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County Court's Reliance on "Neb. Rev. Stat. § 77-2018.5"

The county court cited a statute which does not exist, "Neb. Rev. Stat. § 77-2018.5," in support of its factual determination that the value of Craven's residence for inheritance taxation purposes was the auction sale price of the home. The county interprets the court's reference to "§ 77-2018.5" as one to § 77-2018.05 and argues that such reliance was misplaced. However, the record does not establish which statute the court meant when it cited § 77-2018.5, so we do not speculate as to whether the court intended to cite § 77-2018.05. Regardless, the county court's erroneous citation to a nonexistent statute was harmless error. The county court has jurisdiction, pursuant to chapter 77, article 20, to make estate valuation determinations for purposes of inheritance taxation. And as previously discussed, the court did not err when it determined that the value of this particular property, for inheritance taxation purposes, was $113,000.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the county court.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ROCKY J. SHARP, APPELLANT.

795 N.W.2d 638

Filed February 11, 2011. No. S-10-622.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, an appellate court will uphold its findings of fact unless they are clearly erroneous. But an appellate court reviews de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Rocky J. Sharp appeals his conviction and sentence on one count of possession with intent to deliver a controlled substance. The primary issue on appeal is whether a search warrant for Sharp's residence and person authorized a search of his person which was conducted approximately 1½ blocks from the residence. We conclude that it did.

FACTS AND PROCEDURAL BACKGROUND

On March 1, 2010, Omaha police officer Kalon Fancher submitted an affidavit and application for issuance of a search warrant to the county court for Douglas County. The affidavit stated that Fancher had reasonable grounds to believe that

> [c]rack cocaine and its derivatives, . . . scales and packaging materials commonly used in the distribution of illicit drugs[,] monies and proceeds associated with the sales of illicit drugs[,] firearms and ammunition used to protect an illegal narcotics operation[, and] [r]ecords [of] illegal narcotics operation . . . .
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> . . . [were] concealed or kept in, on, or about the following described place or person to wit: [a particular residence on] N 28th Street, Omaha, Douglas County, Nebraska, . . . AND/OR SHARP, . . . a black male with the date of birth . . . AND/OR HICKS, Candice a black female with the date of birth . . . .

The affidavit stated that the premises expected to contain contraband also included all vehicles that were under the control of Sharp and Candice Hicks, and noted that Sharp drove a 1997 Mitsubishi Montero with a specific license plate number and that Hicks drove a 2005 Pontiac Grand Prix with a specific license plate number. The affidavit further stated a reliable

confidential informant had told Fancher within the previous 72 hours that crack cocaine was being sold from the North 28th Street residence noted in the affidavit and that a "black male and a black female" lived there. The informant told Fancher that within the previous 7 days, he had seen the black male carry a firearm inside the residence.

Fancher further averred that he had conducted a background check and found that Sharp was a convicted felon with prior arrests for possession with intent to deliver crack cocaine, possession of crack cocaine, felon in possession of a firearm, and delivery of a controlled substance; Sharp also had multiple prior arrests for possession of marijuana. Fancher also averred that Hicks was a convicted felon and had prior arrests for possession with intent to deliver crack cocaine and possession of a controlled substance. The affidavit requested authorization for a nighttime search and a no-knock warrant.

A search warrant based on Fancher's affidavit was issued on the same day. The warrant stated that based on the affidavit, there was

> probable cause to believe that concealed on the premises located at [the] N 28th Street [address], Omaha, Douglas County, Nebraska, . . . AND/OR SHARP, . . . a black male with the date of birth . . . AND/OR HICKS, . . . a black female with the date of birth . . . who resides or is in control of the afore described premises,

were the items described in Fancher's affidavit, including crack cocaine, firearms, and records of illegal narcotics operations. The warrant stated that the officers were therefore ordered "to search theafore [sic] described location and/or person, for the purpose of seizing the before described property." The warrant further authorized a nighttime, no-knock search of the premises.

On March 2, 2010, Fancher and another officer conducted surveillance on the North 28th Street residence prior to executing the search warrant. The officers noticed that the Mitsubishi vehicle identified in the affidavit in support of the search warrant was not parked at the premises. Because the officers knew there was only one street leading to the premises, they decided to wait at a nearby intersection to see whether the vehicle

would appear. When the Mitsubishi came through the intersection a short time later, the officers immediately stopped it. The stop occurred approximately 1½ blocks from the North 28th Street residence.

Fancher testified that he observed no traffic violation prior to the stop. He stopped the vehicle because he recognized Hicks, who was identified in the search warrant, as its driver, and he believed that the warrant authorized a search of the vehicle. The parties in this appeal agree that the affidavit requested authority to search the vehicle, but that the warrant did not authorize its search.

Once the vehicle was stopped, the officers asked both Hicks and her male passenger, Sharp, for identification. After Sharp's identification was confirmed, Fancher had Sharp step out of the vehicle, handcuffed him, and then patted him down for weapons. During the pat-down, Fancher felt an object which he believed to be a plastic bag containing a soft substance in one of Sharp's pockets. He removed the object, which proved to be a bag containing marijuana. After completing the pat-down, Fancher left Sharp with the other officer, who conducted a more extensive search and found crack cocaine in the inside pocket of Sharp's jacket.

