

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. FRAZIER

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STATE OF NEBRASKA, APPELLEE,

V.

WILLIE C. FRAZIER, APPELLANT.

Filed September 11, 2012. No. A-11-931.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge.
Affirmed.

Thomas C. Riley, Douglas County Public Defender, and John P. Ashford for appellant.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

INTRODUCTION

Following a trial by jury, Willie C. Frazier was convicted in Douglas County District Court of possession of a deadly weapon by a prohibited person. Frazier was also found to be a habitual criminal and was sentenced to 16 to 30 years' imprisonment. Frazier challenges the denial of his motion to suppress based primarily on his claim that the affidavit supporting the search warrant was insufficient, the district court's instruction regarding the element of possession, and the sufficiency of the evidence to support his conviction. Frazier also asserts that the district court imposed an excessive sentence. Finding no merit to Frazier's assignments of error, we affirm his conviction and sentence.

BACKGROUND

Christopher Perna, an officer with the Omaha Police Department, applied for a search warrant on February 10, 2011, seeking permission from the court to search premises located at a particular address in Omaha for marijuana, money, telephones, records, and weapons used to

conduct an illegal narcotics operation. In support of the search warrant application, Perna stated in an affidavit that he was investigating an anonymous tip received from a person who stated that Rodney Anthony, who lives at the premises, was selling crack cocaine and marijuana from the home. Perna confirmed that Anthony had provided the same address during contacts with other police officers, that the address was on his driver's license, and that the utilities for the address were in Anthony's name. Perna also discovered that Anthony had numerous marijuana charges, was sentenced to 1 year's imprisonment in 2004 for possession with intent to distribute crack, and spent 4 years in a federal penitentiary for conspiracy to distribute a controlled substance, crack, in 2004. Anthony also had several arrests involving weapons.

Perna's affidavit further stated that on February 9, 2011, he went to Anthony's address on "trash day" and located a trash bag sitting outside near the street. The trash was likely put out the night before and was seized at 5 or 6 a.m. Perna transported the bag to a secure facility and located loose, green plant material resembling stems in the bag. Perna knew from his experience that the items were a byproduct of marijuana. Perna also located an envelope with Anthony's name and address on it. Later that day, Perna received confirmation from the forensic laboratory that the materials tested positive for marijuana.

Perna requested a no-knock search warrant, because the evidence being sought could easily be destroyed by flushing it down a toilet or sink. Perna also was aware of several gun charges which may pose a threat to the officers executing the search warrant. A no-knock search warrant was obtained on February 10, 2011, and executed on February 16 by an Omaha Police Department SWAT team.

Officer Paul Milone operated the iron "ram" that knocked in the door. Officer Thad Trosper was the first member of the SWAT team inside the residence. Trosper observed an individual on the floor next to a glass table. Trosper gave a command to the individual not to move. The individual was later identified as Frazier. There was also a woman on the floor to the left of Frazier. No one else was in the home.

When Milone entered the residence, he made contact with Frazier, who was on the floor of the living room next to a coffee table. For the officers' safety, Milone said to Frazier, "Sir, you're known to carry firearms. Do you have a gun on you now?" Frazier responded, "Yes, I have one by my right hand." A handgun was found in the position that Frazier indicated, approximately 6 to 8 inches from Frazier's right hand.

Officer Scott Beran, another member of the SWAT team that executed the warrant, assisted in clearing the house and then returned to the living room where Frazier had been located. Prior to Beran's securing Frazier in handcuffs, he was able to view the gun just a few inches from Frazier's right hand. An officer arrived to take photographs of the scene without moving the firearm or Frazier. After the photographs were taken, Beran retrieved the gun, dropped the magazine from it, and cleared the round which was in the chamber. The magazine contained an additional 10 rounds. No latent fingerprints were found on the gun.

