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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1434**

State of Minnesota,
Respondent,

vs.

Frankie Dylan Dircks,
Appellant.

**Filed June 22, 2020
Affirmed; motion denied
Bjorkman, Judge**

Crow Wing County District Court
File No. 18-CR-18-4587

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

Donald F. Ryan, Crow Wing County Attorney, Candace Prigge, Assistant County
Attorney, Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his theft conviction, arguing that the search of his apartment was invalid because the warrant was issued on unlawfully obtained information. We affirm.

FACTS

On November 2, 2018, Baxter Police Officer Timothy Carroll received an incident report, a video recording, and a photograph from an asset-protection manager at a local Wal-Mart. The incident report states that an unidentified man stole approximately \$2,000 in merchandise, including a drone, on the mornings of October 30 and 31, 2018. The report describes the suspect's car, including its license-plate number. The video recording is security footage of the suspect committing the thefts; the photograph is a still image of the suspect taken from the security footage.

After a records search for the suspect's car failed to find a match, Officer Carroll obtained the assistance of Crow Wing County Sheriff's Deputy Phil Stanley. They found a car registered to appellant Frankie Dylan Dircks that matched the physical description of the suspect's car and had a license-plate number that differed by one letter.¹ Officer Carroll also found Dircks's driver's license photo.

The two officers went to Dircks's apartment building the next day, observing his car in the parking lot. Dircks answered the door to his unit and Officer Carroll

¹ The license-plate number provided in the incident report ends with a "T." Dircks's car's license-plate number ends with a "Y."

“immediately recognized him” as the suspect from the surveillance footage. Dircks told the officers he did not want to speak to them. The officers decided to “secure the residence” while they obtained a search warrant and ordered Dircks out of the apartment. Dircks did not comply and tried to shut the door. Deputy Stanley removed Dircks from the apartment and Officer Carroll secured him in the hallway.

One officer then asked Dircks if he wanted to lock his apartment. Dircks responded that he did and told the officer where the keys were located. Deputy Stanley entered the apartment. He could not quickly find the items Dircks requested, so Officer Carroll went in to assist and saw a drone on an open shelf that was the same brand as the one stolen from Wal-Mart. The officers eventually retrieved the items that Dircks requested. They then placed Dircks into the squad car and searched a community trash bin, where they found Wal-Mart bags and an empty box for a drone of the same brand that was reported stolen.

The same day, Officer Carroll applied for a search warrant. The warrant application describes the above events and references the drone the officers observed in Dircks’s apartment. A district court judge issued the warrant and officers executed it that afternoon. The officers found many of the stolen items.

Respondent State of Minnesota charged Dircks with felony theft. Dircks moved to suppress the evidence obtained during the search and to dismiss the charge. Among other things, Dircks argued that the warrant is invalid because it was issued based on what Officer Carroll saw during his unauthorized entry into the apartment. The district court held an evidentiary hearing, during which Officer Carroll testified to the above facts. The district

court also received into evidence Officer Carroll's dash-cam footage,² which contained an audio recording of the officers' interactions with Dircks at the door of his apartment. The district court denied Dircks's motion. The court found, among other facts, that Dircks asked Officer Carroll to enter his apartment at the time of the arrest to retrieve his personal items.

A two-day jury trial took place in May 2019. The state presented testimony from five witnesses, including Wal-Mart's asset-protection manager and Officer Carroll. The jury found Dircks guilty and the district court sentenced him to 21 months' imprisonment. Dircks appeals.

DECISION

I. Dircks's motion to strike fails because the challenged document was filed with and cited by the district court.

The appellate record consists of the "documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. "An appellate court may not base its decision on matters outside the record on appeal" *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). We may strike documents submitted by the parties that are outside the appellate record. *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd on other grounds*, 504 N.W.2d 758 (Minn. 1993).

Dircks moves to strike Wal-Mart's incident report from the state's addendum along with all references to it in the state's brief, arguing that it is not part of the district court

² Officer Carroll wore a body microphone that was synced with the dash camera in his squad car.

record. This argument is unavailing. The incident report was part of a packet of exhibits received without objection at the omnibus hearing, and the district court cited and relied on the report in its suppression order. Accordingly, the incident report is part of the record before this court. Dircks's motion to strike is denied.

II. Officer Carroll's observation of the drone in Dircks's apartment was properly included in the warrant application because he was lawfully present in the apartment when he saw the drone in plain view.

Dircks argues that the evidence obtained during the warrantless search of his home should have been suppressed because (1) the officers' entry into his apartment at the time of his arrest was unlawful and (2) there was no probable cause to issue the search warrant without the information the officers gained during the unlawful entry.

