

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2015

Diane M. Fremgen
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. 2014AP2418-CR

Cir. Ct. No. 2013CF371

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY M. BENDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: TODD P. WOLF, Judge. *Reversed and cause remanded for further proceedings.*

Before Blanchard, P.J., Lundsten, and Sherman, JJ.

¶1 PER CURIAM. Timothy Bender appeals a judgment of conviction for manufacturing THC and unlawful possession of a firearm, a decision denying his motion to suppress evidence, and an order denying his postconviction motion

for reconsideration of the decision denying his suppression motion. Bender's motion to suppress alleged *Franks/Mann*¹ and probable cause violations in connection with a warrant issued for a search of rural farm property that included Bender's residence. The circuit court found *Franks/Mann* violations in the form of three false or materially incomplete statements in the sworn complaint submitted in support of the warrant.² The court examined the sworn complaint as if it had been revised to excise the false statements and to include material omissions. Based on its consideration of what we will refer to as the "revised allegations," the court concluded that the revised allegations provide sufficient evidence of probable cause. Bender argues that the circuit court erred in reaching this conclusion. We agree with Bender that the revised allegations did not establish probable cause. Accordingly, we reverse.

¶2 In light of this conclusion, we need not and do not reach Bender's separate argument that police violated his constitutional rights in placing surveillance cameras on his property and using the cameras to take photographs without consent or a warrant authorizing either placement or surveillance in this manner. We assume without deciding that the unconsented, warrantless placement

¹ See *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). A *Franks* violation occurs when an averment in an affidavit submitted in support of a search warrant is either intentionally false or made with reckless disregard for the truth. See *Franks*, 438 U.S. at 155-56. It is also a violation to intentionally, or with reckless disregard for the truth, omit material information from an affidavit. See *Mann*, 123 Wis. 2d at 385-86. Following a common convention, we collectively refer to both types of violations as "*Franks/Mann* violations."

² The document is styled as a "complaint for search warrant," consistent with WIS. STAT. § 968.12(2) (2013-14) ("A search warrant may be based upon sworn complaint or affidavit,").

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and use of the cameras was lawful, but conclude that, even with the benefit of the information that police obtained through the camera surveillance, the content of the revised allegations fails to establish probable cause.

BACKGROUND

¶3 Officer James Cramm applied to the circuit court for a warrant authorizing a search of property of Joan Bauman and her son, the defendant here. Police sought authority to search 38.8 acres of their rural property, including a pole barn, a garage, and a house located on the property, for marijuana or for instrumentalities or evidence of marijuana cultivation or sales. Based on Cramm's sworn complaint, the circuit court issued a warrant.³ When police executed the warrant they discovered firearms, marijuana, and materials consistent with the cultivation of marijuana. Bender was charged with manufacturing and delivering marijuana, illegal possession of a firearm, possession of marijuana, and maintaining a drug trafficking place.

¶4 Bender filed a motion seeking to suppress all evidence obtained in the search. After holding a hearing on Bender's suppression motion and reviewing the photographic and video evidence from the surveillance cameras, the circuit court ruled that Bender proved by a preponderance of the evidence that Officer Cramm had made several false statements and material omissions and that he had done so in reckless disregard of the truth. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *State v. Mann*, 123 Wis. 2d 375, 385-86, 388, 367 N.W.2d 209.

³ The Hon. Nicholas J. Brazeau, Jr. issued the warrant. The Hon. Todd P. Wolf issued the challenged decision denying the suppression motion.

¶5 Specifically, the court found that the following statements in the sworn complaint were false and had been included in reckless disregard for their truth: that there was a “fence line” differentiating Bender’s property from a neighbor’s in the area of marijuana plants; that there was photographic evidence showing Bender in a marijuana plot and also showing him “traveling towards and from” apparently cultivated marijuana plants; and that multiple paths led from the marijuana plants “toward the Bauman/Bender residence.” Regarding the last statement in the sworn complaint, the court found that it was a material omission not to include the statement that there was one trail leading from the plants toward Bender’s property and a separate trail leading from the plants toward a neighbor’s property.

