

App. 1

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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1959**

State of Minnesota,
Respondent,

vs.

Terry Lee West,
Appellant.

Filed November 6, 2017

Affirmed

Bjorkman, Judge

Polk County District Court
File No. 60-CR-11-1260

Lori Swanson, Attorney General, St. Paul, Minnesota;
and

Greg Widseth, Polk County Attorney, Scott A. Buhler,
Assistant County Attorney, Crookston, Minnesota (for
respondent)

Richard Kenly, Backus, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding
Judge; Bjorkman, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge.

For the second time, appellant challenges multiple controlled-substance convictions based on events that occurred in mid-2011. In December 2013, this court reversed his convictions based on improper denial of an omnibus hearing. On remand, a jury once again convicted appellant of third-degree and fifth-degree sale of a controlled substance, and fifth-degree possession of a controlled substance. He now argues that (1) the district court erred by not suppressing (a) two custodial statements that he made without receiving a *Miranda* warning, (b) evidence obtained when police executed a search warrant at his residence, and (c) his testimony from his initial sentencing hearing; (2) the district court abused its discretion by admitting audio and video recordings made during a controlled purchase; (3) the district court erred by imposing a mandatory minimum sentence under Minn. Stat. § 609.11 (2010); and (4) the district court abused its discretion by denying his request for a continuance to enable his expert witness to testify. We affirm.

FACTS

On May 20, 2011, police met with an informant who said that appellant Terry West was supplying him with marijuana for resale each month. That same day, police worked with the informant to complete a controlled purchase of marijuana at West's residence. Through audio and video recordings, police observed

App. 3

West give the informant two handfuls of marijuana and tell him he could pay for it later.

On June 1, based on the controlled purchase and the details the informant supplied, police obtained and executed a search warrant for West's residence and surrounding property. During the search, police discovered and seized more than 6,000 grams of usable marijuana, additional physical evidence consistent with the cultivation and sale of marijuana, and firearms and ammunition. Police also questioned West briefly without giving a *Miranda* warning, eliciting incriminating statements regarding the controlled purchase, then arrested him.

West was subsequently charged with (1) conspiring to commit third-degree sale of a controlled substance, (2) third-degree sale of a controlled substance, (3) fifth-degree possession of a controlled substance, (4) fifth-degree sale of a controlled substance, and (5) two counts of selling a controlled substance without affixing a tax stamp.

Twice while West was in jail, a police investigator met with West to serve him with property receipts or forfeiture notices. Each time, West became upset and made incriminating statements to the investigator. The investigator did not provide a *Miranda* warning but told West that he would not discuss his case.

After several substitutions of defense counsel and various pretrial motions, the district court determined that West waived his right to an omnibus hearing. West thereafter waived his right to a jury trial, the

App. 4

state dismissed the conspiracy and tax-stamp charges, and the three remaining controlled-substance charges were submitted to the district court on a stipulated record. The district court found West guilty and conducted a sentencing hearing to determine whether West possessed a firearm at the time of the offenses, triggering a mandatory minimum sentence under Minn. Stat. § 609.11. West elected to testify at the hearing. He addressed both his firearms collection and his marijuana business, including the controlled purchase.

Shortly after the sentencing hearing, the state charged West with perjury based on his testimony. At the perjury trial, the district court admitted the recordings of the controlled purchase, the physical and photographic evidence from the search of West's residence, and West's statements to police at the time of the search and while he was in jail. A jury found West guilty, and we affirmed his perjury conviction. *State v. West*, No. A16-0614 (Minn. App. Jan. 30, 2017).

In the meantime, West appealed his controlled-substance convictions, challenging the district court's determination that he had waived his right to an omnibus hearing. We reversed and remanded, instructing the district court to permit West to file a suppression motion and, if any evidence were to be suppressed, to vacate West's conviction and conduct a new trial. *State v. West*, No. A13-0198 (Minn. App. Dec. 30, 2013), *review denied* (Minn. Mar. 18, 2014).

On remand, West moved to suppress the evidence obtained from the execution of the search warrant, as

App. 5

well as his statements to law enforcement at the time of the search and while he was in jail. The district court conducted an omnibus hearing, denied West's motion to suppress the warrant and his jail statements, granted West's motion to exclude statements he made at the time of the search, and ordered a new trial.

West subsequently moved to "exclude" from the new trial his testimony from the prior sentencing hearing. The district court conducted a second omnibus hearing and denied the motion. West again waived his right to a jury trial and agreed to submit the controlled-substance charges to the court on the testimony and exhibits from the perjury trial. The district court found West guilty of all three charges and determined that he possessed firearms at the time of two of the offenses. The district court sentenced West to 36 months' imprisonment. West appeals.

