COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2523-CR **Cir. Ct. No. 2003CF2972**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOWANKA S. KING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Towanka S. King appeals from a judgment entered after he pled guilty to possession of more than forty grams of cocaine, with the intent to

deliver. *See* WIS. STAT. § 961.41(1m)(cm)4. He claims that the trial court erred when it denied his motion to suppress. We affirm.

I.

¶2 King was charged with possessing more than 40 grams of cocaine, with the intent to deliver, after the police found almost 300 grams of cocaine in his apartment. According to the complaint, on May 6, 2003, a confidential source told Officers Mitchell Ward and Bodo Gajevic and Detective Herb Glidewell that a drug dealer with four-and-one-half ounces of cocaine would be going to a house on the 7000 block of North 67th Street in Milwaukee. The officers went there and saw a Chevy Caprice drive up and park. Two men got out of the car, holding what the officers believed were open bottles of liquor.

¶3 The men returned to the car about five minutes later, still holding the bottles. According to the complaint, the officers followed the car, paced it at about fifty miles per hour, and stopped it. When the officers walked to the car, they saw that both the driver, Martago Hicks, and the passenger, King, were holding open wine coolers. Officer Gajevic patted down Hicks and found 124.57 grams of cocaine in his pants pocket. Hicks and King were taken into custody. The officers then searched King and found a Motorola telephone, $2,386, and a set of keys.

¶4 After Hicks was arrested, he told the officers that the cocaine was not his, but that he was holding the cocaine for King. Hicks claimed that he had just left King's apartment where he saw King put nine ounces of cocaine under a fish tank in the living room. Hicks also claimed that King stored cocaine under a sink in the bathroom. Hicks told the officers that King lived in an apartment at 5310-K West Hustis Street, and that a black sport utility vehicle parked in front of

the apartment was King's. The officers checked the sport utility vehicle's registration and found that it belonged to King. They then searched the sport utility vehicle and found a plastic bag containing 7.79 grams of cocaine, a red Cartier box containing $2,100, and several documents with King's name on them.

¶5 After they searched King's sport utility vehicle, the officers sought a search warrant for King's apartment. Detective Glidewell submitted an affidavit in support of the search warrant that was based, in part, on the officer's search of King's sport utility vehicle. After a court commissioner determined that the warrant-affidavit provided probable cause, the police searched King's apartment and found, among other things, 45.65 grams of cocaine under a sink in the bathroom, and 249.62 grams of cocaine under a fish tank in the living room.

¶6 King argued that the search of his sport utility vehicle and apartment violated his rights under the Fourth Amendment to the United States Constitution, and article I, section 11 of the Wisconsin Constitution. The trial court held a hearing at which the prosecutor conceded that the search of King's sport utility vehicle was illegal because the police did not have probable cause to believe that evidence of a crime would be found there. The trial court agreed with the prosecutor and suppressed the evidence found in King's sport utility vehicle. It then ordered supplemental briefing on the validity of the search warrant for King's apartment.

¶7 In supplemental briefs, King argued that the search warrant for his apartment was invalid because: (1) without the evidence from his sport utility vehicle, the warrant-affidavit did not provide probable cause, and (2) material information was omitted from the affidavit in violation of ***Franks v. Delaware***, 438 U.S. 154 (1978).

¶8 The trial court held another hearing, at which it denied King's motion. It excluded from consideration the evidence found in King's sport utility vehicle, but determined that the remaining information in the warrant-affidavit was sufficient to establish probable cause. The trial court also denied King's ***Franks*** claim without an evidentiary hearing, concluding that King had failed to make the necessary preliminary showing.

¶9 King then filed a motion to reconsider, which the trial court orally denied.

II.

¶10 A motion to suppress evidence presents mixed questions of fact and law. *See* ***State v. Harwood***, 2003 WI App 215, ¶10, 267 Wis. 2d 386, 392, 671 N.W.2d 325, 328. We will uphold a trial court's findings of fact unless they are clearly erroneous. ***Ibid.*** Our application of the law to those facts, however, is a question of law that we review *de novo*. ***Ibid.***

¶11 King does not dispute the trial court's findings of fact. Rather, he disputes on two grounds the trial court's ultimate ruling that the search warrant was valid, claiming that: (1) the warrant-affidavit did not establish probable cause, and (2) the State violated ***Franks*** in the warrant application. We address each allegation in turn.

A.

¶12 King contends that the warrant-affidavit did not establish probable cause. In determining whether probable cause exists, we are confined to the record that was before the warrant-issuing officer. ***State v. Kerr***, 181 Wis. 2d 372, 378, 511 N.W.2d 586, 588 (1994). The task of the warrant-issuing officer:

> 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) (totality-of-the-circumstances test). "We accord great deference to the warrant-issuing [officer]'s determination of probable cause and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24, 29 (1991).

¶13 As we have seen, the warrant-affidavit included information about what the trial court concluded was an illegal search of King's car:

> Found within [King's] vehicle was paperwork with the name of King as well as $2,100 in U.S. currency and an additional quantity of a white chunky substance believed to be in excess of 7 grams. Affiant believes this to also be cocaine. Also found within the vehicle were two items of mail, one listing the address of 5310 W. Hustis and the other 5310 K W. Hustis.

This is not, however, fatal to the validity of the warrant. When a warrant-affidavit is based in part on illegally obtained evidence, the search warrant is still valid when, after excluding reference to the illegally obtained evidence, the remaining parts of the affidavit are sufficient to establish probable cause. ***Kyllo v. United States***, 533 U.S. 27, 40 (2001); *see also* ***United States v. Karo***, 468 U.S. 705, 719

(1984). Accordingly, we analyze whether the untainted information in the affidavit establishes probable cause.[1]

¶14 King contends that without the evidence from his car the warrant-affidavit did not contain facts sufficient to support a finding of probable cause. He claims that anyone could have provided the information that Hicks did, and that the information was not specific enough to provide a "nexus" between King's apartment and drug activity. We disagree.

