

*This opinion will be unpublished and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
A19-0273**

State of Minnesota,
Respondent,

vs.

Brian Anthony Varnado,
Appellant.

**Filed February 10, 2020
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-17-25701

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

Michael O. Freeman, Hennepin County Attorney, Sean P. Cahill, Minneapolis, Minnesota
(for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Cleary, Chief Judge; and
Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Brian Anthony Varnado challenges his conviction for possession of
ammunition or a firearm by an ineligible person. Varnado argues that the district court

erred when it allowed the state to introduce evidence found during the search of a vehicle in which he was a passenger, because law enforcement¹ lacked a sufficient legal basis to stop the vehicle in the first place. We affirm.

FACTS²

A series of bank robberies occurred in the Twin Cities in the summer of 2017. The FBI special agent investigating the robberies believed that they were connected because the man depicted on bank surveillance footage at each robbery appeared to be the same person and followed a similar modus operandi: he parked several blocks away from the targeted bank, entered the bank, and then handed the teller a note, which said something similar to “I have a gun, give me money.”

Law enforcement began to suspect that Varnado was involved in the bank robberies based on a tip from a “concerned citizen” who had gone to one of the robbed banks and identified Varnado as the robber. The FBI eventually made the tipster a confidential human source (CHS) to help protect his identity, and the CHS provided the special agent with information about Varnado. The CHS reported that Varnado had attempted to rob banks with two other unidentified individuals. The CHS also reported that he thought Varnado had a gun because he had seen a bulge resembling a holster. The CHS told the special agent that he, the CHS, was not personally involved in the robberies and that he was unaware of

¹ “Law enforcement” refers to the law-enforcement officers involved in this case from the Federal Bureau of Investigation (FBI), the Hennepin County Sheriff’s Office, and the St. Anthony Police Department.

² The following facts are based on the district court’s findings of fact made after an evidentiary hearing on January 12, 2018.

how much money was taken in the robberies. The CHS did not provide physical descriptions, names, or nicknames for the other individuals reported to be involved with Varnado in the robberies. The CHS had never worked with the FBI before and had no record of reliability as an informant. The special agent testified that the CHS had a criminal record, which included a crime of dishonesty, but that the CHS was not receiving any leniency in his cases in exchange for the information that he provided the FBI. The FBI paid the CHS \$3,200 over two payments for his information.

Based on the information from the CHS, the special agent looked up Varnado's driver-and-vehicle-services (DVS) photograph and his criminal record. The special agent believed that Varnado's DVS picture matched the individual in the surveillance footage of the robberies. He also determined that, based on Varnado's criminal record, state law prohibited Varnado from possessing a firearm.

On October 10, 2017, the CHS called the special agent to tell him that Varnado was going to participate in another bank robbery. The CHS identified the address where Varnado was at the moment, and law enforcement set up surveillance of the address. The CHS also informed the special agent that Varnado had told the CHS that he needed a car and would pay to use one. With the CHS's consent, law enforcement placed a global positioning system (GPS) tracker on a vehicle, which the CHS was to provide to Varnado.

While surveilling the CHS-identified address, law enforcement observed Varnado meeting with T.G., who had a previous conviction for bank robbery. After that, an unidentified individual delivered the vehicle with the GPS tracker to Varnado and T.G. Varnado and T.G. left in the vehicle, and law enforcement followed them to a

neighborhood that had a bank. The vehicle looped around the neighborhood of the bank multiple times, appearing to search for a parking spot, but then began to head away from the bank; law enforcement believed that Varnado and T.G. had become aware of the surveillance. Soon after, law enforcement stopped the vehicle.

After stopping the vehicle, law enforcement ordered the driver, T.G., out of the car. On his own initiative, as law enforcement placed him in restraints, T.G. told law enforcement that Varnado had a gun in the glovebox of the vehicle. Law enforcement searched the vehicle and found a gun in the glovebox.

The state charged Varnado with possession of ammunition or a firearm by an ineligible person and later added charges for conspiracy to commit first-degree aggravated robbery and attempted second-degree aggravated robbery. Before trial, Varnado moved to dismiss the aggravated-robbery charges for lack of probable cause and to suppress the firearm as the fruit of an illegal stop. The state dismissed the attempted second-degree aggravated robbery charge for lack of evidence. The district court then granted Varnado's motion to dismiss the charge of conspiracy to commit first-degree aggravated robbery, concluding that there was insufficient evidence of an overt act in furtherance of the conspiracy. The district court also denied Varnado's motion to suppress the firearm.

