COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1238-CR **Cir. Ct. No. 00 CF 379**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEON J. LACE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Leon J. Lace appeals from the judgment of conviction for possession of marijuana with intent to deliver, as a party to a crime, following a jury trial. He argues that the trial court erred in denying his suppression motion because: (1) there was not probable cause for his warrantless arrest; and (2) the application for a warrant to search his residence, following his

arrest, "was defective because it was based upon statements that were either intentionally or recklessly false." We affirm.

I. BACKGROUND[1]

¶2 On January 20, 2000, United States Postal Inspector Daniel Kakonis was notified by a San Diego postal inspector that members of a Jamaican gang "known [to be] mailers of marijuana packages across the country" had recently sent two express mail packages, suspected of containing marijuana, from California to Milwaukee—one to 7135 West Silver Spring Drive, and the other to 2829 North 49th Street. Kakonis intercepted the packages in Milwaukee on January 21, and a police dog detected drugs in them, leading to the application for a warrant to search the packages. Both packages were opened and found to contain marijuana.

¶3 The packages were resealed, and their controlled deliveries were arranged, with Kakonis posing as a letter carrier while surveillance units were in place throughout the delivery areas. When Kakonis attempted to deliver the package addressed to "Alice Rhodes" at 2829 North 49th Street, the female who answered the door refused delivery, saying that nobody by that name lived there. As he was leaving the area, Kakonis, responding to a page from the express mail office, learned that someone had just called there to inquire about the package he had tried to deliver. Since the caller had left a phone number, Kakonis called it and arranged to return to the address in about fifteen minutes to deliver the

[1] Last year, this court affirmed the conviction of a co-defendant, Lace's brother, Everton Taylor. *See* ***State v. Taylor***, No. 00-3514-CR, unpublished slip op. (WI App Oct. 23, 2001). Although Lace, in the instant appeal, asks that we "reconsider" certain aspects of our reasoning in ***Taylor***, he does not take issue with our statements of the factual background and the law, many of which are repeated in this opinion.

package, again with surveillance units in place. The same female again answered the door and refused delivery of the package.

¶4 Meanwhile, a green Mitsubishi Diamante pulled into the alley behind the target address. (Surveillance team members had seen a green Mitsubishi Diamante at 7135 West Silver Spring Drive a short time earlier.) A black female, later identified as Tamitha King, exited the vehicle, which then left the scene. King walked around to the front of the building, claimed that she was "Alicia" Rhodes, and said that the package was supposed to have gone to 2831, rather than 2829, North 49th Street. Although King was unable to produce any documentation confirming her identity, she was allowed by Kakonis to accept delivery of the package, signing and printing the name, "Alicia Rhodes." King walked back to the alley, put the package in the trunk of a Buick Regal at the end of the alley, removed the package from the trunk, and then returned the package to the trunk. Surveillance team members saw the Mitsubishi reappear at the scene, and they observed nonverbal communication between King and the Mitsubishi's occupants, Lace and his brother, Everton Taylor.

¶5 Surveillance team members followed the Buick as it was driven away with King as a passenger and, upon their direction, a marked police cruiser stopped it and the police arrested King. King told them that the package belonged to "E.T." Other officers had information that "E.T." either owned or was in the Mitsubishi. As surveillance team members followed the Mitsubishi, a marked police squad car, with its emergency lights and siren activated, attempted to pull it over; the Mitsubishi, however, did not stop until about two blocks later, when its path was obstructed by a police van. Shortly after Lace, the driver, and Taylor, the passenger, exited the Mitsubishi, police arrested them.

¶6 Subsequently, a Milwaukee County assistant district attorney, together with City of Milwaukee Police Detective Jeff Micklitz, applied for a search warrant of the Lace/Taylor residence.[2] A circuit court judge issued the search warrant, resulting in the ultimate seizure of numerous items from the residence that were introduced in evidence at Lace and Taylor's joint trial.

¶7 Lace was charged with possession of marijuana with intent to deliver, party to a crime. He filed suppression motions challenging, among other things, his arrest, as well as the search of the residence, which, he alleged, "was illegal by reason that the search warrant issued was based on false, inappropriate or wrongfully obtained information and was not sufficient to establish probable cause for a search warrant." After hearing testimony and argument, the trial court found that both the arrest and the search warrant were lawful. Accordingly, the court denied Lace's motions. Following the jury's return of a guilty verdict, the court imposed a bifurcated sentence of fifteen years—an initial ten-year term of prison confinement and five years of extended supervision.

