COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP310-CR **Cir. Ct. No. 2006CF1114**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN ODELL BROOKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Shawn Odell Brooks appeals from a judgment of conviction entered against him for attempted first-degree sexual assault with a dangerous weapon, first-degree reckless homicide, and armed robbery with use of force. Brooks argues that the circuit court erred when it denied his motions to

suppress evidence because the search warrants used to obtain the evidence were based on stale and false information, and lacked sufficient particularity to constitute probable cause. We conclude that the search warrants were constitutionally valid, with one exception. We further conclude that to the extent the circuit court erred when it denied the motion to suppress as to one item, a knife, that error did not affect Brooks' substantial rights, and was harmless. Consequently, we affirm the judgment of conviction.

BACKGROUND

¶2 Pursuant to a plea agreement, Brooks pled guilty to the three charges in the stabbing death of Julienne McGuire. McGuire was killed on March 27, 2006. On April 24, 2006, the Wisconsin Crime Lab informed the Beloit Police Department that it had a "hit" on DNA that had been recovered from the victim's fingernails. The police found two addresses for Brooks in Beloit. The police prepared an affidavit for the search warrant that stated an intent to search for "certain things" that "were used in the commission of (or may constitute evidence of)" the crime of first-degree intentional homicide, "to wit: clothing, knife, jewelry, purse and contents, and any and all personal belongings of Julienne McGuire." The affidavit also stated:

> On April 24, 2006, Chief Sam Lathrop of the Beloit Police Department was contacted by Marie Varriale, Supervisor of the Wisconsin State Crime Laboratory DNA Section in Madison, Wisconsin, who advised that a DNA profile had been obtained from samples found underneath Julienne McGuire's fingernails. The DNA profile was a mix of DNA belonging to Julienne McGuire and another person. The DNA profile was run through the CODIS DNA database and a match was obtained on a sample belonging to Shawn Odell Brooks, DOB: 04/21/1971.

The warrants were signed by a judge, and the police searched the identified residences. The police found rings and other things that were later identified as belonging to the victim. In addition, one of the officers obtained a statement that incriminated Brooks from Startisha Trammell, who lived with Brooks at one of the residences.

¶3 In September 2006, Brooks moved to suppress the evidence obtained from the search on several grounds, two of which are relevant to this appeal. He alleged that the affidavits used to obtain the search warrant lacked probable cause, and contained a critical misrepresentation of fact because the affidavit said that Brooks' DNA had been found "underneath" the victim's fingernails. The circuit court held a hearing on the motion. The parties agreed that the Crime Lab had obtained fingernail clippings from the victim, and swabbed both sides of them to obtain the DNA, but no one could say that the DNA was found "underneath" the fingernails.

¶4 The court ruled that while the affidavits were not "textbook," there was "clearly [] enough to get a search warrant," and that the statements were sufficient. The court also ruled that the police had not intentionally misrepresented the facts by stating the DNA had been found "underneath" the fingernails because if the affidavit had stated that the DNA had been found any where on the victim, the court still would have issued the warrant.[1]

¶5 Brooks, with different counsel, brought a second motion to suppress the evidence obtained from the searches of his residences. This motion alleged the

[1] Brooks' DNA apparently was found on three separate places on the victim.

applications for the search warrants contained a material misrepresentation and a material omission, and if the misrepresentation was deleted and the omission included, the applications lacked probable cause to issue the warrants. The material misrepresentation was that the DNA was "underneath" the victim's fingernails, and the material omission was that the DNA hit was "unconfirmed." Brooks asked to have suppressed all of the items found in the residences, and "any and all statements or investigative leads discovered from Startisha F. Trammell and the results of all such statements or investigative lead, which includes any rings discovered at a pawn shop in South Beloit, Illinois."[2]

¶6 Another hearing was held. The evidence at this hearing again established that the State Lab did not say "underneath" the fingernails. It was also established that the DNA match for Brooks had not been confirmed.[3] The court again determined that it did not make "a wit of difference" whether the DNA evidence was underneath or on the fingernail, and that the only real question was whether there was DNA on any of the evidence. The court found that the police had not intentionally or recklessly disregarded the known truth, and again denied the motion.

