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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 30, 1983
vs.	)	
GERALD JAMES BOROWIAK,	)	3-226 / 69456
Defendant-Appellant.	)	

Appeal from Warren District Court - George Bergeson, Judge.

Defendant appeals from his convictions for possession of methylphenidate, possession of methamphetamine, and manufacture of marijuana. AFFIRMED.

Robert L. Stuyvesant of Schooler, Stuyvesant & Benton, Carlisle, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McGown and Michael K. Jordan, Assistant Attorneys General, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

The defendant appeals from his convictions for possession of methylphenidate, possession of methamphetamine, and manufacture of marijuana. He asserts that Iowa Code section 204.410 (1981), is an unconstitutional denial of due process by creating a presumption that an accommodation offense cannot occur if the amount of marijuana is greater than one ounce. The defendant also asserts that the search warrant used to seize evidence from his house was not supported by probable cause and that the State failed to establish a reliable chain of custody for the evidence. We affirm.

A deputy sheriff went to the defendant's house to serve a civil paper upon the defendant. The deputy was unable to serve the paper because the defendant was not home. While there, the deputy saw what he believed to be potted marijuana plants on the railing of a deck attached to the house. Because he was unsure of his identification of the plants, the deputy had another sheriff's deputy accompany him when he returned to serve the civil paper. The other deputy agreed that the plants were marijuana. The defendant, when questioned, identified the plants as "hybrid tomato plants" and began knocking the plants off the railing. The defendant was arrested, and the second deputy then obtained a warrant to search the defendant's house. During the subsequent search the police seized a substantial amount of marijuana (over an ounce), drug paraphernalia, a substance later identified as methamphetamine, and a substance later identified as methylphenidate.

The defendant was charged with one count of "manufacture and/or possession with intent to manufacture or deliver" of marijuana in violation of Iowa Code section 204.401(1)(b) and two counts of possession of a schedule II controlled substance (methylphenidate and methamphetamine) in violation of Iowa Code section 204.401(3). The defendant was tried to the court and found guilty of

manufacture of marijuana and possession of methylphenidate and methamphetamine.

Generally, our review of criminal proceedings is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). When a criminal defendant raises issues involving the violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. This is equivalent to a de novo review. Id.

I. The defendant challenges the constitutionality of Iowa Code section 204.410 (1981). That section provides:

> **Accommodation offense.** In a prosecution for unlawful delivery or possession with intent to deliver marijuana, if the prosecution proves that the defendant violated the provisions of section 204.401, subsection 1, by proving that the defendant delivered or possessed with intent to deliver one ounce or less of marijuana, the defendant is guilty of an accommodation offense and rather than being sentenced as if convicted for a violation of section 204.401, subsection 1, paragraph "b", shall be sentenced as if convicted of a violation of section 204.401, subsection 3. An accommodation offense may be proved as an included offense under a charge of delivering or possessing with the intent to deliver marijuana in violation of section 204.401, subsection 1. This section does not apply to . . . .

The defendant argues that this section, taken together with Iowa Code section 204.401(1)(b) (1981), denies him due process. The defendant asserts the reference to one ounce or less in section 204.410 shifts the burden to the defendant in an action under section 204.401(1)(b), to prove that he did not intend to deliver more than one ounce of marijuana in order to take advantage of the accommodation offense. Defendant's argument rests on the questionable theory that section 204.410 unlawfully creates a presumption that one who possesses greater than one ounce of marijuana is not an accommodator. See State v. Monroe, 236 N.W.2d 24, 32-35 (Iowa 1975) (holding the prior Iowa accommodation statute unconstitutional).

The State, however, argues that the defendant lacks standing to challenge this statute. Defendant was found guilty of the crime of manufacture of mari-

juana rather than the crime of possession. Iowa Code section 204.410 applies only to "unlawful delivery or possession with intent to deliver marijuana." Although this issue was not raised before the trial court, this issue is nonetheless present, as it inheres in every case in which the constitutionality of a statute is attacked. State v. Gates, 306 N.W.2d 720, 723 (Iowa 1981); State v. Price, 237 N.W.2d 813, 816 (Iowa), appeal dismissed, 426 U.S. 916, 96 S. Ct. 2619, 49 L. Ed. 2d 370 (1976). The defendant was charged with "manufacture and/or possession with intent to manufacture or deliver" marijuana. His motion to dismiss challenged the constitutionality of section 204.410 as it applied to him. Because the statute impacted adversely upon his rights, defendant had the requisite standing. See State v. Gates, 306 N.W.2d at 724.

Although the defendant does have standing, his challenge to the statute as it is applied to him is moot. A question is moot when the issues it presents are merely academic, and any judgment rendered can have no practical legal effect. State v. Beyer, 258 N.W.2d 353, 355 (Iowa 1977). Because section 204.410 no longer is applicable to defendant, our determination of the constitutionality of that section would not affect the disposition of this case. We do not ordinarily decide moot questions unless the issue presented is of substantial public interest. Id. at 355-56. We decline to exercise that discretion to decide the constitutionality of this statute, because we do not find the question presented to be of substantial public interest.

II. The defendant also challenges the issuance of the search warrant alleging that the affidavit to establish probable cause was insufficient. We disagree.

