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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed April 30, 1985
vs.	)	5-92 84-820
MARK NOEDING GROSVENOR,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Johnson County, Vern Robinson, Judge.

A jury found the defendant guilty of two drug-related offenses. The defendant has appealed from the resulting convictions. REVERSED AND REMANDED.

Raymond D. Perry, Des Moines, for defendant-appellant.

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

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

OXBERGER, C.J.

Defendant was convicted of possession of marijuana with intent to deliver and possession of psilocybin mushrooms. He has appealed claiming that a number of errors occurred in events leading to his conviction. We reverse the trial court and remand for a new trial.

On September 7, 1983, police applied for and received a warrant to search the east side of 1822 Friendship, a duplex in Iowa City where the defendant lived. During the search marijuana and psilocybin mushrooms were found in a second floor hall closet of the building. Grosvenor's room was also searched and police seized 13 books on drug-related topics, two scales, two calendars, a piece of note paper, $4000 found in a jacket pocket hanging in the closet of Grosvenor's room, and $800 in Grosvenor's wallet. Grosvenor claims: (1) the evidence resulting from the search should be suppressed since there were false and misleading statements in the warrant and that the affidavit relied on was otherwise improper; (2) a motion in limine granted prior to trial was violated; (3) that the State failed to disclose exculpatory evidence; (4) that the defendant's first amendment rights were violated when the books seized from his room were admitted into evidence and; and (5) there is insufficient evidence to support a verdict of guilty.

Our supreme court has adopted the standard set forth by the United States Supreme Court regarding the proof necessary in order to find a search warrant was improperly issued. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978); State v. Groff, 323 N.W.2d 204, 207 (Iowa 1982). That standard set forth in Franks indicates the defendant must show the affiant either intentionally and knowingly made a false statement or made a false statement with reckless disregard for the truth. Franks at 155, 98 S. Ct. at 2676, 57 L. Ed. 2d at 672.

We find it necessary to set out the basis for the search warrant given by the affiant police officer:

> FACTS AND CIRCUMSTANCES which lead applicant to believe that grounds exist as specified above to issue a search warrant for the described premises, place, residence and/or automobile are as follows: Spring of 1983 this officer drove to 1822 Friendship St. accompanied by one Michael Hardy. Hardy pointed out said address to me and informed that large quantities of LSD were being sold from 1822 Friendship St. Spring of 1983 a DCI undercover narcotics officer for the state of Iowa established the transaction was under surveilance by me. I observed the intermediary post the undercover officer a short distance from 1822 Friendship St. Returning directly back to the undercover officer the intermediary handed over to the officer the 100 units of LSD. The intermediary told the officer that the purchase had been made from a male named Mark and provided the officer with a physical description of Mark consistent with that of Mark Grosvenor. July, 1983 a confidential informant told me of his knowledge that large quantities of illegal drugs were being sold by one Mark. The informant described the location of Mark's residence consistent with that of the residence of Mark Grosvenor, 1822 Friendship St. In addition, the informant, as above, on Sunday, September 4, 1983, went to the residence of Mark Grosvenor and attempted to purchase drugs. By means of electronic surveillance I heard Mark Grosvenor tell the informant to go through the intermediary as described above in order to purchase drugs. Again, Sunday, Sept. 4, 1983 the same informant entered the residence of Mark Grosvenor and saw a large triple beam scales, marijuana seeds in large quantity on a tray and marijuana cigarettes partially used. The informant also saw a large plastic bag containing a white powdered substance. By means of this informant and the same intermediary as described through out, a quantity of psilocybin mushrooms was purchased on Sept. 4, 1983. I did surveillance on this transaction, I observed the informant posted just outside the residence of Mark Grosvenor. The intermediary entered into and returned from the residence of Mark Grosvenor and turned over to the informant a quantity of psilocybin mushrooms purchased from Mark Grosvenor. Extensive surveillance of those vehicles parked at 1822 Friendship St. revealed no other Mark other than Mark Grosvenor, 1822 Friendship St. September 1983 I received new information from another police agency of illegal drugs from his residence over an extended period of time. On Wednesday, September 7, 1983 this officer again ran surveillance on a drug transaction using the informant as above and the intermediary as

> above. The informant and intermediary were under electronic surveillance. The informant parked a short distance from 1822 Friendship St. and the intermediary was observed going directly to and returning directly from the residence of Mark Grosvenor. Intermediary then turned over the informant.
> WHEREFORE, the undersigned applies to Stephen C. Gerard II Magistrate of the District Court of Iowa for Johnson County, Iowa, for a search warrant to be issued and the said 1822 Friendship St. Iowa City, Iowa and 1974 Olds Omega be searched for said property.

