IN THE COURT OF APPEALS OF IOWA

No. 1-899 / 11-0264
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY HENRY BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John G. Linn (motions to dismiss and suppress) and Mary Ann Brown (trial), Judges.

Jeffrey Brown appeals from his convictions and sentences for possession of marijuana with intent to deliver and child endangerment following a bench trial on the minutes of testimony. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Rogers, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Jeffrey Brown appeals from his convictions and sentences for possession of marijuana with intent to deliver and child endangerment following a bench trial on the minutes of testimony. We affirm in part, reverse in part, and remand.

***I. Background Facts and Proceedings*.**

On February 9, 2010, the State filed its trial information, along with minutes of testimony, charging Brown with five criminal counts. Counts I through III charged Brown with delivery of a controlled substance, methamphetamine, on three separate dates in December of 2009.[1] Count IV charged Brown with possession of marijuana with intent to deliver in January 2010. Count V charged Brown with child endangerment.

The minutes of testimony, as amended, stated that several witnesses would testify as follows. Burlington Police Department Investigator Chris Chiprez spoke with a confidential informant on December 18, 2009. The confidential informant stated he would be able to introduce another investigator, Investigator Al Waterman, to Brown for the purpose of conducting a controlled drug buy from Brown. The confidential informant called Investigator Chiprez about twenty minutes later to advise he and Brown were on their way to a Burlington grocery store and would meet there for the buy.

Investigator Waterman then went to the grocery store to conduct the controlled buy. Brown's vehicle was parked in the lot, and Investigator Waterman got into the back seat. He observed the confidential informant was

[1] Counts I through III were later amended, but their amendments are not relevant here.

seated in the front passenger seat. He also observed a male child, approximately three years of age, sitting in a car seat in the back seat of Brown's car.

Brown handed Investigator Waterman a cigarette box and stated "it was inside the box." Investigator Waterman looked into the box and observed a small clear plastic baggie with a white powdery substance in it. He then gave Brown $150.

The confidential informant arranged two other controlled buys between the police department and Brown in December 2009. On January 29, 2009, Brown was stopped by law enforcement officials to detain him for purposes of interviewing him in reference to the controlled drug buys. An officer patted Brown down and discovered a large quantity of marijuana on his person. Brown was transported to the police station and interviewed.

Brown stated that prior to the first controlled buy, the confidential informant called Brown and offered him $100 for a ride to the grocery store. The confidential informant gave Brown the cigarette pack with the methamphetamine in it, and Brown then gave it to the officer during the controlled buy. Brown admitted he knew he was delivering methamphetamine when he handed the items to the officer during the three controlled buys in December. He also admitted his three-year-old son was present in his car during the first buy.

Brown was arrested thereafter and charged as stated above. Relevant here, count I specifically charged Brown with "the crime of delivery [of a] controlled substance in violation of [Iowa Code] section 124.401(1)(c)(6) [(2009)]," asserting he intentionally delivered methamphetamine on December

18, 2009. Count V charged Brown with child endangerment in violation of section 726.6, asserting Brown on December 18, 2009 knowingly acted in a manner that created a substantial risk to the physical health or safety of a child, while having custody or control over that child.

After the interview, law enforcement officers applied for a search warrant to search Brown's residence. Attached to the search warrant was an affidavit by an officer setting forth details of the three prior controlled drug buys and the seizure of a large amount of marijuana on Brown's person as probable cause to search his residence. The district court agreed there was probable cause and issued the warrant. Thereafter, the search warrant was executed by the officers. Baggies containing marijuana residue and stems were found at Brown's residence.

Law enforcement officials later learned that the confidential informant had in fact supplied the methamphetamine to Brown to sell at the controlled buys, without their knowledge or involvement. The information was then disclosed to Brown.

Brown filed a motion to dismiss counts I through III, asserting the controlled buys constituted "take-back entrapment." *See State v. Overmann*, 220 N.W.2d 914, 917 (Iowa 1974) (explaining that "take-back entrapment" is shown "if an accused produces evidence disclosing (1) the government, through an agent or informer, supplied drugs to defendant, and (2) the government, through an agent or informer, later reappropriates any of those drugs from the accused." If the State fails to come forth with evidence which contradicts either of the above two elements, "then an accused is entitled to a dismissal as a matter of law"). At

a hearing on the motion before district court judge Michael Shilling, Brown testified that the confidential informant gave him the drugs to sell to the investigators. The State conceded the confidential informant gave Brown the drugs, but contended, among other things, that the elements of take-back entrapment were not satisfied because the officers did not know the confidential informant had supplied the drugs to Brown. On June 10, 2010, the district court rejected the State's argument and dismissed the three counts, finding Brown had established take-back entrapment.

