IN THE COURT OF APPEALS OF IOWA

No. 0-327 / 99-1106
Filed July 26, 2000

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STATE OF IOWA,
Plaintiff-Appellee,

vs.

CURTIS G. SCHMIDT,
Defendant-Appellant.

Appeal from the Iowa District Court for Ida County, John P. Duffy (motion to suppress), Judge.

On appeal from his convictions on two counts of possession with intent to deliver a controlled substance, the defendant argues the district court erred in denying his motion to suppress. He claims the search warrant was not supported by probable cause and was defective because it lacked particularity as to the items to be seized. He also claims the officers' execution of the warrant was so unreasonable that it violated the Fourth Amendment. **AFFIRMED.**

David P. Jennett, Storm Lake, for appellant.

Thomas J. Miller, Attorney General, Karen P. Doland, Assistant Attorney General, Edward A. Jacobson, County Attorney, and Lori J. Kolpin, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Defendant Curtis Schmidt appeals his convictions of two counts of possession with intent to deliver a controlled substance, contending the trial court erred in overruling his motion to suppress evidence found at his home pursuant to a search warrant. Schmidt pled guilty to a drug tax stamp charge, thereby waiving all defenses or objections not intrinsic to the plea itself, *see State v. Morehouse*, 316 N.W.2d 884, 885 (Iowa 1982), and therefore appeals only from the convictions on the two counts of possession with intent to deliver. We affirm.

I. Scope of Review

Schmidt contends the warrant was not supported by probable cause, lacked particularity, and the scope and manner of the search was unreasonable. We review these constitutional questions de novo in light of the totality of the circumstances. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999). We are bound by findings of fact which underlie the district court's ruling if they are supported by substantial evidence. *Id.* Because this search was executed pursuant to a search warrant, Schmidt bears the burden of proof at the suppression hearing. *State v. Farber*, 314 N.W.2d 365, 367 (Iowa 1982).

II. Probable Cause

A. The Law

"The test for probable cause is whether a reasonably prudent person would believe that a crime has been committed on the premises to be searched or evidence of a crime is being concealed there." *State v. Myers*, 570 N.W.2d 70, 75 (Iowa 1997) (quoting *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995)). This nexus between criminal activity, the items to be seized and the place to be

searched, can be found by considering the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items. *State v. Gogg*, 561 N.W.2d 360, 365 (Iowa 1997) (internal quotations omitted). The facts and information presented to establish this finding need not rise to the level of absolute certainty, rather, it must supply sufficient facts to constitute a fair probability that contraband or evidence will be found on the person or in the place to be searched. *State v. Thomas*, 540 N.W.2d 658, 662-63 (Iowa 1995).

We do not make an independent determination of probable cause; rather, we merely decide whether the issuing judge had a substantial basis for concluding probable cause existed. *Gogg*, 561 N.W.2d at 363. In determining whether a substantial basis existed for a finding of probable cause, we are "limited to consideration of only that information, reduced to writing, which was actually presented to the [judge] at the time the application for warrant was made." *Id.* (quoting *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992)).

In making this determination, Iowa follows the "totality of the circumstances" test established in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *State v. Randle*, 555 N.W.2d 666, 670 (Iowa 1996). In *Gates* the United States Supreme Court wrote:

> 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.

Gates, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548. Under the "totality of the circumstances" approach,

> probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub silentio impose a drastically more rigorous definition of probable cause than the security of our citizens demands.

Id. at 243 n. 13, 103 S. Ct. at 2335 n. 13, 76 L. Ed. 2d at 552 n. 13.

Because there is a preference for warrants, we resolve doubtful cases in favor of their validity. *State v. Beckett*, 532 N.W.2d 751, 753 (Iowa 1995). Schmidt contends there was no substantial evidence before the issuing magistrate to support a finding of probable cause, and the district court erred in finding otherwise.