The defendant claims the search warrant affidavit was false and misleading because it failed to indicate not only that 1822 Friendship was a rooming house, but that other people have access to the common areas and occupy other rooms in the house, and one of the rooms was rented by the "intermediate" who allegedly purchased the drugs, Mervin Nissley. The affiant indicated at trial he was aware of both facts, although the information was never given to the magistrate issuing the warrant.

In response to this, the State contends that the error was cured by the fact the warrant refers to the building being "jointly controlled" by Grosvenor. A warrant may be issued even if the defendant is not in exclusive control of the premises; however, where defendant is not in exclusive control of the area, it must be shown by additional proof that he had the ability to maintain control over the drugs. State v. Reeves, 209 N.W.2d 18, 23 (Iowa 1973). This additional information comes from the informant and intermediary, the State says.

The State also says there was no error in failing to inform the magistrate that Nissley rented a room in the building since he had not yet begun living there. However, Nissley testified he had a key to the room at the time the alleged drug transactions occurred and could come and go as he pleased.

The State further says any error is cured by the fact the intermediary says he obtained drugs prior to the time he lived there. As we will discuss further, there is no basis to lend credibility to the informant's statements and his observations occurred well before the observed "drug buys."

Even if misrepresentations were made in the search warrant affidavit, we will uphold it if there is probable cause for issuance of the warrant absent the misrepresentations. State v. Seager, 341 N.W.2d 420, 425 (Iowa 1982). Defendant claims the remaining information provided to the magistrate is deceptive or involves stale information and cannot provide probable cuase for the issuance of the warrant. Probable cause exists when the facts available are sufficient to justify the belief of a reasonably cautious person that an offense has been committed or that evidence is being concealed at the place to be searched. State v. Seiler, 342 N.W.2d 264, 266 (Iowa 1983)

The warrant indicates a Michael Hardy stated in spring 1983, at least three months before issuance of the warrant, that drugs were being dealt from 1822 Friendship. In addition to being remote in time to the warrant, there is no connection of the incidences to Grosvenor, defendant argues, and no indication of the reason for the affiant's reliance on Hardy's statements. The affidavit goes on to state an intermediary went into the building in spring 1983, purchased LSD from someone named Mark, and gave a description consistent with that of Mark Grosvenor. Defendant says this also is stale information, the informant's credibility was never established, and he was never searched prior to going into the building. Another Mark, Mark Bolden, also fit the description given, was an associate of Nissley , and was a suspected drug dealer.

Another confidential informant, later identified as Brad English, stated in July 1983, drugs were being sold from 1822 Friendship. In fact, instead of giving the address of 1822 Friendship, the informant described the building where drugs were dealt as a house in back of a church in "that part of town." Defendant says the officer apparently concluded the building was 1822 Friendship, although there is no church near the building and the nearest facsimile is an Odd Fellows Hall.

Electronic surveillance was also claimed to be used on two occasions. However, no mention is made that in the September 4 surveillance the equipment was not working properly. The officer admits that the only conversation heard

was not working properly. The officer admits that the only conversation heard was between English and Grosvenor. English referred to the other informant, Merv Nissley and said, "When Merv buys from Mark he pinches it. So I'd like to deal with you directly." Gorsvenor's response was, "I don't do business that way. Go find Merv."

The other surveillance occurred on September 7, but the affidavit does not reveal that the intermediary who bought the drugs, Nissley, was not a part of the electronic surveillance and instead an informant who was outside the building during the entire transaction was the only person with a microphone on his body. The actual drug transaction was never under electronic surveillance.

English also reported seeing paraphernalia on September 4 in defendant's room. Defendant again points out there is no information in the warrant which would show any basis for the informant's credibility.

Finally, reference is made to "new information from another police agency that Mark Grosvenor, 1822 Friendship St. has been selling large quantities of illegal drugs from his residence over an extended period of time." Defendant says there must be some reference to the time when this information was received and some of the details obtained in order to provide the specificity necessary for a finding of probably cause.

The general rule recognized in our jurisdiction is that the facts supporting issuance of a search warrant must be so closely related to the moment of issuance as to justify a finding of probable cause at the time. State v. Rockhold, 243 N.W.2d 846, 850 (Iowa 1976); 28 C.J.S. Supp. Drugs and Narcotics § 133 (1974). Probable cause does not continue for an extended period of time, particularly where it involves the presence of a controlled substance seen at a specific time. State v. Paterno, 309 N.W.2d 420, 424 (Iowa 1981). When the facts creating probable cause existed five days before the warrant issued, they were found to be sufficiently close in time. Id. at 423-24. However, a warrant has been found to be issued on stale facts when the observations occurred 56 days prior to the search.

