COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1328-CR **Cir. Ct. No. 2012CF693**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. GAHAGAN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Timothy Gahagan appeals from a judgment convicting him of several drug and drug paraphernalia possession charges,

maintaining a drug-trafficking place, and child neglect, and from the order denying his motion for postconviction relief. We affirm.

¶2 On December 20, 2012, police submitted a telephonic warrant affidavit for 1412 Carl Avenue, described as the upper unit of a brown, two-story, two-unit house in the City of Sheboygan which Police Officers Stephen Schnabel and Jason Pacey had surveilled. Schnabel told the court commissioner that, during a recent traffic stop, they recovered heroin from a person who claimed to have bought it from Gahagan at 1412 Carl Avenue, the upstairs flat, accessible by entering the building's back door. Schnabel stated that standard house numbers were visible from the street: 1414 for the lower unit and 1412 for the upper. The sole door to 1412 is at the rear of the house. Based on this information, other information from a confidential informant (CI) of known reliability that Gahagan had a gun, and their own surveillance, the officers stated they believed drug-dealing was occurring at 1412. The person from the traffic stop had not worked with police as a CI before but agreed to do so in regard to Gahagan and was code-named CI-272. The plan was for CI-272 to attempt to make a heroin buy at 1412. The commissioner issued a no-knock warrant.

¶3 On executing the warrant, police found Gahagan and a companion, heroin, methadone, and other drugs, and materials indicative of drug use and dealing. A small child was asleep on a couch within reach of the drugs, razor blades, and other drug paraphernalia.

¶4 The trial court granted Gahagan's motion to suppress on grounds that CI-272's reliability was unestablished and the affidavit did not support CI-

272's claim that Gahagan was dealing drugs or reliably show that Gahagan lived at 1412 Carl Avenue.[1] The State requested a good-faith hearing, at which it provided testimonial and documentary evidence to support a good-faith exception. The court concluded that the State established that police conducted a "significant investigation" and confirmed the address before applying for the warrant, such that the exclusionary rule should not apply.

¶5 Gahagan filed a timely postconviction motion mainly challenging the support for and issuance of the search warrant. The court denied the motion on all grounds, including his request for a ***Machner***[2] hearing. We affirm. Each issue's facts are fleshed out below.

¶6 A court issuing a search warrant must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before it, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***State v. Multaler***, 2002 WI 35, ¶8, 252 Wis. 2d 54, 643 N.W.2d 437. "It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." ***United States v. Leon***, 468 U.S. 897, 921 (1984). Suppression remains an appropriate remedy if the warrant-issuing magistrate was misled by the affiant's knowing or reckless dishonesty in preparing the affidavit. ***Id.*** at 923. On review of a motion to suppress, we uphold the trial court's factual findings unless clearly erroneous,

[1] Gahagan's companion was charged in Sheboygan County Case No. 12CF692 with similar crimes and likewise filed a suppression motion. The trial court held a joint hearing on their motions. She is appealing her convictions in appeal No. 15AP447-CR.

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

but apply constitutional principles to the facts de novo. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

Franks[3] *Hearing*

¶7 A defendant is entitled to a hearing on a motion to suppress evidence obtained through a search warrant if he or she makes a "substantial preliminary showing" that the warrant affidavit included a false statement made knowingly and intentionally, or with reckless disregard for the truth, and that this allegedly false statement was necessary to the finding of probable cause. ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978); ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987). A hearing is required, however, only if the warrant affidavit is insufficient to support probable cause without the alleged false statements. *See* ***State v. Mitchell***, 144 Wis. 2d 596, 605, 424 N.W.2d 698 (1988). Gahagan claims the trial court erred in denying his request for a ***Franks*** hearing because police intentionally or recklessly misled the commissioner by stating that they actually saw CI-272 walk *in* the rear door leading to Gahagan's flat.[4]

¶8 The trial court rejected Gahagan's claim of reckless disregard for the truth. It reasoned that Schnabel did not say that he had seen CI-272 make contact with the residence but simply relayed that Pacey said he, Pacey, saw CI-272

[3] *See* ***Franks v. Delaware***, 438 U.S. 154 (1978).

