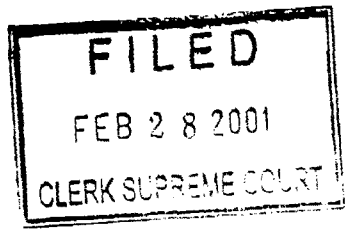
IN THE COURT OF APPEALS OF IOWA

No. 0-722 / 99-1990
Filed February 28, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

RODNEY DEAN SCHULT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer (motion to suppress), Jon Fister (trial and sentencing), Judges.

Defendant appeals from the judgments and sentences entered upon the district court ruling finding him guilty of conspiracy to manufacture more than five grams of methamphetamine, second offender, in violation of Iowa Code sections 124.401(1)(b) and 124.411 (1999), manufacturing of more than five grams of methamphetamine, second offender, in violation of sections 124.401(1)(b) and 124.411, receipt for unlawful purpose of a precursor substance in violation of section 124B.9, interference with official acts in violation of section 719.1, and possession of ephedrine and/or pseudoephedrine in violation of section 124.401(4). He contends his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution and article I, section 8 of the Iowa Constitution were violated by (1) law enforcement's warrantless entry and search of his residence, and (2) lack of probable cause for the issuance of a search warrant. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Par
Montgomery, Boles, L.L.P., Des Moines, for appe

Thomas J. Miller, Attorney General, Lind
General, Thomas J. Ferguson, County Attorne
County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and

MILLER, J.

Rodney Dean Schult appeals from the judgments and sentences entered against him, following bench trial, finding him guilty of conspiracy to manufacture more than five grams of methamphetamine, second offense, in violation of Iowa Code section 124.401(1)(b) and 124.411 (1999), manufacturing of more than five grams of methamphetamine, second offense, in violation of Iowa Code section 124.401(1)(b) and 124.411, receipt of a precursor substance for unlawful purpose, in violation of Iowa Code section 124B.9, interference with official acts in violation of section 719.1, and possession of ephedrine and/or pseudoephedrine in violation of section 124.401(4). He contends his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 8 of the Iowa Constitution were violated by a warrantless entry and search of his residence, and because there was not probable cause for the issuance of a search warrant. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS

The Cedar Falls Police Department received calls from concerned citizens on February 4, 6 and 16, 1999 stating that a smell like ammonia was emanating from Schult's residence and that the residents at that address were involved in the manufacturing of methamphetamine there. On February 25, 1999 a Cedar Falls police officer stopped a vehicle leaving the residence. One of the two occupants had prior arrests for possession of marijuana and possession of methamphetamine. The other was a known associate of two persons known to be methamphetamine users, one of whom had had two suspected methamphetamine labs in her residence. Schult had a prior arrest for

possession with intent to deliver methamphetamine, and the utilities to the residence were in his name. Officer Geisinger prepared a search warrant application and addendum for the residence based on these facts. On March 3, 1999 officers Geisinger and Carter drove to Schult's residence in an unmarked car and noticed the smell of ether, which grew stronger as they neared the residence.

When Geisinger and Carter arrived at the residence they observed Schult carry a glass jar from the detached garage into the house and shortly thereafter leave the house and go back into the garage. After Schult had gone back into the garage the officers decided to attempt to make contact with him outside the house. Schult was in the garage only a few seconds before he came back out carrying a can which he dumped on the ground in the driveway in front of the garage. Schult then closed the garage door and went back into the house before the officers had a chance to confront him. Officer Geisinger testified the ether smell was much stronger after Schult dumped the container in the driveway. The officers then approached the house and Geisinger knocked on the door several times. Carter stayed some distance from Geisinger and informed Geisinger he saw someone look out of a basement window. Schult eventually came to the door and stepped outside, shutting the door behind him. When he opened the door the officers smelled a strong smell of ether emanating from inside the house.

Officer Geisinger testified that when he explained they were police officers and were there to investigate a chemical odor Schult became very tense. Schult stated he had been using ether to try to start a car in the garage and when asked

if there was anyone else in the house he stated there was not. Geisinger testified that Schult began to walk away from the officers and he held onto his arm. As Geisinger continued to try and talk with him Schult began to whistle and tried to yell something back towards the house. The officers handcuffed Schult at that point and placed him in another officer's patrol car to avoid any further attempts to warn those inside.

