

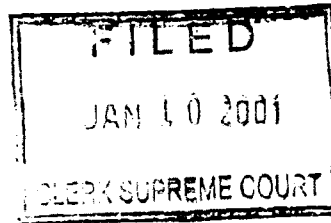
IN THE COURT OF APPEALS OF IOWA

No. 0-573 / 98-2074
Filed January 10, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRADLEY DAVID AUKES,
Defendant-Appellant.



Appeal from the Iowa District Court for Bremer County, Jon Scoles, Judge.

Bradley David Aukes appeals the district court's judgment and sentence, finding him guilty on two counts of possession of a controlled substance (marijuana) with intent to deliver. **AFFIRMED.**

Thomas P. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Karen Doland and James Kivi, Assistant Attorneys General, and Kasey E. Wadding, County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

VAITHESWARAN, J.

Bradley Aukes was adjudged guilty of two counts of possession of marijuana with intent to deliver. On appeal, he contends the district court should have suppressed evidence obtained pursuant to three search warrants. We disagree and affirm.

I. Background Facts and Proceedings.

The search warrant applications reveal the following facts. Michelle Smith met Aukes in Waverly on the evening of September 12, 1997. Early the following morning, she went home with him after he offered her \$150 to do so. Aukes smoked a marijuana cigarette and snorted some methamphetamine in her presence. He offered Smith some methamphetamine. She refused. He then offered her some LSD. When she refused it, he forcibly placed it in her mouth, where it melted. Aukes next asked Smith to perform a sex act. She refused and he knocked her into a chair and assaulted her. Smith passed out. When Smith awoke, Aukes said he would take her home. As they left the apartment, Smith ran across the street and told a man who was walking his dog that Aukes had tried to kill her and may have raped her. The man offered her a ride but told her to hide until Aukes left. Smith panicked and ran to a convenience store. A customer gave her a ride home.

Police applied for their first warrant on October 1, 1997, eighteen days after the incident. The warrant was issued and officers conducted a search of Aukes's home, seizing drugs, drug paraphernalia, cash and other items.

Several days later, an employee of a jewelry store located next to Aukes's home retrieved a black jacket lying on the roof of the building. He discovered

marijuana, LSD, and methamphetamine in the jacket and notified the police. The police obtained a statement from Smith that Aukes had been wearing the jacket on September 13. Based on this information, the police applied for a second warrant to search Aukes's home for evidence corroborating the jacket belonged to Aukes. The district court granted the application but failed to complete portions of the form order. The officers again searched the home and seized items specified in the warrant, as well as other items.

While searching the home pursuant to the second warrant, officers discovered drugs, cash, and drug paraphernalia. They immediately applied for and obtained a third, broader warrant. Again, a portion of the form order was not completed. The items listed as seized pursuant to this third warrant were identical to the items listed as seized under the second warrant.

The State charged Aukes with various crimes arising from the incident on September 13 and based on items seized from his home. The district court denied Aukes's motion to suppress the items. Pursuant to a stipulation reached with the State on the date of trial, Aukes agreed to be tried to the court on two counts of possession of marijuana with intent to deliver. He further stipulated the minutes of testimony were sufficient to support a finding he was guilty of the two charges and acknowledged his punishment could be enhanced based on a prior conviction for the same crime. See Iowa Code § 124.411 (1997). The district court adjudged him guilty as stipulated and sentenced him to an indeterminate term not to exceed ten years on each count, to run consecutively. On appeal, Aukes challenges the constitutionality of all three search warrants.

II. Suppression Ruling.

Aukes challenges the first warrant on the grounds it is based on stale information and police seized more than what was authorized under the warrant. He challenges the second warrant on the same grounds and also argues the warrant was not based on a formal probable cause finding. Aukes challenges the third warrant on the ground it was fruit of the poisonous second warrant, was overbroad, and was not supported by probable cause. Because Aukes's challenges are based on the federal and state constitutions, our review is de novo. *State v. Randle*, 555 N.W.2d 666, 668 (Iowa 1996).

A. Warrant #1. The first warrant, issued on October 1, 1997, sought:

marijuana, methamphetamine (crank), LSD (acid) any and all other illegal drugs as defined in section 124 of the state code of Iowa, any and all paraphernalia, additionally a 5" x 7" (approximately) mirror, a chair described as old with dark wooden arms and light brown or tan cushioned seat and back.

Pursuant to this warrant, officers seized drugs, drug paraphernalia and the mirror. They also seized the following items not described in the warrant: a portable radio scanner, fireworks, miscellaneous phone bills, soda cans, various bottles including vitamin bottles, marijuana related items, magazines entitled "High Times", a Beretta pistol, ammunition, a bottle of raw, unfiltered honey, and two separate stacks of cash totaling approximately \$2500.