¶7 Brooks then pled guilty to the three charges. The court sentenced him to a total of seventy-five years of initial confinement, and fifty years of extended supervision.

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[2] The motion stated that it sought to exclude, among other things, various items of clothing, several cell phones, "three ladies rings," and three kitchen knives. Neither party explains in their briefs what jewelry was recovered from a pawn shop.

[3] The court described the confirmation process: "there are two sets of [DNA] samples. They separate them. One set is sent for analysis. The other set is maintained at the crime lab. When there is a hit then they send the second set over for confirmation."

PROBABLE CAUSE FOR A SEARCH WARRANT

¶8 Brooks argues on appeal that the search warrants lacked probable cause because they were based on stale information, the items to be seized were not stated with sufficient particularity, and the affidavit in support of the warrant contained inaccurate information. Determining whether probable cause supports a search warrant involves making "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 (citing ***Illinois v. Gates***, 462 U.S. 213, 238 (1983)). Our review of an affidavit's sufficiency to support the issuance of a search warrant is limited. ***State v. Ehnert***, 160 Wis. 2d 464, 468, 466 N.W.2d 237 (Ct. App. 1991). "We pay great deference to the determination made by the issuing entity. In doubtful or marginal cases, the determination should be governed by the preference to be accorded to warrants." ***Id.*** at 468-69 (citation omitted). When determining whether probable cause exists, we examine the totality of the circumstances. ***Id.*** at 469. "The probable cause standard is a practical, nontechnical one invoking the practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." ***Id.***

A. TIMELINESS

¶9 When determining whether the evidence was stale, "'the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.'" ***Id.*** (quoting ***Sgro v. United States***, 287 U.S. 206, 210 (1932)). Timeliness, however, is not determined by counting the number of days or months between the occurrence of the facts relied on and the

issuing of the warrant. ***Id.*** "Instead, timeliness depends upon the nature of the underlying circumstances and concepts." ***Id.*** Factors such as the nature of the criminal activity and the nature of the things being sought "have a bearing on where the line between stale and fresh information should be drawn in a particular case." ***Id.*** at 470. Ultimately, the test is whether there is probable cause to believe that the objects sought are linked to the commission of a crime and whether those objects are likely to be found in the place identified in the warrant. ***Id.***

¶10 Brooks argues that because this was not a continuing or continuous crime, then the passage of time between the information relied on becomes more important. Citing to ***United States v. Charest***, 602 F.2d 1015, 1017 (1st Cir. 1979), he further argues that "[e]vidence of a violent homicide would not normally be discovered in another residence nearly one month after the homicide." We disagree.

¶11 Given that the person who killed McGuire was the only person at the scene of the crime besides McGuire, that person would have no reason to get rid of the evidence in his possession connecting him to the crime. As the State argues, the only evidence connecting Brooks to the crime was the DNA the police found on the victim. At the time the warrants were issued, Brooks had every reason to believe he had gotten away with the crime. Consequently, it was still reasonable to believe that Brooks would possess items taken from the murder scene nearly a month after the crime was committed. We conclude that the facts were not stale.

B. SUFFICIENT PARTICULARITY

¶12 Brooks argues that the affidavits and warrants lacked sufficient particularity and a connection to the items sought and the places to be searched. Specifically, Brooks argues that the police applied for warrants for two residences

without conducting a sufficient investigation to determine where Brooks actually lived, and that the affidavits did not identify whose clothing was sought, why the affiant believed the places to be searched would contain the victim's belongings, and did not sufficiently identify the knife being sought.

