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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1432**

State of Minnesota,
Respondent,

vs.

Michael Octarious Williams,
Appellant.

**Filed July 22, 2019
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-16-28919

Keith Ellison, 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, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Peterson,
Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his unlawful-possession-of-a-firearm conviction, arguing that the information in the search-warrant application was stale when the warrant was executed, and that the district court erred in imposing a mandatory prison sentence. We affirm.

FACTS

On July 14, 2016, Deputy Dawson applied for, and received, a search warrant to search appellant Michael Octarious Williams's residence for controlled substances, items related to the sale of controlled substances, currency, and firearms. In his supporting affidavit, Deputy Dawson explained that the request for the search warrant was initiated by a tip from Crime Stoppers of Minnesota. The anonymous tip stated that Williams and B.N. (Williams's now wife) are selling large quantities of narcotics (crack cocaine and heroin) from their residence. The tip stated that Williams sells the drugs, is on parole, and hides narcotics (specifically in door panels of vehicles).

Deputy Dawson checked police records and the department of motor vehicles confirming that Williams resided at the address provided. Deputy Dawson checked Williams's criminal history and learned that he has arrests and convictions for drug offenses; a first-degree murder charge to which he pleaded guilty to accomplice after the fact; and a conviction for first-degree aggravated robbery. On July 13, 2016, officers searched Williams's trash and found a gallon-size zip-lock bag, a small "tear-off" packaging baggie, and a latex glove that all field-tested positive for cocaine.

On July 22, 2016, eight days after it was issued, the search warrant was executed. Officers found, among other things, \$8,330 and a firearm. Williams was charged with ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1(2) (2014). Williams is ineligible to possess a firearm because of his first-degree aggravated-robbery conviction. Williams moved to suppress the firearm. The district court denied the motion, finding that Deputy Dawson corroborated the substance of the tip and the tip's allegation of an "ongoing drug operation," and that the trash search provided an independent basis for probable cause.

In December 2017, Williams pleaded guilty to the firearm-possession charge, reserving his right to withdraw the plea if the district court was unable to consider a sentencing departure under Minn. Stat. § 609.11 (2014). The prosecutor stated that the mandatory prison sentence depended on whether Williams admitted to using a dangerous weapon, including a firearm, in the prior case. Williams's attorney stated that he would order the transcript from the prior plea hearing, and "[i]f it appears clear . . . that [Williams] would be ineligible for a departure, then we would alert the court." The district court added that if, after looking at the prior plea-hearing transcript, the parties agree that the district court did not have discretion in sentencing, the matter would proceed to trial.

On March 6, 2018, the district court issued an order granting Williams's motion to withdraw his guilty plea. The district court stated that after researching the issue, the parties agreed that "Williams was precluded from requesting a departure due to an admission of firearm use in a prior [a]tttempted [a]ggravated [r]obbery plea." The district court ruled that because Williams entered the plea expecting to argue for a departure, and

the district court was unable to depart from the mandatory sentence, it was fair and just to allow Williams to withdraw his plea.

Williams proceeded with a jury trial. The jury found Williams guilty of the charged offense, and the district court sentenced him to 60 months in prison. This appeal followed.

D E C I S I O N

Search warrant

Williams argues that the district court should have granted his motion to suppress the firearm because the search warrant lacked probable cause. Williams contends that the delay in executing the search warrant reduced the likelihood of finding contraband at the residence.

No warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. In determining whether probable cause supports the issuance of a search warrant, this court considers “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 is 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). The issuing judge may “draw common-sense and reasonable inferences from the facts and circumstances” in making this determination. *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Apr. 20, 2004). This court affords the district court “great deference” in reviewing its probable-cause determination

made in connection with the issuance of a search warrant. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001).

Stale information cannot be used to establish probable cause. *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). 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,” and instead employ a flexible, common-sense approach that evaluates the circumstances of each case. *Jannetta*, 355 N.W.2d at 193.

In determining whether information contained in a search-warrant affidavit is stale, consideration is given to “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.” *Id.* at 193-94. Indications of “ongoing criminal activity” remain fresh for a longer period of time than a single instance of criminal conduct. *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998). When an investigation is into “repeated sales of drugs,” for instance, a span of weeks between initial information of illegal activity and the warrant application is permissible. *State v. Cavegn*, 356 N.W.2d 671, 673 (Minn. 1984) (quotation omitted).

Here, Williams argues that the tip did not indicate when the tipster observed the alleged behavior and that the trash search did not sufficiently show an ongoing enterprise. While the search-warrant affidavit does not indicate when Deputy Dawson received the

tip, the tip asserted ongoing criminal activity. The tip provided that Williams and B.N. “*are selling large quantities of narcotics . . . from their residence.*” The tip explained that Williams sells the drugs and B.N. supplies the money and helps cook the crack cocaine. Deputy Dawson verified that Williams lived at the address provided. The tip also stated that Williams is on parole, and Deputy Dawson verified Williams’s drug-related criminal history and that Williams was on probation after pleading guilty to accomplice after the fact on a first-degree murder charge.