Perna took Frazier into the kitchen area of the house to interview him. Frazier told Perna that Anthony is his nephew. After reading Frazier his *Miranda* rights, Frazier agreed to speak with Perna. Frazier told Perna that he was living at Anthony's residence and sleeping on the couch. Perna told Frazier that officers located a handgun within Frazier's reach or close to Frazier's person, and Frazier acknowledged that it was there and that he pointed it out to the

officers. Frazier stated that Anthony had been a victim of home invasion robberies recently and that Frazier had a handgun for protection.

The warrant and inventory was returned on March 1, 2011. The inventory included a gun that was found in the living room “next to Frazier” and one live round from the gun’s chamber. In other areas of the house, officers also seized surveillance cameras, bullets, bills, marijuana, hydrocodone pills, crack pipes, and cash.

On March 15, 2011, the State filed an information in Douglas County District Court charging Frazier with possession of a deadly weapon by a prohibited person, a Class ID felony, and possession of a stolen firearm, a Class III felony. The State also alleged that Frazier was a habitual criminal.

Frazier filed a motion to suppress all evidence seized from the residence because the evidence was obtained in violation of his constitutional rights. Frazier alleged that the search warrant was not supported by sufficient evidence to establish probable cause and that the execution of the search warrant by force and without notice violated his Fourth Amendment rights.

The court heard testimony and received a copy of the search warrant application and search warrant into evidence. Based upon this evidence, the district court found that the search warrant was validly issued and was supported by sufficient probable cause. It further found that the service was done within the time limit specified by statute. Accordingly, the court denied the motion to suppress.

A jury trial was held on August 4 and 5, 2011. Prior to the commencement of the trial, the State dismissed the charge of possession of a stolen firearm. The parties stipulated that Frazier had a prior felony record and was thus a “prohibited person.” Testimony was heard from the various police officers, crime laboratory technicians, and the chief deputy clerk of the district court as outlined above.

At the jury instruction conference, Frazier objected to the court’s proposed instruction defining the element of possession. Frazier proposed a jury instruction defining “possession” as “either knowingly having the object on one’s person; or knowing of the object’s presence, having the ability to control it, and the intent to do so.” The court rejected this proposed instruction and overruled Frazier’s objection to the court’s instruction of the definition of possession.

Following deliberations, the jury found Frazier guilty of possession of a deadly weapon by a prohibited person. The district court accepted the jury’s verdict, ordered an enhancement hearing on the habitual criminal allegation, and ordered a presentence investigation. On October 7, 2011, an evidentiary enhancement hearing was held to determine whether Frazier was a habitual criminal as charged in the information. The evidence indicated that Frazier was convicted of eight felonies from April 1994 to March 2004. The court found that Frazier was a habitual criminal.

A sentencing hearing was held on October 18, 2011. The court sentenced Frazier to 16 to 30 years’ imprisonment, with the first 10 years of the sentence to run without good time credit. Frazier subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Frazier assigns that (1) the district court erred in denying his motion to suppress, (2) the district court erred in its jury instruction regarding possession, (3) the evidence adduced at trial was insufficient to find him guilty beyond a reasonable doubt, and (4) the sentence imposed was excessive.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress, based on a claim of insufficiency of the affidavit supporting the warrant, will be upheld unless the court's findings are clearly erroneous. *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008). In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. *State v. Lammers*, 267 Neb. 679, 676 N.W.2d 716 (2004). The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *Id.*

In connection with a challenge to the execution of a search warrant, in reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.*

Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). In an appeal based upon a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Fremont*, 284 Neb. 179, 817 N.W.2d 277 (2012). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

An appellate court will not disturb a sentence imposed within statutory limits absent an abuse of discretion by the trial court. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

ANALYSIS

Motion to Suppress.

Frazier asserts that the district court erred in denying his motion to suppress and allowing the resulting seized evidence to be presented at trial. In connection with this assignment of error, Frazier presents three separate arguments, which we address in turn. Frazier first argues that the warrant lacked probable cause because it failed to establish the reliability of the confidential informant.

