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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 26, 1985
vs.	)	4-532 84-463
TERRY LEE TONEY,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Tama County - Paul J. Kilburg, Judge, and Ansel J. Chapman, Judge.

The defendant appeals from his conviction of one count of second-degree theft, one count of third-degree theft, and one count of possession of a controlled substance. AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for the plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Defendant appeals from his conviction of second-degree theft, third-degree theft and possession of a controlled substance.

Tama County Sheriff's officers were called on May 12, 1983, to investigate a theft from the Tama County Shopyard. At the yard officers observed a series of boot prints and tire tracks. The tire tracks showed the left rear tire to be wider than the right rear tire. The officers found evidence of fuel oil barrels having been moved and observed a uniquely shaped hole in the ground.

After leaving the scene the officers stopped at the residence of the defendant to serve a search warrant. The warrant was issued on the basis of an alleged shooting incident that had occurred a month earlier. The officers knocked on the rear door of the house without success. They observed tire tracks, similar to those observed at the shopyard, in the driveway leading to a garage on the premises. The doors of the garage were slightly open. The officers looked in and observed fuel barrels and a pump similar to those reported stolen from the shopyard. The officers also observed a piece of board which they believed may have caused the uniquely shaped hole at the yard.

On the basis of this information the officers obtained a search warrant for the residence and surrounding buildings. Upon execution of the warrant, the fuel-filled barrels, the pump and other items were seized. While searching a small out-building, two space heaters were found which were later determined to be stolen. The space heaters were photographed.

In searching the living quarters, while defendant was present, a quantity of marijuana was discovered.

A third search warrant was obtained for the space heaters. However, on returning to the residence, the officers discovered the heaters were no longer there.

Defendant claims the trial court erred in denying his motion to suppress the evidence seized from defendant pursuant to search warrants.

The Iowa rules of criminal procedure outline five grounds for suppression of evidence: 1) the property was illegally seized without a warrant; 2) the warrant was insufficient on its face; 3) the property seized was not that described in the warrant; 4) no probable cause existed. Our review is de novo and we look to the totality of the circumstances surrounding the issuance of the search warrant. State v. Seiler, 342 N.W.2d 264, 266 (Iowa 1983).

When we consider the totality of the circumstances surrounding the issuance of a search warrant, we consider only such information as was actually presented to the magistrate when the warrant was issued. Seiler, supra at 266. A search warrant may issue only on an adequate showing by oath or affirmation, of probable cause. State v. Spier, 173 N.W.2d 854, 858 (Iowa 1970). We may not consider information in the record which was not before the magistrate when the warrant was issued. State v. Seager, 341 N.W.2d 420, 426 (Iowa 1983). In determining whether probable cause has been established for the issuance of a search warrant, the test is whether a person of reasonable prudence would believe a crime has been committed on the premises to be searched or evidence of a crime could be located there. Id. at 426-27.

A judicial officer must not rely on conclusions in order to find probable cause to issue a warrant but must be furnished and presented with circumstances and facts that would justify a reasonable person to believe an offense has been or is being committed. State v. Kaufman, 265 N.W.2d 610, 616 (Iowa 1978).

Defendant moved to suppress the items seized from his house and garage. He contends the May 12, 1983, search was invalid because the warrant was procured by misrepresentation and consequently the subsequent warrants were invalid as the fruit of the poisonous tree.

It appeared defendant had been accused of firing a shotgun at a woman he lived with. With the woman's consent the house was searched. No gun was found. Defendant at that time had left the premises.

In May the officers learned defendant had returned to the premises and sought a warrant to again search the house for the gun. The evidence presented to the magistrate was that the defendant fired a shotgun at an automobile in which the girl and two other persons were riding. The paint on the automobile had been chipped off and some shotgun shell casings had been found on defendant's front lawn. The magistrate was not told of the earlier consent search when the gun was not found.

