COURT OF APPEALS
DECISION
DATED AND RELEASED

April 16, 1997

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

NOTICE

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

No. 95-0685-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID W. JANKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed in part and reversed in part.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. David W. Janke was convicted of two counts of possession of a controlled substance with intent to deliver contrary to § 161.41(1m), STATS., 1993-94. Janke was also convicted of two counts of failing to obtain a drug tax stamp. Janke first contends on appeal that the trial court erred

in denying his motion to suppress evidence resulting from a warrantless separation and seizure of a Federal Express package mailed to his address. Janke argues that the officers did not have a reasonable suspicion to seize the package and that the search warrant was invalid on the grounds of misrepresentation or omission of a material fact. We reject Janke's arguments and affirm his conviction for possession with intent to deliver.

Next, Janke challenges the constitutionality of the tax stamp law. In ***State v. Hall***, 207 Wis.2d 54, 557 N.W.2d 778 (1997), the supreme court ruled that the drug tax stamp statute is unconstitutional.[1] Therefore, we reverse this portion of the judgment of conviction.

FACTS

On March 11, 1994, Officer Roger Price of the Outagamie County Sheriff's Department applied for a warrant to search the contents of a Federal Express package addressed to Janke's residence. At the warrant application hearing, Price testified that on March 10, 1994, he notified Federal Express that he was suspicious of any packages arriving at 712 Grove Street–Janke's address. Price further testified that earlier that morning he and his partner, Steve Verwiel, were called to the Federal Express office to investigate a package addressed to 712 Grove Street. After receiving notice from the Federal Express office that a package addressed to "First Class Limo" at 712 Grove Street had arrived, Price

[1] This case was placed on hold pending the supreme court's decisions in ***State v. Hall***, 207 Wis.2d 54, 557 N.W.2d 778 (1997), and ***State v. Hicks***, 207 Wis.2d 51, 557 N.W.2d 412 (1997).

contacted Investigator Randy Lind of the Brown County Sheriff's Department who had a dog trained in narcotics detection. Price requested that Lind bring the dog to the Federal Express office. Price proceeded to empty the contents of a desk drawer and place the suspicious package inside. Lind arrived at the Federal Express office at approximately 10:30 a.m. The dog alerted on the package addressed to Janke, and Price applied for a warrant to search the contents of the package.

At the trial court's request, Price further testified that his initial suspicion of packages addressed to the Janke residence was prompted by a phone conversation he had with a citizen witness earlier that year. Price recounted the information provided by the witness as follows: "[The] citizen … stated that a telephone number appeared on a telephone bill, and that this citizen believed that this phone number was associated with a cocaine dealer, and that this citizen had a very close friend who was buying cocaine from whoever this phone number was listed to." Price contacted the telephone company's listing office and found that the phone number was assigned to David and Lori Janke at 712 Grove Street in Oshkosh, Wisconsin.

The trial court granted the warrant application to search the contents of the package. The officers opened the package and removed 86.7 grams of cocaine. Verwiel repackaged the cocaine, put on a Federal Express uniform and delivered the package to Janke's address at approximately 3:15 p.m. Once the package was accepted, the police requested a search warrant for Janke's residence. The court granted the search warrant request. The search was conducted and controlled substances were found.

On March 15, 1994, Janke was charged with two counts of illegal possession of a controlled substance with intent to deliver contrary to § 161.41(1m), STATS., 1993-94. Janke was additionally charged with two counts of failing to comply with the drug tax stamp statute. Janke moved to dismiss the charges and suppress the evidence asserting that the officers did not have a reasonable suspicion to seize the package and because material facts were omitted at the warrant hearing. The trial court denied Janke's motions. Janke then pled no contest to all the charges, and a judgment of conviction was entered. Janke appeals.

DISCUSSION

A trial court's findings regarding the suppression of evidence must be upheld unless they are clearly erroneous. *See* ***State v. Richardson***, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether statutory and constitutional standards are satisfied are questions of law that this court reviews de novo. *See* ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

In order to detain a package being shipped to a suspect, the police must possess a reasonable suspicion of illegal activity. *See* ***State v. Gordon***, 159 Wis.2d 335, 344, 464 N.W.2d 91, 94 (Ct. App. 1990). Janke first contends that the trial court erred in finding that the officers had a reasonable basis to seize the package. Janke argues that the information given to Price by the citizen witness was "much too vague to form a basis for establishing reasonable suspicion."

The standard of reasonableness for the detention of a package was discussed in ***Gordon.*** Janke cites to ***Gordon*** in support of his contention that the police in this case did not have a basis for reasonable suspicion. While we

similarly believe that ***Gordon*** provides the appropriate guidance on this issue, we conclude that the facts of this case satisfy the reasonable suspicion requirement set forth in ***Gordon***.

In ***Gordon***, an anonymous caller contacted the police and informed them that the defendant, Gordon, was going to receive a shipment of marijuana and cocaine "'via a private mail carrier like UPS or Federal Express from possibly Arizona either tomorrow or sometime next week.'" ***Id***. at 340, 464 N.W.2d at 92. The caller told the police that Gordon had received shipments from New York but usually received them from Arizona and that Gordon was a student at the University of Wisconsin-Madison. Finally, the caller provided the police with the name of Gordon's private residence hall. *See* ***id***. at 340-41, 464 N.W.2d at 92. Two days later, the caller recontacted the police to inform them that Gordon would be receiving a drug shipment via UPS or another carrier on Friday, April 14. *See* ***id***. at 341, 464 N.W.2d at 92.