Thereafter, Brown filed a motion to dismiss counts IV and V. As to count IV, Brown argued the warrant obtained by law enforcement officials was invalid because it was predicated upon the three prior controlled buys (counts I through III) that constituted take-back entrapment. Brown also asserted count V should be dismissed because the take-back entrapment by law enforcement "enticed [Brown] into the situation and introduced the methamphetamine into the situation. At the point where a child was present, this already-inappropriate drug transaction should have been aborted by law enforcement."

On the same day, Brown also filed a motion to suppress the evidence seized after execution of the search warrant. Brown argued the warrant obtained by law enforcement officers was defective because it was based on the prior drug buys that constituted take-back entrapment. The State resisted Brown's motions.

A hearing on the motions was held on September 1, 2010, before district court judge John Linn. The court issued its rulings on the record, denying Brown's motions. The court found that the minutes of testimony

> sufficiently supply facts that would lead to a conclusion of guilt if left unexplained by the trier of fact, so there are adequate facts to support the counts IV and V. The court simply doesn't have the ability, the jurisdiction, the remedy, the right to dismiss counts IV and V simply because a court has decided that the counts I, II, and III should be dismissed because of entrapment. Those counts are really independent of the counts which [the court] dismissed.
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> So it's this court's conclusion that whether or not [Brown] was entrapped under counts I, II, and III, that does not give him a remedy of dismissal of counts IV and V. Those facts are independent of any activity by the confidential informant, and the State has a right to bring those counts to trial.
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> So . . . the motion to dismiss . . . is denied.

Additionally, the court found that Brown's motion to suppress should be denied, noting "[t]he fact that entrapment may have occurred doesn't render any of the information false." The court concluded the affidavit attached to the application did not contain any "deliberate falsehoods by the officers, nor was there a reckless disregard for the truth by the officer when the affidavit was filled out and sworn to . . . ."

A jury trial was scheduled for October 19, 2010. On that day, Brown filed a written waiver of jury trial and agreed to have a bench trial on the minutes of testimony before district court judge Mary Ann Brown. A hearing on the bench trial was then held. The State offered the minutes of testimony as exhibits, and Brown objected, explaining:

> [W]e believe that the witnesses would testify consistent with the contents of those minutes. But . . . those minutes do contain testimony relative to . . . former counts I through III that were dismissed. And in a jury trial, such information would not be admissible for consideration. So we are trusting the court to distinguish between the proper information and the improper information.

The court admitted the exhibits, ruling:

> The court will, in evaluating the evidence in this case, follow the ruling entered on June 10, 2010, [dismissing counts I through III,] and consider it to be the law of this case. I will instruct myself . . . to disregard any testimony that I read or gather from the file that relates to the dismissed counts . . . I, II, and III, and will only consider the evidence that's relevant to the remaining counts that are being tried in this case.

The State did not challenge the court's ruling.

On December 23, 2010, the court entered its findings of fact, conclusions of law, verdict, and order finding Brown guilty as charged in counts IV and V. As to count V, the court's ruling stated, in relevant part:

> [Brown] agreed that the State could offer its evidence through the minutes of testimony. In doing so, [Brown] did not waive his right to object to certain portions of those minutes or to reassert the claims he had made as part of his motion to suppress and motion to dismiss the remaining two counts of the trial information. The court, therefore, received into evidence . . . the minutes of testimony . . . . Those exhibits were received subject to [Brown's] objection to them and the provision that the court would not consider for the purposes of counts IV and V the information concerning counts I, II, and III, *except as the related to counts IV and V*. Now that the court has had an opportunity to review the minutes of testimony, it is clear that any information relating to counts II and III are irrelevant and immaterial to the issues involved in counts IV and V. The child endangerment charge in count V took place as a part of the crime which was alleged in count I. *As a result*, *it is necessary for the court to consider information concerning count I*. [Brown] offered no evidence.

