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DISTRICT II

May 7, 2014

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

2013AP181 State of Wisconsin v. Carl A. Lewis, Jr. (L.C. #2007CF75)

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

Carl A. Lewis, Jr., pro se, appeals from an order denying his WIS. STAT. § 974.06 postconviction motion, in which he challenged the search warrant leading to his arrest. 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 (2011-12).[1] We affirm.

Lewis was convicted following a jury trial of five counts of false imprisonment, five counts of armed robbery, one count of first-degree recklessly endangering safety, and one count

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

of being a felon in possession of a firearm. Thereafter, the trial court denied Lewis's WIS. STAT. RULE 809.30 postconviction motion, and the judgment and order were affirmed on appeal. ***State v. Lewis***, 2010 WI App 52, 324 Wis. 2d 536, 781 N.W.2d 730.

Lewis then filed a WIS. STAT. § 974.06 postconviction motion challenging the search warrant underlying his arrest and conviction on grounds that the warrant's affidavit: (1) contained false statements; and (2) failed to establish probable cause to search the east apartment, where contraband was ultimately located.[2] According to Lewis, Officer Albert Gonzales falsely averred that there was indoor access between the east and west apartments "through a drywall wall." In support, Lewis attached a letter from Paul Cox, the building's owner, stating that the apartments "were not connect[ed] from the inside."

The trial court conducted a hearing at which Cox and Gonzales both testified that a person could travel from one unit to the other without ever leaving the property or stepping outside.[3] When asked about his letter, Cox clarified that:

> What I was saying is that if you were to not use a normal passageway, you could crawl out of the one apartment, actually leave that apartment, and via the attic you could crawl through and get into the other apartment. That's what I tried to write in the letter without—You know, I was asked if you could get from one apartment to the other through a passageway, and there really is not a normal passageway between the two.

[2] The charged incident involved a robbery and the discharge of firearms at a party in the west-side apartment of a duplex. In obtaining a search warrant for the entire house, Officer Albert Gonzales, who also happened to be the homeowner's son-in-law, averred that he was familiar with the building and knew there was indoor access between the east and west apartments. During the warrant's execution, Lewis and a large number of guns were found in the east apartment rented by Lewis's aunt.

[3] Cox testified that there was a loose panel connecting the east and west apartments, and also that one could gain access to the east apartment through a closet in the west apartment. Gonzales testified that there was a gap in the attic that permitted travel from one apartment to the other.

Cox explained that by "normal," he meant "something you could walk through, a door you could open, something like that."

The trial court found "it's clear the two apartments were joined somehow[,]" and that there was access between the units through the attic. The trial court concluded that there was no reckless disregard for the truth in the search warrant affidavit, the warrant was supported by probable cause, and neither trial nor appellate counsel performed deficiently in failing to challenge the warrant.[4]

Lewis maintains that the search warrant affidavit falsely averred that the east and west apartments were accessible to each other, and argues that the trial court erred in determining that the search warrant contained no false statements. *See* ***Franks v. Delaware***, 438 U.S. 154 (1978).[5] We disagree. The trial court's finding that the east and west units were accessible to each other is not clearly erroneous. ***State v. King***, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993) (an appellate court "will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence."). Both Cox and Gonzales explained in detail how the apartments were connected. Cox clarified that his letter was intended to indicate that there was no "normal passageway" such as a door connecting the units. Lewis

[4] Because the trial court reached the merits of Lewis's motion, we will not address the procedural law potentially serving to bar Lewis's successive postconviction motions, such as his failure to establish a sufficient reason why his claims were not raised in his initial appeal. *See* ***State v. Lo***, 2003 WI 107, ¶20, 264 Wis. 2d 1, 665 N.W.2d 756.

[5] A defendant may challenge the veracity of factual statements made in an affidavit supporting a search warrant by making a preliminary showing "that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and [that] the allegedly false statement is necessary to the finding of probable cause[.]" ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978).

testified only that at the time of the search, he was an overnight guest in the east apartment, and was unaware that the two apartments were connected. The trial court properly determined that Lewis failed to establish by a preponderance of the evidence that Gonzales's affidavit statement was false and this ends our inquiry. *See* ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987) (the defendant bears the burden to show by a preponderance of the evidence that: (a) the statement is false; *and* (b) it was included intentionally or with reckless regard for the truth; *and* (c) that absent the statement, the search warrant was not supported by probable cause) (emphasis added).[6]

We also conclude that the warrant permitting a search of the entire building was supported by probable cause. Great deference is afforded to a finding of probable cause in a search warrant. ***State v. Mechtel***, 176 Wis. 2d 87, 98, 499 N.W.2d 662 (1993). Because police knew that a crime had occurred in the west apartment, and because the police knew that the offenders also had access to the east apartment and the basement, the warrant authorizing the search of those areas was supported by probable cause. *See* ***State v. Ward***, 2000 WI 3, ¶¶26, 34, 231 Wis. 2d 723, 604 N.W.2d 517.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals

[6] Additionally, the trial court properly concluded that neither trial nor appellate counsel was ineffective. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (counsel's failure to bring a meritless motion does not constitute deficient performance).