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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed August 9, 1979

vs.)

WILLARD EDWARD MORE, JR.,)

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62469

Defendant-Appellant.)

Appeal from Linn District Court - Robert E. Ford, Judge.

Defendant appeals from jury conviction of possession of marijuana in violation of section 204.401(3), The Code 1977, and possession with intent to deliver cocaine in violation of section 204.401(1), The Code 1977, asserting trial court erred: 1) in overruling his motion to suppress certain evidence and in denying his request for an in-camera examination of an informant; 2) in admitting evidence allegedly seized outside the scope of the search warrant; 3) in finding there was sufficient evidence to warrant submission to the jury the questions of intent to deliver cocaine and possession of marijuana; 4) in sentencing defendant to a class C felony; 5) in denying defendant's application to act as co-counsel; and, 6) in refusing to appoint counsel upon a showing of alleged indigency. **AFFIRMED IN PART; REVERSED AND REMANDED IN PART.**

Gerald J. Kucera of Cedar Rapids, Iowa, attorney for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Faisom Sessoms, Assistant Attorney General, attorneys for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Defendant, Edward More, Jr., appeals from a jury conviction of possession of marijuana in violation of section 204.401(3), The Code 1977, and possession with intent to deliver cocaine in violation of section 204.401(1), The Code 1977. On appeal, defendant asserts trial court erred: 1) in overruling his first motion to suppress evidence obtained as a result of a search warrant based upon allegedly false information given by an informant and in overruling the defendant's request for an in-camera examination of said informant; 2) in admitting into evidence Exhibit 6, the subject of a second motion to suppress, which defendant alleges was outside the scope of the search warrant; 3) in finding there was sufficient evidence to warrant submission to the jury the question of intent to deliver cocaine and possession of marijuana; 4) in sentencing defendant to a class C felony under section 204.401(1)(a), The Code 1977, and in refusing to honor the parties' stipulation to treat cocaine as a non-narcotic drug for purposes of sentencing; 5) in denying defendant's application to act as co-counsel; and 6) in refusing to appoint counsel on a showing of alleged indigency. We affirm as to issues one through five. We reverse as to issue six and remand the case to trial court for a determination of costs to be paid by the county.

On April 5, 1978, based upon a four-week surveillance of traffic in and out of defendant's residence, and information received from an unidentified informant that there were drugs in defendant's residence, the Metro Narcotics Unit of the Cedar Rapids Police Department obtained a warrant to search defendant's apartment. On April 8, 1978, the search warrant was executed. Defendant and another male were apprehended in a bedroom of defendant's apartment where defendant was found holding a gram scale and pouring "something" into a folded piece of paper held by the second male. The paper later was identified as "Snow Seal," a material often used to facilitate the transportation of cocaine. Evidence seized as a result of the search included the gram scale, the Snow Seal paper, \$350 in cash found on the bed near where the men were standing, a substance wrapped in plastic which appeared to be cocaine, a metal band-aid can containing a white powdery substance, a cake pan containing what appeared to be marijuana, a white plastic garbage bag containing a green plant-like

substances found inside a tote bag, and a sheet of paper listing names, dollar amounts, references to "gold" and grams, which appeared to be a record of drug sale transactions.¹

Defendant More was taken into custody, along with Julie Dusteroff, the woman with whom he shared the apartment, and Clifford Rice, the other male apprehended in defendant's bedroom. Following a jury trial which resulted in defendant's conviction, trial court sentenced him to six months incarceration for violation of section 204.401(3) to be served concurrently with the sentence of imprisonment for a period not to exceed ten years for violation of section 204.401(1)(a).

I. Validity of Search Warrant and In-Camera Examination of the Informant

A. The Search Warrant. Defendant argues that the evidence seized from his apartment was the fruit of an unconstitutional search and seizure and should have been suppressed. Our initial inquiry is whether defendant has properly preserved his record to permit his challenge to the validity of the warrant. To preserve error on appeal, a defendant whose pretrial motion to suppress has been overruled must make a proper objection at trial when the objectionable evidence is offered. State v. Everett, 214 N.W.2d 214, 217 (Iowa 1974); State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973). Defendant's counsel stated that defendant had "no objection" when the prosecutor attempted to introduce eleven of the state's fourteen exhibits.² Thus, error was not preserved as to these items.

