COURT OF APPEALS
DECISION
DATED AND RELEASED

August 22, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0345-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAVEE RALSTON,

Defendant-Appellant.

APPEAL from judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

DEININGER, J.[1] Javee Ralston appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI) (second offense), contrary to § 346.63(1)(a), STATS. The issues are: (1) whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars criminal prosecution of Ralston for OMVWI following an administrative suspension of his operating license; and (2) whether Ralston was

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

entitled to a ***Franks/Mann***[2] evidentiary hearing by virtue of an affidavit purporting to show material misrepresentations in the criminal complaint.

We conclude: (1) prosecuting Ralston for OMVWI does not violate the Double Jeopardy Clause because an administrative agency suspension does not constitute a second punishment for double jeopardy purposes; and (2) the trial court properly found that Ralston had failed to make a sufficient preliminary showing under ***State v. Mann***, 123 Wis.2d 375, 367 N.W.2d 209 (1985), to mandate an evidentiary hearing. We therefore affirm the judgment.

DOUBLE JEOPARDY

Ralston's objection to this prosecution on the basis that it violates the Double Jeopardy Clause has been previously decided in ***State v. McMaster***, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), *review granted*, ___ Wis.2d ___, 546 N.W.2d 468 (1996). In ***McMaster***, we held that the Double Jeopardy Clause does not bar criminal prosecution for OMVWI when the defendant's driver's license has been administratively suspended. ***Id.*** at 553, 543 N.W.2d at 503. While Ralston correctly notes that the Wisconsin Supreme Court has accepted a petition to review ***McMaster***, until a change in law is made, ***McMaster*** is precedential and is dispositive of this issue.

FRANKS/MANN HEARING

The criminal complaint against Ralston was sworn to and signed by Detective James McCarthy of the Town of Madison Police Department. It included the following statements:

> Further, your complainant has read the official law enforcement agency reports prepared by Town of Madison Police Officer D. Stapleton, whom your complainant knows

---

[2] ***Franks v. Delaware,*** 438 U.S. 154 (1978); ***State v. Mann,*** 123 Wis.2d 375, 367 N.W.2d 209 (1985).

> to be a duly certified [I]ntoxilyzer operator, certified by the State of Wisconsin and qualified by training and experience to operate an [I]ntoxilyzer machine; said reports having been prepared, filed and maintained in the ordinary course of business. ... Your complainant is further informed by the [I]ntoxilyzer operator that the operator has followed the recommended procedures for the calibration and operation of the [I]ntoxilyzer machine during the analysis of the defendant's breath. Your complainant further states that he personally knows that the [I]ntoxilyzer machine used on the defendant's breath has been regularly maintained and certified for accuracy.

Ralston moved to dismiss the criminal complaint on the ground that the foregoing statements were false. In support of his motion, Ralston filed an affidavit of a private investigator who had interviewed Detective McCarthy. The affidavit included the following statements:

> 5. McCarthy informed your affiant that he has not seen a certification of Officer D. Stapleton of the Town of Madison Police Department certifying that Stapleton is a certified Intoxilyzer operator. McCarthy stated to your affiant, "He must be because he operates the Intoxilyzer."
>
> 6. McCarthy informed your affiant that he has not seen training certificates of Officer Stapleton pertaining to Intoxilyzer training and that he does not know where training records are located at the Town of Madison police department.
>
> 7. McCarthy informed your affiant that he has not reviewed the maintenance records of the Intoxilyzer machine located at the Town of Madison Police Department.
>
> 8. McCarthy informed your affiant that he did not check the certification of the Intoxilyzer or check for

> the accuracy of the machine prior to signing the complaint in this action.
>
> 9. McCarthy stated to your affiant, "You know this is bull shit, the only thing I swear to is that the report corresponds to the complaint. I'm not swearing to the truthfulness o[f] Stapleton ...

Ralston argues that the statements attributed to McCarthy in the affidavit constitute a sufficient preliminary showing under ***State v. Mann***, 123 Wis.2d 375, 367 N.W.2d 209 (1985), that McCarthy had made false material statements in the complaint, and therefore, an evidentiary hearing on the issue is mandated. The trial court denied Ralston's request for a hearing, finding "an adequate showing to support such a hearing has not been made by the affidavit."

The trial court's determination represents the application of law to undisputed facts, which we review independently without deference to the decision of the trial court. ***Ball v. District No. 4, Area Board***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

The Wisconsin Supreme Court in ***Mann*** identified four requirements for the preliminary showing needed to mandate an evidentiary hearing when a defendant alleges that a criminal complaint contains false material statements: (1) the allegations must be stated in an affidavit or offer of proof; (2) the misstatements must be identified; (3) the part of the complaint rendered inadequate for a finding of probable cause because of the misstatements must be identified; and (4) when the alleged misstatements are omitted from the complaint, the complaint must be insufficient to support a finding of probable cause. ***Mann***, 123 Wis.2d at 388, 367 N.W.2d at 214-215.

Ralston has met the first and third requirements in that he has submitted an affidavit which identifies the parts of the complaint that he claims to be "rendered inadequate" by misstatements. He has failed to meet the second requirement, however, because he has not identified misstatements in the criminal complaint. As the trial court noted, McCarthy's statements to the investigator do not controvert McCarthy's statements in the complaint that he knows or personally knows certain facts.

At best, the affidavit negates several possible sources for McCarthy to have obtained knowledge or personal knowledge of the certification of the Intoxilyzer and its operator. The fact of McCarthy's knowledge of these matters, however, is not controverted by his statements in the affidavit. More importantly, whether the machine and operator were each in fact certified is not even remotely called into question by the affidavit. Had the investigator during his visit to the Town of Madison Police Department discovered that either the Intoxilyzer or the operator were not certified, an affidavit to that effect would directly refute the veracity of McCarthy's statements in the criminal complaint.

Because we find that Ralston's affidavit fails to identify misstatements in the criminal complaint, we do not address whether the complaint would have sufficient content to support a finding of probable cause even with all statements regarding certification of the Intoxilyzer and its operator excised.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.