**IN THE COURT OF APPEALS OF IOWA**

No. 8-640 / 97-2256

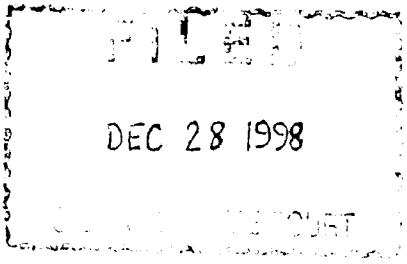
**STATE OF IOWA,**

Plaintiff-Appellee,

**vs.**

**THOMAS RICHARD MYERS,**

Defendant-Appellant.




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Appeal from the Iowa District Court for Monroe County, E. Richard Meadows, Jr., Judge.

Defendant appeals from the judgment and sentences entered for two counts of possession of a controlled substance. **REVERSED AND REMANDED.**

Steven Goodlow of Sinclair & Associates, Albia, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and William S. Owens, County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

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**MAHAN, J.**

Thomas Richard Myers appeals from judgment and sentences entered on two counts of possession of a controlled substance in violation of Iowa Code section 124.401(5) (1995). We reverse and remand.

On March 27, 1997, deputy Patricia Resczenko applied for a warrant to search Myers' residence for drugs. Resczenko attached a narrative to the search warrant detailing the facts she believed supported the search of the Myers residence: surveillance of the residence, citizen complaints, and two controlled purchases of marijuana from Myers in April 1994. Resczenko also detailed her interviews with two confidential informants (CIs) regarding drug trafficking at the residence. CI #1's information was not specific as to times or dates of the drug deals. CI #2 indicated he was recently at the Myers residence. Resczenko interviewed CI #2 between February 10 and 28, 1997.

The magistrate approved the search warrant application. Officers executed the warrant, and Myers was charged with two counts of possession of a controlled substance.

Myers filed a motion to suppress claiming the search warrant was defective. The court denied his motion. Myers then filed a motion to enlarge the court's findings. He claimed another judge had determined the information provided to the magistrate was stale and insufficient to support probable cause for the search of two other residences included in the application. This resulted in the search warrants being suppressed and criminal charges being dismissed against two other

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co-defendants.[1] Myers argued issue preclusion principles should apply. The district court summarily denied this motion as well. Myers was subsequently found guilty and was sentenced by the district court.

Myers appeals challenging the validity of the search warrant. He argues: (1) the information provided to establish probable cause for the search warrant was stale; (2) the information provided to the magistrate does not support a finding that the CIs were credible; and (3) the magistrate did not make sufficient findings regarding the informants' credibility as required by Iowa Code section 808.3. He also claims the district court erred in failing to apply issue preclusion principles to sustain his motion to suppress.

**I. STANDARD OF REVIEW.** Our review is de novo. However, we do not make an independent determination of probable cause. *See State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). We must decide whether the issuing magistrate had a substantial basis for concluding probable cause existed. *Id.*

Probable cause is determined on the "totality of circumstances." *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). Those circumstances must show a reasonably prudent person would believe a crime was committed at the place to be searched or evidence of a crime would be located at the place to be searched. *State v. Padavich*, 536 N.W.2d 743, 747 (Iowa 1995).

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[1] The Honorable Daniel P. Wilson suppressed evidence obtained pursuant to the same search warrant in *State v. Gilbert*, No. FECR060010 (Iowa D. Sept. 8, 1997) and *State v. Ostermyer*, FECR060013 (Iowa D. Sept. 8, 1997). These previous rulings provide no basis for our decision today.

In determining whether a substantial basis existed for a finding of probable cause, we are "limited (on review) to consideration of only that information, reduced to writing, which was actually presented to the [magistrate] at the time the application for warrant was made." *Gogg*, 561 N.W.2d at 363 (citing *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992)). We give great deference to a magistrate's finding of probable cause to search, and close cases must be resolved in favor of upholding warrants. *Green*, 540 N.W.2d at 655.

**II. STALENESS OF EVIDENCE.** Myers argues the fruits of the search warrant should be suppressed because the probable cause determination of the magistrate was based upon stale information. We agree.

