COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 12, 1995

No. 95-1482-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY F. TOCZYNSKI,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Price County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Stanley Toczynski appeals a judgment of conviction for manufacturing a controlled substance, marijuana, contrary to § 161.41(1)(h)2, STATS. He contends that (1) the trial court erred when it failed to conduct an in camera hearing to resolve defense counsel's request to reveal the State's confidential informer, and (2) his due process rights were violated when the State failed to produce a crime laboratory report until two days before trial and failed to produce photos until the day of trial. We reject Toczynski's contentions and affirm the judgment of conviction.

The relevant historical facts surrounding this appeal are as follows. A Price County deputy sheriff furnished an affidavit to support a search warrant for Toczynski's residence issued on August 7, 1993. The probable cause statement relied upon information provided by a confidential "citizen informant." Included was a statement to affiant by the informer who had observed marijuana plants in Toczynski's bedroom planted in ice cream buckets in July 1993. The informer also advised the affiant that "within 24 hours of August 6, 1993" he had observed marijuana plants growing in Toczynski's bedroom and that Toczynski sells the marijuana he manufactures. Affiant alleged that he believed the informer because he had given information in other investigations in the past that proved to be truthful and reliable. Execution of the search warrant led to the recovery of marijuana plants and other paraphernalia used in growing and packaging marijuana, and the evidence was used to convict Toczynski at his jury trial.

Prior to trial, defense counsel sought to suppress evidence in part because the search warrant "was based upon untrue and uncorroborated statements made by an unnamed informant." Defense counsel sought the informer's identity in a discovery motion unsupported by any factual allegations.

At the hearing on defense motions, defense counsel asserted only that she needed the identity of the informer "to intelligently defend this case ...." The trial court ruled that the defense had made an inadequate showing to compel disclosure of the informant's identity. The court also rejected an argument that the deputy's affidavit failed to show the basis of the informer's knowledge and failed to show indicia of the informer's reliability.[1]

Defense counsel made an offer of proof: "It's my information from the Defendant that it was impossible, that no other person had been in his residence for the week prior to August 6th."[2] The court ruled that the search

[1] The court relied upon the affidavit's reference to the informant's actual presence in the residence to establish the "basis of knowledge" and the reference to informant's prior truthful information to show an indicia of reliability. Toczynski does not contest the trial court's rulings in those respects.

[2] Although we do rely upon such an analysis, Toczynski's reference to the absence of visitors the "week prior to August 6th" and the informant's reference to a visit "within 24 hours of August 6,

warrant was not defective. At trial, the court rejected defense counsel's summary renewal of the objection to the admission of search warrant evidence.

We first reject Toczynski's contention, made for the first time on appeal, that the trial court denied him the opportunity to make a proper offer of proof. As the attorney general points out, the record does not suggest that the trial court interrupted the offer of proof much less explicitly refused to allow counsel to offer more. The record does disclose that counsel made an offer of proof, and had unrestricted opportunities both at the motion hearing and at trial to set forth a basis for disclosure of the confidential informer.

We also reject Toczynski's contention that the court did not consider the exception to the informer's privilege found in § 905.10(3)(c), STATS.[3]

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1993," are not necessarily inconsistent.

[3] Section 905.10, STATS., provides:

Identity of informer. (1) Rule of privilege. The federal government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(2) Who may claim. The privilege may be claimed by an appropriate representative of the federal government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof.

(3) Exceptions. (a) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the federal government or a state or subdivision thereof.

