COURT OF APPEALS DECISION DATED AND FILED

March 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP1339-CR **Cir. Ct. No. 2011CF40**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER WAYNE HAAKENSTAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Christopher Haakenstad appeals a judgment convicting him of, inter alia, possession with intent to deliver methamphetamine. He also appeals an order denying his motion for postconviction relief. That motion, and a previously filed suppression motion, involve a search warrant for

Haakenstad's apartment obtained after police received a tip from a named informant. Haakenstad contends the circuit court erroneously denied his motion to suppress drug-related contraband seized at his apartment because the law enforcement officer's affidavit in support of the warrant failed to state probable cause. Specifically, Haakenstad challenges the informant's credibility, asserting that the affiant, either deliberately or with reckless disregard of the truth, improperly vouched for the informant based on past encounters.

¶2 We conclude the affidavit states probable cause even if what Haakenstad alleges is true. If we excise the challenged averment concerning past information the informant provided, there was still sufficient police corroboration to establish the reliability of the informant's information and, consequently, probable cause to conduct the search. Accordingly, we conclude that the circuit court properly denied Haakenstad's suppression motion and that, under the facts of this case, Haakenstad is not entitled to a hearing regarding whether the search-warrant affiant deliberately or recklessly presented facts relevant to a determination of probable cause. We affirm.

BACKGROUND

¶3 On November 18, 2010, law enforcement officials applied for a warrant to search Haakenstad's apartment, which, according to the application, was located in the Village of Roberts "on the northeast corner of Division Street and County Road TT[.]" The application was accompanied by an affidavit from Brent Standaert, who worked for the St. Croix County Sheriff's Office and was assigned to the St. Croix Valley Drug Task Force.

¶4 Most of the information Standaert provided in his affidavit he appears to have received from Marty Folczyk, a City of Menominee detective

assigned to the West Central Drug Task Force. Members of the West Central Drug Task Force had arrested an individual, M.H.,[1] earlier that afternoon. Standaert averred M.H. "is known to the West Central Drug Task Force and has given good information in the past."

¶5 According to Standaert's affidavit, M.H. told Folczyk that he visited Haakenstad's apartment to purchase methamphetamine on November 17, 2010. Haakenstad did not have any methamphetamine at the time, but Haakenstad told M.H. he would be picking up an ounce later in the evening. At 4:30 a.m. on November 18, Haakenstad called M.H. and told him to come to Haakenstad's apartment in Roberts. M.H. drove to Haakenstad's apartment with a companion, who purchased 4.4 grams of methamphetamine from Haakenstad. M.H. told Folczyk that he saw a large baggie of methamphetamine on Haakenstad's coffee table left over immediately after the purchase. M.H. also told Folczyk that Haakenstad's apartment was located "in the Village of Roberts in a brick building near the corner of CTH TT and Division Street near a BP gas station."

¶6 Standaert averred that at approximately 2:15 p.m. on November 18, Folczyk had M.H. place a telephone call to Haakenstad. Folczyk listened to the conversation on speakerphone and heard Haakenstad tell M.H. that there were 16 grams of methamphetamine remaining from the ounce Haakenstad had purchased the night before. Based on the information Folczyk provided, Standaert contacted the Roberts police chief, who confirmed Haakenstad's address based upon Haakenstad's previous contacts with the Roberts police department.

[1] M.H. was not a confidential informant. However, the State's response brief uses the source's initials rather than his full name, purportedly for confidentiality. We adopt the State's practice out of an abundance of caution.

¶7 The warrant issued, and police conducted a search on the afternoon of November 18. Police discovered drug paraphernalia and material that field-tested positive for methamphetamine and tetrahydrocannabinol (THC). Haakenstad was then charged with one count each of possession with intent to deliver methamphetamine, possession of THC, and possession of drug paraphernalia. Additional charges were included in an amended Information following consolidation with a Barron County case.

¶8 Haakenstad filed a motion to suppress the evidence seized during the search of his apartment. He alleged Standaert's affidavit in support of the search warrant omitted undisputed material information that would have affected the court's probable cause determination. Specifically, Haakenstad alleged that: (1) M.H. admitted smoking methamphetamine on the morning of his arrest, and injecting it two days prior; (2) M.H. was a known drug dealer and user with outstanding warrants; (3) M.H. previously "double-crossed" the West Central Drug Task Force during a controlled buy; and (4) M.H. previously "'ripped' off" a meth buyer and took his money.[2]

¶9 Haakenstad asserted this information, if disclosed in the affidavit, would have created serious doubt about M.H.'s credibility, particularly in light of the fact that the affidavit had not explained how M.H. was "known" and what "good information" he provided in the past. Indeed, Haakenstad asserted that, because the allegedly omitted information was known to Standaert at the time he signed the affidavit, Standaert's averment that M.H. was "known to the West

[2] This information was included in police reports from Dunn County and Menominee police departments that were provided to Haakenstad during discovery in this case.

