FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed August 27, 1986

vs.) 287

MICHAEL JOHN MAAS,) 6-171
85-1667

Defendant-Appellant.)

Appeal from the Iowa District Court for Black Hawk County (07X 00311 21 and 07X 0031 25) - George L. Stigler, Judge.

Defendant appeals the trial court's refusal to suppress evidence seized as a result of the execution of a search warrant upon his residence. **AFFIRMED.**

Richard A. Knock of Mershon, Snow & Knock, Cedar Falls, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Elizabeth E. Ciebell, Assistant Attorney General; and James D. Coil, Assistant Black Hawk County Attorney; for plaintiff-appellee.

Heard by Oxberger, C.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J. 383

Defendant appeals the trial court's refusal to suppress evidence seized as a result of the execution of a search warrant upon his residence. We affirm.

Defendant was arrested and charged with two counts of possession of a controlled substance in violation of Iowa Code sections 204.401(1)(b) and 204.401(3) and one count of delivery of a controlled substance in violation of Iowa Code section 204.401(1)(a). Defendant filed a motion to suppress evidence relating to all the charges against him, alleging that the search warrant used by the police was invalid and unconstitutional. The trial court overruled defendant's motions and the evidence of the controlled substances was used to find defendant guilty on all counts. Defendant appeals the trial court's ruling concerning the validity of the search warrants.

Defendant and the State entered into a written stipulation of the facts and submitted them to the trial court. The facts crucial to the trial court's ruling, as well as our review, relate to the affidavit sworn to by one Greg Brugman, a special DCI agent, and submitted to the judge as part of his application for the search warrant. Brugman's affidavit was the only testimony relied upon by the judge in issuing the search warrant. No information was supplied by any informant, and so no finding of credibility was made as to any informant's reliability.

In his application affidavit, Agent Brugman detailed five meetings that took place with a man that he gave money to purchase drugs. Brugman stated that on each occasion the purchaser would go directly to defendant's house, where he would park his vehicle and go inside. The purchaser would remain in the house for varying lengths of time but would eventually leave the house and drive back to a prearranged meeting place with Brugman where he would give Brugman varying amounts of cocaine. In the affidavit Brugman also stated

that on four of the five occasions that he used this particular method, the purchaser made one stop en route back to the meeting place after he left defendant's house, but did not make contact with anyone.

Brugman also stated that on one occasion the purchaser introduced a man named "Mike" to him as his source. However, Brugman stated in the affidavit that "officers conducting surveillance of the activity" identified the alleged source as someone other than defendant.

On appeal defendant alleges that the search warrant was invalid because the affidavit submitted in support of the search warrant was based partially on hearsay, and not the direct personal observations of affiant Brugman. Specifically, he contends that Brugman should have stated in his affidavit that information regarding the purchaser's travels to and from defendant's house was obtained from fellow police officers. This omission, he argues, renders the affidavit insufficient to establish the probable cause necessary for a search warrant to be issued.

In deciding whether to issue a search warrant, it is the task of the magistrate to "simply make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548, reh'g. denied, ___ U.S. ___, 104 S. Ct. 33, 77 L. Ed. 2d 1453 (1983); State v. Luter, 346 N.W.2d 802, 808 (Iowa 1984), cert. den., Luter v. Iowa, ___ Iowa U.S. ___, 83 L.Ed.2d 59, 105 S.Ct. 116 (1984). This standard is known as the "totality of the circumstances" approach. This approach specifically deals with the fact that hearsay evidence will be considered by the magistrate in making his decision whether to issue the warrant.

Therefore, if we were to understand defendant's argument that the warrant is invalid just because hearsay evidence was used, he would fail in this appeal. In this case, however, defendant argues that because Brugman testified only as to his observations without acknowledging the source of some of the information, the affidavit consists of only bare assertions by the affiant which, under Gates and Luter, are insufficient to establish probable cause. According to this argument, certain facts alleged in the affidavit are unsupported and unidentified as to its source, and constitute hearsay which is therefore unreliable. This unreliability according to defendant renders the magistrate's determination of probable cause wrong or in error. In Gates, the United States Supreme Court stated:

