COURT OF APPEALS
DECISION
DATED AND RELEASED

January 30, 1997

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. 96-1384-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD A. STOETZEL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marquette County: DONN H. DAHLKE, Judge. *Reversed and remanded*.

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Edward Stoetzel appeals from a judgment convicting him of manufacturing marijuana, in violation of § 161.41(1)(h)3, STATS. Under authority of a search warrant, police seized evidence of marijuana cultivation in and around Stoetzel's residence. Stoetzel pled guilty after the court denied his motion to suppress that evidence. The dispositive issues are (1) whether the search warrant affidavit contained a false statement made

intentionally or with reckless disregard for the truth, regarding an informant's credibility and, (2) if it did, whether the affidavit provided probable cause for the search without the informant's statements. We resolve these issues in Stoetzel's favor and therefore reverse.

False statements in search warrant affidavits, made intentionally or with reckless disregard for the truth, may lead to the suppression of evidence seized under the resulting warrant. ***Franks v. Delaware***, 438 U.S. 154, 156 (1978). Only if the affidavit states probable cause without reference to the false information will the state be allowed to use the evidence. ***Id***. The defendant has the burden of showing false statements in the affidavit by the preponderance of the evidence. ***Id***.

The affidavit of Officer Kim Gaffney in support of the search warrant in this case stated in relevant part:

> Affiant interviewed Douglas Strong, who he believes to be truthful and credible based on prior contacts, who indicated that in June, 1991 he was at [Stoetzel's] residence. Mr. Strong indicated that on said date he observed ... large grow lights and numerous marijuana plants.... Mr. Strong also ... observed an individual ... enter the above residence and leave with a 1/4 pound of marijuana. Mr. Strong said that Mr. Stoetzel had told him he had recently went into the business of growing marijuana. Affiant has compared the records of electric use for the above residence from 1990 and 1991. The 1991, for the months of January to August is 75% more than the same months in 1990.

At the suppression hearing, Gaffney admitted that he barely knew Strong and had no personal knowledge regarding Strong's credibility. His sole source of information on Strong's "prior contacts" was another officer who told Gaffney that once several years before Strong had unwittingly provided information about drug activity to an undercover policeman. In short, Gaffney had no information from which to judge Strong's credibility as a knowing and voluntary police informant.

We therefore conclude that Gaffney's averred belief in Strong's truthfulness based on prior contacts showed a reckless disregard for the truth because he had no information regarding any relevant prior contacts. No other inference is reasonably available from the undisputed testimony of Gaffney and his fellow officer. All information reported from Strong must therefore be disregarded in reviewing the probable cause determination. *See* ***Franks***, 438 U.S. at 156.

Without Strong's information, Gaffney's affidavit does not provide probable cause to issue the search warrant. The only other information in the affidavit reported Stoetzel's recent 75% increase in electricity usage. Standing alone, evidence of a significantly higher electricity usage is not sufficient to issue a search warrant. *See* ***United States v. Field***, 855 F. Supp. 1518, 1520 (W.D. Wis. 1994).

Additionally, the State notes that Stoetzel never brought the ***Franks*** issue before the court in the proper manner nor made the necessary threshold showing to obtain a hearing on the issue. Nevertheless, the court held a hearing on the issue without objection, and we deem it tried by consent of the parties. The State also contends that even if the warrant was invalid, we should nevertheless affirm under the good faith exception to the exclusionary rule. ***United States v. Leon***, 468 U.S. 897, 926 (1984). Under the facts and our holding, the good faith exception would not apply in this case.

Our decision makes it unnecessary to address the other issues raised on appeal. The evidence seized pursuant to the warrant at issue here may not be used in any further prosecution of Stoetzel.

By the Court.—Judgment reversed and cause remanded.

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