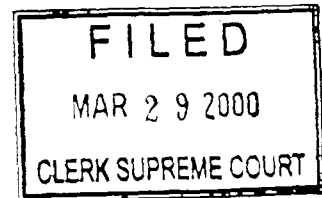


IN THE COURT OF APPEALS OF IOWA

No. 1999-350 (9-603) / 98-1809
Filed March 29, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

PETER J. LASSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, David H. Sivright
(trial) and John A. Nahra (motion to suppress), Judges.

Peter J. Lassen appeals his conviction and sentence, following a jury trial,
for possession of methamphetamine. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant
Attorney General, Lawrence H. Schultz, County Attorney, and Bruce Ingham,
Assistant County Attorney, for appellee.

~~Considered~~ by Mahan, P.J., Hecht, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206
(1999).

HABHAB, S.J.

Peter Lassen appeals his conviction for possession of methamphetamine, in violation of Iowa Code section 124.401(5). He claims (1) the search warrant application lacked sufficient detail to establish probable cause; (2) false information was used to obtain the search warrant; (3) the district court should have granted a mistrial because information was admitted which should have been excluded under a motion in limine; and (4) evidence of prior bad acts was improperly admitted. We affirm on appeal.

On August 28, 1997, Lassen's wife, Karen, asked for help from the Clinton County Sheriff's Department because she was having problems with her sixteen-year-old son from a previous marriage. On the advice of deputies, she agreed to have her son, Tylor, hospitalized for an evaluation. Tylor informed a deputy there was marijuana, and possibly methamphetamine, in a locked office in the house. Karen consented to a search of the office. Officers found 11.2 grams of marijuana in the room.

On August 30, 1997, deputy Steve Cundiff made out a search warrant application, which provided:

On 8/28/97, Deputies Pete Postma and Kevin Cain went to 405 3rd St. Low Moor, Iowa on a property damage call [to] the residence of Pete and Karen Lassen. Pete Lassen is currently on probation for a felony marijuana charge by the Drug Task Force. While at this residence during the investigation by the Deputies, Deputy Postma asked Mrs. Lassen for permission to search the residence for marijuana. Mrs. Lassen gave Deputy Postma permission to search one of the rooms inside the residence. Inside this room Deputy Postma found a plastic bag containing marijuana. Mrs. Lassen did not give consent to search the rest of the residence. This residence is a large two story home with several rooms. Through the affiants training and experience as a narcotics

~~officer~~, it is common for people using and selling marijuana to store and use marijuana [in] more than one room inside a residence.

A district court judge approved the search warrant. The search warrant was executed on September 5, 1997. When officers entered the house Lassen and Karen were in the kitchen. Officers found 11.8 grams of methamphetamine in a container in the kitchen. The methamphetamine was worth about \$1000. Marijuana was found in two different bedrooms and in a small outbuilding. Lassen claimed all of the illegal drugs found in the house belonged to Tylor.

Lassen was charged with possession of methamphetamine with intent to deliver, failure to affix a drug tax stamp, and possession of marijuana. He filed a motion to suppress the results of the search. The district court found the search warrant was valid because it was supported by probable cause and deputy Cundiff made no material misrepresentations. The court denied the motion to suppress.

The district court granted Lassen's motion in limine seeking to exclude any evidence of his conviction in 1995 for failure to affix a drug tax stamp. The court denied Lassen's motion for a mistrial based on statements made by two witnesses during the trial, which he claimed made the jury aware of his prior conviction.

The jury found Lassen guilty of possession of methamphetamine as a lesser included offense of Count 1, possession of methamphetamine with intent to deliver. The jury also found Lassen guilty of possession of methamphetamine as a lesser included offense of Count II, failure to affix a drug tax stamp. The jury found Lassen not guilty of possession of marijuana. The court found the jury

verdicts on Counts I and II merged. Lassen was sentenced to 180 days in the county jail and fined \$250. He appealed.

I. Scope of Review

Our review of the district court's determination concerning the statutory sufficiency of the search warrant is for the correction of errors at law. *State v. Beckett*, 532 N.W.2d 751, 753 (Iowa 1995). We review de novo the district court's ruling regarding probable cause for issuance of the search warrant. *State v. Myers*, 570 N.W.2d 70, 72 (Iowa 1997). Under that standard, we must independently evaluate the totality of the circumstances as shown by the entire record. *State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993).

II. Motion to Suppress

A. Staleness

Lassen contends the search warrant application does not provide sufficient information to lead a reasonable person to believe there were any controlled substances at his residence at the time the warrant was issued. Lassen claims the information was stale. He asserts the fact there was a small amount of marijuana in the home on August 28, 1997, would not lead anyone to believe there were more controlled substances in the home on August 30, 1997, the day the search warrant was issued.