¶15 Under the totality of the circumstances, we conclude that the warrant-affidavit provided a substantial basis for concluding that drugs would be found in King's apartment. *See* ***Gates***, 462 U.S. at 238–239 ("duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for … conclud[ing]' that probable cause existed") (quoted source omitted; brackets and omission by ***Gates***). The warrant-affidavit provided, as material:

- On Friday, May 6, 2003, Officers Gajevic and Ward stopped a car that Hicks was driving and in which King was a passenger.

[1] In his appellate brief-in-chief, King contends that the warrant-affidavit was insufficient under the independent-source doctrine. *See* ***Murray v. United States***, 487 U.S. 533, 537 (1988) (independent-source doctrine permits introduction of evidence initially discovered during illegal search, but would have been discovered later independently from lawful activities untainted by the initial illegality). The State claims, and King concedes in his reply brief, that the correct test is whether the untainted information in the warrant-affidavit provided probable cause. *See* ***Kyllo v. United States***, 533 U.S. 27, 40 (2001) (warrant is valid if sufficient untainted evidence establishes probable cause). Because the untainted information in the warrant-affidavit established probable cause, we need not discuss the independent-source doctrine. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

- The officers found "in excess" of 100 grams of a white, chunky "substance" on Hicks, and Hicks told Detective Glidewell that the "substance" was cocaine.

- The officers found $2,286 in "U.S. Currency" on King.[2]

- Hicks told Detective Glidewell that the cocaine was King's, and that he had just come from King's apartment in Presidio Square at 52nd Street and Good Hope Road.

- Hicks took Detective Glidewell to Presidio Square and pointed out King's apartment at 5310 K West Hustis Street.

- Hicks told Detective Glidewell that he had been in King's apartment within one-half hour of being stopped by the police, and that he saw more than four ounces of what he believed was cocaine in King's apartment.

- While outside of 5310 West Hustis Street, Hicks told the police that a Black GMC Yukon truck with a Wisconsin license plate of WPV-594 was King's. A check with the Wisconsin Department of Motor Vehicles showed that the truck was registered to King.

- The manager at Presidio Square told Officer Gajevic that a Towanka King had lived at 5310 K West Hustis Street since June of 2002.

The warrant-affidavit has sufficient facts apart from what was found in the Yukon truck to connect illegal drugs to King's apartment.

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[2] The complaint alleges that the police found $2,386 on King. The warrant-affidavit gives the amount as $2,286. The *de minimis* conflict is not material on this appeal.

¶16 King contends, however, that Hicks was inherently unreliable because the police found cocaine on Hicks and thus, Hicks had had an "incentive to lie." Again, we disagree. The information Hicks provided was reliable for the purposes of securing a warrant. It contained specific details regarding where King lived and the amount of drugs that would be found. *See* ***State v. Jones***, 2002 WI App 196, ¶17, 257 Wis. 2d 319, 332, 651 N.W.2d 305, 311 ("an untruthful informant is best served by providing only general information"). Moreover, much of the information Hicks provided was corroborated by the police, including the location of King's apartment and sport utility vehicle. *See* ***State v. Lopez***, 207 Wis. 2d 413, 426, 559 N.W.2d 264, 269 (Ct. App. 1996) ("Independent police corroboration of the informant's information imparts a degree of reliability to unverified details.").

B.

¶17 King argues that Detective Glidewell allegedly omitted material information from the warrant-affidavit in violation of ***Franks***. Under ***Franks***, a defendant challenging the veracity of statements in support of a search warrant must first make a "substantial preliminary showing" that a false statement in a warrant-affidavit was made knowingly and intentionally, or with reckless disregard for the truth, and that the false statement was necessary to the finding of probable cause. ***Id.***, 438 U.S. at 155–156.

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise

> reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Id., 438 U.S. at 171. ***Franks*** includes material omissions as well as deliberately false statements. *See* ***State v. Mann***, 123 Wis. 2d 375, 385–386, 367 N.W.2d 209, 213–214 (1985) (applying ***Franks*** to a criminal complaint). "For an omitted fact to be the equivalent of 'a deliberate falsehood or a reckless disregard for the truth,' it must be an undisputed fact that is critical to an impartial judge's fair determination of probable cause." ***Mann***, 123 Wis. 2d at 388, 367 N.W.2d at 214 (footnote and quoted source omitted).

¶18 King claims that Detective Glidewell did not include in the warrant-affidavit: (1) how the police got the keys to King's truck, or that the police illegally took the keys from King; (2) that the police saw Hicks enter the house on North 67th Street when they were conducting surveillance for drug activity; and (3) that the police found four and one-half ounces of cocaine on Hicks, the same amount that the confidential source told the police that the "unknown drug dealer" would have. King contends that these omissions, when considered together, would have affected the court commissioner's assessment of Hicks's credibility. Under our *de novo* standard of review, we disagree. *See* ***State v. Manuel***, 213 Wis. 2d 308, 315, 570 N.W.2d 601, 604 (Ct. App. 1997) (we review trial court's denial of defendant's motion for ***Franks*** hearing *de novo*). None of the omitted information has any impact on whether the assertions we have set out above independently support issuance of the search warrant. Accordingly, King has not established the necessary basis for an evidentiary ***Franks*** hearing. *See* ***Mann***, 123 Wis. 2d at 390, 367 N.W.2d at 215 (defendant challenging a search warrant on ***Franks*** grounds, "'must show that the information omitted was material to the

determination of probable cause and that it was omitted for the purpose of misleading the magistrate'") (quoted source omitted).

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.