**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 30, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP2186-CR** **Cir. Ct. No. 2011CF745**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LESTER C. GILMORE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed*.

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

¶1 GUNDRUM, J. Lester Gilmore appeals his judgment of conviction following a jury trial, as well as an order denying his motion for postconviction relief. He contends the circuit court erred when it determined his trial counsel was not ineffective in his attempt to suppress under ***Franks v. Delaware***, 438 U.S. 154

(1978), evidence obtained through a search warrant. The circuit court did not err; we affirm.

## *Background*

¶2 A search warrant that ultimately led to Gilmore's conviction for burglary was issued based upon an affidavit of a city of Kenosha detective. In the affidavit, the detective averred in relevant part:

> Officer Galley stated that Rachel [Griebel] informed him that she witnessed the suspect [Gilmore] removing property from the garage in white garbage bags. He put the garbage bags in the alley behind the garage and re-entered the garage several times before leaving northbound on foot through an alley that runs north and south behind 6119-26th Ave. [Griebel] also witnessed him carrying a brown paper bag.

The same day, Griebel provided a written statement for police which stated in material part:

> I … saw [the suspect, Gilmore,] … walk[] … across my back yard…. I then saw him jump the fence into my daughter[']s yard who lives in the house north of me. I then went … to get my son Terry and a friend Matthew S. Carey, who I told about what I saw. Terry called the police and we all went to the backyard of my daughter[']s house. When we got into the backyard we heard noise like someone was throwing things around in the garage. I then yelled asking who's there 3 times. Then it got silent in the garage. The man then came out of the garage and it was the same man I saw jump over the fence. I did not see anything in his hands and he walked right passed [sic] me, around the fence and into the alley. I followed him into the alley and saw him walking away with 3 bags….

¶3 Prior to trial, Gilmore's trial counsel filed a ***Franks*** motion to suppress evidence obtained through the search warrant. Counsel argued that the police misled the judge who signed the warrant in that the affidavit for the warrant indicated that "[Gilmore] was seen carrying items from [the] garage when in fact

the opposite was true." Counsel attached a copy of Griebel's statement and the affidavit to the motion. The circuit court held a hearing at which the detective who drafted and signed the affidavit as well as city of Kenosha police officers Mohit Singh and Jeffrey Galley—the officers who interviewed witnesses at the scene—testified.

¶4 The detective testified that he never spoke with Griebel and that all of the Griebel-related information in the affidavit was told to him by Galley through multiple telephone conversations. The detective stated that Galley "summarized basically" information about the burglary, and that for his phone calls with Galley, the detective had to step out of the police department building to get cell phone reception. In between these calls, the detective would return inside and "piecemeal" draft the search warrant affidavit. The detective testified he had no independent recollection of what Galley had told him related to Griebel on the date of the burglary.

¶5 Singh testified next and noted that at the scene "there was a lot of information by [Griebel] and the other two parties [Griebel's son Terry and friend Matthew] that were there" and "they were all very, you know, excited about what had occurred and they were trying to all get their information out and tell us what happened." Singh confirmed that during this time the three witnesses were "talk[ing] over each other," and it would have been difficult if he "had been trying to write down everything they were saying at that moment." Singh stated Galley may or may not have been on the phone while these conversations were occurring, but that Galley was present when Griebel was speaking with Singh. He testified that he and Galley were continuously sharing information, but that Galley was not present when Griebel provided her written statement, which Singh wrote down

and Griebel signed. Singh confirmed that Griebel never told Singh she saw Gilmore leave the garage with anything in his hands.

¶6 Galley testified that he had spoken with Griebel prior to her providing her written statement to Singh and that he was not present when she provided that statement. He testified that "there [were] three people outside that had seen something take place" and he had spoken with all of them at some point. He confirmed that when he spoke with the detective, he was conveying information "obtained from all those individuals." He testified that "it was a little chaotic when we first arrived. Everybody outside the residence was frantic. They were nervous about what just had happened because it was confusing to them." He stated that he had multiple telephone conversations with the detective, and that while he did not recall what he told the detective regarding whether Gilmore had anything in his hands when he exited the garage, he was "not going to mislead" the detective.

