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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1954**

State of Minnesota,
Respondent,

vs.

Anthony James Harrell,
Appellant.

**Filed September 3, 2019
Affirmed in part and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-18-6118

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

Ryan C. Young, Special Assistant Public Defender, Fredrickson & Byron, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's order denying his motion to suppress evidence obtained pursuant to a search warrant, arguing that the search-warrant application contained misrepresentations and omissions that compromised the state's showing of probable cause, as well as its justification for an unannounced entry. We affirm, in part, the district court's determination that there was probable cause for the warrant, but we remand for findings and an express ruling regarding appellant's challenge to the unannounced entry.

FACTS

Respondent State of Minnesota charged appellant Anthony James Harrell with possession of a firearm by a prohibited person and fifth-degree controlled-substance possession. The complaint alleged that officers executed a search warrant at a single-family home in Minneapolis and recovered a 9mm Springfield XD handgun with a loaded magazine, \$5,300 in cash, and over 1,000 grams of marijuana. Harrell was present during the search and admitted that the handgun, cash, and nearly 800 grams of the marijuana belonged to him.

Harrell moved to suppress the evidence obtained during the search, asserting that the "warrant was defective and lacked probable cause." Harrell also moved for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), asserting that there were material misrepresentations in the underlying search-warrant application. The district

court granted Harrell's request for a *Franks* hearing, and the search-warrant affiant, Officer Aaron Collins of the Minneapolis Police Department, testified at the hearing.

After the hearing, Harrell submitted a memorandum in support of his motion to suppress. He argued two grounds for suppression: the warrant was not supported by probable cause once "false and omitted information is corrected" and the search-warrant application "[did] not include reasonable articulable suspicion for an unannounced entry." The district court denied Harrell's motion to suppress. The district court's written order explains that although the search-warrant application contained misrepresentations, "probable cause to search exists even when the misrepresented facts are set to the side," and thus "the misrepresentations in this case were not material." The district court did not address Harrell's challenge to the unannounced entry.

Harrell stipulated to the prosecution's case under Minn. R. Crim. P. 26.01, subd. 4, to obtain review of the district court's suppression ruling. Harrell's "waiver of rights and agreement regarding rule 26.01, subd. 4" described the dispositive pretrial ruling as "deni[al of Harrell's] motion to suppress based on bad search warrant." The district court found Harrell guilty as charged, entered judgments of conviction on both offenses, and sentenced him to serve a 60-month prison term for the firearm-possession offense. Harrell appeals, challenging the denial of his motion to suppress and resulting convictions.

D E C I S I O N

Harrell contends that the search warrant in this case contained material misrepresentations and omissions that were intentional or reckless and that suppression was therefore appropriate. In *Franks*, the United States Supreme Court explained that

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56, 98 S. Ct. at 2676; *see also State v. Doyle*, 336 N.W.2d 247, 250 (Minn. 1983) (“[I]f it is established that the affiant deliberately falsified or recklessly disregarded the truth in his affidavit, then the [district] court should set aside the false statements (or supply the omissions) and decide whether the affidavit still establishes probable cause.” (footnote omitted)).

When a defendant seeks to invalidate a search warrant based on misrepresentations or omissions in a search-warrant application, the defendant must show that (1) the affiant deliberately falsified or recklessly disregarded the truth in his affidavit, and (2) the statement or omission was material to the probable-cause determination. *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010). “A misrepresentation or omission is material if, when the misrepresentation is set aside or the omission supplied, probable cause to issue the search warrant no longer exists.” *Id.* But even if a misrepresentation or omission is material, this court will not grant relief unless the affiant deliberately falsified or recklessly

disregarded the truth. *See State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989) (“[I]nnocent or negligent misrepresentations will not invalidate a warrant.”).

This court reviews a district court’s finding regarding whether the affiant deliberately falsified or recklessly disregarded the truth in the search-warrant affidavit for clear error. *Andersen*, 784 N.W.2d at 327. But we review a district court’s determination regarding whether the alleged misrepresentations or omissions were material de novo.¹ *Id.*

Misrepresentations and Omissions

We begin by determining whether there were misrepresentations and omissions in the underlying search-warrant application. The information in the application was based on a tip provided by a cooperating defendant (CD).² The relevant portions of the application are as follows:

Your affiant and assisting investigator Sergeant Jeff Carter, are conducting a criminal inquiry involving the *address* of 2805 Oliver Ave N and the *resident* [D.B.] . . . for the distribution of controlled substances to wit, marijuana and the illegal possession of firearms and ammunition. . . .

