This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0246

State of Minnesota,
Respondent,

vs.

Kareem Jamar Waites,
Appellant.

Filed January 30, 2023
Affirmed
Segal, Chief Judge

Stearns County District Court
File No. 73-CR-19-9700

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

Janelle P. Kendall, Stearns County Attorney, Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Connolly, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges his conviction for first-degree controlled-substance crime, arguing that the district court erred by denying his motion to suppress evidence obtained from two tracking-device orders. We affirm.

FACTS

Appellant Kareem Jamar Waites was convicted of first-degree controlled-substance crime. The investigation leading to his conviction began in November 2018 when law enforcement with the Central Minnesota Violent Offender Task Force (CMVOTF) received a crime-stoppers tip that Waites was selling controlled substances out of his car and apartment and kept controlled substances in his vehicles. Over the following four months, officers also received information from a "concerned citizen" and an informant that Waites sold the substances with his significant other, J.E.H., and that Waites and J.E.H. used Waites's 2007 Chevrolet Tahoe in the sales.

In July 2019, law enforcement conducted a traffic stop of J.E.H. in the Tahoe and found 2.5 grams of heroin in the car. The investigating officer applied for a tracking-device order for the Tahoe pursuant to Minn. Stat. §§ 626A.36-.38 (2018), which the district court granted. The following month, law enforcement saw Waites driving a 2018 Dodge Challenger and learned that it was newly registered to Waites. Law enforcement then applied for and received a tracking-device order for the Challenger.

Based on the information obtained from the tracking devices, law enforcement determined that Waites and J.E.H. lived at a residence on Cooper Avenue in St. Cloud. On three occasions in August, September, and October 2019, law enforcement searched the trash collected from the Cooper Avenue residence. The trash contained items that tested positive for cocaine. Law enforcement obtained a search warrant for the residence, which CMVOTF officers executed in late October 2019. The officers collected evidence from the home that included suspected heroin and over $7,000 in cash.

J.E.H. was at the residence during the search and informed officers that she had been selling the substances for Waites for about ten months and that Waites brought the substances to the house. In October 2019, respondent State of Minnesota charged Waites with three counts of first-degree controlled-substance crime.[1]

Waites filed a pretrial motion to suppress the evidence obtained from the two tracking-device orders (the orders), arguing that the orders lacked probable cause. Waites further argued that, because law enforcement located Waites's residence through the orders, the evidence obtained from the search of his residence must also be suppressed. The district court denied the motion.

The state amended its complaint before trial, charging Waites with a fourth count of first-degree controlled-substance crime based on additional testing that revealed the quantity of heroin obtained from Waites's residence was approximately 65 grams. Waites and the state later agreed to move forward with a stipulated-evidence trial under Minn. R. Crim. P. 26.01, subd. 4, that allowed Waites to preserve for appeal his challenge to the tracking-order and search-warrant evidence. The parties agreed that the pretrial issue of suppression of the evidence was dispositive, that three of the counts would be dismissed, and that the stipulated-evidence trial would proceed only on the charge of first-degree possession of 25 or more grams of heroin.

[1] Specifically, the charges were (1) first-degree aggravated controlled-substance crimes with two aggravating factors; (2) first-degree possession of 25 or more grams of heroin; and (3) first-degree possession of 10 grams or more of heroin.

The district court found Waites guilty of the single count of first-degree controlled-substance crime based on the stipulated evidence and imposed a 128-month sentence.

DECISION

In his appeal, Waites argues that the district court erred by denying his motion to suppress evidence for two reasons. First, he argues that the tracking orders lacked probable cause because the factual background to support the orders references evidence of controlled-substance crimes, but the district court's probable-cause determinations refer to the crime of arson, not controlled-substance crime. For his second argument, Waites contends that, even if the probable-cause determinations had referenced a controlled-substance crime instead of arson, the factual allegations were not sufficient to establish probable cause.

The United States and Minnesota Constitutions protect the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provide that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10.

When law enforcement installs a tracking device on a vehicle and monitors its location, as here, a search occurs within the meaning of the Constitution. *State v. Liebl*, 886 N.W.2d 512, 516 (Minn. App. 2016) (citing U.S. Const. amend. IV; *United States v. Jones*, 565 U.S. 400, 404 (2012)). Thus, monitoring of a vehicle via a tracking device is only constitutional if (1) the authorizing tracking order is "legally equivalent to a search warrant" and supported by probable cause or (2) "a specific exception to the warrant

requirement applies." *Id.* (applying this standard to a vehicle-monitoring search pursuant to a tracking-device order).

"A warrant is supported by probable cause if, on the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Holland*, 865 N.W.2d 666, 673 (Minn. 2015) (quotations omitted). Probable cause also requires that there be "a direct connection . . . between the alleged crime and the particular place to be searched." *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998).

Appellate review "is limited to the information presented in the affidavit supporting the warrant." *Holland*, 865 N.W.2d at 673. Appellate courts review de novo a district court's legal conclusions on a pretrial motion to suppress evidence. *Id.* But "great deference" must nevertheless be accorded the issuing judge's determination at the time of the warrant's issue. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001).

