IN THE COURT OF APPEALS OF IOWA

No. 5-601 / 95-140

001163

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ORLANDO RAMIREZ,

Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles and Jack W. Frye, Judges.

Orlando Ramirez appeals the judgment and sentence entered upon his conviction of theft in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Paul L. Martin, County Attorney, and Gregg R. Rosenbladt, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

Orlando Ramirez was convicted of the crime of theft in the second degree, in violation of Iowa Code sections 714.1(4), 714.2(2), and 714.3 (1993), under a theory he had exercised control over stolen property. He now appeals his conviction, and we affirm.

On August 15, 1994, Steve Cork reported to the Mason City Police Department several items had been stolen from the cab of his pickup. Among the items stolen were an Arizona Cardinals baseball hat, a pair of Oakley sunglasses, car stereo speakers, two amplifiers, a CD player, a pair of Air Jordon shoes, and approximately 100 compact disks. Cork obtained the baseball hat in a different city and believed it was unique to the area. The Oakley sunglasses had a distinctive checkered design on the bows.

On September 9, 1994, Cork's friend, John Brumm, was driving in Mason City on his way to meet another friend, police officer Logan Wernet. Brumm observed a vehicle driven by a Hispanic male wearing an Arizona Cardinals baseball hat. The driver was also wearing Oakley sunglasses with the distinctive checkered design. Brumm reported the license plate number of the vehicle to Wernet.

Later that same evening, while on patrol, Wernet saw a Hispanic male wearing an Arizona Cardinals baseball hat in the passenger seat of a vehicle. Wernet stopped the vehicle, and told the passenger, who was the defendant Orlando Ramirez, the baseball hat could be stolen property. Ramirez stated he had purchased the baseball

hat from a man named Jim for $10. Wernet obtained the baseball hat, and showed it to Cork. He identified the hat as his because of his initials, S.M.C., on the headband.

Wernet then obtained a search warrant for Ramirez' home and car. In his residence, officers found the other items stolen from Cork. Ramirez also had possession of stereo equipment, musical instruments, and tools which had been stolen from other people. Ramirez was charged with theft by exercising control over stolen property in the second degree.

Ramirez filed a motion to suppress the evidence seized in the search of his residence. He claimed there was a lack of probable cause to issue the search warrant because the burglary occurred about twenty-six days prior to the date he was seen with the property. After a hearing, the district court denied the motion to suppress. The court noted that even though the burglary had occurred earlier, Ramirez was seen with the stolen items on the same day Wernet made the application for the search warrant, and thus, the information was "fresh."

The case was tried to the court. The court concluded Ramirez had exercised control over stolen property, knowing or having reasonable cause to believe the property was stolen. He was convicted of theft in the second degree, by exercising control over stolen property. Ramirez was sentenced to a term of imprisonment not to exceed five years. This sentence was suspended and he was placed on probation. He now appeals.

Ramirez contends the district court should have granted his motion to suppress the evidence seized from his residence. He believes there was an insufficient nexus between the criminal activity, the things to be seized, and the place to be searched. He claims there was insufficient evidence in the search warrant application to show police officers reasonably believed he had possession of other items stolen from Cork, or that stolen items might be at his residence.

Since the defendant is alleging a violation of his constitutional right to be protected against unreasonable searches and seizures, our scope of appellate review is an evaluation of the totality of the circumstances; this is the equivalent of de novo review. *State v. Peck,* 517 N.W.2d 230, 232 (Iowa App. 1994).

Our duty on review is simply to insure that the magistrate had a substantial basis for concluding that probable cause existed. *State v. Godbersen,* 493 N.W.2d 852, 854 (Iowa 1992) (*citing Illinois v. Gates,* 462 U.S. 213, 239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983)). An application in support of a search warrant must present the issuing magistrate with a substantial basis to make reasonable inferences as to probable cause. *State v. Niehaus,* 452 N.W.2d 184, 190 (Iowa 1990).

The test for determining if probable cause exists to issue a search warrant is whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there. *Godbersen,* 493 N.W.2d at 855. Probable cause to search requires a probability determination as to the nexus between the criminal activity, the things to be seized,

and the place to the searched. *State v. Ripperger*, 514 N.W.2d 740, 746 (Iowa App. 1994).

We find the search warrant application in the present case presented the issuing magistrate with a substantial basis to make reasonable inferences as to probable cause. The facts presented in the application showed certain items had been stolen from Cork. Brumm had seen defendant in possession of two of the items, the baseball hat and sunglasses, both of which were fairly unique. Also, Wernet had seen defendant in possession of the baseball hat. These facts, together with the nature of the other stolen items, were sufficient to allow the magistrate to find there was probable cause to believe defendant had the other stolen items at his residence. *See State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987) (a person's home is a logical place to search for items in his or her possession or control). Having found Ramirez in possession of some of the stolen items, it was reasonable to infer he possessed some of the other stolen items, and those items would be in his residence. *See State v. Lewis*, 535 So. 2d 943, 948 (La. App. 2 Cir. 1988) (items stolen were of kind defendant might be inclined to keep for personal use.).

We also find the information in the application was not so stale as to preclude a finding of probable cause. Time is ordinarily not conclusive, and the staleness issue is resolved by consideration of all of the factors present in the particular situation. *State v. Hennon*, 314 N.W.2d 405, 406 (Iowa 1982); *State v. Gillespie*, 503 N.W.2d 612, 616 (Iowa App. 1993). Here, Brumm and Wernet had seen defendant in

possession of the stolen items on the same day the search warrant application was signed. We conclude the information in the application was not stale.

We affirm Ramirez' conviction for theft in the second degree. Costs of this appeal are assessed to defendant.

AFFIRMED.