This investigation began after your affiant received information from a cooperating defendant (CD hereinafter) who indicated that [D.B.] was possessing and distributing large quantities of high grade marijuana from 2805 Oliver Ave N. The CD further indicated that [D.B.] has been observed in possession of a handgun. Your affiant is aware that [D.B.] is a convicted felon who is prohibited from possessing firearms and ammunition. Your affiant positively identified [D.B.] utilizing a photograph provided by the Minnesota Bureau of Criminal Apprehension. During a check of the CLEAR database provided by Thomson Reuters, your affiant found that

¹ Because our review of the district court’s materiality determination is de novo, we do not address Harrell’s arguments assigning error to the district court’s analysis of that issue.

² A cooperating defendant is an individual whose information has not yet proved reliable.

in 2016 [D.B.] had a utility for 2805 Oliver Ave N listed to him.

After receiving this information your affiant conducted a controlled buy of marijuana from [D.B.] while at 2805 Oliver Ave N. This controlled buy took place within the past 72hrs. Prior to the buy your affiant and Sgt. Carter met with the CD who was supplied with a quantity of pre-recorded MPD buy money and checked for contraband, nothing was found. Your affiant and Sergeant Carter watched as the CD arrived at 2805 Oliver Ave N and entered into the residence. After a period of time the CD exited the residence and met with your affiant. The CD handed your affiant a quantity of high grade marijuana which the CD indicated was purchased from [D.B.] while inside 2805 Oliver Ave N. The marijuana field tested positive for the presence of tetrahydrocannabinol.

A criminal history check of [D.B.] revealed that he has been charged with or convicted of the following offenses: Loitering with intent to buy/sell narcotics 2000, possession of marijuana in a motor vehicle 2002, loiter with intent to buy/sell narcotics 2002, 5th degree controlled substance crime 2002, 5th degree controlled substance crime 2003, prohibited person in possession of a firearm 2004 and controlled substance crime 5th degree 2013.

(Emphasis added.)

The district court found, and the state agrees, that the warrant application misidentified the suspect-resident of 2805 Oliver Avenue North as D.B. The district court found that “all of the information about [D.B.] was misrepresented by Officer Collins, even if done unintentionally.” “[T]he CD identified the target as a ‘white male with red hair,’ [and] not as [D.B.]” and “[D.B.] was developed as a suspect only after [Officer Collins] conducted his own independent research of possible tenants at [2805 Oliver Avenue North].” The district court’s findings explain that

Officer Collins obtained a photograph of [D.B.] from the Minnesota Department of Driver and Vehicle Services

(DVS). The photograph was a driver's license photograph that displayed only the front of [D.B.'s] face and his shoulders. Officer Collins showed the photograph to the CD and asked whether the photograph displayed the person selling drugs in 2805 Oliver Avenue North. The CD indicated that it did. This was the manner in which [D.B.] was identified as the suspected drug dealer.

The record indicates, and the parties agree, that the CD's photo identification occurred after the controlled buy. The district court found that "[t]he CD did not provide [D.B.'s] name, as the warrant affidavit suggested, and [D.B.] could not have possibly been the person selling drugs out of 2805 Oliver Avenue North because he was incarcerated in a federal prison at that time."

Although the parties agree that the warrant application misrepresents that the suspect-resident was D.B., the parties disagree regarding how to cure the misrepresentation. Because that determination ultimately impacts materiality, we consider it de novo. *See Andersen*, 784 N.W.2d at 327 (adopting federal courts' reasoning that "the issue of materiality presents a mixed question of law that is reviewed under the de novo standard").

Harrell argues that we should set aside all statements in the application regarding D.B., including statements that "[D.B.] was possessing and distributing large quantities of high grade marijuana from 2805 Oliver Ave N," that "[D.B.] is in possession of a firearm," and that "[D.B.] utilizes this firearm as a means of protection for his controlled substance sales." The state counters that "the district court was not required to ignore that the house [was] under investigation for 'marijuana and the illegal possession of firearms and ammunition' and that [the] house had a 'resident' who was actually doing the distribution

and possession.” The state argues that “[i]nstead, the district court was simply required to ‘set aside’ that D.B. was the specific ‘resident,’ along with other D.B.-specific information (like his criminal history).” Harrell responds that the state’s approach is impermissible because it adds the state’s “own generic phrases—‘resident,’ ‘suspect’ or ‘person’” in place of specific language identifying D.B. in the search-warrant application. For the reasons that follow, the state has the better argument.