Having set out the constitutional requirements governing tracking orders and the standard of review, we turn to Waites's argument that the orders are constitutionally infirm because they are not supported by probable cause.

A. The orders can be construed as containing probable-cause findings for controlled-substance crime, despite their mistaken references to arson.

Waites first challenges the validity of the orders because the orders and their supporting affidavits include probable-cause statements related to arson instead of the crime which the officers were in fact investigating—controlled-substance crime.

The two applications for the orders contain multiple attestations related to the commission of a controlled-substance crime, such as "[a]ffiant certifies that the Central MN Violent Offender Task Force is conducting a criminal investigation of [Waites] for the following criminal offenses: controlled substance crimes," and "[y]our affiant believes that the tracking device will aid in the locating of Waites' co-conspirators as well as additional residences which Waites may be using to facilitate his controlled substance distribution." The second paragraph of each affidavit includes the phrase "controlled substance crime" four times. The affidavits also cite tips regarding Waites's alleged controlled-substance sales from his cars, his former controlled-substance-related conviction, and police finding heroin in a car registered to Waites.

In the third paragraph of both affidavits, however, the officer states that "[t]he facts establish[] probable cause to believe arson has been committed or that a particular person has committed arson."[2] The resulting orders from each affidavit similarly references arson:

> The Court further finds there is probable cause to believe that arson has been committed and that a particular person has committed arson and that the installation and use of a tracking device will result in the discovery of evidence which tends to show arson has been committed or tends to show that a particular person has committed arson.

Because the probable-cause determinations are for arson but the factual allegations relate only to controlled-substance crimes, Waites asserts that the orders are invalid. He

[2] The affidavits and resulting tracking-device orders for the Chevrolet Tahoe and Dodge Challenger are nearly identical—the affidavit for the Challenger repeats the same facts as the Tahoe affidavit and then adds that Waites had been observed driving the Challenger and that it was newly registered to Waites. We thus analyze them together.

maintains that the orders lack the required "direct connection . . . between the alleged crime and the particular place to be searched." *Souto*, 578 N.W.2d at 747. The state contends that these references to arson are technical errors which do not affect the orders' constitutional validity. We agree with the state.

First, despite referencing arson in the sections quoted above, the applications and orders sufficiently connect the tracking of the vehicles to controlled-substance crime. The affidavits make no other mention of arson or facts related to arson. Similarly, the orders list Waites's vehicle information and state that the tracking devices will be used to investigate controlled-substance crime. They do not mention arson except in the probable-cause sentences. Given these facts, we are persuaded that the references to arson should be treated as typographical errors committed by law enforcement in the preparation of the tracking-order applications that were not caught by the issuing judges. As such, we conclude that the orders establish the requisite direct connection between Waites's vehicles and the alleged controlled-substance crime, despite the erroneous reference to arson. *See id.*

Second, analogous caselaw regarding warrant particularity requirements and misrepresentations in warrant affidavits holds that mistakes in warrants and applications do not necessarily render warrants constitutionally invalid.[3] For example, the Minnesota Supreme Court held in *State v. Gonzales* that a warrant containing an incorrect address was

[3] While Waites does not argue that the orders at issue are insufficiently particular, caselaw on this issue is instructive because it demonstrates the willingness of reviewing courts to overlook clerical-type errors in an analogous context.

valid where the "address stated in [the] warrant was reasonable for the location intended and the error did not create a reasonable probability that an innocent party's residence would be mistakenly searched." 314 N.W.2d 825, 826 (Minn. 1982); *see also State v. Kessler*, 470 N.W.2d 536, 537 (Minn. App. 1991) ("A search warrant with an incorrect house number does not lack sufficient particularity when the defendant suffers no prejudice, the house intended to be searched was searched, and the executing officer went directly to the house shown to him by an informant and observed by him from the air.").

The supreme court has also found warrants constitutionally valid where law enforcement's misstatements in affidavits were not deliberately or recklessly made and were not material to the determination of probable cause. *State v. Jenkins*, 782 N.W.2d 211, 224 (Minn. 2010) (holding that "[a]lthough the warrant application here misstates the location where the taxicab dropped the man and woman off, [nothing] in the record before us suggest[s] that the misstatement was deliberately or recklessly made or that the precise location of their drop off was material to establishing probable cause"); *State v. Andersen*, 784 N.W.2d 320, 328-29 (Minn. 2010) (stating, in a case where law enforcement made incorrect statements about the weapons owned by defendant, that "[w]hile greater care in assembling the application would have been preferable, we do not believe that any of the alleged misrepresentations or omissions were material to the probable cause determination. We conclude that the application established probable cause to justify issuance of the search warrant."). These cases provide additional support for our conclusion.

Having determined that the orders can be construed as containing probable-cause findings for controlled-substance crime, we proceed to address whether the orders were supported by probable cause.

