COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP99-CR **Cir. Ct. No. 2004CF103**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAX W. OHLMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Max Ohlmann appeals his judgment of conviction on three counts related to his manufacture and possession of methamphetamine. Ohlmann challenges the validity of a search used to discover most of the evidence against him. He argues that the affidavit supporting the warrant contained

recklessly made factual errors, and that once those errors are corrected, the affidavit does not allow a finding of probable cause.[1] Because the affiant had no reason to doubt the truth of his assertions at the time he made them, we affirm the judgment.

BACKGROUND

¶2 On June 11, 2004, Wisconsin Department of Justice agents and Lincoln County Sheriff's deputies searched Ohlmann's home. They found various items indicating that Ohlmann had been manufacturing and using methamphetamine in the house, including lithium batteries, starter fluid, drain cleaner, and Sudafed tablets. They also found methamphetamine and marijuana.

¶3 The search was performed pursuant to a warrant issued earlier that day. The warrant was based on an affidavit prepared by special agent Ronald Glaman. The affidavit contained (1) information about a theft of lithium batteries allegedly committed by Ohlmann; (2) information from two separate confidential informants; and (3) information from Jeffrey Weber, a third informant.

¶4 Glaman did not have any personal knowledge of the theft of the lithium batteries. In the affidavit, he noted that (1) according to Fleet Farm loss prevention, a person had stolen lithium batteries from Fleet Farm, then had driven in a pickup truck after being confronted by a store employee; (2) the license plate on the pickup truck showed that the truck was registered to Ohlmann; (3) in an

[1] In his brief, Ohlmann discusses the weight to be given the confidential informants' testimony. This discussion is part of his argument that a corrected affidavit would not allow a finding of probable cause. He does not argue that the affidavit actually submitted to the court was insufficient to allow a probable cause finding.

interview with an Antigo police officer, Ohlmann had admitted driving the truck but did not admit to stealing the batteries; and (4) Ohlmann had been charged with retail theft in connection with the incident. At the time he made the affidavit, Glaman was aware that a second man had been in the truck when it left Fleet Farm, but he did not mention this man in his affidavit. He also did not view the Fleet Farm surveillance videotape of the incident.

¶5 Had Glaman viewed the surveillance videotape, he would have discovered that the person depicted stealing the batteries was Weber, the third informant, not Ohlmann. Apparently, Ohlmann's only involvement in the theft was as driver of the vehicle Weber used to leave the store. Glaman discovered his mistake only well after the search of Ohlmann's home.

¶6 Glaman's affidavit also included information from two confidential informants. According to the affidavit, those informants told Glaman and another officer that Ohlmann possessed various items used to manufacture methamphetamine. One of them told Glaman that Ohlmann had sold him a small quantity of the drug. The affidavit did not indicate how the informants had discovered most of the information or give any indication of their credibility.

¶7 Finally, Glaman's affidavit contained information from Weber. Weber told Glaman that he had been at Ohlmann's house numerous times, that Ohlmann had tanks containing anhydrous ammonia, and that Ohlmann used the ammonia for manufacturing methamphetamine. Weber also said that he had witnessed Ohlmann performing various tasks related to the manufacture of methamphetamine, that he smelled ingredients used to manufacture methamphetamine, and that Ohlmann also had a shotgun and a tackle box with

various methamphetamine manufacturing supplies in his house. Weber admitted that he had used marijuana on the morning of the interview.

¶8 A judge granted the search warrant on June 11, 2004. Law enforcement officers executed the warrant later that day and found a variety of incriminating objects. Ohlmann was charged with twelve counts: ten drug-related counts, bail jumping, and possession of a firearm by a felon.

¶9 Ohlmann made a ***Franks/Mann***[2] motion to suppress the fruits of the search, arguing that Glaman had recklessly included false facts in the affidavit in support of his application for the warrant, and that the information in the affidavit, corrected or otherwise, was insufficient to support probable cause. His motion was denied. Ohlmann then pled guilty to three of the counts and was sentenced to ten years, five in confinement and five on extended supervision.

STANDARD OF REVIEW

¶10 Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. ***State v. Hughes***, 2000 WI 24 ¶15, 233 Wis. 2d 280, 288, 607 N.W.2d 621. A question of constitutional fact is reviewed in a two step process. First, we uphold a circuit court's findings of fact unless they are clearly erroneous. Second, we apply the law to those facts without deference to the circuit court. ***Id***.

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

DISCUSSION

¶11 Ohlmann argues that Glaman recklessly made five different factual errors in his affidavit. The State argues that Ohlmann waived his right to challenge all but one of the errors. We address that issue first, and agree with the State. We then discuss whether the remaining error was recklessly made. Because we conclude that it was not, it is unnecessary to decide whether a corrected affidavit would have allowed a finding of probable cause.

I. Waiver

¶12 In his brief, Ohlmann alleges five recklessly made factual errors: (1) Glaman never viewed the Fleet Farm surveillance videotape and therefore included incorrect information provided by Fleet Farm in his affidavit; (2) Glaman did not make known the existence of the videotape; (3) Glaman did not make known the existence of a second person in the pickup truck at Fleet Farm; (4) Glaman mischaracterized Ohlmann's admission that he had been the driver of the pickup truck; and (5) Glaman stated that he had met confidential informant number one at "a pre-determined location in the Marathon County vicinity" when in fact Glaman had met the informant in the Marathon County Jail.

¶13 Arguments raised for the first time on appeal are generally considered waived. ***State v. Jones***, 2002 WI App 196, ¶24, 257 Wis. 2d 319, 651 N.W.2d 305. In order to raise an issue at the circuit court, trial counsel must do so "with sufficient prominence … that the [circuit] court understands that it is called upon to make a ruling." ***Id.*** (citations omitted).