DECISION

I. The district court did not err by denying West's motions to suppress.

"When reviewing a district court's pretrial order on a motion to suppress evidence, [appellate courts] review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted).

West argues that the district court erred by not suppressing his two jail statements, evidence obtained

App. 6

from the warranted search, and his sentencing testimony. We address each argument in turn.

A. West's Jail Statements

West argues that the district court erred by failing to suppress the incriminating statements he made to police while in jail because he was not given a *Miranda* warning.¹ “Statements made by a suspect during custodial interrogation are generally inadmissible unless the suspect is first given a *Miranda* warning.” *State v. Edrozo*, 578 N.W.2d 719, 724 (Minn. 1998). But a *Miranda* warning is required only if a suspect “is both in custody and subject to interrogation.” *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010). We determine whether an individual was interrogated by independently examining the totality of the circumstances based on the facts as found by the district court. *State v. Jackson*, 351 N.W.2d 352, 355 (Minn. 1984).

Interrogation includes both express questioning and “its functional equivalent,” meaning “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

¹ The state's appellate brief suggests in a footnote that West is collaterally estopped from raising this argument because it was decided adversely to him in the perjury case. The state does not substantively analyze the collateral-estoppel factors or address critical distinctions between the perjury case and this controlled-substance case. Accordingly, we decline to consider collateral estoppel.

App. 7

incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90 (1980). Indeed, “even express questions are not always interrogation” if not reasonably likely to elicit a response that is incriminating. *State v. Tibiatowski*, 590 N.W.2d 305, 309 (Minn. 1999). The crux of the inquiry is whether, from the suspect’s perspective, the police conduct reflects “a measure of compulsion above and beyond that inherent in custody itself.” *Edrozo*, 578 N.W.2d at 724-25.

The district court made the following findings regarding West’s interactions with the investigator. When the investigator met with West at the jail on June 13 to serve him with property receipts or forfeiture notices, West spontaneously began to talk about his case. The investigator told West he did not want to talk about the case without West’s lawyer present and offered to organize a meeting with West’s lawyer. But West continued to talk to the investigator and made incriminating statements. The investigator returned on June 30 with another property receipt. This time he brought an audio recorder. When West again began to speak about his case, the investigator repeated his caution and reiterated his willingness to organize a meeting with West and his lawyer. West continued to make incriminating statements, which the investigator recorded.

West contends that these circumstances amount to interrogation because the investigator “hoped the disclosures would be incriminating” and operated a hidden recorder during the second jail encounter. We

App. 8

are not persuaded. A police officer does not interrogate a suspect simply by hoping, or even planning for the possibility, that he will incriminate himself. *See id.* at 725 (upholding admission of statements defendant made to a fellow suspect while they were left alone with a hidden recording device). And while West was tired and upset at the time of the conversations, nothing in the record indicates that the investigator caused or took advantage of West's condition by asking about his alleged offenses. On this record, we conclude that the investigator did not subject West to interrogation, so no *Miranda* warning was required. Accordingly, the district court did not err in denying West's motion to suppress his incriminating statements to the investigator.²

B. Search Warrant

When reviewing the decision to issue a search warrant, we consider only whether the issuing judge had "a substantial basis for concluding that probable cause existed." *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). Our review is limited to the information in the warrant application and the supporting affidavit. *Id.* at 384-85. We consider the totality of the circumstances alleged to determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v.*

² West also argues, without any supporting legal authority, that the district court erred in relying on the jail statements in determining West's guilt. This argument fails because the district court did not err in declining to suppress those statements.

App. 9

Souto, 578 N.W.2d 744, 747 (Minn. 1998) (quotation omitted). We defer to the issuing judge's determination of probable cause. *State v. Holiday*, 749 N.W.2d 833, 839 (Minn. App. 2008).

West argues that the search warrant was invalid because it was based on stale information. The "freshness of the information" in a warrant application bears on probable cause. *Souto*, 578 N.W.2d at 747. Indications of "ongoing criminal activity" remain fresh for a longer period of time than a single instance of criminal conduct. *Id.* at 750. For example, a span of weeks between initial information of illegal activity and the warrant application is permissible when the activity involves "repeated sales of drugs." *State v. Cavegn*, 356 N.W.2d 671, 673 (Minn. 1984) (quotation omitted).

West contends that the information police gleaned from the informant and the controlled purchase on May 20 was stale by June 1 because there was no evidence of an ongoing criminal operation. We disagree. The warrant application contains a detailed description of precisely such an operation. The informant told the police officers that he had been selling marijuana for ten years. He indicated that he stopped obtaining marijuana from his prior source "one or two years ago" and had "recently" been buying from West on a monthly basis. The same day, the informant obtained marijuana from West during a controlled purchase that police captured on a portable recording device. During the purchase, West gave the informant two handfuls of what was subsequently confirmed to be marijuana, telling him that he could pay for it later.

