

IN THE COURT OF APPEALS OF IOWA

No. 8-530 / 97-1410

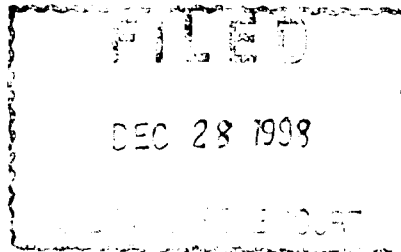
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL ANTHONY BARNHART,

Defendant-Appellant.



Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson,
Judge.

Defendant appeals from the judgments and sentences entered upon his
conviction of two counts of second-degree sexual abuse and seven counts of sexual
exploitation of a minor. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, and Victoria Siegel, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

MAHAN, J.

Michael Anthony Barnhart appeals from the judgments and sentences entered upon his conviction of two counts of second-degree sexual abuse and seven counts of sexual exploitation of a minor. Barnhart contends the search warrant under which evidence was seized from his home lacked probable cause because: (1) some of the information presented to the magistrate cannot be used to support a finding of probable cause because it was not reduced to writing or otherwise incorporated into the application; and (2) the facts are insufficient to support a finding of probable cause. We affirm.

Officer Steve O'Brien applied for a warrant to search Barnhart's residence for evidence of the commission of sex crimes against minors. Officer O'Brien's affidavit indicated he had received information that a seventeen-year-old girl was involved in making numerous videos of her having sex with a seventeen-year-old male, as well as with other adult males. The videos were being recorded by a forty-six-year-old male named Mike, whom Officer O'Brien noted was the alleged defendant in this case. This information was provided by the girl's father. The father also provided a copy of a letter written to his daughter by the seventeen-year-old male and a tape recording of a recent phone conversation between his daughter and the seventeen-year-old male. Officer O'Brien testified he listened to the tape, "including the part about the 'naming' of Mike and about the camera."

The magistrate relied upon Officer O'Brien's testimony and the information provided by the father. The endorsement reads, in part, as follows:

Information received from informant/father corroborated with letter and tape. Informants corroborate that "Mike" is the occupant of the home desired to be searched. Letter and taped call occurred within last month. Officer has personal knowledge that Mr. Barnhart resides at these premises and in his experience and training as a police officer individuals creating such films retain these films. Filming took place on these premises, further substantiating the presence of the films in the home. Informants found credible and based on totality of the circumstances probable cause for search is found.

Officer O'Brien executed the search warrant at Barnhart's home and seized a large number of items: several televisions, two video cameras and assorted equipment, a portable movie screen, five videocassette recorders, two penis-shaped vibrators, ten condoms, up to two hundred video cassettes including commercial x-rated videos and home-made videos, numerous adult magazines depicting nude adults and children, and several firearms. Barnhart challenged the search warrant on constitutional grounds; the district court denied his motion to suppress. The jury found Barnhart guilty of two counts of sexual abuse in the second degree and seven counts of sexual exploitation of a minor.

I. STANDARD OF REVIEW. Challenges to searches on constitutional grounds are reviewed de novo. *State v. Randle*, 555 N.W.2d 666, 668 (Iowa 1996). We do not, however, make an independent determination of probable cause; we merely decide whether the issuing judge had a substantial basis for concluding probable cause existed. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). In determining whether a substantial basis existed for a finding of probable cause, we are "limited to consideration of only that information, reduced to writing, which was actually presented to the [judge] at the time the application for warrant was made."

State v. Gogg, 561 N.W.2d 360, 363 (Iowa 1997) (quoting *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992)). Only information that was actually presented to the judge or magistrate is considered in determining the validity of a warrant. *State v. Barger*, 511 N.W.2d 632, 635 (Iowa App. 1993).

II. THE APPLICATION. Barnhart contends some of the information presented to the magistrate cannot be used to support a finding of probable cause because it was not reduced to writing or otherwise incorporated into the application. Specifically, Barnhart argues the magistrate was required to abstract the oral testimony of Officer O'Brien and reduce the tape and letter to writing or otherwise incorporate them into the application. We disagree.

