ELECTRONICALLY FILED MAR 05, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. PATRICK BRACY, Defendant-Appellant.	)))))))))	S.CT. NO. 19-1052

APPEAL FROM THE IOWA DISTRICT COURT
FOR MARSHALL COUNTY
HONORABLE JOHN A. HANEY, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

SHELLIE KNIPFER
Assistant Appellate Defender
shellie.knipfer@spd.state.ia.us
appellatedefender@spd.state.ia.us

KERRIGAN L. OWENS
Law Student
kowens@spd.state.ia.us
appellatedefender@spd.state.ia.us

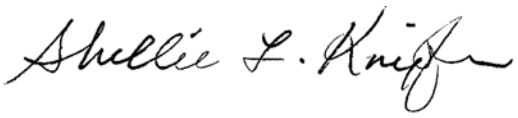
STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, IA 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEY FOR DEFENDANT-APPELLANT

Final

CERTIFICATE OF SERVICE

On the 5th day of March, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, Patrick Bracy, No.6424206, Ft. Dodge Corr. Facility, 1550 L Street, Ft. Dodge, IA 50501-5767.

APPELLATE DEFENDER'S OFFICE



SHELLIE KNIPFER
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
sknipfer@spd.state.ia.us
appellatedefender@spd.state.ia.us

SK/d/11/19
SK/sm/3/20

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. WHETHER THE WARRANT APPLICATION LACKED PROBABLE CAUSE BECAUSE THE CONFIDENTIAL INFORMANTS WERE NOT SHOWN TO BE RELIABLE? AND, THEREFORE, WHETHER THE DISTRICT COURT ERRED WHEN IT DENIED BRACY'S MOTION TO SUPPRESS?

Authorities

Iowa R. Crim. P. 2.11(2)(c)

State v. Niehaus, 452 N.W. 2d 184, 186 (Iowa 1990)

State v. Lane, 726 N.W. 2d 371, 377 (Iowa 2007)

State v. Turner, 630 N.W. 2d 601, 606 (Iowa 2001)

State v. Seager, 341 N.W.2d 420, 426 (Iowa 1983)

A. The search warrant application was not supported by probable cause, and therefore, should not have been granted.

U.S. Const. amend. IV

Iowa Const. Art. I § 8

State v. Fleming, 790 N.W.2d 560, 564 (Iowa 2010)

State v. Gogg, 561 N.W.2d 360, 363 (Iowa 1997)

State v. Weir, 414 N.W.2d 327, 330 (Iowa 1987)

1. The anonymous tips do not have sufficient indicia of reliability.

Florida v. J.L., 529 U.S. 266 (2000)

State v. McNeal, 867 N.W.2d 91 (Iowa 2015)

State v. Weir, 414 N.W.2d 327, 332 (Iowa 1987)

State v. Kooima, 833 N.W.2d 202 (Iowa 2013)

State v. Robbins, No. 16-1694, 2018 WL1433525 (Iowa Ct. App. March 21, 2018)

Alabama v. White, 496 U.S. 325 (1990)

Spinelli v. United States, 393 U.S. 410 (1969)

Aguillar v. Texas, 378 U.S. 108 (1964)

Gates v. Illinois 462 U.S. 213, 238 (1983)

Jones v. United States, 362 U.S. 257, 269 (1960)

a. Tip from Criminal Defendant 1 (CD1)

State v. Kooima, 833 N.W.2d 202, 211 (Iowa 2013)

Alabama v. White, 496 U.S. 325, 326-27 (1990)

Gates, 496 U.S. 325

Florida v. J.L., 529 U.S. 266 (2000)

b. Tip from Criminal Defendant 2 (CD2)

State v. Gogg, 561 N.W.2d 360, 364-65 (Iowa 1997)

State v. Kooima, 833 N.W.2d 202, 204 (Iowa 2013)

Florida v J.L., 529 U.S. 266, 268 (2000)

c. Tip from Concerned Citizen 1 (CC1)

Gates v. Illinois 462 U.S. 213, 226-28 (1983)

Alabama v. White, 496 U.S. 325, 327 (1990)

State v. Kooima, 833 N.W.2d 202, 214 (Iowa 2013)

State v. Drake, 224 N.W.2d 476, 478 (1974)

State v. Post, 286 N.W.2d 195, 200 (Iowa 1979)

d. Tip from Concerned Citizen 2 (CC2)

No Authorities

2. Without the anonymous tips, the warrant application cannot meet the probable cause standard.

United States v. Olvey, 437 F. 3d 804, 807 (8th Cir. 2006)

Franks v. Delaware, 438 U.S. 154, 155-56 (1978)

a. Bracy's Criminal History

State v. Kolbeck, No. 04-0376, 2005 WL 157382, at *4 (Iowa App. Jan. 26, 2005)

b. Bracy's Phone Calls Made from the Jail

Webster's Third New Int'l Dictionary 2098 (1993)

State v. Seager, 341 N.W.2d 420, 427-28 (Iowa 1983)

c. Boilerplate language is suggestive of outcome not tied to Bracy

No Authorities

3. Considering the totality of the circumstances, there was not probable cause for the magistrate to grant the warrant application.

