IN THE COURT OF APPEALS OF IOWA

No. 9-539 / 08-1622
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDREW CHARLES NEARMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

Appeal from conviction of and sentence for possession with intent to deliver a controlled substance. **AFFIRMED.**

Stanley Munger and Jay Denne of Munger, Reinschmidt & Denne, L.L.P., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Patrick Jennings, County Attorney, and Amy Ellis, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Andrew Nearman appeals from his conviction of and sentence for possession with intent to deliver a controlled substance. He contends the court erred in admitting evidence obtained pursuant to a search warrant because the warrant was defective. We affirm.

I. Background.

One afternoon in November of 2007 a police officer stopped a vehicle containing two men for a traffic violation. The officer smelled the odor of marijuana coming from the vehicle. The driver admitted they had smoked marijuana at his house half an hour before the stop and were on their way to Nearman's house to buy another pound of marijuana. Based on the statements, officers obtained and executed a search warrant on the men's residence. Officers found some marijuana and several guns. Because of the guns, officers contacted federal alcohol, tobacco, and firearms agents.

The two men were questioned separately. Among other things, they said they were on the way to buy a pound of marijuana from Nearman at his house and that they had bought marijuana from him several times before. Although they did not know Nearman's new address, they knew where his house was. One went with officers to the area and pointed out Nearman's house with his truck in the driveway. Officers checked on the truck license plate and the county assessor's records for the house. The house had been purchased by the Nearman in mid-August. The truck was registered to Nearman at that address in mid-October.

With that information, officers sought and obtained a search warrant, which they executed about 10:30 that evening. They found Nearman at home with others. He told officers they would find about five pounds of marijuana in a duffel bag upstairs and between $10,000 and $15,000 in cash under the dresser. Officers seized about six pounds of marijuana, about $14,000 in cash, two digital scales, and plastic bags. They arrested Nearman and charged him with possession with intent to deliver a controlled substance and a drug tax stamp violation.

Nearman filed a motion to suppress, alleging the search warrant was constitutionally defective because the application for the warrant lacked sufficient information to support a finding of probable cause. Alternatively, he alleged the information in the application was not sufficiently reliable to support probable cause. He sought exclusion of all evidence obtained pursuant to the warrant and exclusion of all statements or admissions he made to officers. In his brief submitted on the motion after deposing the police officers, Nearman argued (1) the affidavit failed to establish a sufficient nexus between the criminal activity, the things to be seized, and the place to be searched; (2) the application failed to establish the reliability and veracity of informants; and (3) the application makes material misrepresentations about the credibility of the informants.

The district court denied the motion. Defense counsel filed a motion to reconsider, which the court denied. At trial, counsel renewed the motion and also objected to the evidence offered by the State on the same grounds raised in the motion to suppress. The court overruled the objections. Following a trial on

the minutes of testimony, Nearman was found guilty and sentenced to a term of incarceration not to exceed five years.

II. Scope and Standards of Review.

We review constitutional challenges to search warrants de novo. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). We do not independently determine the existence of probable cause; instead, we decide whether the issuing judge had a substantial basis for concluding probable cause existed. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). In making that determination we are limited to considering only that information, reduced to writing, which was actually presented to the judge or magistrate when the application for warrant was made. *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992). Even though our review is de novo, we have a "duty to give deference" to the judge's or magistrate's findings. *Id.* at 854; *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987). 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." *Weir*, 414 N.W.2d at 330.

> [T]he affidavit of probable cause is interpreted in a common sense, rather than a hypertechnical, manner. In addition, we draw all reasonable inferences to support the judge's finding of probable cause, and give great deference to the judge's finding. Close cases are decided in favor of upholding the validity of the warrant.

Gogg, 561 N.W.2d at 364-65 (citations omitted).

III. Probable Cause to Issue Search Warrant.

A. Nexus. "'Probable cause to search requires a probability determination as to the nexus between criminal activity, the things to be seized and the place to be searched.'" *Godberson*, 493 N.W.2d at 855 (quoting *Weir*, 414 N.W.2d at

330). Nearman challenges the sufficiency of the nexus between the place searched, the things seized, and any criminal activity. He contends there is nothing in the application for the warrant to tie his house to any drug dealing activity or to explain why the items on the list would be in this particular house at this particular time.

Considering only the written information provided in the application, we conclude a "reasonably prudent person would believe . . . that evidence of a crime could be located" at the defendant's house. *See State v. Padavich*, 536 N.W.2d 743, 747 (Iowa 1995). Both men in the car that was stopped, in separate interviews, told officers that they were on their way to purchase a pound of marijuana from the defendant at his house. One had $700 in cash with him at the time of the stop. While neither knew the defendant's address, they knew where he lived. One led officers to the defendant's house, where they located his pickup truck in the driveway. A check of the county assessor's website confirmed the defendant had purchased the property about three months earlier. His pickup truck had been registered at the house about a month earlier. The place to be searched had a nexus to drug dealing on that day because it was the immediate destination of two repeat customers who planned to buy marijuana from their drug supplier who lived there.

Given the totality of the circumstances, the issuing judge had a substantial basis to conclude there was a sufficient nexus between marijuana and other evidence of drug dealing and the defendant's house on that day.

B. Veracity and Reliability of the Informants. The defendant contends the statements of the two men who were stopped on their way to the defendant's house to purchase drugs "are insufficiently reliable to support a finding of probable cause." He argues there was no independent corroboration of their statements, they lied to the officers, and their statements were inconsistent. Factors tending to enhance the credibility of an informant include: (1) past reliability, (2) the fact the informant was named, (3) whether the informant directly witnessed the crime or fruits of it in the possession of the accused, (4) the specificity of the facts detailed by the informant, (5) whether the information furnished is against the informant's penal interest, (6) whether the informant was trusted by the accused, and (7) whether the information was not public knowledge. *See State v. Niehaus*, 452 N.W.2d 184, 190 (Iowa 1990) (citing *Weir*, 414 N.W.2d at 332).