¶6 Subsequently, in response to a motion to reconsider its decision denying suppression, the circuit court amended one of the revised allegations to add the statement that photographs from the hidden cameras showed Bender walking from the direction of the marijuana plants, while he was approximately 800 feet away from the plants, rather than showing him “traveling towards and from” the plants.

¶7 The State does not challenge any of these findings. Similarly, Bender does not argue that the court should have found additional statements in the sworn complaint to have been false or that any different material should have been added. Therefore, when determining whether the warrant is supported by probable cause, we, like the circuit court, must rely on the revised allegations, because courts assess probable cause against the allegations after false statements are deleted and material omissions remedied. *See Franks*, 438 U.S. at 156 (if defendant establishes perjury or reckless disregard for the truth, court sets aside false statements and reviews allegations absent the false statements for probable

cause); *Mann*, 123 Wis. 2d at 390 (if court determines that omission is critical and material, court inserts omitted material into complaint and evaluates revised allegations for probable cause).

¶8 Undertaking the required review of the revised allegations, the circuit court concluded that they establish probable cause for the issuance of a warrant to search Bender's property. Separately, the court concluded that police did not violate Bender's constitutional rights by placing and using the surveillance cameras on his property without consent or warrant authorization. On this basis, the circuit court denied Bender's motion to suppress.

¶9 After the court denied Bender's suppression motion, Bender entered no contest pleas to two counts, and filed a motion asking the court to revisit and revise its findings on the suppression motion. In response, the court made the amendment to the revised allegations referenced above, but otherwise denied Bender's postconviction motion and declined to reconsider its earlier probable cause finding. Bender appeals.

DISCUSSION

¶10 Bender argues on appeal that the circuit court erred in concluding that the revised allegations establish probable cause supporting the warrant to search the property, including his residence, for marijuana or for instrumentalities or evidence of marijuana cultivation or sales.

¶11 The State explicitly agrees that Bender, in his principal brief on appeal, has accurately summarized the allegations of fact contained in the revised allegations as found by the circuit court. The State argues that these allegations establish probable cause, and Bender disagrees. We follow the parties in relying

on Bender's summary, which we relate below, with one exception that we highlight *infra* at note 4.

¶12 We typically give “great deference” to a magistrate’s determination that an affidavit for a search warrant establishes probable cause. *See State v. Marquardt*, 2005 WI 157, ¶23, 286 Wis. 2d 204, 705 N.W.2d 878. However, we independently review whether an affidavit establishes probable cause to issue a search warrant after a circuit court has made *Franks/Mann* excisions. *See State v. Herrmann*, 233 Wis. 2d 135, 143, 608 N.W.2d 406 (Ct. App. 2000).

¶13 In determining whether probable cause is established in an affidavit for a search warrant, we consider “whether objectively viewed, the record ... provide[s] ‘sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.’” *State v. Ward*, 2000 WI 3, ¶27, 231 Wis. 2d 723, 604 N.W.2d 517 (internal quotations and quoted sources omitted). “[W]e employ a ‘totality of [the] circumstances standard’” to determine whether there is a “fair probability” that evidence or contraband will be found in a particular place. *State v. Popp*, 2014 WI App 100, ¶28, 357 Wis. 2d 696, 855 N.W.2d 471 (quoted source omitted). When conducting our independent review, we “may make the usual inferences reasonable persons would draw from the facts presented.” *See Ward*, 231 Wis. 2d 723, ¶28 (quoted source omitted).

¶14 We pause to stress that our task is limited to reviewing only the *revised allegations* to determine whether they supply probable cause to search Bender's property. As discussed below, the revised allegations provide scant information on such pertinent topics as distances, directions, public road access, terrain, or the extent of housing in the area other than Bender's house. We

acknowledge that there appears to be other information in the record suggesting that police could have alleged facts in the sworn complaint supporting probable cause. For example, at the *Franks* hearing, an aerial photo was introduced, along with corresponding testimony, regarding the relative locations of the marijuana plants, adjacent farm fields, some buildings, and what appears to be a public road. Our review, however, is limited to the revised allegations. We conclude they are not sufficient “to excite an honest belief in a reasonable mind” that items of the type sought would be found in Bender’s house. *See Ward*, 231 Wis. 2d 723, ¶27 (quoted source omitted).

