IN THE COURT OF APPEALS OF IOWA

No. 1-300 / 10-1109
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC LEE TYSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, David H. Sivright Jr. (motion to suppress) and Paul L. Macek (trial and sentencing), Judges.

Eric Lee Tyson appeals his convictions of possession with intent to deliver a Schedule I controlled substance and drug tax stamp violation. **AFFIRMED IN PART, VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Eric Lee Tyson appeals his convictions of possession with intent to deliver a Schedule I controlled substance and drug tax stamp violation. Because probable cause supported the search warrant, we conclude the motion to suppress was properly denied and we therefore affirm the convictions. However, the district court was not authorized to levy a DARE surcharge upon a chapter 453B violation, and we thus vacate that portion of the sentence.

I. Background Facts and Proceedings.

Upon execution of a search warrant for the premises located at 1446 West 15th Street in Davenport, a tan Chevy Impala registered to Eric Tyson, and Tyson's person, police found several pounds of marijuana, paraphernalia for weighing and packaging, and approximately $3000 in cash. Clothing and personal items found in the master bedroom and around the residence indicated Tyson lived there.[1] Tyson's fingerprints were found on packaging containing marijuana and look-alike marijuana. Tyson's name and the address 1446 West 15th Street, Davenport, were found on correspondence and on a prescription container found near drugs or drug paraphernalia in the residence.

Tyson was charged along with a codefendant[2] with possession with intent to deliver marijuana, in violation of Iowa Code sections 124.401(1)(d), 124.204(4)(m), and 703.1 (aiding and abetting) (2009), and a drug tax stamp

[1] The warrant application stated: "A utilities check through MidAmerican shows the utilities for 1446 West 15th Street in Davenport, Iowa were listed in the name of the codefendant since January 2007. The codefendant and her son also lived in the single-family dwelling.

[2] Charges against the codefendant were later dropped after the district court found the search warrant did not establish a sufficient nexus between the noted drug activity and the codefendant.

violation, in violation of sections 453B.1(3)(b), 453B.3, 453B.7(1), 453B.12, and 703.1. Tyson filed a motion to suppress alleging the search warrant issued was not supported by probable cause. The district court (Judge Sivright) denied the motion, finding Tyson had failed to show he had a legitimate expectation of privacy in McKnight's residence.[3]

Tyson's case was tried to the court sitting without a jury. The district court (Judge Macek) found Tyson guilty as charged and overruled his motions in arrest of judgment and for new trial. The court then imposed sentences as follows:

> Pursuant to your conviction to the charge of Possession with Intent, in violation of 124.401(1)(d)(2) of the Code, it is the sentence of this Court that you be—that you serve a period not to exceed five years' incarceration in the custody of the Iowa Department of Corrections, that you pay a fine of $1000, you pay the surcharge, the DARE penalty, the civil penalty of $125, your driver's license be revoked for 180 days, and you be subjected to DNA testing.
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> In respect to the verdict of guilt, Drug Tax Stamp Violation, in violation of section 453B.12 of the Code, it is the sentence of the Court that you be committed to the custody of the Iowa Department of Corrections not to exceed five years, and that you pay a fine of $750 plus surcharge, DARE penalty, and civil penalty, that your license be suspended for 180 days, again your driver's license, and that you be again subjected to DNA testing.

The sentences were to be served consecutively. A written calendar entry provides in part, "Defendant is ordered to pay court costs, $125 LEI surcharge under Count I and under Count 2, and $10 DARE surcharge."

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[3] On appeal Tyson asserts the district court erred in finding he did not have a reasonable expectation of privacy in the premises searched. The State concedes the motion to suppress cannot be justified on that ground. Thus, we address only whether the search warrant is supported by probable cause. The district court's failure to rule on whether probable cause supported the warrant as to Tyson is harmless as we review the matter de novo. *See State v. Johnson,* 756 N.W.2d 682, 686 (Iowa 2008).

Tyson now appeals, contending the district court (1) erred in denying his motion to suppress and (2) imposed an illegal sentence in levying a ten dollar DARE surcharge for the drug tax stamp conviction.