Varnado waived his right to a jury trial. On the second day of the ensuing bench trial, Varnado elected to discharge his public defender and to proceed pro se. The district court found Varnado guilty of possession of ammunition or a firearm by an ineligible person. It then sentenced Varnado to 60 months' imprisonment.

This appeal follows.

DECISION

I. Law enforcement had a reasonable, articulable suspicion to stop the vehicle.

Varnado argues that the district court should have suppressed the firearm as the fruit of an unlawful seizure. When examining a district court's suppression ruling, appellate courts review the district court's factual findings for clear error and its determination of reasonable suspicion of illegal activity de novo. *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012).

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. "The touchstone of the Fourth Amendment is reasonableness." *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quotation omitted). Generally, warrantless searches and seizures are per se unreasonable. *State v. Horst*, 880 N.W.2d 24, 33 (Minn. 2016). That said, "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675 (2000)). "[T]he reasonable suspicion standard is not high" and is "less demanding than probable cause or a preponderance of the evidence." *Id.* (quotations omitted). Still, law enforcement "must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity." *Id.* (quotations omitted).

"The reasonable suspicion standard can . . . be met based on information provided by a reliable informant." *Id.* This court has identified six factors that are relevant in assessing the reliability of a confidential, but not anonymous, informant:

(1) a first-time citizen informant is presumably reliable; (2) an informant who has given reliable information in the past is likely also currently reliable; (3) an informant's reliability can be established if the police can corroborate the information; (4) the informant is presumably more reliable if the informant voluntarily comes forward; (5) in narcotics cases, "controlled purchase" is a term of art that indicates reliability; and (6) an informant is minimally more reliable if the informant makes a statement against the informant's interests.

State v. Ross, 676 N.W.2d 301, 304 (Minn. App. 2004), *review denied* (Minn. June 15, 2004). Courts evaluate the reliability of an informant using a totality-of-the-circumstances analysis. *State v. McCloskey*, 453 N.W.2d 700, 703 (Minn. 1990).

Varnado argues that law enforcement did not have a reasonable, articulable suspicion to justify stopping the tracked vehicle because the officers were acting on a confidential informant's unreliable tip. He does not claim that police officers did not have a basis to search the vehicle after they stopped it and T.G. told them that Varnado had a gun. We therefore consider whether the CHS's tip was reliable and provided a reasonable, articulable suspicion for law enforcement to stop the tracked vehicle.

Some of the *Ross* factors for assessing a confidential informant's reliability are uncontested: the parties agree that the CHS came forward voluntarily, had not previously provided information to law enforcement, and did not engage in a controlled purchase. Thus, *Ross* factor (4) supports concluding that the CHS tip was reliable, while factors (2) and (5) do not apply. The parties dispute the remaining three *Ross* factors.

A. The CHS is not a first-time citizen informant.

Varnado argues that the CHS was not a first-time citizen informant under *Ross* factor (1). He cites the CHS's criminal record and also argues that the FBI special agent did not take enough steps to verify that the CHS was not involved with the bank robberies.

The parties do not dispute that the CHS was a first-time informant; instead, they argue over whether he was a citizen informant. "[S]tatements from citizen witnesses, as opposed to criminal informants, may be presumed to be credible." *State v. Harris*, 589 N.W.2d 782, 789 (Minn. 1999). A first-time citizen informant is presumed reliable when they have "not been involved in the criminal underworld." *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998). When law enforcement relies on information provided by a first-time citizen informant, at least when applying for a warrant, law enforcement "must specifically aver that the informant is not involved in criminal activity." *Id.*

Here, the CHS has a criminal record, which includes a crime of dishonesty. The CHS's criminal history implies that he is "involved in the criminal underworld," and the state offers nothing to disprove this. Thus, the CHS's information would not be presumptively reliable as information from a first-time citizen informant.

The state argues that the CHS is a first-time citizen informant in part because he was not receiving any leniency for his previous crimes. The state also argues that law enforcement had no reason to suspect that the CHS was an accomplice and that law enforcement concluded that the CHS was not involved in the robberies. These arguments, however, do not fully address the broader question of whether the informant was involved

in the criminal underworld, and the limited information in the record shows that the CHS was.