Gates v. Illinois 462 U.S. 213, 245-46 (1983)

Alabama v. White, 496 U.S. 325, 327 (1990)

Wong Sun v. United States, 371 U.S. 471, 485-86 (1963)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issue raised involves applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Statement of the Case: This is an appeal by the Defendant-Appellant, Patrick Bracy, from the judgment and sentence following appellant's convictions for: possession of a controlled substance with intent to deliver (Count 1), in violation of 2018 Acts, ch. 1026, §§ 39, 182 (codified as amended at Iowa Code § 124.401 (2019), 124.411 (2017), and 2017 Acts, ch. 122, §§ 10, 11 (codified as amended at Iowa Code § 124.413 (2019); possession of a controlled substance, third offense (Counts 2, 3, 4, and 5), in violation of 2018 Acts, ch. 1138, §§ 28, 31 (codified as amended at Iowa Code § 124.204 (2019)), 2018 Acts, ch. 1026, §§ 39, 182 (codified as amended at Iowa Code § 124.401(5) (2019)), 124.206, and 2017 Acts, ch. 27, §§ 7-9, 11 (codified at Iowa

Code § 124.210 (Supp. 2017)); failure to affix Iowa drug stamp (Count 6), in violation of 2018 Acts, ch. 1041, § 127 (codified as amended at Iowa Code § 453B.3 (2019)), 453B.1(3)(a)(1) (2017), 453B.1(10) (2017), and 453B.12 (2017); prohibited acts (Count 7), in violation of Iowa Code sections 124.402(1)(e) (2017) and 2017 Acts, ch. 54, § 76 (codified as amended at Iowa Code § 124.402 (Supp. 2017)); and unlawful possession of a prescription drug (Count 8), in violation of Iowa Code section 155A.21 (2017). (Sentencing Order, 06/17/2019) (App. pp. 24-30). The Honorable John J. Haney presided over the trial and sentencing proceedings in Marshall County District Court.

Course of Proceedings: On September 11, 2018, Bracy was charged with possession of a controlled substance with intent to deliver (Count 1); possession of a controlled substance, third offense (Counts 2, 3, 4, and 5); failure to affix Iowa drug tax stamp (Count 6); prohibited acts (Count 7); unlawful possession of a prescription drug (Count 8); and habitual offender (Count 9). (Trial Information, pp. 1-2,

09/27/2018) (App. pp. 4-5). The defense filed a motion to suppress, stating that the search warrant was invalid because the application did not establish the credibility of the informants or the credibility of the informant's information. (Motion to Suppress, 3/13/2019) (Conf. App. pp. 56-59). A hearing was conducted on April 8, 2019. (Other Order, p. 2, 04/30/2019) (Conf. App. p. 71). The district court denied defendant's motion to suppress. (Other Order, p. 12, 04/30/2019) (Conf. App. p. 81). The district court found the "application and sworn testimony in support of the application established the credibility of the informants." (Other Order, p. 8, 04/30/2019) (Conf. App. p. 77).

On May 9, 2019, Bracy waived his right to a jury trial. (Waiver of Jury Trial, 05/09/2019) (App. p. 23). A trial on the Minutes was conducted on May 17, 2019. (Findings of Fact, Conclusions of Law, and Verdict, p. 1, 05/17/2019) (Conf. App. p. 83).

On June 17, 2019, the sentencing hearing was held and Bracy was found guilty on all counts. (Sentencing Order, p.

1, 06/17/2019) (App. p. 24). Bracy was sentenced as follows: with respect to Count 1, defendant was committed for a term not to exceed 25 years; with respect to Counts 2, 3, 4, 5, and 6 the defendant was committed for a term not to exceed 15 years for each count; with respect to Count 7 the defendant was committed to a term not to exceed two year; and with respect to Count 8 the defendant was sentenced to a term in Marshall County jail for a period of 365 days. (Sentencing Order, Att. A pp. 1-4) (App. pp. 26-29). The sentences for Counts 2, 3, 4, 5, and 6 are to be served concurrently to each other and consecutively to Count 1. (Sentencing Order, Att. A, p.4) (App. p. 29). The sentence for Count 7 is to be served consecutively to the other counts, and the sentence for Count 8 is also to be served concurrently with the other sentences for a total of 42 years. (Sentencing Order, Att. A p.4) (App. p. 29). Defendant filed a timely notice of appeal. (Notice, 06/21/19) (App. p. 31).

Statement of Facts: The defendant, Patrick Bracy, resided in Marshalltown, Iowa. During the months of August

and September in 2018, the Marshalltown Police Department received anonymous calls alleging that Bracy was dealing methamphetamine. (Minutes of Testimony (Search Warrant Application, ¶¶ 2, 4, 8, and 9)) (Conf. App. p. 25).[1]

Bracy was arrested for an outstanding, unrelated warrant from an incident on August 30, 2018. (Search Warrant Application, Att. A, ¶ 7) (Conf. App. p. 29). While in jail, Detective Bowermaster heard Bracy make a phone call to Maria Vargas Cervantes, in which he asked her to keep the "Shit" in his safe protected. (Search Warrant Application, Att. A, ¶ 11) (Conf. App. p. 29). Based upon Bracy using the word "Shit", Bowermaster deduced this to mean methamphetamine. (Search Warrant Application, Att. A., ¶ 11) (Conf. App. p. 29).

On September 11, 2018, a search warrant was executed at 614 W. Linn Street, Marshalltown, Iowa by Officers Bowermaster, Dvorak, and Drummer. (Minutes, p. 1) (Conf. App. p. 4). The residence belonged to Donald Bracy,

---

[1] Throughout the remainder of the brief, this will be cited to as "Search Warrant Application."

[hereinafter "Donald"], Bracy's father, who was home at the time. (Minutes, p. 1) (Conf. App. p. 4). Cervantes was also home at the time. Both individuals were brought into the living room by the officers and read their Miranda warnings. (Minutes, p. 1) (Conf. App. p. 4). Dvorak spoke with Donald, who told the officer that Bracy had a safe within the home but was not sure of the location. (Minutes, Dvorak Narrative p. 2) (Conf. App. p. 9). During the execution of the search warrant, officers located drug paraphernalia, methamphetamine, psilocybin mushrooms, a pill bottle containing cyclobenzaprine HCL, and marijuana. (Minutes, Dvorak Narrative pp. 2-3) (Conf. App. pp. 9-10). The marijuana, pill bottle, and mushrooms were discovered within a safe in the home, as well as Bracy's social security card and Iowa identification card. (Minutes, Dvorak Narrative p. 3) (Conf. App. p. 10).

Further facts will be discussed as necessary in the Argument section.

ARGUMENT

I. THE WARRANT APPLICATION LACKED PROBABLE CAUSE BECAUSE THE CONFIDENTIAL INFORMANTS WERE NOT SHOWN TO BE RELIABLE. THEREFORE, THE DISTRICT COURT ERRED WHEN IT DENIED BRACY'S MOTION TO SUPPRESS.

Preservation of Error.

Iowa Rule of Criminal Procedure provides that a person aggrieved by an unlawful search and seizure may move to suppress for use as evidence any items illegally obtained. Iowa R. Crim. P. 2.11(2)(c). Bracy challenged the search warrant that was executed for 614 W Linn Street. (Motion to Suppress, 03/13/2019) (Conf. App. pp. 56-59). The trial court denied Bracy's motion. (4/30/19 Order) (App. pp. 70-82). The issue is preserved by Bracy's motion to suppress and the trial court's denial thereof. State v. Niehaus, 452 N.W. 2d 184, 186 (Iowa 1990).

Standard of Review.

The district court should have granted Bracy's motion to suppress on federal and state constitutional grounds. As such, the review of this Court is de novo. State v. Lane, 726

N.W. 2d 371, 377 (Iowa 2007). The review requires an independent evaluation of the totality of the circumstances shown within the record. State v. Turner, 630 N.W. 2d 601, 606 (Iowa 2001). The Court gives "deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, but [is] not bound by such findings." Lane, 726 N.W. 2d at 377.

The review of whether there was probable cause is limited to what was "reduced to writing, which was actually presented to the magistrate at the time application for the warrant was made." State v. Seager, 341 N.W.2d 420, 426 (Iowa 1983).

Discussion.

A. The search warrant application was not supported by probable cause, and therefore, should not have been granted.

The Fourth Amendment of the United States Constitution states that, "The right of the people to secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated…" U.S. Const. amend. IV. Our

citizens have this explicit right to be safe from these "unreasonable" searches in their homes, and "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV.

The Iowa Constitution is relatively identical, stating, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches shall not be violated…" Iowa Const. art. I § 8. Under State v. Fleming, both the federal and state provisions have the same "scope, import, and purpose." 790 N.W.2d 560, 564 (Iowa 2010).

The test to determine whether probable cause exists to approve a warrant application is:

> "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." 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."

State v. Gogg, 561 N.W.2d 360, 363 (Iowa 1997) (citations omitted).

The search warrant submitted by Bowermaster was deficient of facts and information to establish sufficient grounds to grant the application. (Search Warrant Application, 9/11/2018) (Conf. App. pp. 25-35). The district court should not have denied Bracy's motion to suppress for two reasons: first, the anonymous tips that were relied upon by the magistrate did not have sufficient indicia of reliability, and second, without the anonymous tips, the warrant application cannot stand up to the probable cause standard. As such, the magistrate should not have found probable cause to approve the warrant application, and further, the district court should have granted Bracy's motion to suppress.

Analyzing this issue under either the Federal Constitution or Iowa Constitution, leads to the same conclusion: that the ruling of the district court must be reversed and remanded to comply with Bracy's Fourth Amendment and Article 1 section 8 rights.

1. The anonymous tips do not have sufficient indicia of reliability.

Both the United States and Iowa Supreme Courts have held that anonymous tips for a search and seizure or warrant application must have sufficient indicia of reliability. See Florida v. J.L., 529 U.S. 266 (2000); State v. McNeal, 867 N.W.2d 91 (Iowa 2015). The Iowa Supreme Court, in particular, has enunciated several helpful factors for showing the reliability of anonymous tips: 1) "Whether the informant was named," 2) "the specificity of facts detailed by the informant," 3) "whether the information furnished was against the informant's penal interest," 4) "whether the information was corroborated," 5) "whether the information was not public knowledge," 6) "whether the informant was trusted by the accused," and 7) "whether the informant directly witnessed the crime of fruits of it in the possession of the accused." State v. Weir, 414 N.W.2d 327, 332 (Iowa 1987).

These factors have been used in the Iowa appellate courts several times since Weir. State v. Kooima, 833 N.W.2d 202

(Iowa 2013); McNeal, 867 N.W.2d at 91; State v. Robbins, No. 16-1694, 2018 WL1433525 (Iowa Ct. App. March 21, 2018). Similarly, the United States Supreme Court relied heavily on the details of the information provided and whether the information was public knowledge in their decisions in White and J.L.. Alabama v. White, 496 U.S. 325, 327 (1990); J.L., 529 U.S. at 266.

In determining whether a confidential informant was reliable, the Supreme Court had applied a two-prong test. See Spinelli v. United States, 393 U.S. 410 (1969); Aguillar v. Texas, 378 U.S. 108 (1964). The two-pronged test that came from Spinelli and Aguillar required the prong for the "basis of knowledge" and the "veracity" of information be met. This then stemmed to two additional requirements under the "veracity" prong, that the informant's "credibility" and "reliability" must be shown. Spinelli, 393 U.S. at 410 (1969); Aguillar, 378 U.S. at 108 (1964).

Gates v. Illinois overruled the Aguillar and Spinelli two-pronged test. Gates, 462 U.S. 213, 238 (1983). The Court

began to use the totality of the circumstances test, looking to the specificity, public knowledge, and corroboration of anonymous tips. Gates, 462 U.S. at 238 (1983). These factors have become helpful tools to determine whether probable cause exists for the approval of a search warrant for an individual's personal property.

In Gates, officers received an anonymous tip in regards to Sue and Lance Gates.

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch.

> They are friends with some big drugs dealers, who visit their house often.
>
> Lance & Susan Gates, Greenway in Condominiums."

Gates, 462 U.S. at 225.

The officers in Gates were able to corroborate specific facts from the anonymous letter; including the flight and hotel information that were given, as well as tracking the timeline. Gates, 462 U.S. at 227-28. The detective in Gates was able to contact the Drug Enforcement Administration for additional surveillance of the parties. Gates, 462 U.S. at 226. All of this information, including the anonymous tip and the subsequent investigation, were included in the detective's affidavit for the search warrant which was approved by the magistrate. Gates, 462 U.S. at 227.

Despite the detail of the letter, the Supreme Court stated that, "…standing alone, the anonymous letter sent to the Bloomingdale Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gates' car and

home." Gates, 462 U.S. at 227. The Court identified two issues with this letter: first, the letter did not provide any reason to trust the author or find the information reliable, and second, there was no basis given as to *how* the author gained this information. Gates, 462 U.S. at 227.

Instead, the Court used the letter as a way to supplement the affidavit, rather than be the foundation. Looking to prior cases, the Supreme Court noted that, "…an affidavit relying on hearsay 'is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented.'" Gates, 462 U.S. at 242-243 (quoting Jones v. United States, 362 U.S. 257, 269 (1960)).

This idea is further stated by the Court that, "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale…" Gates, 462 U.S. at 245 (quoting Jones, 362 U.S. at 269). The Court in Gates found that the specificity and predictions that were able to corroborated by officers provided the sufficient reliability

needed to establish probable cause. Gates, 462 U.S. at 245-46.

Similarly, the Supreme Court in Alabama v. White evaluated an anonymous phone call that provided the following to the Montgomery Police,

> "On April 22, 1987, at approximately 3 p.m., Corporal B.H. Davis of the Montgomery Police Department received a telephone call from an anonymous person, stating that Vanessa White would be leaving 235–C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attaché case."

White, 496 U.S. at 327.

