

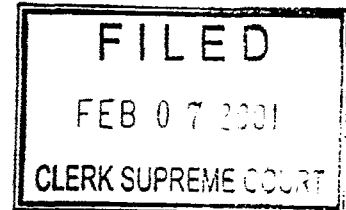
IN THE COURT OF APPEALS OF IOWA

No. 0-785 / 99-1933
Filed February 7, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JIMMIE DEAN McALISTER, Jr.,
Defendant-Appellant.



Appeal from the Iowa District Court for Guthrie County, Paul R. Huscher (motion to suppress), Dale B. Hagen (trial and sentencing), Judges.

Defendant appeals from the judgment and sentence entered upon his convictions for possession of methamphetamine and marijuana in violation of Iowa Code section 124.401(5) (1999). He contends the district court erred in upholding (1) the issuance of the search warrant based on the information presented in the application for the search warrant and statement of the magistrate, and (2) the search of the motor vehicle that came onto the property after the search warrant was executed. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Mary L. Benton, County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

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SACKETT, C.J.

Defendant-appellant, Jimmie Dean McAlister, Jr., appeals from the judgment and sentence entered upon his convictions for possession of methamphetamine and marijuana in violation of Iowa Code section 124.401(5)(1999). Defendant contends the district court erred in upholding (1) the issuance of the search warrant based on the information presented in the application for the search warrant and statement of the magistrate and (2) the search of the motor vehicle that came onto the property after the search warrant was executed. We affirm.

In this case, a confidential informant provided information to a Guthrie County deputy sheriff accusing the defendant of possessing marijuana and marijuana paraphernalia. The deputy prepared and presented an application for search warrant to a magistrate for approval. Based upon the information presented to the magistrate in addition to the magistrate's own questioning of the confidential informant to determine reliability of the information provided; the magistrate issued a search warrant for the house, outbuildings and vehicles located on the premises or owned by the defendant.

On May 20, 1999 the search warrant was executed. During the execution of the warrant the defendant drove into his driveway. The truck the defendant was driving was titled in the name of the business McAlister and Sons. Officers searched the truck and seized a box containing a pipe and green leafy substance later determined to be marijuana.

Defendant claims on appeal the district court erred in upholding (1) the issuance of the search warrant based on the information presented in the

application for the search warrant and statement of the magistrate and (2) the search of the motor vehicle that came onto the property after the search warrant was executed. Specifically, defendant contends the search warrant in this case was issued without probable cause and statements made on the search warrant application regarding the confidential informant's criminal history and reliability were made with reckless disregard for the truth. Furthermore, defendant contends the search of the truck the defendant arrived upon the premises in went beyond the scope of the search warrant.

Both issues raised by the defendant raise constitutional issues. We review constitutional claims de novo. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). We consider all relevant facts and circumstances in deciding whether the defendant has carried his burden to show an intentional or reckless misrepresentation. *Id.* at 364. To successfully impeach the warrant application, defendant must establish that the officer "was purposely untruthful with regard to a material fact in his . . . application for the warrant, or acted with reckless disregard for the truth." *State v. McPhillips*, 580 N.W.2d 748, 750-51 (Iowa 1998). The officer's conduct must be more than negligence or a mistake. *Id.* at 751. The magistrate must be misled "into believing the existence of certain facts which enter into his or her thought process in evaluating probable cause." *Id.*; *State v. Groff*, 323 N.W.2d 204, 210 (Iowa 1982).

Defendant claims the deputy did not check the informant's criminal history prior to making his application for search warrant but nevertheless marked on the application that the informant had no known criminal record. Defendant claims

the failure of the deputy to check the informant's criminal history constituted reckless disregard for the truth.

The United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), developed a means to examine truthfulness of an affiant in presenting evidence to a magistrate supporting issuance of a search warrant. The Iowa Supreme Court adopted the *Franks* standard in *Groff*, 323 N.W.2d at 206-08. The inquiry adopted by *Franks* is limited to a determination of whether the affiant was purposely untruthful with regard to a material fact in his or her application for the warrant, or acted with reckless disregard for the truth. *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684-85, 57 L. Ed. 2d at 682. If the court finds that the affiant consciously falsified the challenged information, or acted with reckless disregard for the truth in his or her application for the warrant, the offensive material must be deleted and the remainder of the warrant reviewed to determine whether probable cause existed. *Id.* 98 S. Ct. at 2684-85, 57 L. Ed. 2d at 682. Allegations of negligence or mistake are insufficient to sustain an assault on the warrant, and only impeachment of the affiant is permitted, not that of a nongovernmental informant. *Id.* at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682.

Reckless disregard can be proven in two ways. *State v. Niehaus*, 452 N.W.2d 184, 187 (Iowa 1990). First by showing directly the affiant had serious doubts as to the veracity of the informant's statement. *Id.* Second "from circumstances evincing 'obvious reasons to doubt the veracity' of the allegations." *Id.* The defendant bears the burden of establishing an intentional or

reckless misrepresentation. *Gogg*, 561 N.W.2d at 364; *State v. Paterno*, 309 N.W.2d 420, 425 (Iowa 1981).