Central Drug Task Force and has given good information in the past" was made with reckless disregard for the truth.

¶10 Accordingly, Haakenstad requested a ***Franks*/*Mann*** hearing as a component of his suppression motion. *See* ***Franks v. Delaware***, 438 U.S. 154, 156 (1978); ***State v. Mann***, 123 Wis. 2d 375, 386, 367 N.W.2d 209 (1985). At a ***Franks*/*Mann*** hearing, Haakenstad would have been required to show, by a preponderance of the evidence, that Standaert deliberately or recklessly included false information in, or omitted material information from, the warrant affidavit. *See* ***Franks***, 438 U.S. at 156; ***Mann***, 123 Wis. 2d at 388-89. However, the circuit court determined Haakenstad failed to make a "substantial preliminary showing" entitling him to a ***Franks*/*Mann*** hearing. *See* ***Franks***, 438 U.S. at 155; ***Mann***, 123 Wis. 2d at 388. The court reached this conclusion after an April 22, 2013 evidentiary hearing at which Folczyk, but not Standaert, testified on behalf of the State.[3]

¶11 Pursuant to a plea agreement, Haakenstad pleaded guilty to the St. Croix County charge of possession with intent to deliver methamphetamine and a Barron County charge of delivery of methamphetamine. The remaining charges were dismissed.

¶12 Haakenstad, represented by new counsel, filed a postconviction motion requesting that the court set aside its previous decision and conduct a ***Franks*/*Mann*** hearing. Haakenstad asserted his trial counsel was ineffective for failing to call Standaert as a witness at the previous hearing. Citing ***State v.***

[3] The State offered to call Standaert to testify, but the circuit court concluded his testimony was unnecessary.

Anderson, 138 Wis. 2d 451, 464, 406 N.W.2d 398 (1987), Haakenstad asserted that Standaert's state of mind and knowledge should have been the focus of the earlier evidentiary hearing.

¶13 The circuit court entered an order denying the postconviction motion following a ***Machner*** hearing.[4] At the hearing, Haakenstad's trial counsel testified that the earlier evidentiary hearing was preliminary to a ***Franks***/***Mann*** hearing and that, if it had been a ***Franks***/***Mann*** hearing, he would have called Standaert as a witness. Postconviction counsel then acknowledged that he mistakenly believed the earlier hearing had been a ***Franks***/***Mann*** hearing and that, if it was not, the postconviction motion was baseless.

¶14 Haakenstad now appeals, asserting the circuit court erroneously denied his suppression motion without holding a ***Franks***/***Mann*** hearing. He contends he was entitled to such a hearing so as to demonstrate that Standaert's assertion in the warrant affidavit that M.H. was known and previously provided good information had been made with deliberate or reckless disregard for the truth.[5]

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[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (testimony from the defendant's trial counsel is required to resolve ineffective assistance of counsel claims).

[5] In ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985), our supreme court held that the principles of ***Franks v. Delaware***, 438 U.S. 154 (1978), require the same procedures set forth in ***Franks*** to be followed where the defendant alleges that the warrant affidavit omitted critical material necessary for an impartial judge to fairly determine probable cause. ***Mann***, 123 Wis. 2d at 385-86. Here, Haakenstad's suppression motion mentioned omitted information, but it is unclear whether he meant those references to supply an independent ground for invalidating the warrant, or whether the references were merely intended to provide context for Haakenstad's argument that Standaert falsely averred M.H. was known and provided good information in the past.

(continued)

DISCUSSION

¶15 "The Fourth Amendment of the United States Constitution guarantees that persons shall be secure from 'unreasonable searches and seizures and sets forth the manner in which warrants shall issue.'" ***State v. Sveum***, 2010 WI 92, ¶18, 328 Wis. 2d 369, 787 N.W.2d 317 (quoting ***State v. Henderson***, 2001 WI 97, ¶17, 245 Wis. 2d 345, 629 N.W.2d 613). The Constitution's Warrant Clause requires that all warrants be validly issued. ***Id.***, ¶19. Among other things, this requires "a demonstration upon oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense …." ***Id.***, ¶20.