II. DISCUSSION

A. The Arrest

¶8 Lace argues that the police did not have probable cause to arrest him without a warrant. He is wrong. As our supreme court has explained:

> Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to such

[2] In his testimony in support of the search warrant application, Detective Micklitz explained that Taylor had told him that the residence for which the police were seeking the search warrant was the "primary residence" for both Taylor and Lace.

> probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.

State v. Paszek, 50 Wis. 2d 619, 624-25, 184 N.W.2d 836 (1971) (citations omitted). We will not "disturb the circuit court's finding of historical or evidentiary fact unless it is against the great weight and clear preponderance of the evidence," ***State v. Mitchell***, 167 Wis. 2d 672, 682, 482 N.W.2d 364 (1992), and we determine *de novo* whether the facts satisfy the constitutional standards regarding probable cause to arrest, ***id.*** at 684.

¶9 Prior to concluding that probable cause supported Lace's warrantless arrest, the circuit court made these factual findings: (1) a police dog detected drugs in two packages that were sent from known marijuana dealers to Milwaukee; (2) a search of those packages confirmed the presence of marijuana; (3) a resident at 2829 North 49th Street refused to accept delivery of the package sent to that address; (4) a female who had been dropped off by a green Mitsubishi accepted delivery of the package at 2829 North 49th Street, after coming around the side of the building and identifying herself as the intended recipient; (5) surveillance personnel had seen a green Mitsubishi at 7135 West Silver Spring Drive, the intended destination of the second package, a short time earlier; (6) police then saw a green Mitsubishi move slowly past the female who had accepted the package, and they observed nonverbal communication between the female and the occupants of the vehicle; (7) the license plate number of the Mitsubishi matched that of the Mitsubishi seen earlier at the Silver Spring address; (8) the female who had accepted delivery of the package told police that the package was for "E.T.";

(9) Lace, the driver of the Mitsubishi, did not "com[e] to a stop like most people come to when they hear sirens and they see the lights of a squad car behind them"; and (10) the initials of one of the occupants of the Mitsubishi were "E.T."

¶10 We conclude that the trial court's findings of fact are not "against the great weight and clear preponderance of the evidence," *see* ***Mitchell***, 167 Wis. 2d at 682, and, unquestionably, that these facts "would lead a reasonable police officer to believe" that Lace probably was a party to the crime of possession of marijuana with intent to deliver, *see* ***Paszek***, 50 Wis. 2d at 624. Thus, these facts satisfy the constitutional standards regarding probable cause to arrest. *See* ***Mitchell***, 167 Wis. 2d at 684. Accordingly, we uphold Lace's warrantless arrest.

B. The Search Warrant

¶11 Challenging the veracity of several statements that Detective Micklitz made in support of the application for the search warrant for his residence, Lace argues that, in light of ***Franks v. Delaware***, 438 U.S. 154 (1978), the trial court should have suppressed the evidence seized from the residence. Specifically, he contends:

> After taking testimony from Detective Micklitz, the court agreed that several mistakes had been made in the testimony given to Judge Wagner [in support of the application for the search warrant]. First, Taylor had been misidentified as the person King had seen using a computer at his residence on 3429 N. 51st Blvd. to track packages coming to Milwaukee. King had also allegedly overheard Taylor discussing marijuana shipments a few days before her arrest.
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> Second, Detective Micklitz told Judge Wagner that he had connected Taylor's residence to additional packages of marijuana going to that residence. In fact, no packages were ever sent to 3429 N. 51st Blvd.
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> Third, Detective Micklitz told Judge Wagner that King, who had accepted delivery of a package at 2829 N. 49th St., told Detective Mathy that she had accepted

> numerous packages for Taylor at 7135 W. Silver Spring Dr. Micklitz corrected this statement during the suppression hearing. He told Judge Schellinger that King was actually referring to Lace.

(Record references omitted.) As Lace acknowledges, however, the trial court, after holding a ***Franks*** hearing,[3] concluded that although portions of Detective Micklitz's testimony were incorrect, those statements had not been made intentionally or with "reckless disregard for the truth." Lace offers nothing to successfully counter the trial court's conclusion.

