

FILED
MAR 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
vs.)
)
DAVID A. WIELING,)
)
Defendant-Appellant.)

Filed March 24, 1981

0-403
64509

Appeal from Ida District Court - Lawrence W. McCormick, Judge.

Defendant was granted discretionary review of the trial court's order denying his motion to suppress evidence in the prosecution against him for the crime of burglary in violation of section 713.3, The Code 1979. - REVERSED.

Morris C. Hurd, Ida Grove, for defendant-appellant

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General of Iowa, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Carter and Johnson, JJ.
Snell, J., took no part.

PER CURIAM

Defendant, David Wieling, sought and was granted discretionary review of the trial court's order denying his motion to suppress evidence in the prosecution against him for the crime of burglary in violation of section 713.3, The Code 1979. We reverse.

Wieling asserts his motion to suppress should have been granted because the search which produced the evidence was invalid. He argues the search warrant issued in this matter was insufficient on its face in that it did not comply with the requirements of section 808.3, The Code 1979. He further asserts no special circumstances excused compliance with those requirements. In our review, we will examine all circumstances shown in the evidence in order to make a determination of the validity of the search. State v. Ahern, 227 N.W.2d 164, 165 (Iowa 1975).

I. Sufficiency of Search Warrant.

David Schossow, deputy sheriff of Ida County, made application for a search warrant to the magistrate. He stated that through an informant and testimony of David Johnson, he had probable cause to believe certain property had been stolen and illegally kept at the premises occupied by defendant. The magistrate issued a search warrant, wherein she stated only the conclusion that certain illegally stolen items were at the residence. The magistrate's statement did not include an abstract of testimony given her to show facts and circumstances necessary for either a probable cause determination or the reliability of informant.

The trial court ruling on the suppression motion found the warrant sufficient. The state concedes the warrant was "hopelessly flawed". We agree. See State v. Schlenker, 234 N.W.2d 142 (Iowa 1975), (search warrant invalid where no abstract of testimony nor evidence of reliability of informant was contained.). See also §803.3, The Code, 1979.

II. Implied Consent.

On the day of the search the deputy stopped David Johnson in regards to a traffic violation. Upon arrival at the courthouse, Johnson related to the deputy that certain stolen items were in his house also occupied by Wieling and that they had been brought there by Wieling and others. The deputy decided to obtain a search warrant because, "[t]hat's the way we do it." No express invitation was offered by Johnson to the authorities to search, nor did they seek his consent.

The State argues Johnson's acquiescence in the State's action to obtain a search

warrant constitutes implied consent. Consent to search when freely and voluntarily given renders a warrantless search valid. State v. Bakker, 262 N.W.2d 538, 546 (Iowa 1978). While we find Johnson may not have objected to the deputy's decision to obtain the warrant, we do not find this equivalent to freely and voluntarily given consent to a search.

The Iowa Supreme Court addressed the issue of implied consent to search in State v. Carter, 267 N.W.2d 385 (Iowa 1978). Carter concerned a search of the person of the defendant but is analagous to the present case as to the factors necessary to constitute implied consent. The court in Carter found the defendant had not given consent but had merely acquiesced in a search carried on under apparent authority. Johnson, in this case, told the officers that stolen items were in his residence. He did not invite them to search, nor was he asked for consent to search. His acquiescence to the search warrant was nothing more than submitting to one having apparent authority to obtain a warrant.

We find the warrant insufficient to justify the search and further find that no consent was given to validate the search. Therefore, we reverse the trial court ruling denying Wieling's motion to suppress.

REVERSED.