COURT OF APPEALS DECISION DATED AND FILED

May 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2006AP1430-CR

Cir. Ct. No. 2004CF2403

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLIFTON D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT and DENNIS P. MORONEY, Judges.[1] *Affirmed*.

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Clifton Harris appeals a judgment of conviction and an order denying his motion for postconviction relief. Harris entered pleas to

[1] The sentencing hearing was conducted by the Honorable John Siefert and the postconviction hearings were conducted by the Honorable Dennis P. Moroney.

two drug crimes. He challenges the circuit court's order denying suppression of evidence derived from the execution of a search warrant. Harris seeks remand for a ***Franks***[2] hearing on whether police misled the warrant-issuing magistrate. Harris also claims the prosecutor breached the plea agreement at the sentencing hearing. We reject Harris's arguments and affirm.

Factual Background

¶2 The West Allis Police Department obtained information that a drug deal was going to take place in the parking lot of a particular Citgo service station. The police were informed that a male driving a light blue Buick Riviera with black tinted windows and Washington license plates would be bringing cocaine and marijuana. A surveillance team observed a light blue Riviera with tinted windows and Washington plates arrive at the Citgo station at approximately 1:25 p.m. Police observed in plain view on the center console of the vehicle a plastic bag with marijuana and another plastic bag with crack cocaine in a coffee cup in front of the shift selector. Three individuals were in the vehicle, including Harris in the driver seat, "Frenchie" Holloway in the front passenger seat, and an informant in the rear seat.

¶3 Approximately five hours later, police executed a search warrant at Harris's residence and found nearly fifty grams of crack cocaine, twenty-five grams of marijuana, $1068 in cash, a loaded 9 mm Ruger semiautomatic handgun, a Ruger 357 Magnum handgun, a 7.62 mm rifle, ammunition, a scale in the living room, and a ski mask in a duffel bag that contained the rifle.

[2] ***Franks v. Delaware***, 438 U.S. 154 (1978).

¶4 Harris filed a motion to suppress the evidence found in his residence. The circuit court denied the motion without an evidentiary hearing.

¶5 Harris subsequently entered a plea. Pursuant to a plea agreement, Harris pled no contest to two of three charged drug offenses and the State recommended, in total, three years of initial confinement and four years of extended supervision. Both the circuit court and the prosecutor indicated that it would be unacceptable if Harris denied guilt and attempted to enter an ***Alford*** plea.[3] The circuit court then conducted a plea colloquy, accepted Harris's pleas, and ordered a presentence report.

¶6 When interviewed for the presentence report, Harris denied having a major role in the incident and claimed he was set up and tricked into going to the gas station. He denied knowledge of the drugs found in the car and the cocaine and certain guns found in the residence, and denied living at the residence at the time of the search.

¶7 At the sentencing hearing, the prosecutor took issue with Harris's denial of guilt, as reflected in the presentence report. The prosecutor said:

> I want to state that at the outset the defendant disagrees with the facts contained in the [presentence] report. He denies doing any of – he denies any knowledge of this, and while I seldom do this. I am going to do this for Mr. Harris here, and I'm offering at this point to allow him to withdraw his guilty plea because I would love to try him on every count in the Amended Information.

¶8 Defense counsel objected, but the circuit court indicated that it thought the prosecutor was making a legitimate offer. The court offered Harris

[3] Referring to ***North Carolina v. Alford***, 400 U.S. 25 (1970).

time to consult with defense counsel, after which counsel advised the court that Harris “indicated to me unequivocally he is here to resolve this case today.”

¶9 As sentencing proceeded, the prosecutor complied with the plea agreement, asking the court to “follow the recommendation of the State.” The court imposed a seven-year sentence, with four years of initial confinement, rather than the three years recommended by the State.

Discussion

Probable Cause For The Search Warrant

¶10 Whether police conduct violates the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. Findings of fact will be upheld unless clearly erroneous. ***State v. Martwick***, 2000 WI 5, ¶¶16-18, 231 Wis. 2d 801, 604 N.W.2d 552. We independently apply constitutional principles to the facts. ***Id.***, ¶18.

¶11 A reviewing court must “accord great deference to the [probable cause] determination made by the warrant-issuing magistrate,” and such determination will stand “unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding.” ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517. “We have rejected taking an overly technical and formalistic approach to the contents of an affidavit.” ***Id.***, ¶32. A finding of probable cause is a common sense test:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, … 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).

