COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0618-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CALVIN PLUIM,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. Calvin Pluim appeals from judgments convicting him of possession of and delivery of marijuana and keeping a house for its manufacture contrary to WIS. STAT. §§ 961.41(1)(h)3, (1m)(h) and 961.42(1)

(1997-98).[1] He contends that his five-year prison sentence was a misuse of the court's sentencing discretion.[2] He also appeals from the court's order denying his motion to quash the search warrant executed upon his home and to suppress the evidence obtained during that search. In the affidavit requesting the issuance of the search warrant, the affiant included misleading information and omitted material facts, Pluim argues, that would have weakened the informant's reliability. Reviewing the search warrant with these allegations in mind, he contends it fails to establish probable cause. We disagree and affirm.

¶2 While conducting surveillance during a controlled drug buy, Officer Randy Woldt of the Lake Winnebago Metropolitan Drug Enforcement Unit (LWDEU) observed Michael Datta speak with another person in Datta's backyard, walk over to a lumber pile, pick up two boxes and place the boxes in the trunk of a car. Datta drove off in the car and was followed by the police. After losing sight of Datta's vehicle, Woldt located it in a restaurant parking lot and called a canine unit to the scene. Datta was arrested after six pounds of marijuana were found in the boxes in the car's trunk.

¶3 After his arrest, Datta was interviewed by Officer Joseph Framke, also of the LWDEU. During this interview, Datta confessed that he received the six pounds of marijuana from a Jamaican drug dealer in Chicago. He claimed that

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[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Pluim was sentenced to a five-year prison term for the delivery of marijuana conviction. *See* WIS. STAT. § 961.41(1)(h)3. For the remaining convictions, sentencing was withheld and probation was ordered. He received two years of probation consecutive to his prison term for the marijuana possession conviction, *see* § 961.41(1m)(h), and an additional concurrent year of probation for the keeper of a drug house conviction, *see* WIS. STAT. § 961.42(1).

he had had a ten-year business relationship with the Chicago dealer and had gotten the marijuana in exchange for cocaine.

¶4 Datta had previously been convicted of drug offenses. He was aware that he faced a lengthy prison sentence if convicted again for the current drug offense. The day after his arrest, Datta entered into a plea agreement with the prosecutors. He agreed to provide information about Pluim in exchange for a sentence under which he would not be incarcerated.

¶5 During a second interview with Framke, the prosecutor and Datta's attorney present, Datta informed them that he had received the marijuana from Pluim. He claimed he had been trafficking drugs with Pluim for nine months and that his most recent drug pickup from Pluim had occurred just the day before. He stated that a few nights ago he was in Pluim's barn and saw ten upright freezers full of marijuana. He reported that Pluim planted marijuana in the fields on his property.

¶6 Framke prepared an affidavit requesting a search warrant for Pluim's property. He relayed the information Datta gave him in the affidavit. The search warrant was issued and the officers retrieved approximately 900 pounds of marijuana from Pluim's house and barn. Pluim was arrested.

¶7 After his arrest, Pluim moved the court to quash the search warrant and suppress the evidence seized during the search. Pluim argued that the search warrant lacked probable cause because "the State recklessly or intentionally omitted from the affidavit in support of that search warrant certain facts that, had they been included," the search warrant would not have been issued. The court denied the motion. Pluim subsequently pled no contest to the charges against him and was sentenced. Pluim appeals.

Validity of the Search Warrant

¶8 On appeal, Pluim reasserts his arguments that Framke's affidavit requesting the search warrant made material misrepresentations and omissions, and, when setting aside the false material and including the pertinent omissions, the affidavit lacked the necessary probable cause. The controversy over the veracity of the supporting affidavit concerns the way Datta's interview statements, personal information and criminal history were conveyed to the magistrate.

¶9 A defendant may contest the finding of probable cause to issue a search warrant in a hearing if he or she "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978) (quoted in ***State v. Marshall***, 92 Wis. 2d 101, 112, 284 N.W.2d 592 (1979)). The search warrant will be voided and the seized evidence suppressed if the defendant establishes by a preponderance of the evidence that: (1) a factual statement made in an affidavit supporting a warrant is false; (2) the affiant committed perjury or recklessly disregarded material information; and (3) after setting aside the affiant's false material, the remaining content of the affidavit fails to establish probable cause. *See* ***id***. at 156.

