This opinion is nonprecedential except as provided by Minn.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
A24-0587

State of Minnesota,
Respondent,

vs.

Justin Nicholas Boggs,
Appellant.

Filed January 27, 2025
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-CR-22-10091

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

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

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Ede, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges his convictions of two counts of possession of pornographic work involving minors by a predatory offender. He argues that the district court erred in denying his motion to suppress evidence seized pursuant to a search warrant because probable cause for the warrant was based on information obtained from an individual who was acting as an agent on behalf of the State of Minnesota when that individual entered appellant's house and discovered items related to child pornography. Alternatively, appellant argues that he is entitled to a *Franks* hearing to determine whether the warrant affidavit included intentional or reckless misrepresentations of material fact. We affirm.

FACTS

Respondent State of Minnesota charged appellant Justin Nicholas Boggs by amended complaint with four counts of possession of pornographic work involving minors by a registered predatory offender. The complaint alleged that, during the execution of a search warrant, officers of the Central Minnesota Violent Offender Task Force ("task force") recovered evidence in appellant's possession that led to the charged offenses.

Appellant moved to suppress the evidence, arguing that (1) the evidence was discovered as a result of an illegal search and seizure conducted by a paid informant acting on behalf of respondent; and (2) the search-warrant application included intentional or reckless misrepresentations of fact that were material to the finding of probable cause. A contested omnibus hearing was held at which neither party presented testimony. Instead, the parties agreed that a *Franks*[1] hearing would be held only if appellant provided the district court with "enough information" to request such a hearing. The parties also agreed

[1] *See Franks v. Delaware*, 438 U.S. 154, 171 (1978) (permitting an evidentiary hearing to challenge the validity of a search-warrant affidavit upon allegations of deliberate falsehood or reckless disregard for the truth, accompanied by an offer of proof).

that respondent would submit a *Florence* packet[2] containing information relevant to the issues before the district court.

The following information was contained in the *Florence* packet: investigative reports; a search-warrant application and warrant authorizing the search of appellant's home; a search-warrant application and warrant to search appellant's electronic devices that were seized during the search of his home and related property; and a letter from the task force related to the task force's use of the confidential informant involved in this case. This information established that a task force investigator used confidential informant CI 22-33 (hereinafter "the CI") to conduct investigations. The CI was known to task-force investigators, as were the CI's past felony convictions for drug-related offenses.

In June 2022, the CI agreed to work for the task force in consideration of pending charges against the CI for fifth-degree possession of a controlled substance and soliciting a prostitute. The CI was then paid $20 for an unsuccessful controlled buy. And in July 2022, the CI was paid approximately $400 for information leading to the arrest of two individuals who were involved in a shooting.

In August 2022, the task force deactivated the CI after the CI was arrested on new drug charges. But in October 2022, the task force reactivated the CI to work for

[2] When a defendant moves to dismiss, the district court "will make the critical determination based on all the information contained in the files and records as of [the omnibus hearing], including reliable hearsay in whole or in part." *State v. Florence*, 239 N.W.2d 892, 900 (Minn. 1976) (quotation omitted). The "*Florence* packet" refers to the complaint, files, and other records respondent submitted at the omnibus hearing.

consideration relating to the new charges. The CI then assisted the task force with methamphetamine investigations in early November 2022, which led to multiple arrests.

On November 17, 2022, the task force deactivated the CI due to another arrest and new drug charges. Prior to this deactivation, however, the CI contacted a task force investigator on November 11, 2022, offering information about appellant, with whom the CI was "affiliated . . . through the sales and use of controlled substances[,] specifically methamphetamine." Although the CI was never directed by the task force to provide information about appellant, or paid any compensation for the information, the CI informed the investigator that the CI went to appellant's house to "conduct a welfare check" after a mutual friend contacted the CI and said that the friend had not "heard from [appellant] in a couple days." According to the CI, appellant was not home, and the CI was not able to contact him. The CI told the investigator that the CI then entered appellant's home, where the CI discovered items that the CI believed were related to child pornography.

