COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1744-CR **Cir. Ct. No. 2013CT1173**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERTO F. OROZCO-ANGULO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JENNIFER DOROW, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Roberto F. Orozco-Angulo appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI),

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

third offense, challenging the circuit court's denial of his motions to suppress. First, Orozco-Angulo maintains the procedure used to obtain a telephonic search warrant for a blood draw following an arrest for OWI and a refusal to submit to a blood test did not comport with the statutory requirements and therefore suppression of the evidence was required. Second, Orozco-Angulo argues that the defense put forth sufficient evidence of deliberate falsehood or reckless disregard for the truth to require a ***Franks*** hearing, which, he argues, would have resulted in suppression of the blood evidence. *See* ***Franks v. Delaware***, 438 U.S. 154 (1978). We conclude that the search warrant for the taking of a blood sample was valid and affirm.

BACKGROUND

¶2 The facts are undisputed. On August 16, 2013, at about 2:20 a.m., Officer Chris Garcia of the City of Brookfield Police Department heard from dispatch about a possibly intoxicated driver who had just exited the freeway, headed towards the city of Waukesha. A citizen had called to report that someone in a TrailBlazer was driving erratically on the freeway and had possibly struck the median. A couple minutes after the dispatch call, Garcia saw a TrailBlazer traveling westbound on East Moreland Boulevard in Waukesha. Garcia turned around and followed the vehicle. As soon as he caught up to it, he noticed that the vehicle was not travelling in a lane, "it was straddling the lane divider lines." The vehicle appeared to try to correct into the middle westbound lane, but "actually cut across the left lane, into the left turn lane … for traffic that wants to proceed southbound onto Highway 164." Garcia stopped the vehicle after it turned southbound onto Highway 164.

¶3 Waukesha County Sheriff Deputy Bradley Stenulson was patrolling the Interstate Highway 94 when dispatch advised that there was a possibly intoxicated driver in the area, driving a TrailBlazer and last seen exiting westbound I-94 at Barker Road. Stenulson received information that Garcia had stopped a TrailBlazer, and there was a request for investigation. Stenulson made contact with Garcia and the driver, Orozco-Angulo. Upon speaking to Orozco-Angulo, Stenulson detected an odor of intoxicants and observed him to have bloodshot, glassy eyes and heavy slurred speech. Stenulson had Orozco-Angulo perform field sobriety tests (FSTs), including the horizontal gaze nystagmus, walk-and-turn and one-leg stand tests. Based on Orozco-Angulo's performance on those tests, his blowing out of the side of his mouth instead of into the tube on the preliminary breath test, and information from Garcia about his observations of Orozco-Angulo's driving, Stenulson concluded that Orozco-Angulo's ability to operate a motor vehicle was impaired. Stenulson placed Orozco-Angulo under arrest and read him the informing the accused form. Another deputy transported Orozco-Angulo to the hospital, where Stenulson met him. When asked if he would submit to a blood test, Orozco-Angulo did not respond. Stenulson took his evasiveness as a refusal. At this point, Stenulson determined that he needed to ask for a search warrant in order to get blood drawn from Orozco-Angulo.

¶4 To request the telephonic search warrant, Stenulson had Deputy Matthew Thompson fill out the standard request form on the computer in Thompson's squad car. Stenulson explained, "I had a blank copy of the affidavit which goes through what he was completing on his computer so … I'd provide him the information, and he would type it on his squad's computer." The form contains several fact statements that can be indicated with an "X" to show why there is probable cause for a warrant for a blood draw. In this case, the reasons

indicated were that the person: was observed to drive a vehicle by the officer and by a citizen witness; had an odor of intoxicants emitting from him; had bloodshot, glassy eyes; had slurred speech; had difficulty keeping his balance; admitted to consuming four beers; and showed poor performance on each of the FSTs administered. Also indicated in that part of the form was the fact that Orozco-Angulo admitted driving the car. Also indicated were the facts that Orozco-Angulo refused to submit to a preliminary breath test and was arrested for OWI at 2:26 a.m., was read the informing the accused form, and refused to submit to a blood test. After the form was completed, Thompson e-mailed it to Judge Carter, the on-duty judge, and then Stenulson called the dispatch center to patch him through to Judge Carter's line so that the conversation with the judge was recorded.

