

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 19, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0066-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES E. SCHULTZ,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

ANDERSON, P.J. James E. Schultz appeals from a judgment of conviction for possession of controlled substances, contrary to § 161.41(3r), STATS. We conclude that even with the omitted facts inserted in the officer's affidavit, probable cause to search Schultz's residence was not erased. Accordingly, the judgment of the trial court is affirmed.

According to the search warrant affidavit, Detective James Nevicosi of the Walworth County Sheriff's Department obtained and searched, on four separate occasions, several bags of garbage set out for collection at W4120 Bray Road. Each search uncovered garbage bags which contained both evidence of controlled substances and items of correspondence in Schultz's and his wife's names.¹

The affidavit also stated that Nevicosi ran a driver's license check and tax record search verifying that Schultz and his wife's address was W4120 Bray Road. Nevicosi also described the property based upon his personal observation.

The search warrant was signed and executed, yielding various quantities of marijuana throughout the W4120 Bray Road residence and on Schultz's person. Subsequently, Schultz was charged with unlawful possession of a controlled substance.

Schultz filed a motion for a "*Mann* hearing"² and for an order to suppress the evidence seized from his residence, claiming that material facts

¹ The four searches uncovered the following: (1) March 3, 1995, 8 marijuana seeds, 1 plant stem, and correspondence in the name of Ruth L. Swisher; (2) March 10, 1995, 70 marijuana seeds, 2 marijuana stems, and correspondence addressed to Ruth L. Swisher-Schultz; (3) March 17, 1995, approximately 38 marijuana seeds, 4 plant stems, and correspondence to Ruth Schultz, Ruth Swisher, J. Schultz, and James Schultz and Ruth Swisher; and (4) April 7, 1995, 2 plant stems, 1 marijuana roach, 7 marijuana seeds, a letter to Ruth Swisher-Schultz, and two separate bills in the name of Jim Schultz and Ruth Swisher.

² *State v. Mann*, 123 Wis.2d 375, 367 N.W.2d 209 (1985). While Schultz refers to a "*Mann* hearing," we interpret this to refer to a *Franks* hearing. See *Franks v. Delaware*, 438 U.S. 154 (1978).

were intentionally or recklessly omitted by Nevicosi. The trial court denied his motion. Schultz subsequently pled guilty to criminal charges. A judgment of conviction was entered against him for possession of marijuana. Schultz appeals.

Schultz argues that the trial court erred by denying his motion for a “*Mann* hearing” and by denying his motion to suppress physical evidence seized from his residence. When we review a trial court's decision regarding a motion to suppress evidence, the court's findings of fact will be sustained unless they are contrary to the great weight and clear preponderance of the evidence. *State v. Callaway*, 106 Wis.2d 503, 511, 317 N.W.2d 428, 433, cert. denied, 459 U.S. 967 (1982). However, we independently review the application of the *Franks* rule.³ *State v. Mann*, 123 Wis.2d 375, 384, 367 N.W.2d 209, 212-13 (1985).

³ The *Franks* Court stated:

where the defendant makes a substantial preliminary showing that a false statement ... was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, ... [then] a hearing [must] be held at the defendant's request....

Franks v. Delaware, 438 U.S. 154, 155-56 (1978). The *Franks* rule was extended in *Mann*, 123 Wis.2d at 388, 367 N.W.2d at 214-15 (1985), to include omissions from a warrant affidavit if the omission is the equivalent of a deliberate falsehood or reckless disregard for the truth.

Schultz contends that there were material facts omitted from the warrant affidavit which would have undermined the existence of probable cause to search his home. He argues that if the court would have known that there was a second residence on the property and that the garbage was common to both residences, then the court would not have found probable cause to search his residence.

In *Mann*, the Wisconsin supreme court held that the *Franks* rule applies to “specific and limited material evidentiary facts omitted from a search warrant affidavit.” *Mann*, 123 Wis.2d at 386, 367 N.W.2d at 213. The omitted facts must be undisputed, capable of single meanings and critical to a probable cause determination to be viewed as the reckless disregard for truth required by *Franks*. See *Mann*, 123 Wis.2d at 388, 367 N.W.2d at 214-15. The court must determine, when the omitted facts are inserted into the search warrant, whether there remains sufficient probable cause for the search. *Id.* If probable cause is not erased, then a *Franks* hearing is not required. *Mann*, 123 Wis.2d at 388, 367 N.W.2d at 215.

Here, the identified omissions are not sufficient to meet the threshold requirements warranting a *Franks* hearing or requiring suppression of the seized evidence. Although undisputed, the omissions are not critical to

the finding of probable cause. Rather, the averments that marijuana stems and seeds were found in the same garbage bag as correspondence addressed to Schultz and his wife are more critical. These allegations, combined with the officer's confirmation that Schultz and his wife lived in the house described in the affidavit, support probable cause that Schultz's residence might contain marijuana and/or drug paraphernalia. Even if the omitted facts are included in the warrant affidavit, probable cause is not erased. We therefore affirm the trial court.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.