Both officers testified they had prior experience with the manufacturing of methamphetamines and knew ether is used in the process. They were also aware that ether is highly explosive and had a low ignition point. It was a cold March night and the officers believed an ignited furnace could cause an explosion. Schult shortly thereafter admitted his girlfriend was inside. Officers were also concerned that she or other persons in the residence could have been overcome by the ether or were destroying evidence. Based on these concerns the officers knocked on the door again. Receiving no response, they kicked the back door open and entered the house to search for and remove any occupants. Once inside the residence they noticed the smell of ether was very strong. A third officer, who checked to see if anyone was in the basement, described the smell of ether in the basement as very strong, like a "fog".

Officer Carter located Doney Howard in a bedroom and Officer Geisinger located Roberta Baker in the living room. They removed them from the home. They contacted the fire department and utility company. The officers also contacted several neighbors in an attempt to evacuate the area. The area surrounding the house was taped off. No items were seized from the house and

the officers testified no search, other than for persons present in the house, was conducted.

Officer Geisinger then updated the warrant application he had previously prepared by adding two paragraphs to relate the events of that evening. A judge issued the search warrant, finding that the information from the citizen informants, the odor of ether, and the observations of law enforcement officials constituted probable cause for issuing it. Following execution of the warrant Schult was charged with conspiracy to manufacture more than five grams of methamphetamine (second offense), manufacture of more than five grams of methamphetamine (second offense), possession of ephedrine and/or pseudoephedrine with intent to use it as a precursor, receipt of a precursor substance for an unlawful purpose, and interference with official acts.

Schult filed a motion to suppress and later substituted an amended motion to suppress. He alleged the initial warrantless search of the residence was conducted in violation of the Fourth Amendment to the United States Constitution. He further alleged the application for search warrant omitted any mention of the officers' entry of his residence and the search warrant lacked probable cause. He asserted that all evidence obtained from both searches should be suppressed. The district court denied Schult's motion, finding that the officers reasonably feared for the safety of the occupants of the residence and others in the neighborhood. The court found

> the officers were actually motivated by a perceived and actual need to render aid or assistance, and the court finds that a reasonable person under the circumstances confronted by the officers would have thought an emergency had existed.

The district court also concluded that the exigent circumstances exception to the warrant requirement applied based on the officers reasonable fear that other occupants would destroy evidence and their fear for the safety of the occupants of the residence and others in the neighborhood. It further concluded that the application was not materially false and demonstrated a substantial basis for the issuing magistrate's conclusion that probable cause existed.

Schult stipulated to a trial on the minutes of testimony and the trial court found him guilty on all charges. Schult admitted to being a second offender and was sentenced to up to fifty years each on the conspiracy and manufacturing charges, up to ten years for receipt of a precursor substance, thirty days on the interference charge, and up to five years on the possession of ephedrine and/or pseudoephedrine charge, all to be served concurrently with each other and with a sentence imposed in a separate case. The court merged the sentences on the receipt of precursor drugs and possession of ephedrine charges. The conspiracy and manufacturing offenses were subject to a one-third mandatory minimum sentence.

Schult appeals the judgments and sentences. He contends his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 8 of the Iowa Constitution were violated by (1) the warrantless entry and search of his residence, and (2) a lack of probable cause for the issuance of the search warrant. In support of his first claim he argues that the emergency-aid and exigent circumstances exceptions to the warrant requirement are inapplicable and the officers' decision to seek a warrant was prompted by their illegal entry into his house. In support of his

second claim he argues that the search warrant application and addendum used information relating to the illegal warrantless search and seizure at his residence to establish probable cause, with the deletion of this illegally obtained information there was not probable cause to support the issuance of the warrant, the information in the warrant and the addendum was stale and did not create probable cause, and officer Geisinger was purposely untruthful and acted with a reckless disregard for the truth when drafting his application for the search warrant and addendum.

II. STANDARD OF REVIEW

Schult's challenge is based on his constitutional right to be free from unreasonable search and seizure, as guaranteed by the Fourth Amendment to the United States Constitution and Article I section 8 of the Iowa Constitution. We review this alleged constitutional violation de novo in light of the totality of the circumstances as shown by the entire record. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999); *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). In reviewing the district court's ruling we consider both the evidence presented at the suppression hearing and that introduced at trial. *Id.* Error was preserved by the court's adverse ruling on Schult's motion to suppress. *Breuer*, 577 N.W.2d at 44.

