



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

October 16, 2013

To:

Hon. Eugene A. Gasiorkiewicz
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

W. Richard Chiapete
Assistant District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Bradley J. Lochowicz
Seymour, Kremer, Koch,
Lochowicz & Duquette
P.O. Box 470
Elkhorn, WI 53121-0470

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2013AP86-CR

State of Wisconsin v. Brian D. Bohm (L.C. # 2011CF1483)

Before Brown, C.J., Reilly and Gundrum, JJ.

Brian Bohm appeals from a judgment convicting him of possessing tetrahydrocannabinols with intent to deliver after he pled no contest. On appeal, Bohm argues that the affidavit in support of the search warrant for his residence contained falsehoods, and the circuit court should have granted him an evidentiary hearing on his motion challenging the search. Based upon our review of the briefs and record, we conclude at conference that this case

is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the circuit court because the affidavit was not flawed.

Bohm filed a *Franks*² motion seeking suppression of evidence found during a search of his residence. A *Franks* motion alleges “that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.” *State v. Jones*, 2002 WI App 196, ¶25, 257 Wis. 2d 319, 651 N.W.2d 305 (citation omitted). If the allegedly false statement was essential to the probable cause finding, a hearing must be held on the motion. *Id.* Bohm bore the burden to make a substantial preliminary showing that the false statement was necessary to the probable cause finding. *State v. Mitchell*, 144 Wis. 2d 596, 604, 424 N.W.2d 698 (1988). We independently review the circuit court’s decision to deny Bohm’s *Franks* motion without a hearing. *Jones*, 257 Wis. 2d 319, ¶25.

As material to this appeal, Racine police department investigator Nuttal’s affidavit alleged: (1) within the seventy-two hours preceding his November 7, 2011 warrant application, Nuttal was contacted by a confidential informant who stated that he or she observed marijuana packaged for resale at Bohm’s residence; and (2) the confidential informant told Nuttal that he or she had observed Bohm selling marijuana from his residence. The search warrant issued, and the search of Bohm’s residence located marijuana, drug paraphernalia, currency, and other evidence.

In his *Franks* motion, Bohm contended that inconsistencies between the testimony at his December 2011 probation revocation hearing and Nuttal’s affidavit required a conclusion that

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

² *Franks v. Delaware*, 438 U.S. 157 (1978).

Nuttal's affidavit was false. At the revocation hearing, Bohm's probation agent testified that according to her contact log, Nuttal called her on October 31, 2011, to advise that marijuana was purchased from Bohm on October 30, and a search warrant was being contemplated. The agent believed that she made the log entry contemporaneously with her conversation with Nuttal.

At the same hearing, Nuttal testified that he learned at the end of October that Bohm was selling marijuana. Nuttal began an investigation and enlisted the assistance of a confidential informant. Nuttal testified that he witnessed the confidential informant purchase marijuana from Bohm away from Bohm's residence sometime after November 1.³ Nuttal was not aware of any other marijuana sales. Nuttal applied for a warrant based upon his observations and the observations of the confidential informant.

The circuit court did not agree that the probation revocation testimony rendered Nuttal's affidavit false. The court flatly rejected Bohm's contention that the agent's contact log was inherently more reliable than Nuttal's sworn testimony. The court concluded that Nuttal "was in a better position to accurately recall the dates and timing of his own personal investigation." The court found that Nuttal's October 31 discussion with Bohm's agent likely did not refer to the same incident alleged in Nuttal's affidavit. The court found that the differences among the agent's log, Nuttal's testimony, and Nuttal's affidavit did not create the falsehood required by *Franks*. As the court reasoned:

[A]lthough it is true that the CI did not purchase the marijuana from the defendant at [his residence], the affidavit indicates that the CI did observe marijuana packaged for resale and witness the sale of contraband by the defendant from [his residence]. The

³ When asked whether he observed the purchase of marijuana from Bohm at the end of October, Nuttal responded, "No. It would have been after the first of the month."

affiant's affidavit further documents efforts to identify the seller with the defendant and confirmed that the utilities were billed to the defendant in this matter.

On appeal, Bohm renews his argument that Nuttal's affidavit contained false statements. We conclude that the circuit court's ruling is supported by the record. Even though the probation agent testified that on October 31, Nuttal contacted her to discuss his investigation of Bohm, this testimony does not necessarily refer to the same conduct and contacts alleged in Nuttal's affidavit. The affidavit's allegations were not inconsistent with the probation revocation hearing testimony. Bohm did not meet his burden in his *Franks* motion, and an evidentiary hearing was not warranted.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals