FILED
APR 27 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

191

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MARC A. GIFFORD and GEOFFREY L. GIFFORD,

Defendants-Appellants.

Filed April 27, 1982

2-55
66540

Appeal from Butler District Court - Ray E. Clough, Judge.

Defendants appeal from the judgment entered upon their conviction of manufacturing a controlled substance, marijuana, in violation of section 204.401(1)(b), The Code, asserting: (1) that evidence seized pursuant to a search warrant should have been suppressed because the applicant for the warrant allegedly lied in the application; (2) that there was no probable cause for issuance of the warrant; and (3) that a DCI agent's observation of defendant's marijuana patch from a neighbor's field was an unconstitutional search. AFFIRMED.

Patrick R. Grady, Assistant Appellate Defender, for defendants-appellants.

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

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendants appeal from the judgment entered upon their conviction of manufacturing a controlled substance, marijuana, in violation of section 204.401(1)(b), The Code, asserting: (1) that evidence seized pursuant to a search warrant should have been suppressed because the applicant for the warrant allegedly lied in the application; (2) that there was no probable cause for issuance of the warrant; and (3) that a DCI agent's observation of defendant's marijuana patch from a neighbor's field was an unconstitutional search. We affirm.

Generally, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. However, when a constitutional issue is presented, the evidence relevant to that issue is reviewed de novo. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

I.

On September 19, 1979, a magistrate issued a search warrant to search defendant's rural acreage for a large plot of cultivated marijuana. The warrant was issued on the basis of an affidavit from a Department of Criminal Investigation agent, who stated that he had received two anonymous letters and two anonymous phone calls reporting the marijuana. The letters provided a detailed description of the location of the property and of the plot of marijuana. The agent stated in the application that he had flown over the property in a highway patrol plane, and observed "green plants, later identified to be marijuana." He also stated that he had received permission from defendant's neighbor to enter the neighbor's field, from which he personally observed the marijuana. The agent set out his training and experience and stated that from this he knew the plants were marijuana.

Defendants' motion to suppress did not assert that the information in the warrant was false. At the suppression hearing, however, defendants did attack the

agent's credibility in his claim that he could see and identify the marijuana from the air and from the neighbor's field.

The trial court denied the motion to suppress, dealing at some length with the agent's credibility but not specifically applying the analysis provided in State v. Boyd, 224 N.W.2d 609 (Iowa 1974), for attacks on the truthfulness of statements in warrant applications. Apparently the court treated the issue as one of the accuracy of the agent's observations, rather than the truthfulness of his statements in the warrant application. The court found that the agent could see and identify the marijuana from the neighbor's field.

Defendants were tried to the court on stipulated facts, found guilty, and given suspended sentences of five years. The suspension was subject to successful completion of three years probation. Defendants subsequently instituted this appeal.

II.

Defendants contend the trial court committed reversible error by failing to suppress evidence seized pursuant to a search warrant because defendants showed that the agents who applied for the warrant made untrue statements and practiced fraud upon the magistrate. Defendants' October 15, 1979, motion to suppress raised only two issues:

> 2. That the information used to obtain said Search Warrant was improperly obtained;
>
> 3. That said search warrant was improperly served by the law enforcement officials on September 19, 1979;

State v. Boyd, 224 N.W.2d at 616, requires that:

> . . . to inquire into the truth of the representations upon which a search warrant has been issued there must be a preliminary showing under oath that an agent or representative of the state has: (1) intentionally made false or untrue statements or otherwise practiced fraud upon the magistrate; or (2) that a material statement made by such agent

> or representative is false, whether intentional or not.

Our de novo review indicates that no such preliminary showing was made by the defendants; therefore, they have failed to preserve error on this issue.

III.

Defendants assert that insufficient facts were presented to the magistrate to justify probable cause for the issuance of a search warrant. We disagree. Our examination of the totality of circumstances indicates that there was probable cause to issue a search warrant. The investigation was initiated by anonymous letters and telephone calls asserting that marijuana was being grown and giving the location. This led to an aerial observation of green plants which were later identified as marijuana when they were observed from a bordering fence line with permission of the neighboring owner. This observation, by an agent qualified to identify marijuana plants, was sufficient to establish probable cause and we, therefore, affirm the trial court.

IV.

Defendants' final allegation is that the trial court erred by failing to suppress the fruits of evidence seized as a result of the illegal search of defendants' curtilage from a neighbor's property. We disagree. "The application of the Fourth Amendment depends on whether a person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." Smith v. Maryland, 442 U.S. 736, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220, 226 (1979). We find there is no such justifiable, reasonable, or legitimate expectation of privacy with respect to a 50 foot by 150 foot field of marijuana containing plants which are 10 to 12 feet tall and are readily observable from a neighbor's fenceline. See State v. Ryder, 315 N.W.2d 786 (Iowa 1982). We affirm the defendants' convictions.

AFFIRMED.