IN THE COURT OF APPEALS OF IOWA

FILED
OCT 28 1982
CLERK SUPREME COURT

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| **STATE OF IOWA,** | ) | |
| Plaintiff-Appellee, | ) | Filed October 28, 1982 |
| vs. | ) | 2-214<br>67024 |
| | ) | 368 |
| **CLARK LEROY WEEKS,** | ) | |
| Defendant-Appellant. | ) | |

Appeal from Union District Court, Robert O. Fredericks, Judge.

Defendant appeals his conviction of two counts of possession of a controlled substance with intent to deliver for a profit, in violation of Iowa Code § 204.401(1)(b) (1979). On appeal, defendant asserts that (1) the application for a search warrant for defendant's house and car did not contain underlying facts showing the reliability of an informant; (2) the warrant was granted on the basis of false testimony by the applicant police officer, so the warrant should have been invalidated; and (3) property seized from defendant that was not listed on the warrant should have been suppressed. AFFIRMED.

C. W. Carlberg of Carlos, Carlberg & Jungmann, Greenfield, for defendant-appellant.

Thomas J. Miller, Attorney General, and John Messina, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

**PER CURIAM**

On December 31, 1980, defendant Clark Leroy Weeks' house and car were searched for controlled substances pursuant to a search warrant. The magistrate who granted the search warrant set forth the basis for it in his endorsement, which read, in pertinent part:

> I rely on the sworn statement... by Sgt. Heatherington that he did personally observe an informant who, has proven reliable in the past, enter [defendant's residence] and purchase marijuana at the price of $140 per ounce. This informant wishes to remain unidentified.

Upon executing the warrant, officers seized a large quantity of marijuana, a small amount of LSD, various drug paraphernalia, and other items.

The defendant moved to suppress the evidence on the grounds, inter alia, that the search warrant was invalid, that the property seized was not that described in the warrant, and that there was no probable cause for issuing the warrant. At the hearing on the motion the officer who had applied for the search warrant testified that although he had not witnessed the actual purchase, he had searched the informant and his car for drugs before sending him to purchase drugs from defendant, given him money to make the purchase, watched him enter and leave the residence, and received the newly purchased marijuana from him. The court subsequently denied the motion to suppress.

Defendant was found guilty by a jury of possession of marijuana and LSD with intent to deliver for a profit, in violation of Iowa Code § 204.401(b)(1979). He was sentenced to imprisonment for a maximum of five years on each count.

Defendant's first contention on appeal is that there was no probable cause for issuance of the search warrant because the reliability of the informant was not substantiated. Defendant cites Spinnelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) and Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) in support of this proposition.

While we agree that the general principles enunciated in Spinnelli and Aguilar regarding the constitutionality of search warrants are applicable to this

case, we note that the specific requirement that the reliability of the informant be substantiated is applicable only when the search warrant is based on hearsay statements made by the informant. See State v. Post, 286 N.W.2d 195, 199 (Iowa 1979). In Spinnelli and Aguilar, the affidavits presented to the magistrates for a determination of probable cause cited only hearsay statements made by informants. Spinnelli, 393 U.S. at 414, 89 S. Ct. at 588, 21 L. Ed. 2d at 642; Aguilar, 378 U.S. at 109, 84 S. Ct. at 1511, 12 L. Ed. 2d at 725. In the instant case, however, the search warrant was based on statements by a police officer that he personally observed the informant enter the defendant's residence and purchase marijuana. Although the officer did not witness the actual purchase, his testimony indicates that he searched the informant and his car for drugs prior to the informant's entrance into defendant's residence; watched him enter and leave the residence; and received newly purchased marijuana from him. We conclude that under such circumstances, when the search warrant is based on personal observations of the affiant rather than on hearsay statements of an informant, substantiation of the informant's reliability is unnecessary.

Defendant also contends that the trial court should have invalidated the search warrant because it allegedly contained false statements of material facts, citing State v. Boyd, 224 N.W.2d 609 (Iowa 1974). Subsequent to the filing of the parties' briefs on appeal, however, the Iowa Supreme Court modified its decision in Boyd in light of the United States Supreme Court decision of Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In State v. Groff, 323 N.W.2d 204 (Iowa 1982), the Iowa Supreme Court held that, consistent with Franks, a defendant may challenge the veracity of an affidavit under the Iowa Constitution by showing that the affiant: "(1) intentionally and knowingly made a false statement, or (2) made a false statement with reckless disregard for the

truth." Groff, 323 N.W.2d at 207 (citing Franks v. Delaware, 438 U.S. at 155, 98 S. Ct. at 2676, 57 L. Ed. at 672). We cannot conclude that either statement that defendant challenges, that the officer did "personally observe" the informant enter the defendant's residence and purchase marijuana, or that the informant had "proven reliable in the past" was false and was made intentionally or with reckless disregard for the truth. The affiant was not inaccurate in stating that he personally observed the informant. Nor can we accept defendant's argument that because the informant gave inconsistent testimony, the officer's testimony that the informant gave reliable information in the past must have been false. In any case, we do not believe that the officer intentionally made a false statement about the informant's previous tips, or made it with reckless disregard of the truth.

Finally, defendant claims that certain property seized at his residence should have been suppressed because it was not described in the search warrant. Again, we disagree. The warrant authorized a search for "Controlled Substances as defined in Schedule 204-401 Code of Iowa." Each of the items seized constituted controlled substances, contained controlled substances, or were in "plain view" to the officers during the lawful search. The marijuana and LSD and items containing marijuana and marijuana residue were validly seized pursuant to the search warrant itself. Other items were in "plain view" and of an incriminating nature and hence were lawfully seized by the officers during an otherwise valid search. State v. Davis, 228 N.W.2d 67, 72 (Iowa 1975).

Finding no merit in any of defendant's contentions on appeal, we affirm the decision of the trial court.

AFFIRMED.