Also visible in the room during the sale was what appeared to be a growing marijuana plant.

This information indicates an ongoing operation in which West regularly, over the course of one or two years, sold the informant substantial quantities of marijuana for resale. We note the informant supplied much of the information against his own penal interest. *See Souto*, 578 N.W.2d at 750 (stating that admissions against interest bolster an informant's credibility). And his description of his drug partnership with West was corroborated when, during the controlled purchase, West readily provided a substantial quantity of marijuana to the informant and trusted the informant to pay for it at a later date. *See Holiday*, 749 N.W.2d at 841 (stating that corroboration of even minor details "lends credence to an informant's tip and is relevant to the probable-cause determination"). In sum, the totality of the circumstances presented in the warrant application amply establish probable cause to believe that West had been engaged in ongoing drug sales before and on May 20, such that police were reasonably likely to find evidence of that criminal activity on June 1. The district court did not err in denying West's motion to suppress evidence obtained in the execution of the search warrant.

C. West's Sentencing Testimony

A defendant's trial testimony generally is admissible against him in later proceedings. *Harrison v. United States*, 392 U.S. 219, 222, 88 S. Ct. 2008, 2010

(1968). But if the defendant's prior testimony "was compelled by the admission of illegal evidence," it should be suppressed. *State v. Clark*, 296 N.W.2d 372, 375 (Minn. 1980).

West argues that he was compelled to testify at his sentencing hearing because "illegal evidence" was admitted at his first trial. He points to the statement he made to law enforcement at the time of the search agreeing that he had "fronted" marijuana to the informant during the controlled purchase; the statement was suppressed on remand because it was obtained in violation of *Miranda*. We agree with the district court that the admission of this evidence did not compel West's sentencing testimony. Indeed, West's own arguments belie his claim of compulsion. Most notably, West contends that he testified at the sentencing hearing to "convince [the district court] that he did not possess firearms for the purpose of drug dealing." The earlier admission of his unlawfully obtained statement about providing marijuana to the informant had no bearing on that purpose. On this record, we discern no error in the admission of West's testimony from the sentencing hearing.³

³ West again asserts without any supporting legal authority that the district court erred in relying on his sentencing testimony to find him guilty. We disagree because the district court did not err in denying the motion to suppress this testimony.

II. West waived his challenge to the admission of audio and video recordings of the controlled purchase.

Generally, we review a district court's evidentiary rulings for an abuse of discretion. *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). A defendant appealing the admission of evidence has the burden to show both error and resulting prejudice. *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). West gives only cursory treatment to his evidentiary challenge in his brief, offering neither legal argument nor supporting authority. Mere assertion of error is insufficient to preserve the issue for appeal. See *Brooks v. State*, 897 N.W.2d 811, 818-19 (Minn. App. 2017), *review denied* (Minn. Aug. 8, 2017). We conclude that West has waived this evidentiary challenge.

III. The district court did not err by imposing a three-year sentence based on West's possession of firearms at the time of his offenses.

A defendant who possesses a firearm at the time he commits a felony controlled-substance offense is subject to a mandatory prison sentence of at least three years. Minn. Stat. § 609.11, subds. 5, 9. Possession of a firearm may be actual or constructive, though a court considering constructive possession should examine "all aspects of the firearm," including its nature, type, condition, and location relative to the drugs, to determine the degree to which its presence increased the risk of violence. *State v. Royster*, 590 N.W.2d 82, 85

(Minn. 1999). Where, as here, the relevant facts are undisputed, application of Minn. Stat. § 609.11 is a question of law, which we review de novo. *See State v. Kolla*, 672 N.W.2d 1, 6 (Minn. App. 2003).

The district court found, and West does not dispute, that West constructively possessed 12 firearms in his residence when police conducted the search. Many of the firearms were loaded and readily accessible to him at that time, including two loaded pistols that were within his reach when the police arrived. West simultaneously possessed in an outbuilding on his property a quantity of marijuana well in excess of the felony threshold amount. And West does not directly challenge the district court's finding that his possession of numerous firearms substantially increased the risk of violence.

West contends only that the mandatory minimum sentence should not apply because there was little or no marijuana – less than the quantity required for a felony – found within his residence, where he stored the firearms. In essence, he urges this court to read a proximity requirement into Minn. Stat. § 609.11 in cases of constructive possession. We expressly declined to do so in *Salcido-Perez v. State*, 615 N.W.2d 846, 848 (Minn. App. 2000) (citing *Royster*, 590 N.W.2d at 85), *review denied* (Minn. Sept. 13, 2000), and West has identified no legal authority for us to deviate from that holding. Accordingly, we conclude that the district court did not err by sentencing West under Minn. Stat. § 609.11.

