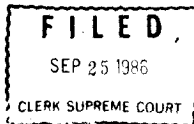


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

188

vs.)

6-221
85-944

MACK ROLAND GIBSON,)

Defendant-Appellant.)

Appeal from the Iowa District Court for Linn County (No. CRF 7798-1282),
Thomas L. Koehler, Judge.

The defendant appeals his conviction of two counts of possession with
intent to deliver a controlled substance in violation of Iowa Code section
204.41(1)(1985). **AFFIRMED.**

B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney
General; and Mary W. Vavrach, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

The appellant challenges his conviction of two counts of possession with intent to deliver a controlled substance in violation of Iowa Code section 204.41(1)(1985). He contends: (1) that the district court erred in overruling his motion to suppress evidence seized pursuant to a search warrant; and (2) that the evidence was not sufficient to establish that he was in constructive possession of the seized controlled substances. We affirm.

I. Motion to Suppress

The appellant premised his motion to suppress upon the alleged invalidity of the search warrant. He asserts that the warrant was invalid because it was based on information regarding a controlled drug sale which occurred three weeks to a month prior to the issuance of the warrant. As such, the appellant contends that the information was "stale." The trial court overruled the motion, stating that, under the totality of the circumstances, the content of the affidavit submitted in support of the search warrant was sufficient to establish probable cause.

Because the appellant alleges that he was the subject of an unconstitutional search and seizure, our standard of review is de novo. State v. Conger, 375 N.W.2d 278, 279 (Iowa Ct. app. 1985). Accordingly, we will make an independent evaluation of the totality of the circumstances. Id.; State v. Losee, 353 N.W.2d 876, 878 (Iowa Ct. App. 1984).

It is axiomatic that the probable cause upon which a search warrant is based must exist at the time the warrant is issued, not merely at some earlier date. Munz v. State, 382 N.W.2d 693, 700 (Iowa Ct. App. 1985); see also State v. Bean, 239 N.W.2d 556, 559 (Iowa 1976); State v. Rockhold, 243 N.W.2d 846, 850 (Iowa 1976). Thus, delay in obtaining a search warrant may result in its invalidity. Although the amount of elapsed time is an important consideration

and may in certain circumstances be controlling, it is not necessarily determinative. State v. Paterno, 309 N.W.2d 420, 423 (Iowa 1981). In ascertaining whether the lapse of time has been unreasonable, thereby invalidating the warrant, other factors, including the nature of the alleged offense, must be considered, "... a greater lapse of time being permissible where the activity is of a continuous nature as distinguished from an isolated violation." State v. Bean, 239 N.W.2d at 559 (quoting 68 Am. Jur. 2d Searches and Seizures § 70 (1974)); see also State v. Birkestrand, 239 N.W.2d 353, 359 (Iowa 1976). "The test is whether a person of reasonable prudence would believe a crime was being committed on the premises... or evidence of a crime was being concealed there. The test is one of probability and not certainty." State v. Beau, 239 N.W.2d at 559-60.

Upon a review of the record, we conclude that the totality of the circumstances surrounding the issuance of the warrant reveals continuous illegal activity sufficient to sustain the warrant's validity. The appellant had been under surveillance for four months preceding the application for the search warrant. The record shop operated by the appellant and his apartment building had been under surveillance for two months and one month respectively prior to the issuance of the warrant. During this period, the investigating officer observed several known drug traffickers frequenting both the appellant's apartment building and the shop. The appellant had a history of involvement in illegal drug sales; he had been arrested five times for controlled substance violations and was on parole following incarceration when the search warrant was applied for.

In addition, in November of 1982, a controlled buy took place between a reliable police informant and a known heroin user who was observed entering the appellant's apartment building prior to the sale. During the buy, the

investigating officer heard the user indicate that he had purchased the heroin from the appellant, and that the appellant and his wife had a large quantity of controlled substances in their apartment. The officer stated that he was aware of the fact that the appellant was out of town from December 2 through December 18, 1982; the police waited to apply for the warrant until he had returned. During this period, the police continued to surveil the apartment. Within seventy-two hours preceding the application for the warrant, a reliable informant observed a heroin user in possession of heroin immediately after the user entered and came out of the appellant's apartment building.

In light of the above, we cannot say that the time lapse was so great as to invalidate the warrant; nor can we say that the district court erred in denying the appellant's motion to suppress. See State v. Paterno, 309 N.W.2d at 423; State v. Post, 286 N.W.2d 195, 200-01 (Iowa 1980); State v. Bean, 239 N.W.2d at 559-60; State v. Birkestrand, 239 N.W.2d at 359; Munz v. State, 382 N.W.2d at 701. Cf. State v. Rockhold, 243 N.W.2d at 849-50 (unsubstantiated reference in affidavit to alleged isolated purchase of drugs fifty-six days before application for warrant insufficient to establish probable cause).

II. Sufficiency of Evidence

The appellant next contends that the evidence was insufficient to establish that he was in constructive possession of the seized controlled substances. In reviewing this allegation, we review all of the evidence in the light most favorable to the state, without regard to contradictions or inconsistencies, and respecting all reasonable inferences. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980).

In State v. Reeves, 209 N.W.2d 18 (Iowa 1973), the supreme court held that evidence of possession is sufficient if it establishes constructive possession. Id. at 22. The court said that constructive possession exists when the defendant

has control or the right to control the substance. Id. "Possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another." Id.

The appellant contends that because he did not reside at the apartment where the substances were seized at the time of the search, he could not have exerted dominion and control over the drugs. We think that the evidence is sufficient to support the jury's finding of constructive possession. The record reveals that the appellant's name was listed on the apartment mailbox, and the apartment address was on his driver's license issued just ten weeks earlier. Inside the apartment, the officers found ten bottles of prescription medication in the appellant's name; the medication was scattered throughout the apartment. The appellant's clothing and shoes were in the closets. The seized substances were found in various places in the apartment, and cocaine was found in the pocket of one of the appellant's jackets. This evidence is sufficient to show that the appellant had dominion and control over the contents of the apartment. See State v. Reeves, 209 N.W.2d at 21-23.

The appellant argues that this case is governed by the Washington Court of Appeal's decision in State v. Davis, 16 Wash. App. 425, 558 P.2d 263 (1977). In Davis, the court found the evidence insufficient to show that the defendant had constructive possession of marijuana found in a house. We think Davis is factually distinct from the instant case. The defendant in Davis did not reside at the house in which the evidence was seized, although he was temporarily staying there the weekend of the search. The only items belonging to the defendant were a pile of clothes found in the room where he was sleeping. No marijuana was found on the defendant's person or in the room where he was staying, or any of his belongings. On the night of the search, more than twenty

people were in the house attending a party. The court concluded that the defendant was merely present in the house, and that no participative contact on his part had been proven. The same cannot be said in the case at bar.

AFFIRMED.