IN THE COURT OF APPEALS OF IOWA

No. 9-430 / 08-1186
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEIYIA RENEE BERRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Page County, James S. Heckerman and Timothy O'Grady, Judges.

Deiyia Renee Berry appeals from judgment and sentence for possession of marijuana. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Richard Davidson, County Attorney, and Jeremy Peterson, Assistant County Attorney, for appellee.

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

DOYLE, J.

Deiyia Renee Berry appeals from judgment and sentence for possession of marijuana in violation of Iowa Code section 124.401(5) (2007). Upon our review, we affirm.

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

This appeal concerns a search warrant obtained to search a house and not the individual apartments contained within that house. According to the minutes of testimony, on January 30, 2008, law enforcement officials obtained a search warrant for Deiyia Berry's residence located at 307 West Valley, Shenandoah, Iowa. The warrant was obtained after two informants gave police information regarding drug activity in the house. The informants stated they had been staying at the house in the apartment of Deiyia's son and daughter-in-law, Jesse and Stephanie Berry. Jesse and friends had been using drugs in the apartment, which made the informants uncomfortable. The informants told Jesse they were uncomfortable with the drug use, and Jesse told one informant that "they would keep it at Jesse's mom's house ([Deiyia] Berry)." One informant stated "[t]hat day they did keep it out of the house. However, [the next day] Jesse and his friend . . . were smoking crack in the house." Stephanie told the informants they had to leave and that they could not stay in the apartment because the informants were uncomfortable with the drug use. The informants then left the apartment. The other informant stated that Deiyia kept her drugs and pipes by her bed in a nightstand.

The warrant was executed at approximately 7:10 p.m. on January 30. Two officers covered the east door, and the other officers went to the front door of Deiyia's apartment. Upon entering Deiyia's front door, the officers encountered five people including Deiyia. Deiyia admitted she had a pipe on the coffee table in the living room. A brown makeup bag containing filters, a pipe, rolling papers, and a bag containing residue was located. Marijuana was found in the house.

On February 18, 2008, Deiyia was charged by trial information with possession of marijuana in violation Iowa Code section 124.401(5). On April 14 Deiyia filed a motion to suppress challenging the validity of the search warrant as overbroad, lacking sufficient probable cause, and containing uncorroborated statements from anonymous informants. The State resisted Deiyia's motion.

A hearing on the motion was held May 29, 2008, before Judge James S. Heckerman. There, Deiyia testified that she was buying the house at 307 West Valley on contract. She testified the house is a one-story building, which is divided into apartments. She testified that the building once contained three apartments, but she now occupies two of the apartments and rents the third apartment to her son, Jesse, and his wife. She testified Jesse's apartment has a separate entrance from her apartment and is separate and closed off from her apartment. Deiyia testified she paid the water bill for all of the apartments, but Jesse paid the electricity bill for his apartment. Deiyia testified that all of the mail was delivered to the same mailbox and there was not a separate mailbox for Jesse's apartment.

Officer Steve Mather testified that Jesse's apartment is divided from the other part of the house and cannot be accessed from the inside of the other apartments. Officer Mather testified the informants provided a floor plan of the house and described the rooms in the house, who occupied those rooms, and where the drugs were located. After obtaining the informants' statements, Officer Mather testified he called city hall to verify there was only one person getting water at the house, because he had heard the house was once an apartment complex. Officer Mather testified that the house was not considered an apartment unit by city hall at that time.

On June 2, 2008, Judge Timothy O'Grady entered an order denying Deiyia's motion to suppress, finding the items were seized pursuant to a validly issued search warrant. On July 14, Deiyia waived her right to a jury trial and proceeded with a trial to the court based upon the minutes of testimony. The court found Deiyia guilty of possession of marijuana. She was sentenced to serve thirty days in the county jail, which was suspended, and placed on unsupervised probation, along with a $315 fine and suspended driving privileges for 180 days.

Deiyia appeals. She contends the district court erred in failing to grant her motion to suppress.

***II. Scope and Standards of Review*.**

When assessing an alleged violation of a constitutional right, our review is de novo. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005). We independently evaluate the totality of the circumstances. *State v. Turner*, 630

N.W.2d 601, 606 (Iowa 2001). We do not make an independent determination of probable cause, but must only determine whether the district court had a substantial basis for finding probable cause. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). In making this determination, we are limited to the written information that the applicant presented in the application for the warrant. *Id*. We resolve all close cases in favor of the validity of the warrant. *State v. Bishop*, 387 N.W.2d 554, 558 (Iowa 1986).

***III. Discussion*.**

On appeal, Deiyia contends the district court erred in failing to grant her motion to dismiss. Among other things, she argues there was not probable cause to search her premises, asserting there is no nexus between the alleged illegal activities of her son in his separate apartment and the existence of criminal activity at her residence. We disagree.

