COURT OF APPEALS DECISION DATED AND FILED

April 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 01-1449-CR

Cir. Ct. No. 00 CF 943

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MINKO LEWIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and CLARE L. FIORENZA, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

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[1] Judge Clare L. Fiorenza presided over the pretrial motion and entered the order denying Lewis' motion for postconviction relief. Judge Jeffrey A. Wagner presided over the guilty plea and entered the judgment of conviction.

¶1 PER CURIAM. Minko Lewis appeals from a judgment of conviction, following his guilty plea, for possession with intent to deliver cocaine, and from an order denying his motion for postconviction relief. He argues that the trial court erred in denying his motion to suppress.[2] Specifically, he contends that the court should have granted his request for an evidentiary hearing, pursuant to ***Franks v. Delaware***, 438 U.S. 154 (1978), to determine whether the affidavit submitted in support of the search warrant resulting in his arrest contained statements that were made with a reckless disregard for the truth. We affirm.

I. BACKGROUND

¶2 On December 14, 1999, Tamika Ollie, while seated in a car, was accidentally and fatally shot by two gang members who were shooting at opposing gang members. Three weeks later, a confidential informant advised police of the identity of the shooters and, six weeks after that, told police that one of the shooters had confided that he had hidden his gun, a .45 caliber semi-automatic pistol, at his mother's house. The informant pointed out the residence at 3641 North 25th Street as the house where the shooter claimed to have hidden the gun. On February 21, 2000, a court commissioner signed a warrant authorizing a no-knock entry into the target residence. It was later learned, however, that the informant had pointed out the wrong house; the correct one was one block away. While executing the search warrant, police discovered the contraband and related materials leading to the prosecution of Lewis.

[2] A defendant may appeal from an order denying a motion to suppress evidence even though the judgment of conviction rests on a guilty plea. WIS. STAT. § 971.31(1) (1999-2000).

II. DISCUSSION

¶3 Lewis first argues that the trial court erred in denying his request for a ***Franks*** hearing. He contends that he succeeded in making a substantial preliminary showing that the affiant recklessly relied on the confidential informant's false statement regarding the location of the target residence. We disagree.

¶4 When challenging the veracity of statements in support of a search warrant, a defendant must first make a substantial preliminary showing that a false statement in the 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. ***Franks v. Delaware***, 438 U.S. at 155-56. To make a substantial preliminary showing: "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." ***Id.*** at 171.

¶5 Moreover, a defendant may not challenge the search warrant solely on the ground that a nongovernmental informant made a false statement. ***Id.*** Consequently, the fact that a police informant lied to the affiant who, in turn, included the information in a search warrant affidavit, does not constitute a ***Franks*** violation. ***United States v. Pritchard***, 745 F.2d 1112, 1119 (7th Cir. 1984) Rather, the affiant must be shown to have included the statement with knowledge of its falsity, or with reckless disregard for the truth. ***Id.*** Hence, to prove that the affiant had reckless disregard for the truth, the defendant must prove that the affiant in fact entertained serious doubts as to the truth or veracity of the

allegations. ***State v. Anderson***, 138 Wis. 2d 451, 463, 406 N.W.2d 398 (1987). Courts have concluded that the failure to investigate certain facts constitutes negligence, at most, and does not qualify as reckless disregard for the truth. *See* ***Beard v. City of Northglenn, Colo.***, 24 F.3d 110, 116 (10th Cir. 1994); ***United States v. Dale***, 991 F.2d 819, 844 (D.C. Cir. 1993); ***United States v. Miller***, 753 F.2d 1475, 1478 (9th Cir. 1985).

¶6 If the court concludes that the defendant has made the substantial preliminary showing, then the defendant is entitled to a hearing at which the defendant must prove, by a preponderance of the evidence, that the challenged statement is false, and that it was made either with intent or with reckless disregard for the truth and, further, that absent the challenged statement, the affidavit does not provide probable cause. ***Franks***, 438 U.S. at 156. We review a court's denial of a defendant's motion for a ***Franks*** hearing de novo. ***State v. Manuel***, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997).

¶7 In his memorandum in support of the suppression motion, Lewis asked for a ***Franks*** hearing to challenge the search warrant on the ground that the search warrant affiant, City of Milwaukee Police Detective Christopher Domagalski, recklessly included the informant's incorrect identification of the target residence. At the motion to suppress hearing, Lewis suggested that Domagalski acted recklessly in relying on the informant's identification without independently verifying the identity of the residents at the address.