B. Relevant Facts

On May 27, 1998, a confidential informant, who in the past had provided reliable information, told Deputy Frank that she could purchase methamphetamine from a Roger Harrell who was going to purchase methamphetamine from Schmidt at Schmidt's residence. Deputy Frank gave the confidential informant five hundred dollars in serialized currency and a surveillance of the informant was set up. The confidential informant met Harrell at Harrell's Body Shop in Ida Grove, Iowa, where she asked Harrell to buy her two "eight-balls" of methamphetamine and gave him the five hundred dollars. Law enforcement officers then observed Harrell get into his pickup and monitored his activity via aircraft. Harrell drove directly to Schmidt's residence, where Harrell stayed inside, out of the view of officers. He returned to the body shop less than an hour later, making no stops between the two destinations. After

Harrell spoke with the confidential informant outside, the two went inside to complete the transaction. Once inside, Harrell took two plastic bags out of his pocket and gave them to the informant. The confidential informant then turned what Harrell gave her over to Deputy Frank, who subsequently conducted field testing and determined the dark chunky powder within the two bags contained amphetamine. A search warrant to search Schmidt's residence was obtained the next day.

C. Application of the Law to the Facts

Schmidt argues the magistrate did not have probable cause to issue the warrant of his residence because there was 1) no controlled buy on Schmidt's premises; 2) no information from the informant as to how she knew Harrell could buy drugs from Schmidt; 3) no direct evidence there were drugs on Schmidt's premises; 4) no evidence Harrell's visit to Schmidt's was more than circumstantial; and 5) no evidence Schmidt was at the residence when Harrell was observed at the residence. He further argues the aerial surveillance violated Fourth Amendment standards and information gained as a result of that surveillance therefore cannot be used to support the issuance of the search warrant.

We find the issuing magistrate had a substantial basis for concluding probable cause existed to believe drugs, evidence of drug trafficking, or both, would be found at Schmidt's residence. There is substantial evidence the confidential informant was credible. There is substantial evidence the informant was searched prior to the buy, was given serialized currency with which to make the transaction, and was under constant law enforcement surveillance. There is

substantial evidence the confidential informant gave the money to Harrell, who, under similar constant surveillance, drove directly to Schmidt's residence and returned with the drugs without making any other stops. There is substantial evidence the informant, after receiving the drugs, immediately turned them over to law enforcement. The Fourth Amendment does not deny use of the usual inferences which reasonable persons draw. *See State v. Seiler*, 342 N.W.2d 264, 267 (Iowa 1983); *Munz v. State*, 382 N.W.2d 693, 698 (Iowa App. 1985). From the evidence presented in support of the application for the search warrant the magistrate could reasonably infer Harrell obtained the drugs from Schmidt at Schmidt's residence. We find a reasonably prudent person would believe a crime had been committed on Schmidt's premises and evidence of a crime was being concealed there. The magistrate could readily conclude there was a nexus between criminal activity, the possession and delivery of drugs; the items to be seized, drugs and evidence of drug use and/or trafficking; and the place to be searched, Schmidt's residence.

Schmidt separately contends in this division of his argument the police are required to have reasonable suspicion of criminal activity before deploying aircraft to monitor a person's movements, citing *State v. Ortiz*, 600 N.W.2d 805 (Neb. 1999) for support. Schmidt argues because the aircraft surveillance violated his Fourth Amendment rights due to a lack of reasonable suspicion, any information gained as a result of the aerial surveillance must be stricken from the warrant application. Once that information is stricken, Schmidt argues there is no probable cause from which the search warrant could issue.

In *Ortiz*, the Nebraska Supreme Court held before a canine sniff for illegal drugs may take place at the threshold of an apartment, officers must have, at a minimum, reasonable suspicion that a crime is being committed within the apartment. *Ortiz*, 600 N.W.2d at 820. This is because by using a canine to sniff for illegal drugs at the threshold of Ortiz' apartment, the police "engaged an investigative technique by which they are able to obtain information regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy." *Id.*