[4] During the warrant application the prosecutor asked Schnabel: "And in your surveillance were you able to actually observe CI-272 make contact with the residence?" Schnabel answered: "Officer Pacey was able to identify the CI-272 walking, what appeared to be up the driveway, to the rear door located on the east side which led upstairs." Gahagan argues this demonstrates, at minimum, a reckless disregard for the truth because Schnabel should have known that from Pacey's vantage point it was impossible to see CI-272 enter a door on the east side of the building, and because at other points in the litigation Pacey denied seeing the CI enter the house.

"walking up the driveway … to the rear door," essentially the same thing Schnabel said in the warrant affidavit. It further noted that, in their questioning during the litigation, virtually all of the attorneys appeared to assume Pacey had seen CI-272 enter the door although neither Schnabel nor Pacey had said that was the case.

¶9 Gahagan has not made a "substantial preliminary showing" that the warrant affidavit included a knowingly, intentionally, or recklessly made false statement. He thus has not shown that a ***Franks*** hearing is warranted.

New Good-Faith Hearing, Overturn Conviction in Interest of Justice

¶10 Postconviction, Gahagan challenged the trial court's good-faith-exception ruling. He sought both a new good-faith hearing and to have his conviction overturned in the interest of justice. He requests the same here, contending that later inconsistent testimony about whether Pacey saw CI-272 enter the door to 1412 leaves little confidence in the original good-faith hearing.

¶11 When there is insufficient particularized evidence in the affidavit to establish the reasonable suspicion necessary to justify a no-knock warrant, the exclusionary rule will cause suppression of the contraband found unless the good-faith exception to the exclusionary rule applies. *See* ***Eason***, 245 Wis. 2d 206, ¶65. The good-faith exception does not apply when the affiant misleads the warrant-issuing magistrate by knowingly or recklessly supplying false information; the magistrate wholly abandons the judicial role; the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers could not reasonably have presumed it to be valid. ***Leon***, 468 U.S. at 923. Additionally, the exception does not apply if the State fails to establish that the process used in obtaining the

search warrant included a "significant investigation" and a review of the application by either a police officer or a government attorney knowledgeable about the requirements of probable cause. ***State v. Marquardt***, 2005 WI 157, ¶26, 286 Wis. 2d 204, 705 N.W.2d 878. The application of the good-faith exception is a question of law we review de novo. *See* ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97.

¶12 Citing ***United States v. Koerth***, 312 F.3d 862 (7th Cir. 2002), Gahagan contends the trial court erred by considering at the good-faith hearing evidence not disclosed to the court commissioner. *See* ***id.*** at 871 (probable-cause determination based solely on information presented during warrant application process such that court properly refuses to consider documents not presented to warrant-issuing magistrate and cited for first time at suppression hearing).

¶13 The trial court here was not making a probable-cause determination at the good-faith hearing. The parties argued and the court considered only the two ***Marquardt*** requirements—whether the process included a "significant investigation" and a proper review of the application. Additional evidence the court accepted went only to making those determinations, and it determined that both ***Marquardt*** requirements were satisfied.[5]

[5] The court read from its findings on the good-faith issue:

> So to boil it all down, there was information gathered in November connecting Mr. Gahagan with selling heroin. There was information that two weeks prior to December 20th an individual was observed—an individual observed Mr. Gahagan dealing heroin, marijuana, and pills in the residence on Carl Avenue.

(continued)

¶14 While the court acknowledged at the postconviction motion hearing that it incorrectly incorporated into its good-faith findings the prosecutor's argument that Pacey saw CI‑272 going into the residence at 1412 Carl Avenue, it also noted that the inaccurate finding ultimately made no difference to its good-faith ruling. We agree. A second good-faith hearing is unwarranted.

¶15 As to overturning Gahagan's conviction in the interest of justice, this court may reverse a judgment "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." WIS. STAT. § 752.35 (2013-14)[6]; *see also* ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990). Gahagan has not developed this argument and we will not develop it for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We discern no reason for discretionary reversal and therefore decline to overturn the conviction in the interest of justice.

