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DISTRICT III

July 2, 2024

To:

Hon. Gregory B. Huber
Reserve Judge

Philip J. Brehm
Electronic Notice

Kelly Schremp
Clerk of Circuit Court
Marathon County Courthouse
Electronic Notice

John D. Flynn
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP1311-CR State of Wisconsin v. Shabaka P. Nubian-Yl
(L. C. No. 2017CF1014)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Shabaka P. Nubian-Yl appeals a judgment convicting him of first-degree reckless homicide by manufacture or delivery of a controlled substance, as a party to the crime and as a repeater. Nubian-Yl argues that the circuit court erred by denying his motion to suppress evidence that was discovered during a search of his apartment. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We summarily affirm the judgment of conviction.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The State charged Nubian-Yl with first-degree reckless homicide by manufacture or delivery of a controlled substance, as a repeater, along with four other drug offenses. According to the criminal complaint, on August 18, 2017, W1[2] called 911 to report that V1 needed medical attention. V1 was subsequently pronounced dead of a suspected heroin overdose. Detective Steven DeNovi later interviewed W1 at the sheriff's department, and W1 admitted that V1 had used heroin prior to his death. W1 also admitted that he had obtained the heroin from Tonya Muzynoski and that the delivery occurred outside of the Pine Park Apartments "on Bloedel" in Schofield, Wisconsin. The complaint alleged that when DeNovi asked W1 whether Muzynoski had a partner, W1 initially denied knowing but then stated that Muzynoski lived with Nubian-Yl.

DeNovi subsequently applied for and obtained a warrant to search Apartment #2 at 1812 Bloedel Avenue. The search warrant affidavit alleged that Nubian-Yl had been renting that apartment since July 28, 2017. Inside the apartment, officers found 33.78 grams of packaged heroin, drug paraphernalia, packaging material, and $10,635 in cash.

Nubian-Yl later moved to suppress the evidence discovered during the search of his apartment, arguing that the search warrant affidavit contained false statements. Specifically, Nubian-Yl argued that the warrant affidavit repeatedly paired his name with Muzynoski's name and falsely stated that W1 "revealed the source of the heroin was [Muzynoski and Nubian-Yl]." According to Nubian-Yl, W1 never stated that he had purchased heroin from Nubian-Yl and only reported purchasing heroin from Muzynoski. Nubian-Yl asserted that the warrant affidavit's

[2] Following the parties' lead, we refer to the witness in this case as "W1" and to the victim as "V1."

statement that W1 reported buying heroin from both Muzynoski and Nubian-Yl was made "at the very least in reckless disregard for the truth" and that DeNovi "exaggerated what he knew from [W1]" and "made presumptions not founded in fact." Accordingly, Nubian-Yl asked the circuit court to hold a ***Franks*/*Mann*** hearing. *See* ***Franks v. Delaware***, 438 U.S. 154, 156 (1978); ***State v. Mann***, 123 Wis. 2d 375, 386, 367 N.W.2d 209 (1985).

The circuit court denied Nubian-Yl's motion to suppress, without holding a ***Franks*/*Mann*** hearing.[3] The court noted that Nubian-Yl's challenge to the search warrant affidavit focused on "the 'coupling' of his name with … Muzynoski as the source of the heroin" delivered to V1. The court concluded that even after excising those "couplings" from the affidavit, the remaining information provided probable cause for the issuance of a warrant to search Nubian-Yl's apartment.

After the circuit court denied his suppression motion, Nubian-Yl entered a no-contest plea to an amended charge of first-degree reckless homicide by manufacture or delivery of a controlled substance, as a party to the crime and as a repeater. In exchange for Nubian-Yl's plea, the remaining counts in this case were dismissed and read in, along with two counts from another case. The court sentenced Nubian-Yl to eight years of initial confinement followed by ten years of extended supervision.[4] Nubian-Yl now appeals, challenging the court's denial of his suppression motion without a ***Franks*/*Mann*** hearing.

[3] The Honorable Lamont K. Jacobson issued the order denying Nubian-Yl's suppression motion.

[4] The Honorable Gregory B. Huber accepted Nubian-Yl's no-contest plea, imposed his sentence, and entered his judgment of conviction.

When challenging the veracity of statements in a search warrant affidavit, a defendant must make a "substantial preliminary showing" that a false statement was knowingly and intentionally included in the warrant affidavit, or was included with reckless disregard for the truth, and that the allegedly false statement is necessary to a finding of probable cause. ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987) (citing ***Franks***, 438 U.S. at 155-56). "The ***Franks*** rule was extended in [***Mann***, 123 Wis. 2d at 385-90], to include omissions from a warrant affidavit if the omissions are the equivalent of deliberate falsehoods or reckless disregard for the truth." ***State v. Jones***, 2002 WI App 196, ¶25, 257 Wis. 2d 319, 651 N.W.2d 305.

If a circuit court concludes that a defendant has made the substantial preliminary showing required by ***Franks***, "the defendant is entitled to a hearing at which the defendant must then prove, by a preponderance of the evidence, that the challenged statement is false, that it was made intentionally or with reckless disregard for the truth, and that absent the challenged statement the affidavit does not provide probable cause." ***Anderson***, 138 Wis. 2d at 462. "If the challenged statements are proven to be false and either made recklessly or intentionally, then the challenged statements are excised from the affidavit," and the court must determine "whether, with the statements excised, the affidavit provides probable cause for a search warrant." ***Id.*** at 464.