Just as in Gates, the Court in White did not find this tip alone to be sufficient, as it lacked "the necessary indicia of reliability." The tip was void of any sort of notion that the author was honest or providing reliable information. White, 496 U.S. at 327. Moreover, the Court noted that there was no basis in the tip as to how this tipster was aware of White's criminal activities. White, 496 U.S. at 327.

The White Court found the corroboration extremely compelling. The officers were able to follow up and corroborate these tips by trailing White in the vehicle matching the tipster's description and followed it to the location that was predicted. White, 496 U.S. at 327. The Court in White ruled that there were sufficient indicia of reliability within the anonymous call based upon the corroboration and prediction of future movement of the Respondent. White, 496 U.S. at 332.

It is important to note, that while White was analyzing the indicia of reliability for a Terry stop, this standard of reasonable suspicion is lesser than probable cause. White, 496 U.S.at 329. As such, this case is still applicable, as any facts that fail under reasonable suspicion, will always fail under the higher probable cause standard. White, 496 U.S.at 329.

In contrast, Florida v. J.L. analyzed an anonymous tip which provided officers the following information: "A young black male standing at a particular bus stop and wearing a

plaid shirt was carrying a gun." 529 U.S. at 268. Similar to White, the J.L. Court analyzed this anonymous tip for the purpose of meeting the reasonable suspicion standard for a Terry stop. 529 U.S. at 270.

The Court noted that the tip provided no "predictive information" and, therefore, "left the police without means to test the informant's knowledge or credibility." J.L., 529 U.S. at 271. The Court also noted that there was no audio recording of the tip and nothing was previously known about the informant. Id. at 268. Officers ultimately stopped and frisked the young man, and found a weapon. Id. However, the Court stated, "[t]hat the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct." Id. The Court found no supporting indicia of reliability, and granted J.L.'s motion to suppress the evidence. Id. at 274.

The Iowa Supreme Court in State v. Kooima analyzed an anonymous tip reporting a drunk driver. 833 N.W.2d at 203.

The anonymous tipster called 911 to report a drunk driver and for the officers to look into the described vehicle [description given was a BC299 Silver Suburban] that was driving in the location. Kooima, 833 N.W.2d at 204. The tipster gave details that there was a "carload of Rock Valley merchants, huge money guys" and that this tipster was bothered because "these guys get away with everything, cuz they know everybody in Rock Valley and they think they can do everything." Id. The call continued with the tipster stating he knew that the driver and passenger of this Suburban were all intoxicated. Id. A dispatch went out to officers in the area, broadcasting the information from the anonymous tipster. Id. at 205. Based upon this dispatch, an officer followed Kooima's vehicle. Id. The officer ultimately pulled the vehicle over, based on the anonymous tip and not a traffic violation. Id. The officer had Kooima perform several field sobriety tests [which he failed] and placed him under arrest. Id.

The Iowa Supreme Court stated that, "[a]s J.L. teaches us, without a means for the police to test an anonymous tipster's personal knowledge or credibility, the tip is nothing more than a hunch." Kooima, 833 N.W.2d at 209-10 (quoting J.L., 529 U.S. at 271). The court ultimately held that this tip did not have any sort of requisite indicia needed to be reliable. The court stated in their decision that "[w]e hope that in the future, a dispatcher will be able to get more than conclusory statements from the anonymous caller, so the tip has the requisite indicia of reliability in its assertion of illegality to justify a stop under the Fourth Amendment." Kooima, 833 N.W.2d at 212.

Although Kooima analyzed the reliability of tips of drunk driving, the framework for anonymous tipsters still applies to the present case. For an anonymous tip to fail the reasonable suspicion test means that it will always fail the more stringent probable cause analysis needed, as is the present case. White, 496 U.S.at 329.

The trial court in Bracy's case found that Bowermaster corroborated information provided by "CD1" and "CD2." (Other Order, pp. 9-10, 04/30/2019) (Conf. App. pp. 78-79). This corroboration included identifying Bracy's home address listed as 614 West Linn Street in police department records. (Other Order, pp. 9-10, 04/30/2019) (Conf. App. pp. 78-79). Bowermaster also witnessed the White Mazda Tribute, registered to Bracy's father Donald, leaving the 614 W. Linn address, and having personal knowledge that Bracy lived with his father Donald. (Other Order, pp. 9-10, 04/30/2019) (Conf. App. pp. 78-79). The court also relied upon the fact that Bracy had a criminal history of a controlled substance violation from 2017. (Other Order, pp. 9-10, 04/30/2019) (Conf. App. pp. 78-79).

With Gates and White serving as the gold standard for reliability of anonymous tips, and utilizing J.L. and Kooima as the examples of inadequacy, it is clear that anonymous tips alone are unreliable and the corroboration was all public

information. Gates, 462 U.S. 213; White, 496 U.S. 325; J.L., 529 U.S. 266; Kooima, 833 N.W.2d 202.