Defendant, however, did raise objections as to the admissibility of Exhibit 2 (Ohaus gram scale) and Exhibit 6 (paper purportedly listing drug transactions) on the grounds that they were beyond the scope of the warrant. Trial court ruled that each was admissible because it came within the plain view exception to the search warrant requirement.³ Because this exception requires that the governmental agent inadvertently discover the item in plain view following a legitimate intrusion by the agent, State v. Davis, 228 N.W.2d 67, 70 (Iowa 1975) (emphasis added), we must determine the validity of the search warrant.⁴

The warrant, in this case, was issued on the strength of an affidavit by Deputy David Knott based on information supplied in part by an unidentified informant.⁵ Defendant asserts that the information supplied by the informant was false, thereby rendering the warrant invalid.

A presumption of validity is accorded to an affidavit supporting a search warrant. Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2685, 57 L.Ed.2d 667, 682 (1978). In State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974), the court ruled that a defendant is entitled to an evidentiary hearing attacking the veracity of the representations upon which a search warrant has been issued only upon a preliminary showing under oath that an agent or representative of the state has made an intentional misrepresentation of fact, or that a fact which is material to the finding of probable cause is false.⁶ The defendant must point out with specificity the portion of the warrant affidavit that is claimed to be false and accompany it with an offer of proof. Franks v. Delaware, 438 U.S. at 171, 98 S.Ct. at 2685, 57 L.Ed.2d at 682, State v. Boyd, 224 N.W.2d at 616. If defendant thereafter proves either an intentional misrepresentation or false statement of fact by a preponderance of the evidence, the search warrant must be invalidated. However, defendant is permitted to impeach only the falsity of statements by the governmental affiant, not those of the informant. Franks v. Delaware, 438 U.S. at 171, 98 S.Ct. at 2685, 57 L.Ed.2d at 682; State v. Boyd, 224 N.W.2d at 616.

⁵ The affidavit stated in part:

I further wish to state that for the last (4) four weeks we have maintained surveillance on this residence and have seen known cocaine users enter this residence and then leave after having been there a short period of time. I further wish to state that a confidential reliable informant has observed cocaine inside the residence on three (3) different occasions within the last seventy-two (72) hours and that on one of these occasions, it amounted to 3/4 of an ounce of cocaine. Information given to me in the past by this confidential reliable informant has proved to be accurate after a check by the affiant.

⁶ If, after excising the false statements, the remaining statements are sufficient to establish probable cause, the statements are not material and the warrant will stand. Franks v. Delaware, 438 U.S. at 171, 98 S.Ct. at 2685, 57 L.Ed.2d at 682; State v. Iowa District Court in and for Johnson County, 247 N.W.2d 241, 247 (Iowa 1976).

In his challenge, defendant does not contend that Deputy Knott falsely swore to the information supplied by the unidentified informant, but rather that the unidentified informant made false statements to Deputy Knott. We conclude under these facts that whether or not defendant proved by a preponderance of the evidence that there was no cocaine in his residence between April 1st through 5th is irrelevant. Because he attacks only the veracity of the informant, defendant received more than he was entitled to under the law when trial court granted the evidentiary hearing.

Although defendant does not specifically attack the warrant's validity due to its failure to meet the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 114-115, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723, 729 (1964), his asserted error essentially raises this question. It is constitutionally required that a search warrant issue only upon probable cause independently determined by a neutral magistrate based on information supplied by the governmental agent. U.S. CONST. amend. IV; IOWA CONST. art. I, § 9; State v. Spier, 173 N.W.2d 854 (Iowa 1970). Further, the magistrate "... must not rely on conclusions 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). Where an informant supplies information used by the governmental agent to establish probable cause for obtaining the warrant, the magistrate must be apprised of "underlying facts and circumstances ... 1) from which the informant reached his [or her] conclusion, and 2) from which the affiant concluded the information was reliable." State v. Kaufman, 265 N.W.2d at 616, quoting State v. Spier, 173 N.W.2d at 859.