(Emphasis added.) The court then found:

> The unrebutted record before the court is that [Brown] is the parent of [a child that] was [three] years of age on December 18, 2009. As a result, the only element [of child endangerment] that is subject to any question or interpretation is whether [Brown] knowingly acted in a manner creating a substantial risk to the child's health or safety by exposing him to a methamphetamine transaction.
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> [Brown's] own statements verify that he knew that he was handing methamphetamine over to the police officer in the cigarette package. So the question becomes whether being involved in methamphetamine transactions or trade in the presence of a

> [three]-year-old child creates a substantial risk to that child's physical health or safety.
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> The inherent dangers of methamphetamine are well known and established and ones which the court can take judicial notice of. Methamphetamine itself is highly dangerous if ingested by a child. In addition, it is common knowledge and the court can take judicial notice of the fact that those involved in drug trafficking are quite often dangerous unpredictable people. As a result, [Brown] by placing his [three]-year-old child in the midst of a drug transaction exposed the child not only to the drug but also to the participants that would be involved in narcotics trafficking. Such behavior would create a substantial risk to both the child's health and safety. As a result, the State has proven beyond a reasonable doubt each and every element necessary to establish [Brown] guilty of the crime of child endangerment.

Brown now appeals. He contends the district court erred in denying his motions to dismiss counts IV and V and to suppress evidence concerning count IV, and in finding him guilty of child endangerment.

***II. Discussion*.**

***A. Motions to Dismiss and to Suppress*.**

Brown argues the court erred in dismissing his motions to dismiss and to suppress, both premised upon his argument that counts IV and V, along with the warrant, arose from circumstances surrounding the take-back entrapment. Stated another way, Brown asserts that his charges in counts IV and V and purpose of seeking the warrant would not have occurred but for the State's take-back entrapment. Upon our review, we agree with the ruling of the district court.

1. Motion to Dismiss.

Iowa Rule of Criminal Procedure 2.11(6) sets forth the procedure and grounds for a motion to dismiss in criminal case. Relevant here, the rule provides:

> a. In general. If it appears from the indictment or information and the minutes of evidence that the particulars stated do not constitute the offense charged in the indictment or information, or that the defendant did not commit that offense or that a prosecution for that offense is barred by the statute of limitations, the court may and on motion of the defendant shall dismiss the indictment or information unless the prosecuting attorney shall furnish a bill of particulars which so states the particulars as to cure the defect.
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> . . . .
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> c. Information. A motion to dismiss the information may be made on one or more of the following grounds:
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> (1) When the minutes of evidence have not been filed with the information.
>
> (2) When the information has not been filed in the manner required by law.
>
> (3) When the information has not been approved as required under rule 2.5(4).

Iowa R. Crim. P. 2.11(6)(*a*) & (*c*). We review the district court's denial of Brown's motion to dismiss for errors at law. *State v. Bates*, 689 N.W.2d 479, 480 (Iowa Ct. App. 2004).

Here, Brown did not assert any specific ground as the basis for his argument, and we find none apply here. The particulars stated in the information and minutes of testimony constitute the offenses charged in counts IV and V. Moreover, none of the grounds stated in subsection (*c*) apply here. We agree with the district court's conclusion that a finding that Brown was entrapped under counts I through III does not give him a remedy of dismissal of counts IV and V. Accordingly, we affirm on this issue.

2. Motion to Suppress.

Brown also contends the district court erred in denying his motion to suppress the evidence obtained during the search of his home. He contends the search warrant was defective and lacked probable cause to justify its issuance

because it was premised on the three controlled buys that constituted take-back entrapment. We review the district court's denial of the motion to suppress de novo, giving great deference to the judge's finding of probable cause and drawing all reasonable inferences to support it. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997).

The inclusion of a false statement alone is insufficient to attack a warrant; a defendant must show the affiant consciously falsified the challenged information or acted with reckless disregard for the truth when applying for the warrant. *State v. Niehaus*, 452 N.W.2d 184, 186–87 (Iowa 1990). Reckless disregard can be shown in two ways: (1) proof that the applicant harbored serious doubts about the informant's truthfulness; or (2) showing circumstances evincing an obvious reason to doubt the informant's veracity. *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998). Negligence or mistake is insufficient. *Id*. Only after the requisite showing has been made does the court review the remainder of the application to determine whether probable cause existed to issue the warrant. *Niehaus*, 452 N.W.2d at 186–87.

Upon our review, we conclude Brown is unable to make a showing the challenged statements were made with knowledge as to their falsity or with a reckless disregard for the truth. The undisputed evidence was that the officers did not learn that the confidential informant had provided the methamphetamine to Brown until after the warrant issued. Moreover, we agree with the district court's conclusion that the "fact that entrapment may have occurred doesn't render any of the information false." Accordingly, we affirm the district court's denial of Brown's motion to suppress on the grounds the affidavit for the search

warrant was predicated on three controlled buys that constituted take-back entrapment.