¶16 Affidavits made in support of search warrants are presumed valid. *See* ***Franks***, 438 U.S. at 171. However, a warrant affiant cannot include allegations that are deliberately false or made with reckless disregard for the truth. ***Id.*** at 155-56. When a defendant challenges the veracity of the warrant affidavit, he or she must first make a "substantial preliminary showing" that deliberately or recklessly false statements were included in the affidavit. ***Id.*** "Allegations of negligence or innocent mistake are insufficient," and the attack must be more than

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Either way, we elect not to consider whether Haakenstad is entitled to a hearing on the basis of omitted information. To the extent his suppression motion can be read as challenging only the averment that M.H. was "known" and had "given good information in the past," the allegedly omitted information only supplied the requisite substantial preliminary showing of deliberately or recklessly false statements, which, as explained herein, we have assumed to exist. *See infra*, ¶22. To the extent Haakenstad wished to independently claim that the warrant affidavit fell short of ***Mann***, he does not resurrect that argument on appeal, *cf.* ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989) (questions not argued will not be considered or decided), including, importantly, his failure to make any argument that the omitted facts are "undisputed, capable of single meanings and critical to a probable cause determination," ***Mann***, 123 Wis. 2d at 388. Nor does he reply to the State's observation that he failed to raise any such argument on appeal. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

conclusory. ***Id.*** at 171. The allegations must be accompanied by: (1) an offer of proof that "point[s] out specifically the portion of the warrant affidavit that is claimed to be false;" and (2) a statement indicating why the defendant believes those portions of the warrant affidavit are false. ***Id.*** "Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." ***Id.***

¶17 If the defendant makes this substantial preliminary showing, the court must then consider whether the allegedly false information was critical to a finding of probable cause. The court does this by excising the challenged statements from the affidavit. *See* ***Anderson***, 138 Wis. 2d at 464. "The affidavit is then examined to determine whether, with the statements excised, the affidavit provides probable cause for the search warrant." ***Id.*** If not, and if the defendant successfully demonstrates at an evidentiary hearing—known as a ***Franks*** hearing—that the affiant deliberately or recklessly included false information, the warrant is voided and any evidence seized pursuant to it must be suppressed. ***Franks***, 438 U.S. at 155-56. If the warrant affidavit establishes probable cause despite the applied excisions, the warrant is valid and the evidence admissible. ***Id.*** A circuit court's denial of a defendant's motion for a ***Franks*** hearing is subject to de novo review. *See* ***State v. Manuel***, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997).

¶18 Here, Haakenstad asserts he made a substantial preliminary showing that Standaert's averment that M.H. was "known to the West Central Drug Task Force and has given good information in the past" was made with deliberate or reckless disregard for the truth. Haakenstad recognizes on appeal that no ***Franks*** (or ***Mann***, for that matter) hearing occurred in this case, but he contends the circuit court was required to hear Standaert's testimony before denying his suppression

motion. Haakenstad asserts the court erred because it "failed to ascertain the state of mind of the affiant." That, however, is precisely the purpose of a ***Franks*** hearing. *See* ***Anderson***, 138 Wis. 2d at 464. Haakenstad was not entitled to such a hearing unless he made the requisite substantial preliminary showing *and* demonstrated that the alleged excisions would have resulted in a lack of probable cause to issue the search warrant.

¶19 In light of the procedurally odd state of affairs before the circuit court, including the court's decision to hold an evidentiary hearing before deciding whether a ***Franks*** hearing was warranted, we elect not to address whether Haakenstad made a substantial preliminary showing.[6] Instead, we assume, without deciding, that Haakenstad's suppression motion satisfied this requirement. However, we conclude the allegedly improper information in the affidavit was not critical to a determination of probable cause. In other words, even if the challenged portion of the affidavit is excised, the affidavit nonetheless states probable cause.

¶20 Although framed in multiple ways throughout this case, Haakenstad's challenge to the affidavit has always been that Standaert recklessly averred that M.H was "known to the West Central Drug Task Force and has given good information in the past." We therefore excise that portion of the affidavit asserting M.H. was known and previously provided good information to law enforcement.