The circumstances before us and before the judge issuing the warrant increase the credibility measure for the two men when analyzed according to the factors listed in *Niehaus*. The men were named in the warrant application. They directly witnessed the defendant supplying marijuana to them in significant quantities on numerous occasions. They were interviewed separately and provided consistent information about their history of purchasing marijuana from defendant and that they were on the way to his house to purchase another pound of marijuana at the time of the traffic stop. One provided specific details about the defendant's pickup truck, where the defendant had lived previously, that the defendant had recently moved, and that the informant knew where the defendant

lived at the time of the stop. The officers independently corroborated the statements by driving one of the men to the neighborhood where he said his drug supplier, the defendant, now lived. He identified the defendant's truck in the driveway of the house the assessor's website corroborated as being purchased by the defendant a few months earlier. A check of vehicle records confirmed the registration of the pickup truck had been changed to the new address more than a month before the date in question. The statements by the two men, admitting their own drug use and intent to purchase a large quantity that day, were credible because admitting their use and intent to purchase controlled substances was against their penal interest. *See State v. Miller*, 535 N.W.2d 144, 149 (Iowa Ct. App. 1995); *see also United States v. Tyler*, 238 F.3d 1036, 1039 (8th Cir. 2001) (statements against the penal interest of an informant typically "carry considerable weight"). The defendant apparently trusted the two men because he repeatedly supplied them with marijuana and had agreed to sell them a large quantity that day. Their plan to drive to the defendant's house on the day of the traffic stop to purchase a pound of marijuana was not public knowledge.

We conclude the issuing judge was presented with enough information regarding the "veracity" and "basis of knowledge" of the two men to determine there was a fair probability the information was truthful. *Niehaus*, 452 N.W.2d at 190 (citing *Illinois v. Gates*, 462 U.S. 213, 238-40, 103 S. Ct. 2317, 2332-33, 76 L. Ed. 2d 527, 548-49 (1983)).

C. Material Misrepresentations. Nearman contends the application for the search warrant contained material misrepresentations about the credibility of the

two informants. The application for the search warrant contains two "informant's attachment" forms, one for each man. The items checked for each, giving reasons why the informant is reliable, were: (1) is a mature individual, (2) is regularly employed, (3) is a person of truthful reputation, (4) has no motive to falsify the information, (5) has otherwise demonstrated truthfulness as follows: information was corroborated by additional informant, and (6) informant has not given false information in the past. The defendant contends the officer completing the application materially misrepresented the reliability of the men.

A defendant challenging a search warrant "has the burden of establishing intentional or material misrepresentation, by a preponderance of the evidence." *State v. Paterno*, 309 N.W.2d 420, 424 (Iowa 1981). The applicant's conduct must constitute more than negligence or mistake. *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998). The defendant also must show that the issuing judge was "misled into believing the existence of certain facts [that] enter into his thought process in evaluating probable cause." *Id*.

In ruling on the motion to suppress, district court found: "The court does not believe this was a case involving either officer making material misstatements or acting with a reckless disregard for the truth." The court dismissed the defendant's claims concerning the items checked on the informant's form as listed above:

> First, the term "mature" deals with the informants' ages. They were mature enough to contemplate and understand their actions. Second, while "false information" had been given, officers had never acted on false information provided by the [informants]. There was no history of them providing false "tips" as informants. While the court agrees that a dictionary definition of "false

> information" might suggest that this box remain unchecked, the court does not believe the tangential information about how much marijuana the informants have dealt with in the past is enough to invalidate a finding of probable cause. Even if Officer Divis had taken the time to include an addendum explaining what he truly meant by "truthful reputation" and "no history of false information", the court believes the ultimate finding of probable cause would not be disturbed based on the other information Judge Andreasen relied on to make his decision.

Nearman asserts that the men were not truthful and had a motive to falsify information. Although they might have had a motive to lie about where they were headed and why, they both indicated, when questioned separately, they were going to the defendant's house to buy a pound of marijuana. As noted above, an informant's statements given against penal interest tend to be more credible and reliable.

Nearman also argues the officer misrepresented the corroborating nature of the information given by the two informants. He points to inconsistencies in their statements. The court found, and we agree, that, "Despite the fact that there were superficial differences in the stories presented by the men, there were sufficient details shared between their stories to support a finding of probable cause." Furthermore, the inconsistencies and changes in their stories were revealed in the application. We conclude the officer did not intentionally or recklessly misrepresent the informants or the information they provided. Although there was information he could have included, the officer "is not required to present all inculpatory and exculpatory evidence" in the application, but "only that evidence which would support a finding of probable cause." *Green*, 540 N.W.2d at 657 (citation omitted). We conclude the issuing judge based his

finding of probable cause on the complete evidence placed before him and not merely on the boxes checked on the informants' form in the application.

From our review of the record, we find no constitutional infirmities in the search warrant or the application for the warrant.

IV. Fruit of the Poisonous Tree.

Nearman claims his statements to the officers executing the search warrant and afterward should be suppressed because the warrant was invalid and the resulting search and seizure were illegal. Our resolution of the challenges to the search warrant compels the result on this claim. Because the search warrant was valid, the search was legal and the defendant's statements were not the product or result of any illegality. The district court properly declined to suppress them. We affirm.

AFFIRMED.