IV. The district court did not abuse its discretion by denying a trial continuance.

A district court has discretion to grant or deny a trial continuance. *State v. Larson*, 788 N.W.2d 25, 30-31 (Minn. 2010). This discretion affords the district court the ability to control the timing of a trial, which “is critical in ensuring sound judicial administration and a speedy trial for all criminal defendants.” *State v. Sanders*, 598 N.W.2d 650, 655 (Minn. 1999). Factors that weigh against granting a continuance include lack of diligence in preparing for trial, *see State v. Courtney*, 696 N.W.2d 73, 82 (Minn. 2005), and previous continuances granted to the defendant, *Sanders*, 598 N.W.2d at 654. We will not reverse a conviction for denial of a continuance unless the district court abused its discretion and the denial prejudiced the defendant by materially affecting the outcome of the trial. *Larson*, 788 N.W.2d at 30-31.

West argues that the district court abused its discretion by denying him a trial continuance to accommodate his expert witness’s schedule. And he asserts that the denial was prejudicial because it deprived him of “the ability” to have his expert testify. We consider the district court’s ruling in context. West’s trial was scheduled to begin on Monday, April 18, 2016. Counsel’s April 14 continuance request indicated the defense expert was not available until April 22. West had already received two trial continuances due to the same expert witness’s scheduling conflicts. Those continuances and other scheduling delays had already delayed the trial more than ten months. In denying

App. 15

West's third continuance request, the district court reminded West that he had received several months' notice of the April 18 trial date. The district court also noted that it provided as close to a day certain for trial as possible and "it's up to counsel to make sure that their witnesses are lined up and available." Although the court denied West's request, it indicated that it would adjust the trial schedule, if possible, to accommodate West's expert witness. But West elected to forgo a jury trial and submit the controlled-substance charges to the district court based on the record from his perjury trial, without testimony from the expert witness.

On this record, we discern no abuse of discretion by the district court. Indeed, the record demonstrates the district court's repeated efforts to afford West an opportunity to present expert testimony while also moving West's protracted case toward a final resolution and simultaneously maintaining a fair and organized court calendar. Striking such a balance is exacting and careful work that falls within a district court's broad discretion. The district court's denial of West's continuance request does not amount to an abuse of discretion.

Affirmed.

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF POLK NINTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Terry Lee West,

Defendant.

ORDER

Court File No.

60-CR-11-1260

60-CR-13-1098

The above-entitled matters came on for an omnibus hearing on August 11, 2014, at the Polk County Justice Center in Crookston, Minnesota pursuant to the Defendant's motions to suppress certain statements he made to law enforcement and suppress evidence gained from a search warrant.

Scott Buhler, Assistant Polk County Attorney, appeared on behalf of the State of Minnesota.

Defendant Terry Lee West personally appeared with his attorney, Rich Kenly.

At the hearing, the Court heard testimony from Deputy Brian Steffen, Investigator Justin Swang, Deputy Nathan Rasch, Sergeant Michael Norland, and Sargent Phil Juve. The State of Minnesota also submitted discovery in opposition to the Defendant's motion.

A briefing schedule was then established, and the Court took this matter under advisement as of October 6, 2014.

App. 17

Based on the same and on all files and records herein, and being duly advised in the premises, IT IS ORDERED:

1. The Defendant's motion to suppress evidence discovered as a result of the execution of a search warrant on Defendant's residence is DENIED.

2. The Defendant's motion to suppress statements made to law enforcement officers on June 1, 2011 is GRANTED

3. The Defendant's motion to suppress statements made to law enforcement officers on June 13, 2011 and June 30, 2011 is DENIED.

4. The attached memorandum is made a part of this Order.

Dated: 1/2/15

BY THE COURT:

/s/ Tamara L. Yon

Tamara L. Yon

Judge of District Court

MEMORANDUM

INTRODUCTION

On June 3, 2011, Defendant Terry Lee West was charged with three crimes: two counts of Controlled Substance Crime in the Third Degree – Sale of Marijuana Mixture in violation of Minnesota Statute§ 152.023, Subd. 1(5), and one count of Sale of

Marijuana without an affixed tax stamp in violation of Minnesota Statute § 297D.09, Subd. 1a. On July 7, 2011 the Complaint was amended to include the additional crimes of: 1) Controlled Substance in the Fifth Degree – Possession of Marijuana in violation of Minnesota Statute § 152.025, Subd. 2(a)(1), 2) Sale of Marijuana without an affixed tax stamp in violation of Minnesota Statute § 297D.09, Subd. 1a; and 3) Controlled Substance in the Fifth Degree – Sale of Marijuana in violation of Minnesota Statute § 152.025, Subd. 1(a)(1).

