IN THE COURT OF APPEALS OF IOWA

No. 1-897 / 11-0136
Filed February 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDREW BRUCE SHANK,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Jane F. Spande, District Associate Judge.

Andrew Shank appeals from the district court's denial of his motion to suppress evidence. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Brian Claney and Nicholas Maybanks, Assistant County Attorneys, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

DANILSON, P.J.

Andrew Shank appeals following his conviction and sentence for possession of marijuana, in violation of Iowa Code section 124.401(5) (2009). Shank contends the district court erred in denying his motion to suppress evidence seized pursuant to a search warrant. Upon our review, we find the issuing magistrate had a substantial basis for granting the portion of the search warrant seeking evidence of weapons and ammunition in connection with an ongoing burglary investigation. Because the evidence of controlled substances and paraphernalia were properly seized pursuant to that portion of the warrant, that evidence was properly admitted. Evidence of Shank's drug tests results were related to an invalid portion of the search warrant and should have been suppressed. However, even absent the evidence of the positive urine test results, we conclude substantial evidence exists to support Shank's conviction. We therefore affirm Shank's conviction and sentence for possession of marijuana.

I. Background Facts and Proceedings.

Andrew Shank's involvement in this case stems from the Marion Police Department's execution of a search warrant at the home of Jesse Akers on July 13, 2010. The search warrant application was initiated as part of an ongoing burglary investigation. It is helpful to first explain the background and information contained in the search warrant application, as the warrant is central to Shank's claim in this appeal.

On June 20, 2010, a burglary was reported during which "numerous long guns," ammunition and a Wii gaming system were stolen from a Marion

residence. The burglary victim suspected Curtis Grandon, Jesse Akers, and Porchia Frazier Jr., whom the victim knew to be associates. Grandon, a former friend of the victim's son, was familiar with where the guns were kept and knew the key code to open the garage door. Upon investigation of the burglarized house, officers collected a duffel bag that was missing a zipper pull. The duffel bag was partially loaded with ammunition and also contained a Jolly Rancher candy wrapper and a torn blue latex glove. Neighbors reported seeing a tall man exit a purple car, open the garage door using the keypad, and drive the car into the garage. Several minutes later, at least two people left the house quickly wearing blue gloves and got into the purple car. A neighbor viewed a photo line-up and picked Grandon as the man that opened the garage door. Neighbors described the purple car as having a missing hubcap with a partial plate number "631---."

Officers made contact with Grandon at his residence. Grandon was very defensive and initially refused to discuss where he was at the time of the burglary. He later stated he was playing videogames with a friend named Dunte, who lived in southeast Cedar Rapids. Police identified that friend as Dunte Blair, a known gang member who had been involved in previous shootings.

The Cedar Rapids Police Department located a purple Dodge Stratus missing a hubcap with license plate "631 XHE" parked in front of a house on the southeast side of the city. As the car was being towed, Kendrick Ankum and Sakariya Muhidin came outside. Both agreed to be interviewed. Officers learned Muhidin was an associate of Grandon and Blair; however, Muhidin provided an alibi for the burglary. Officers obtained consent to search the purple car from its

registered owner, Asha Said. In the car, officers found a torn blue rubber glove and an empty box of Jolly Rancher candy.

On July 9, 2010, Marion officers executed a search warrant at the home of Porchia Frazier Jr., whom officers knew to be an associate of Grandon and Akers. In Frazier's home, officers discovered two of the stolen guns, as well as ammunition the same caliber as the stolen ammunition, but a different caliber than the guns recovered. Frazier admitted to possessing the stolen guns, but refused to explain how he got them. Officers also found a zipper pull that matched the duffel bag left behind at the burglary scene.

Marion officers obtained a warrant for Akers' cell phone records. The records contained several text messages, including one from xxx-xxx-2615 on June 20, 2010, (the same day as the burglary) asking, "can u get any green[?]"[1] Later that day, Akers received a message from xxx-xxx-4681 asking, "U got any more guns bro[?]" Akers replied, stating, "no I live with my mom." The affidavit also reflects that Akers lived with his mother, Victoria Akers, at 900 South 7th Street in Marion.

Officers also obtained a warrant for the records of a cell phone used by Liban Muhidin, Asha Said's son. The night before the burglary, Liban received a text message from xxx-xxx-2615 stating, "hey lee ima need the car 8 in the morning so I can get thos guns remember me and porchia where you at." The xxx-xxx-2615 phone number was the same number that had texted Akers requesting marijuana.

