FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
GILBERT BRANDT,	)	9-202 88-627
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Buchanan County (CR 2884-0387), John Bauercamper, Judge.

Defendant appeals from his conviction, following a jury trial, of possession of marijuana with the intent to deliver and of simple possession of psilocybin. **AFFIRMED.**

Jon M. Kinnamon, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; and Alan W. Vander Hart, County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J.

Defendant-appellant Gilbert Brandt appeals from his conviction, following a jury trial, of possessing marijuana with the intent to deliver and possession of another controlled substance in violation of Iowa Code sections 204.401(1)(b) and 204.401(3) (1987). We affirm.

I. Jury Communication

Prior cases have clearly held that defendant and his counsel have a right to be present, absent a waiver of that right, when communications between the court and jury take place. State v. Meyers, 426 N.W.2d 614, 616 (Iowa 1988); State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983) (citing State v. Folck, 325 N.W.2d 368, 374 (Iowa 1982); State v. Griffin, 323 N.W.2d 198, 201 (Iowa 1982)).

In State v. Williams, the court held defendant's claim of error regarding the jury communications was inadequately preserved and harmless. 341 N.W.2d at 751. The defendant had failed to raise the issue in the trial court, such as in a motion for new trial, so the record did not show defendant was absent when the communications between judge and jury took place. Id. Additionally, the court found the communications did not involve an instruction on the law and had no bearing on the evidence being considered. Id.

In the present case defendant filed a pro se motion for new trial, which was denied as untimely, stating the jurors had specifically requested instructions on simple possession but were denied such instructions. The record is unclear as to when or if defendant's trial counsel withdrew from representation or what discussions occurred in determining how to respond to the jury's requests for portions of the transcript and an explanation regarding jury instruction No. 17. The record does contain the questions asked by the jury and the judge's responses.

The Williams court said:

> The defendant was required to preserve the claimed error both by raising it in the trial court and then by presenting a record adequate for our review. This could have been done by a motion for new trial and the filing of supporting affidavits. Since defendant made no such motion and the record before us does not show that defendant was absent when the trial court received and responded to the jury's inquiry, there is no basis for us to conclude that defendant's due process right was violated. (Citations omitted.)

Williams, 341 N.W.2d at 751.

In the case at bar the defendant has failed to preserve error in failing to timely file a motion for new trial and has failed to present a record adequate for our review in that the record is silent whether he was present or not when the trial court gave additional written instructions to the jury.

We conclude there is no basis for us to determine whether defendant's due process rights have been violated.

II. Search Warrant

Defendant contends the search warrant was invalid because (1) the magistrate issuing the warrant failed to state the reason for finding the confidential informant reliable, (2) the affiant's affidavit, upon which the magistrate relied, contained material misrepresentations and did not support a finding of probable cause and (3) the issuance was based in part on evidence the confidential informant obtained during a warrantless search encouraged by public school officials.

Our standard of review on defendant's constitutional challenge to the search warrant is a de novo review of the facts and circumstances which led to its issuance. State v. Weir, 414 N.W.2d 327, 329 (Iowa 1987). In deciding whether probable cause was shown sufficient to justify the warrant we consider only that information, reduced to writing, which was actually presented to the magistrate at the time application for the warrant was made. Id. The test for determining the existence of probable cause is whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime located there. Weir, 414 N.W.2d at 330 (citing State v. Sykes, 412 N.W.2d 578, 583 (Iowa 1987); State v. Woodcock, 407 N.W.2d 603, 604 (Iowa 1987); State v. Seager, 341 N.W.2d 420, 426-27 (Iowa 1983)).

However, when the defendant also alleges the supporting affidavit contains false statements the Iowa Supreme Court adopted the reviewing standard set forth in Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978); State v. Groff, 323 N.W.2d 204, 210 (Iowa 1982). In Franks, the court held the defendant must show that the affiant either intentionally and knowingly made a false statement, or made a false statement with reckless disregard for the truth. State v. Thongvanh, 398 N.W.2d 182, 186 (Iowa App. 1986) (citing Franks, 438 U.S. at 155, 98 S.Ct. at 2672, 57 L.Ed.2d at 672). This scrutiny requires us to look at the circumstances behind the statements in the supporting affidavit to determine its veracity and the chance of misleading the magistrate when determining probable cause.

