IN THE COURT OF APPEALS OF IOWA

No. 8-920 / 08-0107
Filed December 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY LYNN McGRANE,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey (motion to suppress), James M. Drew (trial), and Colleen D. Weiland (sentencing), Judges.

Defendant appeals his conviction for possession of a controlled substance with intent to deliver, contending the district court improperly denied his motion to suppress. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Paul L. Martin, County Attorney, for appellee.

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

MAHAN, J.

Terry McGrane appeals from judgment entered upon his conviction of possession of a controlled substance with intent to deliver. He contends the district court erred in denying his motion to suppress because: (1) the supporting affidavit did not provide a sufficient basis for a finding of probable cause and (2) the application failed to establish the reliability and veracity of sources relied upon by applicant officer. We affirm.

I. Background.

A Cerro Gordo magistrate was presented with an application for a search warrant prepared by Mason City police officer David Tyler. The application sought to search the dwelling and garage of Terry McGrane and Rosemary Ramon Peters (Ramon) expecting to find certain stolen property and/or drugs and evidence of drug dealing and use. In his affidavit, Officer Tyler stated that on February 23, 2007, he had authored a search warrant application to search Nick Wilmarth and his residence for stolen items from recent burglaries; Wilmarth was subsequently interviewed and admitted committing numerous burglaries and trading the stolen items for drugs; one of the trade locations named by Wilmarth was the home of McGrane and Ramon; Wilmarth indicated specific stolen items he had traded there for methamphetamine or marijuana, including "a Craftsman Powerdrill, a Sony receiver, an Ultra Violet Cannondale bicycle, a red Cannondale bicycle, Sockets and wrenches"; "Wilmarth made the statements against his penal interests" after *Miranda* warnings were given; and Wilmarth had seen one of the Cannondale bicycles at the McGrane/Ramon house two days prior. Officer Tyler also stated McGrane had two prior drug convictions: a 1995

"felony conviction for cocaine" and a 2004 "conviction for delivery of methamphetamine." Also attached to the warrant application was the affidavit of North Central Iowa Narcotic Task Force Officer Logan Wernet, which describes the typical conduct of drug dealers and users, including that "drug dealers commonly have stolen property in their possession" that is "usually traded for narcotics" and includes such items as "bicycles, electronics, tools, jewelry and money."

The magistrate's endorsement finding probable cause to issue a search warrant cited the sworn testimony of Officer Tyler, specifically that portion of the application which stated:

> Wilmarth admitted committing numerous burglaries in recent weeks (prior warrant taken into consideration as well). Wilmarth stated that this home was location of some of stolen property—trade in exchange for methamph. or marijuana. McGrane has history of drug convictions. "Trades" have been made recently.

On February 24, 2007, the search warrant was executed. The search of the McGrane/Ramon residence pursuant to that warrant resulted in the seizure of drugs, drug paraphernalia, cash, and stolen property. McGrane and Ramon were charged with possession with intent to deliver a Schedule II controlled substance.

McGrane filed a motion to suppress, alleging the warrant was not supported by probable cause. McGrane later joined Ramon's amended motion to suppress, alleging the warrant application omitted material facts that would cast doubt on the existence of probable cause. Specifically, the defendants contended the warrant application omitted the fact that Wilmarth was under the influence when he was being interviewed.

The district court held a hearing on the motions to suppress at which officer Steve Klemas testified that he had conducted the February 23, 2007 interview of Nicholas Wilmarth as part of a burglary investigation after a string of recent burglaries in eastern Mason City. Officer Klemas testified:

> I believed that was possible for [Wilmarth] to be under the influence based on the commission of the crimes prior to that night. I believe he was stealing things to supplement his drug problem. Other than that, there was no signs of intoxication in the sense of speech, balance, recollection, things of that issue.

Officer Klemas also testified:

> Q. And when he was giving you that interview this evening at the police station, did in fact you approach him and ask him whether or not he was under the influence at the time? A. I believe I questioned him very early on, yeah, in reference I was trying to determine the level of impairment or of intoxication, if there was any question there.
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> Q. Were there verbal cues or visual cues that led you to believe that he was under the influence at the time? A. No. The reason I believed is based on my experience. A lot of folks that go out and commit burglaries and theft are stealing for their drug problem, and some prior history that I had gotten during the course of the investigation led me to believe that Nick is stealing to support his. As far as him saying any verbal or nonverbal communication to alert me that he was impaired, I didn't have any.

Officer Klemas testified that Officer Tyler watched at least some of the interview from a nearby room through a DVR camera system. He stated he and Officer Tyler did discuss where items Wilmarth had taken had gone; they did not discuss the issue of Wilmarth being under the influence. Officer Klemas testified that he "felt Mr. Wilmarth was sober enough to conduct an interview and ascertain or gain information from him and I found out through the course of it it was reliable."

The district court denied the motion to suppress, concluding there was probable cause to issue the warrant. The court noted that the magistrate relied on a very detailed and specific affidavit and the details contained in the warrant established the named informant's reliability. The court found the fact that Wilmarth "was high" could go directly to his reliability. Nonetheless, the court concluded that under the totality of the circumstances, the warrant application was supported by probable cause.