¶8 After hearing testimony and argument from counsel, the trial court concluded that Lewis had failed to make the preliminary showing necessary to obtain an evidentiary hearing under ***Franks***, and denied his motion. The court noted that the police had corroborated much of the information supplied by the

informant, including the names of the shooters, the gangs involved, the types of weapons used, and the alibi of one of the shooters. The court concluded that police were not required to corroborate every fact given to them in order not to act in reckless disregard, and that nothing in Lewis' motion or argument established that Detective Domagalski doubted or had reason to doubt the information from the informant. The court was correct.

¶9 According to the search warrant affidavit, on January 6, 2000, Detective Domagalski "interviewed a confidential informant who has [been] reliable in the past and has provided information that has led to the arrest and convictions of suspects." The informant, who wished to remain anonymous due to fear of retribution, said that on December 14, 1999, he spoke to two B.O.S. gang members, "Cowboy" and "Meaty," who reported that they had just been in a shoot-out with "Cigar" and "Skeet," two Vice Lord gang members. The informant told Domagalski "that Cowboy and Meaty [had] told him that they saw Skeet on the south side of Keefe near the store on the southwest corner and [that] they both fired at him, but accidentally shot a female in a vehicle passing by." Detective Domagalski reported that the informant identified Roy K. Collins as "Cowboy." The affidavit also stated that, shortly thereafter, police arrested Collins, a/k/a "Cowboy," and questioned him regarding the shooting. During this interview, Collins denied any involvement and claimed he had been meeting with his probation/parole officer at the time of the offense. The affidavit stated that on February 18, 1999, Domagalski again interviewed the informant who said he had spoken with Cowboy, after the police interview, and that Cowboy told him that the police suspected he was involved in the death of Tamika Ollie. The informant reported that Cowboy had told him that he was not concerned about the police's

suspicions because he had a solid alibi—a meeting with his probation/parole officer, and because he had hidden his gun at his mother's house.

¶10 The affidavit also reported that the informant knew Cowboy was referring to his mother's home on the southwest corner of North 25th and West Nash Streets. On February 19, 2000, the informant, accompanied by police, went to the corner of 25th and Nash and identified 3641 North 25th Street as Cowboy's mother's house. Based on this information, Detective Domagalski requested a no-knock search warrant to search for the guns involved in the shooting.

¶11 Lewis argues that Detective Domagalski acted with a reckless disregard for the truth because he failed to: (1) verify who lived in the target house, and (2) establish the informant's reliability and the basis for the informant's knowledge of where Collins's mother lived. We reject his arguments.

¶12 First, the failure of police to conduct further investigation to verify who lived at the target residence does not constitute reckless disregard for the truth. *See* ***Dale***, 991 F.2d at 844; *see also* ***Miller***, 753 F.2d at 1478. As a federal court explained:

> The failure to investigate a matter fully, "to exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence" rarely suggests a knowing or reckless disregard for the truth. To the contrary, it is generally considered to betoken negligence "*at most.*"

Beard, 24 F.3d at 116 (citations omitted).

¶13 Second, and contrary to Lewis' claim, the affidavit established the informant's reliability. Based on the informant's prior conduct, Detective Domagalski had no apparent reason to doubt the accuracy of his identification of

the house. *See* ***Riticca v. Kenosha County Court***, 91 Wis. 2d 72, 79-80, 280 N.W.2d 751 (1979) ("A statement that the informant has given reliable information on past occasions affords a basis from which a magistrate may conclude the informant is a credible person.") Hence, the trial court correctly concluded that Detective Domagalski acted without reckless disregard for the truth.

¶14 Lewis argues, however, that "with four subpoenaed officers in the courtroom, [his] counsel . . . made it clear that he expected to show that the confidential informant was known by the officers to be less than fully reliable." As the State responds, however, "the record does not show that Lewis' attorney intended to prove that the officers knew the informant was less than reliable. . . . [A]t no point did [defense counsel] explain to the court that the officers would testify that the informant was less than reliable." In reply, Lewis argues that "[i]t was manifestly obvious—to the State, to the defendant, and to the trial court—that [defense counsel] would attempt to elicit testimony from the officers relevant to these claims if a hearing were granted." We disagree. There is a significant difference between "ma[king] it clear" to the court, and presuming that a court would recognize that the defense intends to call police officers to establish that it "was known" that the informant was "less than fully reliable." Consequently, we reject Lewis' contention.

¶15 Lewis next argues that even if the false information remained in the affidavit, the warrant failed to establish probable cause. Specifically, he contends that the affidavit was insufficient to establish the reliability of the information with respect to the address, or that the police had verified the address. This argument has no merit.