¶12 As our supreme court has explained, to prevail at a ***Franks*** hearing, a defendant:

> must … prove, by a preponderance of the evidence, that the challenged statement is false, that it was made intentionally or with reckless disregard for the truth, and that absent the challenged statement the affidavit does not provide probable cause. If the defendant meets this burden, the fourth amendment requires that the search warrant be voided and the evidence discovered pursuant to the warrant be suppressed.

State v. Anderson, 138 Wis. 2d 451, 462-63, 406 N.W.2d 398 (1987) (citation omitted). The supreme court went on to offer guidance for the determination of whether a false statement "was made intentionally or with reckless disregard for the truth":

> Proof that the challenged statements were made innocently or negligently is insufficient to have the challenged statement removed from the affidavit. As noted earlier, both the proof that the statement is false and that it was made either intentionally, or with a reckless disregard for the truth, must be shown by a preponderance of the evidence.
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> Although ***Franks*** did not define "reckless disregard for the truth," cases applying ***Franks*** have held that, to prove reckless disregard for the truth, the defendant must

[3] In his brief-in-chief to this court, Lace explains that the trial court granted a ***Franks*** hearing "after all parties, including the State, requested it."

> prove that the affiant in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations. Because the defendant must show either intent or reckless disregard, a ***Franks*** hearing, by necessity, focuses on the state of mind of the affiant.

Id. at 463-64 (citations omitted).

¶13 Because Lace's entitlement to a ***Franks*** hearing is not at issue, "[w]e are thus only concerned with whether [Lace has] shown, by a preponderance of the evidence, that false statements were made either intentionally or with a reckless disregard for the truth." ***Id.*** at 464. We conclude that "there is insufficient evidence to show that the challenged statements were either intentionally untruthful or made with reckless disregard for the truth." *See* ***id.*** at 464-65.

¶14 While Lace correctly contends that the trial court applied an incorrect standard—requiring him to establish "clear and convincing evidence" rather than the "preponderance of the evidence" to support his claim—he fails to offer anything to suggest that Detective Micklitz's misstatements were made intentionally or with reckless disregard for the truth. The differences were insignificant and the accurate information, if anything, would have been even more supportive of probable cause with respect to Lace. After all, as Lace notes, at the suppression hearing Detective Micklitz corrected his application statement by explaining that King, who had accepted delivery of a package at 2829 North 49th Street, had actually done so for Lace, not for Taylor.

¶15 The remaining issue is whether the statements made in support of the application for the search warrant for the residence, including the challenged statements, establish probable cause for the search warrant. Reiterating the standards for issuance of a search warrant, the supreme court has explained:

> Whether probable cause exists is determined by analyzing the "totality of the circumstances."

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
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> This court has stated that the warrant-issuing judge must be apprised of "sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." "The quantum of evidence necessary to support a finding of probable cause for a search warrant is less than that required for a conviction or for bindover following a preliminary examination." "Probable cause [is] not susceptible of 'stringently mechanical definitions.' What is required is more than a possibility, but not a probability, that the conclusion is more likely than not. This court has always stressed the reasonableness factor."

State v. DeSmidt, 155 Wis. 2d 119, 131-32, 454 N.W.2d 780 (1990) (citations omitted; first brackets added).

¶16 Additionally, the supreme court has set the standards governing our review of a challenge to the sufficiency of an application for a search warrant:

> In reviewing whether probable cause existed for the issuance of a search warrant, we are confined to the record that was before the warrant-issuing judge. The person challenging the warrant bears the burden of demonstrating that the evidence before the warrant-issuing judge was clearly insufficient. Review of the warrant-issuing judge's finding of probable cause is not *de novo*. Rather, great deference should be given to the warrant-issuing judge's determination.
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> 'A grudging or negative attitude by reviewing courts toward warrants' … is inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case ... A deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.

> "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for … conclud[ing]' that the probable cause existed." "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 warrants."

Id. at 132-33 (citations omitted).

¶17 Lace has not established that the information provided by Detective Micklitz in support of the application, even excluding the erroneous information, was "clearly insufficient" to support the issuance of the search warrant. Accordingly, we uphold the validity of the warrant.

By the Court.—Judgment affirmed.

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