1. Staleness. Aukes first contends the warrant was based on stale information because the incident supporting the warrant application occurred eighteen days before the warrant was issued. Aukes maintains there was no reason to believe the controlled substances described as being in his home on September 13 would still be there on October 1.

The federal and state constitutions require a search warrant to be supported by probable cause. U.S. Const. art. IV; Iowa Const. art. 1, § 8. Staleness implicates these constitutional provisions because allegations of criminal conduct may be so remote in time as to provide no probable cause for a warrant. *Randle*, 555 N.W.2d at 670. The test for probable cause is "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. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). In determining whether probable cause exists, the issuing magistrate or judge may ordinarily consider only information contained in supporting affidavits and magistrate's abstracts and endorsed on the application. *State v. Thomas*, 540 N.W.2d 658, 661-2 (Iowa 1995).¹ Our review is likewise ordinarily limited to only that information, reduced to writing, actually presented to the judge or magistrate at the time the application for warrant was made. *State v. Mehner*, 480 N.W.2d 872, 875 (Iowa 1992).²

A claim of staleness of facts precluding issuance of the warrant is not to be determined by a mere computation of the number of elapsed days. *State v.*

¹ Courts have recognized an exception to this rule where a defendant makes a substantial preliminary showing that the warrant affidavit contains a false statement or omits crucial information. *Frank v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *State v. Poulin*, ___ N.W.2d ___ (Iowa 2000). This exception is not applicable here.

² According to the minutes of testimony, Smith reported the incident to the Waverly police on September 14, 1997. Approximately six days later, an officer applied for a warrant to search Aukes's home. The officer testified at the suppression hearing that the district court denied the application because it lacked a corroborating statement from the man walking his dog. The officer then obtained that statement and submitted a renewed application to the district court, which the court granted on October 1, 1997. Although these facts are enlightening to explain the delay in obtaining the warrant, we do not consider them in resolving the staleness issue because they were not contained in the warrant application.

Padavich, 536 N.W.2d 743, 748 (Iowa 1995). Whether information is stale depends on the circumstances of each case. *Randle*, 555 N.W.2d at 670. We must first determine whether there was a significant lapse of time between the observation and the issuance of a warrant. *Gogg*, 561 N.W.2d at 367. If we determine the lapse of time was significant, we must then determine whether the criminal activity was continuous or isolated. *Id.*

Under the circumstances of this case, we agree with the district court that the lapse of time was not significant. The warrant application sought evidence relating to the claimed sexual assault and illegal drug use. The police officer's affidavit attached to the warrant application specifies Aukes knocked Smith into a chair. Although the application does not specify that the chair sought to be seized is the chair mentioned in the affidavit, we believe a magistrate could reasonably have drawn that inference. See *Id.* at 366. As for the drugs, we recognize that isolated observances of drug use may not support a probable cause determination for long, as drugs are readily consumable and transferable. *Id.* at 377. However, in this instance, we have more. Smith's statement to the officer reveals Aukes, while in his home, had possession of and used three distinct drugs in the span of less than three hours. See *State v. Bean*, 239 N.W.2d 556, 559 (Iowa 1976) (noting "accumulation of evidence" less likely to disappear). Additionally, he forced one drug upon Smith. In light of the deference we must accord the issuing judge and our preference for police to obtain warrants before conducting a search, we conclude this evidence had not become stale by October 1 and supported a finding there was probable cause to

believe evidence of drug crimes would be found at the home. See *State v. Franklin*, 564 N.W.2d 440, 444 (Iowa App. 1997).

2. Lack of Authority. Aukes next contends the police did not have authority to seize cash from his home. Our jurisprudence requires a nexus between the criminal activity, the things to be seized, and the place to be searched. *Randle*, 555 N.W.2d at 671. The nexus can be found "by considering the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items." *Id.* We conclude such a nexus existed between the drugs described in the warrant and the large amounts of cash found in Aukes's home. The cash was additional incriminating evidence of a drug crime. See *State v. Swaim*, 412 N.W.2d 568, 575 (Iowa 1987). Accordingly, Aukes was not entitled to have this evidence suppressed. See *Randle*, 555 N.W.2d at 671; *State v. Hamilton*, 236 N.W.2d 325, 329-330 (Iowa 1975).

B. Warrant #2. The second warrant, issued on October 17, sought the following items thought to be associated with the jacket: (1) chewing gum packages like the gum found in the jacket; (2) shoestrings like the ones used to tie the jacket; (3) fibers or hairs similar to those on the jacket; (4) clear baggies or white envelopes, like those found in the jacket pocket and believed to contain drug residues; (5) gravel-sand fertilizer mixture like that found in the jacket; (6) any photographs depicting Aukes's ownership of the jacket.