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[6] We are unsure why the circuit court ordered an evidentiary hearing in this case prior to determining whether a ***Franks/Mann*** hearing was required. As set forth *supra*, ¶¶16-17, a defendant's entitlement to a ***Franks***/***Mann*** hearing should be evident from the motion and supporting materials. As we explain, we conclude Haakenstad's submission did not entitle him to a ***Franks***/***Mann*** hearing, regardless of Folczyk's testimony at the evidentiary hearing.

¶21 Even with this modification to the affidavit, its contents were still sufficient to establish probable cause to conduct a search of Haakenstad's apartment. Probable cause is determined by applying the totality-of-the-circumstances test adopted in ***Illinois v. Gates***, 462 U.S. 213 (1983). *See* ***State v. Lopez***, 207 Wis. 2d 413, 425, 559 N.W.2d 264 (Ct. App. 1996). The test deals with nontechnical probabilities—that is to say, the "'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" ***Gates***, 462 U.S. at 231 (quoted source omitted). Evaluating probable cause requires a "commonsense determination as to whether there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***Lopez***, 207 Wis. 2d at 425.

¶22 Therefore, when determining whether probable cause exists, all the circumstances set forth in the affidavit, "including the veracity and basis of knowledge of persons supplying hearsay information," must be considered. ***Id.*** Elaborate specificity is not required, and officers are entitled to draw reasonable inferences from the facts. ***Id.*** at 425-26. A hearsay declarant's veracity and basis of knowledge, while highly relevant, should not be understood as entirely separate and independent requirements to be rigidly exacted in every case. ***State v. Romero***, 2009 WI 32, ¶20, 317 Wis. 2d 12, 765 N.W.2d 756 (citing ***Gates***, 462 U.S. at 230).

¶23 Here, Haakenstad argues that M.H. was not a credible informant and his information was untrustworthy. "A declarant's credibility is commonly established on the basis of the declarant's past performance of supplying information to law enforcement." ***Id.***, ¶21. We have excised Standaert's averment that M.H. was "known" and provided "good" information in the past. Other than

that assertion, nothing else in the affidavit established that M.H. was a credible informant based on *past* interactions with law enforcement.

¶24 However, that limitation alone does not mean police could not rely on the information M.H. provided. Haakenstad ignores that police can establish the reliability of an informant's information other than by vouching for an informant's credibility based on past experience. "Even if a declarant's credibility cannot be established, the facts may still permit the warrant-issuing officer to infer that the declarant has supplied reliable information on a particular occasion." ***Id.*** The reliability of the information may be established by corroboration of details sufficient to support a search warrant. ***Id.*** "If a declarant is shown to be right about some things, it may be inferred that he is probably right about other facts alleged." ***Id.***

¶25 In this case, there was ample police corroboration of the information M.H. provided. Police did not simply take M.H. at his word that Haakenstad was distributing drugs out of his apartment. Instead, Folczyk requested that M.H. place a monitored telephone call to Haakenstad. It is unclear whether Haakenstad identified himself during the telephone call, but, in all events, the individual whom M.H. represented to be Haakenstad did provide information consistent with M.H.'s assertion that Haakenstad previously said he was "picking up an ounce of methamphetamine."[7] Further, Standaert independently verified the location of

[7] There are slightly more than 28 grams in an ounce. Hours after M.H.'s companion purchased 4.4 grams, Haakenstad represented that 16 grams remained from the original ounce. Haakenstad does not advance any challenge to the affidavit based on the reduced quantity disclosed during the telephone conversation. In any event, any such challenge would fail because it is reasonably probable that a person engaged in the distribution of methamphetamine would have sold to individuals other than M.H.'s companion, either before or after that transaction.

Haakenstad's apartment with the Roberts police chief, who confirmed the apartment was at the location M.H. provided. Because police corroborated these specific details about M.H.'s account, they could infer that M.H. was telling the truth about the other, unconfirmed aspects of his story—including the identity of the other person on the monitored telephone call.

¶26 In light of this corroboration, and considering the totality of the circumstances, we conclude the affidavit, objectively viewed, stated probable cause even if every allegation in Haakenstad's suppression motion was correct and capable of being proven by a preponderance of the evidence. The information M.H. provided was validated and bolstered by the monitored telephone call, during which an individual M.H. identified as Haakenstad effectively admitted to possessing and distributing methamphetamine. M.H. told police where the drugs could be found, and Standaert confirmed the location of Haakenstad's residence with the local police department. Based on the valid information included in the affidavit, there was a fair probability that contraband would be found in Haakenstad's apartment. *See* ***Lopez***, 207 Wis. 2d at 425.

By the Court.—Judgment and order affirmed.

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