IN THE COURT OF APPEALS OF IOWA

No. 7-245 / 96-1354 000595

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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

LARRY JESSIE BREON,

Defendant-Appellant.

Appeal from the Iowa District Court for Dickinson County, Frank B. Nelson and David C. Larson, Judges.

Defendant appeals his convictions and sentences for possession of stolen property in violation of Iowa Code sections 714.1(4) and 714.2(2) (1995), and possession of a controlled substance (marijuana), in violation of section 124.401.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

David J. Stein, Jr., of Stein Law Office, Milford, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Edward Bjornstad, County Attorney, for appellee.

Heard by Habhab, C.J., and Cady, and Streit, JJ. Sackett, J., takes no part.

CADY, J.

Larry Breon appeals his conviction and sentence for possession of stolen property and possession of marijuana. We affirm in part, reverse in part, and remand.

The facts important to the resolution of this appeal date back to December 1995 when Larry Breon moved into the home of Chris and Paulette Breon in Spirit Lake, Iowa. Larry and Chris are brothers, and Larry rented a room in the basement of the home.

On February 26, 1996, Joe Breon, another brother of Larry, contacted deputy Dickinson County sheriff Rex Ondler and told him Larry possessed stolen antiques in the garage of his home. After investigating the allegation, deputy Ondler sought a warrant to search the home of Chris and Paulette Breon.

The search warrant application completed by deputy Ondler indicated he received information from two informants. One informant provided a description of Chris and his pickup truck and revealed Chris had taken antiques and other items from vacant farm homes and sold some of the antiques. This informant also told deputy Ondler a farmer discovered Chris removing items from a farm house, but let him go. Another informant told deputy Ondler that Chris had sold several specific antique pieces to a store on January 28, January 30, and February 18, including a table with an ink well hole and a church bell.

The application also revealed deputy Ondler contacted the Osceola County sheriff's office. Deputy Ondler was told they had received a report about a farmer

who had discovered two males removing items from a vacant farm, but let them go before contacting authorities. The two men had a pickup truck which matched the description of the pickup owned by Chris. Osceola County officials also told deputy Ondler there had been a burglary reported at a farm home in the county in which a table with an ink well hole and a cast iron bell were taken. Deputy Ondler also indicated there had been farm burglaries in Dickinson County in which antiques were taken.

A district associate judge issued the warrant, noting the informant's information appeared credible because it had been verified. Police found numerous items of stolen property in the house during the execution of the warrant. They also recovered a dresser in the bedroom where Larry lived. There was other property in the basement.

Chris and Larry were subsequently placed under arrest. Police discovered marijuana in Larry's possession after his arrest.

Larry was charged by a seven count trial information with two counts of burglary, three counts of conspiracy, one count of possession of stolen property and one count possession of marijuana. A motion to suppress the evidence seized at the home was overruled by the trial court.

Larry was subsequently convicted of the crime of possession of stolen property and possession of marijuana following a jury trial. He was acquitted of the charges

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of burglary and conspiracy. As a part of his sentence, Larry was ordered to pay all court costs.

Larry contends on appeal the search warrant failed to make a specific finding of credibility for the unnamed informants and lacked probable cause. He next claims there was insufficient evidence to support his conviction for possession of stolen property. Finally, he argues the district court erred by requiring him to pay the costs related to the charges in which he was acquitted.

I. Standard of Review.

Our review of challenges to the statutory sufficiency of a search warrant is for errors at law. *State v. Beckett,* 532 N.W.2d 751, 753 (Iowa 1995). A claim that a warrant lacked probable cause under the fourth amendment, however, is reviewed de novo. *State v. Howard,* 509 N.W.2d 764, 767 (Iowa 1993). Our review of challenges to the sufficiency of evidence is reviewed for errors at law. *State v. Simpson,* 528 N.W.2d 627, 630 (Iowa 1995). We follow the same standard of review for claims of error at sentencing. *State v. Holmberg,* 449 N.W.2d 376, 377 (Iowa 1989).

II. Credibility Finding.

A magistrate must make a specific finding that information provided by an unnamed informant is credible before a search warrant may issue based on information supplied by a confidential informant. Iowa Code § 808.3 (1995); *Beckett,* 532 N.W.2d at 754. Without the required finding, the probable cause determination

made by the magistrate must be measured without reference to the informant's information. *Id.*

Breon argues the credibility finding made by the issuing judge in this case was insufficient to comply with section 808.3. The judge found the informants' information credible because it had "been verified." Breon points out the judge failed to make separate credibility findings for each informant, and failed to specifically determine the credibility of any hearsay information relied upon by the informants.

