COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2384-CR **Cir. Ct. No. 2006CF331**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH R. FRESON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Keith Freson appeals a judgment of conviction for possession with intent to deliver cocaine and the denial of his postconviction motion. The issues are whether Freson had standing to challenge the search of his father's residence and whether the affidavit in support of the warrant application

provided probable cause to support the search warrant. Assuming without deciding that Freson had standing to challenge the search, we conclude the affidavit provided a proper basis for a finding of probable cause. We therefore affirm.

¶2 Based upon a May 17, 2006, search of his father's home, Freson was charged with: (1) intent to deliver cocaine in an amount greater than fifteen but less than forty grams, as a second or subsequent offense; (2) maintaining a drug house, as a second or subsequent offense; and (3) possession of drug paraphernalia. The court denied Freson's suppression motion on the ground that Freson lacked standing to challenge the search of his father's house. Freson subsequently pled no contest to count one and the remaining counts were dismissed.[1] The court denied Freson's postconviction motion and this appeal follows.

¶3 When assessing a defendant's standing to challenge a search under the Fourth Amendment, the critical inquiry is "whether the person … has a legitimate expectation of privacy in the invaded place." ***State v. Trecroci***, 2001 WI App 126, ¶26, 246 Wis. 2d 261, 630 N.W.2d 555 (quoting ***Rakas v. Illinois***, 439 U.S. 128, 143 (1978)). The defendant bears the burden of establishing by a preponderance of the evidence that he manifested a subjective expectation of privacy and the expectation was objectively reasonable. ***State v. Rewolinski***, 159 Wis. 2d 1, 16, 464 N.W.2d 401 (1990). Our supreme court has developed relevant

[1] Another drug case was dismissed and read in. The circuit court also granted a motion to consider other violations as uncharged read in offenses. These included disorderly conduct, carrying a concealed weapon and possession of drug paraphernalia that occurred subsequent to the offenses in the present case.

non-exclusive factors to be considered in determining whether the defendant has a legitimate expectation of privacy. *See* ***State v. Whitrock***, 161 Wis. 2d 960, 974, 468 N.W.2d 696 (1991).

¶4 Here, we need not decide whether the circuit court correctly determined that Freson lacked standing to challenge the search. Assuming without deciding that Freson does have standing, we conclude the affidavit in support of the search warrant application provided a proper basis for a finding of probable cause.[2]

¶5 The existence of probable cause for a search warrant is determined by applying the totality of the circumstances test adopted in ***Illinois v. Gates***, 462 U.S. 213, 231 (1983). When reviewing the sufficiency of an affidavit supporting a warrant, we confine our review to the record made before the issuing judge. ***State v. DeSmidt***, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). The issuing judge should make a practical and common sense determination whether, given the circumstances stated in the supporting affidavit, there is a fair probability that

[2] Recognizing that "Mr. Freson was not present when the search warrant was actually executed," the circuit court stated that the second ***Whitrock*** factor "has to be applied somewhat differently here, and that is whether the items which were seized by the police were legitimately on the premises. *See* ***State v. Whitrock***, 161 Wis. 2d 960, 974, 468 N.W.2d 696 (1991) (giving the second factor as "whether he was legitimately (lawfully) on the premises"). Invoking ***State v. McCray***, 220 Wis. 2d 705, 583 N.W.2d 668 (Ct. App. 1998), the circuit court regarded the question as "whether the owner gave permission to store drugs" on the premises. However, we did not conclude in ***McCray*** that contraband on the premises transformed a person's expectation of privacy from reasonable to unreasonable. Rather, it was the absence of permission to remain on the premises that led us to conclude there was no reasonable expectation of privacy. ***Id.*** at 712-13. If the circuit court's reading of ***McCray*** were correct, there could be no expectation of privacy as long as a police search revealed contraband. Similarly, in ***State v. Trecroci***, 2001 WI App 126, ¶43, 246 Wis. 2d 261, 630 N.W.2d 555, we also stated, "Although these defendants used the attic for a commercial and criminal enterprise, the use was secretive and private." Accordingly, we conclude the circuit court was wrong to the extent that it used the contraband nature of the evidence discovered to conclude that Freson had no expectation of privacy.