III. MERITS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation , and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Evidence obtained in violation of this provision is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v. Manna,* 534 N.W.2d 642, 643-44 (Iowa 1995).

Warrantless searches and seizures are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *State v. Carlson*, 548 N.W.2d 138, 140 (Iowa 1996); *State v. Cadotte*, 542 N.W.2d 834, 836 (Iowa 1996). Valid exceptions to the warrant requirement exist for those searches (1) consented to, (2) based on probable cause coupled with exigent circumstances, (3) involving items in plain view, or (4) incident to arrest. *Cadotte*, 542 N.W.2d at 836 (citing *State v. Eubanks*, 355 N.W.2d 57, 58-59 (Iowa 1984)). Our supreme court has also recognized an officer's right to enter a dwelling without a warrant for the purpose of rendering emergency aid and assistance when a reasonable person would believe that a person within is in need of immediate aid. *See Carlson,* 548 N.W.2d at 140-42. The State has the burden of proving by a preponderance of the evidence that a warrantless search falls within one of the exceptions to the warrant requirement. *Carlson*, 548 N.W.2d at 140.

As set forth above, the record indicates that Officer Geisinger had prepared a warrant application and addendum *prior* to going to Schult's house on March 3, 1999 based on prior phone calls from concerned citizens regarding a chemical smell coming from Schult's residence, the stop by another officer of a vehicle leaving the same residence, Schult's prior arrest for possession of methamphetamine with intent to deliver, and the utilities being in Schult's name. After the challenged entry of the residence Geisinger returned to the police

station and before seeking a search warrant added two paragraphs to the addendum to the application regarding the events that had occurred that evening at the Schult residence.

Schult argues the search warrant application and addendum was defective because it used information relating to or gained from the illegal warrantless search and seizure of his residence and with the deletion of the information relating to this warrantless search and seizure there was not sufficient probable cause to issue the warrant. We disagree.

Assuming, without deciding that the initial, warrantless entry into Schult's residence was illegal, we find there is nothing of consequence in the warrant application or addendum derived from the entry. Further, nothing was seized during that entry. The only information that could be related to the disputed entry is the information in the two additional paragraphs added to the addendum by Geisinger after the entry, because the remainder of the application was prepared *prior* to the officers arrival at the Schult residence. The relevant added paragraphs state:

> On March 3rd, 1999 Inv. Richard Carter and myself drove past the residence and as we drove past we could smell a strong odor of ether coming from the garage area. From past training and experience, your Affiant is aware that ether is an ingredient for manufacturing methamphetamine.
>
> That your Affiant observed Rod Schult dumping ether on the ground outside the garage of the residence. That your Affiant and Inv. Carter approached this subject to inquire as to his activities. At this point Schult attempted to run from your Affiant and alerted others in the residence that officers were present. Schult was restrained, and investigators made contact with two other subjects inside the residence. The residence was secured, until the search warrant application can be reviewed.

The only information in the two additional paragraphs relating to the warrantless entry is that investigators made contact with two other subjects in the residence. We do not believe this fact to be material to the determination of probable cause. However, as this fact came from the warrantless entry of he residence, we will review the issuing judge's probable cause determination without considering this additional fact.

The test for probable cause is whether a reasonably prudent person would believe that a crime has been committed on the premises to be searched or evidence of a crime is being concealed there. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). "A probable cause finding must rest on 'a nexus between criminal activity, the things to be seized and the place to be searched.'" *Id.* (quoting *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987)). Taking into account the officers prior experience and training in drug related matters as shown by the record, their knowledge of Schult's prior arrest for a closely similar crime, the prior citizen complaints of the smell of chemicals from the residence, the strong odor of ether coming from the residence when the officers arrived, and the officers' observations of Schult's activities outside his residence prior to their entry into the house, we find there was sufficient information in the warrant application and addendum for a reasonably prudent person to believe that a crime was being committed on the premises to be searched.

Because nothing was seized during the initial entry and there was probable cause to issue the search warrant without considering any information which may have been obtained by that entry we need not decide whether the entry was illegal or could be justified under one of the recognized exceptions to

the warrant requirement discussed above. The fact the initial entry was made without a warrant provides no basis for suppression of evidence seized pursuant to the search warrant.

