IN THE COURT OF APPEALS OF IOWA

No. 7-358 / 06-1096
Filed June 13, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTT LYNN BLOW,
Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, William L. Dowell, Judge.

Scott Blow appeals following his conviction for manufacturing marijuana and failure to affix a tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Darin Stater, County Attorney, and Michael Riepe, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

Scott Blow appeals following his conviction for manufacturing marijuana and failure to affix a tax stamp. He asserts the State failed to establish in its warrant application that there was probable cause to search his property.

I. Background and Facts

On August 18, 2005, Henry County Deputy Sheriff Dean Walter participated in a "drug interdiction flyover" with a member of the Iowa National Guard.[1] Because he had received some reports indicating illegal activity in the area, Walter pre-selected Blow's property for flyover. As they flew over Blow's property, Walter noticed marijuana plants approximately 153 feet[2] from a shed on Blow's property and a path going from the plants to an area between Blow's home and shed. The plants were outside the area that was mowed or maintained around the home and shed. It was later determined they were not on Blow's property. Although the marijuana plants were located between Blow's acreage, a farm field, and a wooded area, Walter did not determine who owned the field or the wooded area.

A deputy was posted on the property to maintain security while a search warrant was obtained. Walter executed an affidavit for a search warrant based on what he had observed during the flyover. A warrant was issued that day. In his affidavit, Walter stated the "patch of marijuana was located at residence consisting of a mobile home and a large metal roofed building." A search was

[1] During an interdiction flyover, the National Guard provides a helicopter, and local law enforcement searches for evidence of marijuana or methamphetamine manufacturing.

[2] Although the search warrant stated the marijuana plants were located approximately seventy-five to one hundred yards from the shed, at trial Walter testified they were 153 feet from the shed.

conducted of Blow's property. Officers discovered abundant evidence of marijuana manufacturing and use, including bags of marijuana, scales, rolling papers, pipe screens, and grow lights.

Blow was charged with two counts of manufacturing marijuana, second offense, in violation of Iowa Code sections 124.401(1)(d) and 124.411 (2005) and two counts of failure to affix a tax stamp in violation of section 453B.12. Blow filed a motion to suppress on January 23, 2006, which the State resisted, requesting all physical evidence from the search be suppressed for lack of probable cause.[3] The motion was denied.

Following a May 9, 2006 jury trial, Blow was convicted of the charges and sentenced to an indeterminate term of fifteen years on the manufacturing convictions and five years on the tax stamp convictions and was fined $3000 ($750 for each offense). Blow appeals.

II. Merits

Blow's challenge to the finding of probable cause by the court that issued the warrant to search his property is based on constitutional grounds. Our review, therefore, is de novo. *State v. Davis*, 679 N.W.2d 651, 655-56 (Iowa 2004). "We do not make an independent determination of probable cause, but only determine whether the issuing court had a substantial basis for finding the existence of probable cause." *Id.* at 656. We will draw all reasonable inferences to support the court's determination of probable cause and will resolve close questions in favor of validating the warrant. *Id.*

[3] Blow acknowledged that he did not have proper standing to challenge the twenty-nine growing marijuana plants that were not located on his property.

a. False Statements

Blow contends the search warrant was invalid with respect to his shed, home, and other areas located on his property. He argues the search warrant affidavit contained false statements which should be disregarded in determining probable cause, and in the absence of such statements, no probable cause existed.

The Fourth Amendment of the United States Constitution and the Iowa Constitution guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV; Iowa Const. Art. 1, § 8. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Court*, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752, 764 (1972). "If evidence is obtained in violation of the Fourth Amendment, it is inadmissible regardless of its relevancy or probative value." *State v. Lloyd*, 701 N.W.2d 678, 680 (Iowa 2005).

Under the Fourth Amendment, a search warrant must be supported by probable cause. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). A "totality of the circumstances" standard is used to determine whether probable cause has been established. *Davis*, 679 N.W.2d at 656 *(citing Illinois v. Gates,* 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). "Probable cause to search requires a probability determination as to the nexus between criminal activity . . . and the place to be searched." *State v. Ripperger*, 514 N.W.2d 740, 746 (Iowa Ct. App. 1994). The issuing judge simply makes a "'practical, common-sense decision whether, given all the circumstances set forth

in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information,' probable cause exists." *Gogg*, 561 N.W.2d at 363 (quoting *Gates,* 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548). In making the decision, "the judge may rely on reasonable, common-sense inferences from the information presented." *Davis*, 679 N.W.2d at 656.

Blow contends the search warrant was invalid with respect to his property because there was no nexus established between the marijuana plants and his property since Walter "made false statements that should be extracted from the application." Walter acted with reckless disregard for the truth, Blow argues, when he stated the "marijuana was located at residence," and that the residence was Blow's, because (1) the marijuana was not "at" Blow's residence, (2) the area which encompassed the marijuana was not Blow's residence, and (3) there was no showing Blow actually resided at the house.[4] Blow asks this court to also consider Walter's "reckless failure" to inform the magistrate of other pathways leading from the marijuana plants to other properties. He asserts that, without these false statements, there was an insufficient nexus between his property and the marijuana plants.

