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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0336**

State of Minnesota,
Respondent,

vs.

Billy Gene Hunt,
Appellant.

**Filed February 3, 2020
Affirmed in part, reversed in part, and remanded
Reyes, Judge**

Sherburne County District Court
File No. 71-CR-17-1823

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

Kathleen A. Heaney, Sherburne County Attorney, Samuel Wertheimer, II, Chief Deputy
County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Slieter,
Judge.

UNPUBLISHED OPINION

REYES, Judge

In this direct appeal from convictions of first-degree possession of narcotics and
first-degree sale of narcotics, appellant argues that (1) the district court erred by admitting

evidence of drugs found in his home because the search warrant lacked probable cause and (2) the state failed to provide sufficient evidence to properly calculate his criminal-history score under Minnesota law when it included multiple out-of-state burglaries committed the same day. We affirm in part, reverse in part, and remand.

FACTS

On September 18, 2017, a confidential informant (CI) tipped police that appellant Billy Gene Hunt had “maybe a quarter pound” of methamphetamine at his residence. The CI had purchased methamphetamine from appellant previously, typically in appellant’s residence. On December 5, 2017, a district court judge authorized a search warrant to search appellant’s residence. On December 7, 2017, the police executed the search warrant, seizing drug paraphernalia, \$23,812, and over 470 grams of narcotics.

The State of Minnesota charged appellant with four counts: two counts of felony first-degree aggravated controlled-substance crime, one for sale of narcotics and one for possession of narcotics, in violation of Minn. Stat. § 152.021, subd. 2b(2) (2016); felony first-degree controlled-substance sale in violation of Minn. Stat. § 152.021, subd. 1(1) (2016); and first-degree controlled-substance possession in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (2016).

Appellant filed a motion to suppress the evidence police seized from his house. The district court denied appellant’s motion, determining that the CI provided reliable information on appellant’s drug trafficking sufficient to establish probable cause for the search warrant and to establish appellant as a wholesaler, which demonstrated a sufficient nexus between the drugs and appellant’s residence.

Appellant proceeded with a court trial on stipulated evidence to preserve his challenge to the pretrial search-warrant ruling on appeal. See Minn. R. Crim. P. R. 26.01, subd. 4. The district court found appellant guilty of all four counts and sentenced him to 158 months in prison. The preplea sentencing worksheet assigned appellant 14 of his 16 criminal-history points based on third-degree burglary convictions from Iowa. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by concluding that probable cause supported the warrant to search appellant’s residence.

Appellant argues that the district court should have suppressed the evidence of drugs found in his residence based on speculative and stale evidence that failed to establish a sufficient nexus between his drug activity and his home. We disagree.

We review the issuing of a warrant “only to consider whether the issuing judge had a substantial basis for concluding that probable cause existed.” *State v. Rochefort*, 631 N.W.2d 802, 803 (Minn. 2001). In determining whether a substantial basis exists, “the 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).

The constitutions of the United States and Minnesota both guarantee people the right “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 may not conduct a

search without first obtaining a valid search warrant issued by a neutral and detached magistrate. *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014). Search warrants must be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Probable cause requires the issuing judge to determine that there is a fair probability that contraband or evidence of a crime will be found in the location to be searched. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983).

A. A sufficient nexus connected appellant’s drug activity to his residence.

Appellant argues that facts connecting his residence to drugs were “too speculative.” We disagree.

The issuing judge may infer a nexus between a crime and a residence from the totality of the circumstances, including the type of crime alleged, the nature of the items sought, and “the normal inferences as to where the defendant would usually keep the items.” *Yarbrough*, 841 N.W.2d at 623. It is reasonable to infer that drug wholesalers, as opposed to casual users, keep drugs at their residences. *Id.* at 623-24; *State v. Harris*, 589 N.W.2d 782, 789 (Minn. 1999). The Minnesota Supreme Court defines the term “drug wholesaler” as someone who “deal[s] in large quantities” of drugs. *Novak v. State*, 349 N.W.2d 830, 832-33 (Minn. 1984). Here, the issuing judge considered evidence supporting the inference that appellant was a drug wholesaler. Further, the CI previously purchased methamphetamine from appellant, and “the deals typically happen[ed] in [appellant’s] residence,” which establishes a clear nexus to appellant’s residence. *See State v. Cavegn*, 356 N.W.2d 671, 674 (Minn. 1984). Based on these facts, we conclude that the issuing

judge reasonably inferred that appellant kept drugs at his residence. *See Yarbrough*, 841 N.W.2d at 623-24; *Cavegn*, 356 N.W.2d at 674.