Moreover, in the present case, the totality of these circumstances does not equate to probable cause. The detectives in this case provided unreliable tips without corroboration, and the magistrate incorrectly found probable cause, which the trial court affirmed.

a. Tip from Criminal Defendant 1 (CD1)

CD1 and Bowermaster had contact in the second week of August 2018. (Search Warrant Application, Att. A, ¶ 2, 09/27/2018) (Conf. App. p. 28). CD1's tip was as follows:

> "… they knew Pat Bracy to be a large level meth dealer, who was in possession of multiple ounces of methamphetamine. CD1 told me that Pat lived on Linn Street…"

(Search Warrant Application, Att. A, ¶ 2, 09/27/2018) (Conf. App. p. 28).

CD1 was not able to identify the house where Bracy lived, only the street that he lived on. This is akin to the issues in J.L. that "the observations relayed to the police were such that

anyone in the general public could observe." Kooima, 833 N.W.2d at 211.

The information that Bracy lived on a particular street would be public knowledge to any neighbor, friend, or member of the community. Simply because the officer was able to corroborate public information, does not mean that the rest of the tip was accurate. Moreover, with today's technology, this information could easily be looked up online. The Attachment to the affidavit does not include why Bowermaster had contact with CD1, how they came into contact, or if there were prior tips provided by CD1.

There was no follow up to the hearsay statements provided by CD1. The only tip that the officers were able to follow up on, was the address Bracy lived at, which was public knowledge. This flies in the face of White, where the anonymous tip alone was not enough to warrant reasonable suspicion, and independent police work was necessary to corroborate the tips information. White, 496 U.S. at 326-27.

The Supreme Court in White made note that,

> [a]n anonymous telephone tip without more is different, however; for even if the officer's testimony about receipt of the tip is found credible, there is a second layer of inquiry respecting the reliability of the informant that cannot be pursued. If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.

496 U.S. at 275 (Kennedy, J. concurring).

This tip does not come close to the detailed nature of Gates or White, nor does it provide any sort of predictive information as demanded by the Supreme Court in J.L. and the Iowa Supreme Court in Kooima. Gates, 462 U.S. 213; White, 496 U.S. 325; J.L., 529 U.S. 266; Kooima, 833 N.W.2d 202. With no indicia of reliability and no additional police corroboration, this tip must be redacted from the search warrant application.

b. Tip from Criminal Defendant 2 (CD2)

CD2 met with Bowermaster during the third week of August 2018. (Search Warrant Application, Att. A, ¶ 4, 09/27/2018) (Conf. App. p. 28). CD2 was able to properly

identify where Bracy was residing, and stated, "...they also knew Pat to be a meth dealer moving anywhere from ounce to pound level quantities." (Search Warrant Application, Att. A., ¶ 4, 09/27/2018) (Conf. App. p. 28). Again, there was no information provided as to why Bowermaster made contact with CD2, how they knew each other, or if CD2 had provided tips in the past. (Search Warrant Application, Att. A., ¶ 4, 09/27/2018) (Conf. App. p. 28). See State v. Gogg, 561 N.W.2d at 364-5 (This court noted that "the officer testified that the informant had provided reliable information on two prior occasions.").

The tip from CD2 is similar in nature to the anonymous caller in Kooima and J.L., as it is simply a statement that this anonymous individual *knows* Bracy to be a meth dealer, as in Kooima where they *knew* the driver of the vehicle to be intoxicated, and in J.L. where the caller *knew* there was gun. Kooima, 833 N.W.2d at 204; J.L., 529 U.S. at 268. In both instances, there was no information given as to how the

anonymous tipster came of this information or why it should be believed.

The only information given that could be corroborated by officers was the address, and again, Bracy's address is public knowledge. As the Court in J.L. noted,

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

J.L., 529 U.S. at 272.

The fact that CD2 also states that Bracy deals in methamphetamine, does not corroborate the same statement by CD1. There was no predictive information given, and the only information given was to identify Bracy. See J.L., 529 U.S. at 272.

c. Tip from Concerned Citizen 1 (CC1)

The first concerned citizen contacted the Marshalltown Police Department during the second week of September.

CC1 told the officer that "... Pat was a meth dealer and knew Pat was in possession of large quantities of meth." (Search Warrant Application, Att. A., ¶ 8, 09/27/2018) (Conf. App. p. 29).

In the present case officers did not corroborate the tip further which is contrary to Gates and White. In Gates and in White, the officers trailed the defendant, investigated, and contacted outside authorities to corroborate the tip. Gates, 462 U.S. at 226-28; White, 496 U.S. at 327.

"[T]here was no predictive information and the tip involved concealed criminal activity... What J.L. emphasizes is that when the criminal activity is concealed, the tip must provide more than just a description of the alleged criminal and his location." Kooima, 833 N.W.2d at 214 (Mansfield, J., dissenting). The criminal activity in this case, possession of methamphetamine, is concealed, and under J.L., there must be more information than merely the location of an individual and an allegation. Kooima, 833 N.W.2d at 214.

