IN THE COURT OF APPEALS OF IOWA

No. 1-201 / 10-0865
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellant,

vs.

HEATHER LYNN KRUGER,
Defendant-Appellee.

Appeal from the Iowa District Court for Osceola County, Nancy L. Whittenburg, Judge.

The State appeals the court's ruling suppressing evidence obtained pursuant to a search warrant. **AFFIRMED.**

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Robert E. Hansen, County Attorney, for appellant.

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

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

The State appeals the district court's ruling suppressing evidence obtained pursuant to a search warrant. We affirm.

I. Background Facts and Proceedings.

Around midnight on May 18, 2009, Officer Krikke knocked on the door at Heather Kruger's residence. When no one came to the door, he moved across the entry's raised porch and looked in the nearby window located to the left of the door. He observed alcohol containers. Officer Krikke stepped down from the front porch, crossed the yard, and stepped up into a raised flower bed to look in another window. He observed drug paraphernalia.

Officer Krikke's application for a search warrant for Kruger's residence was granted at 1:15 a.m. on May 19, 2009. In the early morning hours of May 19, the police executed the warrant. Based on the items seized, Kruger was charged: (1) in August 2009, with second-degree theft and possession of marijuana; and (2) in October 2009, with possession of a schedule III controlled substance without a prescription.

In October 2009, Kruger moved to suppress the evidence obtained during the search. At the hearing, the State agreed four of the ten items seized should be excluded from evidence, but argued:

> I would concede that when Deputy Krikke stepped into the fern bed or the flowerbed and he looked in that window that was a violation of curtilage of the residence. That was not a place where the owner would expect the public to come. So anything he saw there—if the entire search warrant was based on what he saw through that window, it would—the warrant would be bad.

> However, the observations that he saw when he was on the porch . . . at the front door, those are legal observations. . . . Those observations relate to alcoholic beverages.

In April 2010, the court granted Kruger's motion to suppress evidence. It ruled anything seen while looking through the window behind the flower bed "cannot be used to give probable cause for issuance of a search warrant." The court also ruled Kruger had "no expectation of privacy in the window [near] the front door. . . . Anyone passing by could reasonably walk up to the front door and, upon receiving no answer, peer in the window next to it." However, the court concluded the search violated Kruger's constitutional rights because officer Krikke's observation "of alcohol boxes and containers . . . is not enough for probable cause."

The State successfully sought discretionary review and now appeals.

II. Scope of Review.

The State challenges the district court's grant of Kruger's motion to suppress evidence based on the unconstitutionality of the search warrant. We review de novo in light of the totality of the circumstances. *State v. Prior*, 617 N.W.2d 260, 263 (Iowa 2000). "We do not make an independent determination of probable cause, but only determine whether the issuing [magistrate] had a substantial basis for finding the existence of probable cause." *State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004).

III. Probable Cause.

In evaluating "whether a substantial basis existed for finding probable cause, we are limited to consideration of only that information, reduced to writing,

which the applicant presented to the court at the time of the application for the warrant." *Id*.; *see State v. Thomas*, 540 N.W.2d 658, 661-62 (Iowa 1995) (holding "[i]t is well established . . . that the issuance of a search warrant is to be tested entirely by the recitals in affidavits and the magistrate's abstracts of oral testimony endorsed on the application"); *State v. Seager*, 341 N.W.2d 420, 426 (Iowa 1983) (stating "[w]e may not consider other relevant information in the record which was not presented to the magistrate").

"In determining whether probable cause has been established for the issuance of a search warrant, the test is whether a person of reasonable prudence would believe a crime was being committed on the premises to be searched or evidence of a crime could be located there." *Seager*, 341 N.W.2d at 426-27. "In reviewing the court's determination, we draw all reasonable inferences to support a court's finding of probable cause." *Davis*, 679 N.W.2d at 656.

"Probable cause to search, in contrast to probable cause to arrest, requires a probability determination as to the nexus between criminal activity, the things to be seized, and the place to be searched." *Seager*, 341 N.W.2d at 427. We require a sufficient nexus between the items to be seized and the alleged criminal activity: "Mere suspicion that the objects in question are connected with criminal activity will not suffice." *Id*.

Where, as here, officer Krikke's affidavit in support of the search warrant "contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself,

establishes probable cause for the warrant to issue." *See State v. Naujoks*, 637 N.W.2d 101, 113 (Iowa 2001). When "the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant," suppression is not warranted. *Id*.

Officer Krikke's affidavit, stripped of references to drug paraphernalia, provides:

> On May 18 at approximately 23:50 I went to the residence of Heather Kruger to speak with a male subject by the name of Jesse Richardson about some vandalism done the prior evening. I was told by his friend, Tiffany McKee, that he was at Kruger's and I also did observe a vehicle registered to Richardson's father on the road by Kruger's residence (See exhibit #2 [motor vehicle registration]). I went to the door and knocked. I then heard people moving around in the residence. I looked through the window and observed several beer cans and boxes lying in the residence. There are also several different types of liquor bottles on top of the fridge. I also observed a beer can lying in the front lawn. Kruger's date of birth is January 24, 1990. (See Exhibit #1 [Kruger's driver's license record with two, 2008 notations: "possession of alcohol—under legal age"]).

We note the total absence of any information that Kruger lived alone at the residence. Nor is this information contained in the magistrate's abstract: "The applicant supplies information of illegal alcohol possession by underage people. The officer observed the alcohol through the window of the household that is the subject of the warrant application."[1]

The Iowa Supreme Court recognizes "friends and family are likely to be present in a residential neighborhood." *Prior*, 617 N.W.2d at 263. Additionally, "a private place used as a residence also makes it likely that persons with no

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[1] We have removed the magistrate's references to drug paraphernalia.

connection to criminal activity may be present. . . . [T]here was no evidence . . . whether other persons may have resided in the [residence]." *Id*. Under these facts, absence of the tainted evidence of drug paraphernalia creates "grave doubts" the warrant would have been issued without it. *See Naujoks*, 637 N.W.2d at 113. We agree with and adopt the district court's resolution:

> However, [officer] Krikke's observation through the left window of alcohol boxes and containers alone is not enough for probable cause. [Officer Krikke] was there to interview Richardson and not called because of some disturbance at the home. Although Krikke states that he heard people running around, he did not see anyone actually possessing the alcohol and had no idea whether the alcohol containers/boxes had alcohol in them or were owned by [defendant Kruger]. The cases cited by the State in support of its argument, that Krikke's observations through the kitchen window provided probable cause, involve circumstances where law enforcement observed evidence of use or possession of controlled substances, generally an illegal activity. This case is distinguished by the fact that Krikke's observations were not of an activity that is generally not legal, such as the possession of controlled substances, but of an activity that is legal for persons over the age of twenty-one and not illegal under some circumstances for persons under the age of twenty-one. Krikke could not tell if the alcohol containers were full or empty, who possessed them or why, or who put the containers there. Further, he had no information on who was present in the home, if anyone, or the ages of those people. On the observation of alcohol containers or boxes alone, with no other information, there is insufficient evidence for a magistrate to determine that there is a crime being committed for issuance of a search warrant.
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> [T]he court finds that the State has failed to show probable cause for issuance of the search warrant. Accordingly, the court finds that the search of [defendant Kruger's] property violated her Fourth Amendment protections and the evidence derived therefrom must be suppressed.

AFFIRMED.