IN THE COURT OF APPEALS OF IOWA

No. 1-526 / 10-1544
Filed October 5, 2011

STATE OF IOWA,
Plaintiff-Appellant,

vs.

DARREN LEE STROUGH and
AMBER KRISTINE STROUGH,
Defendants-Appellees.

Appeal from the Iowa District Court for Taylor County, Brad McCall, Judge.

The State seeks discretionary review of a suppression ruling that found a search warrant was not supported by probable cause. **REVERSED.**

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, and Clinton L. Spurrier, County Attorney, for appellant State.

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellee Darren Strough.

Catherine K. Levine, Des Moines, for appellee Amber Strough.

Considered by Vogel, P.J., and Vaitheswaran and Mullins, JJ.

VOGEL, P.J.

The State seeks discretionary review of a suppression ruling that found a search warrant was not supported by probable cause. Upon finding that information from the two named informants was stale, and after a *Franks* hearing determination that certain statements from the affidavit in support of search warrant application should be stricken, the district court found the remaining information provided in the search warrant application insufficient to establish probable cause for the issuance of the warrant. On our de novo review, we find the district court should have considered the information from the two named informants as corroboration of information supplied by the confidential informant, and thus not improper as stale. Even assuming that certain statements were properly stricken pursuant to a *Franks* analysis, the magistrate had probable cause to issue the search warrant. We therefore reverse the district court as to its findings regarding probable cause supporting issuance of the search warrant.

I. Background Facts and Proceedings

On April 21, 2010, the Taylor County District Court issued a search warrant for the property of Darren and Amber Strough, located in rural Taylor County. The search warrant application was submitted by Deputy Robert Hitch, Tri-County Narcotics Officer for Taylor, Adams, and Ringgold counties.

The search warrant application contained information provided by a confidential informant, who had charges pending in a separate case. The confidential informant obtained information regarding the Stroughs within ten days before the search warrant application was submitted in April 2010. The confidential informant told Deputy Hitch he had been in Darren's home and had

seen three garbage bags full of cultivated marijuana and several marijuana plants in the home that were approximately six feet tall. The confidential informant also believed the red barn, located southeast of the Stroughs' house, contained 100 to 150 marijuana plants and housed numerous grow lights.

The search warrant application also contained information provided to Deputy Hitch by two named informants. The first, a statement made in October 2008—eighteen months prior to the search warrant application—by Dean Hultquist, informed the affiant and Iowa Division of Narcotics Enforcement Special Agent Mike Mittan of his knowledge of Darren Strough. Hultquist admitted to purchasing marijuana from Darren in the past and conveyed that he knew Darren grew marijuana, but was not exactly sure of the location.

The second statement was made in September 2009 during an interview with Richard Whipple. Whipple's interview was held as part of a cooperation agreement for pending charges against him of possession with the intent to distribute marijuana. Whipple indicated that he had knowledge of Darren's involvement in marijuana cultivation and distribution and that he had purchased marijuana from Darren in the past. Whipple also stated that he knew Darren cultivated marijuana in his home and various outdoor locations and that marijuana was also stored in Darren's bedroom or basement. On one particular instance in February 2009, Whipple observed approximately 100 marijuana plants on a table with two platforms. He further stated that Darren had been growing marijuana for more than ten years and that Darren used a "cloning" cultivation method. Whipple also disclosed that Darren drove a gold Blazer. Deputy Hitch corroborated this information in the affidavit, stating he knew

"D. Strough to drive a gold Blazer with Iowa license plate [number omitted] and . . . registered to Larry James Refer."

Deputy Hitch verified the location of the Stroughs' house by using the description provided by the confidential informant, his personal knowledge gained from his "on-going investigation of Darren Lee Strough . . . and his involvement in the manufacturing of marijuana since 2008," by checking driver's license information (which verified Amber Strough resided at the specified location), and acquiring the home's utility records, which were in Darren Strough's name. Deputy Hitch noted in the search warrant application that, "[t]he observations made by [the confidential informant] are consistent with that of an indoor marijuana cultivation site and/or operation."