This case is now before the Court pursuant to the Defendant's motions to suppress certain statements he made to law enforcement and to suppress evidence gained from a search warrant. The Defendant seeks to suppress the evidence gained from a search warrant on the grounds that there was not probable cause to issue the warrant. The Defendant seeks to suppress statements made to law enforcement on June 1, June 13, and June 30, 2011 on the grounds that he was in custody and officers failed to give him his *Miranda* rights.

STATEMENT OF FACTS

On May 20, 2011, Investigator Justin Swang, Deputy Nathan Rasch, and Sergeant Michael Norland went to the residence of Adam and Tiffany Sterry, whom they had been investigating for selling marijuana. Previously, law enforcement had done at least four controlled buys of marijuana involving Mr. and Ms. Sterry using a confidential informant.

Tiffany Sterry was home when the officers arrived. After being informed of her rights, Ms. Sterry informed the officers that her husband obtained marijuana from a residence near Lengby, Minnesota. Ms. Sterry consented to a search of her residence. During this search, the officers found a 9mm semi-automatic handgun in a leather holster together with a receipt for the handgun. The receipt had the name "Terry West" on it.

While the officers were searching the residence, Adam Sterry came home. After being advised of his rights, Mr. Sterry informed the officers that he obtained his marijuana from Defendant Terry Lee West, who lived on U.S. Highway 2, east of Lengby, in Polk County, Minnesota. Mr. Sterry also told the officers that the Defendant supplied him with marijuana about once a month and gave him a handgun.

Later in the day on May 20, 2011, the officers had Mr. Sterry place a recorded phone call to the Defendant to obtain marijuana. Mr. Sterry informed the Defendant that he would stop over later that day. The officers provided Mr. Sterry with a portable video recording device, a transmitter, and \$480 in pre-recorded buy-money. Mr. Sterry then went to Defendant's residence. Once inside, the officers heard him ask for "a couple," and a male voice respond in the affirmative. A few minutes later, Mr. Sterry exited the Defendant's residence and provided the officers with two plastic bags containing marijuana and all \$480 of the pre-recorded money. He told the officers that the Defendant gave him the marijuana, saying he could pay for it later.

Deputy Rasch later reviewed the video from the surveillance, which showed the Defendant grabbing two handfuls of marijuana from behind a blue tote, setting it on the table, and removing a grocery bag from the blue tote (the grocery bag was similar to those found in Mr. Sterry's residence). Also visible on the video were electrical cords connected to an electric panel, a fan, plastic on the window, red and blue water lines, and what appeared to be a growing marijuana plant.

Deputy Rasch later obtained records from Wild Rice Electric Company which indicated substantially different usage of electricity at the Defendant's residence than normal. Based upon this information, Deputy Rasch believed that the Defendant was growing marijuana inside of his residence and diverting electricity to do so.

On June 1, 2011, using the above information, Officer Scott Jordheim obtained a search warrant from the Honorable Judge Jeffrey S. Remick to search the Defendant's residence. At approximately 3:30 P.M. that same day, officers executed the search warrant. At least eight officers were involved in executing the search warrant. When the officers arrived, their guns were drawn and they ordered the Defendant out of his house. The Defendant immediately came out of his house, was handcuffed behind his back, and led away from his house.

While handcuffed, the Defendant was surrounded by multiple officers and questioned. Deputy Rasch

questioned the Defendant about a marijuana grow, which the Defendant denied. Investigator Swang informed Defendant that he should cooperate with Deputy Rasch so that he could stay at his house tonight rather than going straight to jail. Deputy Rasch and Investigator Swang continued to question the Defendant about selling marijuana. When Defendant continued to deny it, Deputy Rasch informed the Defendant that they already knew he sold marijuana to Adam Sterry, that Mr. Sterry "sold him out," and that it was in his best interest to cooperate with officers and answer questions. The Defendant then admitted to selling some marijuana to Mr. Sterry, but denied his involvement in growing marijuana. Deputy Rasch again asked the Defendant to answer his questions and give a statement. The Defendant replied that he would not say anything without talking to his lawyer first, to which Deputy Rasch responded, "well then right now you're being placed under arrest." At this point, Deputy Rasch stopped talking to the Defendant.

During this entire time, the Defendant remained handcuffed and was never read his *Miranda* rights. The Defendant's placement did not change after Deputy Rasch told him he was under arrest: he remained handcuffed, standing in the same place. A bit later, Sergeant Phil Juve placed the Defendant in the back of his squad car and transported him to the Polk County Jail.