We begin by recognizing that substantial compliance by the magistrate satisfies the credibility finding requirement of section 808.3. *See State v. Swaim*, 412 N.W.2d 568, 574 (Iowa 1987). Furthermore, independent corroboration of an informant's information can serve to support a finding of the informant's reliability. *Id.*

We also recognize section 808.3 does not require the issuing magistrate to make a separate credibility finding for individuals used by informants as a source of information. Instead, the magistrate must only be given the means to assess the credibility of the individual who spoke with the affiant and the means of assessing the initial source of the informant. *State v. Niehaus*, 452 N.W.2d 184, 190 (Iowa 1990).

In this case, the information provided by both informants was corroborated by the information received from the Osceola County sheriff's office. In particular, the information provided by the first informant concerning the description of Chris's pickup truck and the incident involving the farmer who discovered Chris removing items from a house was independently corroborated by the information received by

Osceola County officials. The information provided by the second informant concerning the specific items of property Chris sold to an antique store matched the description of items that had been stolen from farm homes in Osceola County. Although the issuing judge did not separately identify each informant in making the credibility finding, it is clear from the documents submitted with the search warrant application that deputy Ondler used two informants. Moreover, the information received from Osceola County officials separately corroborated the details provided by both informants, as well as the information the informants may have received from other sources. Thus, viewing the totality of the circumstances in a common sense manner, we conclude the issuing judge substantially complied with the credibility requirement of section 808.3 for both informants.

III. Probable Cause.

The test for determining probable cause is whether a reasonably prudent person would believe a crime was committed on the premise to be searched or evidence of a crime would be located on the premise. *Beckett*, 532 N.W.2d at 753. The determination is made based on the totality of the circumstances. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995).

Having found the information provided by the two informants may be used to determine probable cause, we find a substantial basis for the probable cause determination by the issuing judge.

IV. Substantial Evidence.

We consider the evidence in a light most favorable to the State in determining the sufficiency of the evidence to support a conviction. *State v. Adams*, 554 N.W.2d 686, 691 (Iowa 1996). All the evidence is considered, together with all fair and reasonable inferences from the evidence. *Id.* Evidence is substantial if it could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.*

Breon was convicted of first-degree theft by exercising control over stolen property. He maintained at the trial he merely rented a room in his brother's house and did not know the various items of property in his brother's home were stolen. He claims the State failed to prove he exercised control over the property or knew it was stolen. We disagree.

Paulette Breon testified Larry Breon's room was sparsely furnished when he first moved in the house, and he did not bring a dresser with him. After Breon moved in the house he would frequently go out in the evenings. Property also began to accumulate in the house. The stolen property found in the Breon house was traced to farm house burglaries which all occurred after Breon moved into the area. Furthermore, many items of stolen furniture were very heavy, and would have required more than one person to move them. Based on all the evidence, we conclude sufficient evidence supports the theft conviction.

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V. Costs.

Court costs "attributable to the charge on which a criminal defendant is convicted should be recoverable under a restitution plan." *State v. Petrie*, 478 N.W.2d 620, 622 (Iowa 1991). On the other hand, when a defendant is acquitted on one or more charges of a multiple count indictment, the costs should be assessed proportionally against the defendant. *Id.*; *State v. Klindt*, 542 N.W.2d 553, 555 (Iowa 1996) (viable argument existed that court costs would be assessed proportionally for a defendant acquitted of one charge and convicted of another charge in the trial of a multiple count indictment).

In this case, the district court did not believe it could separate the costs and expenses between the various counts that were jointly tried. The State argued the expenses could not be fractionalized because the time and effort expended in defending the various charges were inextricably intertwined. As a result, the district court assessed all the costs to Breon.

We believe the assessment of costs against a defendant in a criminal case in a multiple count indictment, absent a plea agreement, requires both a judgment of conviction and some relationship between the expense and the conviction. *See Petrie*, 478 N.W.2d at 622. In some instances, this may result in a fractional percentage based on the number of counts in the indictment and the number of counts which resulted in a conviction. *See id.* Yet, a strict apportionment rule would not meet the goal of restitution to fairly compensate victims of crimes in those cases where the

time and effort of the prosecution and defense focused on one count over another count.[1] Thus, in other instances apportionment may require the sentencing court to exercise its judgment by determining which expenses were reasonably related to the convictions and which expenses were incurred for charges which resulted in an acquittal. In this case, the district court did neither. A defendant should not be required to pay all the costs of a trial involving a multi-count indictment simply because the task of apportionment may be difficult.

We acknowledge in many cases most of the same costs and expenses of a multi-count trial would be incurred even if only one count was tried. Nevertheless, we believe some form of apportionment must be made. In this case, the district court misapplied the law by failing to make any apportionment. We remand the case to the district court to assess the costs proportionally against Breon.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[1] An example cited by the State is a trial involving a murder charge and a theft charge, with the murder charge requiring the introduction of massive amounts of evidence including DNA, fiber, and fingerprint analysis. If the defendant was convicted of murder and acquitted of theft, it would be inappropriate to apportion the costs evenly when much more than one-half of the time expended in defending the defendant was devoted to the murder charge.