(b) Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony

Before discussing this exception to the rule of privilege protecting confidential

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> necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the federal government or a state or subdivision thereof is a party, and the federal government or a state or subdivision thereof invokes the privilege, the judge shall give the federal government or a state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make an order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

(c) Legality of obtaining evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed. The judge shall on request of the federal government, state or subdivision thereof, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the appropriate federal government, state or subdivision thereof.

informers, we note that although Toczynski mentions the other exceptions to the privilege found in subsecs. (3)(a) and (b) of this statute, he proceeds to discuss and rely solely upon the provisions found in (3)(c). Subsection (3)(c) inquires only into the legality of obtaining evidence. There was no argument advanced in the trial court and none on appeal that the informer's testimony was necessary to the merits of Toczynski's guilt or innocence. Rather, Toczynski contends that his offer to prove "that no other person [than Toczynski] had been in his residence for the week prior to August 6th" compelled an *in camera* disclosure to the judge to determine whether the evidence was legally seized.[4] We address only his argument concerning subsec. (3)(c).

We agree with the attorney general's contention that (3)(c) requires the judge to resolve whether it was reasonable for the affiant, in this case the deputy sheriff, to believe the information received from the informer was reliable. The question is whether the officer actually believed the informant, and whether that belief was reasonable. We also agree with the attorney general's contention that a challenge to the integrity of the officer's claim that he believed the information received from the informer is analogous to the inquiry made in a ***Franks*** inquiry.[5] Under such an inquiry, allegations in an affidavit supporting issuance of a search warrant will be struck only if they were deliberately false or made with reckless disregard of the truth. ***State v. Fischer***, 147 Wis.2d 694, 699, 433 N.W.2d 647, 649 (Ct. App. 1988) (citing ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978)). ***Franks*** sets forth the method to determine whether the defendant is entitled to a hearing to challenge the veracity of a statement made by the officer in the affidavit:

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[4] Subsection (3)(a) relating to voluntary disclosure of the identity of the informer is not applicable to the circumstances of this case. Subsection (3)(b) relating to the necessity of the informer's testimony for a fair determination of the defendant's guilt or innocence on the merits was not argued. *See* ***Reiman Assocs. v. R/A Advertising***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (An issue raised but not briefed or argued is deemed abandoned.). Further, the trial transcript reveals no basis for such a claim had it been made. The unrefuted evidence showed that Toczynski was at his residence when the warrant was executed and the evidence seized. Toczynski gave a written statement to the sheriff's deputy that strongly implies his guilt wholly apart from anything the informant's testimony would show. He stated only that he disagreed with the law denying one the right to grow or smoke marijuana for one's own uses, adding: "It is and has been for some time one of the few things I have found to thank God for ...."

[5] ***Franks v. Delaware***, 438 U.S. 154 (1978).

> There is of course, a presumption of validity with respect to the affidavit supporting the search warrant. ... There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. ... *The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant*.

Id. at 171 (emphasis added).

Toczynski's terse offer of proof does nothing more than imply an attack on the veracity of the citizen informer and not the affiant. Keeping in mind that the defendant's offer of proof was aimed at the validity of the search warrant, the offer was inadequate to compel the judge to hold an in camera inquiry concerning disclosure of the informer's identity.

Next, Toczynski contends that his due process rights were violated by untimely response to his discovery demands. The contention has been waived. At the motion hearing of September 28, 1994, the trial court ordered the State to comply with the discovery demands, and the trial was set for October 26, 1994. The district attorney furnished the crime lab report to defense counsel on Monday, October 24, the day the district attorney received it from the state crime laboratory. The prosecutor explained that the crime laboratory has a policy that it will not test any evidence until a court date has been established. On the day of trial, after the prosecutor explained that he did not get the report until two days before trial, defense counsel stated: "I've also been in this long enough to know what the crime lab's policy is, and just to state for the record, that we were not surprised by this evidence." Failure to raise an issue in the trial court, including a constitutional issue, constitutes a waiver. ***State v. Skamfer***, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993). Moreover, Toczynski does not explain how he was prejudiced by any delay in receipt of the crime lab report.

The argument challenging the production by the district attorney of "a bunch of photos" on the day of trial needs little discussion. There was no objection made in the trial court, and defense counsel's only response when the court granted a recess to allow an examination of the photos was "Thank you,

Your Honor." Further, the photos were not used at trial. There is no suggestion that they were exculpatory. The claim of a due process violation is without merit.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.