The defendant claims this was a misrepresentation and that this misrepresentation was sufficient to negate probable cause. He further contends any information obtained from an attempted execution of this "illegal" warrant was "fruit of the poisonous tree" and cannot serve as competent information in seeking the two subsequent warrants. A failure to disclose information can constitute misrepresentation.

Revealing the fact that the house had been searched before would have appropriately allowed the magistrate to consider this factor. However, in this case, because of the information supplied to the magistrate that the defendant had in fact shot at the car with a shotgun and the corroboration of the damaged auto and spent shells in defendant's yard, the evidence before the magistrate was sufficient to establish probable cause. Hence, supplying the omitted information is not material to the finding of probable cause and the omission does not negate probable cause. See United States v. Lefkowitz, 464 F. Supp. 227, 234 (C.D. Cal. 1979).

Defendant contends the trial court committed reversible error by admitting into evidence documents not shown to fall within the business records exception to the hearsay rule. The trial court admitted into evidence an invoice received by the Tama County Highway Department from the Key Tank Corporation. The invoice was to be used as evidence of the value of the stolen fuel. The defendant was charged with one count of theft in the second degree and one count of theft in

the third degree. The difference between these degrees of theft depends on the value of the items stolen. See Iowa Code §714.2 (1983). In order to prove theft in the second degree it was necessary for the State to show that the value of the fuel taken from the department was in excess of five hundred dollars but equal to or less than five thousand dollars. Id. at §714.2(2).

The State called as a witness Charles Ohr, who was the office manager for the shopyard and oversaw the financial matters of the Tama County Highway Department. Ohr gave some rather involved and detailed testimony regarding the value of the fuel stolen from the yard. The challenged exhibit was admitted as a part of his testimony. Key Tank Corporation prepared the invoice and delivered it to the department. Both the State and the defendant acknowledged that the invoice was hearsay under the definition found in Iowa Rule of Evidence 801(c). Iowa R. of Evid. 801(c)(1984). The trial court admitted the invoice into evidence under the "business records" exception to the hearsay rule. See Iowa R. of Evid. 803(6) (1984).

In the case of In Re Delaney, 185 N.W.2d 726, 731 (Iowa 1971), the supreme court outlined the criteria necessary to establish a proper foundation for business records:

> (1) the writing or record was made in the regular course of business, (2) at or about the time of the act, condition or event recorded, (3) the source of information from which made, the method and circumstances of preparation were such as to indicate trustworthiness and (4) they were not excludable as evidence because of any rule of admissibility of evidence other than the hearsay rule.

Id. at 731 (the court cited McCormick on Evidence, (1954 ed.) section 289). Ohr's testimony reveals that the third criteria was not satisfied. The Highway Department did not prepare the invoice, but merely received it from the Key Tank Corporation. Ohr was unable to testify as to the source of information from which the invoice was derived, or the method or circumstances under which the invoice was prepared. It was error for the trial court to admit the document under Rule of Evidence 803(6).

Error in the admission of hearsay is presumed to be prejudicial unless the contrary is affirmatively established. State v. Johnson, 272 N.W.2d 480, 482 (Iowa 1978). However, there is substantial other evidence in the record from which the trial court as fact finder can determine that the fuel taken was valued in excess of $500. From documents maintained by the Highway Department and records kept by employees, Ohr was able to make an approximate determination as to how much fuel was in the gasoline and diesel barrels immediately prior to May 12, 1983, when the barrels were allegedly emptied by the defendant. Ohr estimated that there were 477 gallons of unleaded gasoline and 727 gallons of diesel fuel taken from the respective tanks. He testified from personal knowledge and as business manager that the county paid 98 cents per gallon for the gasoline and 87-1/2 cents per gallon for diesel fuel. This multiplies out to total amounts of $467.46 and $636.13, respectively. There has been no affirmative showing of prejudice. See State v. Farris, 359 N.W.2d 190, 193 (Iowa 1984).

AFFIRMED.