Sharp was then placed in a police cruiser and transported to the police station. Fancher orally advised Sharp of his *Miranda* rights after he was placed in the cruiser. At the police station, a strip search was conducted and another small bag containing crack cocaine was found concealed in Sharp's underwear.

After Sharp dressed, Fancher questioned him. Sharp admitted during this questioning that he used crack cocaine and that he smoked it with marijuana. He also stated that he gave crack cocaine to family and friends and that he did not give it to them "out of the goodness of his heart." Fancher then left Sharp at the police station and executed the search of the premises, which yielded a scale, loose marijuana, and plastic baggies.

Sharp was subsequently charged with possession with intent to deliver a controlled substance. He filed a motion to suppress the evidence found on his person and the statements he made at the police station, alleging that the stop of the Mitsubishi

and the search of his person were illegal. After conducting an evidentiary hearing, the district court denied the motion to suppress. In its order, the court found that the officers had a good faith belief the search warrant authorized a search of the vehicle and that their conduct in stopping the vehicle was not sufficiently deliberate or culpable so as to trigger the exclusionary rule. The court also found that the officers had probable cause to stop the vehicle based upon the information in Fancher's affidavit and application for a search warrant. The court further found that Sharp was identified in the warrant as subject to search and that nothing in the warrant limited the search of his person to a search at the described premises. Finding both the stop of the vehicle and the search of Sharp's person to be lawful, the district court denied the motion to suppress.

Sharp waived his right to a jury trial and was tried to the court based on stipulated facts while preserving the issue raised by his motion to suppress. He was found guilty of possession with intent to deliver a controlled substance and sentenced to 3 to 5 years' incarceration. Sharp subsequently filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

Sharp assigns that the district court erred in failing to suppress all evidence used against him resulting from the unlawful stop and search.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, we will uphold its findings of fact unless they are clearly erroneous.[2] But we review de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.[3]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[2] *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010); *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009).

[3] *Id.*

ANALYSIS

Sharp's broad assignment of error is narrowed by his argument, which challenges the legality of the vehicle stop and the subsequent search of his person. With regard to the vehicle stop, Sharp argues that the good faith exception articulated in *United States v. Leon*[4] is inapplicable because there was no error in the search warrant, only in the officers' belief that it authorized a search of the vehicle. Sharp argues that the search warrant did not authorize a search of his person conducted away from the premises identified in the warrant and that because of this, all evidence and statements obtained by police during the vehicle stop and subsequent search of his person must be suppressed under the Fourth Amendment exclusionary rule.

Officers Were Justified in Stopping Vehicle

The district court determined that the officers stopped the vehicle in the erroneous but good faith belief that it was specifically mentioned in the search warrant.[5] But the court also found that "based upon the totality of circumstance [sic] there is ample evidence in the affidavit and application to support a finding of probable cause to stop the vehicle that [Sharp] was riding in." Although Sharp argues that the district court erroneously applied the *Leon* good faith exception to this case, he does not challenge the court's alternative finding that the officers had probable cause to stop the vehicle.

We agree with the district court that based upon what Fancher knew about the activities of Sharp and Hicks, as set forth in the affidavit and application, he had probable cause to stop the vehicle.[6] Because we conclude that the officers had justification for stopping the vehicle independent of the search warrant, we need not reach the question of whether the *Leon* good faith exception applies.

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[4] *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

[5] See *id.*

[6] See *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

Search Warrant Authorized Search of Sharp's Person Away From Premises

In deciding whether the search of Sharp's person was valid, we first consider whether a search warrant may lawfully be issued with respect to a person as distinguished from a place. Sharp directs us to *Zurcher v. Stanford Daily*,[7] in which the U.S. Supreme Court held that a search warrant may properly be issued for premises notwithstanding the fact that the owner or possessor is not reasonably suspected of criminal conduct. In reaching its conclusion, the Court noted: "Search warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized."[8] But *Zurcher* did not hold that search warrants cannot be directed at persons. To the contrary, state and federal courts, including the U.S. Supreme Court, have long recognized that a search warrant may be issued for a person as long as the requisite showing of probable cause is made.[9] One commentator has noted that "[t]here is no inherent defect in a single warrant which authorizes search of a place and also a person . . . ."[10] We agree.

Because much of Sharp's argument is premised on *Michigan v. Summers*,[11] the next step in our analysis is to determine the applicability of that case to the issue presented here. In *Summers*, police had a warrant authorizing the search of a

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[7] *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

[8] *Id.*, 436 U.S. at 555, quoting *United States v. Kahn*, 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974).

[9] See, *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *United States v. Ward*, 682 F.2d 876 (10th Cir. 1982); *State v. Brown*, 245 Kan. 604, 783 P.2d 1278 (1989); *State v. Ballou*, 148 Vt. 427, 535 A.2d 1280 (1987); *People v. Sunday*, 109 Ill. App. 3d 960, 441 N.E.2d 374, 65 Ill. Dec. 461 (1982); *People v Sherman*, 68 Mich. App. 647, 244 N.W.2d 3 (1976).