¶5 On that night, Stenulson did not read through the paragraphs of text in the first part of the standard form affidavit. However, he had read the form prior to that night during training. Stenulson testified that the judge told Stenulson that he, the judge, had a copy of the affidavit, and the parties stipulated that the judge had all five pages of the warrant, return form and affidavit. The transcript of the recording of Stenulson's conversation with the judge reads:

> JUDGE CARTER: Do you swear the information you're providing in support of this application for a search warrant in your affidavit and verbally here is your testimony and is true and correct to the best of your knowledge so help you god?
>
> DEPUTY STENULSON: It is.
>
> JUDGE CARTER: All right. Then what I'm going to ask you is related to the affidavit and just indicate I have read the search warrant and the affidavit and it's recorded. I'm asking for additional information in relation to paragraph three as to why this vehicle was stopped.
>
> DEPUTY STENULSON: Okay.

> JUDGE CARTER: You can provide that verbally now.
>
> DEPUTY STENULSON: I can. At this point Officer Garcia observed the vehicle cross a lane divider on two occasions.
>
> JUDGE CARTER: All right.
>
> DEPUTY STENULSON: Would—that information then correlated to the complainant who gave a partial vehicle description of reckless driving.
>
> JUDGE CARTER: Who obtained the information that was received regarding—was that from a citizen that you've identified?
>
> DEPUTY STENULSON: Yep. It would have been the parent to Maria Ward. She observed the vehicle operating recklessly on I-94 and gave a partial vehicle description, that Officer Garcia located a vehicle matching that and observed the two violations of crossing the lane divider.
>
> JUDGE CARTER: All right. And make the time with that additional information, the court is going to indicate that it finds probable cause. For the record here, I am signing the search warrant electronically at this time and we will be e-mailing it back to—the address I got it from was mthompson@waukeshacounty.gov is that the e-mail address I should be returning it to?
>
> DEPUTY STENULSON: That would be fine.
>
> JUDGE CARTER: Okay. Then we are done.

Stenulson testified that once the warrant was approved by the judge, it was submitted back to the police department, and it was at that point that Stenulson signed a paper copy in three different spaces: on the affidavit, on the return at 5:04 a.m. and then again at 10:20 a.m. when he returned the return form to the court.

DISCUSSION

Standard of Review

¶6 "In reviewing a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous, and review the application of constitutional principles to those facts de novo." ***State v. Grady***, 2009 WI 47, ¶13, 317 Wis. 2d 344, 766 N.W.2d 729. "Suppression is only required when evidence has been obtained in violation of a defendant's constitutional rights or if a statute specifically provides for the suppression remedy." ***State v. Raflik***, 2001 WI 129, ¶15, 248 Wis. 2d 593, 636 N.W.2d 690 (citation omitted). There is no statutory provision for suppression as a remedy for failure to comply with WIS. STAT. § 968.12, which governs the issuance of search warrants. Therefore, we must only consider whether the alleged failure to comply with the statutory procedure violated a constitutional right. ***Raflik***, 248 Wis. 2d 593, ¶15.

WISCONSIN STAT. § 968.12(3), Telephonic Search Warrant

¶7 The procedures for obtaining a telephonic search warrant are set forth in WIS. STAT. § 968.12(3). Under para. (a), "A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication." Additionally, under subsec. (2), "The complaint, affidavit or testimony may be upon information and belief." Regarding telephonic procedure specifically, "The person who is requesting the warrant shall prepare a duplicate original warrant and read the duplicate original warrant, verbatim, to the judge. The judge shall enter, verbatim, what is read on the original warrant." Sec. 968.12(3)(b).

¶8 Before we describe what happened here, we should describe the form that Stenulson and Thompson were using to make their application for a search warrant. The first page of the document is titled "TELEPHONIC OWI SEARCH WARRANT" and indicates that an officer has arrested the individual for operating a motor vehicle while intoxicated or impaired by an unknown substance and that the individual has refused to submit to a chemical test under the Implied Consent Law. The warrant states that the Court has found that the blood of the driver may constitute evidence of a crime and commands officers to seize the driver and secure the assistance of medical personnel in obtaining a blood specimen. The warrant instructs the arresting officer to secure the recording of the search warrant application and bring the recording to the court by the next day following the order. The warrant further commands the officer to execute the search warrant immediately and return the warrant within forty-eight hours after its execution, with any inventory of property taken, to the clerk of court. The form has blanks for the arresting officer's name and agency, the driver's name, date of birth and gender, the location of custody, the date and the judge's signature. Page two is a form for the officer to return to the court indicating that he or she has executed the search warrant and is in possession of the blood sample. Page three of the document is titled "AFFIDAVIT IN SUPPORT OF OWI SEARCH WARRANT." The only blank on this page is for the officer's name, indicating that the officer, after being duly sworn, testifies to his office, training, experience, his knowledge regarding dissipation of alcohol from a person's body, and personal knowledge of the contents of the affidavit. Relevant to this case, as will be discussed below, paragraph three indicates that "this Affiant references the reports and conclusions of fellow peace officers whose reports Affiant believes to be truthful and reliable." On page four various possible fact scenarios are listed with

a space in front of each and instructions to "[p]lace an X for all that apply (recite all marked lines to the judge)."

¶9 Orozco-Angulo makes two main arguments on appeal. First, he maintains that the "search warrant was improperly granted because the evidence submitted was not based on oath or affirmation and the warrant was not read by the witness requesting the warrant." Second, he argues that the search warrant was unlawful because it was "issued on intentionally or recklessly false statements."

Procedural Defects

¶10 Orozco-Angulo's first argument is that the procedures set forth in WIS. STAT. § 968.12(3) were not followed, thus invalidating the search warrant. Orozco-Angulo argues that the evidence relied on by the judge was unsupported by oath or affirmation, "because all parties contributing to it were not sworn." Orozco-Angulo points to that portion of § 968.12(3)(d) that says "the judge shall place under oath each person whose testimony forms a basis of the application and each person applying for the warrant." Orozco-Angulo does not specify whether he means that Garcia or Thompson, or both, had to be sworn; we address them both.

¶11 Thompson did not apply for the warrant, Stenulson did. Stenulson was the arresting officer. Stenulson saw all the indicia of intoxication listed on the affidavit for the warrant, with the exception of the two items regarding an officer and a witness seeing Orozco-Angulo drive. Stenulson swore to the judge over the phone that the information he provided in the application for the warrant in his

affidavit and verbally was true and correct.[2] Thompson was a mere scrivener; he contributed no testimony and did not need to be sworn. Orozco-Angulo points to no information in the application that came from Thompson.

¶12 Garcia did supply information, which Stenulson references in his testimony. Garcia is the officer who first saw Orozco-Angulo driving after the information came from dispatch about a possibly intoxicated driver in that area. However, the statute specifically allows for the person applying for the warrant to give testimony upon information and belief. WIS. STAT. § 968.12(2); *see also* ***State v. Beal***, 40 Wis. 2d 607, 614, 162 N.W.2d 640 (1968). There was no error in the inclusion of information obtained from Garcia without Garcia swearing under oath to the application.

¶13 Orozco-Angulo next argues that the warrant is invalid because Stenulson never saw the completed application before swearing to it and because Stenulson never read the warrant to the judge, as required by the statute. Orozco-Angulo does not explain how either of these alleged procedural defects violates his constitutional rights. *See* ***Raflik***, 248 Wis. 2d 593, ¶15. In ***Raflik***, an officer called in a telephonic search warrant application and the judge took testimony over the phone, but the call was mistakenly not recorded. ***Id.***, ¶¶5-6. The officer and the judge got together the next day and reconstructed the officer's testimony. ***Id.***, ¶¶7-10. The Wisconsin Supreme Court held that the warrant process fulfilled all the requirements of the Fourth Amendment. The reconstruction of the warrant application adequately protected Raflik's right to

[2] The application did contain an affidavit, sworn to by Stenulson, to the judge, as permitted under WIS. STAT. § 887.01(1).

judicial review. ***Id.***, ¶21. "The essential thing is that proof be reduced to permanent form and made a part of the record, which may be transmitted to the reviewing court." ***Glodowski v. State***, 196 Wis. 265, 272, 220 N.W. 227 (1928), *quoted in* ***Raflik***, 248 Wis. 2d 593, ¶28.

¶14 Here, as in ***Raflik***, the components of the warrant process can be reconstructed. First, regarding Stenulson's not reading a paper manifestation of the document, Stenulson had a blank form of the standard form "AFFIDAVIT IN SUPPORT OF OWI SEARCH WARRANT." Stenulson dictated to Thompson which boxes to check on that form. Thompson then e-mailed the form to the judge. The statute allows for a search warrant to be "based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication." WIS. STAT. § 968.12(3)(a); *see also* 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 4.3(c) (5th ed. 2012) ("The officer can electronically transmit a written but wireless warrant application and affidavit to the magistrate. The magistrate can then transmit the approved warrant back to the officer in the same fashion."). Stenulson testified that he had previously read the form document, he dictated to Thompson the specific content describing the facts that made up probable cause in Orozco-Angulo's case, and he swore to Judge Carter regarding the truth of the contents of the document and his testimony. Ultimately, Stenulson signed the document as the affiant three times: once on the affidavit, and in two different places on the return form. There was no error in Stenulson not viewing a completed paper representation of the warrant application.