The search warrant application also contained information provided by Deputy Hitch. Not only did Deputy Hitch secure utility records to confirm the location of the Stroughs' home, he also used them to compare the electrical usage of the Stroughs with two neighboring homes. After speaking with an employee of the rural electric company and undertaking a comparative review of the utility records, Deputy Hitch concluded, "these bills indicate an abnormally high kilowatt usage compared to similar properties in the area." Deputy Hitch used all of this information, as well as his two years of knowledge and experience as a narcotics officer to conclude:

> [T]he physical characteristics and description of the residence, barn, and property at 2572 130th Street, Lenox, Iowa are consistent with that of an indoor/outdoor marijuana cultivation site. The isolated barn could/would support an indoor marijuana cultivation operation. A person(s) involved in marijuana cultivation would perceive this type of location as secure.

On April 21, 2010, a magistrate issued a search warrant for the property of Amber and Darren Strough. After executing the search warrant, Amber was charged with possession of a controlled substance (marijuana; third offense) and child endangerment. Darren was charged with multiple counts of possession of a controlled substance and child endangerment. Amber and Darren each filed a motion to suppress evidence seized during the search. The State resisted both motions. After the suppression hearing, the district court entered a ruling, granting each defendant's motion to suppress. The supreme court granted the State's application for discretionary review and stayed further proceedings pending resolution on appeal.

II. Standard of Review

Our review of a district court's ruling regarding probable cause for issuance of a search warrant is de novo. *State v. Myers*, 570 N.W.2d 70, 72 (Iowa 1997). Under our de novo review, we must determine whether the district court properly decided whether the magistrate had a substantial basis for concluding that probable cause existed. *See State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995) (recognizing the task of the appellate court is "not to make an independent determination of probable cause, but only to determine whether the issuing magistrate had a substantial basis for . . . conclud[ing] that probable cause existed" (internal quotations and citations omitted)). A determination regarding whether probable cause exists is limited in scope to "only that information, reduced to writing, which was actually presented to the magistrate at the time the application for warrant was made." *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992).

III. Analysis

A. Staleness

The State alleges the search warrant application submitted by Deputy Hitch did not contain stale information. It argues the information provided by the two named informants is not too remote in time because it "provided proof of an ongoing marijuana cultivation." Amber responds by asserting the information provided by the two named informants was stale. She does not, however, set forth an argument addressing why the claims were stale, but merely emphasizes that (i) no marijuana plants were seized from the residence or any outdoor location, (ii) she had no criminal history involving drugs, and (iii) no evidence of cultivation or cloning was found. Darren responds to the State's claim that the information was not stale by asserting Hultquist's statements in October 2008 and Whipple's statements in September 2009 were simply too remote in time.

Important in determining whether probable cause exists is whether the information upon which a belief is based is "current and not remote in time." *State v. Gogg*, 561 N.W.2d 360, 367 (Iowa 1997). When considering the timeliness of information provided in an affidavit, "the observations are assumed to have occurred on the most remote date within the time period mentioned in the affidavit." *Id.* However, information does not become stale by the passage of time alone. *Id.* Instead, the court will consider the circumstances of each case. *Id.* Those circumstances deemed relevant by the court include:

> (1) the character of the crime (whether an isolated event or an ongoing activity) . . . ,
> (2) the character of the criminal (nomadic or stable) . . . ,

> (3) the nature of the thing to be seized (perishable, easily destroyed, not affixed and easily removable, or of enduring utility to the holder) . . . , and
> (4) the place to be searched (mere criminal forum of convenience or secure operational base).

See id. (internal citations omitted).

