COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP682-CR **Cir. Ct. No. 2008CF378**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICK E. SAMMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 BROWN, C.J. Nick E. Sammon was convicted of possessing materials for manufacturing methamphetamine contrary to WIS. STAT. § 961.65

(2009-10)[1] after police executed a no-knock search warrant of his home. Sammon asserts two grounds to argue that the trial court wrongfully denied his motion to suppress the evidence obtained through the search warrant. We reject his first claim, that law enforcement "intentionally[] or with reckless disregard for the truth," included what were purported to be two felony convictions in the affidavit supporting the warrant, when they were actually charges that had been dismissed. *See* ***Franks v. Delaware,*** 438 U.S. 154, 155 (1978). As will be seen, law enforcement checked and double-checked its information as to one of the offenses and had no reason to believe that the information on the other offense was ambiguous. We also hold that a report of several guns on the premises of this meth user and manufacturer was a recipe for danger and, therefore, there was evidence supporting the issuance of a no-knock warrant. We affirm.

BACKGROUND

¶2 The following is a summary of the information included in the affidavit used to obtain the no-knock search warrant. Sammon's wife Nancy contacted police on August 20, 2008. Nancy revealed that she had found 120 cold tablets, a scale, a cleaning product, a smoking pipe, ten boxes of D-Max vitamin D-3 and a book on manufacturing methamphetamines in the basement of her home. She also stated that she was concerned for her safety and the safety of her young child because of Sammon's drug use. A few days later, Nancy reported that the suspicious items she had previously mentioned had been removed from the basement.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 On September 18, 2008, a police detective spoke with confidential informant Metro 584.[2] Metro 584 informed the detective that on that day, in a detached shed on Sammon's property, he had observed both laboratory glassware and books on manufacturing methamphetamine. In addition, he stated that Sammon had shown him six to eight firearms, including an assault rifle, stored in a second floor bedroom. Finally, Metro 584 told the detective that Sammon appeared to be "high on narcotics" at the time of the contact.

¶4 In light of the information from Nancy and Metro 584, the detective performed a National Crime Information Center (NCIC) search for Sammon. The affidavit states that the NCIC report "showed a February 7, 1997 federal conviction for manufacturing methamphetamine in the [s]tate of Texas [and] a December 18, 1989 conviction for burglary in the state of Texas." It is now undisputed that both charges resulted in dismissals after deferred adjudications of guilt.

¶5 On September 19, 2008, based on the information in the affidavit, a judge issued a no-knock search warrant for Sammon's residence. The warrant was executed and evidence was obtained. Sammon was thereafter charged with various firearm and drug-related offenses. He filed a motion to suppress based in part on what he claimed to be false statements regarding his criminal record in the affidavit supporting the warrant.

[2] Metro 584 is a confidential informant who had been a reliable source in past drug cases. Although it appears that he may have received consideration after giving information in this case, his reliability is not at issue.

¶6 At the motion hearing, a police detective investigating the case, who was also the scrivener of the affidavit, explained why he reported two convictions. He stated that his search in the NCIC database revealed that Sammon had two felony arrests in Texas. One related to a Houston Drug Enforcement Agency (DEA) case and listed an "unknown" disposition. The other was a burglary charge listed as a conviction. The unknown disposition was ambiguous, so the detective's lieutenant contacted the Green Bay Drug Enforcement Agency office for further information. The DEA informed the lieutenant that the arrest in question had resulted in a conviction. The detective did not specifically follow up on the listed burglary conviction until after the search of Sammon's home.[3]

¶7 Based on the testimony from the hearing, the trial court denied Sammon's motion to suppress in a well-reasoned written decision, finding no evidence that the incorrect information in the affidavit was included either intentionally or with reckless disregard for the truth as required by ***Franks***. The trial court also held that there was evidence in the affidavit to support the no-knock entry. Sammon then pled no contest to the one count of Possessing Material for Manufacturing Methamphetamine. This appeal followed.

DISCUSSION

[3] Interestingly, the hearing testimony shows that *after* the affidavit was signed and the search was executed, the lieutenant double-checked the burglary conviction. He called the county in Texas where the conviction had supposedly occurred and was told that it was in fact a conviction. Only later, after requesting copies of the record from the case, was he able to see that the charge had been dismissed after a deferred adjudication of guilt. So, if he had called to double check the listed conviction before the affidavit was prepared, it would have been confirmed.

¶8 When reviewing a motion to suppress, we first review the trial court's findings of historical fact and uphold them unless they are clearly erroneous. *See* ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. Second, we review the application of constitutional principles to those facts de novo. ***Id.*** As a general rule, affidavits supporting a search warrant are presumed to be valid. *See* ***State v. Anderson***, 138 Wis. 2d 451, 463, 406 N.W.2d 398 (1987). A defendant challenging the veracity of statements in an affidavit must prove by a preponderance of the evidence first, that a challenged statement is false, and second, that the affiant made the false statement intentionally or with reckless disregard for the truth.[4] ***Anderson***, 138 Wis. 2d at 463; *see also* ***Franks***, 438 U.S. at 171. If the defendant meets those requirements, we must determine whether there was probable cause for a warrant absent the challenged statements. ***Anderson***, 138 Wis. 2d at 464. If there was not, evidence discovered pursuant to the warrant must be suppressed. ***Id.***

Did the affidavit contain material false statements that were made intentionally or with reckless disregard for the truth?

¶9 As we already mentioned, it is undisputed that the two listed convictions were in fact dismissals, so we begin with the question of whether the detective made those false statements intentionally or with reckless disregard for the truth. The trial court found that the detective was a credible witness[5] and that

[4] Before even getting to that stage, the defendant must make a substantial preliminary showing "that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and that the allegedly false statement is necessary to the finding of probable cause." ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987). Whether Sammon made the required showing in this case is not in dispute.

