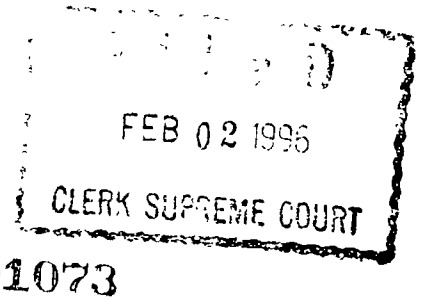
IN THE COURT OF APPEALS OF IOWA

No. 5-679 / 95-376



STATE OF IOWA,

Appellee,

vs.

WARNER DON MUNGER,

Appellant.

Appeal from the Iowa District Court for Clay County, John P. Duffy and Charles H. Barlow, Judges.

Defendant appeals from judgment and sentences following a bench trial entered upon his convictions of possession of a controlled substance with intent to deliver, in violation of Iowa Code section 124.401(1)(d) (1993), and failure to affix a drug tax stamp, in violation of sections 453B.3 and 453B.12. **AFFIRMED.**

Robert E. Walker, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael L. Zenor, County Attorney, and Michael Houchins, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., Cady, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, J.

Warner Don Munger appeals his sentences and convictions for possession with intent to deliver marijuana and for failure to affix drug tax stamps. On our de novo review, we affirm.

On December 11, 1993, deputy sheriff Scott Kramer applied for a warrant to search Munger's residence. In support of the application, Kramer submitted an affidavit stating he had been investigating Steven Ray Rohrbaugh since January 1993, and informants had purchased marijuana from Rohrbaugh on various occasions including October 30, 1993 and December 11, 1993. The informants were "wired" and investigating officers overheard their conversations with Rohrbaugh.

Kramer also stated Rohrbaugh told informants on October 30 he had to go to his "source" to obtain marijuana. Officers then followed Rohrbaugh to Munger's residence where Rohrbaugh stayed a short time, then immediately returned to the informants to deliver marijuana. Kramer stated Rohrbaugh followed a nearly similar pattern on December 11. Rohrbaugh had also told informants he could get larger quantities (over one-half of a pound) of marijuana and his source was expecting a delivery of a pound of marijuana that day (December 11) at the "source's" residence.

Kramer further stated in the application he had substantial experience investigating drug cases, knows marijuana "when he sees it," and the substance delivered on the above dates was marijuana. In paragraph ten of the application, Kramer also stated another deputy advised him three or four years ago that a different

informant, who was not necessarily reliable, told the deputy Munger was a consumer of marijuana.

The warrant was issued and executed on December 11. Officers seized drugs and drug paraphernalia from Munger's residence. Munger and Manuel Acosta drove up while officers searched the residence. Munger informed officers the automobile was his, but refused to give consent to the officers to search the vehicle. Officers then informed Munger of items seized from the residence and placed him under arrest.

An officer looked in a window of Munger's car and saw an orange pipe which the officer believed had been used for smoking marijuana. The officer opened the car door and picked up the pipe. The officer then observed a paper sack behind the driver's seat, picked it up, and opened it. Inside the sack was approximately one pound of marijuana.

Munger was charged with conspiracy to distribute marijuana, possession with intent to deliver marijuana, and failure to affix drug tax stamps. Munger moved to suppress the items seized during the search of his residence and his car, which was denied.

The case was submitted to the court on stipulated evidence. The district court denied Munger's renewed motion to suppress, acquitted Munger on the conspiracy charge, but found him guilty of possession with intent to deliver and of failure to affix drug tax stamps.

Munger now appeals the court's denial of his motion to suppress evidence obtained from the search of his residence. He claims the warrant was based on stale evidence, the issuing judge failed to make independent evaluations of the confidential informant in paragraph ten of the application, the warrant failed to support a finding of a fair probability of contraband or evidence of a crime at Munger's residence, and the good faith exception to searches pursuant to a warrant should not apply. He also appeals the denial of his motion to suppress evidence obtained from the search of his automobile.

I. Standard of Review

Munger asserts violations of his Fourth and Fourteenth Amendment right to be free from unreasonable searches and seizures. U.S. Const. Amend 4, 14. We review constitutional claims de novo. *State v. Godberson*, 493 N.W.2d 852, 854 (Iowa 1992).