Crimes involving drugs may be classified as isolated events or ongoing activities, depending on the facts involved. *See id.* (acknowledging that drug offenses can be "isolated observance[s]" or "ongoing" in nature). Such a classification is important because it influences the amount of time it takes for information to become stale. *See State v. Randle*, 555 N.W.2d 666, 670 (Iowa 1996) (recognizing that although there is "no bright line rule for when evidence of a crime becomes stale," probable cause "quickly dwindles with the passage of time" for isolated occurrences, and that a "significant passage of time between the alleged criminal conduct and the application for a warrant [requires] the application [to] show that the offense is continuous in nature, 'likely to remain in operation for a period of time'"). Where an isolated observance of a drug offense is involved, "probable cause diminishes quickly," due in large part to the fact that drugs are "readily consumable or transferable." *Gogg*, 561 N.W.2d at 367. By contrast, where information concerning ongoing drug-related activities is presented to a magistrate, "the passage of time is less problematic because it is more likely that these activities will continue for some time into the future." *Id.*

Although the statements made by Hultquist and Whipple pre-date the search warrant by eighteen and fourteen months,[1] respectively, our supreme

[1] The statements made by Whipple were made in September 2009. However, Whipple stated that he observed marijuana in the Stroughs' home in February 2009. Because

court has rejected staleness claims where unlawful activities persist over an extended period of time. *See, e.g.*, *State v. Woodcock*, 407 N.W.2d 603, 605 (Iowa 1987) (finding eighteen month old information concerning defendant's sexual contact with a minor was not stale because "it would be reasonable for an issuing magistrate to conclude that a person charged with sexual exploitation of children through photographs and similar items would be likely to retain them for an indefinite period"); *compare State v. Padavich*, 536 N.W.2d 743, 748–51 (Iowa 1995) (holding that probable cause could be established for a warrant issued February 1993 where information regarding the defendant's involvement in drug activity was provided by a named informant in March 1991 (twenty-three months earlier) and a confidential informant in May 1988 (fifty-seven months earlier)), *with State v. Gillespie*, 503 N.W.2d 612, 616 (Iowa Ct. App. 1993) (finding that where two drug sales occurred within less than one week, the drugs were readily moveable and not affixed to the home, and the reported transactions were "not specific, or detailed, or more than two in number," the evidence did not support probable cause that the drug-related activity was continual in nature).

Other courts have similarly rejected staleness claims where ongoing marijuana growth operations are involved. *See, e.g.*, *United States v. Thomas*, 605 F.3d 300, 310 (6th Cir. 2010) (recognizing that "[a] marijuana growing operation, which is a long-term operation, may allow for greater lapses of time

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the court considers the timeliness of information provided in an affidavit on the "most remote date within the time period mentioned in the affidavit," Whipple's statement will be considered made in February 2009—fourteen months prior to issuance of the search warrant. *Gogg*, 561 N.W.2d at 367; *see also State v. Birkestrand*, 239 N.W.2d 353, 358 (Iowa 1976) (determining that where an unidentified informant told the police on November 23 or 24 that within the past ten days he observed drugs on defendant's premises, the court used November 13 as the date the last report was received).

between the information relied upon and the request for a search warrant"); *United States v. Myers*, 106 F.3d 936 (10th Cir. 1997) (finding a five-month gap between the time police received tips relating to drug activity and the time the search warrant was obtained did not render the information stale because the activity was "'ongoing and continuous'"); *United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991) (holding two-year-old information relating to a marijuana growing operation was not stale because the "magistrate could reasonably conclude that evidence of a marijuana grow would still be present two years after the grow operation began"); *United States v. Yokshan*, 658 F. Supp. 2d 654, 664 (E.D. Pa. 2009) ("The protracted and continuous nature of narcotics operations … extend the shelf life of information in determining staleness."). Moreover, even if a search warrant application contains information that is in some respects stale, more recent information in the search warrant application that corroborates this otherwise stale information may serve to "refresh" the otherwise stale information. *United States v. Spikes*, 158 F.3d 913, 924 (6th Cir. 1998).