"To impeach a search warrant, . . . [t]here must be allegations of deliberate falsehood or of reckless disregard for the truth." *Ripperger*, 514 N.W.2d at 745. The defendant "bear[s] the burden of establishing an intentional or reckless

[4] The State acknowledges that Blow preserved error on his lack of probable cause claim by filing a motion to suppress. The State asserts that Blow did not preserve his claim that he was not residing at the house because the issue was raised at trial rather than in the motion to suppress. We need not determine the preservation issue because we find that any lack of showing that Blow actually resided at the house did not constitute false statement or a reckless disregard for the truth.

misrepresentation." *Gogg*, 561 N.W.2d at 364. The affiant's conduct must be more than mere negligence or mistake. *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998). If an affiant made a false statement in a search warrant "with reckless disregard for the truth, the Fourth Amendment requires the statement be deleted from the affidavit and the remaining contents be scrutinized to determine whether probable cause appears." *State v. Groff*, 323 N.W.2d 204, 206-07 (Iowa 1982) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978)). "A 'false' affidavit statement is one which misleads the magistrate into believing the existence of certain facts which enter into his thought process in evaluating probable cause." *Id.* at 210.

Blow does not contend Walter deliberately falsified the search warrant application, rather that he acted with reckless disregard for the truth. We agree with the trial court that Blow "has failed to establish by a preponderance of the evidence that false statement included in the affidavit was included by Deputy Walter . . . with a reckless disregard for the truth." As the trial court noted, the word "at" is commonly used more broadly to indicate presence "near" an area. In the context of this case, any distinction between the terms "at" and "near" is negligible. Therefore, Walter's statement that the marijuana plants were "at" Blow's residence did not constitute a reckless disregard for the truth, did not have the potential for misleading the magistrate, and was not "false" for the purpose of determining probable cause. *See Groff*, 323 N.W.2d at 210 (concluding the affiant's statement regarding ownership of a field was not "false" where any distinction between the terms "own" and "farm" was negligible).

Similarly, Blow asserts that the area which encompassed the marijuana plants was not his residence and there was a lack of showing that Blow actually resided at the house. He argues that these false statements or a reckless disregard for the truth should be disregarded in determining probable cause, and in the absence of such statements, no probable cause existed. First, Blow owned the searched premises. Second, Walter confirmed that the area searched was the correct mailing address for Blow, notwithstanding that he may have been living in Burlington at the time. Finally, he was still receiving his mail at the searched premises. Given this information, it was reasonable for Walter to conclude that this was Blow's residence. Even if this were not his "residence" and this statement was disregarded, probable cause would still have existed for the issuance of the warrant.

The magistrate was told the plants were seventy-five to one hundred yards from a shed on Blow's property, with a path leading from the plants to an area between the house and the shed. Whether Blow was actually residing in the house or the marijuana plants were actually on his property, it was reasonable for the magistrate to make the common-sense inference from the information presented that there was a nexus between the crime – manufacturing a controlled substance – and Blow's property, where evidence of the crime would be located. *See Davis*, 679 N.W.2d at 656; *Ripperger*, 514 N.W.2d at 746.

Further, Walter's failure to inform the magistrate of other pathways leading from the plants to other properties does not constitute reckless disregard for the truth. "The omission of facts rises to the level of misrepresentation only if the omitted facts 'cast doubt on the existence of probable cause.'" *Ripperger*, 514

N.W.2d at 745 (citation omitted). The existence of pathways leading to a field and to a wooded area would not cast doubt on the likelihood there was some nexus between the plants and Blow's property. *See id.* at 746.

b. Probable Cause

Blow further contends that, even if the false statements are considered, the affidavit failed to show probable cause. He argues "[s]imply because criminal activity is taking place on another's nearby property is not enough of a nexus to establish probable cause that criminal activity is taking place on the defendant's property." Considering the totality of the circumstances, we find the affidavit supported the court's conclusion that probable cause existed for the issuance of the search warrant. Notwithstanding the paths leading from the marijuana plants to a field and a wooded area, or the fact that there is a lane to Blow's property that serves another residence, the plants were proximately located to a shed on Blow's property, with a path leading from the plants to Blow's property. Moreover, Blow had previously been convicted of manufacturing marijuana, and in making a probable cause determination, a magistrate may consider other relevant factors, including a suspect's history of involvement with drugs. *State v. Padavich*, 536 N.W.2d 743, 748 (Iowa 1995). The information presented to the magistrate was sufficient to make the "'practical, common-sense decision'" that probable cause existed. *See Gogg*, 561 N.W.2d at 363 (citation omitted).

III. Conclusion

Upon our careful de novo review, we find the trial court properly denied Blow's motion to suppress, and we affirm his convictions. Walter's statements that the marijuana plants were "at" Blow's residence and that Blow resided at the

property did not constitute reckless disregard for the truth and were not "false" for the purpose of determining probable cause. Moreover, considering the totality of the circumstances, the affidavit supported the court's conclusion that probable cause existed for the issuance of the search warrant.

AFFIRMED.