The first prong of the Aguilar test is met in this case by the recent and personal observations of the informant. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). See also Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). However, informant's present trustworthiness, often established by a factual showing of previous reliability, is absent in this case. Mere conclusory statements by the affiant that the source is reliable is insufficient. State v. Birkestrand, 239 N.W.2d 353, 357 (Iowa 1976); State v. Valde, 225 N.W.2d 313, 315 (Iowa 1975); State v. Salazar, 174 N.W.2d 453, 456 (Iowa 1970). Nonetheless, if other allegations of the affidavit provide independent corroboration of the informant's hearsay report and establish a substantial basis for believing the tip to be truthful, the

second test of Aguilar is fulfilled. United States v. Harris, 403 U.S. at 579, 91 S.Ct. at 2080, 29 L.Ed.2d at 731; State v. Dodson, 195 N.W.2d 684, 685 (Iowa 1972).

We believe that Deputy Knott's independent sworn statement concerning lengthy surveillance of defendant's residence, and of frequent visits of short duration by known, convicted drug users, is sufficient to satisfy the Harris test and, therefore, conclude that the magistrate had sufficient independent factual information upon which to make a finding of probable cause for issuance of the search warrant here challenged. See also Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, 78 A.L.R.2d 233 (1960).

B. In-Camera Examination of Informant. Defendant further asserts the trial court erred in denying his request for an in-camera examination of the unidentified informant because such examination was essential to the determination of the validity of the search warrant. The United States Supreme Court has held that due process does not require such disclosure at a suppression hearing. McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967). See also State v. Salazar, 174 N.W.2d at 456. But the government's privilege to withhold an informant's identity in the furtherance and protection of the public interest in effective law enforcement, is limited by the "fundamental requirements of fairness." Roviaro v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 628, 1 L.Ed.2d 639, 645 (1957). Following Roviaro, Iowa law requires the disclosure of an informant's identity when it "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . ." (emphasis added). State v. Sheffey, 243 N.W.2d 555, 557 (Iowa 1976), quoting Id. Defendant has the burden of showing the need for disclosure. "Mere speculation an informer may be helpful is not enough to carry the burden and overcome the public interest in the protection of the informer." State v. Sheffey, 243 N.W.2d at 559.

Except for his desire to challenge the veracity of the informant, defendant has put forth no substantial ground to show that the informant's identity is essential to his case. We conclude the trial court properly denied his request for an in-camera examination of the informant.

II. Admissibility of Exhibit 6

Defendant asserts trial court erred in admitting Exhibit 6, the list of names and dollar amounts, which was the subject of a motion in limine and a second motion to suppress. We agree with the trial court that the motion to suppress was not timely. See Iowa R. Crim. P. 11(e).

Defendant also asserts that because his motion in limine alerted trial court to the questionable admissibility of Exhibit 6, trial court committed reversible error in refusing to allow him to argue the merits of his objections to its admissibility outside the presence of the jury, and that trial court improperly summarily overruled his objections thereto. We disagree. A motion in limine alerts trial court to the questionable nature of a particular item of evidence and careful procedure would preclude its disclosure until the court, during trial in the jury's absence, has received an offer and objection. State v. Johnson, 183 N.W.2d 194, 197 (Iowa 1971). However, trial court's failure to follow such procedure is not reversible error per se. We believe defendant's objection to the evidence on the grounds that it was beyond the scope of the search warrant was properly overruled in this case and any claimed procedural error was harmless.

We concur in trial court's finding that Exhibit 6 was found in "plain view" by the officers conducting a valid search according to the principles of Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, reh. denied 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed.2d 120 (1971), adopted by Iowa in State v. Davis, 228 N.W.2d 67 (Iowa 1975). Exhibit 6 was found laying on a table in defendant's dining area, next to a cake pan containing a substance later found to be marijuana. The police had a prior justification for the intrusion (the valid search warrant); the incriminating nature of the object was immediately apparent (listing of names, dollar amounts, and use of the terms "gold" and "grams"); the discovery was inadvertent (paper lying in plain view). Based on these facts, we find that it was not error to admit Exhibit 6 into evidence.

III. Sufficiency of the Evidence as to Intent to Deliver Cocaine and Possession of Marijuana

In considering the sufficiency of the evidence, we view that evidence in the light most favorable to the State and "accord the evidence all the reasonable inferences to support the verdict." State v. Boyd, 224 N.W.2d 609, 612 (Iowa 1974). We find the evidence of several grams of cocaine, the gram scale, the Snow Seal, the \$350 found on the bed, and Exhibit 6, containing names, grams and amounts of money, to be substantial evidence from which a jury could find intent to deliver in violation of section 204.401(1), The Code 1977. Thus it was not error to submit the question of defendant's innocence or guilt to the jury on this issue. State v. Didley, 264 N.W.2d 732 (Iowa 1978); State v. Metcalf, 260 N.W.2d 857 (Iowa 1977). Further, we find that the

substantial amount of marijuana found in an apartment "... accessible to the accused and subject ... to the joint dominion and control of the accused and another" was sufficient evidence from which a jury could determine possession in violation of section 204.401(3), The Code 1977. See State v. Reeves, 209 N.W.2d 18, 22 (Iowa 1973). Trial court did not err in overruling defendant's motions for acquittal on either charge.