A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010). Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id.* Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time. *Id.* In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test. *Id.* The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *Id.* In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *Id.*

Where a search warrant is obtained on the strength of information from an informant, the affidavit must set forth facts showing the basis of the informant's knowledge of the criminal activity. *State v. Lammers*, 267 Neb. 679, 676 N.W.2d 716 (2004). An informant's reliability may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Hernandez*, 268 Neb. 934, 689 N.W.2d 579 (2004).

In the present case, Perna relied upon an anonymous tip which stated that drug activity was occurring at the residence occupied by Anthony. There is no evidence indicating that the informant in the instant case had given reliable information in the past, that the informant was a citizen informant, or that the informant's statement was against his or her penal interest. Thus, the question is whether the affidavit supports a finding of reliability of the informant established by a police officer's independent investigation.

Perna's independent investigation included his verification that Anthony lived at the premises. Perna stated in his affidavit that Anthony's driver's license listed the same address, the utilities at the address were in Anthony's name, and it was the same address provided by Anthony in connection with prior police contacts. In addition, Perna discovered that Anthony had previous drug convictions, including two separate distribution charges. Based on this information, Perna conducted a "trash pull" outside the residence, which resulted in the discovery of stems that are a byproduct of marijuana and which tested positive as such. The trash bag also contained an envelope addressed to Anthony.

When these factors are considered collectively, we determine upon our de novo review, based upon a standard of objective reasonableness, that the totality of the above circumstances was sufficient to warrant a belief that contraband or evidence of a crime would be found in Anthony's residence. Thus, we conclude that the affidavit established probable cause and that the search warrant was valid.

Frazier next argues that the warrant was stale when it was executed because of the time that elapsed between the date the warrant was issued, February 10, 2011, and the date it was executed, February 16.

In executing a warrant, Neb. Rev. Stat. § 29-815 (Reissue 2008) requires that it be executed and returned within 10 days after its date. *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001). Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit still exists at the time of the execution of the warrant--that is, whether it is still likely that the items sought will be found in the place to be searched. *Id.*

Although the warrant was not executed until 6 days after it had been issued, the record shows that the probable cause recited in the affidavit still existed at the time of the execution of the warrant. The information from the anonymous tip indicated that Anthony was selling crack cocaine and marijuana from the residence. This information suggests an ongoing operation as opposed to a one-time event. Further, the record indicates that, because of the concern for officer safety and the destruction of evidence, the time taken between receiving and executing the warrant was necessary in order for the local law enforcement officers to arrange for the involvement of the SWAT team. We determine that the delay of 6 days in executing the warrant did not act to make the search unconstitutional. See, also, *State v. Moore*, 2 Neb. App. 206, 508 N.W.2d 305 (1993) (finding execution of warrant 6 days after its issuance did not require suppression of evidence based on warrant).

Finally, Frazier argues that the failure to return the warrant within the statutory time period is evidence of the State's failure to ensure proper procedures were utilized to protect Frazier's Fourth Amendment rights. The warrant was not returned and filed until March 1, 2011, more than 10 days after its issuance. The record suggests that the delay resulted from the officer's time constraints as opposed to an intentional act. In the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant, and further, a failure in the ministerial act of returning and filing a search warrant does not void the warrant. *State v. Hinton*, 226 Neb. 787, 415 N.W.2d 138 (1987).

Frazier fails to provide any evidence that the ministerial act of returning the warrant in any way prejudiced him. This argument is without merit, and we reject Frazier's first assignment of error. The district court did not err in denying Frazier's motion to suppress.

Jury Instruction.

Frazier argues that the trial court erred in failing to give his proposed instruction regarding the definition of possession and in giving a definition which combined actual possession and constructive possession. For the following reasons, we determine Frazier's arguments to be without merit.

Frazier's proposed instruction defines possession as "either knowingly having the object on one's person; or knowing of the object's presence, having the ability to control it, and the intent to do so." Frazier relies heavily upon *U.S. v. Howard*, 427 F.3d 554 (8th Cir. 2005), for his proposition that the trial court erred in not giving his proposed instruction. The Eighth Circuit defined "constructive possession" as "knowledge of an object, the ability to control it, and the

intent to do so.’” *Id.* at 557. Frazier argues that by not using this definition, the jury was precluded from deciding whether he had the intention of having control over the object.

