COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP565-CR **Cir. Ct. No. 2003CF1067**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT G. HAGERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed*.

Before Snyder, P.J., Brown, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Scott G. Hagerman appeals from a judgment of conviction for possession of marijuana with intent to deliver and from an order denying his postconviction motion to supplement the record with respect to

suppression issues. He argues that the anticipatory search warrant used to seize a delivered package of marijuana from his residence was not supported by probable cause and was invalid because it did not explicitly state that execution of the warrant was conditioned on the delivery of the package. We conclude that under ***State v. Meyer***, 216 Wis. 2d 729, 744-45, 576 N.W.2d 260 (1998), the warrant was not required to include conditional language and that because probable cause existed for issuance of the anticipatory warrant, the marijuana was properly seized from Hagerman's residence. We affirm the judgment and order.

¶2 A package addressed to Hagerman and found to contain nine bricks of marijuana was intercepted by a FedEx security specialist. Detective Jason Ganiere, an agent with the United States Drug Enforcement Administration Task Force (DEA), was contacted and he picked up the package at a local FedEx facility on October 8, 2003. The next day Ganiere applied for a warrant to search Hagerman's residence. The warrant affidavit stated, "On 10-9-2003 an undercover agent delivered the aforementioned Fed Ex package to the residence of 4803 21st Avenue, Kenosha, WI [Hagerman's residence], and the package was accepted and taken into the aforementioned residence." The warrant was issued at 12:56 p.m. on October 9, 2003. An undercover agent delivered the package to Hagerman's residence at approximately 2:30 p.m. that day. The search took place about five minutes later.

¶3 After his arrest, Hagerman moved to suppress evidence of the seized marijuana on the ground that the warrant was invalid because it was based on false information and did not explicitly or implicitly condition execution on the actual

delivery of the package.[1] The trial court denied the motion to suppress. It found that even ignoring the false information in the warrant affidavit, probable cause for issuance of the warrant existed.

¶4 Under ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978), inaccurate information either intentionally or recklessly included in a search warrant affidavit must be excised. The State argues that Hagerman failed to prove that the false statement that the package had been delivered and accepted was made intentionally or with reckless disregard of the truth. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 99, 499 N.W.2d 662 (1993) ("Under ***Franks***, suppression is not required unless the statements at issue were made intentionally or with reckless disregard for the truth."). The trial court did not make a specific finding on whether the false information was intentionally or recklessly included in the affidavit. The State did not argue before the trial court that there was no reason to excise the false information. The State waived the argument and we do not address it. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

¶5 We assume, as the trial court did, that the false information should be excised from the search warrant affidavit. A search warrant may issue when,

[1] Hagerman suggested that DEA agents tried to cover up the false statement by handwriting "anticipatory" on the documents and returning the next day to Hagerman's residence stating they had left the wrong warrant and exchanging it for the warrant with the word "anticipatory" on it. Hagerman's proof went so far as to include the court commissioner's confirmation that he did not recall the word "anticipatory" on the warrant he signed. Although Hagerman's postconviction motion requested additional evidentiary development on when the word "anticipatory" was added to the affidavit and warrant and the trial court denied his request, he does not pursue any aspect of the issue on appeal. We agree with the trial court's assessment that the addition of the word "anticipatory" and when it was added make no difference to the issues on appeal.

considering the totality of the circumstances set forth in support of the warrant, probable cause exists to believe that objects linked to the commission of a crime are likely to be found in the named location. ***State v. Herrmann***, 2000 WI App 38, ¶22, 233 Wis. 2d 135, 608 N.W.2d 406. Where, as here, some portion of the affidavit in support of the warrant is excised, this court independently determines whether the remaining portions of the affidavit are sufficient to support a finding of probable cause. *See* ***id.***, ¶21.

¶6 An anticipatory search warrant may be issued concerning contraband in transit. ***Meyer***, 216 Wis. 2d at 743. Although the probable cause doctrine does not require that the contraband to be seized is presently located at the premises to be searched, there must be probable cause to believe that a crime is being committed and that evidence of it can likely be found at the named location at the time of the search. ***Id.*** Thus, probable cause for an anticipatory search warrant exists if the affidavit demonstrates that the contraband is on a "sure course" to the premises to be searched. ***Id.*** (quoting ***United States v. Leidner***, 99 F.3d 1423, 1427 (7th Cir. 1996)). "We recognize that 'government-controlled deliveries may be more likely to reach their destination than those deliveries expected within the normal course of a drug organization's operations.'" ***Meyer***, 216 Wis. 2d at 743 (quoting ***Leidner***, 99 F.3d at 1429).

¶7 Ganiere's affidavit established that the package containing marijuana was on a "sure course" of delivery to Hagerman's residence. The affidavit indicated that the package was originally addressed to Hagerman and that it was repackaged for delivery to the original address. The address was confirmed as belonging to Hagerman. Ganiere took possession of the package. The only reasonable inference from the police taking possession of the package is that a controlled delivery was intended. There was nothing to interrupt delivery of the

package from that point on. There was a sufficient showing to establish probable cause to believe that the marijuana was on a sure course for delivery to Hagerman's residence and would be there at the time the warrant was executed.

¶8 Hagerman also argues that the warrant was invalid because neither the affidavit nor the warrant explicitly or implicitly conditioned execution of the warrant on actual delivery of the package. The issue is controlled by ***Meyer***, 216 Wis. 2d at 734, where the Wisconsin Supreme Court held that a warrant "is not unconstitutional merely because it lacks explicit conditional language stating that the warrant may not be executed until delivery of the contraband is made to the premises to be searched." In ***Meyer*** the court recognized that although some federal courts have a preference for including conditional language, the constitution requires only that an anticipatory search warrant be supported by probable cause. ***Id.*** at 745.

¶9 Hagerman contends that the ***Meyer*** decision is ambiguous as to whether the delivery requirement must be, at a minimum, logically implicit when explicit conditioning language is absent. He suggests that in adopting the Seventh Circuit rationale in ***Leidner***, 99 F.3d at 1425-27, the ***Meyer*** court failed to state the ***Leidner*** rule in its entirety. *See* ***State v. Ruiz***, 213 Wis. 2d 200, 206-07, 570 N.W.2d 556 (Ct. App. 1997) (indicating agreement with the ***Leidner*** conclusion that a warrant need not explicitly state that it is valid only after delivery has occurred when such a requirement is logically implicit). The ***Meyer*** decision is not ambiguous in stating that the only constitutional requirement for an anticipatory search warrant is that it be supported by probable cause and nothing

more. We are bound by the decisions of our supreme court.[2] ***State v. Donner***, 192 Wis. 2d 305, 316, 531 N.W.2d 369 (Ct. App. 1995). The warrant here was supported by probable cause and nothing more was required to validate the search of Hagerman's residence.

By the Court.—Judgment and order affirmed.

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

[2] As supplemental authority, Hagerman points out that the United States Supreme Court has granted a petition for certiorari in ***United States v. Grubbs***, 377 F.3d 1072 (9th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3650, 74 U.S.L.W. 3169, 74 U.S.L.W. 3199 (U.S. Sept. 27, 2005) (No. 04-1414), to address: "Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched." (http://www.supremecourtus.gov/docket/04-1414.htm) It is not clear whether the case will necessitate determining whether there is a constitutional underpinning to the federal court's policy preference for requiring conditional language in the warrant. In any event, our supreme court has held it is not constitutionally required.