The trial court incorrectly cites to State v. Post to say that, "Information from a citizen informant is typically presumed reliable." (Other Order, p. 7, 04/30/2019) (Conf. App. p. 76). However, the informants in Post were all *identified.* State v. Post, 286 N.W.2d 195, 200 (Iowa 1979). The court in Post relied upon State v. Drake, which stated that "[t]he reliability of a citizen informant may be shown 'by the very nature of the circumstances under which the incriminating information became known.'" Id. (quoting State v. Drake, 224 N.W.2d 476, 478 (1974)).

Post is distinguishable from Bracy's case for two reasons: first, the informants in Post were all identified, and gave their statements with the knowledge that supplying false information is a crime, and second, because all three of the informants in Post described *how*, *when*, and *why* they knew the information that they were reporting. See Post, 286 N.W.2d at 200.

The two tips from CC1 and CC2 were both given by anonymous individuals. There is no detail given how they

knew the information to be true, there were no details provided to the officers, and there was no way to identify this concerned citizen. For all the detective knew, CC1 could have been a neighbor who merely disliked Bracy. Any individual could call in, under these facts, and give whatever information they wanted to the officers.

This tip, as well as the first two, was unreliable and does not provide for probable cause. As such, it too should be redacted from the search warrant.

d. Tip from Concerned Citizen 2 (CC2)

The only information provided by concerned citizen two was that they *heard* Bracy had left pound quantities of meth behind (after his arrest). (Search Warrant Application, Att. A., ¶ 9, 09/27/2018) (Conf. App. p. 29). The State in their resistance to the motion to suppress concedes that "[T]he information is based on rumors heard by CC2 rather than personal observations or knowledge." (Resistance, p. 9, 04/08/2019) (App. p. 16). This tip is unreliable hearsay and need not be evaluated.

2. Without the anonymous tips, the warrant application cannot meet the probable cause standard.

Without the anonymous tips, the four corners of this search warrant cannot stand up to the probable cause standard. "When there is no evidentiary hearing before the magistrate judge, the probable cause determination must be based upon only that information which is found within the four corners of the affidavit." United States v. Olvey, 437 F.3d 804, 807 (8th Cir. 2006). Here, there was no evidentiary hearing held by the magistrate judge, meaning all determinations came from the search warrant application. (Search Warrant Application, p. 3, 09/11/2019) (Conf. App. p. 27).

> Once a portion of an affidavit is suppressed, the reviewing Court may then decide whether what's left of the affidavit is sufficient to create probable cause of the search.' If the first paragraph of the affidavit here is deleted and the remaining contents are insufficient to establish probable cause, the warrant is void and the evidence obtained in the search … must be excluded.

Franks v. Delaware, 438 U.S. 154, 155-56 (1978).

Without the anonymous tips from CD1, CD2, CC1, and CC2, the search warrant application is left with a search of Bracy's criminal history, assumptions, and boilerplate language used to suggest an outcome not tied to Bracy.

a. Bracy's Criminal History

The third paragraph of Attachment A describes Bracy's prior criminal charges. (Search Warrant Application, Att. A, ¶ 3, 09/27/2018) (Conf. App. p. 28). "The relevance of the prior drug convictions, and their underlying facts, necessarily fades with time." State v. Kolbeck, No. 04-0376, 2005 WL 157382, at *4 (Iowa Ct. App. Jan. 26, 2005). Bracy has two convictions that were three and four years old, and the remaining conviction was a possession of a controlled substance from 2017. (Search Warrant Application, Att. A, ¶ 3, 09/27/2018) (Conf. App. p. 28).

As stated in Kolbeck, the relevance of these convictions fades with time, and this isolated incident in 2017 merely establishes that at one time, Bracy was in possession of methamphetamine, not that he was ever dealing these drugs.

Kolbeck, No. 04-0376, 2005 WL 157382 at *4. "To support the inference that drugs would be found on [Kolbeck's] property, there must be at least some more recent evidence indicating that [Kolbeck's] current drug use is somehow linked to his property." Kolbeck, No. 04-0376, 2005 WL 157382 at * 4.

Under this principle, without more, this mere conviction alone does not establish probable cause for this search warrant application.

b. Bracy's Phone Calls Made from the Jail

Paragraphs 10 and 11 of Attachment A provide minimal information in regards to two phone calls that Bracy made while in jail. (Search Warrant Application, Att. A, ¶ 10, 11, 09/27/2018) (Conf. App. p. 29).

The first phone call was to Bracy's father, Donald, and all that Bowermaster included about this call was that Bracy told Donald, "…Don't let nothing happen to my safe man. There is a lot of money in that safe. That's where everything is." (Search Warrant Application, Att. A, ¶ 10, 09/27/2018) (Conf.

App. p. 29). There was nothing further provided, only that Bracy was concerned about the money that was kept in his safe.