Schmidt contends the aerial surveillance employed by law enforcement in this case is analagous to *Ortiz* because, although like a canine sniff aerial surveillance usually does not constitute a "search" within the meaning of the Fourth Amendment, *see United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644-45, 77 L. Ed. 2d 110, 121 (1983) (holding a canine sniff is not a search within the meaning of the Fourth Amendment), *State v. Ryder*, 315 N.W.2d 786, 788 (Iowa 1982) (noting a warrantless aerial observation of what is not visible from most places on the ground is not *per se* a fourth amendment violation), it is a "search" under special circumstances, including those in this case. However, in order for Schmidt to prove his Fourth Amendment rights were violated by the aerial surveillance, he must have had a reasonable expectation of privacy in the area exposed to aerial view. *Ryder*, 315 N.W.2d at 788. Schmidt bears the burden of proving he had a legitimate expectation of privacy that was violated by the challenged search and seizure. *Rawlings v. Kentucky*, 448 U.S. 98, 104-05, 100 S. Ct. 2556, 2561, 65 L. Ed. 2d 633, 641 (1980). This Schmidt cannot do, because he had no expectation that Harrell's movements, which

occurred on public streets and highways and in areas outside businesses and homes and which Harrell knowingly exposed to the public, would be private. *See Katz v. United States*, 389 U.S. 347, 351-52, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967) ("What a person knowingly exposes to the public, . . . , is not a subject of Fourth Amendment protection.").

Further, even if on the facts of this case the Fourth Amendment applied, it would be Harrell's rights that would be implicated, not Schmidt's. Thus, Schmidt would not have "standing" to challenge the aerial surveillance of Harrell's movements. *See State v. Bakker*, 262 N.W.2d 538, 544 (Iowa 1978) ("Standing to object to a search belongs only to the victim of illegal search and seizure. A litigant cannot invoke violation of constitutional rights of third persons."); and *see Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) (abandoning "standing" in favor of an inquiry focusing directly on the question of whether the defendant's own personal right to be free from an unreasonable search or seizure has been violated).

For these reasons, Schmidt's reliance on *Ortiz* is misplaced. In *Ortiz*, the court found the defendant had a reasonable expectation of privacy in his apartment, *Ortiz*, 600 N.W.2d at 817-820, while in this case, Schmidt had no reasonable expectation Harrell's trip to Schmidt's would be private. In *Ortiz*, the canine sniff occurred at the threshold of the *defendant's* apartment, where in this case, the officers in the aircraft never observed Schmidt. We therefore hold, on the facts of this case, law enforcement officers did not need to have reasonable suspicion to engage in aerial surveillance of Harrell's movement.

We conclude the district court did not err in holding there was a substantial basis to support the issuing magistrate's finding of a nexus between the drugs and related items to be seized and the place to be searched.

III. Particularity

A. The Law

Schmidt contends the search warrant lacked particularity. The Fourth Amendment was passed in response to the use of general warrants in England and writs of assistance used in the colonies. *See generally Stanford v. Texas*, 379 U.S. 476, 481-85, 85 S. Ct. 506, 509-12, 13 L. Ed. 2d 431, 434-37 (1965). By requiring a warrant to particularly describe the persons or places to be searched and things to be seized, the Fourth Amendment forbids the use of general warrants. *Thomas*, 540 N.W.2d at 662.

> In order that the Fourth Amendment right of privacy from arbitrary police intrusion be left intact, nothing should be left to the discretion of the official executing the warrant. The officer must be able to reasonably ascertain and identify the places and things authorized to be searched. This is not to mean that a hypertechnical, perfectly accurate description must be provided, rather, that the descriptions in the warrant and affidavits be sufficiently definite to enable the searcher to identify the persons, places or things the magistrate has previously determined should be searched or seized.

Thomas, 540 N.W.2d at 662 (internal citations and quotations omitted).

B. The Facts

The front page of the search warrant described the property to be seized as, *inter alia*,

> [A]ny and all controlled substances as listed in *Chapter 204* of the State Code of Iowa, as well as other paraphernalia, instrumentalities, or documents which are evidence of the illicit possession, use, dealing or distribution in controlled substances.

(Emphasis added). The warrant also authorized the seizure of many other definite items, including items that would document the distribution of controlled substances, currency, and customer and supply lists. After the magistrate reviewed the search warrant application, he deleted several items law enforcement requested they be allowed to seize, including travel documents, electronic equipment (such as computers and telephone answering machines), photographs, and firearms.

