.

magistrate had a substantial basis for concluding that probable cause existed. Applying the deferential standard that is required, we conclude that she did. The informant's tip that Vagle was selling drugs out of his apartment, combined with the narcotic-detection dog's positive alert to the presence of narcotics in the hallway outside of Vagle's apartment door, established a fair probability that contraband or evidence of a crime would be found in the apartment. Indeed, Vagle conceded at oral argument that if the dog sniff was constitutional, there was probable cause for the search warrant.

In addition to challenging the dog sniff, Vagle challenges the warrantless collection of a sample from his door handle for Ionscan analysis. Vagle argues that the swab of his door handle was a search. *See United States v. Charles*, 290 F. Supp. 2d 610, 614 (D. V.I. 1999) ("Clearly, the doorknob on the defendant's front door [to] the . . . residence is within the curtilage of the home. The agents' warrantless search of the doorknob for marijuana residue violated [defendants'] Fourth Amendment rights."). Vagle further argues that because the police did not obtain a warrant to take the sample, the police violated his Fourth Amendment rights and the results of the Ionscan analysis should not be considered when determining whether there was probable cause for the search warrant.

Because the informant's tip, combined with the dog-sniff alert, provided a substantial basis for the magistrate to find probable cause, it is not necessary to rely on the results of the Ionscan analysis. We therefore do not consider whether the warrantless collection of a sample for Ionscan analysis violated Vagle's Fourth Amendment rights, which appears to be an issue of first impression. Nor do we address the parties' arguments regarding the potential application of the good-faith exception to the exclusionary rule. *See*

State v. Lindquist, 869 N.W.2d 863, 864 (Minn. 2015) (“The exclusionary rule does not apply to violations of the Fourth Amendment to the U.S. Constitution, or Article I, Section 10, of the Minnesota Constitution, when law enforcement acts in good-faith, objectively reasonable reliance on binding appellate precedent.”).

Affirmed.