COURT OF APPEALS DECISION DATED AND RELEASED

November 14, 1996

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

NOTICE

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

No. 94-2952-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALLEN D. MECHTEL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for La Crosse County: PETER G. PAPPAS and ROBERT W. RADCLIFFE, Judges. *Affirmed*.

Before Dykman, P.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Allen Mechtel appeals from a judgment convicting him of possession of cocaine and marijuana with intent to deliver and an order denying his motion for postconviction relief. He argues that a search warrant issued for his residence was invalid under ***Franks v. Delaware***,

438 U.S. 154 (1978). The trial court found probable cause and issued the search warrant for Mechtel's residence based on information supplied to the trial court by police officers that on April 9, May 5, and June 3, 1988, cocaine was delivered to a police informant after the supplier had been observed at Mechtel's residence. We affirm.[1]

Mechtel argues that evidence seized pursuant to the search warrant should be suppressed because the testimony presented to obtain the warrant was false and was presented intentionally or with reckless disregard for the truth. *See* ***Franks***, 438 U.S. at 171. Under ***Franks***, a defendant who claims that a false statement was intentionally or recklessly made in support of the issuance of a search warrant may obtain suppression of the evidence seized pursuant to the warrant if he or she "prove[s], by a preponderance of the evidence, that the challenged statement is false, that it was made intentionally or with reckless disregard for the truth, and that absent the challenged statement the affidavit does not provide probable cause." ***State v. Anderson,*** 138 Wis.2d 451, 462, 406 N.W.2d 398, 404 (1987); ***Franks***, 438 U.S. at 156. Whether statements are knowingly or recklessly false "focuses on the state of mind" of the person making the statements, ***Anderson***, 138 Wis.2d at 464, 406 N.W.2d at 404, and a finding as to state of mind, is a finding of fact. *Cf.* ***Patton v. Yount***, 467 U.S. 1025, 1036-38 (1984) (the state of mind of a prospective juror is a question of fact). This court will not upset the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS.

Even if the defendant shows, however, that the warrant was procured with testimony that included false statements, made intentionally or with reckless disregard for the truth, the warrant will be voided only if, with the false testimony set to one side, the remaining testimony is insufficient to establish probable cause. ***Franks***, 438 U.S. at 156. To determine whether there was probable cause to support the issuance of a warrant, the court must look to the "totality of the circumstances" to determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***Illinois v. Gates***, 462 U.S. 213, 238 (1983).

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[1] This case has a long and complicated procedural history which need not be repeated here.

After holding a ***Franks*** hearing, the trial court concluded that false statements were made and omissions occurred in the State's testimony to procure the search warrant. Indeed, the State conceded this fact. The trial court also found, however, that the statements were not intentionally false, nor were they made with reckless disregard for the truth. Therefore, the trial court ruled that the evidence seized pursuant to the warrant should not be suppressed.[2]

Mechtel argues that the police officers intentionally gave false information about a recorded telephone conversation between the police informant and the supplier when applying for the warrant. The police reported this conversation as follows: "at that time [the supplier] agreed to meet with the informant and sell him one-quarter ounce of cocaine for $500.00" The actual recorded conversation is in part as follows: "Hello." "Hello, Pete?" "Yeah." "Yeah, it's Joe." "Yeah." "Say there's a change in plans. I've got relatives at my house." ... inaudible ... "Okay, um (inaudible) ... Oh, okay ... (inaudible) ... `bout half hour...." Without further communication between the informant and the supplier, the supplier delivered $500 worth of cocaine to the informant within a few hours.

The State contends that the taped conversation shows that the deal was prearranged and the telephone call confirmed the transaction. The trial court agreed, concluding that the information given—that the supplier agreed to meet with the informant and sell him the drugs—was not intentionally false because there could "be little doubt of the understanding of the parties as to this conversation and the [police officers' testimony was] consistent with that understanding." This finding is not clearly erroneous.

