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DISTRICT III

April 14, 2020

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

2018AP1729-CRNM State of Wisconsin v. Terrance James Neubauer
(L. C. No. 2015CF58)

Before Stark, P.J., Hruz and Seidl, 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).

Counsel for Terrance Neubauer has filed a no-merit report concluding there is no basis to challenge Neubauer's convictions for possession with intent to deliver over fifty grams of methamphetamine, as a second or subsequent offense; and maintaining a drug trafficking place, as a second or subsequent offense. Neubauer was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by *Anders v. California*,

386 U.S. 738 (1967), we conclude there is no merit to any issue that could be raised on appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).¹

A search warrant was executed at Neubauer's residence, which was located within 1000 feet of a school. The search revealed a large amount of methamphetamine divided into plastic baggies as well as a variety of drug paraphernalia. The drugs were located in an open safe accessible to three children living in the home. Witnesses interviewed by police at the scene of the search stated they were present many times when drug transactions occurred at that location. At the time of the offenses, Neubauer was released on bond for numerous drug and other offenses.

Neubauer eventually pleaded no contest to one count of possession of over fifty grams of methamphetamine with intent to deliver, without a school penalty enhancer; and one count of maintaining a drug trafficking place, with both counts charged as repeaters. Three other felony bail jumping charges and a misdemeanor bail jumping charge were dismissed and read in, as were charges in another case involving possession with intent to deliver tetrahydrocannabinols, possession of methamphetamine, and misdemeanor bail jumping. The circuit court imposed sentences consistent with the parties' joint recommendation of four years' initial confinement and six years' extended supervision on the methamphetamine charge; and a concurrent four years' initial confinement and two years' extended supervision on the drug house charge. However, contrary to the parties' joint recommendation of running the sentences in the present

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

case concurrent with another sentence Neubauer was then serving in a La Crosse County case, the court ordered the sentences to be served consecutive to that sentence.

The no-merit report identifies potential issues regarding whether Neubauer's pleas were knowingly, intelligently, and voluntarily entered; whether a factual basis supported the circuit court's finding of guilt; whether the court erroneously exercised its sentencing discretion; and whether Neubauer was provided effective assistance of counsel in plea negotiations and at sentencing. Upon our independent review of the record, we agree with counsel's description, analysis, and conclusion that any challenge to these issues would lack arguable merit, and we will not further address the issues.

Counsel also identifies in the statement of issues a potential issue regarding a suppression motion filed in the circuit court. However, he fails to discuss the issue in the no-merit report. Neubauer's suppression motion was undeveloped and merely argued "the affidavit in support of [the] search warrant for Mr. Neubauer's residence contained false and misleading statements made knowingly or with reckless disregard for the truth; and intentionally left critical information relevant to the issue of probable cause out of sworn affidavits."

The affidavit in support of the search warrant averred that based on prior information Neubauer was involved in methamphetamine sales and had an open court case for possession of methamphetamine. The officer who prepared the affidavit stated that he observed a Chevrolet vehicle parked in Neubauer's driveway, but a registration check listed an Oldsmobile vehicle. A short time later, a female left Neubauer's residence, and the officer followed the vehicle, eventually conducting a traffic stop for a registration violation. The driver of the suspect vehicle admitted that she knew the registration on her vehicle was not current, and while speaking, she

was visibly shaky and very nervous. The officer ran the driver's identification, which revealed her driver's license was revoked.

A sheriff's deputy assisted the traffic stop with a narcotic-detecting dog. The K9 alerted positive for the presence of narcotics inside the vehicle. A search of the vehicle revealed heroin, a hypodermic needle loaded with methamphetamine, a pipe commonly used for smoking methamphetamine containing burnt residue inside, and a straw used for snorting drugs. The driver stated the methamphetamine pipe belonged to a person she was supposed to pick up at a gas station.

Another officer made contact with the driver's friend at the gas station, who then accepted a ride to the scene of the traffic stop. The police chief arrived at the scene and spoke with the friend, who provided a written statement. The friend stated that the driver went to buy \$750 of methamphetamine from "Terry" at his residence. The driver then stated she knew "Terry" through "Terry's" girlfriend and that the driver was coming from "Terry's" residence prior to being stopped. Information was received from another officer that Neubauer was a felon and possibly in possession of a firearm at his residence. The affidavit identified Neubauer's residence by description and street address.

The only witnesses called at an evidentiary hearing on the suppression motion were the police chief and the officer who prepared the search warrant affidavit. The officer who prepared the warrant affidavit testified that the facts contained in the affidavit were true. The police chief testified that he worked with the officer at the traffic stop to get statements from the driver and the driver's friend. He also testified that he verified the credibility of the driver's friend with the assistance of an investigator at the Trempealeau County Sheriff's Department. The police chief

testified law enforcement had no reason to doubt the credibility of either witness. The circuit court concluded:

I don't have any evidence that they did anything untoward to these people or any evidence that they aren't credible, and I find both officers' testimony to be entirely credible and sufficient to support the warrant for the search, and that these people told him that they had bought drugs from Mr. Neubauer at his residence, that was sufficient.

A defendant may not challenge a search warrant solely on the ground that a nongovernment informant made a false statement. See *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Thus, the fact that a police informant may have lied to an affiant who, in turn, included the information in a search warrant affidavit, does not constitute a *Franks* violation. See *United States v. Pritchard*, 745 F.2d 1112, 1119 (7th Cir. 1984). Instead, the affiant must be shown to have included the statement with knowledge of its falsity, or with reckless disregard for the truth. *Id.* Thus, to prove that the affiant had reckless disregard for the truth, the defendant must prove that the affiant in fact entertained serious doubts as to the truth or veracity of the allegations. *State v. Anderson*, 138 Wis. 2d 451, 463, 406 N.W.2d 398 (1987).

Here, our independent review of the record fails to establish that the affiant included any statement with knowledge of its falsity, or with reckless disregard for the truth. Indeed, the officers had corroboration leading them to suspect that Neubauer was dealing drugs from his residence. A female observed leaving Neubauer's residence was found to be in possession of methamphetamine and heroin when she was stopped. The driver's friend told police that the driver went to buy methamphetamine from a male named "Terry." In addition, this individual stated the driver was coming from "Terry's" residence prior to being stopped, corroborating the police observation of the female leaving Neubauer's residence. The totality of the circumstances

reported in the search warrant affidavit established probable cause to search. The circuit court found no evidence of false or misleading statements. Rather, the court found the officers' testimony to be entirely credible, and it was within the ambit of the court to assess their credibility. *See Chapman v. State*, 69 Wis.2d 581, 583, 230 N.W.2d 824 (1975). Any challenge to the affidavit supporting the application for the search warrant would lack arguable merit.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Mark A. Schoenfeldt is relieved of his obligation to further represent Terrance Neubauer in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals