COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP1099-CR **Cir. Ct. Nos. 2012CF353**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMETRIUS L. COOPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL O. BOHREN and MICHAEL P. MAXWELL, Judges. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Demetrius L. Cooper appeals a judgment entered after a jury found him guilty of attempted first-degree intentional homicide, intimidation of a witness, and first-degree recklessly endangering safety, and an order denying his motion for postconviction relief.[1] Before trial, Cooper unsuccessfully moved to suppress evidence seized pursuant to a search warrant, arguing that the supporting affidavit contained a materially false statement in violation of ***Franks v. Delaware***, 438 U.S. 154 (1978). After conviction, Cooper moved for a new trial on the ground that trial counsel provided ineffective assistance at the suppression hearing. The postconviction court denied Cooper's motion without an evidentiary hearing. Cooper challenges the circuit court's denial of his original suppression motion and further contends that the court erred in denying his postconviction motion without an evidentiary hearing. We reject Cooper's claims and affirm.

¶2 In November 2011, multiple shots were fired at A.K. and his wife outside their home. A.K. told police he suspected Cooper because A.K. was scheduled to testify for the State at Cooper's upcoming trial on Rock County drug charges. Police discovered evidence showing that Cooper had rented the two-toned truck observed at the scene of the shooting.

¶3 After further investigation, Detective Brian Fredericks applied for a warrant to search the home where Cooper resided before his pre-trial incarceration in the Rock County Jail, and where Cooper's girlfriend, Magdalena Ramos, still lived. As relevant to this appeal, the application sought evidence including

[1] The Honorable Michael O. Bohren presided at trial and entered the judgment of conviction. The Honorable Michael P. Maxwell denied Cooper's postconviction motion.

correspondence from Cooper to Ramos and documents concerning A.K. and the assistant district attorney (ADA) prosecuting Cooper's drug case. Fredericks's supporting affidavit averred that on December 24, 2011, officers at the Rock County Jail discovered and photocopied correspondence in Cooper's possession that was intended for Ramos. The jailers emailed copies to Fredericks. The correspondence included two letters, one of which purported to be from A.K. to the Rock County ADA stating that A.K. would be moving to Las Vegas, was unwilling to testify at Cooper's trial, and did not want further contact with law enforcement. The second letter was described as "a series of instructions" directing Ramos how to type and deliver the first letter to the ADA without leaving DNA or other evidence. The affidavit stated that later that day, Ramos visited Cooper in jail and "took custody" of the correspondence.

¶4 Pursuant to the warrant, police seized items including a letter from Cooper to Ramos instructing her to write a letter to the Rock County ADA impersonating A.K. and advising the ADA that A.K. no longer wished to testify against Cooper. Cooper was charged with two counts of attempted first-degree intentional homicide and intimidating a witness.

¶5 Cooper moved to suppress his letter to Ramos seized pursuant to the warrant. He asserted that Fredericks's affidavit contained a false representation, namely, that Cooper had actually passed the correspondence to Ramos. According to Cooper, the evidence showed that although he intended to pass the correspondence to Ramos, he was thwarted from doing so by jail officers and that

Fredericks knew this. Cooper argued that Fredericks's false averment led the court to authorize the search warrant.[2]

¶6 At a hearing on Cooper's suppression motion, Fredericks testified that in January 2012, before he wrote his affidavit, Janesville Police Officer Bechen emailed to tell him that officers at the Rock County jail had discovered letters that Cooper intended to pass to Ramos on December 24, 2011. Fredericks testified that it was his understanding that the letters had ultimately been passed from Cooper to Ramos. Fredericks said he was told that "Cooper tried hiding the letter in some property, but the correctional officer saw it and copied it without [Cooper's] knowledge so he would think it made it to [Ramos] without any problems." The State showed Fredericks the property receipt from the Rock County Jail indicating that the letters were copied and returned to Cooper so that he was "none the wiser."

¶7 Detective Robert Wepfer testified that he worked closely with Fredericks during the investigation and warrant application process, and stated "it was [his] belief" that Cooper passed the letter to Ramos during the December 24, 2011 visit. Wepfer confirmed that at the time Fredericks applied for the search warrant, he personally believed that the original letters would be in Ramos's possession and that he never told Fredericks anything to the contrary.

[2] Though not discussed on appeal, we observe that the warrant authorized a search for additional evidence including a computer, global positioning system, and Trac Phone, none of which are implicated by Cooper's suppression motion.

¶8 The circuit court denied the suppression motion.[3] After correctly restating the evidence, the legal standard, and Cooper's theory, the court said:

> Honestly, I'm not seeing it. There is information contained in this affidavit in support. There were conclusions and presumptions and maybe assumptions that were made, but those assumptions were based upon information that was contained in the record at the time. Now, that in this Court's opinion is not a reckless disregard for the truth. The statements I think were honestly held. The beliefs were honestly held by the detectives.

The court reiterated that it was understandable why the detectives had concluded that Cooper actually passed the letters to Ramos.

¶9 After sentencing, Cooper moved for postconviction relief, arguing that the manner in which his trial counsel litigated the suppression motion constituted ineffective assistance of counsel. After a short hearing, the postconviction court denied the motion, determining that Cooper had not "met [his] burden to show that there is a basis for an evidentiary hearing to be conducted." Cooper appeals.

¶10 Cooper maintains that the circuit court should have granted his suppression motion because the search warrant was issued pursuant to an affidavit containing Fredericks's false statement that Ramos "took custody" of Cooper's letters during the December 24, 2011 visit.[4] In reviewing a suppression ruling, we uphold the trial court's findings of historical fact unless clearly erroneous, but review the application of constitutional principles to those facts de novo. ***State v.***

[3] A third circuit court judge, the Honorable William J. Domina, heard and decided Cooper's suppression motion.