¶10 Our review of the magistrate's probable cause determination is not de novo, even though it presents a question of law; rather, we give "great deference" to the magistrate's decision. *See* ***Illinois v. Gates***, 462 U.S. 213, 236 (1983); ***State v. DeSmidt***, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be

accorded to warrants." ***United States v. Ventresca***, 380 U.S. 102, 109 (1965). "The deferential standard of review is 'appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.'" ***State v. Kerr***, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) (citations omitted).

¶11 Pluim contests the adequacy of the search warrant because of omissions and misrepresentations made by affiant Framke.[3] He insists that the

[3] Framke's affidavit requesting a warrant to search Pluim's property reads in relevant part:

> Your affiant is informed from the records of the Lake Winnebago Area Metropolitan Enforcement Group-Drug Unit (LWAM) kept in the regular course of business which your affiant believes to be truthful and reliable and have proven so on numerous occasions in the past that on December 12, 1997, your affiant had occasion to interview Michael L. Datta … regarding illegal drug trafficking activities occurring in Winnebago and Fond du Lac Counties. Specifically, Michael L. Datta reported that for the past year, he has been an acquaintance of Calvin L. Pluim …. Michael L. Datta further reported that he has personally been involved in illegal drug trafficking with Calvin L. Pluim for approximately the last 9 months. During that time, Michael L. Datta has been running and distributing marijuana for Calvin L. Pluim. Michael L. Datta reported that his most recent delivery of marijuana from Calvin L. Pluim took place on December 11, 1997, in the City of Oshkosh. Michael L. Datta attempted to deliver six pounds of marijuana for $13,000 to an Oshkosh resident. Your affiant reports that Michael L. Datta's information concerning the December 11, 1997, drug activity was confirmed by the visual observation of several LWAM officers, including your affiant.
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> Michael L. Datta further reported that three nights ago, approximately December 8 or 9, 1997, he was personally at the Calvin L. Pluim residence …. At that time, Michael L. Datta personally observed at least 10 upright freezers on the second level of the barn located on the Calvin L. Pluim property full of marijuana. Michael L. Datta estimated that the freezers contained approximately 300 to 400 pounds of marijuana with other miscellaneous drums containing marijuana clippings. Michael L. Datta further reported that there are numerous marijuana plant stalks still in the surrounding fields which were previously planted and harvested by Calvin L. Pluim. Michael L. Datta reported that many of the stalks are located in an area directly behind a corn crib on the Calvin Pluim property.

magistrate would not have found the informant to be credible if Framke had informed him that Datta initially lied about the source of the marijuana, received substantial charging and sentencing concessions from the State for his information, and had a criminal record. The State concedes that this information was excluded from the affidavit but argues that it was not required to be divulged. Additionally, Pluim argues that Framke made factual misrepresentations in the supporting affidavit. Specifically, he contends that the following assertions in the affidavit are false: (1) Framke states that he personally observed the drug activity, and (2) he claims that he gained knowledge of the drug activity by reviewing LWDEU records. The State disagrees.

¶12 Under ***Franks***, the warrant will not be voided unless the statements at issue were made intentionally or with reckless disregard for the truth. *See* ***Franks***, 438 U.S. at 155-56. The ***Franks*** principle applies to material omissions as well as deliberately false statements. *See* ***State v. Mann***, 123 Wis. 2d 375, 385, 367 N.W. 2d 209 (1985). The purpose of this principle is simple.

> [A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant … was credible or his information reliable." Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his [or her] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment.

Franks, 438 U.S. at 165 (citations omitted).

¶13 Upon reviewing the affidavit and the ***Franks*** hearing record, we conclude that Framke knew of but omitted numerous facts from the affidavit that were important to the magistrate's determination of the informant's reliability and credibility.[4] "For an omitted fact to be the equivalent of 'a deliberate falsehood or a reckless disregard for the truth,' it must be an undisputed fact that is critical to an impartial judge's fair determination of probable cause." ***Mann***, 123 Wis. 2d at 388 (citations omitted). Although we agree with the State that an affiant is only required to detail some of his or her reasons for believing an informant to be credible, Framke's omissions were material facts to the credibility determination and, taken together, amount to a reckless disregard for the truth.[5]

¶14 Because we determine that Framke recklessly disregarded the truth, our next step is to determine whether, if the omitted material had been provided, the affidavit would still have shown probable cause to believe that evidence of criminal activity would be found with the search warrant. However, we first will answer Pluim's allegations that Framke also made factual misrepresentations in the affidavit.

