IN THE COURT OF APPEALS OF IOWA

No. 7-370 / 06-1792
Filed July 25, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TODD MICHAEL WEBER,
Defendant-Appellant.

Appeal from the Iowa District Court for Allamakee County, John Bauercamper, (search warrant), Margaret L. Lingreen, (suppression motion), and Monica L. Ackley, (trial), Judges.

Todd Weber appeals from his judgment and sentence for possession of marijuana. **AFFIRMED.**

Christopher R. Riker of Riker Law Office, Decorah, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, William Shafer, County Attorney, and W. Richard White, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

On September 23, 2004, Deputy Sheriff Robert Thorsten met with a confidential informant. The informant told Deputy Thorsten that he had seen a sandwich bag approximately half-filled with marijuana and a glass pipe filled with marijuana at Weber's residence. The informant also stated he had observed Weber and other people smoking marijuana at least four times over the last two months. Deputy Thorsten indicated he had performed a records check which confirmed that Weber resided at the address given by the informant.

The Honorable John Bauercamper issued the search warrant and attached an endorsement. In his endorsement, Judge Bauercamper indicated he relied on Deputy Thorsten's affidavit and the statements made by the confidential informant in making his probable cause determination. Judge Bauercamper further indicated he found the informant to be reliable because the informant was a concerned citizen with no reason to fabricate the information, the disclosure of information was against the informant's penal interest, the informant had not given false information in the past, and the informant had personally observed the activity. During the search of Weber's residence, officers seized green leafy plant material, a glass pipe, and cash. Based on the evidence seized at Weber's residence, he was arrested and charged with possession of marijuana in violation of Iowa Code section 124.401(5) (2003).

Weber filed a motion to suppress the evidence, contending the district court should not have found probable cause to issue the search warrant. The district court found the informant was reliable because he was a concerned

citizen with no reason to fabricate the information, he made a statement against his penal interest, he had not given false information in the past, his observations were first-hand, and his descriptions were detailed. The district court found probable cause existed to issue the warrant and subsequently denied Weber's motion to suppress. Weber was found guilty after a stipulated trial on the minutes. On appeal, Weber argues that the search warrant application and attachments fail to establish the reliability of the confidential informant.

II. Timeliness of Appeal.

The State contends Weber's appeal is untimely. The State asserts that Iowa Rule of Appellate Procedure 6.5(1) requires the defendant file a notice of appeal within thirty days from a judgment entry. Iowa R. Civ. P. 6.5(1) (2005). Rule 6.5(1) states that "appeals to the supreme court must be *taken within*, and not after, 30 days from the entry of the order, judgment, or decree . . . ." *Id*. (emphasis added). The notice of appeal was file-stamped by the district court on November 3, 2006, and the judgment was entered and filed with the district court on October 2, 2006. The deadline for this appeal under rule 6.5(1) was November 1, 2006. The State correctly notes that the notice of appeal was filed more than thirty days after the entry of judgment. The notice of appeal contains a proof of service stamp which is signed and dated November 1, 2006. The State does not cite any case law which indicates that the words "taken within" in rule 6.5(1) require filing within thirty days of the entry of judgment or that service is insufficient for compliance with the rule.

Furthermore, under our supreme court's decision in *Thayer v. State*, 653 N.W.2d 595, 598 (Iowa 2002), this appeal was timely. Thayer had timely served

her notice of appeal on all parties but did not file her notice of appeal with the district court clerk until thirty-five days after serving the notice on opposing counsel. *Id*. In determining whether Thayer had timely filed her appeal, the supreme court cited Iowa Rule of Civil Procedure 1.442(4) which states,

> Filing is timely if all necessary documents are filed with the court either before service or within a *reasonable time* thereafter . . . Whenever these rules or the rules of appellate procedure require a filing with the district court or its clerk within a certain time, the time requirement shall be tolled when service is made, provided the actual filing is done within a reasonable time thereafter.

Id. (emphasis added in underlying case). The supreme court then stated, "The time for filing an appeal is tolled upon *service* if the party files within a reasonable time after service." *Id*. The supreme court held that Thayer had timely served and filed her appeal. *Id*. at 599. Weber's notice of appeal was timely served on November 1, 2006, and filed with the district court two days after, on November 3. We hold Weber's appeal is timely.

III. Standard of Review.

When a defendant challenges a search warrant on constitutional grounds, our review is de novo. *State v. Davis*, 679 N.W.2d 651, 655-56 (Iowa 2004). We do not make an independent determination of probable cause, but only determine whether the issuing court had a substantial basis for finding the existence of probable cause. *Id*. at 656. In determining whether 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. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). The information needed for a finding of probable

cause to support a search warrant is far less demanding than the information necessary to sustain a conviction. *State v. Wells*, 629 N.W.2d 346, 355 (Iowa 2001).

