STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO NOVEMBER 5, 2005, SEARCH WARRANT

INTRODUCTION

The defendant seeks to suppress all evidence seized from the Avery Auto Salvage Yard property and the defendant's residence and garage on November 5-9, 2005, together with any derivative evidence. The defendant's argument is basically twofold. First, the defendant alleges a violation of *Franks v. Delaware,* 438 U.S. 154 (1978), that would result in a lack of probable cause for the warrant. Secondly, the defendant challenges the fruits of the search to the salvage property and the defendant's premises on the theory that there were multiple executions of a single search warrant. Prior to the commencement of testimony, the state objected to taking evidence on the "*Franks* allegation" asserting that Avery's pleadings are deficient. The state also asserted the defendant lacked "standing"; *i.e.,* he has no legitimate expectation of privacy to challenge any of the searches, except those to his trailer and garage. This response is pursuant to the court's invitation to file written argument regarding whether the defendant's motion and supporting documents justify an evidentiary hearing.

First, the state reasserts the defendant does not have "standing" to challenge any of the searches to and in the Avery Auto Salvage Yard, burn barrel, burn pit, Teresa Halbach's Toyota RAV 4, or any of the buildings located in the salvage yard. Avery has standing only to assert a challenge to the searches of his residence and garage. Second, even though defendant has standing to assert the challenge to those searches, his pleadings alleging a violation of *Franks v. Delaware*, 438 U.S.154, 155-56 (1978), are insufficient to justify an evidentiary hearing.

STANDING

The United States Supreme Court in *Rakas v. Illinois,* 439 U.S. 128 (1978), corrected the focus courts use in determining whether a defendant has the right to challenge a particular search and seizure. Underlying the correction was the understanding and recognition that fourth amendment rights are personal rights which may not be asserted by another individual. *Id.* at 133. Thus, the relevant inquiry is whether the defendant had a legitimate expectation of privacy in the place searched. *State v. Orta,* 2003 WI App 93, 264 Wis. 2d 765, 663 N.W.2d 358; *State v. Trecoci,* 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555, *review denied,* 2001 WI App. 117, 247 Wis. 2d 1033, 635 N.W.2d 782; and *State v. Fillyaw,* 104 Wis. 2d 700, 312 N.W.2d 795 (1981). The defendant bears the burden of establishing his or her reasonable expectation of privacy by a preponderance of the evidence. *State v. Whitrock,* 161 Wis. 2d 960, 468 N.W.2d 696 (1991). Whether a person has a reasonable expectation of privacy depends on (1) whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized; and (2) whether society is willing to recognize such an expectation of privacy as reasonable. *Trecoci,* 246 Wis. 2d 261, ¶ 35.

In *Fillyaw,* the Wisconsin Supreme Court determined whether Fillyaw was entitled to challenge the constitutionality of searches and seizures made at the apartment of his murder victim. Defendant Fillyaw's status as a paramour was insufficient and thus diminished any expectation of privacy which he would have inferred from keeping a few possessions at the victim's apartment. His expectation of privacy was limited by the nature of his relationship. The court determined that any "subjective expectation of privacy" on the part of Fillyaw was an expectation which the court did not consider legitimate, nor was it one that society was prepared to recognize as reasonable.

Similarly, the court in *State v. Orta,* 264 Wis. 2d 765, determined that Orta did not have a legitimate expectation of privacy when using a stall in a public bathroom to facilitate a drug transaction with another person. The court ruled that Orta failed to demonstrate a subjective expectation of privacy and that he also failed to objectively demonstrate that society was willing to recognize his claim for an expectation of privacy as reasonable; and as a result, he did not have standing to challenge the officer's entry of the stall and to seek suppression. *Id.* at ¶ 25.

In the case at bar, defendant Avery does not and cannot show that he has a subjective expectation of privacy in the Toyota RAV 4 of Teresa Halbach. Avery, likewise, cannot demonstrate that his claim of an expectation of privacy in her vehicle or its location near the car crusher in the salvage yard is one society is objectively prepared to recognize as reasonable. The vehicle was not registered to him. As far as anyone knows, he had never driven the vehicle until October 31, 2005. He did not pay for that vehicle. He never rode in that vehicle. He had no possessions in that vehicle. It was not registered to him. He did not pay for the insurance on the vehicle. Consequently, Steven Avery does not have a reasonable expectation of privacy in Teresa Halbach's vehicle.