We find the deputy did not act recklessly or with an intention to mislead the magistrate when he did not check the informant's criminal history prior to making his application for search warrant but nevertheless marked on the application that the informant had no known criminal record. This action on behalf of the deputy at the most can be construed as mere negligence. Furthermore, the magistrate in accordance with Iowa Code section 808.3 made an independent determination the informant was credible. The confidential informant appeared before the magistrate and was personally examined by the magistrate. The magistrate indicated on the endorsement to the application that the sworn testimony appeared credible because the informant gave very detailed information, had no incentive to lie and had a good demeanor when examined by the magistrate. The defendant failed to meet his burden establishing an intentional or reckless misrepresentation was made in the application.

Defendant also contends the application for search warrant failed to establish probable cause due to the unreliability of the statements made by the police officer in the application. Defendant contends the deputy took no action to verify any of the information provided by the confidential informant and furthermore made sweeping generalities concerning drug cases in the application.

Our review of a probable cause determination is de novo. *State v. Randle*, 555 N.W.2d 666, 668 (Iowa 1996). We do not, however, make an independent determination of probable cause; we merely decide whether the

issuing judge had a substantial basis for concluding probable cause existed. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). 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." *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992); *Randle*, 555 N.W.2d at 668-69.

The Fourth Amendment requires a search warrant to be supported by probable cause. U.S. Const. amends. IV, XIV, § 1. The test for probable cause is well established: "whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there." *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987). Probable cause to search requires a probability determination that "(1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched." *United States v. Edmiston*, 46 F.3d 786, 789 (8th Cir.1995); see *Weir*, 414 N.W.2d at 330. The issuing judge "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information," probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983); accord *State v. Hennon*, 314 N.W.2d 405, 407 (Iowa 1982). In doing so, the judge may rely on "reasonable, common sense inferences" from the information presented. See *Green*, 540 N.W.2d at 655. In addition, we draw all reasonable inferences to support the judge's finding of probable cause, *State v. Padavich*, 536 N.W.2d 743, 747 (Iowa 1995), and give great deference to the judge's finding, *Green*,

540 N.W.2d at 655. Close cases are decided in favor of upholding the validity of the warrant. *Godbersen*, 493 N.W.2d at 854-55; *Hennon*, 314 N.W.2d at 407.

Upon our de novo review, we conclude there was adequate probable cause based upon the information provided by a confidential informant who was independently found credible by the magistrate who issued the search warrant. In this case, the informant had firsthand knowledge of defendant's drug activities. The magistrate determined the informant was credible based upon the detailed information provided, having no incentive to lie and the demeanor exhibited by the informant. The magistrate noted these facts in compliance with the "specific reasons" requirement of Iowa Code section 808.3. Probable cause existed supporting the issuance of the search warrant in question. The district court acted properly when it denied the defendant's motion to suppress for lack of probable cause.

Defendant also contends the district court erred when it upheld the validity of the search of a truck that came onto the property while the warrant was being executed. The search warrant itself stated, "[y]ou are commanded to make immediate search of the house, outbuildings, vehicles located on premises or owned by Jimmy Dean McAlister." Defendant claims he had no ownership interest in the vehicle so no nexus between the criminal activity and the vehicle could be established.

The State contends the defendant failed to address this issue for appeal. The State advances the trial court's suppression ruling only addressed the narrow mixed question of fact and law as to whether the pickup was "on the premises" when the warrant was executed. They contend the court's ruling does

not decide who owned the pickup or whether the warrant was overbroad. The district court concluded in its suppression ruling:

The Defendant's claim that the pickup was not a part of the "premises" to be searched according to the warrant is untenable. The warrant authorized the search of vehicle on the premises, and, during the search, the pickup was on the premises. The search of the pickup was proper and within the scope of the warrant.

The district court ruled the search warrant was not overbroad with respect to the vehicle being located on the premises. The district court did not rule on the specific issue as to ownership of the vehicle and what effect ownership of the vehicle played up the validity of the vehicle search. The defendant raised this issue for the first time on appeal.

In determining whether error has been preserved, it is important to understand the purpose of our error-preservation rules. *State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999). A helpful starting point is the underlying rationale for the general rule that issues not raised in the district court cannot be raised for the first time on appeal:

The orderly, fair and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial and a different one on appeal. One reason is that the trial court's ruling on an issue may either dispose of the case or affect its future course. In addition, the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.

Id.; *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983). We have cited similar reasons in support of our error-preservation rule that a constitutional challenge to a statute must be raised at the earliest opportunity. *See State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997) (stating the purpose of the earliest-opportunity rule "is to give notice to the court and opposing counsel at a time when corrective action

is still possible"). We are a court of review, not a nisi prius court. *State v. Holbrook*, 261 N.W.2d 480, 482 (Iowa 1978). We cannot "review" an issue unless it was raised in the trial court. *Id.*

Consequently, we hold the defendant failed to adequately preserved error regarding the ownership of the vehicle and any effect that may have had upon the scope of the subsequent search. The district court never had the opportunity to rule upon the issue. The district court found the search did not begin until defendant in the pickup arrived on the premises. There is substantial evidence to support this finding. Defendant's contention the court erred in upholding the search of the truck that arrived during the search is without merit. We affirm.

AFFIRMED.