The CI took photographs of items in appellant's house that were associated with child pornography and presented them to the investigator on November 14, 2022. The next day, the investigator applied for, and was granted, a warrant to search appellant's house for "[a]ny evidence related to the sexual exploitation of children." Although task-force members failed to recover child pornography during execution of the search warrant, investigators learned during the search that appellant stored items in a neighbor's detached garage. The neighbor subsequently consented to a search of his garage and, during the search, investigators located a chest belonging to appellant.

After appellant consented to a search of the chest, investigators discovered, among other things, two computers and two cell phones. Task-force investigators were then granted a warrant to search the electronic items found in the chest. One of the laptops found in the chest contained child pornography.

The district court determined that the CI was not acting as an agent or instrument of the government because "the government did not know of or acquiesce to the search" conducted by the CI. Thus, the district court denied appellant's suppression motion. The district court also denied appellant's request for a *Franks* hearing because appellant failed to make a "substantial preliminary showing" that the warrant to search appellant's house included a false statement made knowingly and intentionally, or with reckless disregard for the truth.

Appellant waived his right to a jury trial and proceeded with a stipulated-facts trial under Minn. R. Crim. P. 26.01. Respondent informed the district court that it was submitting facts only as to the first two counts of the amended complaint and, therefore, guilty verdicts on counts three and four were not expected. The district court subsequently found appellant guilty of counts one and two, but not guilty of counts three and four, and sentenced him to 102 months in prison. This appeal follows.

DECISION

I.

Appellant challenges the district court's decision to deny his motion to suppress. In reviewing such a challenge, we review the district court's factual findings for clear error and its legal determinations de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

"A factual determination is clearly erroneous if it is unsupported by the record." *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *rev. denied* (Minn. Nov. 16, 2004).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. U.S. Const. amend IV; Minn. Const. art. I, § 10. These constitutional protections act "as a restraint upon the *activities of the government*." *State v. Buswell*, 460 N.W.2d 614, 617 (Minn. 1990) (emphasis added). But the Fourth Amendment does not prohibit unreasonable searches by private individuals. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The exclusionary rule, therefore, does not prohibit the government from using evidence obtained through a private search. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Nevertheless, "the mere fact that a private individual made the search and seized the contraband does not always isolate his or her conduct from Fourth Amendment scrutiny." *Buswell*, 460 N.W.2d at 618. "If, in the light of all the circumstances of the case the private individual must be regarded as having acted as an instrument or agent of the [government] when conducting the search, the search is subject to Fourth Amendment constraints." *Id.* (quotations omitted). "The determination of whether the private person acted as an agent of the [government] is one of fact to be decided on a case-by-case basis after consideration of all the facts and circumstances relative to the search." *Id.*

"Whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes necessarily turns on the degree of the government's participation in the private party's activities." *Id.* Relevant factors to consider include "(1) whether the government knew of and acquiesced in the search and

(2) whether the search was conducted to assist law enforcement efforts or to further the private party's own ends." *Id.*; *State v. Jorgensen*, 660 N.W.2d 127, 131 (Minn. 2003) (applying two-factor test). Ultimately, however, "the diversity in factual settings involving private searches mandates an individual case-by-case analysis in which precedent plays but a small part," and the "final determination of whether the government's involvement was such as to transform a private search into a governmental search subject to the constraints of the Fourth Amendment is a question of fact to be resolved by the [district] court." *Buswell*, 460 N.W.2d at 618.

In this case, the district court determined that there was no evidence indicating that law enforcement (1) "knew of or acquiesced to the search"; (2) did anything to persuade [the] CI . . . to enter [appellant's] home, search his items, or retrieve any evidence from his home"; or (3) were told by the CI "in advance that [the CI] was planning on [going] into [appellant's] home." The district court also determined that, although the task force "ultimately received information on [appellant]," the CI was not directed by the task force to provide this information, and the CI was not financially compensated for the information. Thus, the district court concluded that appellant failed to establish the first *Buswell* factor.

