STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1379

State of Minnesota,
Respondent,

vs.

Tommy Earl Upshaw,
Appellant.

Filed April 15, 2019
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-17-8614

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

Michael O. Freeman, Hennepin County Attorney, Morgan D. Kunz, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Kirk M. Anderson, Anderson Law Firm, PLLC, Scott A. Lewis, Scott Lewis Law Firm, Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Worke, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions of two counts of first-degree controlled-substance crime, arguing that the district court erred by denying his suppression motion in which he claimed that a search warrant executed at his residence was invalid because it was not supported by probable cause. We affirm.

FACTS

In April 2017, Officer Jeffrey Werner applied for a warrant to search the residence of appellant Tommy Upshaw for narcotics and related paraphernalia. In his supporting affidavit, Officer Werner stated that he met with a confidential reliable informant (CRI#1) in August 2016, and that CRI#1 provided information that a male whom the CRI#1 knew as "Red" was selling a large amount of cocaine/crack in Minneapolis. Officer Werner was familiar with a cocaine dealer named "Red" and knew him as Upshaw. During an investigation in April 2015, law enforcement recovered approximately 80 grams of cocaine from Upshaw's residence, along with two firearms and a large amount of currency. As part of that investigation, CRIs were used to conduct controlled buys from Upshaw, and each controlled buy yielded 28 grams of cocaine. Officer Werner also knew that Upshaw had two prior narcotics-related felony convictions.

Officer Werner showed CRI#1 a picture of Upshaw, and CRI#1 confirmed that Upshaw was the person whom CRI#1 knew as "Red." CRI#1 provided Officer Werner with Upshaw's phone number. Based on the information provided by CRI#1, Officer Werner received two district court orders that allowed him to obtain the GPS locations for

Upshaw's cell phone. Officer Werner then "conducted electronic surveillance and physical surveillance on Upshaw for multiple months." Through his surveillance, Officer Werner determined that Upshaw lived at an address on Parkview Boulevard in Robbinsdale (Parkview address) and frequented an address on Sheridan Avenue North (Sheridan address), an address on Thomas Avenue North (Thomas address), and an apartment on Garfield Avenue South (Garfield address).

In February 2017, Officer Werner again met with CRI#1, who stated that Upshaw often sold cocaine to customers on the block of the Thomas address. Officer Werner corroborated this information by regularly observing Upshaw meeting with occupants of other vehicles for brief periods of time, which was consistent with narcotics dealing.

In March 2017, Officer Werner met with another CRI (CRI#2), who identified Upshaw from a photograph as a person CRI#2 knew as "Red." CRI#2 told Officer Werner that CRI#2 had observed Upshaw selling cocaine and crack and knew that Upshaw sold a large amount of cocaine in Minneapolis. CR#2 also stated that Upshaw "cooks" his cocaine into crack at the Sheridan address. CR#2 corroborated CRI#1's claim that Upshaw regularly met customers on the block of the Thomas address. Through electronic and physical surveillance, Officer Werner observed Upshaw "leave his house" at the Parkview address, go to the block of the Thomas address, and meet "multiple suspected drug customers."

The district court signed the search warrant, finding probable cause to search Upshaw's residence at the Parkview address. Law enforcement executed the search warrant at the Parkview address on April 6, 2017, and discovered 139 grams of suspected cocaine, a large amount of cash, items connecting Upshaw to the Parkview address, and items used in the packaging of narcotics. Respondent State of Minnesota charged Upshaw with one count of first-degree controlled-substance sale and one count of first-degree controlled-substance possession. Upshaw moved to suppress the evidence obtained during execution of the search warrant at his residence, arguing that the warrant was invalid because (1) the warrant lacked probable cause to demonstrate a nexus between the suspected unlawful activity and the place to be searched; and (2) the information relied upon by law enforcement was stale. The district court denied the motion.

Upshaw waived his right to a jury trial, stipulated to the state's evidence, and agreed to submit the case to the district court under Minn. R. Crim. P. 26.01, subd. 4, to preserve for appellate review the pretrial suppression ruling. The court found Upshaw guilty of the charged offenses and sentenced him to 95 months in prison.

This appeal follows.

D E C I S I O N

The United States and Minnesota Constitutions protect citizens from unreasonable searches and seizures, providing that no warrant shall be issued without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found." *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). "The issuing judge's task is to make a practical, common-sense decision." *Id.*

“When reviewing a judge’s decision to issue a search warrant, [an appellate court’s] 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). Our review “is limited to the information presented in the warrant application and supporting affidavit.” *Fawcett*, 884 N.W.2d at 384–85. We 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 consider the warrant application using common sense rather than applying a hypertechnical construction. *Id.* And we “defer to the issuing magistrate, recognizing that doubtful or marginal cases should be largely determined by the preference to be accorded to warrants.” *Fawcett*, 884 N.W.2d at 385 (quotations omitted).

Upshaw challenges the district court’s denial of his suppression motion, arguing that the search warrant was not supported by probable cause because (1) the warrant lacked probable cause to demonstrate a nexus between the suspected unlawful activity and the place to be search; and (2) the information relied upon by law enforcement was stale. We address each argument in turn.

