

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 2016

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. 2015AP1326-CR

Cir. Ct. No. 2013CF107

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MACK E. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Mack E. Scott appeals from a judgment convicting him of first-degree reckless homicide by delivery of a controlled substance, possession with intent to deliver heroin, possession with intent to deliver cocaine, and possession with intent to deliver tetrahydrocannabinols (THC). He contends

that the circuit court should have granted his motion to suppress evidence because the police's search warrant was invalid. We disagree and affirm.

¶2 On May 9, 2013, police were dispatched to a residence where they discovered the body of Tyler Bares, who had died from a drug overdose. Bares' cousin informed them that Bares had exchanged text messages with Justin Glander the evening before his death.

¶3 An examination of Bares' cell phone confirmed text messages between Bares and Glander. Using coded language, Bares told Glander that he was looking for fifty dollars worth of heroin and fifty or one hundred dollars worth of cocaine. Glander agreed and said that he tried to get a hold of "Pat," but was unsuccessful. Bares informed Glander that Pat had two numbers, "his old and new," and that his old one worked.

¶4 While Bares and Glander exchanged text messages, Bares was communicating with a contact named "Kool" using two different phone numbers. Kool asked Bares via a text message what he was looking for, and Bares replied "both." Kool called Bares shortly thereafter.

¶5 Police interviewed Glander, who indicated that "Pat" and "Kool" were the same person. Glander said that he purchased heroin and cocaine from Pat/Kool on May 8, 2013. Afterwards, he met with Bares and shared the drugs with him. Glander told police that he had seen Pat/Kool drive both a green Ford Explorer and a tan Chevrolet Malibu. Glander then identified Pat/Kool as Scott from a photo array.

¶6 Police sought and obtained a warrant to “ping”¹ the two phones associated with the contact named “Kool” on Bares’ phone. The two phones repeatedly pinged in the direct vicinity of a residence in Wauwatosa while Scott was inside. Police surveilled the residence and observed both Scott and a female exit and re-enter. They also observed the Ford Explorer and Chevrolet Malibu described by Glander.

¶7 Police subsequently sought and obtained another warrant to search the aforementioned vehicles and residence. The application included the above information and statements about how drug dealers commonly use cell phones to run their illicit businesses. The warrant listed the vehicle identification numbers and a physical description of the residence under the “place to be searched” section. Meanwhile, it listed “cellular telephones” under the “items to be searched for” section.

¶8 After the second warrant was obtained, police stopped and arrested Scott, who was driving the Ford Explorer. Police seized multiple phones inside it. They also searched the Chevrolet Malibu and seized additional phones there. Finally, they searched the residence in Wauwatosa and found even more phones along with heroin, cocaine, marijuana, a firearm, and cash. After his arrest, Scott made an inculpatory statement to police. Police then obtained another warrant to search the seized phones.

¹ “Ping” is a reference to a cellular company assisting police in locating a person by determining a cell phone’s location using cell phone towers.

¶9 Scott filed a motion to suppress the evidence obtained from the second warrant. He argued, among other things, that the warrant was invalid in its issuance. Following a hearing on the matter, the circuit court denied the motion.

¶10 Scott eventually entered no contest pleas to the charges against him and was sentenced to a total of twelve years of initial confinement followed by eight years of extended supervision. This appeal follows.

¶11 On appeal, Scott contends that the circuit court should have granted his motion to suppress evidence because the police's second search warrant was invalid. Specifically, he complains that the warrant violated the Fourth Amendment's particularity requirement.

¶12 When reviewing a circuit court's decision on a motion to suppress evidence, we apply the clearly erroneous standard to the court's findings of fact. *State v. Guard*, 2012 WI App 8, ¶14, 338 Wis. 2d 385, 808 N.W.2d 718. However, we review the court's application of constitutional principles to those facts de novo. *Id.*

¶13 “The Fourth Amendment to the United States Constitution mandates that warrants particularly describe the place to be searched, and the persons or things to be seized.” *State v. Schaefer*, 2003 WI App 164, ¶23, 266 Wis. 2d 719, 668 N.W.2d 760 (internal quotation marks omitted). “The particularity requirement serves three purposes by preventing general searches, the issuance of warrants on less than probable cause, and the seizure of items different from those described in the warrant.” *Id.*

¶14 Here, Scott's particularity challenge rests on his claim that the warrant's description of the items to be searched for, i.e., “cellular telephones,” is

simply too general to pass constitutional muster. He asserts that the warrant should have included more detailed information about the phones themselves such as their number and location.

¶15 We are not persuaded that the warrant in question violates the Fourth Amendment’s particularity requirement. Although police may have known the numbers that Scott used in selling drugs to Bares and Glander, they did not know the type of phones assigned to those numbers at the time the transaction occurred. As such, it was not improper for them to rely upon the general description of “cellular telephones” under the “items to be searched for” section of the warrant. *See State v. Noll*, 116 Wis. 2d 443, 451, 343 N.W.2d 391 (1984) (general descriptions are permitted if a more specific description is not available). Moreover, the warrant did account for the location of the phones by limiting the places to be searched to the two vehicles and the residence in Wauwatosa.

¶16 For these reasons, we are satisfied that the warrant was valid and that the circuit court properly denied Scott’s motion to suppress. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