The search warrant was obtained as the result of an application by peace officer, Capt. J. L. Straw. The application included an affidavit by Capt. Straw setting forth information and evidence obtained from a confidential informant and identifying two factors which supported the reliability of the information. During the hearing on defendant's motion to suppress, the defendant's stepson, Jason, was revealed as the confidential informant. Jason, school officials, and two police officers testified regarding Jason's statements to school officials and the police as well as the marijuana cigarette and box

containing marijuana Jason brought from home. Jason's testimony indicated the school principal asked him to bring the drugs from home while the principal testified Jason voluntarily brought the items to school. The police were not contacted about the defendant's possible dealing in drugs until after Jason brought the marijuana cigarette to school.

In denying the motion to suppress based on claims of an invalid search warrant the trial court made specific fact-findings stating the search warrant did not contain false statements that rendered the application and the issuance void and there was no coercion on Jason by the school employees.

Defendant's first challenge to the warrant is based on Iowa Code section 808.3 (1987) which requires in part:

> . . . if the grounds for issuance are supplied by an informant, the magistrate shall identify only the peace officer to whom the information was given but shall include a determination that the information appears credible either because sworn testimony indicates that the informant has given reliable information on previous occasions or because the informant or the information provided by the informant appears credible for reasons specified by the magistrate. . . .

The magistrate's warrant indicates the confidential informant was deemed credible for the reasons indicated in Capt. Straw's attached affidavit which were: (1) the informant has not given false information in the past and (2) the information supplied by the informant in this investigation has been corroborated by law enforcement

personnel. Defendant contends these reasons and the affidavit were insufficient to satisfy Iowa Code § 808.3 and were misleading because: (1) the application led the magistrate to believe Jason had been a truthful informant before, (2) the field testing, which supposedly verified the items Jason brought from home as marijuana, never took place, and (3) the officer improperly led the magistrate to believe Jason's identity had to remain confidential which prevented a proper weighing of credibility factors such as Jason's age.

The officers testified they visually confirmed the substance Jason brought from home as marijuana although no actual lab testing was done prior to issuing the warrant. Capt. Straw testified his discussion with the magistrate made it clear the informant was a first-time informant and the information was obtained in a school setting. The evidence does indicate defendant was aware Jason had told the school about the presence of drugs in his home. Prior to getting the search warrant Capt. Straw knew defendant had called the school about Jason's statements. Based on these facts we cannot say the officer acted improperly on trying to protect Jason's identity before the magistrate because it appears defendant still had no knowledge of Jason's contact with the police or that Jason had taken some drugs from the home.

We find defendant's remaining claims of error regarding alleged omissions or misrepresentations to be without merit. The detail of Jason's statements regarding location of drugs in the home, the actual drugs brought from home and Jason's knowledge of defendant's contact with at least one person investigated as a drug dealer provided adequate factors of reliability and proof of probable cause. See generally State v. Weir, 414 N.W.2d at 332 (citations omitted).

Defendant also contends the warrant is tainted because probable cause for the warrant is based, in part, on two searches by Jason allegedly encouraged by school authorities. In concluding the school officials had not encouraged or suggested Jason bring samples of the drugs to school, the trial court must have believed the principal's testimony rather than Jason's testimony regarding this issue. The trial court was in a better position to assess the credibility of the witnesses and we will defer to its fact-findings in this regard. State v. Farris, 359 N.W.2d 190, 192 (Iowa 1984). Having reviewed the totality of the circumstances, we conclude these were private searches by Jason in his own home, untainted by improper governmental involvement which do not invalidate the search warrant. See State v. Coy, 397 N.W.2d 730, 731 (Iowa 1986). The drugs seized by Jason and turned over to the authorities were properly relied upon by the magistrate in finding probable cause to search defendant's premises.

We find no error in the trial court and affirm the defendant's conviction.

AFFIRMED.