We note at the outset that the district court did not expressly decide the first issue in its suppression order. We generally do not consider matters that were not decided by the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we may do so if it would not unfairly surprise a party to the appeal. *Id.* That is the situation here. Dircks moved the district court to suppress "all evidence obtained as a result of the illegal entry into [his] home." The court did not expressly decide that issue, but it made a relevant factual determination that Dircks asked the officers to enter his apartment to retrieve his keys and other personal items. And the district court did not exclude Officer Carroll's observation of the drone in Dircks's apartment from its probable-cause analysis. Notably, the state does not challenge our ability to review the validity of the officers' entry into the apartment and both parties briefed the issue. On this record, we will address the issue.

When reviewing a suppression order, we examine the district court's factual findings for clear error, *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009), and defer to the district court's credibility determinations, *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). But we review the court's legal determinations de novo. *Ortega*, 770 N.W.2d at 149.

The United States and Minnesota Constitutions protect against “unreasonable searches and seizures” and provide that search warrants may be issued only upon a showing of 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.’” *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)). Evidence obtained as a result of an unreasonable search may not be considered in determining probable cause and must be excluded from warrant applications. See *State v. Lieberg*, 553 N.W.2d 51, 55 (Minn. App. 1996).

Dircks contends that Officer Carroll's entry into his apartment at the time of his arrest was unlawful because he did not consent and there were no exigent circumstances. The state does not cite either of these exceptions to the warrant requirement, instead arguing that the entry into the apartment was justified and the officer's observation of the drone inside the apartment was properly included in the warrant application under *State v. Jenkins*, 782 N.W.2d 211 (Minn. 2010). The state's argument is persuasive.

The “plain view doctrine” provides that no Fourth Amendment violation occurs where a police officer sees or seizes “what clearly is incriminating evidence or contraband

when it is discovered in a place where the officer has a right to be.” *State v. Griffin*, 336 N.W.2d 519, 522 (Minn. 1983) (quotation omitted). *Jenkins* applied the plain view doctrine in the context of an arrest in the defendant’s home. Officers arrested Jenkins in his home on an outstanding warrant. *Jenkins*, 782 N.W.2d at 223. Before he was taken away, Jenkins asked the arresting officers if he could enter his bedroom to retrieve a coat and shoes. *Id.* The officers accompanied him, and saw cell phones and a gun in plain view. *Id.* Jenkins argued that references to these items should have been excluded from the subsequent search-warrant application because the officers “were not lawfully in his room when those items were first discovered.” *Id.* at 222. The district court found that Jenkins asked for his personal items and, “based on that request[,] the officers were lawfully in Jenkins’ room when they observed the cell phones and gun,” which were “in plain sight.” *Id.* at 223. Our supreme court discerned no clear error in the district court’s factual findings and held that “an officer may lawfully accompany an arrestee into his room after an arrest outside the room in order for the arrestee to retrieve items such as a coat and shoes.” *Id.* (citing *Griffin*, 336 N.W.2d at 523-24).

We see no meaningful difference between *Jenkins* and this case. The district court found that (1) Dircks asked Deputy Stanley “to get his keys, phone, and cigarettes to take with him”; (2) Deputy Stanley could not immediately locate those items and Officer Carroll went in to help find them; and (3) Deputy Carroll “observed a drone in plain view on a shelf in [Dircks’s] bedroom.” The evidence supports these findings. Officer Carroll testified that Dircks asked for his personal items and that he “went in the apartment with Dircks to assist with looking for those items.” The audio recording reflects that Dircks

asked the officers to retrieve his shoes from the apartment, permitted the officers to enter the apartment to find his keys, and then told the officers where the items were located. It is undisputed that Officer Carroll saw the drone in plain view while in an area to which Dircks directed him. To the extent Dircks argues that the dash-cam audio conflicts with Officer Carroll's testimony, we defer to the district court's factual findings after weighing the evidence. *See Dickerson*, 481 N.W.2d at 843. On this record, the district court did not clearly err in finding that Dircks asked the officers to enter his apartment to collect his personal items and that Officer Carroll saw the drone on an open shelf while doing so.

As in *Jenkins*, the record establishes that Officer Carroll was lawfully present in Dircks's apartment when he observed the drone in plain sight. Accordingly, his observation of the drone was properly included in the warrant application. *See Jenkins*, 782 N.W.2d at 223. Because we conclude that the search warrant is valid, we need not consider Dircks's alternative argument that a "sanitized" warrant application would not have established probable cause.

Affirmed; motion denied.