The state cites *McCloskey* for the proposition that an informant's criminal record alone does not reduce the informant's credibility. 453 N.W.2d at 700. In *McCloskey*, the supreme court determined that an informant was reliable, even though the informant admitted to purchasing marijuana from the defendant. *Id.* at 703. But the supreme court reached this conclusion by considering the totality of the circumstances, not by presuming the informant was reliable. *Id.* Indeed, the supreme court stated that the admitted crime, along with the informant's decision to remain anonymous, disqualified the informant as a citizen informer of presumed honesty. *Id.*

In sum, the CHS's criminal record and previous conviction for a crime of dishonesty, with no evidence to the contrary, show that the CHS was involved in the criminal underworld. The state's arguments that the CHS did not receive leniency for his previous offenses and that law enforcement concluded that the CHS was not involved in the robberies under investigation are insufficient to show that he is a first-time citizen informant.

B. Law enforcement corroborated the information that the CHS provided.

Varnado argues that law enforcement did not meaningfully corroborate any of the CHS's information under *Ross* factor (3). He claims that law enforcement identified Varnado in the surveillance video with a misleading identification procedure and otherwise only corroborated innocuous information, such as Varnado's location at a house and his desire to borrow a car.

“[T]he fact that police can corroborate part of the informer’s tip as truthful may suggest that the entire tip is reliable.” *State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978). “Even corroboration of minor details lends credence to an informant’s tip.” *State v. Holiday*, 749 N.W.2d 833, 841 (Minn. App. 2008). The corroboration of easily obtained facts and conditions, however, does not enhance the reliability of an informant. *See State v. Albrecht*, 465 N.W.2d 107, 109 (Minn. App. 1991).

Varnado claims that law enforcement did not corroborate CHS’s information because the CHS did not provide much information to be corroborated; he argues that the CHS left out numerous details and provided no first-hand information related to the robberies themselves. He highlights that the CHS did not see a firearm but merely assumed that there was one because he saw a bulge resembling a holster. He also points out that the CHS did not specify which bank Varnado intended to rob, when he intended to do it, what route Varnado would take to the bank, or that T.G. was a potential accomplice.

While it is true that the CHS did not fully explain the basis for his knowledge and lacked details on many aspects of the alleged bank robbery scheme, law enforcement was still able to corroborate the information that the CHS did provide. As the district court discussed, law enforcement’s surveillance corroborated the CHS’s information of Varnado’s name, the location where he could be found, and the date that an alleged offense would occur. Law enforcement further corroborated Varnado’s identity as a suspect by comparing his DVS photo to the surveillance footage of the earlier bank robberies; while, as Varnado argues, this is an imperfect means of identification, law enforcement still

verified that the CHS provided the name of someone whose DVS photo was consistent with the footage of the bank robber.

Law enforcement also corroborated the CHS's information regarding Varnado's alleged plan to rob a bank on October 10, 2017. The CHS correctly identified that Varnado wanted to borrow a car for the day of the alleged offense. Then, on the day that the CHS claimed that Varnado planned to rob a bank, Varnado and T.G. used the borrowed car provided by the CHS to drive near a bank. Once they neared the bank, Varnado and T.G. began circling neighborhood streets within a couple of blocks of it. Even though the charge related to a conspiracy to rob the bank was eventually dismissed, these facts corroborate the CHS's tip that Varnado planned to rob a bank that day.

Thus, we conclude that law enforcement corroborated the CHS's tip and that this corroboration supports the conclusion that the CHS's information was reliable.

C. While the CHS may have provided information against his interests, it has minimal probative value of the CHS's reliability.

The state argues that the CHS provided information against his interests under *Ross* factor (6) because the CHS had concerns that providing the information to law enforcement would affect his safety and his standing in the community. The district court rejected this argument, concluding that there was not enough information to determine whether the statements truly were against the CHS's interests.

The CHS's interest in his safety is clearly valid. *Cf. McCloskey*, 453 N.W.2d at 704 (describing an informant's fear of retribution as a "good reason" to remain anonymous). Yet some degree of safety interest would presumably apply in most, if not all, informant

cases because there will often be the possibility of retribution. Furthermore, the CHS also received \$3,200 in cash payments for his information. With no additional information, it is difficult to weigh the CHS's safety interest against his financial interest and reach a conclusion about whether the decision to inform the police was against the CHS's interests on the whole.