contraband or evidence of a crime will be found in a particular place. ***State v. Marten***, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991). When challenging the finding of probable cause to issue the warrant, the defendant bears the burden of proof. ***State v. Edwards***, 98 Wis. 2d 367, 376, 297 N.W.2d 12 (1980). A decision to issue a warrant will be upheld unless the facts before the judge at the time the warrant was issued were clearly insufficient to support a finding of probable cause. ***State v. Sloan***, 2007 WI App 146, ¶8, 303 Wis. 2d 438, 736 N.W.2d 189.

¶6 In this case, the informant told investigators that he was at the residence of Michael Ball on the evening of May 15, 2006. Ball and his girlfriend left and returned about an hour later with shoeboxes and larger boxes of controlled substances. The informant helped Ball unload the boxes from his car and carry them into the kitchen of Ball's residence. The informant observed approximately six kilograms of cocaine, ten pounds of marijuana, and one-half ounce of another substance.

¶7 During the morning of May 16, 2006, Ball had the informant take two shoeboxes and place them in the trunk of Ball's car. Ball instructed the informant to put one of the boxes on the left side of the trunk. Ball told the informant the box contained "others," a term Ball used in reference to heroin. Ball and the informant then drove to a residence, whereupon Ball opened the trunk and took one of the shoeboxes into the lower portion of the residence, where the informant believed Freson resided. Ball then delivered the other shoebox to another residence where an individual known as "Los" resided, later determined to be Carlos Garcia.

¶8 The informant specifically advised the investigators he had known Freson for years, and that "Freson deals cocaine as well as cooks cocaine into crack cocaine." The informant stated he "[h]ad accompanied Ball on several occasions when Ball ha[d] delivered cocaine to Freson in the past." The informant also stated that he knew Freson "gets a kilo of cocaine a month …."

¶9 The informant also advised investigators he knew Ball for approximately four years, and helped Ball deliver controlled substances approximately twenty times. In the eight months since Ball had been out of prison, the informant helped Ball deliver approximately five times, and each of those deliveries were "kilos." The informant stated Ball picked up his controlled substances once every three weeks.

¶10 Although the affidavit does not set out specific instances of prior contact between the informant and the investigators, the informant provided specific and detailed information that police independently confirmed. The informant told investigators that Ball had an appointment with his probation officer on May 16, 2005, and that Ball dropped the informant off at the informant's house between 1:30 and 2:00 p.m., while en route to that appointment. An investigator contacted Ball's probation agent during the afternoon of May 16, who confirmed Ball had an appointment earlier that afternoon and that Ball had appeared for the appointment.

¶11 In addition, the informant stated "he believe[d] that Freson lives in the lower portion of the residence with his father and younger brother," thus indicating a degree of knowledge that the residence had two parts. Law enforcement officers reviewed Jefferson County Sheriff's Department records showing Freson living at 1126 South Tenth Street, Apt. ½, in Watertown. The

informant also provided other information about Ball and Carlos Garcia that law enforcement officers confirmed, including where they lived and the vehicles they drove. The verifiable detail of the information provided by the informant concerning Ball and Garcia was evidence of the reliability of the manner in which the informant obtained the information concerning Freson, and it enabled the law enforcement officers to conclude that he was relying on something more than casual rumor or accusation based on a person's general reputation. *See* ***State v. Boggess***, 115 Wis. 2d 443, 455, 340 N.W.2d 516 (1983).

¶12 We reject Freson's contention that the information was "the type of information" that "[a]nybody could get." To the contrary, information of this sort would almost certainly come from actual contact with persons unlikely to disclose it to someone known casually. Under the totality of the circumstances, we conclude the affidavit supporting the search warrant established probable cause.

By the Court.—Judgment and order affirmed.

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