The search-warrant application describes “the address of 2805 Oliver Ave N and *the resident* [D.B.]” and refers to D.B. as “*the resident* of 2805 Oliver Ave N.” (Emphasis added.) Although the warrant application misrepresented that D.B. was the resident drug-dealer at 2805 Oliver Avenue North, it did not misrepresent the allegation that the resident was selling large quantities of high-grade marijuana at that location. Indeed, Harrell does not argue that Officer Collins misrepresented any information regarding the suspect-resident’s alleged illegal activities; the misrepresentations regarded only the suspect-resident’s identity. We therefore set aside only the information that identifies the suspect-resident as D.B. and describes D.B.’s criminal history, and not the information that describes the suspect-resident’s activities.

Harrell argues that this court “must also add material omissions.” *See Doyle*, 336 N.W.2d at 250 (stating that if the affiant deliberately falsified or recklessly disregarded the truth in his affidavit, then the district court should “supply the omissions” and decide whether the affidavit still establishes probable cause). Harrell argues that two omissions “[bear] on the trust and veracity” of the CD: “the fact that he similarly faced drug-related charges and what those charges were” and that “following the controlled-buy, the

cooperating defendant was shown a photograph of [D.B.] and identified [D.B.] as the individual who he purchased the drugs from.”

Harrell does not point to any record evidence suggesting that the CD faced drug-related charges. We therefore fail to see how the lack of such information in the search-warrant application could be considered a material omission. But the fact that the CD misidentified the resident drug-dealer as D.B. was a relevant omission. As the district court noted, “Officer Collins presented information in the search warrant in a misleading way,” promoting “an inference that the informant (the CD) is credible and that the information [the CD] provided in this case was true.”

Having identified the information that must be set aside to cure the misrepresentation regarding the suspect-resident’s identification as D.B., as well as the related omission that must be supplied, we turn to Harrell’s challenges to the search warrant.

Probable Cause

The United States and Minnesota Constitutions guarantee “[t]he right of the people to be secure in their persons, houses, papers, and effects” against “unreasonable searches and seizures.” U.S. Const. amend. IV; Minn. Const. art. I, § 10. Police generally must obtain a valid search warrant issued by a neutral and detached magistrate before conducting a search. *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014). To be valid, a search warrant must be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. “Probable cause exists if the judge issuing a warrant determines that ‘there is a fair

probability that contraband or evidence of a crime will be found.” *Yarbrough*, 841 N.W.2d at 622 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)).

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.

State v. Wiley, 366 N.W.2d 265, 268 (Minn. 1985) (quoting *Illinois v. Gates*, 462 U.S. at 238, 103 S. Ct. at 2332).

When a search-warrant application includes information from an informant, the supporting affidavit “must provide the magistrate with adequate information from which [the magistrate] can personally assess the informant’s credibility.” *State v. Siegfried*, 274 N.W.2d 113, 114 (Minn. 1978). This court has articulated six factors that are relevant when assessing the reliability of a confidential, but not anonymous, informant. *State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004), *review denied* (Minn. June 15, 2004). Two are relevant here: “an informant’s reliability can be established if the police can corroborate the information” and “in narcotics cases, ‘controlled purchase’ is a term of art that indicates reliability.” *Id.*

The district court explained that it was

troubled by Officer Collins’ cursory research into a database that he is not trained to use, his suggestive method of having the CD identify [D.B.] as a suspect, and the manner in which he presented this information to the Court. Officer Collins presented information in the search warrant in a misleading way, suggesting that the CD provided a specific name for the alleged suspect and that Officer Collins corroborated the information using investigatory databases. This manner of

corroboration promotes an inference that the informant (the CD) is credible and that the information [the CD] provided in this case was true.

But the district court concluded that despite those “serious concerns, . . . the representations about [D.B.] were ultimately immaterial to probable cause to search 2805 Oliver Avenue North.” The district court did not make an express finding regarding whether the misrepresentation and omission were deliberate or reckless, but it was unnecessary to do so given its determination that the misrepresentation regarding the suspect-resident’s identity was immaterial. *See Andersen*, 784 N.W.2d at 327 (stating that to obtain relief, a defendant must show that the affiant deliberately falsified or recklessly disregarded the truth in his affidavit and that the statement or omission was material to the probable-cause determination).

We reach the same conclusion regarding materiality. The CD’s controlled buy of high-grade marijuana from a person at 2805 Oliver Avenue North corroborates the CD’s tip that a resident at that location was distributing large quantities of high-grade marijuana, and it establishes the CD’s reliability regarding those activities. The identity of the suspect-resident is largely irrelevant. Once the misrepresentation and the omission regarding the suspect-resident’s identity are accounted for, the totality of the remaining circumstances—the CD’s tip, which was corroborated by the controlled buy—establish probable cause to search 2805 Oliver Avenue North for evidence of drug-sale activities.

In sum, the misrepresentation and omission stemming from the misidentification of the suspect-resident as D.B. were not material to the probable-cause determination.

Unannounced Entry

Under early common law, courts adopted a “knock and announce” requirement applicable to the execution of search warrants. *Wilson v. Arkansas*, 514 U.S. 927, 931-33, 115 S. Ct. 1914, 1916-17 (1995). The purpose of the knock-and-announce requirement primarily was to prevent property damage; the common law required that occupants be given an opportunity to comply with a search warrant and to allow the executing officers to enter without breaking down their door. *Id.* at 931-32, 115 S. Ct. at 1916-17. The common law recognized that forcible entry without an announcement would penalize someone who ““did not know of the process, of which, if he had notice, [presumably] would [have] obey[ed] it.”” *Hudson v. Michigan*, 547 U.S. 586, 594, 126 S. Ct. 2159, 2165 (2006) (quoting *Wilson*, 514 U.S. at 931-32, 115 S. Ct. at 1917).

A reasonableness inquiry under the Fourth Amendment includes consideration of the necessity of an unannounced entry. *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000). The police must “inform the issuing magistrate of the circumstances that they believe justify the unannounced entry and to obtain specific advance authorization for an unannounced entry.” *Id.* “To substantiate the need for a no-knock warrant an officer must establish more than that drugs are involved.” *Id.* The “police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.” *Id.* (quotation omitted). The standard is “reasonable suspicion,” and “[i]n other contexts [the supreme court] has defined reasonable suspicion as something more than an unarticulated hunch, . . . the officer must

be able to point to something that objectively supports the suspicion at issue.” *Id.* The showing required for reasonable suspicion justifying a no-knock warrant is “not high.” *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1422 (1997)).

“Given the constitutional dimension to the method of entry into a residence, evidence should be suppressed when the circumstances do not warrant an unannounced entry.”³ *Id.* When the material facts are undisputed, this court “independently determine[s] whether evidence obtained during a search conducted with a no-knock warrant should be suppressed.” *State v. Goodwin*, 686 N.W.2d 40, 43 (Minn. App. 2004) (citing *Wasson*, 615 N.W.2d at 320), *review denied* (Minn. Dec. 14, 2004).⁴

As support for an unannounced entry in this case, the warrant application stated:

An unannounced entry is necessary to prevent the loss, destruction, or removal of the objects of the search, or to protect the safety of the searches or the public because, [t]he cooperating defendant in this case indicated that the target of this investigation, [D.B.] is in possession of a firearm. The cooperator further went on to indicate that [D.B.] utilizes this firearm as a means of protection for his controlled substance sales. [D.B.] has been convicted of prohibited person in possession of a firearm in the past. Your affiant knows that an unannounced entry allows officers executing the search warrant the element of surprise while making entry to the

³ We note that the United States Supreme Court more recently held that the exclusionary rule does *not* apply to violations of the knock-and-announce requirement. *Hudson*, 547 U.S. at 594, 599, 126 S. Ct. at 2165, 2168. We are not aware of any Minnesota precedent rejecting *Hudson*. See *State v. Jackson*, 742 N.W.2d 163, 165, 178-80 (Minn. 2007) (distinguishing the unannounced search in *Hudson* from the invalid nighttime search in *Jackson* and declining to address as unnecessary an argument that Minnesota should reject *Hudson* on state constitutional grounds). Because we remand Harrell’s challenge to the unannounced entry for further proceedings, we do not consider the effect of *Hudson*.

