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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff - Appellee,) Filed August 9, 1979

vs.)

DEAN MICHAEL LINTZ,) 155/62175

Defendant - Appellant.)

Appeal from Keokuk District Court - Ira F. Morrison, Judge.

Defendant appeals from his conviction for possession of a controlled substance with intent to deliver in violation of section 204.401(1)(b), The Code 1977, alleging that certain evidence was improperly admitted at trial, that insufficient evidence existed to support the charge, and that he was denied a fair trial when a chemist of his choice was not allowed to analyze the pills seized. - Affirmed in part; Reversed and remanded in part.

Emmit J. George, Iowa City, for Defendant - Appellant.

Thomas Miller, Attorney General of Iowa, Richard L. Cleland, Assistant Attorney General, and Glenn M. Bradley, Keokuk County Attorney, for Plaintiff - Appellee.

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

PER CURIAM

Defendant appeals from his conviction of possession of a controlled substance with intent to deliver in violation of section 204.401(1)(b), The Code 1977, alleging that evidence was improperly admitted at trial in that it was seized from defendant's home pursuant to a search warrant not supported by probable cause, that no evidence existed to show that he possessed the seized amphetamines, and that he was denied a fair trial when a chemist of his choice was not allowed to analyze the pills seized. We affirm on the first two issues, but reverse on the third issue and remand to the trial court to allow defendant to have a chemist of his choice examine the alleged drugs.

I. Probable cause exists for the issuance of a search warrant if a magistrate relies, not on conclusions, but on circumstances and facts that would justify a reasonable person to believe that a crime has been or is being committed. State v. Kaufman, 265 N.W.2d 610, 616 (Iowa 1978); State v. King, 256 N.W.2d 1, 5 (Iowa 1977); State v. Wright, 244 N.W.2d 319, 320 (Iowa 1976). In cases such as this, in which an informant supplies information used as a basis to support the application for a search warrant, the magistrate must be informed of the underlying facts and circumstances from which the informant reached his conclusions and from which the officer concluded that his informant was reliable. Aguilar v. Texas, 378 U.S. 108, 114-15, 84 S. Ct. 1509, 1514, 12 L. Ed. 2d 723, 729 (1964); Kaufman, 265 N.W.2d at 616; State v. Moehlis, 250 N.W.2d 42, 45 (Iowa 1977). Hearsay, even double or triple hearsay, may be sufficient for probable cause without extrinsic corroboration, King, 256 N.W.2d at 8; State v. Birkestrand, 239 N.W.2d 353, 358 (Iowa 1976), provided there is a substantial basis for crediting it. United States v. Harris, 403 U.S. 573, 580-81, 91 S. Ct. 2075, 2080-81, 29 L. Ed. 2d 723, 732 (1971); State v. Everett, 214 N.W.2d 214, 217 (Iowa 1974). In assessing the reliability of an informant's tip, a magistrate may rely on a policeman's knowledge of a suspect's reputation. Harris, 403 U.S. at 583, 91 S. Ct. at 2081-82, 29 L. Ed. 2d at 733.

Based on the foregoing authority, we conclude that there was probable cause for the search warrant issued here. The affidavit supporting the information for the search warrant was based on information obtained from an unidentified informant whose information was in part supported by another informant's admissions against interest and also supported by the officer's attestations of the informant's prior reliability. The

information was also corroborated by the officer's knowledge of defendant's reputation. We believe that this information was sufficient to justify a reasonable belief that a crime had been or was being committed.

Defendant asserts that information supporting the warrant was too remote to consider in determining probable cause. We disagree. The information presented in the affidavit here adequately portrayed a continuing illegal activity, in which case a reasonable time lapse between the information and the illegal act will not preclude the issuance of a search warrant. Kaufman, 265 N.W.2d at 617; State v. Cassady, 243 N.W.2d 581, 582 (Iowa 1976); Birkestrand, 239 N.W.2d at 359.

Defendant contends that the warrant issued for the search for "marijuana; and any and all controlled substances described in Chapter 204 of the Code of Iowa" was an improper general warrant since the information conveyed to the magistrate only related to marijuana. We believe that this case is similar to State v. Hamilton, 236 N.W.2d 325 (Iowa 1975), in which the Iowa Supreme Court concluded that there was probable cause for issuance of a warrant authorizing a search for "any and all controlled substances" despite the limitation of the affiant's personal knowledge to the presence of only hashish. Id. at 327-28. We conclude that Hamilton is dispositive of this issue and that the warrant issued here was not an impermissible general warrant.

