AUG 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed August 31, 1978
vs.	)	555
CHARLES RAYMOND TILLEY,	)	61059 & 61060
Appellant.	)	

Appeal from Boone District Court. - Paul Hellwege, Judge.

Defendant's appeal alleges lack of probable cause to justify issuance of a search warrant and a fatal variance occurred between the stolen motorcycle's serial number stated in the information and proved at trial. - Affirmed.

Timothy J. Mahoney, of Mahoney, Jordan, Mahoney & Donelson, Boone, for Appellant.

Richard C. Turner, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Wallace Taylor, Boone County Attorney, for Appellee.

Heard by Donielson, Acting C.J., and Snell, Oxberger and Carter, JJ.

PER CURIAM

In a consolidated appeal, defendant Charles Raymond Tilley appeals his convictions of possession of a stolen motor vehicle in violation of § 321.77, The Code, and of receiving and concealing stolen property in violation of § 712.1, The Code.

On appeal, defendant alleges the evidence seized pursuant to the search warrant should have been suppressed because the affidavit in support of the warrant contained an intentional mistatement of material facts and because the magistrate who issued the warrant did not have sufficient information concerning the reliability of the professional informing witness to determine the existence of probable cause to justify issuance of the warrant. Defendant also alleges the trial court erred in failing to direct a verdict at the close of the evidence where there was a variance between the elements alleged in the information and the proof offered concerning the serial number of the motorcycle. We discuss defendant's allegations in a different order than presented.

Generally where the State goes further than is required by § 773.35, The Code, in informing against defendant, and includes the particulars in the information, defendant has the right to rely upon the acts alleged as constituting the offense with which he is charged and rest his defense upon a lack of proof by the State of the acts specified. State v. Cooper, 223 N.W.2d 177, 180 (Iowa 1974); State v. Hochmuth, 256 Iowa 442, 446-7, 127 N.W.2d 658, 660-1 (1964).

However, a variance between the allegations in an information and the proof at trial is only fatal if defendant is taken by surprise or in some other way prejudiced or mislead in maintaining his defense and the variance between the allegations and the proof is regarded as material. State v. Shepard, 247 Iowa 258, 263, 73 N.W.2d 69, 72 (1955); State v. Potter, 195 Iowa 163, 166, 191 N.W. 855, 857 (1922).

In State v. Thompson, 19 Iowa 299, 300 (1865), the supreme court held an information charging defendant with forging the name of F. B. Skiff and an instrument introduced at trial signed by T. B. Skiff was not a material variance because it did not mislead the defendant as to the charge. Similarly, a one digit difference in the serial number of an automobile has been held not to be a fatal material variance. Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952).

Neither is a one letter variance on the serial number of automobile tires or a motor a material variance. United States v. Cox, 147 F.2d 587, 588-9 (7th Cir.) cert. den., 325 U.S. 858, 65 S. Ct. 1194, 89 L.ED. 1978 (1945) (tires); United States v. Drexel, 56 F.2d 588, 589 (CCA2d 1932) (motor: 910630 instead of S10630).

In the instant case, the serial number of the allegedly stolen motorcycle described in the information differed by one digit from the actual serial number proven at trial. The information listed the serial number of the motorcycle as FSF 24236 instead of F5F 24236, the serial number of the motorcycle actually seized. Defendant was well acquainted with the substance of the charges filed against him. The motorcycle was sufficiently identified at trial so there could be no mistake. The variance which occurred was both trivial and nonprejudicial to defendant. Defendant was not misled and the trial court did not err in overruling the motions for directed verdict.

Defendant's other contentions involve the validity of the search warrants. Tilley's first complaint is that the Sheriff's Affidavit in support of the warrant contained an intentional mistatement of a material fact. The affidavit stated that the informant saw the stolen motorcycle at defendant's residence approximately three weeks before the warrant was issued. It also stated that the informant was again at the defendant's residence the day before the warrant was issued and again observed the motorcycle. The evidence establishes this latter statement was false as the informant never returned to defendant's residence. However, the evidence is also clear that the Boone County Sheriff's Office was unaware the informant failed to make the return visit or that he lied when he said he did.

Intentional misrepresentations by an applicant for a search warrant render a search warrant invalid, but the defendant must prove by a preponderance of the evidence that the misrepresentations were intentional. State v. Kaufman, 265 N.W.2d 610, 617 (Iowa 1978); State v. Iowa Dist. Ct. in and for Johnson Cty., 247 N.W.2d 241, 246 (Iowa 1976); State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974). Once the defendant proves the untruthfulness of the statements, the reviewing court will excise those statements proved by a preponderance of the evidence to be false and the remaining statements will stand. Iowa Dist. Ct., supra.

Removing the statement by the informant that he saw the stolen motorcycle at defendant's residence immediately prior to issuance of the warrant, we

nevertheless conclude that there was probable cause to justify the search. A claim of staleness of facts precluding issuance of the warrant is not to be determined simply by computation of the number of elapsed days. State v. Bean, 239 N.W.2d 556, 559 (Iowa 1976). There was evidence that defendant was involved in a scheme of continuing criminal activity and the items sought in the search -- the air compressor and the motorcycle, were of a bulky nature and not easily removable. Bean, supra. The test is one of the probability of criminal activity, not a certainty.

Additionally, we note that defendant failed to meet his burden of proving the mistatement was intentional on the part of the State or its agents. The mistatement, albeit intentional, was made by the informant, not the State. Impeachment of the veracity of the informant does not affect the warrant. State v. Boyd, 224 N.W.2d at 616-7. There was no error.

Defendant's final attack on the validity of the warrant concerns whether the issuing magistrate had sufficient information regarding the professional informing witness to determine his reliability where the application for the warrant did not state that he was giving information in return for a bond reduction on another criminal charge. State v. Drake, 224 N.W.2d 476, 478-9 (Iowa 1974), distinguished the police tipster who acts for money, leniency, or some other selfish purpose from the citizen informer, whose only motive is to help law officers in the suppression of criminal activity. Because the police tipster is normally considered to be less likely to be truthful, he is subject to much closer scrutiny when determining his credibility.

In the instant case, the informant appeared before the issuing magistrate and was questioned by him. Cf. State v. Drake, supra. Although the sheriff did not specifically tell the magistrate the informant's testimony was being given in return for a favorable recommendation for a bond reduction, the same magistrate handled both matters. The informant's bond was reduced one day prior to his appearance before the magistrate on the search warrant application. The informant was personally present, questioned by the magistrate, found to be credible and the magistrate then determined his information was reliable.

Defendant's conviction is affirmed.