COURT OF APPEALS
DECISION
DATED AND RELEASED

December 11, 1996

NOTICE

No. 95-3297-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL L. BATHE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Paul L. Bathe appeals from a judgment of conviction of attempted first-degree intentional homicide, armed robbery and armed burglary, and from an order denying his postconviction motion. He argues that a weapon seized from his automobile should have been suppressed and that his sentence is unduly harsh. We affirm the judgment and the order.

The convictions arise out of entry of the home of Ron Grebe, a drug dealer, on November 11, 1993. Kelly Litz entered Grebe's house in a

feigned drug deal and left the door unlocked so Bathe could enter. During the course of the attempted robbery, Grebe was shot in the face by a small caliber handgun equipped with a silencer. Joshua Curry acted as a lookout while Litz and Bathe attempted to rob Grebe.

After being told that the police were looking for him, Litz turned himself into the police on November 12, 1993. Curry and Bathe were charged and arrested that same day. In a police interview conducted on April 24, 1994, Curry described the homemade silencer and indicated that the material used to make it would still be found at Bathe's residence. Curry also related that Bathe had intended to hide the gun at the home of Chris Lucchetti, either in the house, the garage or a vehicle at the residence. Litz was interviewed on April 25, 1994. Litz informed the police that he suggested to Bathe to hide the gun at Lucchetti's residence.

Based on the statements of Curry and Litz, police obtained a search warrant for cars registered to Bathe and located at Lucchetti's house. A .22 caliber semi-automatic weapon and material for a homemade silencer were seized from the trunk of a car registered to Bathe. Bathe's motion to suppress this evidence was denied. Bathe asserts that this physical evidence was the only thing directly linking him to the crime other than the testimony of his co-conspirators.

Bathe argues that the affidavit supporting the application for the search warrant was misleading and deliberately withheld vital information necessary to an assessment of probable cause for a search.[1] He claims that the police did not inform the issuing court commissioner that while in custody Curry and Litz made numerous contradictory statements denying knowledge about the weapon or its whereabouts and that the April statements relied upon by the police were only part of their progressive revelations about their involvement in the crime. He also contends that the court commissioner should have been informed that on April 22, 1993, just four days before the application before it, another court denied a search warrant because of insufficient

[1] We do not address the State's contention that Bathe lacks standing to challenge the search because he had no reasonable expectation of privacy in his car. Nor do we find it necessary to determine whether an automobile exception justifies the search.

information. He characterizes the omission of such information as a reckless disregard of the truth.

Franks v. Delaware, 438 U.S. 154, 155-56 (1978), recognizes that a search warrant may be challenged if a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and the allegedly false statement is necessary to the finding of probable cause. The ***Franks*** rule was extended in ***State v. Mann***, 123 Wis.2d 375, 388, 367 N.W.2d 209, 214-15 (1985), to include omissions from a warrant affidavit if the omission is the equivalent of a deliberate falsehood or reckless disregard for the truth. We independently review the application of the ***Franks*** rule. ***Mann***, 123 Wis.2d at 384, 367 N.W.2d at 212-13.

The ***Franks*** rule applies to "specific and limited material evidentiary facts omitted from a search warrant affidavit." ***Mann***, 123 Wis.2d at 386, 367 N.W.2d at 213. The omitted facts must be undisputed, capable of single meanings and critical to a probable cause determination to be viewed as the reckless disregard for the truth required by ***Franks***. *See* ***Mann***, 123 Wis.2d at 388, 367 N.W.2d at 214-15. The court must determine, when the omitted facts are inserted into the search warrant, whether there remains sufficient probable cause for the search. ***Id.*** We are not persuaded that the affidavit in support of the application for a search warrant was required to supply the exculpatory statements of suspects. Probable cause is determined by applying the totality of the circumstances test. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the `veracity' and `basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***Illinois v. Gates***, 462 U.S. 213, 238 (1983). The denial of knowledge of the location of evidence sought adds nothing to a determination of whether probable cause exists that the evidence is located where the police want to search. In this respect, the denial of information is not an evidentiary fact.