¶14 In his suppression motion, Ohlmann's trial counsel noted only that "the first four paragraphs of the affidavit … make reference to an alleged theft of

batteries containing lithium from the Fleet Farm store in Antigo by the defendant and the evidence supports a contention that the defendant committed no such theft."

¶15 The circuit court heard oral argument on the motion on two separate occasions. On the first date, counsel mentioned the ***Franks/Mann*** standard, arguing that the first four paragraphs of the affidavit "demonstrate some degree of lack of concern, indeed even recklessness on the part of" Glaman. In his argument about the first four paragraphs, counsel focused on (1) the fact that Glaman did not view the videotape, even though none of the reports contained a physical description of the driver; and (2) an allegation that Ohlmann's statement that he had not stolen the batteries was not included in the affidavit.[3]

¶16 On the second occasion, counsel focused primarily on the probable cause issue, citing ***Jones***, 257 Wis. 2d 319, for the applicable standard. He did not make reference to the ***Franks/Mann*** standard or argue that any statements were recklessly made.

¶17 In view of the particularized factual determinations required under the ***Franks/Mann*** standard, it was incumbent on trial counsel to point out specific factual errors for the court's consideration. Conclusory allegations of errors in a particular paragraph did not put the court on notice that it was to address the four

[3] In fact, the affidavit did note that Ohlmann "admitted to being at Fleet Farm but denied stealing anything."

new errors raised in this appeal. We therefore conclude that Ohlmann failed to raise those issues in the circuit court.[4]

¶18 This court does have the authority to address issues not raised in the circuit court. ***State v. Whitrock,*** 161 Wis. 2d 960, 970, 468 N.W.2d 696 (1991). The court may exercise this authority if justice will be served by doing so, both parties have had the opportunity to brief the issue and there are no factual issues that need resolution. ***Id.*** Here, however, Glaman's state of mind is an essential part of any inquiry into whether he acted recklessly when he included false information in his affidavit. *See* ***State v. Anderson***, 138 Wis. 2d 451, 463-64, 406 N.W.2d 398 (1987). It is not possible to determine Glaman's state of mind without a circuit court decision addressing the specific errors he made. We therefore decline to address the waived arguments.

II. Glaman's failure to view the videotape

¶19 When an affidavit in support of a search warrant contains false statements, a court first determines, to a preponderance of the evidence, whether the false statements were made intentionally or with reckless disregard for the truth. ***State v. Mann***, 123 Wis. 2d 375, 384, 367 N.W.2d 209 (1985); ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978). If so, the statements are stricken from the affidavit and the court reviews the corrected affidavit to determine whether it

[4] Ohlmann argues that his statement in an earlier motion hearing that "there are things about the affidavit … starting with the alleged theft [of the batteries] which isn't [sic] true" should preserve all of his claimed errors. However, that statement was made in a motion hearing on a different issue – a hearing that took place well before the ***Franks/Mann*** motion was even filed. It therefore did not put the circuit court on notice that it was to consider the arguments raised in this appeal.

still supports a finding of probable cause. ***Franks***, 438 U.S. at 171-72; ***Mann***, 123 Wis. 2d at 388.

¶20 In order to 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 463-64. Because of the mental element involved in recklessness, the state of mind of the affiant is necessarily the focus of the hearing. ***Id.***

¶21 Ohlmann's argument centers on Glaman's failure to view the surveillance videotape showing the theft of batteries from Fleet Farm. In his affidavit, Glaman repeated Fleet Farm's account of the theft, including its incorrect statement that the same person who had stolen the batteries drove away in Ohlmann's truck. Glaman testified that when he drafted the affidavit, he believed Ohlmann had stolen the batteries (and by implication, that Fleet Farm's account of the incident was correct). The circuit court agreed, and Ohlmann does not attack this factual finding regarding Glaman's belief. Rather, he argues that Glaman acted recklessly when he failed to uncover information that would have led him to doubt his belief.

¶22 Ohlmann fails to support this assertion with any authority. It may well be true that failure to take account of facts known to the affiant is reckless behavior. *See* ***Rivera v. United States***, 728 F.Supp. 250, 258 (S.D.N.Y. 1990). However, we read ***Rivera*** as no more than an application of the principle in ***Anderson*** that it is recklessness to include facts where the affiant has "obvious reasons" to doubt the truth of those facts. It does not imply an affirmative duty to confirm facts when the affiant has no reason to doubt their veracity.

¶23 Here, Glaman had no "obvious reason" to doubt the truth of the assertions made in the first four paragraphs of the affidavit. We agree with the circuit court's analysis:

> What we have before us is not a case where the affiant indicated he was relying upon hearsay information that the defendant may have stolen batteries from Fleet Farm or [a] police report that the defendant may have stole[n] batteries from Fleet Farm.
>
> In this case, the affiant was presenting information to Judge Moore that was based upon an investigated incident in Antigo that resulted in the Langlade County District Attorney's Office deciding to file criminal charges and that those charges were still pending at the time of the affidavit.

¶24 Ohlmann argues that Glaman should have doubted whether he committed the crime because he denied that he stole the batteries. However, a defendant's denial, without more, is not an "obvious reason" to doubt that a charged crime has occurred. This is especially true in this case, where Ohlmann coupled his denial with a statement that he intended to go back to Fleet Farm and "fix the problem he had created." We therefore conclude that Glaman did not act recklessly when he included Fleet Farm's incorrect account of the theft in his affidavit.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).