II. Discussion.

A. Motion to suppress. Tyson claims the search warrant was not supported by probable cause. We review de novo the facts and circumstances that led to the issuance of the search warrant to determine whether the magistrate had a substantial basis for concluding probable cause existed. *See State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004).

> The task of the judge issuing the search warrant is "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit" presented to the judge, there is a fair probability that law enforcement authorities will find evidence of a crime at a particular place. A finding of probable cause depends on "a nexus between criminal activity, the things to be seized and the place to be searched." In making that determination, the judge may rely on reasonable, common-sense inferences from the information presented. Close questions are resolved in favor of the validation of the warrant. In reviewing the court's determination, we draw all reasonable inferences to support a court's finding of probable cause.

Id. (citations omitted).

Considering all the facts presented in the application for a warrant and supporting affidavit, we find the magistrate did have substantial evidence to conclude probable cause existed. The search warrant applicant and affiant was a police officer with seven and one-half years of experience assigned to the Davenport Police Department as a narcotics investigator, who had been involved in the investigation of controlled substance offenses for two years. The affiant asserted that based upon his experience and knowledge, persons who possess

and sell controlled substances frequently maintain records, controlled substances, and proceeds from their sales in their residence. The application for the search warrant included a photograph of the residence at 1446 West 15th Street, which was a single-family dwelling with steps leading up to a front porch. In addition, the affidavit provided:

> 3. Members of the Tactical Operations Bureau received information from a Confidential Source [(CS)] in February 2008 that Eric Tyson was selling various amounts of marijuana from 1446 West 15th Street in Davenport, Iowa.
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> 4. Within the past 72 hours a CS controlled purchase was made from 1446 West 15th Street. Plans were formulated and the CS was searched for drugs, money, and/or contraband. Nothing was found. The CS was provided with official buy fund money. The CS was driven into the area by an undercover officer. Officers watched a subject get into a tan Chevy Impala bearing IA plates 359TJO (registered to Eric Tyson), which was parked in front of the residence. Officers watched the CS get into this vehicle and the purchase was made. The CS was picked up by the same undercover officer and the bag of marijuana was turned over to the officer. The CS said the driver, and the only person in the vehicle was Eric Tyson. After the buy was finished the CS was searched for drugs, money, and/or contraband. Again nothing was found. Surveillance continued on Tyson and it was later followed back to 1446 West 15th Street where this officer watched Tyson park the car in the same exact spot in front of the house. The driver exited the vehicle and this officer watched Tyson walk up to the porch of the residence. The substance tested positive for marijuana using the Valtox Text Kit.

Also listed were Tyson's January 2001, August 2001, January 2002, November 2002, and July 2005 arrests for possession of controlled substance or possession with intent to deliver dated.

Tyson argues we must ignore the allegations in paragraph 3 because the magistrate failed to make a specific finding that the confidential informant was credible, citing Iowa Code section 808.3 and *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). However, that case addressed the 1995 version of

section 808.3, *see McPhillips*, 580 N.W.2d at 749, which required that the magistrate

> *shall include a determination that the information appears credible* either because sworn testimony indicates that the informant has given reliable information on previous occasions or because the informant or the information provided by the informant appears credible for reasons specified by the magistrate. The magistrate may in the magistrate's discretion require that a witness upon whom the applicant relies for information appear personally and be examined concerning the information.

See McPhillips, 580 N.W.2d at 751 (emphasis added).

In 1998, however, section 808.3 was amended. *See* 1998 Acts ch. 1117, §1. It now reads in pertinent part,

> If the magistrate issues the search warrant, the magistrate shall endorse on the application the name and address of all persons upon whose sworn testimony the magistrate relied to issue the warrant together with the abstract of each witness' testimony, or the witness' affidavit. *However, if the grounds for issuance are supplied by an informant, the magistrate shall identify only the peace officer to whom the information was given. The application or sworn testimony supplied in support of the application must establish the credibility of the informant or the credibility of the information given by the informant.* The magistrate may in the magistrate's discretion require that a witness upon whom the applicant relies for information appear personally and be examined concerning the information.

