

*This opinion is nonprecedential except as provided by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
A19-2009**

State of Minnesota,
Respondent,

vs.

Romeo Deville Eady,
Appellant.

**Filed January 11, 2021
Affirmed in part, reversed in part, and remanded
Bryan, Judge**

Hennepin County District Court
File No. 27-CR-18-8623

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Ross, Presiding Judge; Florey, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal from his convictions for unlawful possession of a firearm, unlawful possession of ammunition, and various controlled-substance crimes, appellant challenges the district court's decision to deny his motion to suppress evidence and to enter separate convictions for unlawful possession of a firearm and unlawful possession of

ammunition. First, we conclude that because appellant asserts new bases to challenge the second search warrant that he did not raise to the district court, he forfeited appellate review of this issue. Second, we conclude that because the district court improperly convicted appellant for both counts of possession, the conviction for possession of ammunition should be vacated. We affirm in part, reverse in part, and remand for the district court to vacate the judgment of conviction for possession of ammunition.

FACTS

On March 22, 2018, Deputy Jeff Barsness applied for a search warrant to conduct a canine search of the door seam of an apartment in Bloomington, Minnesota. According to Barsness's affidavit, the following facts justified a search of the apartment's door seam. Barsness learned that a confidential informant (CI) had recently purchased marijuana from appellant Romeo Deville Eady. The CI advised that Eady lives at the apartment in question, that the CI purchased marijuana multiple times from Eady at the apartment within the past two-to-three months, and that the CI has seen Eady in possession of firearms and large amounts of money. Eady is a convicted felon with a history of narcotics convictions and is prohibited from possessing firearms. Barsness also received a police report dated February 18, 2018, that listed Eady and his girlfriend as persons involved in a possible domestic disturbance at the apartment. The affidavit did not identify Eady's girlfriend by name. Based on these facts in Barsness's affidavit, the district court granted the search warrant.

On March 30, 2018, Officer Heinzman executed the search warrant with the building owner's permission. The canine gave a positive indication of narcotics at the door

seam of Eady's apartment. In addition, Heinzman detected the odor of marijuana coming from inside of the apartment. Based on this information, Barsness applied for a second search warrant, this time to search the apartment, along with any associated storage units and vehicles, for evidence of controlled-substance, drug-trafficking, and firearms offenses. Barsness's affidavit included all of the facts from the first affidavit plus the results of the canine search, the fact that Heinzman could smell marijuana coming from the inside of the apartment, the fact that an analyst from the United States Postal Service confirmed that "[T.S.] is still receiving mail in [the] apartment," and the fact that Eady posted videos on YouTube of him associating with other people who were possessing firearms.¹ The district court granted the second search warrant.

On April 5, 2018, law enforcement officers executed the second search warrant and recovered marijuana, a loaded firearm, a digital scale, \$1,410 in cash, a pill containing methamphetamine, and metal knuckles. Respondent State of Minnesota charged Eady with the following six offenses: (1) unlawful possession of a firearm; (2) fourth-degree sale of marijuana in a school zone; (3) fifth-degree possession of marijuana; (4) third-degree possession of methamphetamine in a school zone; (5) possession of a dangerous weapon (metal knuckles) in a school zone; and (6) unlawful possession of ammunition.

Eady moved to suppress the results of the first search warrant, arguing that the first search warrant application failed to establish reasonable suspicion or probable cause to

¹ As noted above, the affidavit for the first search warrant did not identify Eady's girlfriend by name. The affidavit for the second warrant identifies T.S. as a person still receiving mail at the apartment, but does not identify T.S. or anyone else as Eady's girlfriend.

justify the canine search of the apartment's door seam. Eady also moved to suppress the results of the second warrant, arguing that the second search warrant application relied entirely on the results of the first search warrant. Thus, Eady claimed that the district court should exclude from evidence all items recovered during the execution of the second search warrant as fruit of the poisonous tree. Eady did not challenge the second search warrant on any other basis.

The district court concluded that the canine search only required reasonable, articulable suspicion because the search occurred in a common hallway and the officers were lawfully present with the building owner's permission. The district court found that reasonable, articulable suspicion existed because the CI's first-hand observations indicated that the criminal activity was ongoing and that Barsness corroborated the CI's statements associating Eady with the apartment. Eady does not challenge this ruling on appeal. The district court denied Eady's motions to suppress. The case proceeded to trial and the jury found Eady guilty on all counts. The district court entered convictions on all counts except for the lesser-included offense of fifth-degree possession of marijuana. The district court only sentenced Eady for unlawful possession of a firearm and imposed a 60-month sentence. This appeal follows.

DECISION

I. Denial of Appellant's Motion to Suppress the Second Search Warrant

Eady argues that, even assuming the validity of the first warrant, the district court erred when it concluded that probable cause existed for the second search warrant. Because

Eady did not raise these specific challenges before the district court, we conclude that Eady forfeited these arguments.

“This court generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure.” *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996) (concluding defendant forfeited challenge to probable cause determination by failing to raise issues at omnibus hearing). In this case, Eady raises entirely new and different challenges to the second search warrant on appeal.

Before the district court, Eady challenged the second search warrant on a single basis: that it relied on the results of the first search warrant, namely, the fact that the canine alerted on the door seam of the apartment. On appeal, however, Eady now contests the veracity of the statements included in the second search warrant affidavit and the connection between himself and the suspected criminal activity. Specifically, Eady argues that Barsness failed to adequately corroborate the CI’s statements, the timing of the CI’s marijuana purchases is too vague, the statement regarding individuals possessing weapons in YouTube videos fails to describe where or when the videos were produced, the single reference to T.S. does not support the inference that Eady’s girlfriend still lived in the apartment, and the statements in the second affidavit fail to sufficiently connect Eady to the suspected criminal activity. Although Eady could have raised these asserted deficiencies in his motion to suppress the second search warrant before the district court, he did not do so, arguing instead only that the second warrant derived from the first, “poisonous” warrant. The district court had no opportunity to consider the deficiencies

asserted for the first time on appeal. We conclude that Eady forfeited appellate review of the district court's decision to deny his motion to suppress the second warrant.

II. Entry of Multiple Convictions

Relying on *State v. Nowels*, 941 N.W.2d 430, 442 n.8 (Minn. App. 2020), *review denied* (Minn. June 16, 2020), Eady argues that the district court erred when it entered judgments of conviction for both unlawful possession of a firearm and unlawful possession of ammunition because possession of a single, loaded firearm constitutes a single act. The state agrees. Whether Minnesota Statutes section 609.04 (2018) precludes multiple convictions, presents a legal question that we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

We agree that *Nowels* controls our decision. Section 609.04 prohibits separate convictions for possessing a firearm and ammunition when both offenses arise out of a person's possession of a single, loaded firearm. *Nowels*, 941 N.W.2d at 442 n.8. Here, Eady possessed a single, loaded firearm. The district court entered convictions on both possession offenses, but only sentenced Eady for possessing a firearm. Pursuant to section 609.04 and *Nowels*, we reverse and remand for the district court to vacate the conviction for unlawful possession of ammunition.

Affirmed in part, reversed in part, and remanded.