¶15 The parties agree that the revised allegations consist of the following.

¶16 A confidential informant (“CI1”) reported to police on July 11, 2013, that he or she suspected that Bender was growing marijuana, although CI1 had never seen any illegal activity. The basis for CI1’s suspicion was that: Bender was not employed and was secretive; when Bender had friends over to visit, they gathered in the garage of the Bender/Bauman home; there were areas of the home that Bauman did not enter, such as the basement and the shed; and Bender kept the shed locked. CI1 said that Bender had been convicted of marijuana offenses several years earlier.

¶17 On September 20, 2013, a second confidential informant, (“CI2”) reported to police that, while “returning from a walk in the woods ... through a portion of a harvested corn field” on the Bender/Bauman property, CI2 “spotted what CI2 thought might be a marijuana plant growing in the unmaintained area

immediately adjacent to the corn field.”⁴ CI2 transmitted to police a cell phone photograph of the suspected marijuana plant.

¶18 Officer Cramm and a colleague walked through a harvested cornfield at some unspecified distance from the Bender home and found a total of five marijuana plants growing in two places separated by approximately 50 feet. The five plants were concealed amid unmaintained vegetation between a cornfield and a hayfield. The suspect plants tested positive for THC. The marijuana appeared to have been intentionally planted, and cultivated on an ongoing basis.

¶19 There is a revised allegation about “trails,” but it ambiguously refers to trails leading from the plants toward two properties, one trail toward the Bender/Bauman property and one trail toward a neighbor’s property. It is not apparent how a trail *on* a property can lead *toward* that same property. And, because we do not know the relationship of the plants or trail to the neighbor’s property, we know little about the direction of that trail. In sum, we know there are two trails, but we do not know whether either leads towards the Bender/Bauman buildings or toward a neighbor’s buildings.

⁴ Here we diverge from the revised allegations of fact agreed to by the parties on appeal, because Bender’s summary at least implies an inaccurate characterization of a potentially pertinent aspect of the contents of the sworn complaint for no valid reason that we can discern. While the State makes no note of it, Bender implies that the allegation was that CI2 came upon the suspect marijuana plant *during* a walk in the woods, but the sworn complaint makes clear that the alleged discovery was made only *after* a walk in the woods. This is not a topic on which the circuit court found any falsity or material omission. The difference between discovery during a walk through woods and discovery after a walk through woods could be significant. If the plant was alleged to be in a wooded area, this would support the reasonable inference that the plant was at least somewhat remote from the Bender residence and places frequented by Bender, and perhaps readily accessible to members of the public willing to trespass on farm land.

¶20 Cramm researched Wood County land and property tax records and reviewed an aerial photograph of the Bauman/Bender property, and concluded based on those sources that the marijuana plants were located on the Bender/Bauman property. However, in the *Franks/Mann* hearing, the circuit court determined that this was not accurate, and that the plants were located on a neighbor's property.

¶21 Cramm surreptitiously installed surveillance cameras on the Bender/Bauman property, which captured photographs of Bender walking on his property, as Bender traveled "from the direction of" the plants. At that time, Bender appeared to be approximately 800 feet from the plants. Separately, Cramm observed Bender walking on his property on September 24, 2013. Police conducted physical surveillance and surveillance through the hidden cameras of the area of the marijuana plants beginning September 21, 2013, and continuing through September 25, 2013.

¶22 Cramm reviewed criminal history information for Bender and made an ambiguous statement regarding his convictions.⁵

⁵ The pertinent paragraph from Cramm's sworn complaint reads as follows:

Your complainant researched the records of the Wisconsin Crime Information Bureau and Wisconsin Circuit Court Access which are held in the ordinary course of business and thus believed to be truthful and reliable. Your complainant has relied upon those records in the past and has found them to be truthful and reliable. Your complainant found that Joan Bauman has no criminal record. Your complainant found that Timothy Bender has a conviction for drug offenses in Ashland County, Wisconsin (2001CF80) and Clark County, Wisconsin (2002CF19) which were consolidated with convictions in Marathon County, Wisconsin (2001CF581) for two counts of

(continued)

¶23 Cramm applied for the warrant on September 26, 2013, and police executed it the next day.

