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DISTRICT I

January 11, 2022

To:

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

2020AP1067-CR State of Wisconsin v. Brandon D. Baker (L.C. # 2018CF5354)

Before Donald, P.J., Dugan and White, 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).

Brandon D. Baker appeals judgments of conviction entered after he pled guilty to possession with intent to deliver not more than 200 grams of tetrahydrocannabinols (marijuana), possession with intent to deliver 100 grams or less of psilocin or psilocybin, and two counts of carrying a concealed weapon. On appeal, he alleges that the circuit court erred by denying his motions to suppress evidence.[1] Upon review of the briefs and record, we conclude at conference

[1] We may review a circuit court's order denying a suppression motion notwithstanding the defendant's guilty plea. *See* WIS. STAT. § 971.31(10) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

The State filed a criminal complaint alleging that on November 6, 2018, police officers responded to the 2900 block of West Michigan Avenue in Milwaukee after receiving reports of gunfire in the area at approximately 5:00 a.m. Upon arrival, the officers saw a man, subsequently identified as Baker, standing outside an apartment building. He was holding an AR-15 rifle. The officers directed Baker to put the gun down but he refused, stating that he had the right to possess guns, he was going to start a militia, he was running for governor, and that he was going to be the governor.[2] Baker also said that he lived in the apartment building, identified his apartment number, and went on to admit that he had fired gunshots earlier. Baker then displayed his cell phone, announced that he was broadcasting on Twitter, and provided the user name for his Twitter account. Police eventually restrained him and took him into custody.

The complaint further alleged that Baker had three loaded firearms concealed on his person at the time of his arrest, and officers determined that he did not have a license to carry a concealed weapon. Officers also determined that Baker had posted video footage on his Twitter page that morning showing him shooting multiple firearms from the roof of his residence on West Michigan Avenue. Police searched the roof of the apartment building and found numerous bullet casings. The complaint went on to allege that police then obtained a search warrant for Baker's apartment. Upon executing the warrant, the officers found, among other items: 232 grams of marijuana; fourteen stamps containing lysergic acid diethylamide (LSD); seventy-three

[2] November 6, 2018, was an election day.

glass jars containing suspected psilocybin mushrooms; an empty cartridge box for 7.62-caliber ammunition; and an empty Glock 19 gun case with a serial number that matched one of the guns discovered on Baker's person.

The State ultimately charged Baker with ten crimes: misdemeanor offenses of possessing LSD; disorderly conduct; and four counts of carrying a concealed weapon; and felony offenses of second-degree recklessly endangering safety; possession with intent to deliver 200 grams or less of marijuana; possession with intent to deliver 100 grams or less of psilocin or psilocybin; and maintaining a drug trafficking place. Baker pled not guilty.

Baker moved to suppress the evidence found in his home. As grounds, he alleged that the affidavit in support of the search warrant was "facially insufficient to support a finding of probable cause for the search." Alternatively, he claimed that the search warrant affidavit contained false statements that should be set aside, and he asserted that if those statements were disregarded, the affidavit lacked probable cause. The circuit court rejected his claims after hearing argument but without taking evidence.

Baker subsequently resolved the charges with a plea agreement. Pursuant to its terms, he pled guilty to the felony counts of possession with intent to deliver 200 grams or less of marijuana, and possession with intent to deliver 100 grams or less of psilocin or psilocybin; and to two misdemeanor counts of carrying a concealed weapon. The remaining charges were dismissed and read in for sentencing purposes. The circuit court imposed a four-year term of probation for the felony convictions and a time-served disposition for the misdemeanors. Baker appeals, renewing his challenges to the search warrant.

A search warrant may be issued only upon a showing of probable cause. *See* ***State v. Romero***, 2009 WI 32, ¶16, 317 Wis. 2d 12, 765 N.W.2d 756. When the facts are undisputed, whether probable cause exists is a question of law that we review independently. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Our review is confined to the record that was before the magistrate issuing the warrant. *See* ***State v. Sloan***, 2007 WI App 146, ¶8, 303 Wis. 2d 438, 736 N.W.2d 189.

The quantum of evidence required to establish probable cause for a search warrant is less than that needed to bind a defendant over for trial. *See* ***State v. Lindgren***, 2004 WI App 159, ¶20, 275 Wis. 2d 851, 687 N.W.2d 60. The magistrate considering the warrant request must "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" ***Romero***, 317 Wis. 2d 12, ¶19 (footnote and citations omitted). We recognize that "the experience and special knowledge of police officers who are applying for search warrants are among the facts that the warrant-issuing court may consider." ***State v. Multaler***, 2002 WI 35, ¶43, 252 Wis. 2d 54, 643 N.W.2d 437. Due to the strong preference for searches conducted pursuant to a warrant, we give great deference to a warrant-issuing magistrate's determination of probable cause, "and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." *See* ***State v. Silverstein***, 2017 WI App 64, ¶13, 378 Wis. 2d 42, 902 N.W.2d 550 (citation omitted).