In the case of *State v. Poulin*, the Iowa Supreme Court considered a challenge to a search warrant that had been issued based on information obtained from a jailhouse informant supported by certain evidence of corroboration. 620 N.W.2d 287, 290 (Iowa 2000). The court stated:

> The existence of probable cause to search a particular area depends on whether a person of reasonable prudence would believe a crime has been committed on the premises to be searched or that evidence of a crime might be located there. *Gogg*, 561 N.W.2d at 363; *Weir*, 414 N.W.2d at 330. The issuing magistrate or a judge resolving a challenge to the magistrate's finding "is simply [required] to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before [the magistrate or judge], including the 'veracity' and

> 'basis of knowledge' of persons supplying hearsay information" probable cause exists. *Gogg*, 561 N.W.2d at 363 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). In so doing, a judge may rely on reasonable common-sense inferences from the information presented. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). Close cases are decided in favor of upholding the validity of the warrant. *Gogg*, 561 N.W.2d at 364; *State v. Godbersen*, 493 N.W.2d 852, 854–55 (Iowa 1992). Applying this standard to the showing before us, we conclude that probable cause existed for the issuance of the warrant permitting the search of defendant's apartment.
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> In the present case, the evidence provided by the jailhouse informant, if corroborated, would render it probable that defendant would possess marijuana. Some corroboration of that statement is found in the information supplied by neighbors in December of 1997. More corroboration indicating that this was a continuing activity was found in the information provided by a neighbor in May of 1998, which included license plate numbers of persons with reputations for using drugs. As the Supreme Court has recognized, police knowledge of reputation may be an important element in determining probable cause. *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). In that case, the Court said:
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> > We cannot conclude that a policeman's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a "legal technician" as Mr. Justice Frankfurter—is not a "practical consideration of everyday life" upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip.
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> *Id.* at 583, 91 S. Ct. at 2081–82, 29 L. Ed. 2d at 733.

Id.

We need not decide whether the information provided by the named informants might be considered stale if they were primary sources in support of the search warrant application. Staleness is less of a concern when that information is considered as corroboration. *See United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993) ("Facts of past criminal activity that by themselves are too stale can be sufficient if the affidavit also establishes a pattern of continuing

criminal activity so there is reason to believe that the cited activity was probably not a one-time occurrence."); *see also United States v. Palega*, 556 F.3d 709, 715 (8th Cir. 2009) (stating that although some of the information in an affidavit was two years old, when combined with information as recent as five days prior to the warrant application, it "describes a continuing pattern of behavior, and when taken as a whole, the information is not stale"). Deputy Hitch has been involved in an investigation of Darren's involvement in the manufacture of marijuana since 2008. He did not apply for a search warrant upon receiving his first tip from Hultquist in October 2008, nor even after receiving a second tip from Whipple in September 2009. Instead, Deputy Hitch waited until he received a third tip from a confidential informant in April 2010. It was at this juncture in the investigation that Deputy Hitch corroborated the information provided by the confidential informant. Deputy Hitch confirmed the location of the residence described by the confidential informant by checking Iowa driver's license records and by obtaining utility records that listed Darren Strough as the customer at the specified location. The essence of the information provided by the confidential informant was corroborated by the two named informants who had provided information in support of ongoing and illegal marijuana possession and delivery. The search warrant application also conveyed that Darren had "multiple prior convictions for possession of a controlled substance."

B. *Franks* Hearing

In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the United States Supreme Court "developed a means to examine truthfulness of an affiant in presenting evidence to a magistrate supporting

issuance of a search warrant." *State v. Niehaus*, 452 N.W.2d 184, 186 (Iowa 1990). *Franks* limits its inquiry to a "determination of whether the affiant was purposely untruthful with regard to a material fact in his or her application for the warrant, or acted with reckless disregard for the truth." *See id.* (recognizing that the Iowa Supreme Court adopted an identical standard in *State v. Groff*, 323 N.W.2d 204 (Iowa 1982)). If the court determines that the affiant was purposely untruthful or acted with reckless disregard for the truth in applying for a warrant, any offensive material is excised and "the remainder of the warrant reviewed to determine whether probable cause existed." *Id.* at 186–87.

Deputy Hitch's search warrant application explained that one of the cloaking methods utilized by persons engaged in cultivation and propagation operations is "the diversion of electric power to conceal large amounts of electricity usually needed in support of an indoor marijuana cultivation operation." Deputy Hitch specifically noted that "[i]n reviewing Strough's electrical bills from 2008 to current, these bills indicate an abnormally high kilowatt usage compared to similar properties in the area."

The district court held that because it was "'obvious'" that the conclusions reached by Deputy Hitch were erroneous, the information regarding the barn and the utility bills must be stricken from the search warrant application. The State argues the Stroughs failed to prove their *Franks* claim. Amber responds by stating that the deputy acted in disregard of the truth. Darren argues that the district court was correct in its determination that Deputy Hitch engaged in a reckless disregard for the truth in support of the search warrant application. As will be shown below, we need not decide whether the utilities information (except

the evidence that the utilities at that address were in the name of Darren Strough) accurately indicated unusually high usage. We also need not decide whether a marijuana cultivation operation could have or ever would have been operated in the barn. Without deciding those issues, we consider that information stricken from the search warrant application.

C. Confidential Informant

Section 808.3 of the Iowa Code states, in pertinent part:

> [I]f the grounds for issuance are supplied by an informant, the magistrate shall identify only the peace officer to whom the information was given. The application or sworn testimony supplied in support of the application must establish the credibility of the informant or the credibility of the information given by the informant.

Iowa Code § 808.3 (2009). "If the magistrate's findings fail to satisfy that requirement, the probable cause determination must be evaluated without reference to the information obtained from the confidential informant." *Myers*, 570 N.W.2d at 73.

In *State v. Swaim*, our supreme court found that where an issuing judge marked an "'x' on a laundry list of informant characteristics," and then "made reference to the affidavit and its attachments as furnishing the specific reasons supporting her finding of [the informant's] credibility," the issuing judge "substantially complie[d]" with the requirements of Iowa Code section 808.3.[2]

[2] It must be noted that *State v. Swaim* was decided in 1987, and in 1998 Iowa Code section 808.3 was amended. Prior to the 1998 amendments, the subject text read:

> [I]f the grounds for issuance are supplied by an informant, the magistrate shall identify only the peace officer to whom the information was given *but shall include 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.*

State v. Swaim, 412 N.W.2d 568, 574 (Iowa 1987). Although *State v. Swaim* relied on the Iowa Code as it appeared in 1985, prior to the 1998 amendments, the analysis supplied by the court does not change, but rather is broadened by the amendments made to the language of Iowa Code section 808.3 in 1998.

In this case, Deputy Hitch filled out the form entitled "Attachment B" and indicated that the informant was confidential because "[d]isclosure of his/her identity would endanger his safety" and "[d]isclosure of his/her identity would impair his future usefulness to law enforcement." Deputy Hitch noted that he had known the informant for one week and checked two boxes indicating that the confidential informant "[h]as no motivation to falsify the information" and "[h]as otherwise demonstrated truthfulness." Attachment B also indicated that the confidential informant had supplied information zero times in the past and that his information had led to zero arrests. Finally, Deputy Hitch checked the box stating, "[t]he information supplied by the informant in this investigation has been corroborated by law enforcement personnel."

In his endorsement of the search warrant application, the magistrate relied on the "[o]fficer['s] statement including information provided by [confidential informant]." The magistrate further indicated the information appeared credible by selecting a box on the endorsement form stating, "[s]worn testimony indicates this informant has not been used before but that either the informant appears

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Iowa Code § 808.3 (1997) (emphasis added to text deleted by the 1998 amendments).

