IN THE COURT OF APPEALS OF IOWA

No. 7-604 / 96-2193 000319

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DAVID ANZIVINO,

Defendant-Appellant.

FILED
DEC 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Warren County, William H. Joy, Judge.

Defendant appeals his conviction, following a bench trial, for possession with intent to deliver (amphetamine) in violation of Iowa Code section 124.401(1)(c) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, Kevin A. Parker, County Attorney, and Douglas D. Hammerand, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Defendant David Anzivino appeals his conviction for possession with intent to deliver amphetamine. Anzivino alleges the court erred in overruling his motion to suppress evidence seized during a search of his home pursuant to a warrant and during a warrantless search of a truck in which he was a passenger. We affirm.

Deputy Sheriff Roger Lettington applied for a search warrant. In the application, he included a statement by Christopher Waters. Waters had been arrested for driving while license suspended. In return for his statement, Lettington promised to release Waters and reduce his charge to driving without a driver's license. When Lettington applied for the warrant, in his affidavit he did not inform the magistrate of the promised reduction but he did state he charged Waters with driving without a license and released him. Lettington also did not check Waters' criminal history, although he claims another person checked for outstanding warrants. Apparently the other person did not discover the existence of a warrant for Waters' arrest on a charge of second-degree burglary. Thus, the magistrate had neither the promise of leniency nor the criminal history when making his determination of probable cause.

I. SCOPE OF REVIEW. Because a constitutional issue is involved, our review is de novo. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997).

II. IMPEACHING THE WARRANT. Lettington's warrant application listed the places to be searched and the items to be seized. Waters signed an affidavit

as an informant, alleging he had been in Anzivino's residence on January 23, 1996 and knew Anzivino was in possession of methamphetamine, marijuana, stolen property, scales, packaged dope, and guns (including a .25 automatic and a twelve-gauge shotgun). Waters admitted he was on his way to Anzivino's residence to buy methamphetamine and marijuana from Anzivino when Deputy Morrison arrested him.

Anzivino now challenges the warrant because Lettington did not inform the magistrate that Waters provided the information only in exchange for leniency and he had a lengthy criminal record, including two second-degree burglary convictions and a third burglary charge pending. Anzivino alleges at the very least Lettington was negligent in failing to ascertain and inform the magistrate about Waters' criminal background. Anzivino also alleges Lettington made a deliberate, intentional decision to exclude the information regarding leniency.

To impeach a search warrant, the burden rests on the defendant to show:

> [A]llegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished. Or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant.

State v. Green, 540 N.W.2d 649, 655 (Iowa 1995). Although we are limited to considering the facts presented to the magistrate when determining probable cause,

we may consider the surrounding facts when determining whether a misrepresentation was intentional or material. *Id.* at 656.

When Waters wrote the statement, he also drew a diagram of Anzivino's residence and wrote a note explaining where the drugs could be found. By Waters' own admission, he never told Lettington his statement was false. Given the great detail provided by Waters, there is no indication Lettington did not believe Waters. We do not find any proof Lettington purposefully misled the magistrate regarding the promised leniency. We find both the failure to discover Waters' prior record and the failure to inform the magistrate about the promise of leniency were, at most, the result of negligence. Thus, we find Anzivino's contention must fail. Waters' statement will be considered as part of the application in determining whether probable cause existed.

III. PROBABLE CAUSE. It is axiomatic that search warrants are to issue only upon a finding of probable cause. *Green*, 540 N.W.2d at 655. The test for probable cause is whether a reasonably prudent person would believe a crime was committed on the premises to be searched or evidence of a crime could be located there. *Gogg*, 561 N.W.2d at 363; *Green*, 540 N.W.2d at 655; *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987). We do not make an independent determination of probable cause; we merely decide whether the issuing judge had a substantial basis for concluding probable cause existed. *Gogg*, 561 N.W.2d at 363. In determining whether a substantial basis existed for a finding of probable cause, we are limited to

consideration of only that information, reduced to writing, which was actually presented to the judge at the time the application for warrant was made. *Id.* Close cases must be resolved in favor of upholding warrants, as public policy is promoted by encouraging officers to seek them. *Green*, 540 N.W.2d at 655; *Weir*, 414 N.W.2d at 330. We draw all reasonable inferences to support the judge's finding of probable cause. *Gogg*, 561 N.W.2d at 364. The probable cause requirement does not deprive law enforcement officers of the use of reasonable, common sense inferences in probable cause determinations. *Green*, 540 N.W.2d at 655. We must weigh the evidence like those versed in the field of law enforcement would, not like a library analysis by scholars. *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 2329, 76 L. Ed. 2d 527, 544, *reh'g denied*, 463 U.S. 1237, 104 S. Ct. 33, 77 L. Ed. 2d 1453 (1983).

Because Waters is a named informant, we are not required to make a specific finding regarding his credibility. *State v. Truesdell*, 511 N.W.2d 429, 431 (Iowa App. 1993). However, we must still assess the totality of the circumstances, and veracity and basis of knowledge of the informant are relevant factors. *Weir*, 414 N.W.2d at 331 (following *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548).

Looking at all of the written information before the magistrate at the time he issued the warrant, we conclude he had a substantial basis for concluding probable cause existed. Anzivino contends much of the information is stale. Heavy reliance will often be placed on the nature of the offense; a greater lapse of time will be

000324

permissible where the activity is of a continuous nature as distinguished from an isolated violation. *State v. Padavich*, 536 N.W.2d 743, 748 (Iowa 1995). We are not going to look at a computation of the number of elapsed days. *Id.* Clearly Anzivino was suspected of an ongoing drug trade. The information provided is indicative of such a trade. Waters' statement only serves to make the information stronger. Looking at the totality of the circumstances, we find probable cause clearly existed to issue the warrant.

Because Anzivino's contention the search incident to arrest was invalid is based on the lack of probable cause for the search warrant, we find this claim also must fail. We find the search of the truck was a valid search incident to arrest. For these reasons, we affirm the decision of the trial court.

AFFIRMED.