"It is axiomatic that search warrants are to issue only upon a finding of 'probable cause.'" *State v. Seiler*, 342 N.W.2d 264, 266 (Iowa 1983). The test for probable cause is whether a reasonably prudent person would believe a crime has been committed on the premises to be searched or evidence of a crime is being concealed there. *See Green*, 540 N.W.2d at 655. Probable cause must exist at the time the warrant is issued, not at some earlier time. *State v. Bean*, 239 N.W.2d 556, 559 (Iowa 1976).

**A. Controlled Purchases of Drugs.** The application for the search warrant was based in part on two controlled buys of marijuana in April of 1994. The search warrant issued in March of 1997. Without doubt, this was not recent information and was, therefore, too remote to support a finding of probable cause. *See State v. Gillespie*, 503 N.W.2d 612, 616 (Iowa App. 1993) (determining information that a

controlled buy was made fifty-four days prior to the application is not recent). This information is stale and provides no basis for a search warrant.

**B. Statements by Confidential Informants.** Confidential informants provided police with information regarding illegal activities at the Myers residence. One informant indicated drugs were being sold there and he had purchased marijuana at the residence. This information was obtained by the police on February 7, 1997, but there is no indication as to when these observations and purchases were actually made.

A second informant also stated drugs were being sold at the Myers residence. These statements were obtained by police between February 10 and February 28, 1997, and were based on the informant's having "recently" been in the Myers household. We assume all information obtained from the second informant was received on February 10. *See Gogg*, 561 N.W.2d at 367 (for purposes of testing timeliness of information contained in an affidavit for which specific dates are absent, observations are assumed to have occurred on the most remote date within the time period mentioned in the affidavit).

We determine the informants' information was too remote to support the search warrant. The contraband is readily moveable and easily destroyed. There may have been probable cause around the time the observations were made, but not when the warrant was issued. *See id.* (drugs are readily consumable or transferrable and, therefore, where there is only an isolated incident of a drug offense, probable cause diminishes quickly). While both informants indicated they had personal contact with

people and activities at the Myers residence, neither provided any specific time period or dates. Even if we assume their contacts actually occurred on the same day they provided information to the police (i.e. February 7 and February 10), those dates are still too remote to support a search warrant issued on March 27, 1997. The informants' statements are vague and ultimately stale, and therefore inadequate to support a search warrant.

**C. Evidence of Ongoing Drug Activity.** The State contends even if the controlled buys and the informants' statements do not individually support a finding of probable cause, when taken together they show ongoing illegal activity sufficient to uphold the warrant. We disagree.

When there is a significant passage of time between the observed illegal activity and the application for the search warrant, it should be determined if the criminal activity is isolated or continuous. *See Gillespie*, 503 N.W.2d at 616. The magistrate should ascertain whether the evidence discloses a continuing offense likely to remain in operation for a period of time. *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 2748, 49 L. Ed. 2d 627, 642 (1976). If the offense is continuing, there may be probable cause to search, even though the evidence is several weeks old.

To determine whether a continuing offense was demonstrated in the application, we look to the nature of the criminal activity, the length of the activity, and the nature of the property seized. *See Gillespie*, 503 N.W.2d at 616. We note a single instance does not usually provide probable cause to believe the situation will continue for an extended period of time. *Id.*

Using the informants' statements and police surveillance of the Myers residence, the applicant attempted to show continuous illegal activity. However, the application did not indicate how long the police were actually monitoring the Myers residence. The application simply stated police began surveilling the residence sometime in January of 1997. Under *Gogg*, we must assume the last observations were made in January. Again, we believe this is too remote to save the search warrant.

In addition, the informants' statements were insufficient to support a finding of ongoing criminal activity. We recognize possession may continue for a period of time after such activity is observed. However, the controlled buys in April 1994 are too isolated and too far removed to provide a basis for determining Myers continued to possess controlled substances in late March 1997. In addition, the informants' observations did not detail the duration of Myers' activities in the past and no dates were given as to when the informants actually witnessed Myers in possession of marijuana. The application for the search warrant at best intimates possession was witnessed at least four weeks before the application was made. Finally, the property seized was readily moveable and easily destroyed. We conclude there was insufficient evidence of Myers' past activities to sustain a finding they were ongoing through the time the warrant application was made.