¶24 Viewing these allegations of fact and the reasonable inferences arising from them under the totality of the circumstances standard, we are not persuaded by the State's position that the revised allegations establish probable cause to search Bender's house for marijuana and items related to cultivation or sales.

¶25 The State asks us to place great weight on the alleged statements of the two confidential informants, emphasizing that the informants "sought neither financial nor criminal law compensation." However, we conclude for the following reasons that, regardless of their apparent motivations in providing information to the police, the tips from the informants add little weight to a finding of probable cause.

¶26 Regarding the information provided to police by C11, this creates, at best, slender inferences that Bender was involved in conduct of an unknown nature that he did not want his mother to know about. In themselves, these inferences are not especially probative as to whether he was cultivating marijuana.

Manufacture THC, Possession of THC, and Possession of Cocaine.

We observe that this language is ambiguous, and is entitled to less weight than it would be if it were clear. It refers to "a conviction for drug offenses" and leaves us to interpret what offense or offenses Bender might have been convicted of. This passage would appear to allege at least two alternative scenarios: (1) that the records reflected that Bender had been charged with four counts in three counties (the three different types of charges listed at the end of the passage), which were then resolved with a single conviction in Marathon County for one of those three categories of offenses; or (2) that the records reflected that Bender had been charged with an unknown number of counts in three counties, which were then resolved with convictions in Marathon County for the four separate counts of conviction listed at the end of the passage.

While the statement suggests that CI1 had some familiarity with Bender and his mother, the content of CI1's statement is essentially devoid of details. *See Popp*, 357 Wis. 2d 696, 717-18 (informant's statement insufficient to support finding of probable cause for a warrant where statement did not provide sufficient detail for court to evaluate veracity and basis of informant's knowledge). We learn nothing about what Bender allegedly did that amounted to "secretive" conduct, the source of the alleged "secretive conduct" information, or how fresh the information was. Moreover, some of the allegations of CI1 appear to have little or no weight as stand-alone propositions, such as the allegations that Bender was unemployed and that he kept a shed locked. At least without more explanation, unemployment might provide a motivation to commit crime generally but has little probative weight here in the context of the revised allegations as a whole, and locking a shed ordinarily represents only a common sense theft-deterrence measure, like locking one's residence when absent. For these reasons, we conclude that CI1's statement is of little value in the probable cause analysis.

¶27 We conclude that CI2's statement adds nothing beyond what is already established through other statements in the revised allegations. CI2 spotted a marijuana plant in an unidentified portion of an unmaintained area adjacent to a cornfield on 38.8 acres of land. We have at least somewhat more specific evidence about the location and number of marijuana plants from Cramm's observations. There is no reason to conclude that the plant that CI2 allegedly saw was not one of the same plants that Cramm allegedly observed personally.

¶28 We turn now to the allegations of direct police observation of the plants and their positive identification as marijuana plants that appeared to be cultivated in an otherwise unmaintained area of vegetation. This is certainly

strong evidence that *someone* was involved in criminal activity related to these plants. However, once the false and incomplete information is addressed under *Franks/Mann*, we are left with little more than the knowledge that five cultivated marijuana plants are secreted at some unidentified location near the Bender/Bauman property, and that there are two trails of unknown length and ending points associated with the plants.

¶29 We recognize, as our supreme court explained in *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988), that probable cause for a search of a location can exist so long as there is evidence that would lead a reasonable person to conclude that an item sought is likely to be found in that location, even if it may also be reasonable to conclude that the same item is instead in as many as two other locations. The problem here is that a reasonable person would not consider it more than a mere possibility, based on the revised allegations, that the person or persons cultivating the plants operated out of either Bender's house or his neighbor's house. So far as the revised allegations suggest, the cultivator or cultivators of these five plants concealed amid this apparently typical rural Wisconsin landscape came and went from any direction, and there is no reason to conclude from the revised allegations that the plants could not be accessed by anyone intending to cultivate a small, secret marijuana plot on farm land.