Moreover, probable cause is concerned with probabilities and not hard certainties. ***State v. Anderson***, 138 Wis.2d 451, 469, 406 N.W.2d 398, 406 (1987). The standard invokes the practical considerations of everyday life on which reasonable and prudent men and women, not legal technicians, act. ***State v. Ehnert***, 160 Wis.2d 464, 469, 466 N.W.2d 237, 238 (Ct. App. 1991).

Here, the court was presented with statements made, albeit months after the crime, that further implicated Curry and Litz. Credibility is established by the fact that the statement is against penal interest. ***Anderson***, 138 Wis.2d at 470, 406 N.W.2d at 407. Common sense dictates that a criminal suspect will at first deny involvement and only progressively release implicating information. The earlier denials of Curry and Litz do not render the subsequent statements incredible. *See* ***United States v. Rumney***, 867 F.2d 714, 720 (1st Cir.), *cert. denied*, 491 U.S. 908 (1989) ("credibility was not undercut merely because [accomplice] made predictable denials until the police could produce evidence linking him to the robbery"). Thus, even if the past statements were added to the search warrant affidavit, it still establishes probable cause for issuance of the search warrant.

Bathe was sentenced to the maximum allowable for each conviction, to be served consecutively. The total sentence is sixty-five years imprisonment. He contends that the trial court did not state adequate justification for imposing the maximum sentence. He also claims that it was error to proceed to sentencing on the armed burglary conviction within twenty-four hours of the verdict for the purpose of alleviating jail overcrowding.

Sentencing is a discretionary act and this court presumes that the sentencing court acted reasonably. ***State v. Scherreiks***, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989). This court will honor the strong policy against interfering with the discretion of the sentencing court unless no reasonable basis exists for its determination. *See* ***id.***

We recognize that a basic requirement of sentencing is that the sentencing court set forth on the record the rationale for the sentence. An obvious reason for this requirement is to facilitate appellate review; an equally important reason is to explain to the defendant why his or her behavior and background compel the sentence pronounced by the court. In ***McCleary v. State,*** 49 Wis.2d 263, 280, 182 N.W.2d 512, 521 (1971), the supreme court recognized that one of the principal obligations of a judge is to explain the reasons for a decision so that the public and the defendant can understand the decision.

We acknowledge that the trial court's comments when it sentenced Bathe the day after trial on the armed burglary conviction were somewhat abbreviated.[2] However, the court did indicate that the gravity of the offense outweighed all other sentencing factors such that the maximum penalty was appropriate. In addition, it is appropriate to view the trial court's comments at both sentencing proceedings to determine if, as a whole, the sentence was a proper exercise of discretion. We do this because when the second sentencing proceeding convened after the preparation of the presentence investigation report, the trial court possessed the power to modify the earlier imposed sentence.

We do not join in Bathe's opinion that the sentencing on the other counts was no more thoughtful. The trial court discussed the relevant factors of the gravity of the offense, the character of the offender and the need for protecting the public. ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). It also referenced several others factors, such as Bathe's prior record, education, employment record and culpability in the crime. The weight given to each factor is left to the sentencing court's broad discretion. ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992).

Bathe argues that the trial court improperly considered his failure to admit guilt. In ***Scales v. State***, 64 Wis.2d 485, 497, 219 N.W.2d 286, 293 (1974), the court held that the defendant's refusal to admit his guilt alone cannot be used to justify incarceration rather than probation. However, "[t]here is a distinction ... between the evil which ***Scales*** seeks to avoid and the trial court's obligation to consider factors such as the defendant's demeanor, his need for rehabilitation, and the extent to which the public might be endangered by his being at large. A defendant's attitude toward the crime may well be relevant in considering these things." ***State v. Baldwin***, 101 Wis.2d 441, 459, 304 N.W.2d 742, 751-52 (1981) (citation omitted). Here, the trial court's comment went only to Bathe's apparent lack of remorse. We conclude that the sentence was the result of the proper exercise of discretion.

[2] The trial court's ultimate conclusion was: "It is very clear to me that protection of the public, the maintenance of the first obligation of government, which is to protect the sanctity of human life, demand that the maximum sentence be imposed in this case."

By the Court.—Judgment and order affirmed.

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