FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	Filed August 26, 1987
ERNESTO MARTINEZ,	)	7-104 85-1838 341
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Muscatine County (No. 1583A-385), Margaret S. Briles and Max R. Werling, Judges.

Defendants appeal from their convictions for possession of a controlled substance with intent to deliver, asserting that false statements in an affidavit supporting an application for a search warrant require suppression of the fruits of the search. In addition, one of the defendants argues that the evidence of constructive possession was insufficient to support the jury's finding of his guilt. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Stephen J. Petersen, Muscatine County Attorney, for plaintiff-appellee.

Tomas Rodriguez for defendant-appellant Pauline Martinez.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J. 342

In this consolidated appeal, the defendants, Ernesto and Pauline Martinez, challenge the jury verdicts convicting them for possession of a controlled substance with intent to deliver in violation of Iowa Code section 214.410(1)(1985). Both defendants maintain that the warrant for the search of their home was not premised upon probable cause and consequently argue that any evidence seized as a result of the search should have been suppressed. In addition, Ernesto contends that the evidence adduced by the State was insufficient to establish that he was in constructive possession of the seized contraband. We affirm.

We first address the defendants' contention that the search warrant was not premised upon probable cause. As a basis for this assertion, the defendants argue that the search warrant was premised upon false information supplied by an informant named Scott McDaniels. In a statement given to the police before the warrant was executed, McDaniels said that he and three other individuals had purchased marijuana from Pauline Martinez the night before, and that they had previously done so on ten to twelve occasions. McDaniels described the house to the police and further stated that he "[knew] for a fact that many high school kids bought marijuana, acid (LSD), and sometimes cocaine at this residence." In his deposition taken after the defendants were arrested, however, McDaniels clarified his statement by adding that he had only been inside the defendants' home on one occasion, approximately three months before his statement was made. In addition, McDaniels stated in his deposition that he had not gone into the home the night before the statement was taken, but had waited in the car while his friend actually made the purchase. Moreover, McDaniels testified that he did not have personal knowledge concerning the defendants' alleged sale of LSD and cocaine, but that he had heard about such sales from "kids at school."

After the above information was obtained, the defendants moved to suppress the evidence found as a result of the search, asserting that McDaniels' statement was false and therefore must be excised from the affidavits presented to the judge who issued the warrant. The defendants further argued at that juncture and reassert on appeal that if McDaniels' statement is stricken, the remaining information is not sufficient to establish probable cause for the issuance of the warrant. We disagree.

The defendants have correctly stated that in determining whether probable cause existed for the issuance of a search warrant, a reviewing court must excise intentionally false statements and statements made with a reckless disregard for the truth. State v. Sieger, 341 N.W.2d 420, 425 (Iowa 1983). We are persuaded, however, that the statements in question here did not rise to this level; although some of the information contained in McDaniels' statement may have been somewhat ambiguous, the defendants have made no showing establishing that this information was false or evidenced a reckless disregard for the truth. See Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676-77, 57 L.Ed.2d 667, 672 (1978) (a defendant must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with a reckless disregard for the truth" was included in the warrant in order to challenge its validity on this basis).

Moreover, we think that the only items of information which can properly be characterized as ambiguous are the inferences that McDaniels had personally purchased controlled substances from the defendants, that he had done so on ten to twelve prior occasions, and that he had personal knowledge regarding the defendants' sale of LSD and cocaine. Even after the excision of these "misstatements," we think that the judge who issued the warrant was presented with information sufficient to establish probable cause. The test for determining

whether probable cause exists to justify the issuance of a search warrant is: "whether a person of reasonable prudence would believe a crime was being committed on the premises to be searched or evidence of a crime was being concealed there." State v. Bean, 239 N.W.2d 556, 559-60 (Iowa 1976). Excluding the aforementioned statements, the affidavit presented to the judge in the present case still contained the following information: McDaniels' statement indicated that he had been among persons who had purchased marijuana from the defendants' home the night before his statement was made and that he had similarly participated in such purchases ten to twelve times. McDaniels further described the defendants' residence both inside and outside and stated that Pauline Martinez resided there. In addition, two police officers had surveilled the defendants' home and observed a number of persons going into the house for a short period of time and then exiting, which the officers found highly suspicious. It is our conclusion that this information provided a sufficient basis for a finding of probable cause. See State v. Seager, 341 N.W.2d at 426-27 (probable cause implies more than a "suspicion"). Accordingly, we find no error in the trial court's order overruling the defendants' motion to suppress.

Defendant Ernesto Martinez additionally argues that the State failed to produce evidence sufficient to establish that he was in constructive possession of the seized controlled substances. Before addressing the merits of this assertion, we find it necessary to briefly set forth the following principles governing our review of an attack levied against the sufficiency of the evidence. When examining such a claim, we view the evidence in the light most favorable to the State. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). In addition, we accept all legitimate inferences which may fairly and reasonably be deduced from the record. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). Moreover, we consider all of the evidence, not only that presented in support of the jury's verdict. Id.

The jury's verdict is binding upon us, however, unless it is not supported by substantial evidence. Schrier, 300 N.W.2d at 306. "Substantial evidence" is evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

The leading case in this jurisdiction concerning "possession" is State v. Reeves, 209 N.W.2d 18 (Iowa 1973). In Reeves, the supreme court held that evidence of possession is sufficient if it establishes "constructive possession." Id. at 22. The court in Reeves further stated that constructive possession exists when a defendant has control of, or the right to control, the substance in question. Id. In addition, the court explained that "[p]ossession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another." Id.

Ernesto contends that he and Pauline were divorced and that he did not reside with her at the home where the controlled substances were found. As such, Ernesto argues that he cannot be said to have exercised dominion and control over the contraband. Our review of the record persuades us, however, that the evidence is sufficient to support the jury's finding of constructive possession. The record reveals that although Ernesto and Pauline were divorced, Ernesto was at Pauline's residence visiting with their children on at least a daily basis. In addition, Pauline's mail carrier testified that although she did not know where Ernesto actually slept, she delivered his mail to Pauline's residence and had never received a change of address card from Ernesto. Furthermore, Pauline's neighbors testified that they had observed Ernesto at the home regularly. Moreover, a number of Ernesto's possessions were found throughout the home; his wallet and driver's license were found in a drawer of a dresser located in one of the bedrooms. It is additionally significant to add that the marijuana was found in a gun case

which had Ernesto's name on it. Although Ernesto testified that the gun case was a gift which had never been given to him, we think that the resolution of this testimony was a matter resting exclusively within the province of the jury. See State v. Sheffey, 234 N.W.2d 92, 96 (Iowa 1975); see also State v. Erving, 346 N.W.2d 833, 835 (Iowa 1984). In sum, we conclude that the evidence delineated above is sufficient to show that Ernesto had dominion and control over the contents of the apartment. See State v. Reeves, 209 N.W.2d at 21-23.

AFFIRMED.