Further, the trash search was done one day before the warrant was issued; thus, this evidence was not stale. *See State v. McGrath*, 706 N.W.2d 532, 544 (Minn. App. 2005) (stating that last garbage search occurred one day before the search-warrant application and two days before it was executed, rendering the evidence from the garbage searches not stale), *review denied* (Minn. Feb. 22, 2006). The trash search recovered several items, including a latex glove that field-tested positive for cocaine. Deputy Dawson asserted that he “knows that individuals that are involved in distributing large quantities of narcotics will use latex gloves when handling the narcotics.”

The district court did not err in determining that the search warrant was supported by probable cause because the tip asserted ongoing criminal activity, Deputy Dawson confirmed Williams’s criminal history, and evidence from the trash search corroborated the tip and provided an independent basis for probable cause. Thus, the district court did not err in denying Williams’s motion to suppress the firearm.

Sentence

Williams argues that the district court erred in concluding that it did not have discretion in sentencing. We can easily dispose of Williams's challenge because he did not request that the district court exercise discretion in sentencing by moving for a departure. But even in addressing the claim as presented by Williams on appeal, we conclude that the district court imposed a lawful sentence.

The presumptive mandatory minimum sentence for unlawfully possessing a firearm is 60 months in prison. Minn. Stat. § 609.11, subd. 5(b). A district court may not depart from this 60-month sentence when “the defendant previously has been convicted of an offense listed in subdivision 9 in which the defendant used or possessed a firearm or other dangerous weapon.” *Id.*, subd. 8(b). One of the subdivision-9 offenses is aggravated robbery. *Id.*, subd. 9. Williams was previously convicted of aggravated robbery. The district court determined that because of Williams's prior conviction, section 609.11 prohibited the district court from considering a sentencing departure. *See id.*, subd. 8(b). Interpretation of a sentencing statute is a question of law reviewed de novo. *State v. Amundson*, 828 N.W.2d 747, 752 (Minn. App. 2013).

Williams argues that a district court is required to impose the 60-month sentence only after a jury finds that a firearm was used in the commission of the prior offense. Williams cites section 609.11, subdivision 7, which states: “The fact finder shall . . . determine whether the defendant has been convicted of a second or subsequent offense in which the defendant, . . . at the time of commission of an offense listed in subdivision 9, used a firearm or other dangerous weapon or had in possession a firearm.” Williams

contends that because the jury did not make this finding, his sentence must be reversed and remanded. Williams is correct; the jury did not find that he used a firearm in the commission of his prior offense. And the record illustrates why the district court did not present the issue to the jury.

When Williams pleaded guilty to the firearm-possession charge, he reserved his right to withdraw his plea if the district court did not have discretion to consider a sentencing departure. The parties agreed that, if the documents from the prior offense showed that Williams admitted that he used a firearm during the prior offense, the district court would not have discretion to depart, and Williams would be permitted to withdraw his guilty plea. Williams's attorney stated that the defense would order the transcript from the prior plea hearing. Although there is no transcript in the record from the prior plea hearing, the record indicates that all involved reviewed the transcript and concluded that Williams admitted that he used a firearm in the commission of the prior offense because the district court allowed him to withdraw his guilty plea. Thus, the record shows that the district court did not require a jury finding that Williams used a firearm during the commission of his prior offense because the parties were aware that Williams admitted to using a firearm.

The state argues that Williams's prior conviction falls within the prior-conviction exception to the general rule that a jury must find every fact that enhances a sentence. The state relies on *State v. Her*, asserting that the prior-conviction exception to the jury-trial right permits a district court to find the existence of a prior conviction if it can be verified by court records, including a plea-hearing transcript. See 862 N.W.2d 692, 700 (Minn.

2015). The state contends that the fact that Williams used a firearm during the prior offense is established because the record shows that he was allowed to withdraw his guilty plea after the parties reviewed the transcript from the prior plea hearing.

Williams asserts that his position is supported by *State v. Crockson*. 854 N.W.2d 244 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014). In *Crockson*, the district court imposed mandatory sentences because Crockson had a prior assault conviction that involved a firearm. *Id.* at 246-47. Crockson stipulated to the prior assault conviction, but the state did not prove that the prior assault involved a firearm. *Id.* at 247. This court remanded for resentencing because the record did not show that Crockson's prior offense involved a firearm. *Id.* at 249. Williams claims that the record here is similarly inadequate to prove that the prior offense involved a firearm.

We conclude that the record here is adequate to prove that Williams committed the prior offense using a firearm. Williams's guilty plea was contingent on him arguing for a departure. After the parties and district court determined that the district court did not have discretion in sentencing, Williams withdrew his guilty plea. The record indicates that all involved reviewed court documents, which showed that Williams admitted to using a firearm in the prior offense. The district court so found in its order granting Williams's motion to withdraw his guilty plea stating, "both parties agreed that Mr. Williams was precluded from requesting a departure due to *an admission of firearm use in a prior [a]ttempted [a]ggravated [r]obbery plea.*" Thus, the district court did not err in interpreting the statute and imposing the 60-month sentence.

Affirmed.