In this case, Detective Steven S. Johnson applied on November 6, 2018, for a warrant to search Baker's West Michigan Avenue apartment. The supporting affidavit stated that Johnson was investigating the crime of endangering safety by use of a dangerous weapon. A person commits that crime by operating or handling a dangerous weapon in a criminally negligent

manner, thereby endangering the safety of another. *See* WIS. STAT. § 941.20(1)(a); *see also* WIS. JI—CRIMINAL 1320. The questions before the magistrate were whether the affidavit showed probable cause to believe that such a crime had been committed and whether Baker's home contained evidence of that crime. *See* ***Sloan***, 303 Wis. 2d 438, ¶31.

Baker's primary complaint is that the search warrant affidavit included information from "two anonymous calls." According to Baker, the anonymity of the informants rendered their statements unreliable and therefore insufficient to support a finding of probable cause to search his apartment.

The affidavit does include information from anonymous sources. The affidavit describes an anonymous "call for service" at 6:02 a.m. on November 6, 2018, regarding a subject with a gun in the 2900 block of West Michigan Avenue. The affidavit also includes information about an anonymous caller's report that "Baker had a full auto gun and was making threats via social media to 'light up Milwaukee.'" The latter caller reportedly advised that "Baker was broadcasting himself standing on a balcony in possession of a long gun and pistol." Baker fails to show, however, that inclusion of information from those anonymous sources prohibited a finding of probable cause.

Investigating officers do not violate Fourth Amendment rights by going to a public place and speaking to a person that the officers encounter there. *See* ***Florida v. Royer***, 460 U.S. 491, 497 (1983). In this case, Johnson averred in his affidavit that when the police responded to reports of gunfire coming from the 2900 block of West Michigan Avenue, the officers observed Baker at that location holding a rifle. Johnson further averred: "Baker advised officers that he wanted to 'talk to the police,'" and then Baker told the officers: "I was shooting because I can do

that, I can shoot my AR on my roof, I can do that." Regardless of any anonymous reports, the allegations describing the officers' encounter with Baker established probable cause to believe that Baker committed the crime of endangering safety by use of a dangerous weapon. *See* ***State v. Fry***, 129 Wis. 2d 301, 303, 306-07, 385 N.W.2d 196 (Ct. App. 1985) (holding that the defendant's confession standing alone constitutes probable cause to believe that the defendant committed a crime and supports binding the defendant over for trial).

The next question is whether the search warrant affidavit also established probable cause to believe that Baker's home contained evidence of a crime. *See* ***State v. Casarez***, 2008 WI App 166, ¶¶12-13, 314 Wis. 2d 661, 762 N.W.2d 385. We consider that question in light of the "great deference" owed to the warrant-issuing magistrate. *See* ***Silverstein***, 378 Wis. 2d 42, ¶13.

The search warrant affidavit in this case states that police sought, *inter alia*, "ammunition, casings, and fired bullets," as well as "identifying documents to show who is in control of the residence." In support of the request to search for those items in Baker's home, Johnson averred that Baker had multiple firearms on his person when he was arrested on November 6, 2018. Johnson then averred that he knew from his training and experience that gun owners typically store ammunition in their homes and that "purchased firearms come with proof of sales/purchase." Further, he averred that, because Baker had admitted shooting a gun from the roof of his home that morning, police had searched the rooftop of Baker's apartment building and found thirty-one spent casings. Johnson said that it was reasonable to believe that Baker's apartment would contain spent casings linking his firearms to the shots fired.

The foregoing allegations support a common-sense conclusion that Baker's home contained documents and physical evidence that would aid in proving that Baker endangered

safety by firing a gun in a residential neighborhood. Johnson's averments described the documents and physical items that gun owners are likely to have in their homes, the detritus that gunfire leaves behind, and the reasons that the evidence sought would link Baker to the crime under investigation. We therefore conclude that facts alleged in the affidavit gave rise to a reasonable likelihood that Baker's home would contain evidence of the crime of endangering safety by use of a dangerous weapon.

Baker urges this court to conclude that the evidence found pursuant to the search warrant should nonetheless be suppressed. First, Baker implies that the finding of probable cause to search was "based on an entirely anonymous tip" from an informant whose allegations were not corroborated. We reject this suggestion. The affidavit describes the observations that the arresting officers made, Baker's admissions, and Johnson's knowledge and experience regarding various aspects of gun use and ownership. The anonymous information supplied some background facts but it was not necessary, let alone the basis, for a finding of probable cause.

