# IN THE COURT OF APPEALS OF IOWA

No. 5-312 / 93-1715

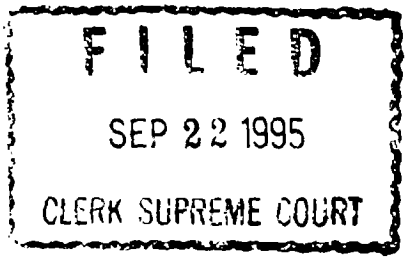
**STATE OF IOWA,**

Plaintiff-Appellee,

vs.

**LEONARD J. WILSON,**

Defendant-Appellant.




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Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of possession of marijuana and failure to affix a drug tax stamp.

**AFFIRMED.**

Thomas P. Frerichs of Fulton, Frerichs, Martin & Andres, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

**PER CURIAM**

Defendant-appellant Leonard Wilson appeals his convictions for possession of a controlled substance (marijuana) in violation of Iowa Code section 204.401(1)(d) (1991) and failure to affix a drug tax stamp in violation of section 421A.12. We affirm.

On November 12, 1992, deputy sheriff Russell Reicherts made an application for a search warrant for defendant's home. The application was based in part on information Reicherts obtained from a confidential informant. This informant stated defendant was selling marijuana from his trailer house. The informant additionally stated he or she had been in defendant's trailer house within the past seventy-two hours and had seen a bag of marijuana. This confidential informant identified defendant's address and the license plates of his car. On the search warrant application, Reicherts swore his confidential informant was reliable.

A judge signed the search warrant and it was executed on November 12, 1992. The search of defendant's home revealed almost two pounds of marijuana, a shotgun, drug paraphernalia, and $879 in cash. A woman, Leah Merrill, was at defendant's home at the time it was searched. Defendant was charged with possession of a controlled substance with the intent to deliver and failure to affix a drug tax stamp.

Defendant filed a motion to suppress the results of the search warrant. He claimed Reicherts supplied false information to obtain the search warrant by stating the confidential informant was reliable. Defendant also filed a motion seeking to

compel the State to identify the confidential informant. He stated he believed the confidential informant was Merrill. Defendant stated that if the informant was Merrill, he was prepared to offer evidence of her reputation for truthfulness and her motivation to falsify testimony.

After a hearing, the district court determined defendant had not met his burden to establish entitlement to disclosure of the informant's identity. The court found defendant had failed to show Reicherts knowingly or with reckless disregard for the truth made a false statement on the search warrant application.

On July 21, 1993, defendant took Merrill's deposition. Merrill stated she had not been to defendant's home for a couple of weeks to a month before November 12, 1992. The State would not allow Merrill to answer any questions which would reveal whether or not she was the confidential informant. Defendant filed a motion to compel Merrill's testimony. The district court determined Merrill should not be required to answer questions which would reveal whether she was the confidential informant and denied the motion to compel.

Defendant also filed a motion to dismiss in which he claimed the charge of failure to affix a drug tax stamp was barred by the doctrine of double jeopardy. Defendant claimed the Iowa Department of Revenue had already seized his assets for failure to pay the tax and he should not be subjected to further punishment for the same act. The district court denied the motion to dismiss.

The district court subsequently ruled on the motion to suppress. The court concluded defendant had not made a substantial preliminary showing Reicherts made a knowing and intentional false statement or made statements in a reckless manner. The court denied the motion to suppress.

The case was tried before a jury. On Count I, the jury found defendant guilty of the lesser included offense of possession of a controlled substance. On Count II, the jury found defendant guilty of failure to affix a drug tax stamp. Defendant was sentenced to a term of imprisonment for six months on Count I and a term of imprisonment not to exceed five years on Count II, these terms to be served concurrently. Defendant has appealed.

Defendant believes Merrill was the confidential informant. Defendant states her presence at his residence at the time of the execution of the search warrant changes the nature of any privilege which would attach to her status as a confidential informant. Defendant points out, at her deposition, Merrill stated she had not been at defendant's trailer for at least a couple of weeks prior to November 12, 1992. However, the search warrant stated the confidential informant had been at defendant's trailer within seventy-two hours. Defendant claims this is evidence of police perjury in obtaining the search warrant.

Defendant furthermore claims, if the State were aware Reicherts may have made untruthful statements in the affidavit in support of the search warrant, it had a

duty to disclose this information to defendant. Defendant asks to have the State reveal to the court *in camera* the identity of the confidential informant. Defendant states, if it is Merrill, her testimony could be impeached and he believes there would then be insufficient probable cause to issue the search warrant.

Our review of this constitutional issue is de novo. *See State v. Robertson*, 494 N.W.2d 718, 722 (Iowa 1993).

We find defendant has failed to preserve error on this issue. The issue of whether Reicherts made a false statement on the search warrant application by stating the confidential informant had been in defendant's home within the past seventy-two hours was first raised in the motion to compel Merrill's testimony. The district court did not address the specific facts alleged by defendant, but did find no evidence of possible police perjury had been shown. Defendant does not appear to be appealing the district court's decision denying his motion to compel Merrill's testimony.

Defendant instead is challenging on appeal the district court's denial of his motion to compel the State to reveal the identity of the confidential informant. The arguments he raises on appeal were not raised in support of this motion. Issues not raised before the trial court, including constitutional issues, cannot be raised for the first time on appeal. *State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992). Where a defendant has not raised his constitutional contention at any time before the appeal, no error has been preserved and there is nothing to review on appeal. *Id.*

Defendant contends his conviction for failure to affix a drug tax stamp violates the double jeopardy clause of the United States and Iowa constitutions. He claims the district court erred in denying his motion to dismiss.

The Iowa Supreme Court has concluded the Iowa drug stamp tax statute is not a criminal penalty. *State v. Lange*, 531 N.W.2d 108, 117 (Iowa 1995). The court has found the tax and penalty are a legitimate tax and civil sanction which are not conditioned on commission of a crime. *Id.* at 116-117. Because the statute does not impose a criminal penalty, the sentence on a drug stamp conviction does not constitute a second punishment violative of a defendant's right against double jeopardy. *Id.* at 117. We reject defendant's argument he has been subjected to double jeopardy.

We affirm defendant's convictions for possession of a controlled substance and failure to affix a drug tax stamp. Costs of this appeal are assessed to defendant.

**AFFIRMED.**