¶12 There is a presumption of validity with respect to the affidavit supporting a search warrant. ***Franks v. Delaware***, 438 U.S. 154, 171 (1978). When a defendant claims that a warrant affidavit contains a false allegation, the defendant must first make "a substantial preliminary showing that a false statement [made] knowingly and intentionally, or with reckless disregard for the truth, was included … in the warrant affidavit" and that such statement "is necessary to the finding of probable cause." ***Id.*** at 155-56. An evidentiary hearing is not warranted if the challenged material is excised, or alleged omissions are included, and there remains sufficient content in the affidavit to support a finding of probable cause for the search. ***Id.*** at 171-72.

¶13 Here, the warrant affidavit was a standard form on which the applying officer entered handwritten statements of fact specific to the matter at hand. The handwritten portion of the affidavit stated that the confidential informant went to Harris's residence and personally observed Harris exit the front door of the residence and enter the vehicle occupied by the informant. Harris then pulled from his front pants pocket two baggies, one containing suspected marijuana and the other containing a large amount of suspected cocaine base. Harris placed both baggies on the center console of the vehicle.

¶14 Harris insists that the title of the form deliberately or with reckless disregard for the truth misled the warrant-issuing magistrate to believe that the

informant observed controlled substances on the premises of Harris's residence. We disagree.

¶15 The title of the form affidavit is as follows:

AFFIDAVIT FOR SEARCH WARRANT
(FORM TO BE USED WHEN RELIABLE INFORMANT
OBSERVED CONTROLLED SUBSTANCES ON PREMISES)

However, it is apparent that the standard observed-on-premises language did not apply. Paragraph 8 of the affidavit informed the court that the informant had not been inside Harris's residence. The pre-printed words "was inside" are crossed out and the handwritten words "went to" are inserted. The affidavit further explains in a handwritten statement that the informant observed Harris exit his residence and enter the vehicle in which the informant was sitting.

¶16 Harris also challenges the statement in the affidavit that the confidential informant "personally observed [Harris] exit the front door of the residence." Harris claims the statement was false. Both he and Holloway submitted affidavits stating that they exited the *rear* door of Harris's residence. This argument also fails.

¶17 Even if we assume, for the sake of argument, that Harris exited the rear door before entering the vehicle, this discrepancy does not affect probable cause. Even if the magistrate was informed that Harris actually left by the rear door, while the informant said it was the front door, that error on the part of the informant does not mean the other information he provided is so unreliable that it cannot support probable cause. This information might provide fodder for impeachment at trial, but a circuit court assessing probable cause does not assess credibility.

¶18 Harris further argues that the warrant is deficient because the affidavit says nothing about where Harris was prior to being in his residence, how long he had been in his residence, or whether Harris had the baggies in his pocket before going to his residence. Harris insists that the affidavit "merely alleges that [he] lived at the address in question, and had pulled baggies of drugs out of his pockets after coming from his home or its vicinity and before engaging in a drug transaction a considerable distance from his house." However, the possibility that Harris obtained the drugs from a location other than his residence does not negate the reasonable inference that Harris obtained the drugs from his home. *See **State v. Tompkins***, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988).

¶19 Thus, we agree with the circuit court that Harris failed to make the necessary preliminary showing that a false statement in the warrant affidavit was made knowingly and intentionally, or with reckless disregard for the truth. Furthermore, even if the challenged material in the affidavit is excised, or the alleged omissions are included, the warrant still provides probable cause for the search. We affirm the circuit court's conclusion that a ***Franks*** hearing was not warranted.

Breaching The Plea Agreement

¶20 Harris contends that the prosecutor breached the plea agreement during the sentencing hearing when he offered Harris the chance to withdraw his plea, adding that he "would love to try [Harris] on every count in the Amended Information." Harris argues that the prosecutor's offer and comment amounted to a suggestion that the court impose more time than the prosecutor had agreed to recommend. We are not persuaded.

¶21 During the plea hearing, both the circuit court and the prosecutor indicated it would be unacceptable if Harris denied guilt. It is readily apparent that the prosecutor's challenged sentencing comments reflect his belief that Harris had breached the plea agreement by telling the author of the presentence report that he was set up and tricked—that he was, in effect, not guilty. We agree with the circuit court that Harris opened the door "by trying to suggest that he really didn't do things which he had pled to as doing."

¶22 More to the point, the prosecutor's comments simply reflect his confidence in the defendant's guilt and his ability to prove guilt. Nothing in the prosecutor's comments suggests that he thought his sentencing recommendation was too low under the circumstances. Accordingly, we conclude that the prosecutor did not breach the plea agreement.

By the Court.—Judgment and order affirmed

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).