

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2110-CR

Cir. Ct. No. 2006CF22

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PRINCE M. PRESTON,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Prince Preston appeals from judgments convicting him of delivery of cocaine and maintaining a drug trafficking place. The sole issue on appeal is whether evidence seized pursuant to a search warrant should have been suppressed based on the State's failure to provide the defendant with a

timely transcript of the telephonic search warrant request. We agree with the trial court that suppression was not required, and therefore affirm.

BACKGROUND

¶2 On May 12, 2006, an investigator for the Vernon County Sheriff's Department telephonically applied for a no-knock warrant to search Preston's residence and vehicles. A CD recording of the application was made. The warrant was executed that same day and various items of drug-related activity were recovered. A return on the warrant was filed with the trial court on May 15, 2006.

¶3 Preston was charged with two drug counts on May 19, 2006. He was bound over for trial on June 7, 2006, following a preliminary hearing. On June 16, 2006, Preston moved to suppress the evidence seized during the execution of the search warrant on the grounds that there was no transcript of any testimony provided in support of the warrant; and therefore, no basis to conclude that a no-knock warrant was justified. Preston argued that he was prejudiced by the lack of a transcript, because counsel was unable to review the factual basis for the search warrant before the deadline for filing pretrial motions expired. The trial court concluded that extending the deadline for Preston to file an additional suppression motion until after the warrant application transcript was filed would cure any prejudice. Accordingly, the court extended the deadline and denied the motion to suppress.

¶4 The transcript was filed on August 4, 2006. Preston subsequently entered guilty pleas, rather than filing an additional suppression motion. He now appeals the suppression ruling.

STANDARD OF REVIEW

¶5 WISCONSIN STAT. § 971.31(10) (2005-06)¹ authorizes review of suppression determinations notwithstanding a subsequent guilty plea. When reviewing the denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, we will independently determine whether the facts found by the circuit court satisfy applicable statutory and constitutional provisions. *State v. Ellenbecker*, 159 Wis. 2d 91, 94, 464 N.W.2d 427 (Ct. App. 1990).

DISCUSSION

¶6 WISCONSIN STAT. § 968.12(3) authorizes a judge to issue a search warrant based upon sworn oral testimony given over the telephone. However, the judge must arrange to have the sworn testimony recorded and a transcript produced and filed with the court. WIS. STAT. § 968.15(3)(d). A transcript of any testimony made in support of a search warrant must be filed within five days after the execution of the warrant. WIS. STAT. § 968.17(2).

¶7 The State concedes that the transcript of the telephonic search warrant application was not timely filed in this case. However, it argues that suppression is not an available remedy under WIS. STAT. § 968.22. That section provides that “[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

defendant.” Section 968.22. It has been held that a violation of the time to file the transcript of a telephonic search warrant application “does not invalidate the search absent prejudice to the rights of the defendant.” *State v. Elam*, 68 Wis. 2d 614, 620, 229 N.W.2d 664 (1975).

¶8 The State contends that application of WIS. STAT. § 986.22 has two elements: first, that the ground asserted for suppression must be some sort of technical irregularity, and second, that the irregularity affected the defendant’s substantial rights. It then argues that *Elam* stands for the proposition that a violation of the time to file a telephonic warrant application transcript is always a technical irregularity, and the only question is whether the defendant’s substantial rights were affected.

¶9 Preston disagrees with the State’s reading of *Elam*. He points out that *Elam* actually labeled the time to file a transcript under WIS. STAT. § 968.17(1) a “ministerial act” rather than a “technical irregularity.” He then argues that not every breach of a ministerial duty must be a technical violation. Rather, he seems to be suggesting that a violation cannot be deemed technical unless it is first determined that it has not affected the defendant’s substantial rights.

¶10 It is unnecessary for us to discuss here whether WIS. STAT. § 968.22 is properly conceptualized as a one- or two-part test because the bottom line under either formulation is that prejudice must be established before the remedy of suppression is barred.

¶11 In *Elam*, the court concluded that there had been no prejudice to the defendant because the transcript was filed before the information, giving the defendant “ample time to study the transcript in preparation for a suppression

motion[.]” *Id.* at 619. The court further explained that “no claim has been made that the passage of time increased the difficulty of challenging the probable cause evidence.” *Id.* at 620.

¶12 Preston attempts to distinguish his case from *Elam* on the grounds that his preliminary hearing had been held and the original deadline for filing pretrial motions had already passed before the transcript was filed. He argues that his due process rights were violated by not having access to the information used to support the search warrant, “which would have potentially identified witnesses to call on his behalf or which would have assisted in the cross-examination of the State’s witnesses,” or could have been used “to challenge the probable cause basis for the warrant.”

¶13 These allegations are conclusory and are insufficient to demonstrate prejudice. Preston has not identified any additional witness he could have called or any additional question he could have asked at the preliminary hearing based on the information in the transcript, much less shown that the additional testimony elicited would have altered the outcome of the preliminary hearing. Furthermore, he was granted an opportunity to challenge the probable cause basis for the warrant after the transcript was filed and did not do so. He has not alleged any reason why his ability to challenge the warrant was adversely affected by the passage of time. If the transcript provided no actual grounds to challenge the warrant, it does not matter when it was filed.

¶14 Preston also argues that we “should consider the potential for police or prosecutorial misconduct that would result if the filing requirements of Section 968.17 could be violated without consequence.” However, the legislature has imposed consequences in WIS. STAT. § 968.22, and it has determined that

suppression is to be used as an individualized remedy only when a defendant has actually suffered prejudice, not as a generalized policy for deterrence.

¶15 Finally, Preston contends that he was also entitled to the transcript under the Open Records Law. That statute is inapplicable here, however, because there is nothing in the record to show that Preston ever made any formal open records request.

¶16 In sum, we are satisfied that the trial court properly denied Preston's suppression motion after extending the time for him to file an additional motion based on information in the delinquent transcript.

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

