IN THE COURT OF APPEALS OF IOWA

No. 1999-592 (9-853) / 99-0733
Filed April 12, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL LYNN TUTTLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Carlynn D. Grupp, District Associate Judge.

Daniel Tuttle appeals from his conviction, following a bench trial, for possession of methamphetamine in violation of Iowa Code sections 124.401(5) and 124.206(4)(b) (1997). He contends the district court erred in denying his motion to suppress. **AFFIRMED.**

DeDra Schroeder of Schroeder Law Office, Charles City, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Paul L. Martin, County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

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MILLER, J.

Defendant-Appellant Daniel Tuttle was convicted, after trial to the court, of possession of methamphetamine. Before trial Tuttle filed a motion to suppress, contending the drugs on which this charge was based were discovered as the result of a search warrant that was not supported by probable cause. The trial court overruled the motion. Tuttle appeals the denial of his motion to suppress. We affirm.

Because Tuttle challenges the search on constitutional grounds, our review is de novo. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). 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. *Id.* 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." *Id.* (quoting *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992)).

> The test for probable cause is well established: 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. 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. The issuing judge 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, probable cause exists. In doing so, the judge may rely on reasonable, common sense inferences from the information presented.

Id. (internal citations and quotations omitted).

Tuttle first contends that the information provided by confidential informants and citizen informants and relied on by the issuing magistrate was "stale" and remote in time," and therefore cannot support a finding of probable cause. *See Gogg*, 561 N.W.2d at 367 (holding because probable cause requires reasonable belief evidence of a crime will be found on the premises to be searched, it is important the information upon which this belief is based must be current and not remote in time). He also contends some of the information supplied by the confidential informants was itself hearsay, with no showing or finding that the persons supplying it were credible, the confidential informants were either not shown to be credible or were not found to be credible, and the two citizen informants described activity that can be innocent activity.

A summary of the facts presented to the issuing magistrate, sworn to by requesting Officer Tyler of the Mason City Police Department, is as follows. Three different confidential informants told Officer Tyler of various methamphetamine buys made or attempted at the Tuttle residence. Two of the attempts to buy from Tuttle were in November 1997. Although both were unsuccessful, on the first occasion Tuttle told the confidential informant that he was out at the time, but referred him to another person from whom he was able to buy. These two informants had provided information in the past which led to the arrest of other persons, thus making their information reliable. Their attempted buys, and buys, occurred while they were working for the North Central Iowa Narcotics Task Force, to which Officer Tyler was assigned. A third informant told Officer Tyler in April 1998 that he or she had observed large

quantities of methamphetamine in Tuttle's garage when there to buy from him in the past, though specific dates of the buys were not given.

The supporting affidavit also stated that in May 1998 two citizens observed heavy vehicle traffic in the rear of the Tuttle residence. According to these citizens, most of the people who visited the house stayed only for a short time.

Deputy Wellen also presented a written statement in support of the search warrant application. It was incorporated by reference into Officer Tyler's verified application. In it, Deputy Wellen stated that on June 17, 1998, he went to the Tuttle residence to recover some stolen property reported to be in Tuttle's possession. Tuttle came out of the garage and closed the door behind him in order to speak with Deputy Wellen. Tuttle then went back into the garage, closed the door, got the stolen item, and came back out with it, closing the door behind him. While standing outside Tuttle's garage, Deputy Wellen smelled the odor of burning marijuana coming from inside the garage.

Based upon these facts, the magistrate found that probable cause existed and issued the warrant on June 17, 1998. During the execution of the search warrant on that same day, the officers found Tuttle in close proximity to a lit marijuana pipe in his garage. A patdown search, incident to arrest, revealed methamphetamine on Tuttle's person.

For the purposes of this appeal only, we will assume, without deciding, that Tuttle is correct that the statements of the three confidential informants in the supporting affidavit could not support a finding of probable cause, either because the information was "stale," or there was an insufficient finding as to their

credibility. We will also assume, without deciding, that, as claimed by Tuttle, the unverified observations of the two citizens were either stale or only described innocent activity that cannot give rise to probable cause. Nonetheless, we find that, even when the information gathered from the confidential and citizen informants is excised, the remaining portions of the application provide a substantial basis for the magistrate to have concluded probable cause existed. *Cf. Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978) (indicating existence or absence of probable cause is to be determined from remaining material after setting aside material which should not be considered); *State v. Myers*, 570 N.W.2d 70, 74-75 (Iowa 1997); *State v. Iowa Dist. Court*, 472 N.W.2d 621, 625 (Iowa 1991); *State v. Swaim*, 412 N.W.2d 568, 574 (Iowa 1987); *State v. Seager*, 341 N.W.2d 420, 425 (Iowa 1983).

On the date the warrant was issued, Deputy Wellen could smell the odor of burning marijuana emanating from the garage.[1] Deputy Wellen was able to identify the smell of burning marijuana through his training and experience. These facts provide a substantial basis for the issuing magistrate to conclude probable cause existed to issue the search warrant. *See Johnson v. United States*, 333 U.S. 10, 13, 68 S. Ct. 367, 368, 92 L. Ed. 436, 440 (1948) (stating in dicta that testimony as to the presence of odors of a forbidden substance, by one qualified to know the odor, can be evidence sufficient to constitute probable cause, "[i]ndeed it might very well be found to be evidence of most persuasive

[1] Tuttle states in his brief the smell of marijuana came one month before the execution of the search warrant. The minutes of testimony, the date the search warrant issued, and the affidavit supporting the warrant application confirm that Deputy Wellen smelled the marijuana coming from Tuttle's garage the same day the warrant was applied for, issued and executed.

character."). *See also Miller v. Sigler*, 353 F.2d 424, 427 (8th Cir. 1965) ("Therefore, when an officer personally states that he detected the odor of marijuana from a particular room in an apartment dwelling, certainly this is sufficient probable cause to issue the requested warrant"); *United States v. Pond*, 382 F.Supp. 556, 561 (S.D.N.Y. 1974) ("It seems clear to this Court . . . that while it is true that the detection of drugs or alcohol odors, without more, will not justify an arrest or a search without a warrant, it may well support the issuance of such a warrant.").

Even when we assume, without deciding, that Tuttle is correct in arguing the information supplied by the confidential and citizen informants was stale or unverified, there is still a substantial basis for the magistrate to find probable cause. We therefore affirm the overruling of Tuttle's motion to suppress and affirm his conviction.

AFFIRMED.

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