IN THE COURT OF APPEALS OF IOWA

No. 5-326 / 94-733

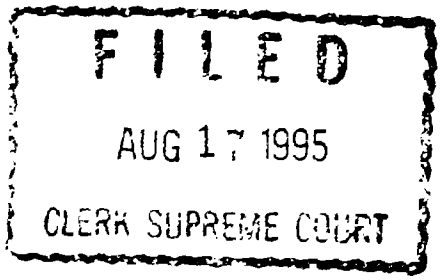
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JERRI JAN TINKER,

Defendant-Appellant.



Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon her convictions of possession of marijuana and failure to affix a drug tax stamp in violation of Iowa Code sections 204.401(3) (1991) (now codified at 124.401(3) (1995)) and 421A.12 (now codified at 453B.12 (1995)). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon Ruth Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark A. Campbell, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

SACKETT, P.J.

Defendant-appellant Jerri Jan Tinker appeals her conviction for possession of marijuana and failure to affix a drug tax stamp in violation of Iowa Code sections 204.401(1)(d), 204.401(1)(e), and 421A.12 (1993). Defendant contends the trial court erred in denying her motion to suppress evidence of sixteen ounces of marijuana found when executing a search warrant.[1] She contends the magistrate issuing the warrant was given false and misleading information. We affirm.

We review de novo. *State v. Lamp*, 322 N.W.2d 48, 50 (Iowa 1982).

Defendant and her husband, Fred Tinker, were both charged as co-defendants following a search of a residence at 1015 River Drive in Sioux City. Defendant's trial was severed from her husband's trial. Defendant filed a motion to suppress evidence obtained in the search.

Defendant contends in obtaining the warrant the magistrate was not advised two prior searches for drugs in places where Fred lived were fruitless.

The State admits the officer whose testimony supported the warrant did not tell the magistrate other search warrants had issued, and there were searches which were not fruitful at two places where Fred resided. The State advances defendant did not bring this matter up before the trial court or here. The State contends if we reach defendant's challenge it is an issue of credibility because the officer, Crafty, said he

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[1] The officers also seized firearms which the district court found should be suppressed.

did not include the information concerning the earlier searches in the application because he did not feel it was relevant.

In defendant's motion to suppress, she contended the officer failed to tell the magistrate of the two unsuccessful searches. The issue was preserved for review.

A search warrant can be impeached where it is obtained on the basis of deliberate falsehood or reckless disregard for the truth, *see Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684-85, 57 L. Ed. 2d 667, 682 (1978), and material omissions may constitute material representations. *See State v. Paterno*, 309 N.W.2d 420, 424 (Iowa 1981); *State v. Gillespie*, 503 N.W.2d 612, 615-16 (Iowa App. 1993).

The application for the warrant stated:

> On July 10, 1992, Fred W. Tinker was arrested for possession of marijuana with intent to deliver. Tinker had several pounds of marijuana in his possession and over $1,200.00 in cash on his person.
>
> On 9/21/92 a garbage search by this officer revealed marijuana seeds, stems, and leaves as well as documents showing the residence at 1015 Riverdrive is occupied by Jerri and Fred Tinker.
>
> This officer is an experienced member of the Sioux City Police Dept. Special Investigations Unit specializing in drug enforcement. Based on this officer's experience, it is common for people involved in drug trafficking to keep scales and packaging material at their residences as well as drugs, records, money, drug paraphernalia, and other types of drugs are also commonly found in those residences.

The application relied on Fred's activities and focused on the July arrest as a basis for his having drugs in his residence. The application also advanced supporting

evidence that Fred lived at 1015 River Drive without supplying the known contrary evidence:

(a) rumor of dissolution pending between defendant and Fred;
(b) Fred not seen at River Drive despite surveillance;
(c) a note found in garbage; and
(d) on July 10, 1992, a warrant issued and houses at 3501 Nebraska Street and 2500 Isabella Street were searched and nothing was found.

The evidence was known and relevant and should have been given to the magistrate. However, even with the evidence of Fred's arrest and residency excised from the application, the application still supports the warrant.

The warrant specified a search of garbage showed marijuana seeds, stems, and leaves in garbage identifiable with 1015 River Drive.

We affirm.

AFFIRMED.