COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2372-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANITA LUSK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed.*

CURLEY, J.[1] Anita Lusk appeals from a judgment of conviction finding her guilty of retail theft. She contends the trial court erred, after

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

conducting a ***Mann***[2] hearing, in concluding that there were no misrepresentations of fact in the complaint. We affirm.

I. BACKGROUND.

Lusk was convicted of misdemeanor retail theft following a court trial. Prior to trial, Lusk brought a motion to dismiss premised on her allegation that the criminal complaint charging her with retail theft contained untrue statements.[3] Lusk contends that several statements in the complaint were factually incorrect. She argues that when the untrue statements are excised from the criminal complaint, the complaint no longer states sufficient facts to establish probable cause that she committed a crime and thus her conviction should be overturned.

Specifically, Lusk argues that the statements found in the complaint, that security officer George Reynolds witnessed her "pushing a cart and filling it with various items of clothing including several men's shirts and several items of baby clothing," and that he "observed [her] already going out of the store after pushing the cart through a closed check out lane," are contrary to the statements found in the police reports which are attributable to him. With respect to these quotes found in the criminal complaint, Lusk notes that the police report actually states that Reynolds "didn't actually see Anita remove some of [sic] shirts and newborn clothing which was in the kart [sic] that was later located in the trunk of her vehicle," and with regard to Lusk's departure from the store, the police report

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[2] ***State v. Mann***, 123 Wis.2d 375, 367 N.W.2d 209 (1985).

[3] Lusk successfully challenged an earlier criminal complaint emanating out of the identical events on the same basis.

states, "George thinks that Anita was able to leave the store without being noticed because at that time the store was busy and they were trying to watch the other two actors." During argument on the ***Mann*** motion, the assistant district attorney informed the court that the issuing assistant district attorney interviewed the security guard independently and that the statements found in the complaint comport with the security guard's statements in this later interview. In the trial court's decision on the motion, the court found that Lusk did not meet her burden of proof and opined, "I think that there isn't a direct contradiction [of facts stated]."

II. ANALYSIS.

The sufficiency of a complaint is a matter of law and is addressed *de novo* by the reviewing court. ***State v. Barman***, 183 Wis.2d 180, 199, 515 N.W.2d 493, 503 (1994). In the seminal case of ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978), the Supreme Court held that:

> [W]here a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth, was included … in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires a hearing be held at the defendant's request.

If, after such a hearing, the trial court concludes that perjury or reckless disregard is established by a preponderance of the evidence, the false material is to be excised from the search warrant. If the remaining content is insufficient to establish probable cause, the search warrant must be voided and any fruits of the search excluded. Wisconsin extended this holding to criminal complaints in ***State***

v. Mann, 123 Wis.2d 375, 388, 367 N.W.2d 209, 215 (1985), and adopted the "preponderance of the evidence" test as the burden to be met by the defendant.

Lusk argues that the police reports written by an investigating police officer, containing purported statements of Reynolds contradict the statements in the criminal complaint that are attributed to him. Lusk notes that the police reports do not state that Reynolds saw Lusk take all the items off the shelves and place them into a cart, which were later discovered in the trunk of her car, nor does the written police report state that Reynolds saw Lusk push a cart filled with the various items go through a closed check-out lane. Lusk insists that even if Reynolds gave an account of his observations to the issuing district attorney which is consistent with the statements found in the complaint, the statements must still be excised because the complaint recites that "the complainant is a City of Milwaukee police officer [Robert Beffa] and bases his complaint on the following: Upon the statement of George Reynolds, security guard at the K-Mart store …." According to Lusk, since at no point does the criminal complaint state that the issuing assistant district attorney interviewed Reynolds, the State is confined to the factual information found in the police reports. Lusk argues that "[w]e cannot proceed in this system on some oral statement that Mr. Reynolds purportedly gave Ms. Manchester in a follow-up phone or in-person conference because there is no reliability there." Lusk is wrong.

In Wisconsin, a criminal complaint is defined in § 968.01(2), STATS., as "a written statement of the essential facts constituting the offense charged. A person may make a complaint on information and belief." To be constitutionally sufficient to support issuance of a warrant and arrest and show probable cause, a complaint "must contain the essential facts constituting the offense charged." ***State v. Williams***, 47 Wis.2d 242, 253, 177 N.W.2d 611, 617

(1970). Contrary to Lusk's argument, there is no requirement that the complaint must be confined to information found in a police report. The police officer was free to rely on the later statements given by Reynolds provided he believed them to be reliable. The complaint does not state that the complaining officer relied on any written statements made by Reynolds nor that he relied exclusively on the police reports. It is entirely feasible that when the issuing assistant district attorney interviewed Reynolds the police officer who signed the complaint either heard the oral statements of Reynolds or was told of them by the assistant district attorney. This is an acceptable practice. Consequently, the complaint truthfully recites that the officer "bases this complaint on information and belief … upon the statement of George Reynolds, security guard …." Thus, no statement in the complaint has been shown to be knowingly false or exhibiting a reckless disregard for the truth and there is no need to excise anything from the complaint. As written, the complaint states probable cause to believe that Lusk committed the crime of retail theft.

Further, Lusk was not disadvantaged by this process. If the security guard gave inconsistent statements those inconsistencies could have been explored at trial.

For the reasons stated, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.