[1] According to the affiant, an experienced law enforcement officer, "green" refers to marijuana.

Officers were also aware that Akers was arrested on June 18, 2010, for public intoxication and possession of marijuana. Additionally, officers knew that on May 4, 2008, they had executed a search warrant on Akers' house and found stolen liquor and drug paraphernalia.

Marion Police Officer Lance Miller applied for a warrant to search the Akers' residence. The application requested to search:

> [T]he residence, the garage, any out buildings located upon the property, any vehicle of which the owner or operator is present at, or a resident of 900 S 7th Street, Marion, IA 52303. Further, the search to include the forensic examination of any electronic data storage device and/or any bodily fluids collected pursuant to the execution of this search warrant.

The affidavit supporting the application contained the aforementioned information of Jesse Akers' past involvement with illegal drugs while he apparently lived at the same residence. A magistrate granted the search warrant on July 12, 2010.

On July 13, 2010, officers arrived to execute the search warrant at the Akers' residence. When they entered, Akers and defendant Andrew Shank, another resident of the home, ran and locked themselves in a bedroom. Akers later admitted to police he and Shank were "throwing" evidence while locked in the bedroom. Officers searched the bedroom and found a plastic bag of marijuana behind the dresser, Shank's I.D. on the dresser, and a marijuana pipe and bong on a shelf in the closet. Police searched Shank and found a plastic bag of ground up oxycodone pills in his hat. Subsequently, while secured in the patrol car, Shank attempted to conceal an oxycodone pill under the seat. A urine sample taken from Shank showed the presence of THC.

On August 11, 2010, the State filed a trial information against Shank, charging him with possession of marijuana, in violation of Iowa Code section 124.401(5), and unlawful possession of a prescription drug, in violation of section 155A.21. On October 18, 2010, Shank filed a motion to suppress the evidence seized from him, arguing the search warrant application did not contain probable cause to believe the items would be found in the location sought, there was no nexus of criminality contained in the affidavit, and the information was stale. Shank therefore alleged the search violated the protections of the Fourth Amendment to the United States Constitution and article 1, section 8 of the Iowa Constitution against unreasonable search and seizure. The State resisted the motion.

On November 12, 2010, a hearing was held on Shank's motion to suppress. The district court denied the motion, finding the facts and circumstances set forth in the search warrant application, along with reasonable inferences, supported the issuance of the search warrant for the Akers residence as of July 12, 2010. As the court stated in part:

> To the extent guns stolen on June 20 were located at Frazier's residence on July 9, it is not unreasonable to believe that remaining guns might be located at the residence of Grandon's and Frazier's other known associates three days later. It is further probative that stolen property was previously located at the Akers residence. Finally, it is not unreasonable to conclude that illegal drugs and drug paraphernalia would likely also be present at Akers' residence since Akers was charged with possession of marijuana on June 18, received a text message asking about having some green on June 19, and drug paraphernalia was previously found in the Akers residence during execution of a search warrant in 2008. Admittedly, the discovery of contraband during search of the Akers' residence two years earlier would not alone support a later search for similar contraband, [but] the result of that earlier search is probative as to whether illegal drugs and paraphernalia are likely to

> be found at the residence where as here there is other evidence of recent possession of illegal drugs by one of the current occupants of that residence.

Following a bench trial, the district court found Shank guilty of possession of marijuana. Shank received a two-day sentence, a $315 fine, and a 180-day driver's license suspension. The charge of unlawful possession of a prescription drug was dismissed.

Shank now appeals. He contends the district court erred in denying his motion to suppress. He argues the search warrant must fail because it: contained stale information; was not supported by probable cause, and should not have contained an "all persons" portion. Accordingly, Shank argues, his conviction should be reversed.

II. Standard of Review.

Because Shank'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. Pals*, ___ N.W.2d ___, ___ (Iowa 2011). This review requires us to make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Lowe*, ___ N.W.2d ___, ___ (Iowa 2012). However, we do not make an independent finding as to the existence of probable cause; we consider only whether the issuing magistrate had a substantial basis for his finding. *State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004). Our inquiry is limited to the information, reduced to writing, that was actually presented to the issuing magistrate at the time the application for the warrant was made. *Id.*

Here, the evidence introduced at trial consisted solely of the minutes of testimony stipulated to by the parties. If there is substantial evidence to uphold the verdict, it must be affirmed. *State v. Webb*, 648 N.W.2d 72, 75-76 (Iowa 2002).