IV. Stipulation for Purposes of Sentencing

The State and the defendant entered into a stipulation that cocaine be treated as a non-narcotic drug for purposes of sentencing. On appeal, defendant asserts trial court erred when it refused to honor this stipulation and instead sentenced him under section 204.401(1)(a) for conviction of a class C felony. Although cocaine is not listed in section 204.204, The Code 1977, Schedule I, cocaine is found in section 204.206(6), The Code 1977, Schedule II - substances included. Defendant does not maintain that such classification is arbitrary or capricious, or that the legislature has no right to make such rational classifications, but instead insists the stipulation should have been honored.

"Stipulations as to the law do not settle for the court what the law is" State v. Aumann, 236 N.W.2d 320, 322 (Iowa 1975). Further, the parties or their attorneys are not competent to determine by stipulation questions regarding the existence or proper construction of a statute or the validity of a legislative enactment. 73 AM. JUR. 2d Stipulations § 5 (1974).

Pursuant to section 902.9(3), The Code (Supp. 1978), a class C felon shall be confined for no more than ten years and sentenced to a fine of not more than \$5,000. Accordingly, we find no abuse of discretion on the part of the trial court in the sentence imposed in this case.

V. Application to Act as Co-Counsel

Defendant asserts trial court erred in overruling his application to act as co-counsel. A defendant in a criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). But he is not entitled to as a matter of right to be heard by himself and also by counsel. See 21 AM. JUR. 2d Criminal Law § 311 (1965). Thus, an accused ordinarily may not participate in the conduct of his or her defense if he or she elects to be heard by counsel. Id. As the Iowa supreme court has noted, the "trial judge must keep order, and a trial can become bedlam if counsel and

client both take the floor." State v. McKee, 223 N.W.2d 204, 206 (Iowa 1974).⁷ There is nothing in the record to indicate that defendant ever asked to proceed without the assistance of counsel, to discharge his counsel, expressed any dissatisfaction with him, or made a showing of prejudice. See State v. Smith, 215 N.W.2d 225, 227 (Iowa 1974). See also United States v. Denno, 348 F.2d 12, 15 (2d Cir. 1965). Thus we find that trial court did not abuse its discretion in denying defendant's request.

VL Defendant's Right to Court-Appointed Counsel

Defendant's last assertion on appeal is that counsel should have been appointed to represent him. Defendant's affidavit shows a 1965 Chevrolet Chevelle as his only asset and a prior twelve-month income of \$2,000, with debts of \$1,000. Although a relatively large sum of money was confiscated during the execution of the warrant, in view of the lack of a formal record in this matter, and the possibility that a portion or all of that money would prove to be illegally gained, we believe trial court erred in determining defendant was not indigent as defined in section 336A.4, The Code 1977.⁸ See also State v. Smith, 262 N.W.2d 567, 574 (Iowa 1978); Bolds v. Bennett, 159 N.W.2d 425, 428 (Iowa 1968).

Our review of this issue requires an independent evaluation of the totality of the circumstances. State v. Smith, 262 N.W.2d at 573. Such review leads us to conclude defendant was indigent and should have been provided with appointed counsel. We therefore reverse on this issue and remand the case to trial court for a determination of costs to be paid by the county.

Judgment of trial court is affirmed as to issues one through five, reversed as to issue six.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

⁷ Although the State points out defendant's affidavit was not notarized, we find the judge signed the Initial Appearance filed concurrently with the affidavit, and also signed the Affidavit and Initial Appearance forms of Julie Dusterhoff, which were before her at the same time. App. p. 3.

⁸ Section 336A provides: "For the purpose of this chapter, an indigent shall be any person who would be unable to retain in his behalf, legal counsel without prejudicing his financial ability to provide economic necessities for himself or his family."