As with most citizens, valuables such as money, jewelry, passports, or a social security card are safeguarded within a safe or lock box. Officers created an inference that the money must be coming from dealing drugs. However, many individuals choose not put money into a banking account, and simply keep their funds on their person or in their home. There is nothing nefarious about keeping money within a safe.

The second phone call was to Cervantes. During this call, Bowermaster makes note that Bracy told Cervantes, "It's like I told him, all that shit is right there from my dads (sic) house." (Search Warrant Application, ¶ 11, 09/27/2018) (Conf. App. p. 29). This paragraph continues by Bowermaster saying, "I know from experience that people often refer to meth as 'shit'." (Search Warrant Application, Att. A, ¶ 11, 09/27/2018) (Conf. App. p. 29).

The word "shit" is slang, which can be used as a noun, verb, or exclamation. "Shit" is defined by Webster's Dictionary as, "excrement". Webster's Third New Int'l Dictionary 2098 (1993). To assume that merely because someone uses this word to describe the contents of a safe means that there is methamphetamine located there is not based on professional experience, but on an assumption not founded in fact. This word is used synonymously with stuff or things, and as Bracy told his father, that is where all of his money is located. (Search Warrant Application, Att. A, ¶ 10, 09/27/2018) (Conf. App. p. 29). As stated in Seager, "mere suspicion, rumor or even 'strong reason to suspect' a person's involvement with criminal activity is inadequate to establish probable cause." Seager, 341 N.W.2d at 427-28.

Moreover, even if this paragraph is found to be reliable based upon Bowermaster's personal experience, this one paragraph alone cannot meet the probable cause standard to grant this warrant application.

c. Boilerplate language is suggestive of outcome not tied to Bracy

Finally, turning to paragraph 12, which includes subparagraphs A-Y. (Search Warrant Application, Att. A, ¶ 12, 09/27/2018) (Conf. App. pp. 29-32). All 25 subparagraphs are blanket generalized statements on what Bowermaster had learned from his training and experience. (Search Warrant Application, Att. A, ¶ 12, 09/27/2018) (Conf. App. pp. 29-32).

Not one of these 25 subparts were actually linked to Bracy in any way, and none of them reference any part of the information in the rest of the Attachment. (Search Warrant Application, Att. A, ¶ 12, 09/27/2018) (Conf. App. pp. 29-32). This boilerplate language is suggestive of an outcome that is not linked to Bracy in any way. These are blanket statements, without connection of this experience or training to anything related to Bracy. Without that connection to Bracy, the officer's experience alone cannot create probable cause and the entirety of paragraph 12 is inapplicable here.

3. Considering the totality of the circumstances, there was not probable cause for the magistrate to grant the warrant application.

Under Gates, all of the information in the search warrant, in totality, must establish probable cause. Gates, 462 U.S. at 245-46. It is easy to look at each factor individually and find that no such standard could be met, but the case must be analyzed as a whole. With both Gates and White the Supreme Court looked at the anonymous tips in conjunction with the officer's corroboration, investigation, and other relevant information. Gates, 462 U.S. at 245-46; White, 496 U.S. at 327. The Court in both Gates and White looked at all of this information under the totality of the circumstances. Because there was outside corroboration of the anonymous tips, that is why the Court could find the tips more reliable. Therefore, the Court could use these tips in their determination of probable cause.

In Bracy's case, the officers did not conduct any such outside investigation. They did not conduct surveillance of

Bracy's home, or track his day to day movements. That is because the anonymous tips given offered only minimal information for the officers to corroborate the tipster's statements. The officers could have had surveillance on Bracy, watched the home, followed his vehicle, or conducted a further investigation. Instead, the officers took the anonymous tips at face value, looked at Bracy's criminal history, heard him use the word "Shit", and put it all together and presented their application for a search warrant to the magistrate.

If a disgruntled employee or a displeased neighbor could call the local police stations anonymously and make allegations against Bracy, and the officers are not required to have anything more than anonymous tips to invade Bracy's homes and his privacy, he no longer has rights under the Fourth Amendment. The officers obtained a search warrant, without probable cause, and illegally obtained evidence from Bracy's home. Therefore, the evidence seized as a result of the warrant, and its fruits, should be suppressed. Wong Sun v. United States, 371 U.S. 471, 485-86 (1963).

CONCLUSION

Patrick Bracy respectfully requests this Court reverse the District Court's decision denying the Motion to Suppress and remand with orders to suppress all fruits of the illegal warrant.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

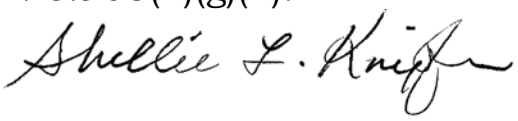
ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.71, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 6,392 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



_____ Dated: *3/5/2020*

SHELLIE KNIPFER
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
sknipfer@spd.state.ia.us
appellatedefender@spd.state.ia.us