FILED
FEB 22 1979
CLERK SUPREME COURT

228

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed February 22, 1979
vs.)
MARYBELLE ANN SWAIM,) 791/62036
Appellant.)

Appeal from the Black Hawk District Court - Karl Kenline, Carroll E. Engelkes and Joseph C. Keefe, Judges.

Defendant appeals from conviction on four counts of possession of a controlled substance with intent to deliver and three counts of possession of a controlled substance. Affirmed.

Kjas T. Long of Waterloo, Iowa for appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and David H. Correll, Black Hawk County Attorney; for appellees.

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

Defendant appeals from judgment of conviction on seven counts of an information charging various violations of the controlled substance laws, as provided in ch. 204, The Code. She asserts: (1) that the trial court erred in not suppressing the fruits of a search pursuant to a warrant; and (2) that she was entitled to a directed verdict on certain counts on the issues of intent to deliver and intent to profit. We affirm all convictions.

I. Defendant's first contention is that evidence produced by a search of her residence pursuant to a warrant should have been suppressed. She urges that the affidavit upon which the search warrant issued failed to provide the magistrate (here a district judge) with sufficient facts that he might determine the presence or absence of probable cause. The affidavit in question is that of a police officer acting on the tip of a confidential informant. In this situation, it was observed in State v. Kaufman, 265 N.W.2d 610, 616 (Iowa 1978):

> ". . . where an informant supplies information used to obtain a search warrant the magistrate must be informed of 'underlying facts and circumstances both (1) from which the informant reached his conclusions, and (2) from which the affiant concluded the informant was reliable.'"

The affidavit in the present case satisfies both of these tests. It recites that the informant reached his conclusions based upon personal observation of marijuana and amphetamines on the subject premises within 48 hours of the application for the warrant. We conclude this is sufficient to meet the first requirement and reject defendant's contention that more specificity is required.

With respect to the reliability of the informant, the affidavit of the police officer recites that this informant had previously given information on at least ten occasions that had proven reliable when independently investigated by the affiant and other members of the Waterloo Police Department. We conclude that this portion of the affidavit sufficiently shows the reliability of the informant. We reject defendant's contention that reliability is lacking because there is no showing of (a) the type of information previously furnished, or (b) whether the informant was familiar with controlled substances of the type referred to in the affidavit. We do not find that the controlling authorities require such specificity. The information was sufficient that the district judge who issued the warrant could conclude that he was "relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." This is the ultimate test. See Spinelli v. United States, 393 U.S. 410, 416 (1969).

As an alternative argument on the existence of probable cause, defendant asserts that testimony given at the suppression hearing by the affiant on the search warrant application shows that much of what is said in the affidavit is materially false. If such were the case, the trial court could have invalidated the warrant pursuant to State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974). But we do not find that the testimony of the affiant at the suppression hearing does, as defendant claims, show material falsity in the affidavit. We therefore conclude the warrant was properly issued and the trial court correctly overruled the motion to suppress.

II. Defendant's next contention is that in respect to those counts of the information (Counts I-IV, inclusive) charging possession of a controlled substance with intent to deliver for profit, the evidence is insufficient to sustain the jury's verdict on the elements of intent to deliver and intent to profit. We disagree.

In the present case, as in State v. Metcalf, 260 N.W.2d 856, 861-62 (Iowa 1977), the physicial evidence of drugs and drug paraphernalia was sufficient to generate a jury issue as to defendant's intent to deliver and intent to profit, or, in the alternative, as to defendant's knowledge of her principal's intent under State v. Lott, 255 N.W.2d 105, 109 (Iowa 1977). The physical evidence is supplemented with respect to these issues of intent by defendant's statements showing knowledge of the prices of various drugs and by the opinion testimony of a narcotics officer, received without objection, that the modus operandi was consistent with a drug operation carried on for profit.

We have considered all issues presented and find no basis for a reversal.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C. J. (dissenting)

I find that the affidavit for search warrant contains insufficiently detailed facts and circumstances from which the issuing officer could make an independent determination of the informant's reliability. The information set forth amounted to no more than the affiant officer's conclusion that the informant was reliable. The affiant asserted that the informant had given reliable information on 10 previous occasions which the affiant had independently investigated. In State v. Moehlis, 250 N.W.2d 42 (Iowa 1977), the affiant officer stated that a confidential informant had given him information on at least five occasions that had proven truthful and had lead to arrests. The court, while discussing the informant's reliability, said, "It should also be noted the statements by Sgt. Quinn's informant gain credibility since they were against the informant's penal interest." 250 N.W.2d at 45. Specifically, the informant told the affiant that he had used illegal drugs in the defendant's home.

In this case, the informant's credibility is not enhanced by any such incriminating statements. Neither was there any showing, as there was in Moehlis, that the "tips" were of sufficient substance that they resulted in numerous arrests. The affiant's statement that the information provided by his informant in the past had been substantiated does not aid the magistrate in determining the tipster's credibility. While I can well imagine that the police would not independently verify insignificant information, I am still unable to discern what "facts and circumstances" were presented to the magistrate to test the informant's reliability.

I would hold the search warrant invalid and suppress the challenged evidence.