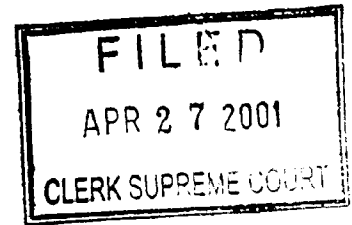


IN THE COURT OF APPEALS OF IOWA

No. 1-115 / 00-0803
Filed April 27, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

LYNN EVERETT WOLLESEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Sac County, William C. Ostlund (bench trial), Gary L. McMinimee (motion to suppress and sentencing), Judges.

Defendant appeals from the judgment and sentence entered upon his convictions for two counts of possession with intent to deliver five grams or less of methamphetamine in violation of Iowa Code section 124.401(1)(c)(6) (1997), and possession with intent to deliver fifty kilograms or less of marijuana in violation of 1998 Iowa Acts ch. 1138, § 24 (codified at Iowa Code section 124.401(1)(d)). He contends the trial court erred in its ruling denying the suppression of evidence because there was no probable cause for the issuance of the search warrant that was granted to search his property. **AFFIRMED.**

Timothy McCarthy II of McEnroe, McCarthy & Gotsdiner, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Pamela K. Dettmann, County Attorney, and Tina Farrington, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

SACKETT, C.J.

Defendant-Appellant Lynn Everett Wollesen appeals following his conviction for drug related offenses contending that the district court erred in overruling his motion to suppress evidence obtained in executing a search warrant. Defendant contends the warrant should not have issued because there was no showing of probable cause. Defendant contends that because neither the affidavit for the warrant nor the abstract by the magistrate showed observations of a confidential informant to be current, the statutory provisions of Iowa Code section 808.3 were not met. The State contends the affidavit and the magistrate's abstract show the information was current and even if they do not, that the warrant was rehabilitated by information included in a tape recording of the warrant proceedings, even though said recording was not noted in either the affidavit or the abstract. We affirm.

Richard Owens, Sheriff of Sac County, applied for a search warrant for buildings and vehicles at a specific address shown by the record to be defendant's. In support of the application Owens alleged there were both illegal drugs and allegedly stolen property at that address. He stated he had received information from a confidential informant whom he had known for twelve years, and considered mature, and who was regularly employed and lacked motive to give false information. Owens further stated that the informant had demonstrated truthfulness, had supplied information twenty-five times in the past, helping to form the basis for other charges, and he had never given false information in the past. The Sheriff further alleged the information given by the informant had been

corroborated: the property seen at the specified address matched the description of property recently stolen in Sac County.

In issuing the warrant the magistrate found that Owen

had the property under surveillance for sometime and has observed the high level of traffic in and out. The stolen property observed by the informant matches recently stolen property. The drug and large quantities of cash have been observed by the CI.

Following a search, defendant was charged on December 12, 1998, with possession with intent to deliver more than five grams of methamphetamine, in violation of Iowa Code section 124.401(1)(b)(8) (1997). The information was later amended to charge defendant with possession with intent to deliver five grams or less of methamphetamine, in violation of Iowa Code section 124.401(1)(c)(6), and possession with intent to deliver fifty kilograms or less of marijuana, in violation of Iowa Code section 124.401(1)(d).

Defendant filed a motion to suppress the fruits of the search, advancing there was no showing that there were drugs or stolen property on his premises at the time the warrant was issued. The district court denied the motion to suppress, finding that the language in the warrant application was sufficient to convey to the magistrate that the observations of the confidential informant were current. Defendant contends this finding was in error.

A finding of probable cause in the issuance of a search warrant requires a reasonable belief that evidence of a crime will be found on the premises searched. It is important, therefore, that the information upon which the belief is based be current and not remote in time. See *State v. Gogg*, 561 N.W. 2d 360, 367 (Iowa 1997); *State v. Paterno*, 309 N.W.2d 423 (Iowa 1981). However, information that there was property at a specific location several weeks or

months in the past may still be sufficient to establish a substantial probability the property is still at the same location on the date the application for the warrant is made. *Andresen v. Maryland*, 427 U.S. 463, 479, 96 S. Ct. 2737, 2747, 49 L. Ed. 2d 627, 642 n.9 (1976). The staleness issue is only resolved by considering all the factors present in a particular situation. *Id.*, 96 S. Ct. at 2747, 49 L. Ed. 2d at 642.

Iowa Code 808.3 provides in applicable part:

... If the magistrate issues the search warrant, the magistrate shall endorse on the application the name and address of all persons upon whose sworn testimony the magistrate relied to issue the warrant together with the abstract of each witness' testimony, or the witness's affidavit.

The validity of a search warrant is determined by looking at the facts in the affidavit and abstracts of testimony presented to the judge or magistrate issuing the warrant. *State v. Easter*, 241 N.W.2d 885, 886 (Iowa 1976). Only information that was actually presented to the judge or magistrate is considered in determining the validity of a warrant. *State v. Seiler*, 342 N.W.2d 264, 266 (Iowa 1983).