The Fourth Amendment requires a search warrant to be supported by probable cause. *State v. Seager*, 571 N.W.2d 204, 210 (Iowa 1997). Probable cause to search requires a probability determination that (1) the items sought are connected to criminal activity and (2) the items sought will be found in the place

to be searched. *Id.* Where a warrant is not supported by probable cause, any evidence seized pursuant to the warrant must be suppressed. *Id.* We give great deference to a magistrate's finding of probable cause to search. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995).

Allegations may be so distant in time as to provide no probable cause for a warrant. *State v. Randle*, 555 N.W.2d 666, 670 (Iowa 1996). Whether information is stale depends on the circumstances of each case. *Id.* Drugs are readily consumable or transferable and therefore, where there is only an isolated observance of a drug offense, probable cause diminishes quickly. *State v. Gogg*, 561 N.W.2d 360, 367 (Iowa 1997). In *Gogg*, the supreme court held probable cause existed where controlled substances were observed on a single occasion and the search warrant was executed six days later. *Id.* at 368. See also *Randle*, 555 N.W.2d at 670 (search warrant not stale when issued forty-eight hours after drugs were seen); *State v. Paterno*, 309 N.W.2d 420, 424 (Iowa 1981) (search warrant not stale when issued two days after drugs were seen).

In the present case, the search warrant was issued about two days after officers had found drugs in the home as a result of a consensual search. The allegations in this case were not so distant in time as to provide no probable cause for the warrant. We conclude the information in the search warrant application would lead a reasonably prudent person to believe evidence of a crime would be found at defendant's residence.

~~E~~ Misrepresentations of Fact

Defendant claims deputy Cundiff knowingly used false information and gross misrepresentations of fact in order to obtain the search warrant. He asserts the warrant application improperly provided (1) he was on probation for a felony marijuana charge; (2) Karen did not consent to a search of the rest of the house; and (3) there was no information about the amount of marijuana seized during the consensual search of the office. Defendant argues that without these misrepresentations there was insufficient information in the search warrant application to provide probable cause for the search.

To successfully impeach a warrant application, a defendant must establish that the officer was purposely untruthful with regard to a material fact in the application for the warrant, or acted with reckless disregard for the truth. *State v. McPhillips*, 580 N.W.2d 748, 750-51 (Iowa 1998). The officer's conduct must be more than negligence or mistake. *Id.* Omissions of fact constitute misrepresentations only if the omitted facts cast doubt on the existence of probable cause. *State v. Green*, 540 N.W.2d 649, 657 (Iowa 1995). In assessing probable cause, we do not consider intentionally or recklessly made false statements in a search warrant application. *State v. Gogg*, 561 N.W.2d 360, 364 (Iowa 1997).

We find defendant has not shown deputy Cundiff's warrant application contained false information or gross misrepresentations of fact. First, at the time of the search warrant, Lassen was on probation for failure to affix a drug tax stamp, which was a felony charge. Second, at the time the office was searched,

~~Karen did not consent to a search of the rest of the house.~~ Although officers only asked to search the office, the facts as presented in the warrant application were not untruthful. An officer applying for a search warrant is not required to present all inculpatory and exculpatory evidence which would support a finding of probable cause. *Green*, 540 N.W.2d at 657. Third, the officer was not required to include the amount of marijuana seized in the consensual search of the office. As noted above, omissions of fact constitute misrepresentations only if the omitted facts cast doubt on the existence of probable cause. *See id.* We determine the search warrant was supported by probable cause and the search of defendant's residence was valid.

III. Mistrial

Lassen contends the district court abused its discretion in denying his motion for a mistrial. The court granted defendant's motion in limine seeking to exclude information concerning his prior conviction for failure to affix a drug tax stamp. During the trial, deputy Joe Steffen was cross-examined by defense counsel as follows:

Q. Did you have any information as to how long he [Lassen] had been in Low Moor before the time you went into that house? A. You mean that day?

Q. ~~At any time.~~ Did you have any information at all? A. No, I didn't. Well, I know he's lived there for a while because I went on another warrant there about a year prior.

Q. ~~But did you know~~ – yes or no are these questions. Did you know where he had been for the past month? A. For the past month, no.

Defendant requested a mistrial after this exchange, claiming the deputy's answer violated the motion in limine. The district court denied the motion, finding the

statements was not prejudicial. The court noted defense counsel interrupted the witness and talked over his answer, to the extent many of the jurors may not have even heard it. Defense counsel did not request a curative instruction.

A trial court has broad discretion in ruling on a motion for a mistrial. *State v. Keys*, 535 N.W.2d 783, 785 (Iowa App. 1995). We will reverse only when the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa App. 1997). We will not reverse on appeal unless the trial judge's ruling denying a mistrial was "so palpably and grossly violative of fact and law that it evidences not the exercise of will but perversity of will, not the exercise of judgment, but defiance thereof, not the exercise of reason but rather of passion or bias." *State v. Lewis*, 391 N.W.2d 726, 730 (Iowa App. 1986) (quoting *State v. Brewer*, 247 N.W.2d 205, 211 (Iowa 1976)).