> Following the 1998 amendments, the subject text reads:
> [I]f the grounds for issuance are supplied by an informant, the magistrate shall identify only the peace officer to whom the information was given. *The application or sworn testimony supplied in support of the application must establish the credibility of the informant or the credibility of the information given by the informant.*

Iowa Code § 808.3 (2009) (emphasis added to text replacing pre-1998 language).

credible or the information appears credible for the following reasons (if credibility is based on this ground, the magistrate MUST set out reasons here)." (Emphasis in original). Handwritten on the form by the magistrate as a reason the information appears credible is the statement, "information corroborated by officer Robert Hitch."

As articulated in *Swaim*, the simplistic process of marking an "x" on a laundry list of informant characteristics, paired with a reference to the affidavits and its attachments, is enough to comply with Iowa Code section 808.3. *Id.* at 574. Even considering the 1998 amendments, we determine that the magistrate complied with the terms of Iowa Code section 808.3 because he checked a box on the endorsement form establishing the confidential informant's credibility by virtue of sworn testimony, and further noted that the "information [was] corroborated by officer Robert Hitch." This act complies with the requirement of Iowa Code section 808.3 because the application supplied in support of the application establishes "the credibility of the information given by the informant." The information provided by the confidential informant will therefore remain as part of the search warrant application for purposes of determining "whether the issuing court had a substantial basis for finding the existence of probable cause." *State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004).

D. Probable Cause

Having determined the information obtained from the confidential informant was corroborated by information from the two named informants and from some of the information provided by Deputy Hitch, and assuming for this opinion that the district court was correct to strike the utilities billing analysis and

the Deputy's assertions concerning growing marijuana in the barn, we are now charged with determining "whether the issuing court had a substantial basis for finding the existence of probable cause." *Id.* When determining whether probable cause exists at the time a warrant is issued, the test is "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." *Gogg*, 561 N.W.2d at 363.

> While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'

Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct. 2317, 2330, 76 L. Ed. 2d 527, 546 (1983) (quoting *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 590, 21 L. Ed. 2d 637, 645 (1969)). The issuing magistrate need not apply a hypertechnical analysis, but "may rely on 'reasonable, common sense inferences' from the information presented." *Gogg*, 561 N.W.2d at 363–64. All reasonable inferences are drawn to support the magistrate's finding of probable cause, and great deference is given to the magistrate's finding. *Id.* at 364. Because there is a preference for warrants, "any doubts are accordingly resolved in favor of their validity." *Godbersen*, 493 N.W.2d at 854–55. The scope of 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." *Id.* at 855.

The search warrant application was presented to the magistrate on April 21, 2010. A confidential informant claimed that he was in Darren's home ten

days before the search warrant application. He saw three large garbage bags full of cultivated marijuana in the home. He remarked about the size of the buds, and said he saw several marijuana plants approximately six feet tall in the house. Deputy Hitch confirmed that Darren lived at that location. Deputy Hitch included in his affidavit that Darren had a felony criminal mischief conviction in 1987 and multiple prior convictions for possession of a controlled substance. Seven months earlier, in September 2009, informant Whipple reported that Darren had sold marijuana at his house; Whipple had purchased some there. Whipple reported personal knowledge of marijuana distribution, and that in February 2009 he saw approximately 100 marijuana plants on a table with two platforms. He identified a vehicle by make and color that Darren drove at that time; Deputy Hitch verified that he knew that Darren had driven a vehicle matching that make and color. In October 2008, informant Hultquist reported that Darren had been known to sell marijuana at his house, as Hultquist purchased some there.

