IN THE COURT OF APPEALS OF IOWA

No. 0-10 / 88-1820

STATE OF IOWA,

Appellee,

vs.

KEVIN PATRICK COX,

Appellant.

FILED
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CLERK SUPREME COURT
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Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

The defendant appeals from his conviction, following a jury trial, for possession of cocaine with intent to deliver. **AFFIRMED.**

Craig Ament of Olsen, Parsons & Ament, Cedar Falls, for the appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; James M. Metcalf, County Attorney; and D. Raymond Walton, Assistant County Attorney; for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

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Defendant Kevin Patrick Cox was found guilty by a jury of possession of a controlled substance with intent to manufacture or deliver, and unauthorized possession of a weapon. Cox now appeals.

Defendant contends the search warrant was invalid because its supporting affidavit contained false statements about the reliability of a confidential informant. Cox argues the district court should have granted his motion to suppress all the evidence obtained from the search conducted pursuant to this warrant.

The defendant, who is black, also asserts the prosecutor improperly struck from the jury panel the only black prospective juror.

The confidential informant had been arrested for burglary. He told Waterloo police drugs were being sold from a specific address. The police then applied for a warrant to search that address. In his application, Officer Mark Meyer checked the following reasons for the informant's reliability on the informant's attachment form: the informant is a concerned citizen who has been known by the above officer for five years and who: is a person of truthful reputation; has no motivation to falsify the information; has otherwise demonstrated truthfulness; has not given false information in the past; and the information supplied by the informant in this investigation has been corroborated.

Cox argues the search warrant was invalid because the affidavit presented to support it contained several false statements about the confidential informant. He contends the informant had, among other things, a poor reputation for truthfulness, a motive to falsify information, and a history of giving false information to police in the past.

Cox also contends the prosecutor improperly struck from the jury panel the only black prospective juror. He requests a remand for a hearing to determine whether the prosecutor acted impermissibly on the basis of race in striking this prospective juror. If an improper racial motivation is found, Cox maintains he should be granted a new trial.

We affirm.

I. **SEARCH WARRANT.** Defendant argues the trial court erred in admitting evidence obtained from an invalid search warrant. We do not agree. The trial court was correct in overruling Cox's motion to suppress.

A court reviewing the issuance of a search warrant gives great deference to a prior determination of probable cause by a judge or magistrate in inquiring whether the judge or magistrate had a substantial basis for concluding probable cause existed, and it does not make its own independent determination of probable cause. State v. Bishop, 387 N.W.2d 554, 558 (Iowa 1986). Because of a preference for warrants, a court must construe them in

favor of their validity. State v. Hennon, 314 N.W.2d 405, 407 (Iowa 1982).

This court must determine from the evidence presented whether the issuing judge "had a 'substantial basis for . . . conclud[ing]' that probable cause existed" to justify the issuance of a search warrant. Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527, 548 (1983), quoting Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697 (1960).

> The task of the judge issuing the search warrant is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband, or evidence of a crime will be found in a particular place.

Id.

The affidavit in support of the application for a search warrant:

> [M]ust provide the [issuing judge] with a substantial basis for determining the existence of probable cause... Sufficient information must be presented to the [issuing judge] to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.

Id. 462 U.S. at 239, 103 S. Ct. at 2332, 76 L. Ed. 2d at 549.

When challenging the veracity of the affidavit, the challenger must allege more than negligence or innocent mistake. Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674,

57 L. Ed. 2d 667, 682 (1978); State v. Groff, 323 N.W.2d 204, 208 (Iowa 1982). The challenger must allege deliberate falsehood or reckless disregard for the truth of the affiant. Id. The burden is on the defendant to establish misrepresentation. State v. Paterno, 309 N.W.2d 420, 425 (Iowa 1981). Once the defendant carries the burden and establishes by a preponderance of the evidence the affiant made a false statement knowingly and intentionally or with reckless disregard for the truth, the statement is deleted from the affidavit and the remaining contents must be scrutinized to determine whether probable cause remains. State v. Seager, 341 N.W.2d 420, 425 (Iowa 1983).

Defendant's contention the search warrant is invalid centers on the inclusion and exclusion of information which he alleges is purposeful or reckless. We do not agree.

Defendant has not met his burden of establishing that Officer Meyer purposefully or recklessly omitted information which would have alerted the issuing judge to the informant's lack of reliability.

Cox argues Meyer's assertion the informant had no motive to falsify information is not true because the informant was in custody on a burglary charge and had discussed the possibility of a deal with the police officer. However, the record reveals the informant provided the officer with most of the information prior to

raising the possibility of a deal. Additionally, when the issue was raised, Meyer told the informant he would have to talk to the county attorney in the morning.

Cox contends Meyer's assertion the informant had otherwise demonstrated truthfulness is likewise, misleading. The informant had provided a police investigator with information five years ago regarding a Radio Shack burglary which resulted in two arrests and the recovery of stolen property. It was subsequently discovered the informant was not truthful about his own involvement in the robbery. He had been the driver of the get-away car. Defendant argues had the issuing judge been provided with this information there would have been no basis to establish the informant's reliability. Again, we do not agree. The record reveals the informant contacted the police investigator on a regular basis and provided accurate information regarding thefts. Furthermore, Officer Meyer was unaware at the time he drafted his affidavit that the informant had previously given false information. Therefore, there is no evidence the officer knowingly or recklessly provided the false information.

We agree with the State the record simply does not reflect Officer Meyer falsified his affidavit or recklessly disregarded the truth.

II. PREEMPTORY STRIKE OF A BLACK VENIREMAN. Defendant asserts the trial court erred in failing to hold a hearing

on the State's preemptory strike of the sole black juror available for the jury panel. However, defendant's failure to request the hearing waives the issue on appeal. It is well settled that an allegation of error may not be heard for the first time on appeal. State v. Steltzer, 288 N.W.2d 557, 559 (Iowa 1980).

Prior to trial, defendant objected to the preemptory strike of the only black prospective juror. The county attorney responded and the following colloquy ensued:

> The Court: "I do not find based upon the reasons given and recognized by the Court with regard to Mr. Middleton and also in light of the fact that there were two black jurors on this case last week I find no improper reason or action on the part of the county attorney with regard to striking Mr. Earnest Middleton.
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> "I would also indicate now on the record I reserved ruling on the motion for change of venue; but obviously in light of the voir dire that has occurred in this case and the lack of knowledge expressed by the various jurors that I now deny defendant's motion for a change of venue.
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> "We'll reconvene this morning at 1:30. Any problems we need to take up at this time?"
>
> Ms. Knock [defense attorney]: "Not that I am aware of Your Honor."
> The Court: "Counsel, be ready with opening statements and to proceed into testimony. Thank you very much."

AFFIRMED.