¶16 When reviewing whether probable cause existed for the issuance of a search warrant, we accord great deference to the warrant-issuing magistrate. ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517. Accordingly, "[t]he magistrate's determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding." ***Id.*** Whether probable cause exists to believe that evidence is located in a particular place is determined by examining the totality of the circumstances in a commonsense and realistic manner. ***Id.*** at ¶¶26, 32. The veracity of the informant and the basis of his or her information are relevant to the totality of the circumstances analysis, ***Anderson***, 138 Wis. 2d at 469; however, a deficiency in one may be compensated for in determining the overall reliability of a tip, ***id.***

¶17 Here, Detective Domalgalski had no reason to question the accuracy of the informant's identification of the house. Therefore, any police failure to verify the identity of the residents of 3641 North 25th Street did not constitute reckless disregard for the truth. At most, the police were negligent for not corroborating the address as the residence of the Collins's mother. *See* ***Beard***, 24 F.3d at 166.[3]

[3] We note, however, that corroborating such information is not necessarily as easy or reasonable as Lewis proposes. First, if we were to assume that the informant had in fact identified the correct home, the home where Collins's mother resided, further police investigation might have undermined the entire case. After all, not all residents of houses are either homeowners or identifiable tenants; thus, Collins's mother might not have been listed as a resident of 3641 North 25th Street. Consequently, if police had "verified" the names of the homeowners, they might actually have been misinformed and, based on faulty data, not pursued a search warrant for the target residence. Or, if police sought to determine who lived in the home by asking neighbors, as Lewis also suggests, police might have risked tipping off Collins who then could have removed the gun from its hiding place.

¶18 The police, however, did have substantial corroboration of other information leading them to reasonably rely on this informant. As noted, Detective Domagalski stated that the informant had been reliable in the past; Detective Domagalski learned the weapons were consistent with what the police investigation had shown; and Detective Domagalski learned that Cowboy reported the same alibi to the informant that he did to police. *Compare **United States v. Williams***, 737 F.2d 594, 602 (7th Cir. 1984) (A fact finder "'may infer reckless disregard from circumstances evincing "obvious reasons to doubt the veracity' of the allegations.'") *with **State v. Lopez***, 207 Wis. 2d 413, 426, 559 N.W.2d 264 (Ct. App. 1996) ("Independent police corroboration of the informant's information imparts a degree of reliability to unverified details.") Clearly, therefore, Detective Domagalski reasonably relied on the informant's identification of the house. Under the totality of the circumstances reported in the search warrant affidavit, the magistrate could reach the commonsense assessment that Collins's gun would be found at 3641 North 25th Street. Hence, we reject Lewis' argument that the warrant failed to establish probable cause to search.

¶19 Finally, Lewis argues that the trial court erred in finding that the no-knock authorization was proper. Although Lewis presents a persuasive argument that "'reasonable belief that firearms may have been within the residence standing alone, is clearly insufficient' to justify excusing the knock-and-announce requirement[,]" *see* ***United States v. Murphy***, 69 F.3d 237, 243 (8th Cir. 1995), he cannot overcome the State's argument that he waived this issue by never challenging the search warrant's authorization of the no-knock entry in his pretrial motion or at the suppression hearing.

¶20 Lewis concedes, "The State correctly points out that [his] suppression motion and supporting memoranda did not isolate the no-knock

authorization as an independent ground for suppression." Nevertheless, he maintains that his attorney, and the attorney representing a co-defendant at the suppression motion, "arguing hand-in-glove at several points in the hearing, raised the issue of the no-knock authorization frequently." He contends: "And contrary to the State's assertion that the trial court made no mention of a no-knock entry, . . . the court, in announcing its ruling from the bench, took note of counsel's arguments regarding the no-knock entry, and even adopted them in its comments." The record, however, refutes his claim.

¶21 While, indeed, the court stated, "And I agree wholeheartedly with the defense counsel . . . that extreme caution needs to be taken whenever there is a no-knock search warrant … because it invades a privacy of a home," this hardly constitutes "[taking] note of counsel's arguments regarding the no-knock entry." The record establishes that Lewis did not challenge the search warrant's authorization of the no-knock entry either in the motion to suppress or at the suppression motion hearing. By failing to expressly challenge the search warrant's authorization of the no-knock entry in the suppression hearing, Lewis waived the right to raise the issue on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604,611, 563 N.W.2d 501 (1997) (party who raises an issue on appeal bears the burden of establishing that the issue was raised before the trial court).

By the Court.—Judgment and order affirmed.

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