Appellant nevertheless argues that we should follow *State v. Souto*, a supreme court case finding an insufficient nexus between drug activity and the defendant's home even though the defendant purchased drugs and communicated with a known drug dealer, and the post office intercepted a drug package mailed to her home. 578 N.W.2d 744, 749 (Minn. 1998). Appellant's argument is not persuasive. In *Souto*, unlike here, "the affidavit . . . did not indicate that [the defendant] ever arranged drug deals, sold, or distributed drugs, much less that she performed such acts from her home." *Id.* at 748.

B. Probable cause did not rely on stale evidence.

Appellant argues that stale facts connected drugs to his residence because nearly two months passed between when the state received the CI's tip and when it executed the search warrant. Appellant's argument is misguided.

Stale information cannot 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 there is no "arbitrary time limit[]" or "rigid formula" for determining "whether the probable cause underlying a search warrant has grown stale." *State v. King*, 690 N.W.2d 397, 401 (Minn. App. 2005), *review denied* (Minn. Mar. 29, 2005). We must examine the circumstances of each case. *Jannetta*, 355 N.W.2d at 193. Relevant circumstances include "indication[s] of ongoing criminal

activity,” which remain fresh for a longer period of time than a single instance of criminal conduct. *Souto*, 578 N.W.2d at 750. For an investigation of repeated sales of drugs, a span of weeks from the initial information of illegal activity does not render a warrant application stale. *Cavegn*, 356 N.W.2d at 673.

Here, the affidavit provided an indication of ongoing criminal activity. *See Souto*, 578 N.W.2d at 750. Moreover, an ion swab of appellant’s door handle on December 5, 2017, tested positive for methamphetamine, after a swab from October 9, 2017 tested negative, providing additional support for the inference of ongoing criminal activity. *See id.* The state also provided information consistent with an investigation of repeated sales of drugs. *See Cavegn*, 356 N.W.2d at 673. Probable cause was not stale and instead supported the district court judge issuing the search warrant. We conclude that the issuing judge had a substantial basis for concluding that probable cause existed.

II. The district court abused its discretion by sentencing appellant without categorizing the felonies listed in the presentence investigation.

Appellant argues that the preplea sentencing worksheet contained insufficient information to determine whether the district court properly increased appellant’s criminal-history score based on multiple offenses from Iowa that occurred on the same day and may have been part of the same behavioral incident. We agree.

We review a district court’s determination of a defendant’s criminal-history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). But we review construction of sentencing guidelines *de novo*. *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007). “The State bears the

burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal history score.” *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). The state must prove by a preponderance of the evidence that the offenses did not occur as part of a single behavioral incident. *State v. Outlaw*, 748 N.W.2d 349, 355-56 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). Whether multiple offenses arose from a single course of conduct presents a question of fact that we review for clear error. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). But when the facts are not disputed, we review the question de novo. *Id.*

The Minnesota Sentencing Guidelines provide uniformity by calculating criminal-history scores with regard to an out-of-state conviction by reevaluating the designation of the offense under Minnesota law in a standard manner. See Minn. Sent. Guidelines 2.B.5 & cmt. 2.B.502 (Supp. 2017); *Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992). Under this standard, the district court must determine “how the offender would have been sentenced had the offense occurred in Minnesota at the time of the current offense.” *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001). The district court may count an out-of-state offense as a felony “only if it would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence.” Minn. Sent. Guideline 2.B.5(b).

Determining whether multiple offenses arose out of a single behavior incident requires the district court to consider the time and place of the offenses and whether a defendant was motivated by a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). Merely because the “crimes were committed within a short time

span and within the same area does not mean the single behavioral incident prohibition is violated.” *State v. Thomas*, 352 N.W.2d 526, 529 (Minn. App. 1984), *review denied* (Minn. Oct. 11, 1984).

Here, we cannot assess the accuracy of appellant’s criminal-history score based on the record before us. Nor does the record allow us to assess de novo the district court’s interpretation of the sentencing guidelines or to review its interpretation of whether appellant’s actions fell under a single course of conduct. *See Maurstad*, 733 N.W.2d at 148; *Marchbanks* 632 N.W.2d at 731.

Because the record is insufficient to resolve these issues, we reverse and remand for further consideration. On remand, the state must develop the sentencing record to enable the district court to determine whether the state can meet its burden of proving by a preponderance of the evidence that the out-of-state offenses would be considered felonies in Minnesota and whether the sentence appellant received in Iowa would be a felony-level sentence in Minnesota. *See Outlaw*, 748 N.W.2d at 356.

Affirmed in part, reversed in part, and remanded.