III. Error Preservation.

The State argues Shank failed to preserve error on his "all persons" contention, but acknowledges the other search warrant issues were preserved for our review. We agree Shank's "all persons" argument was not preserved for appeal. The issue was not raised before the district court, and the court did not rule on the issue. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Further, Shank did not seek to expand the court's ruling to address such a claim. *Id*. at 537-38. Accordingly, we may only address the "all-persons" claim in the context of an ineffective-assistance-of-counsel claim on appeal, which Shank alternatively argues. *See State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) ("Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules."). However, in light of our findings on Shank's other claims, as discussed below, we need not reach the issue of his trial counsel's effectiveness.

IV. Discussion.

The standard to be applied when reviewing the issuance of search warrants is well established:

> The existence of probable cause to search a particular area depends on whether a person of reasonable prudence would believe that evidence of a crime might be located on the premises to be searched. 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.

Davis, 679 N.W.2d at 656 (citations omitted).

Shank brings his claims under both the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Evidence obtained in violation of the Fourth Amendment is inadmissible. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005). Through the Fourteenth Amendment to the United States Constitution, the Fourth Amendment is binding on the states. *State v. Carter*, 696 N.W.2d 31, 37 (Iowa 2005). The Iowa Constitution additionally assures "[t]he 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. Although these provisions use nearly identical language and were generally designed with the same scope, import, and purpose, we retain authority to follow an independent approach under our state constitution. *Pals*, ___ N.W.2d at ___.

A. Staleness. Shank alleges the search warrant application submitted by Officer Miller contained stale information. He states the application "included that Akers' residence had been searched in May 2008, and stolen liquor and drug paraphernalia was found." Shank argues "[t]his information was so stale that it should not have been used to support a probable cause determination."

Important in determining whether probable cause exists is whether the information upon which a belief is based is "current and not remote in time." *State v. Gogg*, 561 N.W.2d 360, 367 (Iowa 1997). When considering the timeliness of information provided in an affidavit, "the observations are assumed to have occurred on the most remote date within the time period mentioned in the affidavit." *Id.* However, information does not become stale by the passage of time alone. *Id.* Instead, courts will consider the circumstances of each case. *Id.*

As the State points out, the reference to the May 2008 search of Akers' residence is "just one piece of information from the warrant application." Indeed, the district court acknowledged in its ruling on the motion to suppress that the 2008 discovery of paraphernalia at the Akers' residence would not by itself support a finding of probable cause in 2010:

> Admittedly, the discovery of contraband during search of the Akers' residence two years earlier would not alone support a later search for similar contraband, [but] the result of that earlier search is probative as to whether illegal drugs and paraphernalia are likely to be found at the residence where as here there is other evidence of recent possession of illegal drugs by one of the current occupants of that residence.

Where an isolated observance of a drug offense is involved, "probable cause diminishes quickly," due in large part to the fact drugs are "readily consumable or transferable." *Id.* By contrast, where information concerning

ongoing drug-related activities is presented to a magistrate, "the passage of time is less problematic because it is more likely that these activities will continue for some time into the future." *Id.* In addition, staleness is less of a concern when the information is considered as corroboration. *See United States v. Wagner*, 989 F.2d 69, 75 (2d Cir.1993) ("Facts of past criminal activity that by themselves are too stale can be sufficient if the affidavit also establishes a pattern of continuing criminal activity so there is reason to believe that the cited activity was probably not a one-time occurrence."); *see also United States v. Palega*, 556 F.3d 709, 715 (8th Cir. 2009) (stating that although some of the information in an affidavit was two years old, when combined with information as recent as five days prior to the warrant application, it "describes a continuing pattern of behavior, and when taken as a whole, the information is not stale").

Here, the district court determined the 2008 information was relevant in the context of more recent evidence of Akers' involvement with illegal drugs; namely, his June 18, 2010 arrest for possession of marijuana, and his June 20, 2010 text message. Under these circumstances, the district court properly considered the May 2008 search as corroboration evidence.