1. Staleness. Aukes first contends the warrant is based on stale information because the jacket was seized eleven days before the warrant was

issued and the application did not state any of the items sought in the warrant would still be present. The State initially contends Aukes did not preserve error on this issue. We elect to bypass this error preservation claim and proceed to the merits. See *State v. Rockhold*, 243 N.W.2d 846, 859 (Iowa 1976). The type of evidence sought by police was the type of evidence that would likely have remained in Aukes's home. See *State v. Woodcock*, 407 N.W.2d 603, 605 (Iowa 1987). Accordingly, we conclude the eleven-day delay in obtaining the warrant did not render the information stale.

2. Lack of Authority. Aukes next contends officers exceeded the scope of the warrant when they seized items not specifically listed or described in the warrant. He specifically sought to suppress a digital postal scale, a Tupperware container with marijuana, gray tennis shoes, brown snow boots, a glass vial with possible residue, one book on methamphetamine, nine books and papers on numerous drugs, and a bag containing \$1,028 in cash. We agree with the State these items are reasonably related to the items sought in the warrant. The warrant specifically authorized seizure of shoelaces. Therefore, it was reasonable for the officers to seize the footwear that might contain those shoelaces. The other items were all related to drug offenses and constituted additional incriminating evidence. See *Swaim*, 412 N.W.2d at 575.

3. Lack of Probable Cause. Aukes finally contends the warrant was not supported by probable cause because the judge did not check the box on the application indicating that probable cause existed and did not indicate on the application whether the court was or was not issuing the warrant. The State concedes these omissions but responds that the district court nevertheless

complied with statutory requirements by endorsing the application and indicating it relied on the officer's affidavit.

Iowa Code section 808.3 states:

If the magistrate issues the search warrant, the magistrate shall endorse on the application the name and address of all persons upon whose sworn testimony the magistrate relied to issue the warrant together with the abstract of each witness' testimony, or the witness' affidavit.

Although the court did not circle the pertinent language, the court signed the application and noted it relied on the police officer's affidavit. The court further signed the warrant which commanded the police to make immediate search of the premises. In light of these signatures and the court's express reference to the information on which it relied, we conclude the court's failure to fully complete the form findings did not render the warrant fatally defective and the warrant was supported by probable cause.³

³ Cf. *State v. Sykes*, 412 N.W.2d 578, 582 (Iowa 1987) (holding magistrate's signature on bottom of affidavit was sufficient compliance with the requirements of Iowa Code section 808.3); *Swaim*, 412 N.W.2d at 574 (holding magistrate's reference to affidavit and attachments and endorsement amounted to substantial compliance with statutory requirement to determine credibility of confidential informant before issuing warrant); *State v. Sheridan*, 247 N.W.2d 232, 233 (Iowa 1976) (holding magistrate's signature on bottom of instrument indicated approval, acceptance, and adoption of prepared instrument); *State v. Hicks*, 300 S.E.2d 553, 556 (N.C. 1983) (failure to check box on search warrant not fatal); but see *State v. Myers*, 570 N.W.2d 70, 74 (Iowa 1997) (magistrate's endorsement not sufficient to permit use of confidential information as basis for issuance of warrant where reason checked for finding credibility not supported by the affidavit and magistrate failed to make any credibility findings); *State v. Beckett*, 532 N.W.2d 751, 754 (Iowa 1995) (holding magistrate did not substantially comply with statute where magistrate failed to set forth reasons supporting credibility of confidential informant and failed to sign bottom of affidavit supporting issuance of warrant); *State v. Iowa Dist. Court*, 472 N.W.2d 621, 624-5 (Iowa 1991) (holding no substantial compliance with statute where magistrate failed to check any boxes relating to reasons for believing confidential informant was credible and failed to include narrative).

C. Warrant #3. The third warrant, also issued on October 17, sought “marijuana, and any other controlled substance as described in Iowa code chapter 124, any drug paraphernalia, any monies from the sale of controlled substance, any other items deemed to be proceeds of the sale of drugs.”

1. Fruit of Poisonous Tree. Aukes first contends this warrant is invalid because the second warrant was invalid. Having concluded the second warrant was valid, we reject this argument.

2. Overbreadth. Aukes next contends the officers lacked authority to seize currency and a postal scale because there was no indication in the officer's affidavit these items were related to an illegal purpose. We reject this contention because we believe a magistrate could have reasonably inferred these items were additional evidence of a drug crime. *See Swaim*, 412 N.W.2d at 575.

3. Lack of Probable Cause. Finally, Aukes appears to contend the warrant was defective because the district court failed to circle the finding it had probable cause to issue the warrant. Because the court indicated it relied on the officer's affidavit, circled the sentence indicating it was issuing the warrant, endorsed the application and signed the warrant, we conclude the warrant was supported by probable cause and was not fatally defective.

We conclude the three warrants were not constitutionally infirm. Accordingly, we affirm the district court's decision overruling Aukes's motion to suppress.

AFFIRMED.