In determining whether there is probable cause to issue a search warrant, the test is "whether a person of reasonable prudence would believe a crime was being committed on the premises to be searched or evidence of a crime was being concealed there." State v. Post, 286 N.W.2d 195, 199 (Iowa 1980). The facts must

establish probable cause that the crime or evidence is presently being committed or concealed at the place to be searched and cannot merely establish that there was probable cause at some time in the past. Id. The application and supporting affidavit is to be tested in a common sense and realistic fashion. State v. Freeman, 297 N.W.2d 363, 366 (Iowa 1980). "While probable cause requires more than a 'mere suspicion' of criminal activity, or 'innocent-appearing activity,' there is a large difference between proof of guilt and probable cause." State v. Leto, 305 N.W.2d 482, 485 (Iowa 1981). It cannot be established unless the issuing officer has sufficient facts, as opposed to mere conclusions, to make his own determination that it exists. State v. Boer, 224 N.W.2d 217, 219 (Iowa 1974).

The affidavit submitted to the district associate judge recounted the events leading to defendant's arrest. The police officer identified the plants as marijuana plants and disclosed the defendant's behavior upon questioning. We think the judge could reasonably infer that further illegal activities were being concealed within defendant's residence because of the proximity of the plants to the residence. Although a nexus must be established between the items to be seized and the place to be searched, direct observation is not required. State v. Groff, 323 N.W.2d 204, 212 (Iowa 1982). The fact the officers observed no illegal drugs in the house does not preclude a finding of probable cause in this case.

Defendant contends that the police officers' conclusions that the plants were marijuana could not be used to establish probable cause. He asserts that both officers were relatively inexperienced in dealing with narcotics and they viewed the plants at dusk. Our review of the record shows that while neither officer was a narcotics expert, both had contact with marijuana in the course of searching people they had arrested for other offenses. Both officers testified they did not need flashlights to clearly see the plants. The identification made by the police officers was sufficient to assist the judge in determining probable cause. See

State v. Paschal, 300 N.W.2d 115, 119 (Iowa 1981). Defendant's contention that probable cause was not established is therefore without merit.

III. The defendant's third error asserts the trial court erred, over his objections, in admitting into evidence the items seized at the residence of the defendant without an adequate foundation showing a proper chain of custody. These exhibits included numerous exhibits of marijuana in various stages of production, methylphenidate and methamphetamine. They were crucial to the State's case.

Principles governing chain-of-custody are well-established.

> As a foundational prerequisite to the admissibility of physical evidence, the prosecution is required to show a sufficient custody to establish that the article has not been altered between the time it was obtained and the time it is introduced at trial. The showing required is that it is reasonably probable that tampering, substitution, or alteration did not occur. The sufficiency of the showing is dependent upon the susceptibility of the article to alteration or substitution. Whether the prosecution has established a proper chain of custody is a matter committed to the sound discretion of the trial court; reversal is warranted only when there has been a clear abuse of discretion. (citations omitted)

State v. Lamp, 322 N.W.2d 48, 57 (Iowa 1982). Marijuana is susceptible to tampering or substitution. State v. Lunsford, 204 N.W.2d 613, 616 (Iowa 1973). A more elaborate foundation to establish identification is required than as to readily identifiable articles. Id. It is not essential, however, that the State negative the possibility of tampering or substitution absolutely. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978); State v. Jeffs, 246 N.W.2d 913, 915 (Iowa 1976); State v. Lunsford, 204 N.W.2d at 617.

There was exhaustive testimony by the police officers involved in the arrest, search and seizure, and testing of the exhibits as to the chain of custody. Each testified as to their possession of the exhibits and that the exhibits were in the same condition as when they were originally seized. This testimony indicated that

all the exhibits were put into two patrol cars, taken to the sheriff's office, cataloged, and stored in an old jail cell in the basement of the court house. The exhibits were removed twice for testing purposes by the officer in charge of their care.

The crux of defendant's argument lies in the storage of the exhibits in the old jail cell. The cell was not locked while the exhibits were stored there. The cell was located in a locked garage in the basement of the court house. The basement garage was also used to house maintenance equipment. The testimony indicated that maintenance personnel as well as members of the sheriff's office had access to the garage. The officers testified that although other physical exhibits were also stored in the old cell, no other controlled substances were stored in the jail cell. Officer Keeney testified that the cell had been locked, but Officer Rouse, the officer in charge of the evidence, testified that it had not been locked. Officer Rouse also testified that he dropped an exhibit, marked "X" for identification, as he was removing them for testing. Some unknown person returned the exhibit to the sheriff's office. It is not clear whether he dropped the exhibit in the garage or in the parking lot. The exhibit, however, was not introduced at trial. Officer Rouse opined that the jail cell was "not that secure," in response to questioning on cross-examination. There was testimony that it was possible that the garage door had been left open by maintenance personnel for extended periods in the summer. The jail cell was not under constant surveillance by law enforcement personnel.

We believe the storage of exhibits for possible use in a legal proceeding in an area accessible to non-law enforcement personnel in total disregard of the potential for tampering or substitution indicates negligence on the part of the law enforcement personnel. We urge that this practice be discontinued immediately.

The State, however, asserts that despite the unlocked jail cell the trial court did not abuse its discretion because there was ample testimony confirming that the evidence was in the same condition as when it was seized. While we find this to be a close case, we believe the evidence does indicate that it is reasonably probable that tampering, substitution, or alteration did not occur. Each officer involved testified the exhibits were in the same or substantially the same condition, excluding testing, as when it was seized. Officer Rouse testified that upon removal of the exhibits from the cell, he found no evidence that they had been disturbed. Moreover, the testimony indicating the garage door would have been left open was speculation in response to questioning on cross-examination. There was no evidence of altering, substitution, or tampering with any of the evidence.

The speculation of tampering might have affected the weight the trial court gave the evidence in this case, but it did not affect its admissibility. See State v. Bakker, 262 N.W.2d at 543. We find no abuse of discretion by the trial court in admitting the evidence seized at defendant's residence over defendant's objections.

AFFIRMED.