Affidavits for search warrants must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. *State v. Paschal*, 300 N.W. 2d 115 (Iowa 1981) (citing *United States v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 746, 13 L. Ed. 2d 684, 689 (1965)). Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to

warrants. *Id.* at 109, 85 S. Ct. at 746, 13 L. Ed. 2d at 689. With these principles in mind we look at the facts before us.

No exact dates as to the time property was stolen or the time the property and drugs were know to be on the premises appear in the application for the warrant or the attachments. The abstract the magistrate relied upon in issuing the warrant also fails to include this information.

In denying the motion to suppress, the district court relied on statements by Owens in the affidavit that (1) "This *is* property at the location," and (2) "There *is* (sic) also illegal drugs at the same location," together with the magistrate's statements in the abstract that, "Owen has had the property under surveillance for some time and has observed *the high level of traffic in and out*," and, "The stolen property observed by the informant matches *recently* stolen property." The district court reasoned, "These factors suggest an ongoing criminal enterprise making any passage of time between the observations and the warrant application less significant."

The State contends that if we do not agree with these findings, evidence of timeliness can be found in a tape recording made at the time the warrant was issued. The State claims that although the tape recording was not referenced in either the affidavit or the abstract, it still should be considered in assessing whether there was probable cause to issue the warrant. Defendant contends we should not consider the tape recording because it was not admitted in the district court and it is referenced neither in the affidavit nor in the magistrate's abstract.

Under Iowa Code section 808.3, probable cause must be based upon "sworn testimony" either in the form of affidavit or oral testimony, or a

combination of them. This section does not address the issue of whether recorded testimony before the magistrate may be used to supplement the supporting affidavits or the magistrate's abstract.

In *State v. Liesche*, 228 N.W. 2d 44, 48 (Iowa 1975) the Justice of the Peace failed to endorse the witness's name and address on the search-warrant application and did not provide an abstract of the sworn testimony.¹ In *Liesche* the court suppressed the fruits of the search. *Liesche*, 228 N.W.2d at 48. The court held that the sufficiency of probable cause for the issuance of a search warrant is tested entirely by recitals in affidavits and the abstracts of oral testimony endorsed on the application, and that the search warrant must stand or fall on facts shown in that manner. *Id.* at 48; *see also Paschal*, 300 N.W. 2d at 115.

.. Unlike *Liesche* where no contemporaneous record of any kind was made, here the State contends it sought to rehabilitate the testimony at the suppression hearing with a tape recording of Owens' testimony allegedly made at the time the magistrate considered the application for the warrant, and that tape recording of Owens' testimony supplied the dates of observation, which were three days prior to the issuance of the warrant. If the State is correct in its assertion, the alleged recorded testimony would satisfy the requirements that the record be contemporaneous and accurate. *See Paschal*, 300 N.W.2d at 115. However, our inquiry does not end there. In *Paschal* where tape-recorded testimony is considered as part of the magistrate's abstract of evidence, the abstract referred to the tape recording. *Id.* at 118; *see also U.S. v. Mendel*, 578 F.2d 668, 670-71

¹ 2. The court in *Liesche* was interpreting Iowa Code section 751.4 (1973), now found substantively in Iowa Code section 808.3.

(7th Cir. 1978) (the court considered a tape recording part of affidavit when referred to in the affidavit). However, unlike *Paschal* where there was a reference in the magistrate's abstract to the tape, here there is absolutely no such reference in the magistrate's abstract, nor is there any reference to it in the supporting application. See *State v. Thornton*, 300 N.W.2d 94, 96 (Iowa 1981) (court distinguished *Paschal* saying the fact the magistrate referred to tape recorded evidence in effect made the tape part of the affidavit). Consequently, if the tape recording was a part of the record before the district court, though the defendant argues it was not, it is not sufficient to correct any omissions in the written record.

We therefore must determine whether the affidavit and the magistrate's abstract or oral testimony are sufficient to support a reasonable belief evidence of a crime would be found on the premises. See *Gogg*, 561 N.W.2d at 368. We do not make an independent determination of probable cause. Rather we determine whether the magistrate had a substantial basis for concluding probable cause existed. *Id.* at 363.

The district court looked to references in the attachment that "property is at the location" and, "there is (sic) illegal drugs at the location." The verb "is" references the present time. This tells us that Owens believed the property and drugs were on location when the application for the warrant was made. These statements, coupled with the reference to recently stolen property and the fact there are no references in either the affidavit or abstract that would indicate the information is stale, provide sufficient evidence to support a reasonable belief

that evidence of a crime would be found on the property to be searched. See *Gogg*, 561 N.W.2d at 367. We affirm the district court on this basis.

AFFIRMED.