Nearly two weeks later, on June 13, 2011, Investigator Swang went to the Polk County Jail to serve numerous property receipts and forfeiture notices on the Defendant. He did not record the service of these

documents upon the Defendant. Investigator Swang testified that when he did so, the Defendant began to talk to him about his case. Investigator Swang advised Defendant that he did not want to talk about his case, because the Defendant was represented by a lawyer, and that if Defendant wished to speak with him about his case, he would organize a meeting later when Defendant's lawyer could be present. Despite this, the Defendant nevertheless made incriminating statements to Investigator Swang regarding his case. Investigator Swang testified that Defendant seemed upset and was crying during the conversation. The Defendant informed Investigator Swang that he was worried and was having trouble sleeping. Investigator Swang sat with the Defendant for approximately an hour until the Defendant calmed down. Investigator Swang testified that he did not ask the Defendant about his case and remained as long as he did because the Defendant seemed worried and scared about what would happen to him and his property.

A few weeks later, on June 30, 2011, Investigator Swang again visited the Defendant at the jail to give him a property receipt for a trailer. This time, Investigator Swang recorded the conversation. As before, the Defendant began to talk to Investigator Swang about his case. As before, Investigator Swang cautioned the Defendant against talking about the case because he was represented by a lawyer, and that if Defendant wished to speak with him about his case, he would organize a meeting later when Defendant's lawyer could be present. The Defendant indicated that he would not

speak about his case. However, the Defendant then made incriminating statements to Investigator Swang. Investigator Swang did not ask any questions meant to elicit incriminating information from the Defendant.

The Defendant now seeks to suppress the evidence obtained from the search of his residence as well as his statements to law enforcement made on June 1, 2011, June 13, 2011, and June 30, 2011. The Court analyzes each issue below.

ANALYSIS

1. PROBABLE CAUSE TO ISSUE A SEARCH WARRANT

A judge may issue a search warrant upon the showing of probable cause. U.S. Const. Amend IV; Minn. Const. art I, § 10. There is sufficient probable cause for a search warrant when the application “contain[s] information which would warrant a person of reasonable caution to believe that the articles sought are located at the place to be searched.” *State v. Gail*, 713 N.W.2d 851, 858 (Minn. 2006). When reviewing a district court’s probable cause determination for issuing a search warrant, the reviewing court should afford the determination great deference. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). The reviewing court considers whether the judge who issued the warrant had a “‘substantial basis’ for concluding that probable cause existed.” *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998) (quoting *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995)). This is different from the *de novo*

standard of review a court employs when evaluating a probable cause determination made by police for a warrantless search. *Rocheftort*, 631 N.W.2d at 805.

In this case, the Defendant argues that there was insufficient probable cause for the search warrant because the evidence in the application was stale and insufficient to reliably establish that he was engaged in a long-term ongoing criminal enterprise involving the regular sale of marijuana. Thus, the Court must determine whether Judge Remick had a substantial basis to conclude that a person of reasonable caution would believe that evidence relating to a marijuana-grow operation and/or the sale of marijuana would be found at the Defendant's residence.

The application provided to the Court at the time the warrant was issued contained the following information:

- On May 20, 2011, Investigator Justin Swang, Deputy Nathan Rasch, and Sergeant Michael Norland went to the residence of Adam and Tiffany Sterry whom they had been investigating for selling marijuana;
- Tiffany Sterry informed them that recently, Mr. Sterry obtained his marijuana from a residence near Lengby, Minnesota;
- Adam Sterry informed officers that for the past one to two years, he obtained the marijuana he sold from Defendant Terry Lee West, who lived on U.S. Highway 2, east of Lengby,

Minnesota; he also told them that the Defendant gave him a handgun;

- The search of the Sterry residence turned up a 9mm semi-automatic handgun in a leather holster with a receipt for the handgun with the name "Terry West" on it;
- Since 2009, officers had done at least four controlled buys of marijuana with Mr. and Ms. Sterry using a confidential informant;
- On May 20, 2011, officers worked with Mr. Sterry to do a controlled buy of marijuana from the Defendant; during which Mr. Sterry obtained two plastic bags containing marijuana from the Defendant and did not have to pay any money for the marijuana up front, as the Defendant told him he could pay for it later;
- On the video from the controlled buy, Deputy Rasch saw the Defendant grab two handfuls of marijuana from behind a blue tote, set it on the table, and remove a grocery bag similar to those found in Mr. Sterry's residence from the blue tote. Also visible on the video were electrical cords connected to an electric panel, a fan, plastic on the window, red and blue water lines, and what appeared to be a growing marijuana plant;
- Records from Wild Rice Electric Company indicated substantially different usage of electricity during January to March 2010 than through that same period in 2011; and

- Based on all the above information, Deputy Rasch believed that Defendant was growing marijuana inside of his residence and that Defendant may have been diverting electricity to do so.