IV. Discussion.

When examining whether probable cause exists to support the issuance of a search warrant under the Fourth Amendment, we use the totality of the circumstances test detailed in *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983). *Davis*, 679 N.W.2d at 656. The existence of probable cause to search a particular area depends on whether a person of reasonable prudence would believe that evidence of a crime might be located on the premises to be searched. *Gogg*, 561 N.W.2d at 363. The task of the judge issuing the search warrant is "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit" presented to the judge, there is a fair probability that law enforcement authorities will find evidence of a crime at a particular place. *Davis*, 679 N.W.2d at 656. A probable cause finding must rest on a "nexus between criminal activity, the things to be seized and the place to be searched." *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). In making that determination, the judge may rely on reasonable, common-sense inferences from the information presented. *Davis*, 679 N.W.2d at 656. We resolve doubtful cases in favor of upholding the validity of the search warrant. *State v. Myers*, 570 N.W.2d 70, 73 (Iowa 1997).

A citizen informant is ordinarily defined as a person who is a witness to or a victim of a crime. *State v. Niehaus*, 452 N.W.2d 184, 189-90 (Iowa 1990). Information given by a citizen informant is presumptively reliable. *State v. Post*,

286 N.W.2d 195, 200 (Iowa 1979). When assessing an informant's credibility, we look at the informant's past reliability, whether the informant directly witnessed the crime or the fruits of it in the possession of the accused, the specificity of the facts detailed by the informant, whether the information furnished is against the informant's penal interest, whether the informant was trusted by the accused, and whether the information was not public knowledge. *Niehaus*, 452 N.W.2d at 190.

Weber contends the informant was unreliable because there was no indication on the search warrant application that the informant had ever given reliable information in the past or that Deputy Thorsten knew who the informant was. While it would be helpful to a judge to have an informant with a track record of giving accurate information leading to arrests and convictions, it is not necessary that the informant have a record as an informant. In *U.S. v. Allen*, 297 F.3d 790, 794 (8th Cir. 2002), an informant gave statements that were against his penal interest and the police were able to corroborate some of the information he provided. The Eighth Circuit Court of Appeals found the informant's statements were sufficiently reliable to support a finding of probable cause. *Id*. at 795. Weber asserts that the informant's admission of prior use of marijuana does not qualify as a statement against his penal interest. The deputy and the judge issuing the warrant found otherwise. Weber cites no authority to support his assertion and merely says it is not a violation of the Iowa Code. The informant, however, was clearly taking a risk when he admitted he had used marijuana in the past because he had no way of knowing whether the police would use his statement against him or not.

Weber also attacks the lack of corroboration of the informant's statement. Attachment A to the search warrant application indicates Deputy Thorsten conducted a records check which confirmed Weber did reside at the address the informant had given. Weber contends this was insufficient. However, this was not an instance where an informant stated a defendant was growing marijuana in his home and an officer could have compared the defendant's utility usage to that of his neighbors to look for excessive utility usage indicative of marijuana cultivation. Nor is this an instance where an informant reported a suspicious amount of traffic at a defendant's house and an officer could have conducted surveillance of the home to confirm suspicious traffic. The lack of information that could be independently corroborated does not make the information inherently unreliable. Furthermore, Deputy Thorsten's failure to state in writing how he knew the informant or whether Weber had a past history of convictions or drug use does not militate against a finding of probable cause.

We are asked to determine whether the issuing court had a substantial basis for finding that probable cause existed. The informant had sufficient knowledge to recognize marijuana and associated paraphernalia because he had used marijuana in the past. The informant personally observed Weber smoking marijuana two days before he met with Deputy Thorsten, and on four other occasions in the two months prior to the issuance of the warrant. Under *Niehaus*, the informant's personal observations of a crime enhance the reliability of his statements. The informant made a statement against his penal interest. Deputy Thorsten was familiar with the glass pipe described by the informant through his experience as a drug investigator and was aware that marijuana is

often smoked in that type of pipe. Deputy Thorsten also confirmed Weber was living at the address the informant had given him. The issuing court could have found, based on the affidavit, there was a fair probability that law enforcement authorities would find evidence of marijuana possession in Weber's house.

We hold the issuing court had a substantial basis for finding probable cause existed. We affirm the finding of probable cause and uphold the search warrant. Weber did not attack the motion to suppress or subsequent trial on any other grounds. Therefore, we affirm Weber's conviction.

AFFIRMED.