II. Search of Munger's Residence

The Fourth Amendment protects citizens from unreasonable searches and seizure by the State. U.S. Const. Amend. 4. However, search warrants are presumptively reasonable with the burden on the defendant to prove the warrant unreasonable. *State v. Farber*, 314 N.W.2d 365, 367 (Iowa 1982). We resolve doubtful cases concerning warrants in favor of their validity. *State v. Niehaus*, 452 N.W.2d 184, 189-91 (Iowa 1991).

All search warrants must be based on probable cause. *See generally* Iowa Code § 808.3 (1993). Probable cause exists when the facts presented to the magistrate or judge would cause

> a person of reasonable prudence [to] believe a crime was committed on the premises to be searched or evidence of a crime could be located there. Probable cause to search requires a probability determination as to the nexus between criminal activity, the things to be seized, and the place to be searched.

Godberson, 493 N.W.2d at 855. The duty of a reviewing court is to ensure the issuing magistrate or judge had substantial basis for concluding probable cause existed. *Id.* at 854. *See Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983).

A. Stale Information

We must examine the evidence presented to the issuing judge to determine whether, as Munger argues, the October 30 delivery was too remote in time and too stale to provide probable cause.

The vitality of probable cause cannot be quantified by a computation of the number of days between the occurrence and the issuance of the affidavit. *State v. Woodcock*, 407 N.W.2d 603, 605 (Iowa 1987). We consider the nature of the criminal activity as well as the time factor involved to determine if information is too stale to provide probable cause. *Id.* The focus of our inquiry "is whether the affidavit establishes a continuing offense rather than the time lapse between the observation

and the issuance of the search warrant." *State v. Gillespie*, 503 N.W.2d 612, 616 (Iowa App. 1993).

The application described the October 30 drug sale, in which officers observed Rohrbaugh, immediately after being contacted for a marijuana order, drive straight to Munger's residence, stay a short while, then immediately return to deliver drugs to the informants. Upon delivery, officers overheard Rohrbaugh indicate he had obtained the marijuana from his source. The application also detailed two incidents implicating Munger in drug transactions in which the sale was never completed. Prior to November 14, officers, unable to perform surveillance, had informants call Rohrbaugh to cancel an order. On November 14, Rohrbaugh again approached the informants about a marijuana sale, and after telling them he needed to go to his supplier, was observed driving directly to Munger's residence. Rohrbaugh was overheard stating he would not be able to complete the drug transaction since his source felt the informants were not reliable and never bothered to pick up the drugs. The application further described the December 11 sale, which closely patterned the October 30 sale.

We find the information in the application for the search warranted evidenced a continuous course of drug trafficking involving Munger's residence. *See Gillespie*, 503 N.W.2d at 616 (drug trafficking is an activity likely to continue for a period of time). As such, we find the information gleaned from the October 30 sale is not too remote in time or too stale for the probable cause determination.

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B. Confidential Informant

Iowa Code section 808.3 (1993) requires, when search warrants are supported by an unnamed informant, an issuing magistrate or judge to make specific findings concerning the informant's credibility or the believability of the information presented. *State v. Weir*, 414 N.W.2d 327, 330-31 (Iowa 1987).

We agree with Munger the issuing judge failed to make a specific finding with respect to the confidential informant referred to in paragraph ten of the application. As such, we review the probable cause determination without reference to the information given by this informant. *See State v. Iowa Dist. Court*, 472 N.W.2d 621, 624-25 (Iowa 1991) (credibility findings of confidential informants are mandatory and lack of compliance requires probable cause determinations to be measured without informant's information).

C. Fair Probability of Contraband or Evidence of a Crime

We must next determine whether the issuing judge had a substantial basis for concluding a fair probability existed that contraband or evidence of a crime would be found at Munger's residence. All reasonable inferences will be drawn to support a magistrate or judge's determination of probable cause. *State v. Padovich*, 536 N.W.2d 743, 747 (Iowa 1995).

Here the application set forth information indicting Munger's residence was used to obtain marijuana used in at least two sales and two aborted sales. The observations of the officers indicated Munger's residence was the only plausible

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"source" for the marijuana sold to the informants on October 30 and December 11. Moreover, Kramer, in the application stated he possessed substantial experience in investigating drug cases, "know[s] marijuana when [he] sees it," and identified the substance delivered on the various occasions to be marijuana.[1]

We find the issuing judge had a substantial basis in concluding a fair probability marijuana and/or evidence of a crime would be found at Munger's residence. As such the officers conducted a valid search of the premises and we need not address Munger's good cause argument. The trial judge properly denied the motion to suppress with regards to the search of Munger's residence.