B. Probable Cause. Shank raises several other points which he argues fail to establish probable cause that the residence would contain stolen guns or illegal substances. Specifically, Shank argues the application failed to indicate: whether a witness had been provided a photo line-up in order to identify Akers; how many long guns were taken from the burglary; the source of the incriminating text messages sent to Akers' phone; and the amount of drugs Akers was found with when he was arrested several days prior to the execution of the

search warrant. In other words, Shank claims the application and supporting documents do not establish probable cause on the basis that there was no nexus between the items sought and the place to be searched.

We are to determine "whether the issuing court had a substantial basis for finding the existence of probable cause." *State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004). When determining whether probable cause exists at the time a warrant is issued, the test 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." *Gogg*, 561 N.W.2d at 363.

> While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'

Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct. 2317, 2330, 76 L. Ed. 2d 527, 546 (1983) (quoting *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 590, 21 L. Ed. 2d 637, 645 (1969)). The issuing magistrate need not apply a hypertechnical analysis, but "may rely on 'reasonable, common sense inferences' from the information presented." *Gogg*, 561 N.W.2d at 363–64. All reasonable inferences are drawn to support the magistrate's finding of probable cause, and great deference is given to the magistrate's finding. *Id.* at 364. Close cases are decided in favor of upholding the validity of the warrant. *State v. Poulin*, 620 N.W.2d 287, 290 (Iowa 2000).

1. Stolen Weapons and Ammunition. Several sources in the application acknowledged Akers was a known associate of Grandon and Frazier. Grandon was identified from a photo line-up to be at the scene of the burglary; a search of

Frazier's residence had uncovered two of the "numerous" stolen guns, as well as stolen ammunition. The affidavit implicates three individuals in the burglary from an eyewitness to the entry. A narcotics search warrant executed at the Frazier residence on July 9 resulted in the seizure of two stolen guns and some ammunition not useable in the guns seized. Akers' phone received a text message later during the day of the burglary asking, "U got any more guns bro[?]" Akers also received a text message that day asking about marijuana; the message was from the same number that had texted Liban Muhidin the day before asking, "hey lee ima need the car 8 in the morning so I can get thos guns remember me and porchia where you at." In addition, officers also knew that in May 2008, they had executed a search warrant on Akers' house and found stolen liquor and drug paraphernalia. The district court pieced the facts together best when it stated:

> Since "numerous guns" were stolen during the June 20 burglary, a reasonable person could conclude not all of those guns were recovered from the Frazier residence on July 9. That conclusion is also buttressed by the fact other ammunition found was not useable in the guns seized. The discovery of two of the guns along [with] ammunition for them at Frazier's residence implicated Frazier in the burglary and also corroborated the victim's initial reports as to the persons responsible. That is, the officers reasonably could give weight and credit on the victim's claim that Frazier associated with Grandon and further could give weight and credit on the victim's claim that Jesse Akers associated with Grandon and Frazier. Jesse Akers' knowledge of, if not the involvement in, the burglary is also reasonably inferred from the text message to the cell phone used by him, asking within 24 hours of the burglary "u got any mo guns bro." The relationship of that message to the burglary is reasonably inferred not only by the date and time of the message but the declared association of Grandon and Frazier with Akers.
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> To the extent guns stolen on June 20 were located at Frazier's residence on July 9 it is not unreasonable to believe that remaining guns might be located at the residence of Grandon's and Frazier's

> other know associate three days later. It is further probative that stolen property was previously located at the Akers' residence.

Our supreme court, in addressing whether a nexus existed to establish probable cause, has also observed that "[r]egarding the required nexus among the crime, the items sought, and the places to be searched, we have held that it is reasonable to infer that stolen property would be found at a defendant's residence." *State v. Gathercole*, 553 N.W.2d 569, 574 (Iowa 1996) (citing *State v. Iowa Dist. Ct.*, 247 N.W.2d 241, 249 (Iowa 1976)). In support of this inference, the court cited from an authority that noted:

> Perhaps because stolen property is not inherently incriminating in the same way as narcotics and because it is usually not as readily concealable in other possible hiding places as a small stash of drugs, courts have been more willing to assume that such property will be found at the residence of the thief, burglar or robber.
>
> [In addition, w]here the object of the search is a weapon used in the crime or clothing worn at the time of the crime, the inference that the items are at the offender's residence is especially compelling, at least in those cases where the perpetrator is unaware that the victim has been able to identify him to the police.

Gathercole, 553 N.W.2d at 574 (quoting Wayne R. LaFave, *Search & Seizure* § 3.7(d), at 381-82, 384 (3d ed. 1996)).