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[4] Specifically, we determine that these facts were material to the magistrate's credibility determination: (1) Datta initially lied about the source of the marijuana, (2) Datta received substantial charging and sentencing concessions from the State for his information, and (3) Datta had a criminal record.

[5] The affiant's conduct in this case does not pass muster. By neglecting to include the three material facts about the informant, the affiant imperiled the case. One could argue that the affiant was attempting to hide the information from the magistrate because it would weaken the informant's credibility. To avoid this kind of claim, the affiant should have included such material facts within his knowledge in the warrant request. We are cognizant that often there is a rush to request a warrant before evidence can be destroyed or removed and such requests are made with little time to spare. However, if an affiant omits material information in the warrant request, he or she may jeopardize the validity of the warrant, laying ruin to the investigators' time and any subsequent successful prosecution.

¶15 We determine that the statements Pluim argues are factual misrepresentations were not falsehoods but were unclear and unartfully worded statements. For instance, Pluim takes issue with Framke's claims that he visually observed the drug activity and consulted LWDEU records for information. The State responds that Framke did visually observe the drug activity—he inspected and weighed the marijuana found in the trunk of Datta's car. The State also suggests that while Datta was under surveillance, Framke searched for Datta's criminal record using LWDEU records. We acknowledge that the facts presented by the State could conceivably be the basis for Framke's assertions. However, this situation demonstrates the necessity for affiants to be precise in their language, use wording that is capable of only one meaning and avoid organizing statements in a manner that could lead to more than one inference.

¶16 We will now examine whether probable cause exists for the issuance of the search warrant with the omitted information included in the affidavit. *See* ***Franks***, 438 U.S. at 171-72 (affidavit should be redrafted to include the omitted information and then examined regarding whether its content supports a finding of probable cause). When probable cause for the issuance of a search warrant is challenged on appeal, our focus is not on the circuit court's decision to grant or deny a suppression motion but on the issuing magistrate's determination that the application for the warrant was sufficient to conclude there was probable cause to believe that evidence of a crime would be found. *See* ***State v. Ward***, 222 Wis. 2d 311, 318, 588 N.W.2d 645 (Ct. App. 1998), *review granted*, 225 Wis. 2d 487, 594 N.W.2d 382 (Wis. Apr. 6, 1999) (No. 97-2008-CR).

¶17 When issuing a search warrant, the magistrate makes a commonsense determination regarding if there is a fair probability that criminal evidence will be found at the place indicated. *See* ***State v. Lopez***, 207 Wis. 2d

413, 425, 559 N.W.2d 264 (Ct. App. 1996). The court may consider all of the information conveyed in the affidavit, including the veracity and basis of knowledge of the informant supplying hearsay information. *See* ***id.*** The affiant is not required to be elaborately specific and is entitled to find support in the usual inferences that reasonable people draw from facts. *See* ***State v. Marten***, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991).

¶18 Pluim asserts that the redrafted affidavit does not support a finding of probable cause. He argues that the informant was not credible and that the police did not take steps to verify the reliability of the informant by corroborating his claims before seeking the warrant.

¶19 We begin our examination by first considering the "veracity" and "basis of knowledge" of the hearsay informant. Datta's basis of knowledge for his allegations was strong. He had made firsthand observations of Pluim's drug operation. He described the drug operation in great detail, basing his observations on a very recent visit to Pluim's property. He identified where the marijuana was planted and then stored in the barn. These direct observations create a sufficient basis of knowledge to be deemed credible.

¶20 In addition, Pluim contends that Datta's veracity was questionable. He asserts that the magistrate would not have found Datta credible if the magistrate had known that he initially lied about his drug source, had a criminal record and was giving the information in exchange for prosecutorial concessions. He urges that his situation is similar to that in ***United States v. Hall***, 113 F.3d 157 (9th Cir. 1997). The State counters that Datta's admissions are credible because they were made against his penal interest.