McGrane appeals.

II. Validity of the Search Warrant.

A. Probable Cause. McGrane contends the search warrant was defective because the affidavit did not provide a sufficient basis for a finding of probable cause. We disagree. Based upon the warrant application presented here, a person of reasonable prudence could believe stolen property or illegal drugs and indicia of drug sales would be found at McGrane's residence.

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961) (stating the Fourth Amendment to the federal constitution is binding on the states through the Fourteenth Amendment to the federal constitution). The language of article I, section 8 of the Iowa Constitution is nearly identical to the language of the Fourth Amendment; therefore, we "usually deem the two provisions to be identical in scope, import, and purpose." *State v. Kreps*, 650 N.W.2d 636, 640-41 (Iowa 2002).

The Fourth Amendment requires a search warrant to be supported by probable cause. U.S. Const. amends. IV, XIV, § 1. The test for probable cause is well established: "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." *State v. Weir,* 414 N.W.2d 327, 330 (Iowa 1987). Probable cause to search requires a probability determination that "(1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched." *United States v. Edmiston,* 46 F.3d 786, 789 (8th Cir. 1995); *see Weir,* 414 N.W.2d at 330. The issuing judge "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," probable cause exists. *Illinois v. Gates,* 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983); *accord State v. Hennon,* 314 N.W.2d 405, 407 (Iowa 1982). In doing so, the judge may rely on "reasonable, common sense inferences" from the information presented. *See State v. Green,* 540 N.W.2d 649, 655 (Iowa 1995).

We do not make an independent determination of probable cause; we merely decide whether the issuing judge had a substantial basis for concluding probable cause existed. *Id*. In determining whether probable cause exists, 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. *State v. Godbersen,* 493 N.W.2d 852, 855 (Iowa 1992).

We draw all reasonable inferences to support the judge's finding of probable cause, *State v. Padavich,* 536 N.W.2d 743, 747 (Iowa 1995), and give

great deference to the judge's finding, *Green,* 540 N.W.2d at 655. Close cases are decided in favor of upholding the validity of the warrant. *Godbersen,* 493 N.W.2d at 854-55; *Hennon,* 314 N.W.2d at 407.

The application was supported by information from a named individual, Nicholas Wilmarth. Factors tending to enhance informant credibility include the fact that the informant was named, whether the informant directly witnessed the crime or 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. *See Weir,* 414 N.W.2d at 332. Wilmarth had firsthand knowledge of exchanging stolen property for drugs from McGrane. Wilmarth stated one of the bicycles he had taken there was still at the house two days prior. Moreover, the affidavit states that McGrane had a known history of drug convictions.

Under the totality of the circumstances, we find the magistrate had a substantial basis for concluding probable cause existed to support the issuance of the warrant for McGrane's residence. The court did not err in denying McGrane's motion to suppress.

B. Reliability of Informant. McGrane contends the application for the warrant contains omitted material facts and was, therefore, invalid.

In *State v.* Green, 540 N.W.2d at 656, our supreme court made clear that to impeach a search warrant the defendant bears the burden of proving an affiant made deliberately false statements in the warrant application or acted in reckless disregard for the truth. *Accord Franks v. Delaware,* 438 U.S. 154, 171, 98 S. Ct.

2674, 2684-85, 57 L. Ed. 2d 667, 682 (1978). If the defendant is relying instead upon omissions of fact, the omissions will constitute misrepresentations only if the omitted facts cast doubt on the existence of probable cause. *Green*, 540 N.W.2d at 656 (internal quotation and citations omitted).

McGrane contends the application omitted the material fact that Wilmarth was "an admitted drug user who was under the influence at the time he gave information." We first note that the magistrate was informed that Wilmarth was an admitted burglar and drug user. Thus, the omitted fact is that Wilmarth had ingested drugs the day of the interview. The interviewing officer stated Wilmarth showed "no signs of intoxication in the sense of speech, balance, recollection, things of that issue." A warrant affiant was not required to include every potentially exculpating fact in the warrant application. *Id.*

McGrane relies upon an Oregon case in which the court of appeals found an informant's "intoxication and her possible motive to falsify her report detracted from her inherent reliability as a named citizen informant." *State v. Culley*, 108 P.3d 1179, 1184 (Or. Ct. App. 2005). Under those circumstances, the court concluded that some corroboration of the informant's tips was needed and, since there was none as to a crucial fact, the evidence seized pursuant to the warrant should be suppressed. *Id.* We do not find the facts before us sufficiently analogous to *Culley* to require discussion.

In any event, Wilmarth provided detailed information concerning his own criminal behavior, the items he had stolen, and which specific items he had taken to McGrane's in exchange for methamphetamines. Had the magistrate also been informed that Wilmarth had used drugs that day, it would not change the

nature of the information Wilmarth provided. Here, recitation of Wilmarth's drug use would not have cast doubt on the existence of probable cause. Moreover, McGrane has made no showing that the omission was intentional or made with reckless disregard for the truth. *See Green*, 540 N.W.2d at 656.

The district court did not err in denying the motion to suppress. This being the only issue raised by McGrane, we affirm.

AFFIRMED.