Conflict of Interest

¶16 Gahagan next contends his conviction should be overturned because, at the time of the good-faith hearing, Assistant District Attorney Samantha Prahl was romantically involved with, and later married, Sheboygan Police Department Investigator Brian Bastil. Bastil was an affiant to the warrant affidavit and testified for the State. He also complains about a "significant pause" between

---

> That residence was under surveillance. CI-272 was observed going into the residence on December 20th, stayed about three to five minutes, left, and was immediately stopped. He or she was in the possession of heroin and said the heroin came from Tim Gahagan and that that person got it at his residence. Sergeant Reineke confirmed the address as being 1412 Carl Avenue.

[6] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

Bastil's testimony at the good-faith hearing and that of the prior witness, prompting defense counsel to question a violation of the sequestration order.

¶17 The trial court rejected Gahagan's argument, noting that the pause was ninety seconds to "maybe two minutes," that the Prahl-Bastil relationship by itself provided no basis to assume that evidence was manipulated, and that there was nothing "untoward" in how they conducted themselves during this case. Gahagan does not say how the court was wrong. Speculation will not overturn a conviction.

Ineffective Assistance of Counsel

¶18 Gahagan contends counsel failed to argue that the good-faith exception should not be applied in this case—again, because of the inability to see the rear door—and that, therefore, the trial court erred in denying his request for a ***Machner*** hearing. We disagree.

¶19 A defendant asserting an ineffective-assistance-of-counsel claim must demonstrate both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Both components of the inquiry need not be addressed if the defendant fails to make a sufficient showing on one. ***Id.*** at 697. Whether counsel's performance constitutes ineffective assistance is a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We uphold the trial court's factual findings unless they are clearly erroneous but the ultimate conclusion of deficiency and prejudice is a question of law that we review independently. ***Id.*** at 127-28.

¶20 The trial court said that if counsel had argued at the good-faith hearing that Pacey's inability to see the door meant he was not acting in good faith, the claim would have been denied. Failing to raise a meritless claim is not deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. A trial court has the discretion to deny a postconviction motion without a ***Machner*** hearing "if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted).

Significant Investigation

¶21 To avail itself of the good-faith exception to the exclusionary rule, the State must demonstrate that the process used in obtaining the search warrant included a significant investigation of the defendant and a review by either a police officer trained in the legal vagaries of probable cause and reasonable suspicion, or review by a government attorney. ***Eason***, 245 Wis. 2d 206, ¶63. A "significant investigation" refers to more than the number of officers or hours devoted to an investigation; the nature and focus of the investigation also are important. ***Marquardt***, 286 Wis. 2d 204, ¶54.

¶22 The court concluded, on the following factual findings, that the officers conducted a significant investigation: Gahagan was "put … on the radar screen" after a CI told police that Gahagan supplied heroin in November 2012 to someone who died of an overdose; a different CI told Investigator Bastil in December 2012 about observing transactions with Gahagan at 1412 Carl Avenue that involved heroin, marijuana, and pills; before the warrant was authorized,

Sheboygan Police Department Sergeant Reineke verified that Gahagan lived at the upstairs flat, 1412 Carl Avenue; Schnabel and Pacey possessed a "Prolific Offenders Memo" on December 20, 2012, the day of the search, from Officer Shannon McKay identifying Gahagan as a "prolific offender" involved in dealing heroin; Pacey testified he saw CI-272 walk toward the door leading to 1412 Carl Avenue; CI-272 was in the residence for three to five minutes, consistent, in Pacey's judgment, with the time normal for a drug transaction; and upon leaving, CI-272 was subjected to a traffic stop, was in possession of heroin, and said a buy of heroin had been made from Gahagan at the target residence.

¶23 Gahagan unpersuasively argues that another police officer's attempted inquiry into an unrelated civil matter involving him "should not be considered part of any substantial investigation." The court did not factor it in and nor do we. The State sufficiently demonstrated a substantial investigation.

By the Court.—Judgment and order affirmed.

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