Judge Remick found this information sufficient to conclude that a person of reasonable caution would believe that evidence relating to a marijuana-grow operation and/or marijuana would be found at the Defendant's residence. This Court agrees. The information provided indicated that the Defendant and Mr. Sterry had an ongoing relationship such that the Defendant trusted Mr. Sterry to pay him for his marijuana at a later date; that Mr. Sterry had obtained marijuana from the Defendant in the past; that Mr. Sterry had been selling marijuana obtained from the Defendant for an extended period of time; and that the Defendant had marijuana plants in his possession. When taken as a whole, the affidavit provides a sufficient basis for a person of reasonable caution to conclude that evidence relating to a marijuana-grow operation and/or the sale of marijuana would be found in the Defendant's residence.

The Defendant also alleges that the above evidence was too stale to support issuing a search warrant. When deciding whether information is stale, a court must examine a number of factors, including the "age of the person supplying the information, whether there is any indication of ongoing criminal activity, whether the items sought are innocuous or incriminating, and whether the property sought is easily

disposable or transferable.” *State v. DeWald*, 463 N.W.2d 741, 746 (Minn. 1990). When the items sought in a search are of “enduring utility to their taker,” it may take months before the evidence is stale. *Id.*, (quoting, *State v. Flom*, 285 N.W.2d 476, 477 (Minn. 1979)). In addition to the above factors, the character of a crime is also important. For crimes that are of a protracted and continuous nature, the time frame is of less significance. *Id.*

Minnesota courts have found that growing marijuana is a continuous process, and that evidence of marijuana growth is not stale as to invalidate a search warrant even a few months in advance of the issuance. *See, State v. Velishek*, 410 N.W.2d 893, 896 (Minn. Ct. App. 1987). Moreover, the fact that someone has personally seen marijuana in a building is sufficient to uphold a search warrant. *Id.*, citing, *State v. Buchholtz*, 295 N.W.2d 629, 632 (Minn. 1980).

In this case, given the nature of the criminal activity (growing marijuana) and given that the evidence of the Defendant’s involvement was obtained only eleven days before the execution of the warrant, this Court finds that the evidence was NOT stale,

Thus, for the foregoing reasons, the Defendant’s motion to suppress evidence obtained from the search of his residence is denied.

2. DEFENDANT'S FIFTH AMENDMENT RIGHTS - MIRANDA

The Defendant also seeks to suppress statements he made to law enforcement on June 1, June 13, and June 30, 2011, claiming that he was in custody and was questioned without receiving a *Miranda* warning.

Under the Fifth Amendment to the United States Constitution, no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. In certain situations where a suspect is being questioned, the United States Supreme Court requires the interrogator to give the suspect a *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436 (1966). Before a person's rights to *Miranda* attach, the person must simultaneously be in custody and be interrogated. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court required that a suspect be specifically warned of his/her Fifth Amendment rights before a custodial interrogation. A "custodial interrogation" occurs when a person is questioned by law enforcement officers after being taken into custody or otherwise denied his/her freedom of action in any significant way. *Id.* at 444. "The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

In this case, on June 1, 2011, the Defendant had been ordered from his home by officers with guns drawn, handcuffed, and then questioned by officers about growing and selling marijuana. Law enforcement told the Defendant that they already had enough information to charge him with a crime and that it was in his best interest to cooperate with them and admit to committing a crime. The Defendant was also told that he may be able to stay in his home if he answered their questions, but would be taken immediately to jail if he didn't. The Court finds that the nature of this questioning was meant to elicit incriminating information from the Defendant, and was interrogative in nature.

In contrast, on June 13, 2011 and June 30, 2011, the Defendant's conversations with Investigator Swang were not interrogative in nature. On both occasions, Investigator Swang met with the Defendant for the purpose of serving documents on him. Both times, Investigator Swang specifically informed the Defendant that he did not wish to talk about his case, and that if the Defendant wanted to talk about his case, Investigator Swang would set up a meeting with the Defendant and his attorney later. Further, Investigator Swang did not ask the Defendant questions about his case that were meant to, or that he should have known would, elicit incriminating statements. Therefore, the conversations the Defendant had with Investigator Swang on June 13, 2011 and June 30, 2011 were not interrogative in nature. As such, the Defendant's

Miranda rights did not attach, and his motion to suppress these statements must be denied.

The next issue is whether the Defendant was in custody for purposes of triggering *Miranda* on June 1, 2011. The Court addresses this issue below.