¶7 The circuit court denied Gilmore's motion to suppress, finding that "if any misstatement was made of fact [in the affidavit] it was not intentionally or deliberately made." A jury found Gilmore guilty. He then filed the postconviction motion now before us, contending, as he does on appeal, that his trial counsel was ineffective because he failed to call Griebel to testify at the ***Franks*** hearing that she never told any police officer, including Galley, that she witnessed Gilmore remove anything from the garage, contrary to the relevant portion of the affidavit.

¶8 The circuit court held a ***Machner***[1] hearing at which Griebel testified and confirmed that she had spoken with two officers at the scene of the burglary, and had never told them anything different from what was reflected in her written statement. When asked by Gilmore's postconviction counsel if she ever told "the police" that she saw Gilmore come out of the garage with anything in his hands, she responded: "He didn't have anything in his hands when he came out, no." When counsel asked if there was any reason she would have told the police anything else, Griebel responded:

> He had nothing in his hands when he came out of the garage. But he walked … around in front of the garage, and he had some bags sitting there … in front of the garage. So, he walked around, he picks them up; and I ran down to see which way he was going, and that's when I saw that he had these bags on his arms. That he did not have when he come [sic] out of the garage.

¶9 Gilmore's trial counsel also testified, noting that at the time of the ***Franks*** hearing he had been practicing law for approximately eight years and that criminal cases comprised ninety to ninety-five percent of his practice. When asked by postconviction counsel why he did not call Griebel as a witness at the ***Franks*** hearing, trial counsel responded that he wanted to rely on Griebel's written statement to the police and the testimony of the officers and that he could and did get her statement admitted into evidence through Singh's testimony. He believed the discrepancy between her statement and the affidavit was sufficient to prove the falsity of the challenged statements in the affidavit, and he did not want Griebel to testify because she would be an unpredictable witness who might detract from the effect of her written statement by "add[ing]" to the statement on

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

the stand. Trial counsel also was concerned what testimony the State might procure from Griebel, noting that she was the victim's mother.

¶10 The circuit court agreed that Griebel's statement sufficiently proved the inaccuracy of the challenged information in the affidavit and that calling Griebel as a witness at the ***Franks*** hearing would have been "a wild card." The court concluded that trial counsel made reasonable strategic decisions and was not deficient in his performance and further concluded that Gilmore was not prejudiced by counsel's decisions. Gilmore appeals. Additional facts are included as necessary.

## *Discussion*

¶11 Gilmore's sole claim on appeal is that his trial counsel was ineffective in the manner in which he attempted to get the search warrant evidence suppressed. To succeed on a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced him or her. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). There is a strong presumption that a defendant received adequate assistance and that counsel's decisions were justified in the exercise of reasonable professional judgment. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. "Reviewing courts should be 'highly deferential' to counsel's strategic decisions and make 'every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

evaluate the conduct from counsel's perspective at the time.'" ***Domke***, 337 Wis. 2d 268, ¶36 (citations omitted). Counsel's performance is deficient only if the defendant proves that counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35. To prove prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. If the defendant fails to prove one prong, we need not address the other. *See* ***id.*** at 697.

¶12 Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶13 Gilmore asserts that his trial counsel provided him ineffective assistance because he "fail[ed]" to "support[] his ***Franks*** challenge with Griebel's testimony on the issue of whether she told law enforcement that she witnessed Gilmore removing things from the garage." We agree with the circuit court that trial counsel was not deficient in "failing" to call Griebel as a witness and that Gilmore was not prejudiced by counsel's decision not to call her.

¶14 To succeed on a motion to suppress evidence under ***Franks***, a defendant must prove by a preponderance of the evidence that a statement necessary to the finding of probable cause for the challenged warrant was (1) false and (2) included by the affiant in the warrant affidavit "knowingly and intentionally, or with reckless disregard for the truth." ***Franks***, 438 U.S.

at 155-56, 171-72; *see also* ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987). Proof that a challenged statement was made innocently or negligently is insufficient. ***Anderson***, 138 Wis. 2d at 463. We begin with the presumption that the detective's affidavit is valid. *See* ***Franks***, 438 U.S. at 171; ***Anderson***, 138 Wis. 2d at 463.

¶15 At the ***Franks*** hearing, Gilmore needed to first prove that the challenged information in the affidavit actually was false. Utilizing Griebel's statement to do so, rather than calling her as a witness, was a reasonable strategy. As Gilmore has acknowledged through his postconviction/appellate counsel at the ***Machner*** hearing and on appeal, respectively, "the [written] statement that [Griebel] gave was helpful" to the defense and "unquestionably supported his assertion that the language in the search warrant affidavit was not completely accurate."