Appellant argues that the district court erred in denying his motion to suppress "[b]ecause the record shows [that] the CI was an active agent of the [task force], which acquiesced to the CI's unlawful entry and search of [appellant's] home." To support his position, appellant relies on agency law, which states that the following three elements establish an agency relationship: "(1) consent to the agency; (2) action by the agent on behalf of the principal; and (3) exercise of control by the principal over the agent." *In re Ins. Agents' Licenses of Kane*, 473 N.W.2d 869, 873 (Minn. App. 1991) (citing *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290-91 (Minn. 1981)), *rev. denied* (Minn. Sept. 25, 1991). Appellant contends that, because these elements are satisfied, "the CI must be considered an agent or instrument of the [government]."

We disagree. First, appellant's argument that agency law supports a determination that the CI was an agent of the government was never argued below and was never considered by the district court. It is well settled that appellate courts "generally will not decide issues which were not raised before the district court." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts do not consider issues on appeal that were not presented to, and considered by, the district court). And parties are not allowed to change legal theories on appeal. *Thiele*, 425 N.W.2d at 582. As such, this argument is not properly before us.

Second, appellant cites no legal authority for his position that agency law dictates whether an individual is acting as an agent of the government for Fourth Amendment purposes. Rather, the proper inquiry "turns on the degree of the government's participation in the private party's activities," and we consider "whether the government knew of and acquiesced in the search." *Buswell*, 460 N.W.2d at 618. "If the government does not know of and acquiesce in the search, the search cannot be attributed to the government and the inquiry ends." *Jorgensen*, 660 N.W.2d at 131.

Here, the record supports the district court's determination that respondent did not know of or acquiesce in the search. The record reflects that the CI was "affiliated with [appellant] through the sales and use of controlled substances[,] specifically methamphetamine." The record also reflects that the CI entered appellant's house without appellant's consent to "conduct a welfare check" on appellant after a friend of appellant's contacted the CI and told the CI that the friend had not "heard from [appellant] in a couple days." Moreover, there is nothing in the record indicating that the task force knew in advance that the CI was planning on entering appellant's home, searching his items, or retrieving any evidence from appellant's home. Nor is there anything in the record indicating that the task force did anything to persuade the CI to enter appellant's home. Instead, a letter from the task force specifically states that the CI "was not directed" by the task force to provide information on appellant. And the record reflects that the "CI was compensated $0.00" for the information about appellant.

Appellant argues that respondent knew of and acquiesced to the CI's search of appellant's home because he was a "paid agent of the [government]" at the time of the search, and was never charged with burglary for his actions. But "[m]ere antecedent contact between law enforcement and a private party is inadequate to trigger application of the exclusionary remedy under the Fourth Amendment." *Buswell*, 460 N.W.2d at 619. "It is only when the government takes some type of initiative or steps to promote the search, that a private citizen is deemed to be an agent or instrument of the government." *Id.*

In this case, there is no indication that the task force took some type of initiative or steps to prompt the CI to search appellant's home. Instead, as noted above, the task force specifically stated that the CI "was not directed" by the task force to provide information on appellant. Although the CI had not been deactivated at the time the CI searched appellant's home, and had been given consideration for information related to previous law-enforcement activities, the CI was not compensated for the information provided to the task force related to appellant. And the fact that the CI was not charged with burglary after he entered appellant's home is not relevant to whether the task force knew of, or acquiesced in, the search *at the time* of the search. Therefore, the district court did not err in determining that respondent did not know of or acquiesce in the search.

Even if the district court erred in determining that respondent did not know of or acquiesce in the search, appellant is entitled to relief only if he can also show that the "search was conducted to assist law enforcement efforts or to further the private party's own ends." *Id.* at 618. The district court determined that it need not consider this factor because it determined that the first factor was dispositive. But the district court noted that, even if it considered this factor, "it would find that the search was conducted to further [the CI's] own ends as opposed to law enforcement's" because "there is no indication that [the CI's] entry into [appellant's] residence was in any way related to his past work as an informant—rather, [the CI] was motivated by a desire to check on [appellant]."