II. Search of Munger's Automobile

Warrantless searches constitute unreasonable searches per se. *State v. Cullor*, 315 N.W.2d 808, 811 (Iowa 1982). The State bears the burden of proving a warrantless search falls within a recognized exception to the warrant requirement. *See State v. Garcia*, 461 N.W.2d 460 (Iowa 1990) *cert. denied* 499 U.S. 909, 111 S. Ct. 1115, 113 L. Ed. 2d 223 (1991).

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[1] Munger alleges the judge may not rely upon Kramer's conclusion concerning the nature of the substance, as he does not sufficiently describe the basis for his conclusions. We recognize a judge must have sufficient facts, not mere conclusions, presented in order for him or her to make an independent probable cause determination. *State v. Freeman*, 297 N.W.2d 363, 366 (Iowa 1980). Here, however, Kramer identified the reasons for his conclusions, specifically his vast narcotics investigation experience and his ability to identify marijuana by sight. The issuing judge had the ability to accept or reject Kramer's identification. We find the issuing judge had a sufficient facts presented to him in order for him to make a determination as to the nature of the substances sold.

We agree with Munger the search warrant did not include searching Munger's vehicle as it approached the residence. Munger asserts the warrantless search did not fall under the exigent circumstances exception to the warrant requirement and items seized should have been suppressed. Before addressing Munger's claim, we first examine the trial court's reasons for the denial of the motion to suppress the evidence obtained from the search of the automobile.

The trial court found the search of Munger's car valid as a search incident to arrest. A search incident to a lawful arrest is a recognized exception to the Fourth Amendment warrant requirement. *State v. Harris*, 490 N.W.2d 561, 562 (Iowa 1992). The minutes of evidence presented to the trial court stated officers arrested and handcuffed Munger prior to the search of Munger's automobile. Under these facts, we agree the search fell with the arrest exception to the warrant requirement.[2] As such the trial court properly denied the motion to suppress the evidence obtained from the search of Munger's automobile. *See State v. Edgington*, 487 N.W.2d 675, 677-78 (Iowa 1992) (search of vehicle incident to arrest valid even after driver was arrested and placed in back of police car.)

We also note the search of Munger's automobile falls within the exigent circumstances exception to the warrant requirement. *See Collins v. State*, 477 N.W.2d

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[2] Munger never addresses the trial court's conclusion or the State's argument the search was incident to a lawful arrest. He also never argued his arrest was invalid or took place after the search of the automobile.

374, 376 (Iowa 1991) (court can affirm district court's ruling on any ground which appears in the record even if the district court did not rely upon it). Warrantless searches are permissible if probable cause and exigent circumstances exist. *State v. Dawdy*, 533 N.W.2d 551, 556 (Iowa 1995).

Here the officers had probable cause the automobile contained contraband. Officers had information connecting Munger to drug trafficking, contraband had been seized from his residence, officers had received information indicating Munger was to receive a large delivery of marijuana that day, and an officer observed a marijuana pipe inside the automobile.

An exigency exists when the automobile is mobile and its contents may never be found if a warrant need be obtained prior to the search. *Dawdy*, 533 N.W.2d at 556. Due to the inherent mobile nature of a vehicle, exigent circumstances is presumed. *State v. Olson*, 293 N.W.2d 216, 218 (Iowa 1980) *cert. denied* 449 U.S. 993, 101 S. Ct. 530, 66 L. Ed. 2d 290 (1980). Here, we find exigent circumstances existed. While Munger was handcuffed and in police custody, his automobile remained available for someone else to remove its contents or drive it away if a warrant need be obtained. As such, the automobile's contents may be lost while officers attempted to obtain a warrant. *See Cullor v. State*, 315 N.W.2d 808, 813 (Iowa 1982) (officers are not required to post a guard on the automobile and then obtain a warrant).

We find the search of Munger's automobile falls within both the search incident to arrest and exigent circumstances exception to the Fourth Amendment's warrant requirement. We find the officers conducted a lawful and constitutionally permissible search of the automobile. The trial court properly denied the motion to suppress evidence seized from the search of Munger's automobile.

AFFIRMED.