Rockhold, at 850. Time alone is not conclusive as to whether probable cause exists. State v. Hennon, 314 N.W.2d 405, 406 (Iowa 1982). All the factors will be considered in deciding if information is stale; for example, where a large quantity of material was observed it is not as likely to disappear as a small quantity might, and more remote evidence would be sufficient. Id. If the timeliness of the observations cannot be ascertained from the warrant, probable cause for search has not been shown. Id. (numerous authorities cited).

We believe the observations reported in spring of 1983 and in July 1983 are too stale to provide probable cause for this warrant. In addition to being remote in time, they are vague and never connect drug dealings to the defendant.

We are particularly concerned with the fact that nowhere in the affidavit is either the intermediary or informant identified or any basis given for lending credibility to their actions and statements. While it is not necessary to reveal the identity of an informant, the United States Supreme Court has stated that the defendant's fourth amendment rights are violated unless there are underlying facts showing the informant's credibility, or verification of his actions, or other indicia of reliability. Illinois v. Gates , ____ U.S. ____, ____, ____,____, 76 L. Ed. 2d 527, 545 (1983). We will look at the totality of circumstances involved. Id.

Looking at the search warrant and considering all of the circumstances presented we find there is not one indication of reliability of the informant or intermediary. The State argues the informant's and intermediary's actions were verified by the fact they were observed during the drug transaction. The fact that the actual transaction was not observed would not be enough, ordinarily, to negate probable cause, and instead goes to the credibility of the informant. 28 C.J.S. Supp. Drugs and Narcotics § 213 (1974). However, the credibility of the person claiming to make the purchase from Grosvenor is seriously in doubt when he also has control over the premises and is a known drug dealer himself.

The remnants of the affidavit which might indicate probable cause include

the tape recording and the information from the police agency. The only statement obtained from the defendant during the recording is the considerably ambiguous statement, "I don't do business that way, go find Merv." While the police agency's indication that Grosvenor was involved in drugs "for an extended period of time" could provide probable cause with more information, no time reference is given and there are no details as to what the information involved. As we have indicated, if timeliness of information cannot be ascertained, probable cause is not shown. Hennon at 406. The reference to an "extended period of time" only further reinforces that the information was from some remote period in time.

The search warrant, then: (1) did not indicate the residence was a rooming house shared by other people; (2) did not indicate the intermediary who claims to have purchased the drugs had access to the common areas of the building and had a room in the house; (3) gave no information providing the credibility of the intermediary or informant; (4) gave as other information vague statements of events occurring at least three months prior to the "observed" buys; (5) did not reveal that on September 4 the only statement taped from the defendant was ambiguous; (6) did not reveal that on September 7 the actual purchase was not under electronical surveillance, and (7) gave no information as to time or any details of information from another agency.

On reviewing all of the facts available to the magistrate, and the facts which were omitted, we find that the statements in the affidavit were misleading. While affiant may not have intentionally written the statement in a misleading fashion, we are compelled to find that omitting such material information was done with reckless disregard for the truth, considering the fact the affiant was aware of many of the omitted items.

The only finding of probable cause supported by the information in the warrant is that drugs were contained somewhere in the building. Nissley was

searched before he went into the house on at least one occasion and he came out of the house with drugs. When there is probable cause to believe drugs are contained in a building, it is permissible to search common areas. State v. Suits, 73 Wis. 2d 352, 358-59, 243 N.W.2d 206, 210-11 (1976); People v. Bell, 53 Ill.2d 122, 127, 290 N.E.2d 214, 217 (1972). The State concedes, however, that there must be probable cause to search defendant's separate bedroom, but claims this is provided by the informant's observation of drugs in Grosvenor's room. For the reasons we have discussed, we do not find this information provides probable cause to search Grosvernor's room.

We hold that the evidence obtained from Grosvenor's room should have been excluded as the result of an improper search; and that the search of the common areas was properly made and the evidence resulting from that search properly included.

We further believe that defendant was not given a fair trial as a result of the admission of the evidence. When evidence is improperly admitted and it prevents the defendant from obtaining a fair trial, reversal is in order. See Hartzell v. U.S., 72 F.2d 569, (8th Cir.) cert. denied 293 U.S. 621, 55 S. Ct. 216, 79 L. Ed. 708 (1934). We find the remedy here should be the same as that provided in State v. Hillsman, 281 N.W.2d 114, 117 (Iowa 1979) where failure to disclose exculpatory evidence warranted grant of a new trial. A fact question remains whether defendant is guilty beyond a reasonable doubt based on the remaining evidence. Defendant's constitutional rights here should be protected by ordering a new trial absent the improperly obtained evidence.

Our ruling obviates the need to address other issues raised by defendant.

REVERSED AND REMANDED FOR NEW TRIAL.