¶13 The Fourth Amendment requires that a search warrant state with particularity "the place to be searched, and the persons or things to be seized." ***Noll***, 116 Wis. 2d 443, 450, 343 N.W.2d 391 (1984). The purpose of this requirement is to prevent "the government from engaging in general exploratory rummaging through a person's papers and effects in search of anything that might prove to be incriminating." ***Id.*** It also prevents the issuance of warrants on less than probable cause, and prevents the seizure of objects when the warrant describes different objects. ***State v. Petrone***, 161 Wis. 2d 530, 540, 468 N.W.2d 676 (1991). The warrant must enable the police to reasonably ascertain and identify the things they are authorized to seize. ***Noll***, 116 Wis. 2d at 450-51. "The use of a generic term or general description is constitutionally acceptable only when a more specific description of the items to be seized is not available." ***Id.*** at 451. A warrant, however, need only be as specific as circumstances permit. ***United States v. Jones***, 54 F.3d 1285, 1291 (7th Cir. 1995).

¶14 First, we are not convinced that the police were constitutionally required to do more to find Brooks' residence. Brooks argues that all the officer did was peruse CCAP. The information on CCAP, however, was provided within one week of the time the search warrant was executed. We see nothing wrong with the police relying on this information.

¶15 We also conclude that the warrant in this case, although not artfully drafted, met the minimum constitutional requirements. Given that the police were

aware that rings, a purse, and a cell phone had been taken from the victim, and the only lead the police had was Brooks' DNA, the warrant was as specific as the circumstances permitted. The only possible exception was the knife. The warrant was not sufficiently particular as to the knife because it did not connect a knife to the homicide, or explain why a knife was being sought.

¶16 We conclude, however, that this lack of particularity as to the knife does not matter in this case. When a warrant is defective in one respect but valid in others, then the defective part may be severed or redacted. ***Noll***, 116 Wis. 2d at 452. The police apparently seized "kitchen knives" from one of Brooks' residences. The portion of the warrant that authorized the police to search for a knife can be severed or redacted from the warrant.

¶17 We also conclude that the circuit court's decision not to suppress the seized kitchen knives was harmless error. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 368, 588 N.W.2d 606 (1999). "When a circuit court has improperly admitted evidence, [WIS. STAT.] § 805.018 prohibits the court from reversing unless an examination of the entire proceeding reveals that the admission of the evidence has 'affected the substantial rights' of the party seeking the reversal." ***Id.*** (citation omitted).

¶18 After the motions to suppress were denied, Brooks entered a plea. We cannot conclude that had the court granted the motion as to the knives, Brooks would not have entered his plea. First, there is nothing in the record that suggests that the seized knives were in any way connected to the crime. More importantly, however, the circuit court properly refused to suppress the evidence of the victim's rings and the statements from Brooks' friend, Trammell. Consequently, this extremely inculpatory evidence would properly have been admitted at trial. We

see no basis for believing that Brooks would not have entered his plea, or would not have been convicted, had only the knives been excluded. *See* ***id.*** at 371. Therefore, we conclude that the decision to admit the evidence of the knives was harmless error.

C. INACCURATE INFORMATION

¶19 Brooks argues that the warrant lacked probable cause because the affidavit in support of the warrant contained inaccurate information about the DNA because it inaccurately stated that DNA was found "underneath" the victim's fingernails, and did not say that the DNA hit was "unconfirmed." Brooks argues that the officer who made the affidavit was aware of the misinformation and made the statement with reckless disregard for the truth, and that the search warrant must, therefore, be voided under ***Franks v. Delaware***, 438 U.S. 154 (1978).

¶20 We are not convinced that either statement was made with reckless disregard for the truth. The fact is undisputed that Brooks' DNA was found on the victim's fingernails, as well as other places on her. It does not matter where on her fingernails the DNA was found; what matters is that it was found on the victim's body. Nor does it matter that the affidavit did not say that the DNA hit was "unconfirmed." There was a match between Brooks' DNA and the DNA found on the victim. That was sufficient to establish probable cause.

CONCLUSION

¶21 In sum, we conclude that there was probable cause to support the warrants issued to search Brooks' residences. To the extent the court should have granted the motion to exclude the kitchen knives because the warrant was not

sufficiently particular as to them, that part of the warrant is redacted. We also conclude that any error the circuit court committed by admitting the knives, was harmless. We, therefore, affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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