¶21 In ***Hall***, a search warrant was voided because the affiant excluded from the affidavit the informant's criminal history—in particular, the informant's criminal conviction for making a false report to the police. *See* ***id.*** at 158. Because the police had no evidence besides the informant's testimony, the court voided the search warrant for lacking probable cause. *See* ***id.*** at 160. In determining that the informant was not credible, the court stated:

> The government argues that because [the informant] incriminated himself by saying "Ron" was his supplier, his information gained credibility. It gained some credibility, but not enough to supply probable cause. In ***United States v. Harris***, 403 U.S. 573 … (1971), the Supreme Court stated that "[a]dmissions of crime, like admissions against propriety interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search." ***Id***. at 583 …. In this case, however, the police had already caught [the informant] red-handed, so his admission of what he knew the police already knew did not make what he said more credible. His claim that "Ron" was his supplier was more in the nature of trying to buy his way out of trouble by giving the police someone "up the chain," than a self-inculpatory statement which also implicated "Ron."

Hall, 113 F.3d at 159.

¶22 Like the ***Hall*** court, we determine that even though Datta's admissions were against his penal interest, this alone does not establish his veracity. Datta was, in fact, "trying to buy his way out of trouble by giving the police someone 'up the chain.'" ***Id.*** However, the affidavit does contain additional evidence that the affiant claimed the police had visually observed and corroborated. Should Datta's admissions about the drug activity be proven accurate through police corroboration, we may conclude that he was telling the truth in all his admissions. "When an informant is shown to be right about some things he or she has alleged, it is probable that the informant is also right about the

others." ***Lopez***, 207 Wis. 2d at 426. Therefore, it is now appropriate to address Pluim's claim that the police did not take steps to corroborate Datta's revelations.

¶23 Pluim argues that the warrant should be voided because of "the complete absence of corroboration" of Datta's information. We disagree. The police had Datta under surveillance and directly observed his drug activity. The police witnessed him putting the boxes of marijuana in his car. He was intercepted en route to delivering the drugs. Later, Datta admitted to planning to sell the marijuana to an Oshkosh resident for $13,000. Because Datta was arrested after being set up by the police in a controlled drug buy, the police could directly verify that Datta was telling the truth about the details of the drug purchase. Datta's truthful admission about the drug purchase could reasonably lead one to conclude that he was being truthful about the marijuana source as well. That being the case, we find Datta to be credible.

¶24 Furthermore, the present case is stronger than the one presented in ***Hall***. In ***Hall***, the affiant relied exclusively on the informant's tip when preparing the affidavit. Here, the affiant relied not only on Datta's admissions but also on the independent police work that corroborated them. Therefore, according great deference to the warrant-issuing magistrate, we conclude that the affidavit supporting the search warrant shows a fair probability that criminal evidence would be found and supports probable cause.

Sentencing

¶25 Pluim states that the trial court misused its discretion when sentencing him because he was entitled to more leniency since he was a first offender and was less culpable than others involved in the drug operation.

¶26 When reviewing whether a sentence was proper, we strongly presume that the sentencing court acted reasonably. *See* ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). We will uphold the sentence unless the defendant shows that it was based on some unreasonable or unjustifiable factor. *See* ***id.*** The relevant factors for the court to consider when imposing a sentence are the gravity of the offense, the character of the offender and the need for the protection of the public. *See* ***id.*** at 43-44.

¶27 Although Pluim argues that his five-year prison sentence is too harsh, we hold that it is not "excessive and unusual and so disproportionate to the offense committed as to shock public sentiment." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Pluim asserts that he is less culpable than Datta and should have received a lesser sentence than Datta. However, the mere fact that the two sentences are different is not enough to support a conclusion that Pluim's is excessively harsh. Pluim was the drug source and was not conducting a fly-by-night operation. He had a well-organized and planned operation for producing illegal drugs to distribute to his community. In addition, Pluim's situation was different from Datta's because Datta had negotiated a plea agreement with prosecutors in exchange for his cooperation with them.

¶28 Pluim also contends that he should have received more leniency because he was a first-time offender. To the contrary, the sentencing court found the gravity of his offense significant:

> He says it's not necessary to protect the public, he's just a first offender…. We can't close our eyes to what you did to the planned operation that you engaged in for this period of time to produce this 900 pounds of marijuana which was going to be made available to the public, to the public's children …. Unfortunately it was not just a big sidestep, it was a huge leap into the criminal background of individuals that you placed yourself and became fully cooperative in that with the hope that you would be financially rewarded for this criminal activity. And there hangs the tale.

¶29 Because Pluim fails to present an unreasonable or unjustifiable factor relied upon by the court in fashioning his sentence, we conclude that the court properly exercised its discretion.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.