An officer from the Madison police department contacted the manager of the private residence hall to verify the information provided by the caller. *See* ***id***. The officer requested the front desk personnel to hold any package that arrived addressed to Gordon. *See* ***id***. On May 2, approximately three weeks later, a package arrived addressed to Gordon. The police retrieved the package at approximately 4:00 p.m. and conveyed the package to Mitchell Field where it was exposed to a "canine sniff" for drugs at approximately 7:30 p.m. The dog alerted on the package so the officer retained the package overnight. *See* ***id***. at 342, 464 N.W.2d at 93. The police applied for a search warrant and redelivered the package to Gordon's residence hall at approximately 3:45 p.m. *See* ***id***.

Like Janke, Gordon argued that the information provided by the caller did not provide an adequate basis for reasonable suspicion. The ***Gordon*** court analogized the seizure of the package to a ***Terry*** stop. *See* ***Terry v. Ohio***, 392 U.S. 1, 38 (1968). The court reasoned that:

> Corroboration by police of innocuous details of an anonymous tip may under the totality of the circumstances give rise to reasonable suspicion to make a ***Terry*** stop. The cumulative detail, along with reasonable inferences and deductions that a reasonable officer could glean therefrom, is sufficient to supply the reasonable suspicion necessary to justify the stop.

Gordon, 159 Wis.2d at 344-45, 464 N.W.2d at 94 (citations omitted). Based on the above reasoning, the court concluded that the information provided by the caller, in addition to the officer's own verification of Gordon's residence, provided a reasonable suspicion to seize the package. *See* ***id***. at 345, 464 N.W.2d at 94.

Janke argues that under the facts and reasoning of ***Gordon***, the officers in this case did not have reasonable suspicion. We disagree. Price testified that he had been informed by a citizen witness that "a very close friend" of that person had been purchasing cocaine from someone at the telephone number assigned to the Jankes. Price contacted the telephone company and ascertained the name and address of the party to which the telephone number was assigned. At the hearing regarding the warrant to search the contents of the package, Price testified that the residence located at 712 Grove Street was an off-white, single-family dwelling with an enclosed porch and that there was a sign on the house which reads "First-Class Limo."

Price verified the information provided by the caller and identified the people and the residence associated with the phone number. Based on the informant's call, Price had reason to suspect that at least one person—on more

than one occasion—had used the assigned phone number to contact the occupants of 712 Grove Street in order to obtain cocaine. Price did not attempt to obtain a warrant to search the residence. Rather, Price sought to confirm the caller's allegations by requesting that Federal Express notify him if any packages arrived addressed to 712 Grove Street. The procedure employed by Price, the detention of a package at a neutral site, involved a minimal invasion of Janke's privacy. We conclude that based on the totality of the circumstances, Price possessed the reasonable suspicion necessary to justify seizing the package.

Next, Janke argues that contrary to the Supreme Court's ruling in ***Franks v. Delaware***, 438 U.S. 154, 165 (1978), the police omitted or misstated the facts underlying the court's finding of probable cause. *See also* ***State v. Mann***, 123 Wis.2d 375, 387, 367 N.W.2d 209, 214 (1985). Although Janke filed a postconviction motion challenging the trial court's suppression ruling on the basis of ***Franks***, neither Janke nor the court addressed the ***Franks*** challenge at the postconviction motion hearing. However, implicit in the court's dismissal of all postconviction motions is a finding that Janke had failed to make a substantial preliminary showing that the State had knowingly or intentionally, or with reckless disregard for the truth, alleged a false statement necessary to a finding of probable cause. *See* ***Franks***, 438 U.S. at 155-56. Because the facts of the record do not support Janke's ***Franks*** challenge, we affirm the court's postconviction ruling. *See* ***Kolpin v. Pioneer Power & Light Co., Inc***., 162 Wis.2d 1, 30, 469 N.W.2d 595, 607 (1991) (appellate court will uphold trial court's discretionary decision if there are facts of record that support it).

Janke contends that the material facts underlying the warrant application were misstated or omitted. In support of his argument, Janke points to the warrant application hearing at which Price testified that the citizen telephone

call provided support for his warrant request. Janke argues that Price's testimony conflicts with the testimony offered by Verwiel at the preliminary hearing that the package was detained because the unit was investigating the sender of the package. Based on these two statements, Janke suggests that "material facts were misstated or omitted" and that "the court was not given the real reason why the package was detained." Therefore, Janke contends, the evidence should have been suppressed and the judgment of conviction reversed. We disagree.

Janke relies upon Verwiel's statement at the preliminary hearing that the package "was coming from an address [the police] were interested in." Verwiel also stated that he "wouldn't have sufficient knowledge" as to whether there was a reason the police were looking for a package addressed to 712 Grove Street. Janke argues that Verwiel's testimony conflicts with the testimony given by Price at the warrant application hearing that his suspicion was based upon information provided by a citizen witness.

We do not view this testimony to be in conflict. Regardless of whether the police were interested in the sender of the package—and nothing in the record suggests that this is so—Verwiel's testimony did not dispute that the police were interested in the receiver of the package. Rather, Verwiel testified that he *did not know* whether there was a reason the police were looking for a package addressed to 712 Grove Street. In light of Price's testimony that, based on the information provided by a citizen witness, the police had reasonable suspicion to seize the package addressed to 712 Grove Street, Verwiel's testimony does not indicate an omission or even a misstatement in the underlying facts supporting the original warrant for the seizure of the package. We affirm the trial court's order denying postconviction relief.

By the Court.—Judgment and order affirmed in part and reversed in part.

Not recommended for publication in the official reports.