¶16 Gilmore asserts that trial counsel's failure to call Griebel to testify constitutes ineffective assistance because Griebel's testimony would have confirmed not only that she did not tell Singh that she saw Gilmore exit the garage with items in his hands, but that she also did not tell this to Galley. Gilmore posits that Griebel would have so testified at the ***Franks*** hearing and, with that, the circuit court would have found that the inaccurate information in the affidavit was included therein with reckless disregard for the truth. However, as both trial counsel and the circuit court noted at the ***Machner*** hearing, calling Griebel to the witness stand at the ***Franks*** hearing carried risks.

¶17 The circuit court noted that calling Griebel as a witness at the ***Franks*** hearing would have been "a wild card." We agree; even if trial counsel had spoken to Griebel in advance of the hearing, as Gilmore asserts counsel should

have done, counsel would still have had good reason to be concerned about how Griebel would testify in that she was the victim's mother and one of those who reported Gilmore's actions to the police. Trial counsel specifically testified to his concern that she was the victim's mother and also to his concern about what questions the State might ask Griebel that could undermine the impact of her written statement and potentially result in the circuit court not finding that the challenged information in the affidavit was false. Furthermore, trial counsel had subpoenaed and questioned the detective and Galley, the witnesses most relevant to establishing the second required showing—that the false statement was included in the affidavit "knowingly and intentionally, or with reckless disregard for the truth."

¶18 Gilmore focuses his argument regarding the second part of the ***Franks*** test on the "reckless disregard for the truth" requirement; accordingly, we do as well. To prove reckless disregard for the truth, Gilmore needed to show that the detective and/or Galley either "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; *see also* ***United States v. Whitley***, 249 F.3d 614, 621 (7th Cir. 2001) (if another officer provides the affiant with information for the warrant affidavit, the inquiry into reckless conduct focuses on both officers' states of mind). This focus on the officers' states of mind is a subjective one. ***United States v. Williams***, 718 F.3d 644, 650 (7th Cir. 2013). Thus, Galley and the detective were the key witnesses Gilmore needed to meet his burden of proving that one or both of the officers acted with reckless disregard for the truth of the

challenged information.[2] *See* ***Anderson***, 138 Wis. 2d at 464; ***State v. Mann***, 123 Wis. 2d 375, 386-87, 367 N.W.2d 209 (1985) ("The distinction in ***Franks*** between statements made 'deliberately' or 'recklessly' and statements made 'negligently' or 'innocently' highlights the fact that the ***Franks*** court was not solely concerned with the nature or kind of statement, but with the motivation [of law enforcement] as well."). As evidenced by her testimony at the ***Machner*** hearing, Griebel would have been able to add little at the ***Franks*** hearing on the question of whether the officers acted with reckless disregard for the truth, while, as noted *supra* at ¶16, calling her as a witness at that hearing posed a real risk to Gilmore's ability to establish the falsity of the challenged information.[3] We cannot say that trial counsel's decision to rely on Griebel's written statement as verified by Singh's testimony fell outside the bounds of reasonable representation.

¶19 Gilmore also has failed to establish that he was prejudiced by trial counsel's decision not to call Griebel as a witness at the ***Franks*** hearing. To begin, there was no evidence presented at that hearing—and still none even with Griebel's testimony at the ***Machner*** hearing—demonstrating that the detective in any way acted with reckless disregard for the truth. It would be complete speculation for us to conclude that the detective so acted.

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[2] Gilmore does not challenge trial counsel's performance regarding counsel's questioning of the officers at the ***Franks*** hearing. *See* ***Franks v. Delaware***, 438 U.S. 154 (1978).

[3] Gilmore complains that part of trial counsel's deficient performance was his failure to speak with Griebel, either directly or through an investigator, prior to the ***Franks*** hearing. We are unpersuaded. To begin, trial counsel testified at the ***Machner*** hearing that he did attempt to contact Griebel, but to no avail. Further, as discussed *supra*, whether he had made contact with her before the hearing or not, as the mother of the victim and as one who reported Gilmore's actions to the police, Griebel still would have been "a wild card" witness for Gilmore. Gilmore has not established that prior contact with Griebel would have alleviated the risk involved in calling her as a witness.