C. Application of the Facts to the Law

Schmidt argues the search warrant lacks particularity because it authorized the seizure of any and all controlled substances listed in Iowa Code Chapter 204, and therefore the definition of "controlled substances" was left to the discretion of the executing officers.[1]

The district court correctly found the search warrant at issue was not a general warrant. The court noted the reference to chapter 204 was a clerical error which did not affect the officers' ability to know and understand what they were searching for. During the hearing on the motion to suppress, the magistrate testified the application for the warrant made specific reference to methamphetamine and it was clear that officers would search for evidence of drugs rather than for anything involving hog manure regulations under Chapter 204. The magistrate also testified he crossed out several portions of the list of property to be seized because he was concerned the list was overly broad. Further, while the warrant application did mistakenly refer to chapter 204 of the

[1] At the time the warrant was issued, Chapter 204 dealt with manure lagoons, not controlled substances. Prior to 1993, however, Chapter 204 was the Iowa enactment of the Uniform Controlled Substances Act, before being transferred by the Code Editor to Chapter 124 in the 1993 Code of Iowa.

Iowa Code, the sentence on the warrant at issue stated that officers would search for "any and all controlled substances" and "other paraphernalia, instrumentalities, or documents which are evidence of the illicit possession, use, dealing or distribution in controlled substances." It is clear therefore that despite the clerical error, officers were aware they were searching for evidence of drugs. *See State v. Hamilton*, 236 N.W.2d 325, 328 (Iowa 1975) (holding the use of words "any and all other controlled substances" in search warrant not overly broad.) The search warrant was sufficiently definite to enable the officers to identify the persons, places or things the magistrate had previously determined should be searched or seized. *Thomas*, 540 N.W.2d at 662.

Schmidt also claims on appeal the officers conducted a general search of his property because, Schmidt claims, the executing officers did not review the warrant prior to the search. This claim must fail. Schmidt did not present this argument to the district court, and therefore did not preserve it for appellate review. *State v. Sykes*, 412 N.W.2d 578, 581 (Iowa 1987) (holding an issue not presented to and passed on by the trial court cannot be raised or reviewed on appeal).

IV. Execution of the Search Warrant

"From the moment of entry until the moment of departure, appellees' [officers'] conduct was subject to scrutiny for reasonableness under the fourth amendment." *Bailey v. Lancaster*, 470 N.W.2d 351, 358 (Iowa 1991) (quoting *Duncan v. Barnes*, 592 F.2d 1336, 1338 (5th Cir.1979)). Schmidt contends in this case the officers acted unreasonably in the execution of the search warrant because 1) seventeen to twenty officers conducted the search when two sheriff's

deputies would have been enough; 2) he was detained for over two hours while the search took place; 3) the officers did answer the telephone while the search took place and did not deliver telephone messages to him; 4) the officers conducted a general rummaging through his house, and 5) violated the "knock and announce rule" of Iowa Code section 808.6 when they entered his home with their guns drawn and without authorization to enter.

With the exception of his claim the officers violated the "knock and announce" rule, Schmidt did not present the arguments listed above to the district court, and as earlier noted, is therefore barred from presenting these arguments to this court. *Sykes*, 412 N.W.2d at 581.

Iowa Code section 808.6 provides in relevant part:

> The officer may break into any structure or vehicle where reasonably necessary to execute the warrant if, after notice of this authority and purpose the officer's admittance has not been immediately authorized.

Implicit in prior case law is the assumption that the "knock and announce rule" in Iowa Code section 808.6 embodies the reasonableness requirement for a Fourth Amendment search. *State v. Cohrs*, 484 N.W.2d 223, 225 (Iowa App. 1992) (citing *State v. Brown*, 253 N.W.2d 601, 602 (Iowa 1977)) (constitutional implications found to exist within the knock and announce rule). "Abundant authority exists for the proposition that exigent circumstances will excuse compliance with constitutional and statutory announcement requirements." *Id.* Even if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified

in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted. *Id.* *See also Ker v. California*, 374 U.S. 23, 47, 83 S. Ct. 1623, 1636, 10 L. Ed. 2d 726, 746 (1963).

In this case, the district court found the search warrant was served on Schmidt prior to the commencement of the search, and Schmidt does not contest this fact. Therefore, pursuant to the first exception listed in *Cohrs*, there was no violation of the "knock and announce" rule.

V. Conclusion

The district court correctly denied Schmidt's motion to suppress. We therefore affirm Schmidt's convictions of two counts of possession with intent to deliver.

AFFIRMED.