COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP584-CR **Cir. Ct. No. 2012CF863**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS J. SELK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Nicholas Selk appeals a judgment of conviction and an order denying postconviction relief. Selk argues that he was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel for failing to

properly argue Selk's suppression motion. We disagree. For the reasons set forth below, we affirm.

¶2 Selk was charged with drug and firearm offenses based on the evidence obtained through the execution of a search warrant at Selk's apartment. Selk moved to suppress the evidence on grounds the affidavit in support of the search warrant was insufficient to establish probable cause. Selk argued that the affidavit was insufficient because it did not establish the reliability of information regarding a controlled buy through a confidential informant. He also argued that the affidavit was insufficient by setting forth incomplete information as to statements provided by two informants, Thomas Perry and Sheldon Tepp. The circuit court found that the search warrant was supported by probable cause and denied the suppression motion. Selk then pled no contest, pursuant to a plea deal, to one count of possession of heroin with intent to deliver, and the remaining counts were dismissed and read-in.

¶3 Selk filed a postconviction motion claiming he was denied the effective assistance of counsel when his trial counsel failed to seek a ***Franks***[1]/***Mann***[2] hearing to challenge the search warrant. He argued that the search warrant affidavit omitted critical information and that he was entitled to an evidentiary hearing to show that the search warrant lacked probable cause. The circuit court denied the postconviction motion without an evidentiary hearing. Selk appeals.

[1] ***Franks v. Delaware***, 438 U.S. 154 (1978).

[2] ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

¶4 Selk argues that he is entitled to an evidentiary hearing on his claim that his trial counsel was ineffective by failing to properly argue his suppression motion. He contends that his counsel performed deficiently by not arguing that he was entitled to a ***Franks*/*Mann*** hearing and that he was prejudiced when he did not get an evidentiary hearing to challenge the search warrant. We conclude, however, that Selk's challenge to the search warrant lacks merit. Because we reject Selk's challenge to the search warrant, we conclude that Selk's trial counsel was not ineffective by failing to request a ***Franks*/*Mann*** hearing.

¶5 A claim of ineffective assistance of counsel "must show that counsel's performance was deficient … [in] that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to satisfy one prong of the ineffective assistance of counsel test, we need not address the other. ***Id.*** at 697.

¶6 A claim of ineffective assistance of counsel requires an evidentiary hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit

court has the discretion to grant or deny a hearing." ***Id.*** We independently determine whether the facts set forth in a postconviction motion require an evidentiary hearing. ***Id.*** If they do not, we review a circuit court's decision as to whether to hold a hearing for an erroneous exercise of discretion. ***Id.***

¶7 The basis for Selk's ineffective assistance of counsel claim is Selk's contention that his counsel failed to obtain a ***Franks***/***Mann*** hearing to challenge the search warrant affidavit. Selk acknowledges that his trial counsel moved to suppress the evidence obtained through the execution of the search warrant by attacking the sufficiency of the affidavit to establish probable cause. Selk contends, however, that his trial counsel was ineffective by failing to cite the relevant case law and argue that Selk was entitled to an evidentiary hearing. He argues that an ordinarily prudent lawyer would have recognized that she needed to request a ***Franks***/***Mann*** hearing to establish that the affidavit omitted critical facts. Selk contends that, had counsel cited the relevant case law and requested an evidentiary hearing, Selk would have established that the warrant lacked probable cause. We conclude, however, that Selk has not established that he was entitled to a ***Franks***/***Mann*** hearing. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 (failure to bring a meritless motion is not deficient performance).

¶8 A ***Franks***/***Mann*** hearing is required if a defendant makes a "substantial preliminary showing" that the search warrant affidavit omitted undisputed facts that are critical to the determination of probable cause. *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978) (hearing required upon substantial preliminary showing that a false statement was included in an affidavit with reckless disregard for the truth and that the statement is necessary to finding of probable cause); ***State v. Mann***, 123 Wis. 2d 375, 385-89, 367 N.W.2d 209

(1985) ("[A]n omitted fact [is] the equivalent of 'a deliberate falsehood or a reckless disregard for the truth'" if it is "an undisputed fact that is critical to an impartial judge's fair determination of probable cause"). "Where the omitted critical fact is undisputed it will not involve credibility determinations, the weighing of evidence, or the drawing of one of several inferences from a fact." ***Mann***, 123 Wis. 2d at 389. The defendant must show that the omitted facts, if included, would prevent a finding of probable cause. ***Id.*** at 388-89. "[I]f, when the material previously omitted is inserted into the complaint, there remains sufficient content … to support a finding of probable cause, no … hearing is required." ***Id.*** at 388.

¶9 Selk contends that the search warrant affidavit omitted critical information and that, with the omitted information added to the affidavit, the search warrant lacks probable cause. Selk points out that the search warrant included information provided by informants Perry and Tepp in their second police interviews, but excluded contradictory statements Perry and Tepp gave in their first police interviews. He argues that the information Perry and Tepp provided in their first and second police interviews, when read together, was so inconsistent that it rendered Perry and Tepp totally lacking in credibility. Selk then contends that the only other information in the search warrant—that a confidential informant had conducted a controlled buy of heroin from Selk at the direction of the police—lacked any showing of reliability. Thus, Selk contends, the omitted contradictory statements by Perry and Tepp are critical to a determination of probable cause. We disagree.

¶10 We conclude that, had the search warrant affidavit included the information Selk asserts was erroneously omitted, the search warrant would still have been sufficient to establish probable cause. The affidavit sets forth the

following: On October 11, 2012, Perry was treated at the hospital for a heroin overdose after being brought to the hospital by Tepp. On October 16, 2012, police interviewed Perry. Perry informed police that he obtained the heroin from someone at the Cimarron Court apartment complex in Oshkosh with a certain phone number, which police then identified as Selk's residence and phone number. Perry also stated that he had bought heroin from the same individual about twenty times over the past few months, at or near the seller's apartment.

¶11 On October 17, 2012, police interviewed Tepp. Tepp stated that he and Perry obtained the heroin from an individual he knew as "Naka" at the Cimarron Court apartment complex. Tepp identified Selk as "Naka" in a photo array.

¶12 On December 12, 2012, a confidential informant performed a controlled buy of heroin from Selk at Selk's apartment in Cimarron Court. The informant purchased the heroin, packaged in tin foil folds, with pre-recorded currency provided by police. The informant knew Selk as "Naka." After the buy, the confidential informant told police that he saw additional heroin at Selk's apartment.

¶13 Selk argues that the search warrant omitted the following critical information: Police first interviewed Perry and Tepp at the hospital on October 11, 2012. At that time, Perry stated that he bought the heroin from a man outside a gas station, and that Perry had bought heroin from that man in the past but did not know the man's name. Tepp did not identify the source of the heroin. Tepp stated he disposed of the drug paraphernalia after Perry overdosed, but police found the paraphernalia in Tepp's car. Finally, Tepp first stated that he used heroin with Perry, but later said he used heroin earlier in the day.

¶14 A determination of whether there is probable cause for a search warrant requires a "practical, commonsense 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." ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517 (citation omitted). All of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of an informant, must be considered. ***State v. Lopez***, 207 Wis. 2d 413, 425, 559 N.W.2d 264 (Ct. App. 1996). Independent corroboration by police of information provided can establish an informant's veracity and basis of knowledge. ***State v. Jones***, 2002 WI App 196, ¶15, 257 Wis. 2d 319, 651 N.W.2d 305 ("Independent police corroboration of the informant's information imparts a degree of reliability to unverified details." (citation omitted)).

¶15 We conclude that the information in the affidavit, together with the omitted information, supports a finding of probable cause for the issuance of the search warrant.[3] The information in the affidavit supports a commonsense, practical determination of a fair probability that contraband would be found in Selk's apartment. In reaching this conclusion, we reject Selk's contention that the information as to the confidential informant lacked any indication of reliability. The affiant asserted that the confidential informant acted under the direction of police in conducting the controlled buy, which is sufficient to verify the information. *See* ***State v. Hanson***, 163 Wis. 2d 420, 423-24, 471 N.W.2d 301 (Ct. App. 1991) ("[O]ne 'situation in which the corroboration will suffice to show veracity is that in which the informant has not been working independently, but

[3] Because we reject Selk's challenge to the search warrant, we also reject his argument that his statements to police were obtained by exploitation of an unlawful search.

rather has cooperated closely with the police, as is true when the informant makes a controlled purchase of narcotics.'" (citation omitted)). While certainly the description of the controlled buy could have been more detailed, we are not persuaded by Selk's argument that the lack of detail renders the report of the controlled buy irrelevant to a determination of probable cause.

¶16 We also reject Selk's contention that Perry and Tepp's statements implicating Selk lacked credibility. The fact that Perry and Tepp provided prior inconsistent information to police does not render their subsequent statements patently incredible. Reading the statements together supports one reasonable inference that Selk was the source of the heroin that caused Perry's overdose. The information regarding the controlled buy, together with the statements by Perry and Tepp, is sufficient to support a finding of probable cause. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.