> Our original phrasing of the so-called "two-pronged test" in Aguilar v. Texas, supra, suggests that the two prongs were intended simply as guides to a magistrate's determination of probable cause, not as inflexible, independent requirements applicable in every case. In Aguilar, we required only that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that . . . narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' " Id., at 114, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (emphasis added).
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> As our language indicates, we intended neither a rigid compartmentalization of the inquiries into an informant's "veracity," "reliability" and "basis of knowledge," nor that these inquiries be elaborate exegeses of an informant's tip. Rather, we required only that some facts bearing on two particular issues be provided to the magistrate. Our decision in Jaben v. United States, 381 U.S. 214, 14 L. Ed. 2d 345, 85 S. Ct. 1365 (1965), demonstrated this latter point. We held there that a criminal complaint showed probable cause to believe the defendant had attempted to evade the payment of income taxes. We commented:
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> > Obviously any reliance upon factual allegations necessarily entails some degree of reliability upon the credibility of the source. . . . Nor does it indicate that each factual allegation which the affiant puts forth must be independently documented, or that

> each and every fact which contributed to his conclusions be spelled out in the complaint. . . . It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.

Gates, 462 U.S. at 230 n.6 (1983) (quoting Jaben v. United States, 381 U.S. 214, 224-225, 14 L.Ed.2d 345, 85 S.Ct. 1365, reh'g. denied, Jaben v. United States, 382 U.S. 873, 15 L.Ed.2d 114, 86 S.Ct. 19 (1965)).

Defendant cites two Iowa cases to support his position, State v. Schlenker, 234 N.W.2d 142 (Iowa 1975), and State v. Johnson, 203 N.W.2d 126 (Iowa 1972). In Schlenker, a search warrant was issued by the magistrate based solely on the affidavit of one police officer. However, the officer had no personal knowledge of the removal of the goods from the owner's restaurant and did not see any of them taken into defendant's restaurant. The supreme court ruled that when the search warrant is based in whole or in part upon information supplied by someone other than the affiant (in that case an informant), a factual showing as to the reliability of that person must be made on the application by the magistrate. We disagree with the defendant as to the controlling effect of the Schlenker opinion to the facts before us for two reasons. First, the requirement of a factual showing by the magistrate is no longer required under the "totality of the circumstances" approach; and second, the officer providing the sole source of testimony in the affidavit here has considerably more first-hand information regarding the probability of an offense having been committed than did the officer in Schlenker.

Defendant also relies upon the Johnson case. In Johnson, one of the arresting officers submitted an affidavit stating that defendant had been identified as the person passing a bad check at a local store. He did not give the source of the information, the facts which made it reliable, nor whether the

identification was by eyewitness, by hearsay, or by informant. As defendant correctly points out, the supreme court in Johnson found that the affidavit "gave no circumstances from which the judge acting as a 'reasonable man' could conclude probable cause existed." Id. at 128 (emphasis defendant's).

We do not have the same circumstances in this case. First, we again have a factual situation where the affiant has considerably more first-hand knowledge than the affiant in the case cited by defendant. Moreover, unlike Johnson, the affiant in this case has identified for the magistrate the source of his "hearsay" information. In his affidavit, Officer Brugman referred to "officers conducting surveillance of the activity." These officers demonstrated their veracity and reliability when they prevented Brugman from being misled by his buyer concerning the source's identity. It is clear, therefore, that this is not an instance where the affiant officer merely makes bald assertions or conclusory statements in his application for a search warrant. A majority of the circumstances required to establish probable cause in this case were established by Brugman's personal first-hand knowledge. The remaining facts or circumstances were the stops made by the purchasers at defendant's house, the stops made on the way back, and the false identity of the alleged source. Brugman did not state in any manner that all of these facts were known by him personally. He made the magistrate aware of the fact that other officers were conducting surveillance of the activity. By reciting the incident of the false source, and the surveillance officers' part in determining that fact, the magistrate could reasonably conclude that Brugman was receiving other information from the officers that together comprised all of the circumstances in the affidavit that established probable cause.

The duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. State

v. Luter, 346 N.W.2d at 808. We conclude that the magistrate had a substantial basis for concluding that probable cause for searching defendant's residence existed based upon the affidavit supplied by Agent Brugman. We therefore affirm the trial court's decision to overrule defendant's motion to suppress the evidence obtained as a result of the search warrant.

AFFIRMED.