The State argues disclosure of the exact times and dates in the warrant application could have jeopardized the safety of the confidential informants and, consequently, failure to include specifics in the application should not be fatal. We agree safety of a police informant may necessitate the withholding of specific times

and dates. *See State v. Birkestrand*, 239 N.W.2d 353, 359 (Iowa 1976). However, the application did not indicate the withholding of specific times or dates was necessary to protect the safety of informants. As we have already noted, we may only consider the information available to the magistrate when the warrant is issued. The State may not now offer more thoroughly developed facts to support probable cause theories unsupported by the original warrant application.

The State also argues an anonymous phone call to the police complaining of drug sales at a residence supports a finding of probable cause. Even if we assume such a call is reliable, the anonymous phone call in this case concerned drug trafficking at a residence other than that of Myers. This does not establish the required nexus between the alleged illegal activity and the place to be searched.

**III. INFORMANT CREDIBILITY.** Myers also argues the informants were not credible and the information they provided should not be used to determine the existence of probable cause. We agree.

The magistrate indicated on the endorsement to the application he relied in part on information supplied by a confidential informant in issuing the challenged search warrant. Pursuant to the independent findings requirement of Iowa Code section 808.3, the magistrate stated the informants and their information appeared credible because the applying "officer was able to verify [and] confirm information through other agencies [and] personal observations." *See* Iowa Code § 808.3 (1997).

The information confirmed by other law enforcement agencies was the two controlled buys in April 1994. As already explained, this information is stale and

cannot therefore serve as a basis for issuing a search warrant. The personal observations of the applicant apparently refers to the surveillance of the Myers residence. However, this surveillance yielded only circumstantial evidence. Nothing was offered which directly confirmed the informants' statements regarding drug trafficking.

The application implies the informants are concerned citizens who have no motivation to falsify information and they have otherwise demonstrated truthfulness. Yet the application fails to state facts that lead to this conclusion. We acknowledge the State's argument citizen informants generally provide reliable information. However, this is not a per se rule, but rather a mere presumption generally proven by the nature of the circumstances under which the incriminating information became known. *See State v. Niehaus*, 452 N.W.2d 184, 189 (Iowa 1990). Reliability must still be shown. *See State v. Weir*, 414 N.W.2d 327 (Iowa 1987) (quoting *State v. Drake*, 224 N.W.2d 476, 478 (Iowa 1974)).

Many factors indicate the police informants were not reliable. The standardized warrant application provided a checklist of options designed to help police officers easily establish the reliability of a police informant. However, basic facts that would go to credibility were left unchecked. The application failed to indicate the informants were mature individuals, regularly employed or well-respected in the community. Nor did it indicate they had a truthful reputation or they had no known criminal record. The application shows the informants have not previously provided false information, but it does not indicate the informants have ever

previously provided reliable information to the police. That these factors were left unchecked -- factors which could be easily verified through the most minimal of investigation -- creates doubt about their veracity.

In addition, one informant acknowledged he was a heavy drug user but he was not using at the time he confided to the police. According to the application, the other informant "has been using drugs since he was fourteen years old," implying he continued to use during the time he provided information to the police.

These factors, in conjunction with the failure to adequately corroborate the statements, indicate the reliability of the informants was not adequately shown. Therefore, their statements provide no basis to support the search warrant.

**IV. ISSUE PRECLUSION.** Because we find the magistrate did not have a substantial basis for determining there was probable cause, we need not address this issue. The warrant to search Myers' residence was invalid when issued and the evidence obtained during the execution of the warrant should have been suppressed at trial on this basis.

For these reasons, we reverse the judgment and sentences entered against Myers for two counts of possession of a controlled substance and remand for proceedings consistent with this opinion.

**REVERSED AND REMANDED.**