The court denied Frazier’s requested instruction and instead gave instruction No. 8, which stated that “to possess” was defined as “either knowingly having it on one’s person, or knowing of the objects presence and having control over the object.” Contrary to Frazier’s assertion, the district court did include the element of intent in its instructions to the jury. In instruction No. 6, the jury was separately instructed that it must find Frazier’s possession of a deadly weapon to be intentional. The jury was further instructed about the element of intent in instruction No. 9, which stated: “Intent is an element of Possession of a Deadly Weapon by a Prohibited Person. In deciding whether the Defendant acted with intent, you should consider his words and acts and all the surrounding circumstances.”

We find no error in the instructions given by the district court. Instruction No. 8 given by the court was based on NJI2d Crim. 4.2, which reads, “‘Possession’ of [the object] means either knowingly having it on one’s person or knowing of the object’s presence and having control over the object.” Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that is the one which should usually be given to the jury in a criminal case. *State v. Fremont*, 284 Neb. 179, 817 N.W.2d 277 (2012). Further, when considering the instructions together, it is clear that the district court properly instructed the jury on the element of intent in relation to possession of the deadly weapon. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012). This assignment of error is without merit.

Insufficient Evidence.

Frazier asserts that the evidence adduced at trial was insufficient to support his conviction.

In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Fremont, supra*. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

Frazier argues that the State failed to prove that he was in possession of the gun found in the house. Frazier asserts that he was a houseguest and that his proximity to the gun was the only evidence offered by the State. However, in addition to the fact that the gun was inches away from Frazier’s hand when the officers entered the residence, the evidence reflects that Frazier told the officers when they entered the premises that “I have a gun by my right hand” and later admitted that he had the gun for protection.

Frazier’s arguments ask this court to resolve conflicts in the evidence presented at trial and to pass on the credibility of witnesses. These are not matters to be resolved by an appellate court. *State v. Fremont, supra*. After viewing the evidence presented in the light most favorable

to the prosecution, we find any rational trier of fact could have found that the essential elements of the crime of possession of a deadly weapon by a prohibited person were presented and sufficient to find Frazier guilty beyond a reasonable doubt. Accordingly, this assigned error is without merit.

Excessive Sentence.

Finally, Frazier asserts that the sentence imposed was excessive. We find no merit to this assertion.

A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012).

When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record or record of law-abiding conduct, and motivation for the offense, as well as the nature of the offense, and the violence involved in the commission of the crime. See *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011). In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Following the jury trial, where Frazier was found to be guilty of possession of a deadly weapon by a prohibited person under Neb. Rev. Stat. § 28-1206(1)(a) (Cum. Supp. 2010), he was sentenced to 16 to 30 years' imprisonment. Under the statute, this offense is a Class ID felony for a first offense, punishable by a mandatory minimum of 3 years' imprisonment and a maximum of 50 years' imprisonment. See § 28-1206(3)(b) and Neb. Rev. Stat. § 28-105(1) (Reissue 2008). However, as a habitual criminal, Frazier was also subject to a mandatory minimum of 10 years' imprisonment. Neb. Rev. Stat. § 29-2221(1) (Reissue 2008). The record shows that Frazier has had several felony convictions in the past.

Frazier does not dispute the validity of the habitual criminal enhancement or that his sentence is within the statutory limits. He instead argues that the sentence is excessive considering that he is 52 years old, nonviolent, and has exhibited "exemplary behavior" while incarcerated. Frazier describes himself as an intelligent and kind person who has the potential to benefit society and states that under his sentence, he will not be eligible for parole until 2024.

Frazier's counsel set forth these factors at the sentencing hearing, and there is no evidence that the district court failed to consider them. No abuse of discretion has been shown, and we find Frazier's arguments to the contrary to be without merit.

CONCLUSION

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

AFFIRMED.