In Minnesota, “[a]n interrogation is custodial if, based on all the surrounding circumstances, a reasonable person under the circumstances would believe that he or she was in police custody of the degree associated with formal arrest.” *State v. Vue*, 797 N.W.2d 5, 10-11 (Minn. 2011) (quoting *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010) (citation omitted)). The Minnesota Supreme Court has identified the following factors as indicating a person may be in custody:

- (1) the police interviewing the suspect at the police station;
- (2) the suspect being told he or she is a prime suspect in a crime;
- (3) the police restraining the suspect’s freedom of movement;
- (4) the suspect making a significantly incriminating statement;
- (5) the presence of multiple officers; and
- (6) “a gun pointing at the suspect.”

Vue, 797 N.W.2d at 11, citing *State v. Staats*, 658 N.W.2d 207, 211 (Minn. 2003). However, the mere fact that an interrogation did not take place at a police station, in and of itself, does not require a determination that the questioning was not custodial in nature. See *State v. Sirvio*, 579 N.W.2d 478, 481 (Minn. 1998).

The Minnesota Supreme Court has also identified factors to indicate when a suspect is NOT in custody:

(1) questioning the suspect in his or her home; (2) law enforcement expressly informing the suspect that he or she is not under arrest; (3) the suspect's leaving the police station without hindrance; (4) the brevity of questioning; (5) the suspect's ability to leave at any time; (6) the existence of a nonthreatening environment; and (7) the suspect's ability to make phone calls.

Vue, 797 N.W.2d at 11, citing *Thompson*, 788 N.W.2d at 491. Though not exhaustive, these factors are a good indication of whether or not a person is in custody.

Whether a suspect is in custody is an objective inquiry. *Yarborough v. Alvarado*, 541 U.S. 652, 662-63 (2004). A court must look at the totality of the circumstances, and no single factor is determinative. *Thompson*, 788 N.W.2d at 491.

In this case, there are factors that are for and against the Defendant being in custody on June 1, 2011. For example, the Defendant was not at a police station or in a confined room that would restrict his movement. The Defendant also voluntarily answered the officer's questions until he refused to speak any more without his attorney. The Defendant was interviewed for a relatively short period of time. These factors weigh against the Defendant being in custody.

On the other hand, the Defendant was handcuffed and surrounded by multiple officers after being ordered from his home at gunpoint. The Defendant was then told that he was the prime suspect, if not the only

suspect, in the crimes the officers claimed he had committed and was never told he was NOT under arrest. The officers never removed his handcuffs or allowed him to move anywhere unescorted by officers. While there is no indication guns were trained upon the Defendant once he was handcuffed, there were guns pointed at him until the handcuffs were secure. The questioning by officers was clearly interrogative in nature and meant to elicit incriminating statements by the Defendant, and the Defendant did in fact make incriminating statements to the officers. These factors weigh toward the Defendant being in custody.

After considering the totality of the circumstances, and reviewing the applicable law, the Court finds that a reasonable person in the Defendant's position on June 1, 2011 *would believe* that he or she was in custody for purposes of triggering *Miranda*. Although there are factors both for and against the Defendant being in custody, the undisputed facts are that the Defendant was never told he was not under arrest, was handcuffed the entire time, escorted everywhere he went by at least one officer, and was often surrounded by multiple officers. During questioning, the Defendant was told he was a prime suspect to the crimes of selling and growing marijuana, told that things would turn out better if he provided officers with further information, and told he was in trouble. Ultimately, the Defendant was jailed after the interrogation.

Based on the above facts, the Court finds that a reasonable person would believe that he or she was in police custody of the degree associated with formal

arrest, which required a *Miranda* warning. Because no such warning was given, the Defendant's statements to officers on June 1, 2011 outside of his home must be suppressed. See *Wong Sun v. United States*, 371 U.S. 471 (1963); see also *State v. Dakota*, 217 N.W.2d 748 (Minn. 1974).

CONCLUSION

For the foregoing reasons, the Defendant's motion to suppress evidence gained from the search of his residence pursuant to a search warrant is *DENIED*. The Defendant's motion to suppress statements made on June 1, 2011 is *GRANTED*. The Defendant's motion to suppress statements made on June 13, 2011 and June 30, 2011 is *DENIED*.

App. 34

STATE OF MINNESOTA
IN SUPREME COURT

A16-1959

State of Minnesota,
Respondent,

vs.

Terry Lee West,
Petitioner.

ORDER

(Filed Jan. 16, 2018)

Based upon all the files, records, and proceedings
herein,

IT IS HEREBY ORDERED that the petition of
Terry Lee West for further review be, and the same is,
denied.

Dated: January 16, 2018 BY THE COURT:

/s/ Lorie S. Gildea
Lorie S. Gildea
Chief Justice
