

IN THE COURT OF APPEALS OF IOWA

No. 7-221 / 96-831

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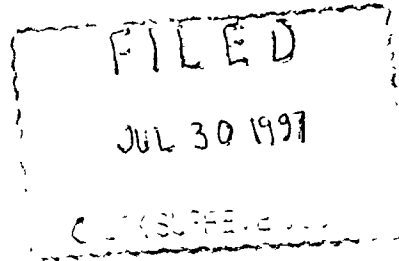
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ANTHONY JOHN FORNICOLA,

Defendant-Appellant.



Appeal from the Iowa District Court for Dallas County, Darrell Goodhue and Dale B. Hagen, Judges.

Defendant appeals from the judgment and sentences entered upon his conviction for possession of methamphetamine with intent to deliver in violation of Iowa Code section 124.401(1)(c) (1995), and transporting a loaded pistol or revolver in a vehicle in violation of section 724.4. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, William Byers, County Attorney, and Wayne M. Reisetter, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Cady, and Streit, JJ.

CADY, J.

Anthony Fornicola appeals from judgment and sentence entered by the district court following his conviction for possession of methamphetamine with intent to deliver and transporting a loaded pistol or revolver in a vehicle. He claims the convictions were based on the illegal search of his home and the illegal stop and search of his vehicle. He also claims the district court abused its discretion in the imposition of sentence. We affirm.

Anthony Fornicola was arrested during the morning hours of June 28, 1995 after drugs and drug paraphernalia were seized by police from his Adel residence following the execution of a search warrant. Drugs and a loaded .357 revolver were also seized from his vehicle following a warrantless search of the vehicle by police.

The information supporting the issuance of the search warrant was gathered during the evening hours of June 27, 1995, after a Stuart police officer arrested Steve Rolston for possession of marijuana. Rolston told police after the arrest he purchased the marijuana from Fornicola the preceding day. Rolston gave police this information in exchange for a promise not to prosecute.

The Stuart police office subsequently contacted the Dallas County Sheriff's office to obtain further information on Fornicola. The officer then sought a warrant to search Fornicola's residence.

The application for search warrant indicated the officer received information from a confidential informant who had recently purchased marijuana from Fornicola,

and had regularly purchased marijuana from him in the past. The informant advised the officer that Fornicola had more marijuana at his house. The officer indicated in the application he had known the informant for one-half year and believed he was reliable because he was mature, regularly employed, had a reputation for truthfulness and had no known criminal record. The promise not to prosecute was not disclosed in the application.

A written statement by the informant was attached to the application. It revealed the informant to be Rolston. The endorsement by the magistrate contained an abstract of testimony of the Stuart police officer. It also indicated the "testimony of [the] buyer seemed credible." Additionally, the endorsement indicated the informant was credible because the information he supplied was consistent with the police officers suspicions about Fornicola. The magistrate met with Rolston for approximately fifteen minutes in the jail before issuing the warrant to search Fornicola's home. The search produced drugs and drug paraphernalia. Fornicola was not present at the time of the search.

A deputy sheriff who participated in the search of the residence observed Fornicola a brief time later in a vehicle while on routine patrol. The vehicle stopped in a grocery store parking lot. Fornicola exited the vehicle while another occupant remained in the vehicle. The deputy pulled his patrol car next to the Fornicola vehicle. He then exited the patrol car and told Fornicola law enforcement officers had just executed a search warrant at his residence. He then asked Fornicola if he "had

anything in the vehicle he shouldn't have." Fornicola responded "guns and drugs." The deputy then instructed the other occupant to exit the vehicle. As the other occupant exited, the deputy observed a handgun in the vehicle. After approaching the vehicle he further observed drug paraphernalia, drugs, and another handgun.

The district court overruled Fornicola's motion to suppress the evidence seized as a result of the search of his home and vehicle. Fornicola was found guilty of possession with intent and transporting a loaded pistol or revolver in a vehicle following a stipulated bench trial. Charges of tax stamp violation and intent to deliver while in immediate possession of a firearm were dismissed prior to the trial. The district court sentenced Fornicola to two concurrent terms of imprisonment. In imposing the sentences, the district court observed the dangerousness of dealing drugs when firearms are present.