The ultimate question is whether there was enough corroboration of the confidential informant's information that it should be considered reliable as to whether there was a probability that there was marijuana or evidence of distribution of marijuana at the location to be searched. The magistrate was not expected to engage in a hypertechnical analysis of the information presented, but only needed to make a common-sense determination regarding probable cause. We find that on the face of the search warrant application, it would be easy for a person of reasonable prudence to find a probability that Darren was engaged in possessing marijuana and/or delivery of marijuana and/or that evidence of possession and/or delivery might be located at the residence. Although the

deputy believed and tried to craft the warrant application to support a claim that Darren was engaged in the manufacture of marijuana, neither the search warrant application nor the warrant should be read to limit the search to evidence of manufacture. The warrant included authorization to search for evidence of manufacture, possession and/or delivery of marijuana; and our decision to negate the authorization to search for evidence of manufacture does not adversely affect the extent to which the search warrant authorized a search for evidence of possession of marijuana or delivery of marijuana.

Considering the totality of the circumstances, we find that the issuing magistrate had a substantial basis for granting the search warrant seeking evidence of possession of marijuana and/or delivery of marijuana. The evidence seized should not have been suppressed. We therefore reverse.

REVERSED.

Mullins, J., concurs; Vaitheswaran, J., specially concurs.

VAITHESWARAN, J. (concurring specially)

I specially concur.

First, I discern a disconnect between the Iowa Supreme Court's statement that we apply a de novo standard of review and its statement that our task is "not to make an independent determination of probable cause, but only to determine whether the issuing magistrate had a substantial basis for concluding that probable cause existed." *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995) (internal quotations and citations omitted); *accord State v. Johnson*, 756 N.W.2d 682, 686 (Iowa 2008); *State v. Davis*, 679 N.W.2d 651, 655–56 (Iowa 2004). The majority attempts to reconcile these contradictory standards by making a distinction between our scope of review and that of the district court. In my view, de novo review is inconsistent with the deferential "substantial basis" test quoted above and should be discarded in this type of case. *See Massachusetts v. Upton*, 466 U.S. 727, 733, 104 S. Ct. 2085, 2088, 80 L. Ed. 2d 721, 727 (1984) (stating substantial basis standard articulated in *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527, 546–47 (1983), was a rejection of "after-the-fact, de novo scrutiny"); *Potts v. State*, 479 A.2d 1335, 1338 (Md. 1984) (stating "[a]fter-the-fact judicial scrutiny of the affidavit should not take the form of de novo review").

Second, I would explicitly conclude that the eighteen-month-old statement of Dean Hultquist and the statement of Richard Whipple about information he garnered fourteen months earlier are stale as primary sources. In *State v. Woodcock*, 407 N.W.2d 603, 605 (Iowa 1987), cited by the majority as rejecting staleness claims where unlawful activities persist over time, the court specifically

noted that the charge was sexual exploitation of children and the offending materials were photographs of minors and other materials that experience showed would be retained for future use and gratification. The court contrasted this type of case from "drug cases where the evidence would likely have been sold or consumed in a year and a half." *Woodcock*, 407 N.W.2d at 605. Given the nature of the offense in *Woodcock,* I would not read the opinion as general authority for the acceptance of affidavits as dated as the ones here to independently support a probable cause determination. *See United States v. Thomas*, 605 F.3d 300, 308 (6th Cir. 2010) (noting the affidavit supporting the search warrant application offered "a relatively thin justification for probable cause" despite the fact the confidential informant's information was eight, rather than fourteen or eighteen months old); *United States v. Myers*, 106 F.3d 936, 939–40 (10th Cir. 1997) (noting that the gap between the informant's tip and the issuance of the search warrant was five months, not fourteen or eighteen months, and that "the information gathered by the [law enforcement authorities] was sufficient to establish probable cause even without the challenged tip"); *United States v. Yokshan*, 658 F. Supp. 2d 654, 664 (E.D. Pa. 2009) (upholding a search warrant sought two months after law enforcement officers received information from a second confidential informant).

That said, I agree with the majority that even if these affidavits were stale as primary sources for the probable cause determination, they could be used for purposes of corroborating the confidential informant's statements. For this reason, I concur in the result.