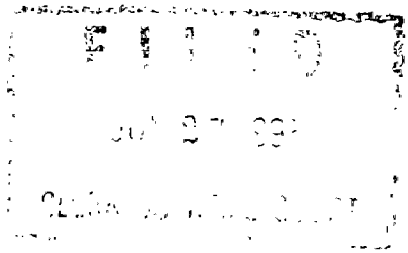
IN THE COURT OF APPEALS OF IOWA

No. 5-221 / 94-868



STATE OF IOWA,

Appellee,

vs.

KENNETH LEE PARTINGTON,

Appellant.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Kenneth Partington appeals the judgment and sentence entered upon his convictions of possession with intent to deliver and failure to affix a drug stamp. **AFFIRMED.**

Robert A. Nading, II, Ankeny, for appellant.

Thomas J. Miller, Attorney General, Thomas G. Fisher, Jr., Assistant Attorney General, John P. Sarcone, County Attorney, and Dan Voogt, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

On March 12, 1993 Jeff Warford, a detective with the Polk County Sheriff's Department, submitted an affidavit and application for a search warrant for Kenneth Partington's residence and outbuildings. Warford's application included the following information: (1) On July 24, 1991 the Polk County Crime Stoppers received a phone call from someone stating Partington was the leader of a major drug ring "occurring two weeks prior to this call" and describing the location of Partington's home; (2) On November 21, 1991 Warford and Detective Burdock spoke with Steve Heller, a convicted drug dealer, who told them Partington was the number one man controlling methamphetamine in Polk County; (3) In February 1993 the Polk County Sheriff's Office Narcotics Unit received a phone call from someone who overheard a conversation between two people in which one person told the other of a major marijuana-growing operation located at the first house on the east side of N.E. 46th Street and that there were large growing lights used in an outbuilding on the property; (4) Midwest Power shows an almost double use of power from January to February 1993 at the Partington residence; and (5) Mike Mittan, a special agent with the Iowa Division of Narcotics Enforcement, assisted Warford in conducting thermal image testing of an outbuilding on Partington's property on March 12, 1993. Mittan believed the findings showed a large amount of heat consistent with prior sightings of indoor marijuana cultivation sites.

The district court issued the search warrant. The judge found the confidential informants mentioned in the affidavit were reliable because of the two crime alert calls, the information from Steve Heller, the results of the thermal image testing, and

"the information from the concerned citizen informant was provided without monetary gain or other incentive."

On March 18, 1993 the search warrant was executed. In the outbuilding the police found hot lights which were being used to keep baby chicks warm. Inside the house police found numerous guns and marijuana plants. Partington was arrested and charged with manufacturing a controlled substance and failure to affix a drug stamp.

Partington filed a motion to suppress all items seized in the search of his house. Partington asserted Warford's application misled the judge and did not provide sufficient probable cause. The motion was denied.

After a trial to the bench Partington was found guilty of the offenses charged. Partington appeals.

I. Credibility of Informants. Partington contends the district court failed to meet the requirements of Iowa Code section 808.3 (1993) when it issued the search warrant. Our review of this issue is for correction of errors at law. *State v. Iowa Dist. Court*, 472 N.W.2d 621, 622 (Iowa 1991).

When issuing a search warrant grounded in information given by an informant, section 808.3 requires a judge or magistrate to:

> [I]nclude 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.

These required findings apply only to confidential informants. *State v. Weir*, 414 N.W.2d 327, 331 (Iowa 1987). Warrant documents must contain specific findings regarding informant credibility. *State v. Sykes*, 412 N.W.2d 578, 583 (Iowa 1987).

The district court was required to make findings regarding the reliability of two informants. The first was the Crime Stopper call of 1991. The second was the anonymous tip received by Detective Warford in 1993.

Both tips were corroborated by other information. The district court noted that a named informant and findings by Special Agent Mittan both corroborated the information given in the anonymous tips. The 1993 tip was further found to be credible since the informant had not given false information in the past, the informant was a concerned citizen who had no motive to lie, and because the information was corroborated. We find the district court made sufficient findings of credibility for both informants.

II. Validity of the Search Warrant. Partington contends there was not probable cause to support the search warrant. As this is a claim based on the constitutional right to protection against unreasonable searches and seizures, our review of this issue is an evaluation of the totality of the circumstances, which is equivalent to a de novo review. *State v. Godbersen*, 493 N.W.2d 852, 854 (Iowa 1992); *State v. Peck*, 517 N.W.2d 230, 232 (Iowa App. 1994). Our examination is guided by the holding in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), as discussed in *Godbersen*:

> The task of the issuing magistrate is simply to 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. And the duty of a reviewing court is simply to insure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Godbersen, 493 N.W.2d at 854 (citing *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)).

We have a duty to give deference to the magistrate's finding. *Weir*, 414 N.W.2d at 330. Due to the preference for warrants, any doubts are resolved in favor of their validity. *Id.* In *Godbersen*, our supreme court stated:

> We have consistently applied the following test for determining the existence of probable cause:
>
> > whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there. Probable cause to search requires a probability determination as to the nexus between criminal activity, the things to be seized and the place to be searched.
>
> [*Weir*, 414 N.W.2d at 330.] (citations omitted). In determining whether probable cause exists, our review is limited to consideration of only that information, reduced to writing, which was actually presented to the magistrate at the time the application for warrant was made. *State v. Mehner*, 480 N.W.2d 872, 875 (Iowa 1992).

Godbersen, 493 N.W.2d at 855.

We find probable cause existed based on the application presented to the district court. Two informants identified Partington as being involved in a drug ring. An identified source provided the same information. A thermal imaging test also provided information which corroborated information provided by the informants. The officer conducting the test stated the results of the test could indicate marijuana was being grown under artificial light.[1] We find there was a substantial basis for concluding probable cause existed.

Partington has also alleged there were intentionally or recklessly false statements made in the warrant application. Partington is particularly concerned with statements made by convicted drug dealer Steve Heller and the statements made in the application regarding Partington's usage of electricity.

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[1] We find the fact that no marijuana was found in the outbuilding during the search to be irrelevant in the determination of whether there was a substantial basis for finding probable cause at the time the application for the warrant was made. In determining whether there was probable cause, our review is limited to consideration of only that information, reduced to writing, which was actually presented to the judge at the time the application for the warrant was made. *State v. Mehner*, 480 N.W.2d 872, 875 (Iowa 1992).

Regarding the statements made by Heller, the inquiry is limited to a determination of whether the affiant was purposely untruthful, or acted in reckless disregard for the truth. *State v. Niehaus*, 452 N.W.2d 184, 186-87 (Iowa 1990) (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674. 57 L. Ed. 2d 667 (1978)). If such a finding is made, then the challenged information is deleted and the remainder of the warrant is reviewed to determine if probable cause existed. *Id.*

Partington contends Heller's testimony at the suppression hearing shows Detective Warford was untruthful with the district court or at least reckless. We find, as the district court found, Heller's testimony at the suppression hearing to lack credibility. This being the case, we do not believe it provides evidence of wrongdoing on the part of Detective Warford.[2]

We also find Partington's claim regarding his usage of electricity is without merit. The important element of the information regarding the electrical usage was that Partington was using a large amount of electricity. It is this fact, and not which months Detective Warford was comparing, which is important in supporting the inference that Partington was using artificial lights to grow marijuana.

We find the district court did not err in finding there was probable cause to issue the search warrant.

AFFIRMED.

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[2] We believe it is important to note the district court specifically stated that even if Heller's statements are excised from the application, there was still a sufficient basis for finding probable cause. We agree.