[5] Sammon argues against the detective's overall credibility based on alleged discrepancies between his testimony at the motion hearing and the affidavit itself. For example, he complains that the detective testified that the affidavit was signed by someone from the district (continued)

based on his testimony, he did not intentionally or recklessly make false statements, which is a finding of fact to which we owe deference. *See* ***United States v. Williams***, 737 F.2d 594, 602 (7th Cir. 1984); *see also* ***State v. Lossman***, 118 Wis. 2d 526, 542-43, 348 N.W.2d 159 (1984) (state of mind determinations are generally questions of fact). "[T]o prove reckless disregard for the truth, the defendant must prove that the affiant in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations." ***Anderson***, 138 Wis. 2d at 463. Proof that the challenged statements, though false, were made innocently or negligently is insufficient to have the challenged statement removed from the affidavit. ***Id.***

¶10 The record in this case fully supports the trial court's finding that the false statements regarding the existence of two convictions were not made intentionally or with reckless disregard for the truth. The detective stated that he had no reason to doubt the listed burglary conviction, and he verified the disposition of the drug case that was listed as an unknown disposition with the DEA. Perhaps for this reason, Sammon focuses on more technical arguments regarding two of the detective's statements—that the NCIC report showed *both* a federal and a state conviction and that "the records of … NCIC … are to be believed as they are records kept during the normal course of business."

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attorney's office when it was in fact signed by a judge. He also complains that the detective's affidavit states that he ran the NCIC search but he testified that it was "run [ ] through" the dispatch center. As the trial court obviously did, we view these alleged discrepancies as insignificant. The detective testified that he had been the affiant for roughly thirty search warrants, so we would not be surprised if minor differences in the history of how these affidavits were obtained played a part in the discrepancies, particularly as they are related to tangential issues.

¶11 Regarding the NCIC listing two convictions, Sammon points out that the NCIC report listed one "unknown" disposition, which the DEA thereafter confirmed (inaccurately) as a conviction. Sammon then contends that the information about the conviction is not attributable to the NCIC report and the detective was wrong to say that it was. We agree that this was a technical misstatement on the detective's part. But we do not see the error as problematic. As the Supreme Court stated in ***Franks***, the truthful showing required by the Fourth Amendment

> does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks, 438 U.S. at 164-65. In this instance, while the detective's lack of precision as to the source of his information may have been negligent, it does not rise to the level of intentional misstatement of fact or reckless disregard for the truth. *See* ***Anderson***, 138 Wis. 2d at 463. We note that the NCIC report was the original source of the information in the sense that it listed the arrest and prompted the detective to take steps to verify a conviction elsewhere. The splitting of fine hairs by the defendant will not carry the day on this issue.

¶12 Sammon next complains that the detective's failure to confirm the NCIC report as to the Texas state arrest listed as a "conviction" was contrary to an admonition on the FBI website that NCIC records must be confirmed with the entering agency before action may be taken by law enforcement. *See* FBI—National Crime Information Center, THE FBI–FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ncic (last visited June 28, 2012).

Based on that, Sammon argues that the detective "represented the NCIC report in a false light," presumably by stating that the records should be believed because they are kept during the normal course of business. Once again, we disagree. It is the police department's practice not to confirm NCIC records unless there is a specific reason. So, even assuming the detective's statement misrepresented the NCIC report's reliability—which really would be putting words in the detective's mouth—we cannot see how it makes his statement intentionally false or reckless. There is simply no evidence that the detective "entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations." *See* ***Anderson***, 138 Wis. 2d at 463. He made statements he believed to be true pursuant to his department's practice and that is enough.

Does the affidavit support the issuance and execution of the no-knock warrant?

¶13 Having concluded that the statements in the affidavit do not present a valid ***Franks*** issue, we go on to briefly address Sammon's argument that the no-knock search warrant was granted and executed without proper justification. A no-knock entry is justified when police have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime. *See* ***Eason***, 245 Wis. 2d 206, ¶10 (citing ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997)). The reasonableness of the police deciding to effectuate a no-knock entry is typically evaluated at the time of the entry. ***Eason***, 245 Wis. 2d 206, ¶10. Here, because nothing in the record indicates that police had information that was not in the affidavit at the time of the entry, we focus on whether the information contained in the affidavit justified the no-knock entry. *See* ***id.***

¶14 Sammon complains that the affidavit did not contain any particularized showing that Sammon was dangerous or violent, that he intended to protect his drug dealing, or that Sammon would quickly destroy the items the affidavit indicated might be in his home. We disagree. The affidavit consisted primarily of the detective's summary of statements made to him by Sammon's wife and Metro 584. Sammon's wife outlined the presence of chemicals and equipment commonly used to manufacture methamphetamines, and she expressed suspicion and concern for her safety and that of her young child because her husband was using drugs.[6] Furthermore, Metro 584 stated that Sammon had six to eight firearms in his home and appeared to be high on narcotics on one occasion. Finally, the detective averred, based on his training and experience, that methamphetamine users tend to have aggressive and violent tendencies. Based on all of that information, with or without the alleged felony convictions, there was reasonable suspicion that knocking or announcing police presence would be dangerous.[7]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[6] As Sammon points out, his wife later stated that the chemicals had been removed after she confronted him and he told her to "stop snooping in his things." We still find her initial report and concerns relevant to whether the no-knock entry was justified.

[7] Because we uphold the issuance of the no-knock search warrant, Sammon's argument that law enforcement cannot rely on the good-faith exception to the exclusionary rule need not be addressed. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).