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**DISTRICT II**

September 11, 2019

To:

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

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2018AP1339-CR                      State of Wisconsin v. Darshun D. Voss (L.C. #2015CF803)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

**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).**

Darshun D. Voss appeals from a judgment convicting him of possession of THC as a second or subsequent offense and possession of a controlled substance. He contends that the circuit court erred in denying his request for a *Franks*<sup>1</sup> hearing. Based upon our review of the

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<sup>1</sup> See *Franks v. Delaware*, 438 U.S. 154 (1978).

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>2</sup> We affirm.

On May 28, 2015, Racine County Deputy Sheriff Daniel Fleming applied for a warrant to search Voss' residence. According to Fleming's affidavit, within the previous seventy-two hours, a reliable confidential informant had told him that an individual known as "Ace" had been storing and selling crack cocaine at the residence. The informant said that he had been inside the residence to witness this within the previous seventy-two hours. He also said that Ace had been involved in the sale and distribution of crack cocaine "for at least the past month." The informant identified a photograph of Voss as the individual he knew as Ace.

Fleming's affidavit noted that Voss had an "extensive" drug history and was known by his probation agent to be living at the residence in question. It further noted that the informant had been working with the Racine County Metro Drug Unit in the recent past and had participated in at least eight controlled drug buys that led to at least eight felony arrests and the issuance of a search warrant that resulted in the seizure of cash and contraband. Finally, it noted that the informant had provided information about at least three other people being involved in drug sales that Fleming had verified.

Based on the foregoing, the circuit court issued the warrant. During the search of Voss' residence, police found marijuana and several pills containing controlled substances for which he did not have a prescription.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2017-18 version.

Voss moved to suppress the evidence and requested a *Franks* hearing. Voss alleged that he was not at the residence in the seventy-two hours prior to the date of the search warrant affidavit, contrary to the statement of the informant. As an offer of proof, he attached a sworn statement from his girlfriend, who indicated that he was visiting her in Madison at that time. Additionally, Voss took exception with the affidavit's description of his drug history as "extensive," noting that he had only three convictions and had not been charged with a drug offense in approximately thirteen years.

The circuit court was not persuaded that Voss had made the requisite showing to warrant a *Franks* hearing. Accordingly, it denied his request. Voss subsequently pled guilty to the charges of possession of THC as a second or subsequent offense and possession of a controlled substance. After sentencing, he filed this appeal.

On appeal, Voss contends that the circuit court erred in denying his request for a *Franks* hearing. He submits that he succeeded in making a substantial preliminary showing that the search warrant affidavit contained statements made with a reckless disregard for the truth.

When applying for a search warrant, the State may not intentionally or recklessly misrepresent facts necessary to establish probable cause. *Franks*, 438 U.S. at 155-56. If a defendant makes a substantial preliminary showing that the search warrant affidavit contained a statement that violates *Franks*, the circuit court must hold a hearing. *Id.*

The defendant must offer more than conclusory assertions in making such a showing. *State v. Mitchell*, 144 Wis. 2d 596, 605, 424 N.W.2d 698 (1988). Also, the misstated fact must have been made by the affiant and been about a matter within the affiant's personal knowledge. *Franks*, 438 U.S. at 163-64; *State v. Marshall*, 92 Wis. 2d 101, 113, 284 N.W.2d 592 (1979).

Whether a circuit court properly denied a request for a *Franks* hearing is subject to de novo review. *State v. Manuel*, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997).

Here, we are not persuaded that the circuit court erred in denying Voss' request for a *Franks* hearing. As noted above, whether a statement in a search warrant affidavit violates *Franks* depends on the affiant's knowledge. Voss has presented nothing to question the credibility of Fleming's belief in the statements of the informant. As for Fleming's description of Voss' drug history, whether three prior convictions qualify as "extensive" is not something that can be called true or false. Rather, it is a characterization that reasonable people can disagree upon.<sup>3</sup> Voss thus failed to make the requisite showing to warrant a *Franks* hearing.

Upon the foregoing reasons,

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

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*

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<sup>3</sup> In any event, Voss' drug history was not needed to establish probable cause.