¶15 Second, regarding Stenulson's not reading the document verbatim to the judge over the phone, when Stenulson called, the judge had the standard form search warrant for taking of a blood sample following an arrest and refusal to

submit to a blood draw. The judge read and electronically signed the warrant. Stenulson received and executed the warrant. Later that same morning, Stenulson returned the signed certification to the court, showing that the warrant had been executed and that the officer was in possession of the blood sample. The resulting record of the signed warrant, the signed return certification, and the signed affidavit preserves the policies of judicial integrity and the right to judicial review. ***Raflik***, 248 Wis. 2d 593, ¶21. There was no constitutional violation requiring suppression.[3]

Intentionally or Recklessly False Statements

¶16 In addition to his procedural arguments, Orozco-Angulo maintains that the statements in the application for the warrant were intentionally or recklessly false and that the circuit court should have held a ***Franks*** hearing to see if the untainted evidence established probable cause. To obtain a ***Franks*** hearing, the defendant must (1) make a substantial showing that the warrant application contains false statements that were made knowingly and intelligently or with reckless disregard for the truth and (2) show that the false information was necessary to the judge's finding of probable cause. ***Franks***, 438 U.S. at 155-56.

¶17 The affidavit indicated that Orozco-Angulo "was observed to drive/operate the vehicle by a citizen witness." Orozco-Angulo maintains this is false because the witness described the vehicle, not the driver. The identified citizen witness called in a reckless driving complaint and described the vehicle

[3] Because we have concluded that there was no constitutional violation requiring suppression, we do not address the State's argument regarding the good faith exception to the exclusionary rule. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address all issues when deciding case on other grounds).

that was driving recklessly. Garcia pursued Orozco-Angulo's vehicle because dispatch had described the vehicle as a TrailBlazer, not because Orozco-Angulo himself matched a description given by the citizen witness. When Garcia caught up with the vehicle and ultimately pulled it over, Orozco-Angulo was the driver. Checking the box on the form affidavit that says "was observed to drive/operate the vehicle by a citizen witness," is not even a discrepancy, much less a false statement that was made knowingly and intelligently or with reckless disregard for the truth. In fact, Orozco-Angulo was driving the identified vehicle, which he admitted. Orozco-Angulo also argues that Garcia indicated that he had located a matching vehicle, but he had not. According to Orozco-Angulo, the description from the witness was that the vehicle was "*like* a '07 Chevy TrailBlazer," and Orozco-Angulo's Chevy TrailBlazer was actually a 2006. Orozco-Angulo also claims the vehicle did not match because it did not have damage, which Orozco-Angulo claims it would have if it had bounced off the median. Orozco-Angulo maintains that "[t]hese misstatements went to the heart of whether or not law enforcement had probable cause or reasonable suspicion necessary to stop the vehicle, to gather further evidence, and whether probable cause existed to search Mr. Orozco-Angulo's blood for evidence of intoxication."

¶18 Orozco-Angulo goes too far. He does not purport to challenge the stop; he has conceded on appeal that he "cannot carry [his] burden of showing that the motion challenging the traffic stop was improperly denied." He is now challenging whether the warrant for the blood draw was properly obtained. At that point, when Stenulson was applying for the warrant, he had spoken with Orozco-Angulo and noticed an odor of intoxicants, bloodshot and glassy eyes, slurred speech, difficulty keeping his balance and poor performance on field sobriety tests. Orozco-Angulo had refused to submit to a PBT, had admitted that he was

the driver, and had refused to submit to a blood draw after arrest for OWI. Thus, Orozco-Angulo has not shown either that the warrant application contained false statements that were made knowingly and intelligently or with reckless disregard for the truth or that the false information was necessary to the judge's finding of probable cause. *See* ***id.*** Orozco-Angulo's ***Franks*** motion was properly denied.

CONCLUSION

¶19 Orozco-Angulo has not shown that his constitutional rights were violated by the procedure used to obtain the search warrant telephonically. Furthermore, Orozco-Angulo has not made a sufficient showing that the warrant application contained false statements that were made knowingly and intelligently or with reckless disregard for the truth. Therefore, we affirm.

By the Court.—Judgment affirmed.

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