A. Nexus

"Probable cause not only requires that the evidence sought likely exists, but also that there is a fair probability that the evidence will be found at the specific site to be searched." *Yarbrough*, 841 N.W.2d at 622. "A sufficient 'nexus' must be established between the evidence sought and the place to be searched." *Id*. This nexus may be inferred from the totality of the circumstances and does not require direct observation of the evidence of the "crime at the place to be searched." *Id*. Circumstances to be considered in making this determination "are the type of crime, the nature of the items sought, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would usually keep the items." *Id*. at 623.

Upshaw "concede[s] that there may be probable cause for the search" of the Thomas address, the Sheridan address, and the Garfield address. But he argues that no sufficient nexus between the evidence and the Parkview address existed because "nothing connect[ed] the unlawful activity with that residence" because "law enforcement did not see any unlawful activity" at that address. We disagree. In *State v. Yaritz*, the supreme court concluded that a sufficient nexus existed because the supporting affidavit for the warrant indicated that "two controlled sales were arranged by telephone, defendant's house was under surveillance[,] and defendant was observed going straight from his house to the place where the sale took place." 287 N.W.2d 13, 15 (Minn. 1979).

Here, the search-warrant affidavit stated that "[t]hrough electronic and physical surveillance," law enforcement "observed" Upshaw leave the Parkview address and go to the block at the Thomas address "where he was observed meeting multiple suspected drug customers." This observation indicates that Upshaw kept the narcotics at his residence because he drove directly from the Parkview address to the block of the Thomas address where he appeared to engage in a drug transaction. Under *Yaritz*, this observation is sufficient to establish a nexus between the evidence sought and Upshaw's residence.

Moreover, the information stated in the search-warrant affidavit reflects that Officer Werner met with two CRIs who provided information that Upshaw was heavily involved in the sale of crack and cocaine. The supporting affidavit also reflects that Officer Werner had previously investigated Upshaw for selling narcotics and that approximately 80 grams of cocaine had been discovered at Upshaw's residence during the execution of a search warrant in April 2015. The supporting affidavit further reflects that Officer Werner conducted surveillance on Upshaw for several months and observed Upshaw going to several different addresses where he appeared to be involved in drug transactions. The totality of these circumstances establishes a fair probability that Upshaw kept narcotics and other related paraphernalia at his residence. Accordingly, the supporting affidavit demonstrated a sufficient nexus between the evidence sought and Upshaw's residence.

B. Staleness

Upshaw also argues that the search warrant lacked probable cause because the information contained in the supporting affidavit was stale. The issue of staleness typically arises during consideration of whether a search warrant is supported by probable cause.

See State v. Souto, 578 N.W.2d 744, 750 (Minn. 1998) (concluding that because information in a search warrant was stale, the warrant lacked probable cause). "[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). But courts have declined "to set arbitrary time limits in obtaining a warrant or to substitute a rigid formula for the judge's informed decision," instead evaluating the facts based on the circumstances of each case. *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). 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, and whether the property sought is easily disposable or transferable." *State v. DeWald*, 463 N.W.2d 741, 746 (Minn. 1990). Indications of "ongoing criminal activity" remain fresh for a longer period of time than a single instance of criminal conduct. *Souto*, 578 N.W.2d at 750. For example, a span of weeks between initial information of illegal activity and the warrant application is permissible when the activity involves “repeated sales of drugs.” *State v. Cavegn*, 356 N.W.2d 671, 673 (Minn. 1984) (quotation omitted).

Upshaw contends that because law enforcement provided “no specific dates about when th[e] alleged unlawful activity was occurring,” and “only provided vague timelines,” one is “left to speculate as to whether there is ongoing criminal activity.” But the supporting affidavit states that Officer Werner began his investigation in August 2016, when he met with CRI#1, who provided information that Upshaw “was selling large amounts of cocaine in Minneapolis”; that Officer Werner began conducting electronic and physical surveillance on Upshaw and became “familiar” with his patterns; that Officer Werner met with CRI#1 again in February 2017, when CRI#1 stated that Upshaw “often” went to the block of the Thomas address to sell cocaine to customers; that Officer Werner observed Upshaw at this location “on a regular basis” engaging in activity consistent with narcotics dealing; and that Officer Werner met with CRI#2 in March 2017, who also provided detailed information about Upshaw’s narcotics activity. The search warrant was issued on April 4, 2017, and executed on April 6, 2017. Although more specific dates of the suspected narcotics transactions may have been helpful, the supporting affidavit provided a specific timeline of the investigation, which demonstrated suspected “ongoing criminal activity.”

Moreover, the search warrant sought many items in addition to narcotics, such as “mailings, keys, photographs, documents, cell phones or clothing,” and cash. Although these items may have appeared innocuous to Upshaw, the items might be incriminating, which supports the state’s position that the information contained in the supporting affidavit was not stale. *See DeWald*, 463 N.W.2d at 746–47 (stating that items that may be incriminating, but appear innocuous to a defendant, support a determination that the search warrant was valid). We conclude that the search warrant was supported by probable cause, and the district court therefore did not err by denying Upshaw's suppression motion.

Affirmed.