B. The tracking-device applications establish probable cause relating to controlled-substance crime.

Waites next argues that "[e]ven if the issuing court made a probable-cause finding relating to controlled substance crimes, the tracking-device applications do not support such a finding." In its order denying Waites's motion to suppress, the district court determined that the applications for the orders established probable cause for controlled-substance crime, citing six details included in the supporting affidavits[4]: (1) "the affiant had received a [crime stoppers] tip that [Waites] was selling controlled substances out of his apartment and vehicle"; (2) "a concerned citizen had reported that [Waites] had hired a third party to drive his vehicle and transport[] 100 grams of fentanyl" and "police subsequently arrested the third party [in Indiana] and recovered the fentanyl"; (3) "the police had executed an ion scan on [Waites's] 2007 Chevrolet Tahoe which tested positive for the presence of cocaine"; (4) "a confidential informant told police that [Waites] is involved in the distribution of controlled substances including heroin"; (5) "the police had stopped [Waites's] girlfriend [J.E.H.] in the 2007 Chevrolet Tahoe with 2.5 grams of heroin" and the "girlfriend stated that [Waites] used his vehicle to make weekly trips to the Twin Cities to pick up heroin"; and (6) Waites has a prior conviction for "the sale and possession of controlled substances."

[4] As noted above, these facts are repeated in both affidavits.

Waites argues this information is insufficient to establish probable cause because it is stale: the orders were issued in July and August 2019, but the crime-stoppers and concerned-citizen tips came in late 2018 and the ion scan was in December 2018. He also asserts that the information from the confidential informant (CI) cannot overcome that staleness because "[t]he applications in this case provide no information establishing the informant's reliability or basis of knowledge." Waites further points to the fact that law enforcement had originally obtained a tracking-device order for the Tahoe in March 2019, but officers removed the device before it expired because they did not obtain useful information. And, finally, Waites points out that the officers never saw Waites driving the Tahoe.

Waites's arguments are not convincing. First, in terms of timing, the application must be comprised "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." *Souto*, 578 N.W.2d at 750 (quotation omitted). However, "[a]ppellate courts have refused to set arbitrary time limits in obtaining a warrant or to substitute a rigid formula for the judge's informed decision. Instead, the question must be determined by the circumstances of each case." *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984) (citation omitted), *rev. denied* (Minn. Jan. 14, 1985). And "[w]hen an activity is of an ongoing, protracted nature, the passage of time is less significant." *Souto*, 578 N.W.2d at 750.

Here, while law enforcement received several of the tips up to nine months prior to the issuance of the first tracking-device order, they also obtained information in the intervening months that suggested Waites's and J.E.H.'s criminal activity was ongoing.

Most significantly, officers pulled over J.E.H. in the Tahoe in July 2019—within a week before the first tracking-device order was issued—and found heroin in the vehicle. Moreover, law enforcement received information from the CI within four months of the order being issued—more recently than the original tips.

Second, in relation to the CI, the affidavits contain sufficient information to support the CI's reliability. According to the affidavits, the CI informed an investigator that Waites and J.E.H. were involved in selling controlled substances, including heroin. The CI also said that when they met with J.E.H., J.E.H. was driving the Tahoe which law enforcement knew was registered to Waites, and the CI saw controlled substances in the car. Four months later, officers pulled over the Tahoe, J.E.H. was driving, there was heroin inside, and J.E.H. told the officers that Waites uses the Tahoe to pick up heroin. This traffic stop corroborated the CI's information. *See State v. Holiday*, 749 N.W.2d 833, 840-41 (Minn. App. 2008) (stating that a confidential informant's "veracity can be proven by showing that details of the tip have been sufficiently corroborated so that it is clear the informant is telling the truth on this occasion" and that "the corroboration of even minor details" can bolster a CI's reliability (quotation omitted)); *see also State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004) (stating that one of the six factors that indicates CI reliability is when the police can corroborate the CI's information).

In addition, as the district court noted, the affidavits listed a prior controlled-substance conviction for Waites, as well as J.E.H., with whom Waites was alleged to be selling controlled substances and in a romantic relationship. These controlled-substance-related convictions both corroborate the CI and support the probable-cause determination.

Holiday, 749 N.W.2d at 844 ("[T]he state correctly asserts that the previous convictions . . . provide additional support for the magistrate's probable-cause determination and corroborate the information provided by the CI.").

Finally, we are not persuaded by Waites's contention that the validity of the orders is subject to question because the officers removed an earlier tracking device from the Tahoe which was issued in March 2019 and because officers never saw Waites driving that vehicle. It is irrelevant that the earlier tracking device was removed—Waites was the registered owner of the Tahoe and heroin was found in the vehicle the week before the first tracking-device order was issued. And it is not surprising that the police did not see Waites in the Tahoe. Waites had apparently switched to driving the Dodge Challenger, which police observed Waites driving within the month following the first tracking-device order and which officers discovered was newly registered to Waites.

Considering the totality of the circumstances, the district court did not err by denying Waites's motion to suppress the evidence obtained from the tracking orders because the applications supporting the orders provide a substantial basis for the issuing judge's conclusion that tracking the vehicles would result in the discovery of evidence of controlled-substance crime.

Affirmed.