[4] We discuss Cooper's appellate claims in a different order than presented in the parties' briefs.

Sloan, 2007 WI App 146, ¶7, 303 Wis. 2d 438, 736 N.W.2d 189. As a general rule, affidavits supporting a search warrant are presumed to be valid. *See* ***Franks***, 428 U.S. at 171; ***State v. Anderson***, 138 Wis. 2d 451, 463, 406 N.W.2d 398 (1987). A defendant challenging the veracity of a statement in an affidavit must prove by a preponderance of the evidence that (1) the statement is false, and (2) the affiant made the false statement intentionally or with reckless disregard for the truth. ***Franks***, 438 U.S. at 171-72; ***Anderson***, 138 Wis. 2d at 462-63.

¶11 We conclude that the circuit court properly denied Cooper's original suppression motion. First, Cooper has not met his burden to prove that Fredericks's statement was actually false. Based on the evidence at the hearing, it is perfectly reasonable to infer that Cooper successfully passed and Ramos "took custody of" the letters in question.

¶12 Second, Cooper has certainly not established that Fredericks's statement, if false, was made intentionally or with reckless disregard for the truth. Fredericks consistently testified that he believed that Cooper passed the letters to Ramos. Fredericks stated it was his impression that the correctional officer who intercepted the letters had photocopied and returned them to Cooper so that Cooper could pass them to Ramos without knowing that the police were aware of his actions. Based on the testimony of Wepfer and Fredericks, the circuit court found that Fredericks did not intentionally or recklessly make a false statement, a finding of fact to which we owe deference. *See* ***State v. Lossman***, 118 Wis. 2d 526, 542-43, 348 N.W.2d 159 (1984) (state of mind determinations are generally questions of fact). The circuit court's finding that Fredericks's statement was based on an "honestly held" belief that was grounded on information in his possession is not clearly erroneous.

¶13 Cooper asserts that Fredericks had "obvious reasons" to doubt that the letters were passed to Ramos and characterizes the two detectives' suppression hearing testimony as "almost magical, and not based on the evidence." We agree with the State's brief that Cooper's arguments are conclusory and run afoul of the applicable legal standard which places the burden of proof on Cooper. "[T]o prove reckless disregard for the truth, the defendant must prove that the affiant in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations." ***Anderson***, 138 Wis. 2d at 463. Proof that the challenged false statement was made innocently or negligently is insufficient. ***Id***. The record, including information provided to Fredericks by Officer Bechen, Wepfer's testimony, and the recorded jail conversation between Cooper and Ramos, amply supports the circuit court's finding that the challenged statement, if false, was not made with reckless disregard for the truth.

¶14 Next, Cooper argues that trial counsel provided ineffective assistance at his suppression hearing, and that the circuit court erred in denying his postconviction motion without a hearing. To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel performed deficiently and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. If the factual allegations of a defendant's motion are insufficient or conclusory, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently. ***Id.*** at 310.

¶15 As asserted in his postconviction motion, Cooper maintains that trial counsel provided ineffective assistance at his original suppression hearing by answering "yes" to the circuit court's compound question: "And the motion is challenging the statement in the affidavit that the correspondence was given to Miss Ramos; right? Paragraph 14 Page 10?" According to Cooper, trial counsel should have qualified his answer by pointing the circuit court to paragraph fifteen as well. Whereas paragraph fourteen sets forth facts about the discovery and contents of the letters that Cooper intended to pass to Ramos, paragraph fifteen contains the challenged statement that Ramos "took custody" of the letters on December 24, 2011.

¶16 We conclude that the circuit court properly denied Cooper's postconviction motion without an evidentiary hearing because the record conclusively shows that Cooper is not entitled to relief on his ineffective assistance of counsel claim. As a matter of law, trial counsel's affirmative answer to the circuit court's compound question asked at the close of the evidence was not prejudicial.[5]

¶17 Cooper's written suppression motion clearly laid out his theory and informed the circuit court: "Paragraph 15 of the affidavit … specifically states that Ms. Ramos received the incriminating letters … in her visit with [Cooper] on December 24, 2011. This statement is patently false." At a status conference held prior to the suppression hearing, trial counsel explicitly told the court that

[5] By deciding this case on the prejudice prong set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), we in no way suggest that trial counsel performed deficiently. A court need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." ***Id.***

Cooper's motion relied on paragraphs fourteen and fifteen of the affidavit. At the suppression hearing, trial counsel clearly presented as Cooper's theory that the letters seized pursuant to the search warrant should be suppressed because the supporting affidavit contained the false statement that Ramos received the letters during the visit. Similarly, the presentation of evidence at the hearing was guided by Cooper's theory that Fredericks falsely averred Ramos's receipt of the letters, and the court's oral decision unambiguously reflected its understanding of which statement Cooper challenged and why. Therefore, there is no reasonable probability that the court would have granted Cooper's ***Franks*** motion had trial counsel pointed out that the challenged statement was contained in paragraph fifteen, not fourteen. *See* ***Strickland***, 466 U.S. at 694 (to satisfy the prejudice prong, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").[6]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2015-16).

[6] We are aware that both the suppression-hearing and the postconviction courts persuasively discussed a separate shortcoming in Cooper's arguments, namely, that there exists ample probable cause for a warrant authorizing a search for correspondence from Cooper to Ramos even without the challenged statement. *Cf.* ***State v. Anderson***, 138 Wis. 2d 451, 464, 406 N.W.2d 398 (1987) (If a warrant still states probable cause without the challenged statement, "the warrant is upheld and the evidence is admissible."). As is our general practice, we decide the case on the narrowest possible grounds. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).