IN THE COURT OF APPEALS OF IOWA

No. 8-021 / 07-0790
Filed March 26, 2008

STATE OF IOWA,
Plaintiff-Appellant,

vs.

LYSA MARIE FISK,
Defendant-Appellee.

Appeal from the Iowa District Court for Tama County, Amanda Potterfield, Judge.

The State appeals the district court's ruling granting the defendant's motion to suppress evidence obtained during the execution of a search warrant. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Linda J. Hines and Mary Tabor, Assistant Attorney Generals, and Brent D. Heeren, County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, Jason Shaw, Assistant State Appellate Defender, and Michael Marquess, Public Defender, Marshalltown, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

The State charged the defendant, Lysa Fisk, with possession of a controlled substance, second offense, in violation of Iowa Code section 124.401(5) (2005). The defendant filed a motion to suppress the evidence an officer obtained during the execution of a search warrant at the defendant's apartment. The district court found the evidence inadmissible because the search warrant was not supported by probable cause. The State appeals this conclusion. We reverse and remand.

I. BACKGROUND.

The application for the search warrant related that on December 1, 2006, at approximately 8:40 a.m., Tama police chief, Daniel Wilkens, went to an apartment building where defendant lived. Wilkens was responding to a complaint a vehicle had been left in the street. The vehicle was registered to defendant and showed her as living at the address in apartment number 25. The apartment building had a foyer. In the foyer were mailboxes, an intercom, and a secured door that led to the apartments. The public could enter the door to the foyer and use the intercoms to contact residents. Visitors could only go through the secured door to the apartment units if given access by the residents. Wilkens noted the name Lysa Fisk on the intercom button marked "25." He pushed button "25" and asked the woman who replied if she were Lysa Fisk and she replied she was. He then asked if he could come to her apartment to discuss the vehicle. She refused Wilkens's request but agreed to come to the foyer.

When the defendant entered the foyer through the secure door, Wilkens detected "a strong odor of burnt marijuana." When asked if she were Lysa Fisk

she responded in the affirmative. The defendant and Wilkens discussed the vehicle for approximately three minutes. The defendant told Wilkens about the vehicle and asked if she could give him the vehicle and get rid of it. Wilkens related during the conversation the odor of marijuana stayed very strong. Wilkens secured a key to the complex. He walked through the area where he and defendant had been standing and there was no odor of marijuana. Wilkens walked through the hallways but could no longer detect the smell of marijuana. He knocked on the defendant's door but no one answered. He did not smell marijuana when he knocked on her door. There was no smell of burnt marijuana anywhere in the building except when he conversed with defendant.

Wilkens applied for the search warrant, believing the defendant had been smoking marijuana in her apartment because of the strong odor he detected when she entered the foyer and while he was speaking with her. In the application, Wilkens stated he believed grounds existed for the search due to the events that occurred that morning and because the defendant had a previous conviction in 2002 for possession of a controlled substance. Wilkens included that his beliefs were based on twenty-five years of law enforcement experience. A judge issued the warrant and after serving it to the defendant, Wilkens found several pipes and a tin box containing marijuana in the defendant's apartment.

The defendant was arrested and charged with possession of a controlled substance. She pleaded not guilty and filed a motion to suppress the evidence discovered in the execution of the search warrant. Following a hearing, the court granted her motion, finding the warrant was not supported by probable cause.

The State filed a motion for discretionary review. The Supreme Court granted the motion and stayed the district court proceedings.

II. SCOPE OF REVIEW.

Since the defendant challenged the search warrant on constitutional grounds, our review is de novo. *State v. Lewis*, 675 N.W.2d 516, 521 (Iowa 2004). We will independently analyze the claim considering the totality of the circumstances. *State v. McGrane*, 733 N.W.2d 671, 675 (Iowa 2007). "We do not, however, make an independent determination of probable cause; we merely decide whether the issuing judge had a substantial basis for concluding probable cause existed." *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). In making this determination, we are "'limited to consideration of only that information, reduced to writing, which was actually presented to the [judge] at the time the application for warrant was made.'" *Id.* (quoting *State v. Godbersen*, 493 N.W.2d 852, 855 (Iowa 1992)). "[W]e draw all reasonable inferences to support the judge's finding of probable cause" and "[c]lose cases are decided in favor of upholding the validity of the warrant." *Id.* at 364.

III. PROBABLE CAUSE.

The federal and Iowa constitutions demand that warrants only be issued if there is probable cause. U.S. Const. amend. IV ("no Warrants shall issue, but upon probable cause . . . ."); Iowa Const. art. I, § 8 ("no warrant shall issue but on probable cause . . . ."). If a warrant is issued without probable cause, any evidence obtained during the warrant's execution is inadmissible at trial regardless of the evidence's probative value. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995). Probable cause is present when "'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 (quoting *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987)).

In deciding whether the affidavit information provides probable cause, the issuing judge or magistrate must make a probability determination as to whether the items sought in the warrant are likely to be related to criminal activity and whether the items are likely to be found in the place to be searched. *Id.* The probability determination is not made in a technical manner. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Gates*, 462 U.S. at 231, 103 S. Ct. at 2328, 76 L. Ed. 2d at 544 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879, 1890 (1949)). The judge or magistrate should look to whether, under the totality of the circumstances, the information in the affidavit is credible and shows a basis of knowledge for the information. *Gogg*, 561 N.W.2d at 363; *see also State v. Randle*, 555 N.W.2d 666, 670 (1996) (explaining that Iowa follows the "totality of the circumstances" test). "In so doing, the judge may rely on reasonable, common-sense inferences from the information presented." *State v. Poulin*, 620 N.W.2d 287, 290 (Iowa 2000).