Thus, while we conclude that the CHS did provide information against his safety interest, the limited detail in the record about this safety interest means it has minimal probative value in the totality-of-the-circumstances analysis of the CHS's reliability.

D. On the whole, the CHS tip was reliable and provided law enforcement with a reasonable, articulable suspicion to stop the vehicle.

Applying all of the *Ross* factors and considering the totality of the circumstances, we conclude that the information provided by the CHS was reliable. The CHS voluntarily came forward and identified Varnado as involved in earlier bank robberies, which the FBI special agent corroborated by comparing Varnado's photo with surveillance footage from the earlier robberies. The CHS also informed law enforcement about Varnado's plan to rob a bank, which law enforcement corroborated by monitoring Varnado and observing him ride in a borrowed car to and around a bank on the day that CHS said Varnado planned to rob a bank. While the CHS had a criminal record, law enforcement sufficiently corroborated the CHS's information to consider the tip reliable.

Because the CHS tip was reliable, law enforcement had a reasonable, articulable suspicion that Varnado and T.G. were engaged in a plan to rob a bank. With that reasonable suspicion that criminal activity was afoot, police officers were justified in making an

investigatory stop of the vehicle. *See Timberlake*, 744 N.W.2d at 393. The district court did not err by refusing to suppress evidence obtained as a result of the search following the stop.

II. Varnado’s pro se supplemental brief includes no arguments that warrant the reversal of his conviction.

Varnado identifies six arguments in his pro se supplemental brief, though aspects of the claims overlap. We address each of his arguments in turn.

A. The dismissal of the conspiracy charge does not imply that there was no basis to stop the tracked vehicle.

Varnado argues that law enforcement did not have probable cause to stop his vehicle. This argument, along with most of Varnado’s other arguments, relies on the district court’s dismissal of the conspiracy-to-commit-robbery charge. The district court determined that, while there was sufficient evidence to present the question to the jury about whether Varnado conspired with T.G., there was insufficient evidence to establish probable cause that Varnado committed an overt act in furtherance of the conspiracy. Varnado argues that the district court’s determination amounts to a determination that law enforcement did not have probable cause to stop his vehicle, so the district court should have suppressed the firearm.

The Fourth Amendment requirement for a police officer to seize a vehicle, however, is distinct from the probable cause required to present the conspiracy issue to the jury. In order to make an investigatory stop of a vehicle, law enforcement must have a reasonable, articulable suspicion that criminal activity is afoot. *See id.* In order for the state to bring charges against a defendant, a court must “determine whether probable cause exists to

believe that an offense has been committed and that the defendant committed it.” Minn. R. Crim. P. 11.04. These two legal standards are assessed separately: reasonable suspicion sufficient to justify a stop may exist even if there is insufficient evidence to establish the probable cause to charge an occupant of the vehicle with a specific crime.

Thus, the fact that the district court determined that there was not probable cause to charge Varnado with conspiracy to commit robbery does not mean that law enforcement did not have a reasonable suspicion to stop Varnado’s vehicle.

B. The firearm-possession conviction does not violate Varnado’s double-jeopardy right.

Varnado claims that the district court’s conclusion that “there is a lack of probable cause for the initial reason that gave rise to the stop in the first place” determines all the related charges, including the firearm-possession charge. Thus, he argues, convicting him of the firearm-possession charge amounts to double jeopardy.

The federal and state constitutions protect “against multiple punishments for the same offense and against a second prosecution after an acquittal or conviction.” *State v. Jeffries*, 806 N.W.2d 56, 60-61 (Minn. 2011). The district court’s order did not acquit Varnado of the firearm-possession charge, so double jeopardy is not implicated. Varnado’s belief that the district court’s order should have also determined the firearm-possession charge does not mean that the state is conducting a second prosecution against him.

C. The stop of Varnado’s vehicle was a lawful seizure.

Varnado’s argument that the gun was a fruit of an unlawful seizure is similar to the argument made by his counsel. Varnado specifically takes issue, however, with the FBI

special agent's affidavit, which he describes as a "contradictive affidavit" and "contrary to the facts." But Varnado does not describe any of the contradictions in the affidavit, other than discussing an argument that he made to the district court that "no crime occurred" so officers should not have stopped the vehicle. As discussed above, however, officers only need to have reasonable, articulable suspicion that a crime is afoot to conduct an investigatory stop of a vehicle. *Timberlake*, 744 N.W.2d at 393.