Appellant argues that the district court's finding that the CI was motivated by a desire to check on appellant is clearly erroneous because (1) "[t]here is no evidence that the [CI and appellant] had the type of relationship that would evoke a concern for one another's welfare," and (2) the fact that the CI turned over incriminating evidence to law enforcement undercuts the CI's claim that he was concerned about appellant's welfare. But appellant's argument amounts to an impermissible request for us to reweigh the evidence. *See In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (stating that appellate courts may not "reweigh the evidence when reviewing for clear error"); *see also State v. Thompson*, 988 N.W.2d 149, 158 (Minn. App. 2023) (applying *Kenney* in reviewing a criminal matter), *rev. denied* (Minn. June 20, 2023). Moreover, evidence related to the extent of the relationship the CI had with appellant is unnecessary to support the district court's decision. The record reflects that the CI knew appellant, was asked by a friend of appellant's to check on appellant's welfare, and then conducted such a welfare check. This evidence reasonably supports the district court's determination that the CI conducted the search to further his own ends, and there is nothing in the record to indicate that the search was conducted to assist law enforcement efforts. Accordingly, the district court did not err in denying appellant's motion to suppress because the record supports the district court's determination that appellant was not acting as an agent or instrument of respondent when the CI searched appellant's house.

II.

Appellant also challenges the district court's denial of his request for a *Franks* hearing. In reviewing such a challenge, we review for clear error the district court's findings on whether there was a statement or omission that was false or in reckless disregard for the truth. *State v. Andersen*, 784 N.W2d 320, 327 (Minn. 2010). But we review de novo whether the alleged misrepresentation or omission was material to the determination of probable cause. *Id.*

"A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause." *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989) (referencing *Franks*, 438 U.S. at 171-72). To challenge the truthfulness of factual statements made in an affidavit seeking a search warrant, a defendant must show that "(1) the affiant deliberately made a statement that was false or in reckless disregard of the truth, and (2) the statement was material to the probable cause determination." *Andersen*, 784 N.W.2d at 327 (quotations omitted) (explaining that the search warrant was valid because the alleged misrepresentations and omissions in the application were not material). No *Franks* hearing is necessary if there is an absence of evidence that an officer deliberately or recklessly omitted information material to the probable-cause determination. *See id.*

Appellant argues that he made a substantial showing to obtain a *Franks* hearing because "the statement in the application for a search warrant alleging that the CI had gone to [appellant's] home to do a welfare check was knowingly and intentionally false information crafted to ensure that the requested search warrant would be issued." The district court rejected this argument, concluding that no "misrepresentation was made at all." We conclude that the district court's determination is supported by the record.

As addressed above, the search warrant application states that the CI was asked by a friend of appellant's to conduct a welfare check on appellant. There is nothing in the record indicating that this statement was false. Although the CI had previously been paid for information provided to law enforcement related to criminal activity, there is nothing in the record indicating that the CI had provided the task force with information about appellant in the past. Moreover, the record reflects that the task force never directed the CI to search appellant's house, and there is no indication that the task force knew in advance that the CI intended to enter appellant's house. As such, the district court did not err in determining that appellant failed to make a substantial and preliminary showing that the search-warrant application contained a false statement that was made knowingly and intentionally, or with reckless disregard for the truth.

Moreover, appellant is unable to establish the second prong necessary to invalidate a warrant, that the alleged false statement was "material to the probable cause determination." *See Andersen*, 784 N.W.2d at 327. As the district court found, even if the CI falsely claimed that the CI was at appellant's house to conduct a welfare check, appellant "has not made a substantial preliminary showing that the purportedly false statement was necessary to the finding of probable cause" because the CI "saw what appeared to be child pornography at [appellant's] home." The finding of child pornography is unrelated to the reason the CI was in the home. As such, omitting the reason why the CI was in the home would not have impacted the probable cause to support the warrant itself. Therefore, the district court did not err in denying appellant's request for a *Franks* hearing.

Affirmed.