When a warrant application requests the search of a particular place, the applicant "must establish by reasonable inference that there is a nexus between the place to be searched and the items to be seized." *State v. Ballew*, 456

N.W.2d 230, 231 (Iowa 1990). The nexus does not need to be established through direct observation of the items to be seized at the place to be searched. *State v. Groff*, 323 N.W.2d 204, 212 (Iowa 1982). An adequate connection can be shown "by considering the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items." *Id.*

The defense argued in its motion to suppress that probable cause was lacking because there was an insufficient nexus between the items to be seized and the place to be searched. The defense maintained that the officer's smell of marijuana in the public foyer of the apartment building did not lead to a reasonable inference that marijuana would be in the defendant's apartment. According to the defense, because the odor was noticed in the public foyer, the smell could have been coming from any of the apartments, from other common areas, or wafting from outside of the building. The insufficient nexus is confirmed, the defense alleges, since the officer could not identify the source of the smell after getting a key and walking through the hallways of the building.

The district court found an insufficient nexus between the smell coming from defendant's person and her apartment to support a finding of probable cause. The court found the defendant could have been smoking marijuana at any number of locations, including other apartments in her building and since the odor was only detected in the common area, the court determined there was no nexus between the odor and the defendant's apartment. We respectfully disagree with this conclusion.

As stated above, a magistrate makes a probable cause determination by considering the totality of the circumstances and is permitted to employ common-sense inferences in its analysis. *See Gogg*, 561 N.W.2d at 363. However, the inferences establishing a nexus between the criminal activity and the place to be searched are limited by a standard of reasonableness. *See Poulin*, 620 N.W.2d at 290. We find the magistrate had a substantial basis for a finding of probable cause and could reasonably infer from the circumstances that evidence of the defendant's drug use was located in her apartment.

The search warrant was supported by probable cause. No other tenants or persons were around when the officer smelled marijuana. Wilkens's warrant application stated, "there was no odor of burnt marijuana anywhere in the building except when I was having the conversation with [the defendant]." The officer detected the odor while talking with the defendant, after the defendant had immediately exited her apartment. The probable cause determination is a question of probabilities. *See Gates*, 462 U.S. at 231, 103 S. Ct. at 2328, 76 L. Ed. 2d at 544. Although it is possible that the smell was coming from another apartment or that the defendant left her apartment after talking to the officer on the intercom to smoke marijuana elsewhere, our standards of review do not focus on possibilities but on "reasonable common-sense inferences from the information presented." *Poulin*, 620 N.W.2d at 290. In this case, the magistrate reasonably could have inferred that Fisk acquired the smell of marijuana after smoking it in the apartment from which she came. *Id.* (upholding warrant issued for apartment following search of garbage shared by tenant of another apartment).

The facts show there was direct evidence of drug use connected with the defendant's apartment. The officer conversed with defendant while she was in her apartment and she agreed to come to the foyer, and she came there smelling of burnt marijuana. The foyer is connected to the defendant's apartment unit and is the entryway leading to her apartment. *See Groff*, 323 N.W.2d at 212 (holding "magistrate could reasonably infer that defendants' residence was the likely location for processing the marijuana" based on quantity of marijuana observed in field near residence and officer's statement that, in his experience, operation required location near growing area to process plant for distribution and use); *State v. Dickerson*, 313 N.W.2d 526, 531 (Iowa 1981) (stating that officers are not expected to wear blindfolds in common areas and the property owner must expect the officer to see all that is visible). This odor, personally detected by the officer, coupled with the officer's experience provided the magistrate with a substantial basis for concluding that probable cause existed. *See State v. Simmons*, 714 N.W.2d 264, 272-74 (Iowa 2006) (finding probable cause and exigent circumstances justifying a warrantless search when officers smelled anhydrous ammonia in an apartment complex hallway and knew of no household uses for it).

> If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant.

Johnson v. U.S., 333 U.S. 10, 13, 68 S. Ct. 367, 369, 92 L.Ed. 436, 440 (1948) (finding no exigent circumstances to justify a warrantless search of a hotel room

when officers detected an opium odor in the hallway, but suggesting the odor may have been sufficient grounds for issuance of a search warrant).

The officer sought a warrant for the defendant's apartment because this is where the defendant was prior to her coming to the foyer where he detected the smell. When the officer obtained a key and walked through the building and knocked on the defendant's door, the smell had dissipated. This fact does not imply there was no longer reason to believe drug evidence was present in the apartment given that drug evidence can be quickly disposed of or hidden. The officer in this case sought a warrant as soon as possible to determine the source of the burning marijuana smell before evidence could be destroyed. Probable cause still existed at the time the warrant was issued.

There was a substantial basis for the magistrate to find probable cause existed for issuing a search warrant for the defendant's apartment. The officer's detection of a burning marijuana odor on the defendant in the foyer of her apartment building led to the reasonable inference that evidence of drug use was in her apartment. We reverse the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.