Schult claims in the alternative that the search warrant is invalid because it was based on stale information as well as containing false statements and omitting material facts. He argues that without this faulty information there was not probable cause to support the issuance of a warrant. We find no merit in Schult's alternative argument.

The facts relied upon to establish probable cause must show that probable cause exists at the time a search warrant is issued and not at some earlier time. *State v. Kaufman*, 265 N.W.2d 610, 617 (Iowa 1978). Because there must be a reasonable belief that evidence of crime will be found, the information must be current and not remote in time. *State v. Gogg*, 561 N.W.2d 360, 367 (Iowa 1997). To impeach a search warrant the burden rests on the defendant to show,

> allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Green, 540 N.W.2d at 656 (quoting *Franks v. Delaware,* 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667, 682 (1978)). The remedy for such a Fourth Amendment violation is to excise the false statements from the warrant application, and if the remainder of the application does not establish probable cause the fruits of the search must be suppressed. *Green,* 540 N.W.2d at 656.

First, Schult argues that the information from the citizen informants was too remote in time to provide probable cause on March 3, 1999. However, "where the information presented to the issuing judge shows ongoing drug-related activities, the passage of time is less problematic because it is more likely that these activities will continue for some time into the future." *Gogg,* 561 N.W.2d at 367. The information from the concerned citizens here came on three different occasions and not only provided information concerning the smell of ether emanating from the premises but also the opinion of a concerned citizen that methamphetamine was being manufactured there. The information involved what appeared to be ongoing drug-related activities. We do not believe the period of approximately five days between the last citizen call and the date of the application for the warrant can be seen as making the information remote in time. More importantly, even if the citizen informants' observations were not sufficiently recent to alone support probable cause, the officers smelled the ether themselves when they arrived at the residence on the day the application was presented and the warrant issued. The citizens' observations, confirmed and updated by the officers own current observations, together with the other information presented to the magistrate provided probable cause to believe evidence of crime would be found on the premises.

Schult also claims that officer Geisinger gave purposefully false information and omitted relevant factual information in the warrant application and addendum thereto. As set forth above, it is Schult's burden to prove Geisinger made deliberately false statements in the application or acted in reckless disregard for the truth. *Green,* 540 N.W.2d at 656. Schult argues

Geisinger's statement in the application that Schult "attempted to run" from him is false and that Geisinger failed to disclose to the issuing judge the illegal, warrantless search of the house.

We agree that it appears from both Officer Geisinger and Officer Carter's testimony that Schult did not attempt to "run" from them but instead attempted to "walk" away from them when they began to question him. Thus, the assertion by Geisinger in the application that Schult attempted to run from him is, at the least, an exaggeration of the facts. Assuming, without deciding, that this was in fact a deliberate or reckless misrepresentation by Geisinger, our remedy is to excise the statement and determine if the remainder of the information in the application is sufficient to establish probable cause. *Id.* Based on the other information in the application as set forth above, we determine that there is sufficient information in the application to establish probable cause even without the statement regarding Schult's "attempt to run" from the officers.

Finally, we find no merit to Schult's allegations that there were significant material facts omitted from the warrant application, including that the officers entered the house without a warrant, that they kicked in the door to the house, and that there was a "fog" of ether in the house. "An officer applying for a search warrant 'is not required to present all inculpatory and exculpatory evidence to the magistrate,' only that evidence which would support a finding of probable cause." *Green*, 540 N.W.2d at 657 (quoting *State v. Johnson*, 312 N.w.2d 144, 146 (Iowa Ct. App. 1981)). Omissions of fact constitute misrepresentations only if the omitted facts cast doubt on the existence of probable cause. *Id.*

We note that although the application does not expressly state the officers were in the house, it clearly implies they were by stating they made contact with two other subjects "inside the residence." However, even assuming the application does not clearly indicate they entered the house, we conclude that the inclusion of this fact would not have cast doubt on the existence of probable cause. Nothing in the application mentioned anything that was seen during the warrantless entry and thus nothing relating to the entry was relied upon by the judge in finding probable cause for the issuance of the warrant to search the premises. We reiterate that Geisinger was not required to include every potentially exculpating or inculpating fact in the application. *See Green,* 540 N.W.2d at 657.

IV. DISPOSITION

We have considered all issues and arguments presented by Schult, whether discussed or not, and find them to be without merit. Accordingly, we affirm his convictions and sentences.

AFFIRMED.