Second, Baker implies that the affidavit included an overbroad request for a warrant that allowed police to search not only his apartment but also his electronic devices and his car. While the warrant did authorize a search of all three areas, Baker did not move to suppress evidence found anywhere other than his apartment. Moreover, the record does not show that the police searched his electronic devices and car, or that the police found any evidence there. Assuming without so holding that the warrant was overbroad in permitting a search of Baker's electronic devices and car, that would not require suppressing the evidence found in Baker's home. When a search warrant is overbroad in describing the premises to be searched, the overbroad portion may be severed, and the items seized from the appropriately authorized areas are admissible. *See* ***State v. Marten***, 165 Wis. 2d 70, 77, 477 N.W.2d 304 (Ct. App. 1991).

Third, Baker implies that the affidavit improperly stated that police sought evidence in regard to "two suspects" when Baker was the sole suspect in the case. The State concedes that police were investigating only Baker, but the defect in referencing a second suspect may be severed. *See* ***State v. Sveum***, 2010 WI 92, ¶34, 328 Wis. 2d 369, 787 N.W.2d 317 (explaining that the severability doctrine permits excising defective portions of an otherwise valid warrant). Baker fails to explain how the defect, or its severance, undermines the probable cause established in the remainder of the affidavit.

Fourth, Baker suggests that the affidavit failed to establish the need to search his home because the affidavit reflected that police had already collected substantial evidence of endangering safety by use of a dangerous weapon, including the guns found on his person, casings found on the roof of his home, and his inculpatory statements. We reject any such suggestion. "[N]othing in the law limits the quantum of evidence related to a crime that may be gathered or bars the gathering of evidence related to the crime." ***Casarez***, 314 Wis. 2d 661, ¶14.

In sum, Baker does not show that the search warrant affidavit was insufficient to establish probable cause. The circuit court properly denied his motion to suppress on this ground.

We turn to Baker's alternative claim for relief. Baker contends that the search warrant affidavit contained false statements without which the State could not show probable cause for the search. According to Baker, he was entitled to develop that claim at an evidentiary hearing, pursuant to ***Franks v. Delaware***, 438 U.S. 154 (1978). We disagree.

To obtain a ***Franks*** hearing, a defendant must make a "'substantial preliminary showing'" that: (1) a search warrant affidavit included a false statement that was made knowingly and intentionally, or with reckless disregard for the truth; and (2) the allegedly false

statement was necessary to the finding of probable cause. *See* ***State v. Jones***, 2002 WI App 196, ¶25, 257 Wis. 2d 319, 651 N.W.2d 305 (citation omitted). We review *de novo* whether the circuit court properly denied a motion for such a hearing. *See* ***id.***

Baker contends that the circuit court should have granted him a ***Franks*** hearing because he alleged that the search warrant affidavit included false statements.[3] Baker, however, did not argue in circuit court that Johnson made the statements at issue knowing that they were false or with reckless disregard for their truth. On appeal, Baker asserts in his brief-in-chief that he had no obligation to make such an argument. That assertion is wrong, as the State points out. *See* ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987). Baker concedes his error in his reply brief and belatedly offers arguments that, he claims, demonstrate Johnson's reckless disregard for the truth of the statements in the affidavit. These arguments come too late. *See* ***State v. Chu***, 2002 WI App 98, ¶42 n.5, 253 Wis. 2d 666, 643 N.W.2d 878 (stating that we do not consider arguments made for the first time in a reply brief).

For the sake of completeness, we add that Baker's belated arguments are insufficient to demonstrate that the circuit court erred by denying him a ***Franks*** hearing. According to Baker, Johnson falsely averred that: (1) Baker told the officers who approached him on November 6, 2018, that he was "going to the poll[s] to air it out"; (2) Baker threatened on social media to "light up Milwaukee"; (3) Baker's interaction with police before his arrest lasted an hour; and

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[3] In ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985), our supreme court extended the holding of ***Franks v. Delaware***, 438 U.S. 154 (1978), "to include omissions from a warrant affidavit if the omissions are the equivalent of deliberate falsehoods or reckless disregard for the truth." *See* ***State v. Jones***, 2002 WI App 196, ¶25, 257 Wis. 2d 319, 651 N.W.2d 305. Baker moved for a "***Franks/Mann***" hearing in circuit court, but he alleged only that the warrant affidavit included false statements, not that the affidavit omitted critical information. Accordingly, he sought a ***Franks*** hearing, regardless of his nomenclature, and he renews his claim on appeal.

(4) two suspects were involved in the incident. Baker asserts that, in fact, he never made the statements attributed to him, he interacted with police for only twenty-four minutes before his arrest, and he was the sole suspect. Assuming that the averments at issue were untrue, however, they were also unnecessary to demonstrate probable cause for a search warrant. As our earlier discussion reflects, the affidavit provided probable cause for the warrant without those averments. Their inclusion in the affidavit therefore did not constitute grounds for relief. *See* ***Jones***, 257 Wis. 2d 319, ¶25. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals