IN THE COURT OF APPEALS OF IOWA

No. 8-595 / 06-1982
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALVIN LEE WORKMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II (motion to suppress) and Peter A. Keller (trial), Judges.

Defendant appeals his convictions for possession of methamphetamine with intent to deliver, failure to affix a drug tax stamp, and possession of marijuana. **AFFIRMED.**

Paul Rosenberg of Paul Rosenberg & Associates, P.C., Des Moines, for appellant.

Alvin Workman, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John Sarcone, County Attorney, and Steve Bayens, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON S.J.

I. Background Facts & Proceedings

On March 8, 2004, detective Don Simpson from the Urbandale Police Department received a telephone call from a person giving only a first name, stating Alvin Workman was selling "pounds" of "methamphetamine ice" from his condominium at 9547 University Ave., Number 19, in Clive, Iowa.[1] The caller reported that a lot of people came and left from the condominium, and young girls sometimes stayed there. The caller stated Workman had a jar full of methamphetamine ice in his bedroom. The caller acknowledged familiarity with methamphetamine ice due to past use, and expressed concern about the possibility Workman was manufacturing methamphetamine at the residence.

Detective Simpson determined the utilities at the condominium were registered to Workman. The detective also checked Workman's criminal record, and found he had past drug-related convictions. Detective Simpson was aware Workman had the street name "Dog."

Detective Simpson was assigned to the Mid-Iowa Narcotics Enforcement Task Force. From other officers on the Task Force he received information that in July 2003, Nicole Poznanski stated she saw Workman sell methamphetamine and he kept the methamphetamine in jars. Also, in July 2003, Steven Buell had stated he purchased methamphetamine from "Dog" at the same condominium in Clive. In November 2003, a confidential informant stated Workman was involved in the sale of methamphetamine ice. During a monitored telephone call in December 2003, Workman was heard to refer to a ten pound methamphetamine

[1] Crystallized methamphetamine is sometimes referred to as methamphetamine ice.

load. Furthermore, in another monitored telephone call in January 2004, Workman arranged to sell one pound of methamphetamine to a confidential informant.

After receiving the telephone call, Detective Simpson applied for a search warrant that same day, based on the information outlined above. The application identified the caller as "an anonymous concerned citizen," but the word "anonymous" was subsequently crossed out. The application was approved by a district court judge, and the search warrant was executed. Officers found methamphetamine, marijuana, baggies, and police scanners.

Workman was charged with possession of a controlled substance (methamphetamine) with intent to deliver, in violation of Iowa Code section 124.401(1)(b)(7) (2003), failure to possess a tax stamp, in violation of section 453B.3 and 453B.12, and possession of a controlled substance (marijuana), in violation of section 124.401(5). He was also alleged to be a habitual offender. Workman filed a motion to suppress the evidence discovered as a result of the search warrant.

The district court initially granted the motion to suppress, finding there was insufficient information concerning the reliability of the informant who made the telephone call on March 8, 2004. The Iowa Supreme Court granted the State's request for discretionary review, and transferred the case to the Iowa Court of Appeals. The court of appeals determined the district court had applied an incorrect legal standard by applying the pre-amended version of section 808.3.

See State v. Workman, No. 05-0052 (Iowa Ct. App. Feb. 1, 2006). The case was reversed and remanded for application of the correct legal standard. *Id.*

On remand, the State and defense agreed to submit the motion to suppress on the record made at the initial hearing. The district court issued a new ruling on April 28, 2006. The court determined the caller should be categorized as an informant, not a concerned citizen, and the credibility of the person should be based on the disclosures in the search warrant application. The court found the caller's information was corroborated by other information provided by Detective Simpson in the application. The court determined that Detective Simpson's use of the term "concerned citizen" was not an intentional false statement. It was also not misleading for Detective Simpson to cross out the word "anonymous" because the caller stated he or she wished to remain confidential. Even if these misstatements are set aside, the court concluded there was still sufficient information in the application to support the issuance of the search warrant. The court denied the motion to suppress.

On September 26, 2006, Workman filed a motion to enlarge and to reopen the record on the motion to dismiss based on newly discovered evidence. He stated that in a deposition of Detective Simpson taken on May 12, 2006, Simpson stated that Assistant County Attorney Dan Voogt crossed out the word "anonymous" in the search warrant application. The district court denied the motion.

The case proceeded to trial, and a jury found Workman guilty of the crimes charged. The district court denied his motion for new trial and motion in

arrest of judgment. He was sentenced to a term of imprisonment not to exceed fifty years on the possession of methamphetamine with intent to deliver charge, fifteen years on the tax stamp charge, and fifteen years of the possession of marijuana charge, all to be served concurrently. Workman appeals his convictions.

II. Newly Discovered Evidence

Workman claims the district court should have granted his motion to reopen the record based on newly discovered evidence. The district court's ruling on a motion to reopen the record is reviewed for an abuse of discretion. *State v. Jefferson*, 545 N.W.2d 248, 250 (Iowa 1996); *see also State v. Teeters*, 487 N.W.2d 346, 348 (Iowa 1992) (noting the ruling on a motion to reopen the record is discretionary).

Workman claims that by crossing out the word "anonymous" there was a false statement in the search warrant application, leading the judge to believe the caller was a concerned citizen, instead of an anonymous informant. If a defendant shows, by a preponderance of the evidence, that a search warrant application contains a false statement "knowing and intentionally, or with reckless disregard for the truth, the Fourth Amendment requires the statements be deleted from the affidavit and the remaining contents be scrutinized to determine whether probable cause appears." *State v. Groff*, 323 N.W.2d 204, 206 (Iowa 1982) (citing *Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978)).

The district court stated:

> The Court finds that Detective Simpson's use of "concerned citizen" was not an intentional or recklessly made false statement to the warrant-issuing magistrate. The question of whether the caller met that legal definition of a concerned citizen was one which this Court had to scrutinize and research. A police officer faced with the immediacy of preparing and submitting a search warrant application to a judge does not have time to either research or ponder how to label such a person who provides information. In certain respects, the "caller," as noted by the Court above, may be thought of as a concerned citizen, but does not meet the legal definition derived from studying court cases.

Workman claims that the information received in the May 12, 2006, deposition of Detective Simpson, that Assistant County Attorney Dan Voogt actually crossed out the word "anonymous," detracts from the court's conclusion that the term "concerned citizen" was hastily placed in the search warrant application by a police officer. Workman asserts this information supports his claim that the search warrant application contained false statements that were knowingly and intentionally made.

Even if the term "concerned citizen" was a false statement knowingly and intentionally placed in the search warrant application, the remedy is to delete that statement, and then review the remaining portion of the application to determine if there is probable cause for issuance of the search warrant. *See State v. Green*, 540 N.W.2d 649, 657 (Iowa 1995).

In ruling on the motion to suppress, the district court determined the caller was not a concerned citizen, but was instead an informant. The court also found the credibility of the informant was not established by the application. Despite this, the court found the information provided by the informant was credible,

based on the information provided by other sources and set forth in the application. Thus, the court determined there was probable cause for the search warrant based on the information provided by the caller, not based on an aura of credibility given to the caller due to a designation as a concerned citizen.[2] The court stated that even if the information characterizing the caller was stricken from the application, the court could still determine the information provided by the caller was credible and it supported a finding of probable cause for the search warrant.

The newly discovered evidence provided by Workman in the motion to reopen the record would not change the court's conclusions in this case because the court's decision was not based on the designation of the caller as a concerned citizen. We conclude the court did not abuse its discretion by denying the motion to reopen the record.

III. Motion to Suppress

Workman claims there are other knowing and intentional false statements in the search warrant application. The application stated the caller had never provided false information in the past, but because Detective Simpson did not know the identity of the caller, he had no way of determining the truth of this statement.

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[2] In *Illinois v. Gates*, 462 U.S. 213, 233-34, 103 S. Ct. 2317, 2329, 76 L. Ed. 2d 527, 545 (1983), the United States Supreme Court stated "If an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny on the basis of his knowledge unnecessary." Therefore, information provided by a concerned citizen is considered to be more credible than that provided by an anonymous informant.

Under the Fourth Amendment, a search warrant must be supported by probable cause. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). False information in a search warrant application must be disregarded in determining whether there is probable cause for a warrant. *State v. Poulin*, 620 N.W.2d 287, 289 (Iowa 2000). If a warrant is not supported by probable cause, evidence seized pursuant to the warrant must be suppressed. *State v. Seager*, 571 N.W.2d 204, 210 (Iowa 1997). We review constitutional challenges de novo. *State v. Shanahan*, 712 N.W.2d 121, 131 (Iowa 2006).

The district court concluded this statement was not supported by the information known to Detective Simpson, and the court properly disregarded the statement. As noted above, the court did not find probable cause for the search warrant based on a finding that the caller was credible, but rather based on a finding that the information provided by the caller was credible because it was corroborated by other information. If the remainder of a search warrant application establishes probable cause, a motion to suppress should be denied. *See Green*, 540 N.W.2d at 657. If the statement in question is removed from the search warrant application, we determine there is sufficient other information in the application to provide probable cause for a search warrant.

On appeal, Workman asserts Detective Simpson also made false statements in the application that confidential informant #509 had given reliable information in the past, and that confidential informants #509 and #550 had not given false information in the past. This issue was not raised before the district court in the motion to suppress. We do not consider an issue raised for the first

time on appeal, even one of constitutional dimension. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994).

IV. Physical Restraint

In a pro se brief, Workman claims the district court denied him a fair trial because he was required to appear in the courtroom in shackles. We determine the record is not sufficient to permit us to address this issue. There is no record of what, if any, restraints were used at trial. Furthermore, we are unable to discern a specific ruling on the issue. "It is a defendant's obligation to provide the court with a record affirmatively disclosing the error relied upon." *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995). A defendant's failure to provide such a record waives error on a claim. *Id*.

To the extent Workman is claiming ineffective assistance due to defense counsel's failure to raise the issue, we determine the issue should be preserved for a possible postconviction action. *See State v. Baker*, 560 N.W.2d 10, 15 (Iowa 1997) (noting claims of ineffective assistance of counsel are generally best preserved for postconviction proceedings in order for a more complete record to be developed).

We affirm Workman's convictions.

AFFIRMED.