***B. Child Endangerment*.**

Brown contends the district court erred in finding him guilty of child endangerment. Brown specifically argues that the court considered inadmissible evidence when it considered the minutes of testimony concerning count I as it related to the child endangerment charge. We agree the district court erroneously considered evidence of the drug transaction.

Brown was charged in count V with the crime of child endangerment in violation of Iowa Code section 726.6. In order for Brown to be convicted of this crime the State must prove (1) on the day of the incident Brown was the parent of the child, (2) the child was under the age of fourteen years, and (3) Brown acted with knowledge he was creating a substantial risk to the child's physical health or safety. *See* Iowa Crim. Jury Instr. 2610.1. In its conclusions of law the district court stated:

> The unrebutted record before the court is that [Brown] is the parent of [the child] and that [the child] was three years of age on December 18, 2009. As a result, the only element that is subject to any question or interpretation is whether [Brown] knowingly acted in a manner creating a substantial risk to the child's health or safety by exposing him to a methamphetamine transaction.

The court concluded Brown,

> by placing his three-year-old child in the midst of a drug transaction exposed the child not only to the drug but also to the participants that would be involved in narcotics trafficking. Such behavior would create a substantial risk to both the child's health and safety.

The court obviously relied on evidence of the drug transaction when finding Brown guilty of the child endangerment charge and therein lies the rub.

Count I, concerning the methamphetamine delivery made in the presence of Brown's child, had been dismissed. Brown contends "[i]t was the agreement of the parties and the court in this bench trial that the court, as the trier of fact, would not consider the minutes of testimony regarding the three dismissed charges." The record belies that any such agreement was made. The court stated it understood Brown's objection to the minutes of testimony to mean he was objecting to the trier of fact having before it information relating to dismissed counts I through III. The court then expressly stated it would "disregard any testimony [it] read or gather[ed] from the file that relate[d] to the dismissed counts . . . I, II, and III, and [would] only consider evidence that's relative to the remaining counts . . . being tried in this case." Asked by the court if there was "[a]nything else on behalf of the State," the State responded, "No."

Further background is in order. Brown made the decision to have a bench trial just shortly prior to the date his jury trial was scheduled to begin. Neither the State nor Brown explained to the court at the pretrial hearing how counts I and V were related. It also appears from the record that the judge presiding at the pretrial hearing was the third judge to become involved in substantive matters concerning the case and did not have an opportunity to review the minutes of testimony prior to the pretrial hearing.

In its findings of fact, conclusions of law, verdict and order, the court specifically stated: "The child endangerment charge in count V took place as a part of the crime which was alleged in count I. As a result, it is necessary for the court to consider information concerning count I." In finding Brown guilty of the child endangerment charge, the court clearly focused upon and considered the

drug transaction. It found the only element of the crime subject to any question or interpretation was whether Brown jeopardized his child's safety by "exposing [the child] to a methamphetamine transaction." It posed the question before it as "whether being involved in methamphetamine transactions or trade in the presence of a three year old creates a substantial risk to that child's physical health or safety." In addition, it took judicial notice "of the fact that those involved in drug trafficking are quite often dangerous unpredictable people." Moreover, the court concluded that "[a]s a result, [Brown] by placing his [three]-year-old child in the midst of a drug transaction exposed the child not only to the drug but also to the participants that would be involved in narcotics trafficking." The court concluded Brown's behavior, in exposing the child to a drug transaction, created "a substantial risk to both the child's health and safety." Clearly, evidence of the drug transaction played a pivotal role in the court's decision to convict Brown of child endangerment. We conclude the court improperly considered evidence of the drug transaction after it ruled it would not do so.

It is against this unique backdrop that we must decide what remedy to employ. Brown asserts his claim is akin to a sufficiency-of-the-evidence[2] challenge and the court "thus . . . found [him] guilty based on insufficient evidence." Given the court's express evidentiary ruling that it would "disregard any testimony [it] read or gather[ed] from the file that relate[d] to the dismissed

[2] We note that "[w]hen such a claim is made on appeal from a criminal bench trial, error preservation is no barrier." *State v. Anspach*, 627 N.W.2d 227, 231 (Iowa 2001) (citing *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997), which held that "when a criminal case is tried to the court, a defendant may challenge the sufficiency of the evidence on appeal irrespective of whether a motion for judgment of acquittal was previously made").

counts . . . I, II, and III," we agree with Brown there was insufficient evidence to find him guilty of child endangerment. Accordingly, we reverse the child endangerment verdict and sentence, and we remand for an order of dismissal of that charge and conviction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.