Fornicola appeals. He first claims the search warrant was issued without probable cause and without a finding by the magistrate that the confidential informant was credible. He next claims the illegal search of his home rendered the search of the vehicle illegal. Finally he asserts the district court improperly considered the dismissed charge of possession with intent to deliver while in immediate possession of a firearm in imposing sentence.

I. Standard of Review

Our standard of review of claims involving a search in violation of the fourth amendment to the constitution is de novo. *State v. Howard*, 509 N.W.2d 764, 767

(Iowa 1993). Claims involving violations of our statutes are reviewed for errors at law. *State v. Beckett*, 532 N.W.2d 751, 752 (Iowa 1995).

II. Search Warrant

Iowa Code section 808.3 mandates the issuing magistrate to make a specific credibility finding for unnamed informants before issuing search warrants. *State v. Weir*, 414 N.W.2d 327, 330-31 (Iowa 1987). This requirement serves to aid reviewing courts in their duty to ensure the existence of probable cause. *Id.* It also gives defendants notice of the facts used to support the issuance of the warrant for the purpose of challenging their veracity. *Id.*

Fornicola claims the credibility finding of the informant made by the magistrate was not specific enough to satisfy the statutory mandate. The “specific reasons” requirement of section 808.3, however, is applicable only when the informant is not named. *Id.*

In this case, although the search warrant application indicated the applicant wanted to keep the informants’ identity confidential, this was not done. The identity of the informant was disclosed in the search warrant application. Thus, the defendant was not required to rely on the magistrate’s endorsement to challenge Rolston’s veracity but was free to directly confront Rolston.¹ Furthermore, Rolston appeared

¹ The search warrant documents were initially sealed to protect Rolston’s identity, but later unsealed at Fornicola’s request prior to the time he filed the motion to suppress.

before the magistrate, who found his testimony credible. We conclude the magistrate was not required to make specific credibility findings.

Fornicola also claims the information presented to the magistrate was insufficient to establish probable cause to search his home. We disagree.

Probable cause exists if the facts presented to the magistrate would lead a reasonably prudent person to believe evidence of a crime could be found in the place to be searched. *State v. Padavich*, 536 N.W.2d 743, 747 (Iowa 1995). The application and endorsement reveal Rolston purchased drugs from Fornicola the day prior to his arrest and was told by Fornicola he had more drugs at his home. If credible, this information would establish probable cause. Here, the endorsement made by the magistrate indicated Rolston presented testimony to the magistrate which was corroborated by the subsequent testimony of the applicant. *See State v. Harris*, 436 N.W.2d 364, 370-71 (Iowa 1988) (testimony at the suppression hearing may serve to corroborate what may be inferred from the warrant documents). The magistrate found Rolston credible and we give weight to this finding.

Fornicola further claims much of the information provided to the magistrate was false. To impeach a search warrant, the defendant must show a deliberate falsehood or reckless disregard for the truth. *State v. Green*, 540 N.W.2d 649, 656 (Iowa 1995). Innocent or negligent misstatements are insufficient to challenge a search warrant. *State v. Niehaus*, 452 N.W.2d 184, 187 (Iowa 1990).

We conclude Fornicola failed to meet his burden of proof. He failed to establish any misstatements. Furthermore, Fornicola failed to establish the failure to disclose the promise not to prosecute was intentional or material. *See State v. Paterno*, 309 N.W.2d 420, 424 (Iowa 1981). The record is clear the magistrate knew Rolston was under arrest and was cooperating with law enforcement officials.

III. Vehicle Search

Fornicola claims the incriminating evidence found in the vehicle should have been suppressed because its discovery was derived from the prior unlawful search of his residence. Having determined the search of his residence was lawful, we reject Fornicola's claim.

IV. Sentencing Consideration

Fornicola's final claim was the district court improperly considered an uncharged crime in imposing sentence. In oral argument however, Fornicola conceded this claim. A sentencing court may consider conduct of a defendant underlying a charge which resulted in an acquittal as long as the conduct has been proven by a preponderance of the evidence. *United States v. Watts*, ___ U.S. ___, ___, 117 S. Ct. 633, 638, 136 L. Ed 2d 554, 565 (1997). Moreover, Fornicola was found guilty based on stipulated evidence involving all the circumstances of his arrest. We conclude the district court did not improperly consider the presence of a weapon in sentencing Fornicola for the drug offense.

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V. Conclusion

We have considered all the claims raised by Fornicola. We affirm the judgment and sentence of the district court.

AFFIRMED.