⁴ This court’s decision in *Goodwin* predates the Supreme Court’s holding, in *Hudson*, that the exclusionary rule does not apply to violations of the knock-and-announce requirement. See *Hudson*, 547 U.S. at 594, 599, 126 S. Ct. at 2165, 2168.

residence. This element of surprise allows the target of the investigation and other person(s) less time to arm themselves. This makes the entry safer for officers, person(s) inside of the residence, and the general public.

Harrell contends that once the misrepresentation and omission regarding the suspect-resident's identity are accounted for, the search-warrant application does not provide justification for an unannounced entry.⁵ Harrell argues that "[t]he only allegation contained in the warrant application that establishes knocking may be dangerous relates to [D.B.], not [him]," noting that the "search warrant application states that [D.B.], not [him], has been observed in possession of a handgun and that [D.B.], not [him], is a convicted felon who is prohibited from possessing firearms and ammunition." Harrell also notes that the search-warrant affidavit includes D.B.'s criminal history, which does not apply to him.

Once again, to obtain relief, Harrell must show that Officer Collins deliberately falsified or recklessly disregarded the truth in his affidavit and that the false statement or

⁵ We question whether Harrell's challenge to the unannounced, or no-knock, entry provision is properly before this court. Once again, this is an appeal from a proceeding under Minn. R. Crim. P. 26.01, subd. 4. That rule provides, "When the parties agree that *the court's ruling on a specified pretrial issue* is dispositive of the case, or that the ruling makes a contested trial unnecessary, the [procedure in rule 26.01, subd. 4] must be used to preserve the issue for appellate review." Minn. R. Crim. P. 26.01, subd. 4(a) (emphasis added). In this case, the district court did not expressly rule on Harrell's challenge to the unannounced entry. However, the parties did not raise or address this procedural issue in their briefing, and at oral argument, the state argued that it is "appropriate to address" the unannounced entry "in the interests of justice." Given this unique procedural posture, we will address the issue. But our willingness to do so in this case does not mean that we will do so in the future. The language of 26.01, subd. 4, limiting its application to the district court's "ruling on a specified pretrial issue" is clear and easily complied with. If a defendant wants to proceed under rule 26.01, subd. 4, and the district court has not expressly ruled on the relevant pretrial issue, the defendant should request a ruling from the district court.

omission was material. *See Andersen*, 784 N.W.2d at 327; *Moore*, 438 N.W.2d at 105 (“[I]nnocent or negligent misrepresentations will not invalidate a warrant.”). If we were to determine, under our de novo standard of review, that the misrepresentation and omission in this case are material regarding the warrant’s unannounced-entry provision, we could not complete the analysis because we are without a factual finding regarding whether the misrepresentations and omission were deliberate or reckless.⁶ We cannot determine whether the misrepresentation and omission were deliberate or reckless because that is a factual determination and we are not a fact-finding court. *See Andersen*, 784 N.W.2d at 327 (adopting federal courts’ reasoning that “the issue of whether an affiant deliberately made statements that were false or in reckless disregard of the truth involves a fact-based question”); *State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002) (“Appellate courts have no . . . business finding facts . . .”).

Because the district court’s findings regarding the first part of the *Franks* test are inadequate to enable effective appellate review of Harrell’s challenge to the warrant’s unannounced-entry provision, a remand is appropriate. *See State v. Wicklund*, 201 N.W.2d 147, 147 (Minn. 1972) (remanding for findings where district court failed to make factual findings justifying suppression order); *see also State v. Licari*, 659 N.W.2d 243, 255-56 (Minn. 2003) (remanding to allow district court to conduct hearing and make findings of fact regarding issues it did not reach). We therefore remand this case to the district court

⁶ The district court found that “all of the information about [D.B.] was misrepresented by Officer Collins, even if done unintentionally,” which may suggest that the district court found that the misrepresentation was not deliberate. But the district court’s order does not indicate whether it also found that the misrepresentation was not reckless.

for findings regarding whether the misrepresentation and omission described herein were deliberate or reckless. In addition to such findings, the district court should expressly rule on Harrell's challenge to the unannounced entry.

In conclusion, we affirm the district court's determination that there was probable cause for the search warrant despite the misrepresentation and omission stemming from the search-warrant application's misidentification of the suspect-resident as D.B. But we remand the district court's implied rejection of Harrell's challenge to the unannounced entry for further proceedings consistent with this opinion.

Affirmed in part and remanded.