Oral testimony supplying the facts necessary to find probable cause to issue a search warrant must be abstracted or contemporaneously recorded and incorporated by reference into the application. See *State v. Paschal*, 300 N.W.2d 115, 118 (Iowa 1981); *State v. Liesche*, 228 N.W.2d 44, 48 (Iowa 1975). However, failure to abstract the entirety of the oral testimony does not invalidate the use of the oral testimony which was recorded by the magistrate. *Liesche*, 228 N.W.2d at 48. Therefore, the portions of Officer O'Brien's testimony which were abstracted may be used to determine whether the issuing magistrate had a substantial basis for concluding probable cause existed.

The purpose of the endorsement requirement is to provide a basis for meaningful review and notice to the defendant. *Paschal*, 300 N.W.2d at 117. In the case at bar, not only was Barnhart notified of the existence of the tape and the letter,

the affidavit and the abstract provided Barnhart with notice of the relevant content of the tape and letter. Therefore, the existence of the tape and letter, as well as the content described in the affidavit and abstract, may also be used to determine whether the issuing magistrate had a substantial basis for concluding probable cause existed. *See id.* (reference in the magistrate's abstract to the tape was sufficient, albeit minimal, notice of the existence of supporting evidence).

III. PROBABLE CAUSE. Barnhart asserts the facts presented to the magistrate are insufficient to support a finding of probable cause. Barnhart argues the information presented was stale, did not sufficiently identify Barnhart as "Mike," and did not sufficiently identify Barnhart's residence as the location of the filming of the videos. We disagree.

The test for determining if probable cause exists is:

[W]hether 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. Probable cause to search requires a probability determination as to the nexus between criminal activity, the things to be seized and the place to be searched.

Godbersen, 493 N.W.2d at 855 (quoting *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987)). The quantum of information needed to establish probable cause is less than required for conviction. *Weir*, 414 N.W.2d at 330. But mere suspicion, rumor, or even "strong reason to suspect" a person's involvement with criminal activity is inadequate to establish probable cause. *Id.*

We interpret the affidavit of probable cause in a common sense, rather than a hypertechnical manner. *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 2329,

76 L. Ed. 2d 527, 544 (1983); *Green*, 540 N.W.2d at 655. In addition, we draw all reasonable inferences to support the judge's finding of probable cause and give great deference to the judge's finding. *Gogg*, 561 N.W.2d at 364.

A. Staleness. Because probable cause requires a reasonable belief that evidence of a crime will be found on the premises to be searched, it is important the information upon which this belief is based be current and not remote in time. *Randle*, 555 N.W.2d at 670 ("Allegations of criminal conduct may be so distant in time as to provide no probable cause for a warrant."). The passage of time alone is not determinative; whether information is stale depends on the circumstances of the case. *State v. Hennon*, 314 N.W.2d 405, 406 (Iowa 1982). In the case at bar, the abstract shows Officer O'Brien testified: (1) the tape was made and the letter was written within the previous month; (2) in his experience and training, people who make such videos keep them; and (3) the videos were filmed at Barnhart's residence. This is sufficient to support a reasonable belief the evidence of the making of these videos could be found at Barnhart's residence at the time the search warrant was issued. *See Gogg*, 561 N.W.2d at 367.

B. Identification of "Mike" and Barnhart's Residence. Officer O'Brien's affidavit indicates Mike is "the alleged defendant in this case." The magistrate's abstract states, "Informants corroborate that 'Mike' is the occupant of the home desired to be searched," and "[o]fficer has personal knowledge that Mr. Barnhart resides at these premises." We may reasonably infer the informant identified the residence and Officer O'Brien's investigation revealed an occupant of the residence

was named Michael Barnhart, and, therefore, "Mike" and Barnhart are the same person. *See Gogg*, 561 N.W.2d at 364. Finally, whether or not the videos were filmed at Barnhart's residence, a reasonably prudent person could believe the person who made the videos would keep them at his residence. Thus, under the totality of the circumstances, we find the magistrate had a substantial basis for concluding probable cause existed to support the issuance of the warrant to search Barnhart's residence; Barnhart's motion to suppress this evidence was properly denied.

For these reasons, we affirm the judgments and sentences entered upon Barnhart's conviction of two counts of second-degree sexual abuse and seven counts of sexual exploitation of a minor.

AFFIRMED.