Iowa Code § 808.3 (2009) (emphasis added). The magistrate is not required to make a written determination of the confidential source's credibility. Rather, the informant's credibility must be supplied in the warrant application, *id*., which we review under the totality of the circumstances. *Johnson*, 756 N.W.2d at 686.

Turning to the facts of this case, we find the totality of the circumstances as presented in the search warrant application and the common-sense inferences that a reasonable person may draw from them result in the conclusion

the issuing magistrate could reasonably have inferred the authorities would find evidence of drug activity at the residence to be searched. The applicant, Detective Scott Lansing, identified observations surrounding the recent controlled drug purchase by the informant that corroborated the informant's credibility and the defendant's drug activity. *See State v. Sykes*, 412 N.W.2d 578, 583 (Iowa 1987) (noting officer's observations of controlled buys bolstered reliability of confidential informant's information). Other factors of the informant's credibility were supplied in the warrant application: the affiant stated the confidential source was reliable because the person was a mature individual, a person of truthful reputation, had no motivation to falsify information, had supplied information three or more times, had been involved in "several CS controlled buys with our Unit, including this purchase," had not given false information in the past, and past information provided had led to the discovery and seizure of stolen property, drugs, or other contraband. *See State v. Niehaus,* 452 N.W.2d 184, 190 (Iowa 1990) ("Factors tending to enhance informant credibility include past reliability, . . . , whether the informant directly witnessed the crime or fruits of it in the possession of the accused, the specificity of the facts detailed by the informant, . . ., whether the informant was trusted by the accused, and whether the information was not public knowledge.").

Thus, the magistrate could reliably consider the information supplied in 2008 that Tyson was selling marijuana from the residence, which suggests ongoing activity. *See Gogg*, 561 N.W.2d 360, 367 (Iowa 1997) (noting "where the information presented to the issuing judge shows ongoing drug-related activities, the passage of time is less problematic because it is more likely that

these activities will continue for some time into the future"). The controlled purchase in a car parked in front of that same residence in March 2009 supports a reasonable inference that the residence is an operational base for Tyson's drug trade. *See id*.

We interpret the affidavit of probable cause "in a common sense, rather than a hypertechnical, manner." *Id*. at 363-64. "Close cases are decided in favor of upholding the validity of the warrant." *Id.* Given the facts presented to the magistrate—defendant's history of drug sales from the residence, the recent drug sale near the residence, and defendant's return to the residence—there was probable cause that evidence of criminal activity would be located within that residence. We conclude the motion to suppress was properly denied.

B. DARE surcharge on chapter 453B violation. We review a challenge to the legality of a sentence for errors at law. *State v. Carstens*, 594 N.W.2d 436, 437 (Iowa 1999).

Tyson argues the district court's imposition of a ten dollar DARE surcharge was error because such a surcharge is not authorized for the crime of drug tax stamp violation under chapter 453B. He asks that this portion of the sentence be vacated. We agree that chapter 453B violations are not included in the crimes listed in section 911.2[4] as being subject to a DARE surcharge.

[4] The relevant paragraphs of Iowa Code section 911.2 read:

> 1. In addition to any other surcharge, the court or clerk of the district court shall assess a drug abuse resistance education surcharge of ten dollars if a violation arises out of a violation of an offense provided for in chapter 321J or chapter 124, division IV.
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> 2. In the event of multiple offenses, the surcharge shall be imposed for each applicable offense. The surcharge shall not be assessed for any offense for which the court defers the sentence or judgment or suspends the sentence.

Therefore, we conclude the court imposed a fine not provided for by law. The DARE surcharge portion of the sentence imposed upon his conviction of the drug tax stamp violation is vacated.

AFFIRMED IN PART, VACATED IN PART.

The State urges us to read the phrase "arises out of a violation" of the listed offenses broadly to include chapter 453B violations. We will not do so.