Mechtel next challenges as intentionally false a police officer's statement that "during the course of that surveillance I took several photographs of people who I knew to be involved in drug trafficking...." Mechtel argues that the testimony was false because the police officer did not personally *know* the people to be drug traffickers. Rather, he *believed* them to be

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[2] In proceedings on separate federal charges, a federal magistrate suppressed the fruits of the search. The Wisconsin Supreme Court held that the state court was not bound by the federal magistrate's determination and ruled that a new ***Franks*** hearing should be held in the state trial court. ***State v. Mechtel***, 176 Wis.2d 87, 499 N.W.2d 662 (1993). This appeal is from the trial court's decision in the ***Franks*** hearing.

drug traffickers based on information he had gathered. The trial court concluded that this statement was not intentionally false or made with reckless disregard for the truth because the officer believed that the individuals he observed entering and leaving the defendant's residence during the periods of surveillance were drug traffickers or users based in part on the hearsay statements of others, but also based upon other factors to which he testified. The officer therefore honestly believed that fact to be true when he related the information in the application for the search warrant, even though the individuals were not, in fact, drug traffickers. The trial court's finding that the officer's statement was not intentionally false or made with reckless disregard for the truth is not clearly erroneous.

Mechtel next argues that the police intentionally gave misleading information concerning Mechtel's wealth by inaccurately describing the vehicle he was driving. The police testified that Mechtel drove "a newer model Mercedez-Benz," described the vehicle as "very, very nice," and placed a photograph of the automobile in evidence. The vehicle was actually fourteen years old. The trial court concluded that the officer's characterization of the vehicle was reasonable based on the photograph of the vehicle. Although the description of the vehicle as a newer model was inaccurate, the trial court concluded that the statement was not intentionally or recklessly made because the characterization was a reasonable mistake based on the appearance of the car.

Mechtel also contends that the police intentionally provided false information concerning Terri Edberg, an informant. The police testified that Ms. Edberg identified the defendant as "Al Mechtel," said that he "was a very large dealer of cocaine," said that she "had been *to* Mechtel's house," and that her companion, after going inside and purchasing some cocaine, had told her that "he had seen more drugs in that house than he had ever seen in his life in any other place." Mechtel argues that this information was intentionally or recklessly false because Edberg did not identify him as "Al Mechtel," she identified him as "Al, who lives on the corner of Island and Avon Streets," and because it implied that Ms. Edberg went *into* Mechtel's house, when she only went *to* his house, and remained outside while her companion went inside to purchase drugs.

We agree with the trial court that the officer's testimony that Edberg had identified the defendant as "Al Mechtel," was not intentionally false or made with reckless disregard for the truth because the information actually supplied to the officer—"Al, who lives on the corner of Island and Avon Streets" in fact identified "Al Mechtel" who lived at that location. We also agree with the trial court's conclusion that Edberg's comment that she had been to Mechtel's house did not imply that she had been *in* Mechtel's house, especially because she also stated that her companion had gone inside to purchase cocaine, implying she had not.

Mechtel next argues that material information was withheld when the officers applied for the warrant. After reviewing Mechtel's numerous claims for error in this regard, we agree that two material omissions were made: the officers should have disclosed that the supplier was lost from police surveillance for fifteen minutes on one of the three dates that the police observed the drug transactions and the officers should have disclosed that Mechtel was not at home on one of the dates the officers testified that "known drug traffickers or users" were frequenting Mechtel's house.

Even if this evidence had been presented, however, there was probable cause to support the issuance of the warrant. "Probable cause is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***State v. Petrone***, 161 Wis.2d 530, 547-48, 468 N.W.2d 676, 682 (1991), *cert. denied*, 502 U.S. 925 (1991). The police provided information about surveillance of Mechtel's residence over a three-month period, including the observations of private citizens living near Mechtel, information from an informant about Mechtel's drug trafficking, and personal background information about Mechtel. Having reviewed this testimony and evidence, we conclude that even if the information about the surveillance gap and Mechtel's absence had been presented there was probable cause to issue the warrant because the testimony and evidence showed "a fair probability that contraband or evidence of a crime [would] be found" in Mechtel's home. *See* ***Gates***, 462 U.S. at 238. Thus, the evidence seized pursuant to the search warrant should not have been suppressed. *See* ***Franks***, 438 U.S. 156.

In sum, while some of the evidence presented to procure the warrant was false, the trial court found that the police officers did not present

the information intentionally or with reckless disregard for the truth. We accept the trial court's findings that the false evidence was not presented intentionally or with reckless disregard for the truth because they are not clearly erroneous. *See* RULE 809.15, STATS. While the evidence that the supplier was lost from surveillance for fifteen minutes and the evidence that Mechtel was not home on one of the occasions should have been presented to the trial court, there was probable cause to support the warrant even if that information had been presented.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.