IN THE COURT OF APPEALS OF IOWA

No. 0-183 / 09-1306
Filed April 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN THOMAS STEARNS,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Jeffrey A. Neary, Judge.

Benjamin Stearns appeals, contending the district court erred in denying his motion to suppress. **REVERSED AND REMANDED.**

Michael P. Murphy of Murphy, Collins & Bixenman, P.L.C., LeMars, for appellant.

Thomas J. Miller, Attorney General, Mary A. Tabor, Assistant Attorney General, Darin J. Raymond, County Attorney, and Amy K. Oetken, Assistant County Attorney, for appellee.

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

DANILSON, J.

Benjamin Stearns appeals, contending the district court erred in denying his motion to suppress. We agree and therefore reverse and remand.

I. Background Facts.

Officer Daniel Plueger is an eight-year Le Mars police officer and a member of the Northwest Iowa drug task force. On October 27, 2008, Officer Plueger and fellow Le Mars police officer Jeff Kramer removed two bags of trash from containers located next to the curb at 428 Seventh Avenue S.W., the address at which Benjamin Stearns lived with Angela Brit. Inside the bags, the officers observed several seeds they "recognized as marijuana seeds." In one of the bags was found mail addressed to Angela Brit.

Officer Plueger set forth the above observations in an application for a search warrant. He noted that he had verified Stearns's residence through utility billing and drivers' license checks. Officer Plueger also added he had arrested Stearns in January 2007 for possession of marijuana and drug paraphernalia.

A search warrant issued, which Stearns challenged upon being charged with possession of marijuana and keeping a dwelling for the purpose of possessing or using controlled substances. Stearns contended the search warrant was not supported by probable cause. He argued the seeds found in the garbage cans without the benefit of a positive field test were insufficient to establish probable cause. Stearns also argues the 2007 arrest was stale information that should not have been considered. The State conceded the information relating to the 2007 arrest was too remote.

The district court agreed that the 2007 arrest "is both remote and stale and does not add to the probable cause consideration." The district court wrote:

> This Court struggles with what appears to be an assumption that a member of law enforcement has sufficient experience and/or training to identify marijuana seeds with[out] some supportive basis for such assumption in the affidavit.[1] The affidavit which accompanies an Application for Search Warrant must establish probable cause. Probable cause cannot be either assumed or imputed. It must be established by way of the affidavit or appended documents or the considering Judge's notes from sworn testimony from the presenting officer.

The district court nonetheless concluded that "it is permitted for a reviewing Judge to conclude that a member of law enforcement can identify marijuana seeds without the benefit of a positive field test." And "despite this Court's misgivings about the quality and quantity of the affidavit," the court opined that in "close calls" such as this one, presumptions should go to upholding the validity of the search warrant. The district court denied the motion to suppress.

Stearns was subsequently found guilty after trial to the court upon the minutes of testimony. He now appeals.

II. Scope and Standard of Review.

Because Stearns's challenge to the warrant implicates his rights under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution, our review is de novo. *State v. Davis,* 679 N.W.2d 651,

[1] We presume this sentence contains a typographical error. The district court notes that the affidavit "does not contain information concerning the number of marijuana cases investigated by" Plueger, and "does not establish any experience where there was recognition of marijuana seeds that was later confirmed by either field testing or lab tests, and the same is true of Sr. Officer Kramer." Thus, in context, the district court's opinion suggests that the court meant to say "*without* some supportive basis for such assumption in the affidavit."

656 (Iowa 2004). However, we do not make an independent finding as to the existence of probable cause; we consider only whether the issuing judge had a substantial basis for the judge's finding. *Id.* Our inquiry is limited to the information, reduced to writing, that was actually presented to the issuing judge at the time the application for the warrant was made. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997).

> Our own decisions pertaining to search warrants have consistently applied the following test for determining the existence of probable cause: 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 as to the nexus between criminal activity, the things to be seized and the place to be searched. The quantum of information needed to establish probable cause is less than required for conviction. But mere suspicion, rumor or even "strong reason to suspect" a person's involvement with criminal activity is inadequate to establish probable cause.

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

III. Discussion.

The State defends the present search warrant arguing that the presence of marijuana seeds in the garbage bag was sufficient standing alone to satisfy probable cause for a search warrant, citing *United States v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003), and *State v. Johnson*, 531 N.W.2d 275, 279 (N.D. 1995). Had the reviewing judge been presented with an affidavit that the seeds were, in fact, marijuana seeds, these cases might be persuasive. *See Briscoe*, 317 F.3d at 907-08 (upholding warrant based upon seeds and stems found in garbage that tested positive for tetrahydrocannabinol, the active component of marijuana); *Johnson*, 531 N.W.2d at 279 (upholding warrant based upon

marijuana seeds found in garbage bag despite fact that the seeds were not capable of germination). In both cases, the seeds were established to be marijuana seeds.

Here, however, the search warrant application does not recite either officer had expertise to identify marijuana seeds or to differentiate marijuana seeds from other seeds that may be found in a person's garbage. The district court noted:

> Sr. Officer Plueger's Affidavit in support of his Application for a Search Warrant gives scant attention to his training with regard to drug recognition or identification and there is no mention of the details that might provide insight into his experience with drug investigations and related activities to include his ability to discern whether or not the seeds found here were in fact marijuana seeds. The same information is lacking with regard to Sr. Officer Kramer who is referenced in the Affidavit as well. . . . The Affidavit does not contain information concerning the number of marijuana cases investigated by Sr. Officer Plueger, it does not establish any experience where there was recognition of marijuana seeds that was later confirmed by either field testing or lab tests, and the same is true of Sr. Officer Kramer. In other words, there is no statement provided under oath or affirmation in the Affidavit that either Sr. Officer Plueger or Sr. Officer Kramer has had the experience or training that would establish either one's ability to recognize the seeds here as marijuana seeds.

The question before us is whether the court reviewing an application for a search warrant may *assume* an officer has sufficient experience to identify marijuana seeds without some supportive basis. We conclude such an assumption is nothing more than speculation, which is inadequate to establish probable cause.

We recognize that a probable cause judgment does not require an exacting degree of certainty, and there need only be a "fair probability" that evidence will be found in the location to be searched. *See State v. Franklin*, 564

N.W.2d 440, 442 (Iowa Ct. App. 1997). However, "mere suspicion" will not suffice. *See State v. Swartz*, 244 N.W.2d 553, 553 (Iowa 1976); *cf. State v. Moriarty*, 566 N.W.2d 866, 869 (Iowa 1997) (finding probable cause where record reflected that the officer had more than five years of experience in law enforcement, was involved in numerous drug-related arrests and "he had received instruction on the identification of marijuana by odor at the Iowa Law Enforcement Academy"). Even in light of our deferential standard of review, we believe a statement that a police officer recognized seeds as marijuana—without more—does not provide a substantial basis for a probable cause determination. We add that in light of the location of these seeds, a residential garbage bag, which may contain bird seed or various cooking ingredients, testing the seed is clearly the better method to establish probable cause. We therefore reverse the district court's suppression ruling.

IV. Conclusion.

To support a finding of probable cause, there must be at least some indication that the affiant has had the experience or training that would establish the ability to recognize the seeds here as marijuana seeds. Because there is not, we conclude there was no substantial basis for the issuing judge's probable cause finding. The evidence seized pursuant to that search warrant is suppressed. Accordingly, we reverse Stearns's convictions and sentences, and remand this matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.