¶20 As to Galley, the evidence that may have been presented by calling Griebel as a witness at the ***Franks*** hearing would have been Griebel's recollection that she never told any officers, including Galley, that she observed Gilmore exit the garage with anything in his hands. As already noted, however, that alone would have provided Gilmore little assistance in proving Galley's state of mind—that he acted with reckless disregard for the truth.

¶21 We note that both Griebel's written statement and her testimony at the ***Machner*** hearing reflect that Griebel heard Gilmore moving items around in the garage and then observed him come out of the garage and immediately depart the area carrying bags. While Griebel could sincerely believe she never told any officers she observed Gilmore exit the garage with anything in his hands, she in fact may have phrased comments on the scene in a manner which Galley could have reasonably interpreted as a statement that she observed Gilmore "remove property from the garage in white garbage bags." Or in the undisputed "chaotic" situation that existed when Galley was first on the scene with multiple people "talk[ing] over each other," Galley may have misheard or misunderstood what Griebel stated, or incorrectly recalled her comments when he spoke with the detective. It is also possible that in relaying information to the detective via multiple phone conversations, Galley may have misstated or ineffectively communicated to the detective the details about Gilmore removing anything from the garage. Finally, it is also plausible that the detective may have misheard or misunderstood the details or, by the time he returned into the police building to

continue drafting the affidavit, he may have inaccurately recalled some of the details.[4]

¶22 At the ***Franks*** hearing, the circuit court found believable Galley's statement that he was "not going to mislead" the detective.[5] This is a credibility determination for the circuit court and, given that there are multiple plausible and reasonable explanations for the asserted error in the detective's affidavit, Griebel's testimony does not provide us with a sufficient basis to conclude the circuit court

[4] For example, the warrant affidavit states that Griebel told Galley that she "witnessed the suspect removing property from the garage in white garbage bags." Neither her written statement nor her testimony at the ***Machner*** hearing include any reference to the bags being "white garbage" bags. The record shows that another witness, who, along with Griebel, was one of those "talk[ing] over each other," provided a written statement to Galley that also was introduced at the ***Franks*** hearing in which the witness references Gilmore walking away from the garage and "grabb[ing]" three bags which "appeared full of items" and described the bags as "two white plastic bags either small garbage bags or grocery bags" and one brown bag. Even though this witness's written statement itself was drafted after Galley had relayed information from the scene to the detective, such evidence suggests Galley could have mixed verbal comments from witnesses, or the detective mixed comments from Galley regarding statements from witnesses, by the time this sentence in the affidavit was drafted.

We further note that the circuit court did appear to conclude at the ***Machner*** hearing that the discrepancy between what Griebel observed and what was written in the affidavit was the result of a shortcoming "in the communication between the officers." Prior to that statement, the court had most recently been discussing the communication between Galley and the detective; thus we assume the court was referring to that communication, as opposed to any communication between Galley and Singh. Even though the court referenced the communication between the "officers," as opposed to between Galley and the *detective*, we note that shortly before this reference, the court twice directly referred to the detective with the title of "officer."

[5] The circuit court stated:

> [T]he second part is was it an innocent or negligent misstatement or was it deliberately false. The testimony that the court *relies on* in terms of this case is both [the detective] and Officer Galley who indicate that that's what was recalled being said and *that Officer Galley was not going to mislead* [*the detective*]. (Emphasis added.)

clearly erred in this determination.[6] Moreover, because there were reasonable explanations for the discrepancy between what Griebel testified she told (or did not tell) officers at the scene and the challenged language included in the affidavit, any testimony Griebel may have offered at the ***Franks*** hearing likely would not have changed the circuit court's finding that Galley did not intend to mislead the detective.

¶23 Based on the above, we are not convinced that had Griebel testified at the ***Franks*** hearing the circuit court would have concluded that either the detective or Galley acted with a reckless disregard for the truth or that the outcome of that hearing would have been any different. At the very most, Griebel's testimony would have led to a conclusion that any inaccuracy in the affidavit was a result of negligence.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

[6] At no time during the ***Franks*** hearing did the court question Gilmore's assertion that the challenged statement in the affidavit was inaccurate; rather, the court denied the suppression motion based upon finding the detective and Galley to be credible witnesses and believing Galley's testimony that he was "not going to mislead" the detective. The court further observed at the ***Franks*** hearing that the police could have inferred the challenged statement in the affidavit from the information gathered at the scene.