The federal and Iowa constitutions demand that warrants only be issued if there is probable cause. U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause . . . ."); Iowa Const. art. I, § 8 ("[N]o warrant shall issue but on probable cause . . . ."). If a warrant is issued without probable cause, any evidence obtained during the warrant's execution is inadmissible at trial regardless of the evidence's probative value. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995). Probable cause is present when "'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 (quoting *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987)).

In deciding whether the affidavit information provides probable cause, the issuing judge or magistrate must make a probability determination as to whether the items sought in the warrant are likely to be related to criminal activity and whether the items are likely to be found in the place to be searched. *Id*. The probability determination is not made in a technical manner. *Id*. (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)).

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Gates, 462 U.S. at 231, 103 S. Ct. at 2328, 76 L. Ed. 2d at 544 (quoting *Brinegar v. U.S.*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879, 1890 (1949)). The judge or magistrate should look to whether, under the totality of the circumstances, the information in the affidavit is credible and shows a basis of knowledge for the information. *Gogg*, 561 N.W.2d at 363; *see also State v. Randle*, 555 N.W.2d 666, 670 (1996) (explaining that Iowa follows the "totality of the circumstances" test). "In so doing, a judge may rely on reasonable common-sense inferences from the information presented." *State v. Poulin*, 620 N.W.2d 287, 290 (Iowa 2000).

When a warrant application requests the search of a particular place, the applicant "must establish by reasonable inference that there is a nexus between the place to be searched and the items to be seized." *State v. Ballew*, 456 N.W.2d 230, 231 (Iowa 1990). The nexus does not need to be established through direct observation of the items to be seized at the place to be searched. *State v. Groff*, 323 N.W.2d 204, 212 (Iowa 1982). An adequate connection can

be shown "by considering the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items." *Id*. "[I]t is constitutionally permissible for a single warrant to authorize the search of more than one subunit in a multiple-occupancy building when there has been a probable cause showing as to each subunit included." 2 Wayne R. LaFave, *Search and Seizure* § 4.5(c), at 591 (2004).

Based on the totality of the circumstances presented to the issuing magistrate, a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of the crime would be located there. The issuing magistrate had a reasonable basis for concluding probable cause existed for the search of Deiyia's residence. Additionally, the required nexus between the criminal activity, the things to be searched, and the place to be searched, was shown by reasonable inference. The informants' statements accompanying the search warrant application stated that after they told Jesse they were uncomfortable with drugs being present in the apartment, the informants were told the drugs would be kept at Deiyia's. Furthermore, one statement included information that drugs and paraphernalia were being kept in the nightstand in Deiyia's bedroom, as well as in Jesse's apartment. Therefore, issuance of a search warrant for the entire house, including Deiyia's apartment, was not improper. Consequently, we conclude the court did not err in denying Deiyia's motion to suppress.[1]

[1] Because our determination of this issue is dispositive, we need not and do not address Deiyia's other claims on appeal.

***IV. Conclusion*.**

Because we find there was probable cause and the requisite nexus between the place to be searched and the items to be seized, we conclude the court did not err in denying Deiyia's motion to suppress.

AFFIRMED.

Vaitheswaran, P.J., concurs; Potterfield, J., concurs specially.

POTTERFIELD, J. (concurring specially)

I concur specially to address the particularity aspect of the warrant at issue. While I agree with the majority that the warrant application provided the issuing magistrate with probable cause to issue a search warrant for both subunits of the home in Shenandoah, I believe the warrant application should have specified the existence of multiple subunits.

The specific commands of the Fourth Amendment are that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. Our supreme court referred to the LaFave treatise to explain the purpose of the particularity requirement.

> The obvious purpose of requiring a particular description of the place to be searched is to minimize the risk that the officers executing search warrants will by mistake search a place other than the place intended by the magistrate. In addition, the requirement of particularity is related to the probable cause requirement.

State v. Mehner, 480 N.W.2d 872, 875 (Iowa 1992) (citing 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.5 at 206-07 (1987)).

Berry contends that the officers applying for the search warrant for her home had sufficient information in the statements of the informants to know that her apartment was a separate living unit from that of her son and daughter-in-law. I agree. The informants' statements refer to moving into "Stephanie and Jesse Berry's house" and taking drugs to "Jesse's mom's house (Dee Berry)" and going "up front to Jesse's mother's (Dee's)". Further, although the floor plan drawn by the informants is not part of the record, the officer testified it was

accurate. If so, the floor plan drawing informed the officers that each apartment had a separate entrance and was not accessible to the other from the interior. The officers should have applied for a search warrant for each subunit of the home. However, though the warrant application did not describe each subunit with the particularity required by the Fourth Amendment, the informants' statements supplied probable cause for a search of both subunits.

The test for determining the sufficiency of the description of the place to be searched is:

> Whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.

Id. at 876 (quoting *United States v. Gitcho*, 601 F.2d 369, 371 (8th Cir.)).

There was no probability here that Berry's apartment would be searched by mistake—the officers knew that her living unit was a target of the search. Any defect in the particularity of the description of the premises in the warrant is cured by the existence of probable cause to search both units.