FILED
JAN 26 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

159

STATE OF IOWA,)

Plaintiff-Appellee,) Filed January 26, 1982

vs.)

DAVID EUGENE THOMAS,) 1-405
66085

Defendant-Appellant.)

Appeal from Lee District Court - William S. Cahill, Judge.

Defendant appeals from his conviction by a jury of possession of a controlled substance with intent to deliver for a profit under section 204.401(1)(b), The Code 1979. AFFIRMED.

Gordon Liles, Fort Madison, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas N. Martin, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals from his conviction by a jury of possession of a controlled substance with intent to deliver for a profit under section 204.401(1)(b), The Code 1979. On appeal, defendant asserts that there was not probable cause for the issuance of a search warrant and that an affidavit upon which the search warrant was based contained false information. We affirm.

Since defendant alleges a violation of his constitutional right against unreasonable searches and seizures, we make an independent evaluation of the totality of circumstances. State v. Iowa District Court in and for Johnson County, 247 N.W.2d 241, 245 (Iowa 1976).

I.

On July 13, 1980, officers of the Keokuk, Iowa, Police Department conducted a search of a residence located at 1122 1/2 Main, Keokuk, Iowa. Seized at the residence were drugs, drug paraphernalia, money, and other items. Defendant was charged, tried, and convicted of possession of marijuana with intent to deliver, a violation of § 204.401(1)(b), The Code 1979. Much of the property seized was admitted at trial.

The search was conducted pursuant to a warrant issued on July 13, 1980, by Lee County Magistrate John Pepple. Defendant filed two Motions to Suppress, the first, on September 18, 1980, alleged that the warrant was issued without probable cause. The second motion, filed on the first day of trial, October 14, 1980, alleged misrepresentations and false statements by one of the witnesses testifying in favor of issuance of the warrant. These motions were overruled and defendant instituted this appeal.

II.

Defendant argues that the trial court erred by failing to grant defendant's first motion to suppress on the grounds that the search warrant issued on July 13,

1980, lacked probable cause, and was based upon stale facts and unreliable information. We disagree.

The police properly followed the procedures outlined in section 808.3, The Code 1979, to obtain the search warrant at issue. Keokuk Police Officer Steenberg applied for the warrant. Officer Steenberg, Deputy Sheriff Emmett, and informant Billy Lee Gooley testified in support of the warrant. The information that Mr. Gooley and the law enforcement officers provided to the magistrate showed long-term and continuing involvement in drug sales by defendant which continued up to the date the search warrant was issued. Gooley's affidavit chronicles a long history of drug purchases from defendant. Gooley's testimony is somewhat rambling, but does set out the dates Gooley observed drugs at defendant's residence. Defendant alleges Gooley is inconsistent and unreliable in this respect, but when closely examined, Gooley's testimony indicates that he last purchased drugs from defendant at defendant's residence in mid-April 1980, and that he last observed defendant's private stock of drugs the last week in May 1980. We find that the facts and circumstances presented to the magistrate here were "sufficient in themselves to justify the belief of a man of reasonable caution that an offense has been or is being committed." State v. Birkestrand, 239 N.W.2d 353, 356 (Iowa 1976).

Defendant was arraigned on August 11, 1980, but his second motion to suppress was not filed until October 14, 1980, the first day of trial. We find that defendant's motion was untimely because it was not filed "within forty days after arraignment" as required by Iowa R. Crim. P. 10(4). Defendant's alleged "new grounds" to suppress were based upon a deposition of Mr. Gooley taken on August 26, 1980, well within the forty day period. Good cause to justify the late filing was not shown. Therefore, the trial court correctly overruled defendant's motion and any error based upon the alleged untruthfulness of Gooley's affidavit

was not preserved. See State v. McCowen, 297 N.W.2d 226, 227-28 (Iowa 1980); State v. Cole, 295 N.W.2d 29, 39 (Iowa 1980).

We affirm defendant's conviction for the above stated reasons.

AFFIRMED.