

**IN THE COURT OF APPEALS OF IOWA**

No. 1-850 / 10-1706  
Filed February 29, 2012

**STATE OF IOWA,**  
Plaintiff-Appellant,

**vs.**

**MAURICE M. FORT and  
ETHAN S. NISSEN,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Clinton County, Charles H. Pelton,  
Judge.

On discretionary review, the State seeks reversal of a district court ruling  
that found a search warrant was not supported by probable cause. **REVERSED  
AND REMANDED.**

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

Robert J. McGee, Clinton, for appellee Nissen.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant  
Attorney General, Michael L. Wolf, County Attorney, and Amanda W. Trejo,  
Assistant County Attorney, for appellant.

Heard by Potterfield, P.J., and Danilson and Mullins, JJ.

**MULLINS, J.****I. Background Facts and Proceedings.**

On August 12, 2010, Officer David James applied for a search warrant, seeking to search a teal 2005 Pontiac Grand Prix and the car's four occupants (Benjamin Ross, Ethan Nissen, and two unknown males) for illegal drugs. See Iowa Code § 808.3 (2009). The application contained information from a confidential informant, who had informed Officer James that Ethan Nissen and Benjamin Ross had contacted his son offering to pay \$400 to rent a car to drive to Chicago and stated they were going to purchase acid (LSD) and ecstasy. The informant further explained that Nissen and Ross then found another car to drive, and were going to a specific business to have the car's oil changed before they left for Chicago. Officer James observed a car registered to Ross's family members at the specified business, with Nissen driving, Ross in the front passenger seat, and two unknown males in the back seats. The information supplied by the confidential informant was supported by the fact that Nissen and Ross were currently being investigated for selling illegal drugs and the "Clinton Police Department and State of Iowa Narcotics Investigators have done controlled buys of narcotics from Ross on several occasions in 2009 and 2010."

The application also included an informant credibility checklist completed by Officer James. Officer James indicated the informant was confidential because disclosure of his identity would "endanger [his] safety" and "impair [his] usefulness to law enforcement." Further, the informant was a "concerned citizen"

who Officer James had known for four years. The informant was described as a “mature individual,” “a well-respected family and/or business person,” and “a person of truthful reputation,” who was “regularly employed,” “has no known association with known criminals,” “no known criminal record,” had “no motivation to falsify the information,” and “had not given false information in the past.”

A district associate judge reviewed the application and completed a form titled “Endorsement on Search Warrant Application.” The judge indicated that he relied upon the testimony of Officer James and information supplied to Officer James by a confidential informant. The form included the following section:

\_\_\_ 4. The informant’s information appears to be credible because (select):

\_\_\_ A. Sworn testimony indicates that the informant has given reliable information on previous occasions; or,

\_\_\_ B. Sworn testimony indicates either the informant appears credible for the following reason (if credibility is based on this ground, the magistrate MUST set out the reasons here);

The judge put an “X” in the blank by the number four and letter A, but after section A handwrote: “See Attachment B.” The judge found the information was sufficient to justify probable cause and issued the warrant.

After returning from Chicago, the car and its three occupants were searched and cocaine, ecstasy, and marijuana were found. Consequently, Nissen, Maurice Fort, and Antwone Buchanan were charged with four drug-related counts each. Fort and Nissen moved to suppress the evidence obtained

as a result of the search, arguing the finding that the informant was credible was not supported by the record before the issuing judge.<sup>1</sup>

On September 17, 2010, the district court ruled:

The court finds that the judge shows on the endorsement to the search warrant application that the informant's information appeared credible because of 4A, "Sworn testimony indicates that the informant has given reliable information on previous occasions." Between 4A and 4B the handwritten note says, "See Attachment 'B'," (which is the form used for determining credibility of an informant). There is nothing checked on Attachment B which would be consistent with the informant having given reliable information on a previous occasion. The Court further Finds that the other alternative, 4B, for other grounds is not checked for determining credibility.

Thus, the court finds and concludes that the search warrant was improvidently issued without proper probable cause, and therefore the items seized must be suppressed.

The State moved for the district court to reconsider, arguing that the search warrant application demonstrated the credibility of the confidential informant and alternatively, a warrant was unnecessary because the search was justified by a search incident to arrest and probable cause combined with exigent circumstances. On October 1, 2010, the district court denied the State's motion to reconsider. The State sought discretionary review, which the supreme court granted and transferred the case to this court. See Iowa R. Crim. P. 2.12(2).

## **II. Warrant.**

The State first asserts the district court applied an incorrect standard in reviewing the issuance of the warrants. "Our review of the district court's

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<sup>1</sup> Buchanan filed a separate motion to suppress raising the same ground, which we address in *State v. Buchanan*, 2-210 / 10-1713 (Iowa Ct. App. \_\_\_\_\_ 2012).

determination concerning the statutory sufficiency of the search warrant is for correction of errors at law.” *State v. Myers*, 570 N.W.2d 70, 72 (Iowa 1997).

When a search warrant application is based upon grounds provided by a confidential informant, “[t]he 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.” Iowa Code § 808.3; *see also State v. Weir*, 414 N.W.2d 327, 331 (Iowa 1987) (interpreting the credibility provisions of section 808.3 as applying to confidential informants only). Under Iowa Code section 808.3, it is not required that the judge issuing the warrant make a written credibility finding.<sup>2</sup> Rather, the application and supporting testimony must be evaluated to determine whether the credibility of the informant was established.

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<sup>2</sup> In 1998 Iowa Code section 808.3 was amended. Prior to the amendment, the subject text read:

[I]f the grounds for issuance are supplied by an informant, the magistrate shall identify only the peace officer to whom the information was given *but 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.*

Iowa Code § 808.3 (1997) (emphasis added to text deleted by the 1998 amendments). Following the 1998 amendments, the subject text reads:

[I]f 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.*

Iowa Code § 808.3 (2009) (emphasis added to text replacing pre-1998 language).

The form utilized by the judge issuing the search warrant was written prior to the 1998 amendment so did not reflect the fact that following the amendment, section 808.3 no longer required a written credibility finding. *See State v. Myers*, 570 N.W.2d 70, 72, 73 (Iowa 1997) (explaining the standard form application conformed with Iowa Code section 808.3 (1997) and on that form a magistrate “must make specific findings that the confidential informant is credible based on one of the following grounds: (1) the informant has provided reliable information on previous occasions; or (2) the informant or information appears credible for reasons specified by the magistrate”).

In its ruling, the district court focused on the form completed by the district associate judge, rather than the information “supplied in support of the application” as section 808.3 requires. The court concluded that the content contained in the form was not adequate and consequently, there was not probable cause. The form, and thus the district court, imposed a requirement that the judge issuing a search make written findings that the confidential informant was credible. Because the district court applied an incorrect legal standard, we must reverse and remand to allow the district court to consider the defendants’ motion to suppress in light of the legal standard included in the current version of Iowa Code section 808.3. *See State v. Robinson*, 506 N.W.2d 769, 772 (Iowa 1993) (holding the district court’s reliance on an incorrect legal standard required reversal and remand to apply the correct legal standard).

**REVERSED AND REMANDED.**