D. Varnado's ineffective-assistance-of-counsel claim fails.

Varnado claims that his public defender, prior to his discharge by Varnado on the second day of trial, failed to assist him effectively by "intentionally raising issues in a form of a defense that [would] not be granted in favor of Varnado." Varnado complains that his attorney did not move to dismiss the firearm-possession charge and that his attorney failed to object to the state's use of leading questions on examination of the FBI special agent. He also states that his attorney did not raise certain constitutional defenses that he wished to raise.

To prevail on an ineffective-assistance-of-counsel claim, an appellant must show that their "counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotation omitted) (applying the test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). These two prongs are known as the performance and prejudice prongs, and appellate courts need not address both prongs if one is determinative. *Id.*

Varnado does not describe how he was prejudiced by his attorney's actions. He does not explain how the result of the proceeding would have been different had his counsel objected to the state's leading questions. Nor does he identify prejudice caused by his attorney's moving to suppress the firearm as evidence instead of moving to dismiss the firearm-possession charge. Finally, Varnado does not identify in his brief what constitutional violations he believes his attorney failed to raise at trial. Assuming the alleged violations are those that Varnado alleges in his appellate brief, we discern no prejudice from counsel's failure to raise them at trial since we conclude that none of them warrants reversing the district court. Because Varnado has alleged no prejudice caused by his attorney's representation, his ineffective-assistance-of-counsel claim fails.

E. Law enforcement had a reasonable suspicion that criminal activity was afoot and thus had the legal authority to stop the vehicle.

Varnado raises an argument nearly identical to one of his previous arguments that law enforcement did not have probable cause to stop his vehicle because there was no "probable cause for the initial reason for the traffic stop." He claims that the vehicle stop violated his constitutional rights because there was no warrant for his arrest and no felony or attempt to commit a felony took place on the day of the arrest. He then argues that the district court's dismissal of the conspiracy charge for lack of probable cause shows there was no probable cause to stop the vehicle. As discussed above, there was reasonable suspicion to stop the vehicle based on the CHS's tip and law enforcement's corroboration of the tip, so police officers could stop the vehicle based on a reasonable suspicion that criminal activity was afoot. *See Timberlake*, 744 N.W.2d at 393.

F. The GPS tracking device provided information that duplicated information that law enforcement obtained through physical surveillance.

Varnado also claims that the GPS device placed on the vehicle was illegally placed without a warrant. He argues that law enforcement inappropriately obtained consent from the CHS to place a GPS tracker on the vehicle days after already having placed the device.

The government's installation of a GPS device to monitor a vehicle's movements constitutes a search. *United States v. Jones*, 565 U.S. 400, 404, 132 S. Ct. 945, 949 (2012). The installation of a GPS device is thus unreasonable unless law enforcement obtains a warrant or one of the warrant exceptions applies. *State v. Liebl*, 886 N.W.2d 512, 516 (Minn. App. 2016). For instance, searches conducted pursuant to consent do not require a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973).

Varnado claims that, since the CHS consented to the placement of the GPS tracker after law enforcement had placed and used the tracker, his consent was invalid and thus law enforcement illegally placed the tracker without a warrant. Varnado has provided no legal authorities for his claim beyond the proposition that the government's use of a GPS device to track a vehicle constitutes a search and generally requires a warrant. Appellate courts decline to reach issues that are inadequately briefed. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

Furthermore, even if Varnado had sufficiently briefed the issue, and if we concluded that the consent was invalid, law enforcement obtained the same information it got from the GPS by also physically monitoring the tracked vehicle. If the state does obtain evidence through an unlawful search, the evidence may still be admissible if the state can show that

“the police had an independent source of [the] information.” *State v. Hodges*, 287 N.W.2d 413, 415 (Minn. 1979); *see also Nix v. Williams*, 467 U.S. 431, 443, 104 S. Ct. 2501, 2508 (1984) (“The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation.”).

Here, law enforcement monitored the house where the CHS stated Varnado was and followed Varnado and T.G.’s vehicle as it left the house and drove toward and around the bank. Thus, even if law enforcement had not placed the GPS tracker on the vehicle, they would have still obtained the same information through lawful means.

Affirmed.