Here, the circuit court effectively assumed, without deciding, that Nubian-Yl had made the substantial preliminary showing required by ***Franks***. The court nevertheless denied Nubian-Yl's motion without a ***Franks***/***Mann*** hearing after concluding that, even without the challenged statements, the search warrant affidavit established probable cause for the issuance of a warrant to search his apartment. We independently review a circuit court's decision to deny a ***Franks***/***Mann*** motion without an evidentiary hearing. *See* ***State v. Manuel***, 213 Wis. 2d 308,

315, 570 N.W.2d 601 (Ct. App. 1997). In this case, we agree with the circuit court that no evidentiary hearing was required because, even without the challenged statements, the search warrant affidavit established probable cause to search the apartment.

"Probable cause supporting a search warrant is determined by the totality of the circumstances." ***Jones***, 257 Wis. 2d 319, ¶10. When assessing the existence of probable cause for a search warrant, we apply a commonsense test, asking whether there is a fair probability that contraband or evidence of a crime will be found in a particular place, given all of the facts set forth in the search warrant affidavit and reasonable inferences from those facts. ***Id.***

Without the challenged statements, the search warrant affidavit in this case alleged the following: (1) W1 told police that he purchased heroin from Muzynoski on August 18, 2017, the day of V1's overdose; (2) W1 set up the purchase by calling Muzynoski at a specific phone number; (3) on the day of the purchase, Muzynoski came out of an apartment building located at 1812 Bloedel Avenue and delivered the heroin to W1 in his vehicle; (4) W1's cell phone revealed a history of conversations with the phone number provided in the affidavit, and those conversations detailed numerous previous heroin transactions; (5) the owner of the apartment building located at 1812 Bloedel Avenue confirmed that Nubian-Yl began renting Apartment #2 on July 28, 2017; (6) Nubian-Yl provided his landlord with the same phone number referenced by W1; and (7) while cooperating with law enforcement, W1 called that phone number, and Nubian-Yl answered the phone, after which Muzynoski joined the conversation.

These allegations—and reasonable inferences from them—established a fair probability that contraband or evidence of a crime would be found in Apartment #2 at 1812 Bloedel Avenue. The search warrant affidavit alleged that W1 purchased heroin from Muzynoski by calling a

specific phone number. When W1 called that phone number in the presence of law enforcement, Nubian-Yl answered, and Muzynoski then joined the conversation, leading to a reasonable inference that Nubian-Yl and Muzynoski shared the phone. W1's phone showed a history of heroin transactions with the phone number in question, creating a reasonable inference that both Muzynoski and Nubian-Yl were involved in selling heroin to W1. Furthermore, the delivery at issue in this case occurred outside of 1812 Bloedel Avenue. The search warrant affidavit linked Nubian-Yl both to Apartment #2 at that address and to the phone number that W1 had called to purchase the heroin. Thus, the search warrant affidavit established a nexus between: (1) the delivery of heroin to W1; (2) Muzynoski; (3) Nubian-Yl; and (4) Apartment #2 at 1812 Bloedel Avenue. Given these connections, the affidavit gave rise to a reasonable inference that Muzynoski had come from Apartment #2 at 1812 Bloedel Avenue when she delivered heroin to W1. On these facts, there was a fair probability that heroin or evidence of the delivery of heroin would be found inside the apartment, and probable cause therefore existed for the issuance of a search warrant.

Nubian-Yl argues that the search warrant affidavit was insufficient to establish probable cause because it contained "no direct factual allegation or other nexus tying Muzynoski to *defendant's* apartment at" 1812 Bloedel Avenue. We disagree. As noted above, when determining whether the allegations in a search warrant affidavit are sufficient to establish probable cause, we consider both the facts alleged in the affidavit and *reasonable inferences from those facts*. *See* ***Jones***, 257 Wis. 2d 319, ¶10. Here, the facts in the search warrant affidavit gave rise to a reasonable inference that Muzynoski had a connection to Apartment #2 at 1812 Bloedel Avenue—and, specifically, that she had come from that apartment when she

delivered heroin to W1 on the day in question—even though there was no specific allegation in the excised affidavit that directly linked Muzynoski to Apartment #2.

Nubian-Yl also argues that the search warrant affidavit was insufficient because it did not contain any factual allegations regarding the number of apartments in the building at 1812 Bloedel Avenue. According to Nubian-Yl, "[t]he more apartments in the building, the greater the possibility would have been that Muzynoski did not reside with [Nubian-Yl] in #2, but in a separate apartment." To obtain a warrant to search Apartment #2, however, the State did not need to establish that Muzynoski resided with Nubian-Yl in that apartment. Instead, the State needed to show a fair probability that contraband or evidence of a crime would be found in that location. For the reasons explained above, the facts in the search warrant affidavit—and reasonable inferences from those facts—were sufficient to establish a fair probability that contraband or evidence of a crime would be found in Apartment #2, regardless of whether Muzynoski actually lived in that apartment.

Finally, Nubian-Yl asserts that while the circuit court stated that it was "excising the objected 'couplings'" from the search warrant affidavit, the court nevertheless relied on the affidavit's assertion that "[W1] stated Muzynoski and [Nubian-Yl] were his regular sources of heroin." Nubian-Yl emphasizes that W1 "never told Detective DeNovi that [Nubian-Yl] had ever sold him heroin." Critically, however, our review of the circuit court's decision to deny Nubian-Yl's suppression motion without a ***Franks*/*Mann*** hearing is de novo. *See* ***Manuel***, 213 Wis. 2d at 315. Upon our independent review, we have concluded that the search warrant affidavit established probable cause for the issuance of a search warrant, without considering W1's alleged statement that Muzynoski and Nubian-Yl were his regular sources of heroin. The

circuit court's apparent reliance on that statement is immaterial to our decision and, accordingly, does not require reversal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals