

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2010

A. John Voelker
Acting 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. 2009AP2532-CR

Cir. Ct. No. 2008CF127

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA T. MCANALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: ROBERT W. WING, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joshua McAnallen appeals a judgment convicting him of second-offense possession of THC. He contends the circuit court erred when it denied his motion to suppress evidence seized pursuant to a search warrant

and when it denied his motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). We reject these arguments and affirm the judgment.

BACKGROUND

¶2 A school guidance counselor, Heidi Styer-Weir, contacted the Trempealeau County Sheriff's Department about a conversation she had with eleven-year-old Paighton Sylvester. Sylvester indicated her mother and her mother's boyfriend, McAnallen, were heavily involved in using drugs. Sylvester found her younger sister playing with a pipe, took it from her and put it in a drawer in an office along with a baggie of marijuana. Sylvester also said McAnallen was growing marijuana and "srooms" in the office closet. She described them as "wild mushrooms that are poisonous." She said McAnallen kept pipes in the pipe box in the office area. She also looked at the sites McAnallen visited on the computer, and described most of them as "regarding marijuana or srooms." She also said McAnallen was smoking in the car while her mother was driving and the smell is not the same as cigarettes. Her mother would nudge McAnallen and say "put that away, the kids are noticing it."

¶3 Deputy Tim Wilson applied for and was issued a search warrant for McAnallen's home, vehicles and any person on the premises to look for controlled substances, drug paraphernalia, evidence of drug dealing and items to establish occupancy at the residence. The officers found mushroom spores and mushroom growing supplies in a closet along with a pipe commonly used to smoke marijuana and two plastic bags containing dried mushroom material. Two more pipes were found atop a dresser. Officers arrested McAnallen and found a small bag of marijuana on his person. McAnallen was charged with manufacture or delivery of

psilocybin, possession of THC and possession of drug paraphernalia, each with a felony repeater enhancement.

¶4 At the suppression hearing, McAnallen argued the affidavit underlying the warrant failed to meet probable cause and the warrant was overbroad. He also requested a hearing under *Franks* alleging the affiant's characterization of Sylvester's statement was substantially different from her actual statement. McAnallen produced an affidavit from Sylvester stating she told her counselor she thought McAnallen smoked marijuana in a car around August 2008, but never told the counselor McAnallen was growing psilocybin and never saw him with any mushrooms. The affidavit said she did not indicate she ever saw marijuana inside her house or that McAnallen was growing marijuana, and never looked inside the office closet where she thought McAnallen was growing mushrooms.

¶5 The court denied the motion to suppress and denied the request for a *Franks* hearing. McAnallen then pled guilty to second offense possession of THC and the other charges were dismissed. Pursuant to WIS. STAT. § 971.31(10),¹ McAnallen now challenges the order denying the motion to suppress evidence.

DISCUSSION

¶6 McAnallen contends the affidavit in support of the search warrant was insufficient because it relied on uncorroborated multiple hearsay lacking evidence of reliability, and on stale information. We disagree. Unlike the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

circumstances described in *State v. Romero*, 2009 WI 32, ¶9, 317 Wis. 2d 12, 765 N.W.2d 756, all of the individuals whose allegations establish probable cause are identified in the application for the warrant. Sylvester had firsthand knowledge because she lived in the residence and personally observed marijuana and McAnallen's pipe. She relayed this information to a guidance counselor. From this information, a magistrate could reasonably evaluate their credibility and the reliability of their information. *Id.*, ¶21. The declarant's past performance supplying information to law enforcement or corroboration of other details is merely one of the methods of establishing reliability. They are not required in every case, particularly when probable cause does not depend on unidentified informants. *See id.*, ¶20.

¶7 In addition, McAnallen isolates individual factors instead of relying on the totality of the circumstances. *See id.*, ¶18. A hearsay declarant's veracity and basis of knowledge should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question of whether there is probable cause to believe that contraband or evidence is located in a particular place. *Id.*, ¶20. When an average citizen such as a school counselor tenders information to police, the police may assume they are dealing with a credible person. *State v. Kerr*, 181 Wis. 2d 372, 381, 511 N.W.2d 586 (1994).

¶8 Likewise, a reasonable construction of Sylvester's, Styer-Weir's and Wilson's statements does not suggest that the information provided was stale. Sylvester indicated McAnallen was growing marijuana and mushrooms. These activities do not typically terminate overnight. In addition, there is no reason to believe the pipes would not be found in McAnallen's home. Sylvester contacted the counselor to express concern about drug activity in her home and in the car.

Although she did not provide a date for this activity, the circuit court could reasonably infer it was not so long ago that it would make the accusations stale.

¶9 McAnallen also contends the warrant was impermissibly overbroad because it allowed officers to search areas other than the office closet. Nothing in the record suggests evidence was seized from any other area. The gist, however, of Sylvester's statement was that McAnallen left his drugs and pipes scattered around the house where her younger sister could play with them. In addition, the warrant authorized the officers to search any person on the premise. The marijuana was found on McAnallen's person.

¶10 Finally, the court properly denied McAnallen's request for a *Franks* hearing. Before he is entitled to an evidentiary hearing, McAnallen must provide some proof that the application for the warrant contained false statements that were made knowingly, intentionally, or with reckless disregard for the truth. *Franks*, 438 U.S. at 171. The inquiry as to deliberate falsehood or reckless disregard applies only to the affiant, not to any non-governmental informant. *Id.* The affidavit must be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. *Id.* at 165. McAnallen offered no proof that Wilson knowingly or with reckless disregard for the truth recited false statements in the application for the warrant. Wilson faithfully reported Styer-Weir's description of her conversation with Sylvester.

¶11 In the application for the warrant, Wilson added the word "psilocybin" in parenthesis after the reference to "shrooms." Wilson inferred from Styer-Weir's account of Sylvester's statement about drug use in her home and the computer sites that "srooms" meant psilocybin mushrooms. That is a permissible inference and thus does not represent either a deliberately false statement or

reckless regard for the truth. Law enforcement officers are entitled to the support of usual inferences that reasonable men draw from evidence. *State v. Starke*, 81 Wis. 2d 399, 409, 260 N.W.2d 739 (1978). By putting the word in parenthesis, Wilson indicated that it was his inference, not Styer-Weir's, that the mushrooms were psilocybin. The affidavit in support of the warrant is not deceptive.

By the Court.—Judgment affirmed.

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