¶30 Turning to Cramm's statement that, based on his review of property records, it appeared that the five marijuana plants were located on Bender's property, we agree with the circuit court that this statement has little bearing on the probable cause issue. As indicated above, the circuit court determined that this understanding was mistaken. However, the circuit court declined to excise this statement under its *Franks/Mann* analysis, explaining in part that Cramm's understanding about whose property the marijuana plants were on was not relevant

to resolving the probable cause issue. We agree. The identity of the owner of the land on which the plants were growing is of little value to a determination of probable cause under the circumstances here, involving a few marijuana plants growing amid other plants on rural property with trails that are said to head in the direction of two properties. That the plants were in the general area of Bender's residence could, of course, be a relevant fact, when considered with other evidence. However, one obvious dynamic in play here is that a person planting and cultivating marijuana outdoors in a rural setting might well prefer to do so on property *other than* his or her own, if alternative locations were available. A countervailing dynamic would be that some cultivators of illicit crops will choose to do so on their own properties in hopes of reducing discovery or interference by others. To repeat, proximity to Bender's property and house are relevant factors. However, given the circumstances otherwise described here, whether the plants were on Bender's side of a property line matters little.

¶31 This discussion regarding the locations of the plants, paths, and property lines brings us to a fundamental problem with the State's argument on appeal. The problem is that the revised allegations provide little evidence of where the plants might have been located relative to either Bender's house or to any parts of his property that he appears to have frequented or visited even once. As far as we can discern from the revised allegations the marijuana plants were not close to the house and, significantly, apparently not readily identifiable to anyone making ordinary use of Bender's property. We say apparently not close to the house because the revised allegations state that there was at least a portion of a cornfield between the house and the plants.

¶32 In particular, under the revised allegations, all we have to rely on regarding pertinent trails is the following: "There were trails leading from the

plots toward the Bender/Bauman property and the [neighbor's] property.” As referenced above, the concept of a “trail” “leading from the plots toward” the “property” of Bender has little probative value. It is certainly a far cry from an allegation that there was a readily discernable, obviously used pathway from the marijuana plants to the Bender residence or any other place frequented by Bender or any person shown to be associated with his property.

¶33 As to the ambiguous statement regarding Bender’s criminal history of more than a decade earlier, it is true that a judge may consider a person’s criminal record as a factor in determining whether probable cause exists for a search warrant. *See State v. Schaefer*, 2003 WI App 164, ¶22, 266 Wis. 2d 719, 668 N.W.2d 760. However, the State seems to concede on appeal, by downplaying Bender’s criminal history, that these allegations, without more explanation, could have small probative value at best in the totality of the circumstances supporting the probable cause standard that the State must meet pursuant to the Fourth Amendment to establish the reasonableness of a warrant to search a home. *See, e.g., State v. Sobczak*, 2013 WI 52, ¶11-12, 347 Wis. 2d 724, 833 N.W.2d 59 (“It has long been established that the Fourth Amendment places the greatest protection around the home, as it was drafted in part to codify ‘the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.’” (quoted source omitted)). We conclude that whatever small value the ambiguous reference might have it does not tip the scales, given the totality of the circumstances.

¶34 On a separate topic, the State suggests that the fact in itself that two confidential informants without apparent stakes in the matter “felt,” to use the State’s word, that Bender might be involved in marijuana cultivation and took the initiative to share their suspicions with police carries some independent weight.

However, mere suspicious feelings do not matter. What matters are allegations of fact and the reasonable, relevant inferences that a neutral observer may draw from them.

¶35 The State does not argue that the circuit court's decision denying suppression may be affirmed on any other ground if the revised allegations do not establish probable cause.

CONCLUSION

¶36 For these reasons, we conclude that, under the totality of the circumstances, the revised allegations are insufficient to support a probable cause finding, and therefore the circuit court erred in denying Bender's motion to suppress evidence.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

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