There is also considerable support from various courts that have found the evidence still fresh after one month or more where the warrant permitted a search for guns or weapons on the basis that weapons are not easily disposed of. *United States v. Medlin*, 798 F.2d 407, 410 (10th Cir. 1986) (one month); *United States v. McCall*, 740 F.2d 1331, 1337 (4th Cir. 1984) (eight months); *United States v. Marriott*, 638 F. Supp. 333, 334-35 (N.D. Ill. 1986) (one year). Considering the facts and circumstances presented in the application, as well as reasonable inferences from the facts, we conclude the magistrate had a

substantial basis for finding probable cause existed for the issuance of the warrant permitting the search of the Akers' residence for weapons and ammunition.

2. Controlled Substances and Paraphernalia. As the court observed in *Gathercole*, 553 N.W.2d at 574, the inference that stolen weapons may be stored at a residence does not equally apply to small amounts of drugs. Further, because controlled substances have not been shown to be reasonably related to the burglary of the guns and ammunition, seizure of the controlled weapons must rely upon an independent basis for their admissibility. *State v. Hamilton*, 236 N.W.2d 325, 329 (Iowa 1975) ("'[A]n officer may seize evidence of a crime even though such property is not particularly described in the search warrant when the objects discovered and seized are reasonably related to the offense in question . . . .'") (quoting *Bell v. State*, 482 P.2d 854, 860 (Alaska 1971)).

Here, most of the facts recited in the affidavit relate to the burglary offense and the stolen weapons. The only facts supporting the issuance of the warrant for marijuana or controlled substances may be summarized as follows:

> 1. Akers' residence had been searched in May 2008, and stolen liquor and drug paraphernalia were seized.
> 2. Akers resides at 900 S 7th Street, Marion, IA.
> 3. Akers and Shank associate together.
> 4. Akers was arrested on June 18, 2010, for possession of marijuana.
> 5. A text message received on Akers' phone on June 20, 2010, stated, "can u get any green," and the affiant, an experienced law enforcement officer, explained that the word "green" is a term for marijuana.

These facts fail to provide any nexus between criminal activity, the things to be searched, and the place to be searched. *State v. Randle*, 555 N.W.2d 666, 671 (Iowa 1996).

Not a single allegation in the affidavit claims anyone had observed drugs in the residence or evidence of drug trafficking. In general, there must be current evidence that connects drug usage or possession directly to the property to be searched, or evidence the individual possessed a large quantity of drugs when apprehended in order to permit an inference the individual was involved in drug trafficking. *See State v. Padavich*, 536 N.W.2d 743, 748 (Iowa 1995) (warrant upheld where drugs and drug use were observed at the location to be searched); *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992) (finding the large quantity of drugs possessed by the individual permitted a reasonable inference that evidence of drug trafficking would be located at the individual's residence). Here, simple possession of marijuana provides no reasonable basis to infer that Akers would possess marijuana twenty-five days later at his residence. In fact, the affiant does not identify where Akers possessed marijuana on June 18 or the amount he possessed. The only protracted activity reflected by the affidavit and supporting documents is that Akers possessed drug paraphernalia, two years later he possessed marijuana, and someone by the name of Tyleia asked him if he could get some marijuana. The affiant did state that the text "indicates that Akers is involved in the distribution of marijuana." Perhaps if the text had stated, "can you get any *more* green," we could agree. But we are unwilling to jump to the same conclusion, particularly where an unknown individual makes a single request for drugs and there is no other evidence of trafficking.

The State argues the full conversation does indeed suggest drug dealing. The full conversation includes the following:

> 11:31:31: can u get any green
> 11:31:51: who this
> 11:32:35: tyleia
> 11:34:17: when yall get back then I can

The last text of this conversation suggests, if anything, Akers did not have marijuana. Neither the text nor the affidavit identifies "Tyleia," where Tyleia may be, or when Tyleia may "get back." There is simply nothing in this conversation that might suggest Akers would have marijuana in his possession at his residence on July 13. The simple possession of marijuana on June 20 and the text received on June 18 constitute stale facts that do not provide the necessary nexus to the residence to be searched. As a result, we conclude the magistrate did not have a substantial basis for finding probable cause. The fact marijuana was found does not save this portion of the warrant.