II. Defendant contends that the trial court erred in overruling his motion for a directed verdict on the grounds that there was insufficient evidence to show that defendant resided at the dwelling where the incriminating evidence was discovered and seized. In considering the propriety of a motion for directed verdict the court views the evidence in the light most favorable to the party against whom the motion was made. State v. Veverka, 271 N.W.2d 744, 746 (Iowa 1978) (quoting State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976); Iowa R. App. P. 14(f)(2). Whether or not the facts are contradicted, a jury question is engendered if reasonable minds might draw different inferences from them. Veverka, 271 N.W.2d at 746-47 (quoting Overstreet, 243 N.W.2d at 883); Iowa R. App. P. 14(f)(17). We conclude that the evidence presented stating that defendant paid the monthly rental fee for the property was sufficient to present the question of defendant's residence to the jury. The trial court did not err in overruling defendant's motion for a directed verdict.

III. Defendant finally contends that the trial court erred in refusing to permit an examination of the alleged drugs by a chemist of defendant's choice. The Iowa Supreme Court has stated that the accused should not be denied the opportunity to examine physical evidence which the State expects to use against him. State v. Rush, 242 N.W.2d 313, 316 (Iowa 1976); State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969). Nonetheless, granting a motion to produce certain evidence is within the sound discretion of the trial court. State v. Gartin, 271 N.W.2d 902, 911 (Iowa 1978). Whether a trial court has abused its discretion in either granting or denying a party's motion to produce is measured against the ultimate test of whether the trial was a fair one. Eads, 166 N.W.2d at 771.

The question of whether a defendant has a right to the production of drugs that serve as the basis of the charge against him so that he might subject the alleged drugs to testing by a chemical analyst of his choice has never been directly addressed in Iowa. While authority does exist saying that defendant has no such right, People v. Anderson, ___Mich. App. ___, ___, 276 N.W.2d 924, 926 (1979), the majority of courts faced with this particular issue have found that a defendant is entitled to an independent chemical analysis of drugs found in his possession. E.g. Warren v. State, 292 Ala. 71, 75, 288 So. 2d 826, 830 (1973); People v. White, 40 N.Y.2d 797, 798, 358 N.E.2d 1031, 1031-32, 390 N.Y.S.2d 405, 406 (1976); Terrell v. State, 521 S.W.2d 618, 619 (Tex. Crim. App. 1975); State v. Harr, 194 S.E.2d 652, 656-57 (W. Va. 1973); for discussion and further authority, see Annot. 7 A.L.R.3d 8, § 25d (1966 and 1978 Supp.). It has been noted that the Federal Rules of Criminal Procedure are routinely used to permit defendants in narcotics cases to call upon their own experts to perform tests on the alleged narcotics. White, 40 N.Y.2d at 798, 358 N.E.2d at 1032, 390 N.Y.S.2d at 406. The right to independent examination of the seized narcotics is especially important when that narcotic serves as the basis of the charge against defendant. Warren, 292 Ala. at 76, 288 So.2d at 830; White, 40 N.Y.2d at 798, 358 N.E.2d at 1032, 390 N.Y.S.2d at 406.

While the provisions of the new criminal code are not controlling in this case, it is proper to consider the new code in ascertaining present legislative intent. State v. Hubbs, 268 N.W.2d 188, 191 (Iowa 1978). Pursuant to Iowa R. Crim. P. 13(2)(b)(1), section 813.2, supplement to the Code 1977, the trial court may, where it is appropriate, order the attorney for the State to permit the defendant to subject to scientific tests those

items seized by the State in connection with the crime. Rule 13(6)(b) states that the trial court shall specify the time, place and manner of any ordered discovery and may prescribe such terms and conditions as are just.

We conclude that under the circumstances of this case, defendant's request for a sample of the drugs seized so that he might subject it to chemical tests done by his own analyst should have been granted. The State's response was not sufficient to render this case an inappropriate situation for granting defendant's request. The trial court could have ordered that reasonable safeguards be maintained to protect the sample against any violation of its integrity during the course of the examination. The tests could be made in the presence of the court's representative, or police laboratories might be used by defendant's analyst. We find allowing the defendant to test the evidence which the State seeks to use to convict him is necessary to provide the defendant the opportunity to prepare a proper defense, thus assuring him a fair trial, and is in keeping with the present legislative intent, evidenced by the discovery provisions of the new rules of criminal procedure, to broaden the scope of defendant's right to pretrial discovery under the proper supervision of the trial court.

We affirm the trial court's decisions on the issues regarding the search warrant. We reverse the trial court's refusal to allow a chemist of defendant's choice to examine the drugs seized and remand so that such an examination may be undertaken. The trial court will then determine whether a new trial is warranted based on the results of that examination. If not, defendant's conviction and sentence shall stand.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.