[10] 2 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 4.9(a) at 703 (4th ed. 2004).

[11] *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981).

house for narcotics. As police were about to execute the warrant, the defendant came out of the house and descended the front steps. The police detained him while they searched the premises and ultimately arrested him after discovering contraband. The defendant challenged his detention. In addressing its validity, the Court examined both the character of the intrusion on the defendant's Fourth Amendment rights and its justification. The Court reasoned that because the police had a warrant to search the premises, the rights' intrusion was minimal. It further reasoned that the minimal intrusion was justified because law enforcement had a legitimate interest in preventing the defendant's flight, in minimizing the risk of harm to officers, and in ensuring an orderly completion of the search. Ultimately, the Court held that a warrant to search premises for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is being conducted.

Sharp argues that *Summers* establishes a limited exception to a general rule that "authority to search stops at the threshold,"[12] and that unless the criteria of *Summers* are met, an individual may not be searched away from the premises identified in a search warrant. Sharp appears to contend that his general rule applies regardless of whether the person to be searched is specifically named in the search warrant.

In support of this argument, Sharp relies in part on *Parks v. Com.*,[13] in which the Supreme Court of Kentucky noted that "courts have applied the *Summers* exception even when the search warrant authorizes search of both the premises and the owner/occupant." But the Florida and Maryland appellate opinions cited by the *Parks* court for this proposition make no mention of any individual being specifically named in the search warrants at issue.[14] And other than *Parks*, the cases which Sharp cites in support of his argument that an off-premises detention and search of a person is prohibited unless it meets

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[12] Brief for appellant at 13.

[13] *Parks v. Com.*, 192 S.W.3d 318, 333 (Ky. 2006).

[14] See, *Fromm v. State*, 96 Md. App. 249, 624 A.2d 1296 (1993); *State v. Thomas*, 603 So. 2d 1382 (Fla. App. 1992).

the *Summers* criteria did not involve warrants which specifically authorized the search of a named person.[15] We conclude that *Summers* provides the criteria for permissible detention, during the execution of a search warrant, of persons who are either unnamed in the warrant or identified only generically as "residents" or "occupants" of the premises. *Summers* would therefore apply to this case only if the search warrant does not specifically authorize a search of Sharp's person.

We therefore turn our attention to the language of the search warrant itself and the affidavit and application upon which it was issued. The affidavit asserted the officer's belief that crack cocaine was being sold from the North 28th Street residence and that Sharp and Hicks, who resided there, had prior convictions and multiple arrests for drug-related offenses. The application alleged that crack cocaine and other items utilized in or associated with the distribution and sale of illicit drugs were kept or concealed on the "place or person" of the North 28th Street residence "AND/OR SHARP . . . AND/OR HICKS." Similarly, the search warrant found probable cause to believe that contraband was concealed on the premises "AND/OR SHARP . . . AND/OR HICKS" and specifically authorized law enforcement officers to search the "location and/or person."

Based upon this language, we conclude that the search warrant was not narrowly focused on Sharp's presence at the residence, but was more broadly applicable to the illicit drug activity which he was alleged to be conducting from that residence. The warrant identified three sources of concealed contraband: the residence, the person of Sharp, and the person of Hicks. The use of the phrase "and/or" connecting the place and persons to be searched authorized a search of the residence, both named persons, or any one of the three. And we agree with the district court that there is no language in the search warrant which required that the search of the named persons be conducted at the identified premises. The language of the warrant

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[15] See, *U.S. v. Sherrill*, 27 F.3d 344 (8th Cir. 1994); *U.S. v. Hogan*, 25 F.3d 690 (8th Cir. 1994); *United States v. Boyd,* 696 F.2d 63 (8th Cir. 1982); *State v. Ruoho*, 685 N.W.2d 451 (Minn. App. 2004).

distinguishes this case from *People v. Green*[16] and *People v Kerrigan*,[17] on which Sharp relies. It is closer to the language of search warrants which were held to authorize an off-premises search of named persons in *People v Carter*,[18] *People v. Velez*,[19] and *People v. Gonzalez*.[20] We conclude that the search warrant was personal to Sharp and authorized a search of his person on or off the premises identified in the warrant.

CONCLUSION

For the reasons discussed, the district court did not err in denying Sharp's motion to suppress. The evidence which was the subject of that motion was properly received and established Sharp's guilt of the offense charged. We affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

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[16] *People v. Green*, 33 N.Y.2d 496, 310 N.E.2d 533, 354 N.Y.S.2d 933 (1974).

[17] *People v Kerrigan*, 49 A.D.2d 857, 374 N.Y.S.2d 22 (1975).

[18] *People v Carter*, 56 A.D.2d 948, 392 N.Y.S.2d 712 (1977).

[19] *People v. Velez*, 204 Ill. App. 3d 318, 562 N.E.2d 247, 149 Ill. Dec. 783 (1990).

[20] *People v. Gonzalez*, 316 Ill. App. 3d 354, 736 N.E.2d 157, 249 Ill. Dec. 315 (2000).