3. Seizure of Marijuana Pursuant to Weapons Portion of Warrant. Where a warrant is valid in part, the questionable portion may be severed. *United States v. Brown*, 984 F.2d 1074, 1077-78 (10th Cir. 1993).

> [T]he infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant . . . , but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain view grounds, for example—during their execution).

United States v. Fitzgerald, 724 F.2d 633, 637 (8th Cir. 1983). As the court stated in *Brown*, 984 F.2d at 1077-78:

> At least eight circuits have held that where a warrant contains both specific as well as unconstitutionally broad language, the broad portion may be redacted and the balance of the warrant

> considered valid. . . . In such cases, only those items confiscated under the overbroad portion of the warrant are suppressed.
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> In both *United States v. Holzman*, 871 F.2d 1496, 1512 (9th Cir. 1989), and *United States v. George*, 975 F.2d 72, 78-80 (2d Cir. 1992), the courts recognized that the seizure of articles found in plain view could be upheld if part of the warrant was valid. They reasoned that if the officers were legally upon the premises under any set of circumstances, items in plain view could be legitimately seized. *See also Horton v. California,* 496 U.S. 128, 138–39, 110 S.Ct. 2301, 2309, 110 L.Ed.2d 112 (1990) (if officer has lawful right of access, discovery of other incriminating evidence need not be inadvertent).

Our supreme court also reached the same conclusion in *Gogg*, 561 N.W.2d at 364, when it observed, "If a warrant is held to permit places to be searched or items to be seized for which probable cause is lacking, the warrant is nevertheless valid for those places and items described for which probable cause exists."

Accordingly, because the search warrant was valid for the stolen guns, anything properly seized pursuant to that portion of the warrant was valid. *Brown*, 984 F.2d at 1077-1078; *Gogg*, 561 N.W.2d at 364. Further, "if entry of the premises is authorized and the search is valid, the Fourth Amendment does not inhibit the seizure of property the possession of which is a crime . . . ." *State v. Wesson*, 150 N.W. 284, 286 (Iowa 1967). Here, there is no contention that all the guns were seized prior to observing the marijuana, a fact that might have limited the scope of the search.[2] Under these facts, the contraband found on the premises was illegal to possess, and the law enforcement officers were entitled to seize it. *Id*. Accordingly, Shank's constitutional rights were not impinged by the admissibility of the marijuana.

[2] The search warrant log reflects that no guns were located.

4. Seizure of Urine Sample Pursuant to Controlled Substances Portion of Warrant. In contrast, the urine sample and drug test results are related to the invalid portion of the search warrant, and Shank was entitled to have that evidence suppressed.

5. Substantial Evidence Supports the Conviction. Shank asks that his conviction be reversed. The verdict must be upheld if it is supported by substantial evidence. *Webb*, 648 N.W.2d at 75-76. We have carefully reviewed the district court's finding of fact, conclusions of law, and verdict, as well as the stipulated minutes of testimony. We are satisfied that, even absent the evidence of the positive urine test results, substantial evidence exists to support and affirm Shank's conviction.[3] When police entered to execute the search warrant at the Akers' residence, Jesse Akers and defendant Shank ran and locked themselves in a bedroom. Akers later told police Shank had smoked some marijuana and he and Shank were "throwing" evidence while locked in the bedroom. Officers searched the bedroom and found a plastic bag of marijuana behind the dresser, Shank's I.D. on the dresser, and a marijuana pipe and bong on a shelf in the closet. These items were found in places officers would have legally searched while looking for guns and ammunition pursuant to the warrant.

V. Conclusion.

Upon our review, we find the issuing magistrate had a substantial basis for granting the portion of the search warrant seeking evidence of weapons and

[3] In light of our conclusion that evidence of the positive urine test should have been suppressed, we need not address Shank's remaining claim that his trial counsel was ineffective in failing to challenge the "all persons" portion of the warrant application requesting to search "bodily fluids (urine samples) of persons determined to be residing at the residence."

ammunition. Because the evidence of controlled substances and paraphernalia could be properly seized pursuant to that portion of the warrant, that evidence was properly admitted. Evidence of Shank's drug tests results were related to the invalid portion of the search warrant and should have been suppressed. However, even absent the evidence of the positive urine test results, we conclude substantial evidence exists to support Shank's conviction. We therefore affirm Shank's conviction and sentence for possession of marijuana.

AFFIRMED.