Here, the district court found the statement was not prejudicial because defense counsel interrupted the witness and talked over his answer. *Cf. State v. Williamson*, 570 N.W.2d 770, 771 (Iowa 1997) (motion for mistrial denied where prosecutor interrupted officer before he could conclude his statement). The district court was in the best position to observe the matter and to ascertain its effect, if any, on the jury. *See State v. Callender*, 444 N.W.2d 768, 770 (Iowa App. 1989). The district court did not abuse its discretion by denying the motion for mistrial.

IV. Prior Bad Acts

During the trial, defendant raised the theory the State's investigation was faulty because there was insufficient consideration of whether the illegal drugs belonged to Tylor. During redirect examination, the State asked deputy Cundiff why he did not question Tylor. Out of the presence of the jury, deputy Cundiff testified one of the reasons he did not believe Lassen's claims the drugs belonged to Tylor was because Lassen admitted to possessing methamphetamine during a previous investigation, which resulted in his conviction for failure to affix a drug tax stamp. Defendant objected, claiming evidence of his prior arrest and conviction was prejudicial.

The district court ruled:

What bothers me is keeping the prior conviction out of the case and then – but yet at the same time criticizing the State for its investigation and handling of Tylor. I don't think that's fair. If the defense is going to make a big deal out of the fact that they didn't question Tylor, I think the State is entitled to say why, and I'm going to let him say why.

The court ruled deputy Cundiff could testify he knew Lassen and did not believe him when he stated he did not own the illegal drugs in question.¹ The court

¹ In addition to the above, the district court additionally stated:

[H]e can say, as he has proposed to say here, there were drugs in the kitchen and the shed, not just his bedroom.

He can go ahead and add that he felt that it would be of little value to question Tylor because he would have to do so in the presence of his mother or stepfather or both, one or the other or both. He can reiterate the fact that it's unlikely a 16 year old would possess \$1,000 worth of methamphetamine, and I'm also going to let him say that he didn't believe Peter Lassen.

I think he alluded to that yesterday. He knows him, and if he wants to say – if he tells me these aren't his drugs, I don't believe him

determined deputy Cundiff could not testify Lassen pled guilty in 1995 to a drug tax stamp violation.

The State's questioning of deputy Cundiff resumed as follows:

Q. Steve, we were talking about the fact that you had not interviewed Tylor [H.], and I want to withdraw the one question that I asked you and ask you some very specific questions. When Peter Lassen told you on September 5 of last year that the marijuana and methamphetamine were the property of Tylor and not of Peter and Karen Lassen, did you believe that statement? A. No, I did not.

Q. And have you had prior professional contacts with Peter Lassen? A. Yes, I have.

Q. Is the fact that you did not believe Peter Lassen based in part on the fact -- or, on the results of those prior contacts? A. Yes, it is.

Defendant claims this evidence should have been excluded because it was unduly prejudicial. He asserts the evidence showed him as a person who had engaged in prior bad acts involving drug dealing.

On evidentiary issues, we review for an abuse of discretion. *State v. Alderman*, 578 N.W.2d 255, 258 (Iowa App. 1998). Under Iowa Rule of Evidence 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove a person's bad character or that the person acted in conformity therewith. *Id.* Prior crimes evidence is admissible, however, if (1) the evidence is relevant to establish a legitimate issue in the case, and (2) there is clear proof the individual

because I know him. He can't say that he confessed in 1995, pled guilty to a drug tax stamp violation and pled guilty to possessing methamphetamine without tax stamps.

I think that is too prejudicial. I cannot let that in. I think if you're going to criticize the fact that they didn't question Tylor, I'm going to let him say why, and he can say -- if he wants to add to it, to what he said in his deposition that I know him, I've dealt with him in the past and if he tells me these aren't his drugs, I'm not going to believe him, but he's got to stop there.

against whom the evidence is offered committed the prior bad act. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998). The key to determining admissibility depends upon whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit a wrongful act. *State v. Shortridge*, 589 N.W.2d 76, 83 (Iowa App. 1998).

The district court did not abuse its discretion in allowing deputy Cundiff to testify he had previous contact with defendant. The evidence was not admitted to show defendant had engaged in prior bad acts, but was admitted to allow the State to explain why the investigation was not faulty, even though it had not focused on Tylor. Furthermore, we note deputy Cundiff did not testify concerning defendant's general credibility, but testified he personally did not believe him on this one issue. The district court carefully limited the evidence in order to reduce the prejudicial impact to defendant.

In any event, even if deputy Cundiff's statement was improperly admitted into evidence, it was harmless error. There was overwhelming evidence the illegal drugs in question belonged to Lassen.

We affirm defendant's conviction for possession of methamphetamine.

AFFIRMED.