Similarly, it is quite clear from all the investigative information obtained that Steven Avery was not a business owner of the Avery Auto Salvage Yard. In an interview conducted by Investigator Gary Steier of the Calumet County Sheriff's Department, Charles Avery indicated that the land is owned by his mother, Dolores, and that he and Earl Avery are partners in the business. Charles Avery also said his dad does the books and handles the money. Although, defendant Avery may work at the auto salvage yard, he does not have a property interest in the land or the business. He does not have a subjective expectation of privacy in the business, the lands of the salvage yard, the vehicles in the yard, or any of the residences or outbuildings, other than his trailer and detached garage, that were searched during the execution of the search warrant at issue. Avery did not and cannot exhibit an actual or subjective expectation of privacy in any of the outbuildings or lands of the salvage yard. Further, even if such an expectation was exhibited, it is clearly not legitimate or justifiable in that these expectations of privacy are not ones society is willing to recognize as reasonable under all the circumstances. The defendant bears the burden of proving that he manifested an actual, subjective expectation of privacy in the areas which were searched. *State v. Rewolinski,* 159 Wis. 2d 1, 464 N.W.2d 401 (1990). The defendant bears the burden of establishing by a preponderance of credible evidence that he manifested a subjective expectation of privacy that was invaded by government action and that such expectation was legitimate. *Id.* Defendant Avery has not established by a preponderance of the evidence that he has a reasonable expectation of privacy in any of the places searched. He should be required to do so. If he cannot; there is no basis to object because there is no search for fourth amendment purposes. As noted at the outset and through the argument, the state concedes the defendant has a reasonable expectation of privacy in his trailer and his garage.

Furthermore, defendant has no basis to challenge the remains found in the search of the burn pit or any of the items found in the searches of the burn barrels. He has yet to establish by a preponderance of the evidence he has a reasonable expectation of privacy in these places or in the items recovered. It is also noteworthy that the defendant has, quite frankly, abandoned any property recovered from those two locations. The act of burning is the quintessential act of abandonment. The defendant does not have an actual, subjective expectation of privacy that society is prepared to recognize in the contents of the burn barrel or burn pit. He also abandoned any interest in the remains of Teresa Halbach as well as her personal effects; *i.e.,* cell phone, camera, etc. Thus, the only area for which defendant Avery has a reasonable expectation of privacy is his trailer at 12932 Avery Road and its detached garage. Therefore, defendant's *Franks v. Delaware* challenge is by law and fact limited to the search of his trailer and garage. The defendant does not have standing to object to any other search.

FRANKS V. DELAWARE

When challenging the veracity of statements in support of a search warrant, the defendant must make a substantially 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 that the allegedly false statement is necessary to the finding of probable cause. *State v. Anderson,* 138 Wis. 2d 451, 406 N.W.2d 398 (1987), *citing Franks v. Delaware*, 438 U.S.154, 155-56 (1978).

To make a substantial preliminary showing, "[t]here must be allegations of deliberate falsehood or a reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons."

Franks v. Delaware, 438 U.S. at 171. If and only if the court concludes that the defendant has made such a substantial preliminary showing, then and only then is the defendant entitled to a hearing, at which time the 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. *Franks,* 438 U.S. at 156; *accord, State v. Anderson,* 138 Wis. 2d at 462. A presumption of validity attends the affidavit. *Franks,* 438 U.S. at. 171; *Anderson,* 138 Wis. 2d at 463. To overcome this presumption, the defendant must first prove that the challenged statement is false, and second that the affiant intentionally made the false statement.

In this case, defendant's pleading fails to establish that a key statement was false or made with reckless disregard for the truth or was intentionally or recklessly omitted. The defendant's brief is replete with conclusory comments that certain statements are false; however, there is no basis for those conclusory statements. The defendant simply says they are false. Defendant's brief, pp. 7-9.

Initially, defendant objects to the characterization of some searchers as "volunteer searchers." Defendant *alleges* these private individuals were actually acting in an agency capacity in the context of a joint venture with law enforcement in that they were organized and instructed by law enforcement authorities to go to the Avery property for purposes of conducting a search. However, close inspection of his pleading reveals there is no such evidence of that fact! There is no actual evidence nor is there an offer of proof that such a joint venture, as that term is discussed in *State v. Payano-Romano*, 2006 WI 47, ___ Wis. 2d ___, 714 N.W.2d 548, existed. There is nothing in the pleading indicating the volunteers were instructed by law enforcement to do anything. There is no evidence in the affidavit that they were organized or

coordinated by law enforcement. The only reference suggesting any association whatsoever is found at the bottom of p. 7 and the top of p. 8 of defendant's brief. Defendant argues that Investigator Wiegert contacted Detective Remiker of the Manitowoc County Sheriff's Department and advised him that he wished assistance for a meeting at the Manitowoc County Sheriff's Office where Wiegert "intended" to meet with several volunteer search parties to coordinate efforts. Assuming for the sake of argument this is a true statement taken in appropriate context, and the state by no means concedes that point, it alone is insufficient to establish an agency relationship. At best, it signals that something in the future may occur to support the joint venture concept. It in no way signals the existence of such a relationship. Similarly, Wiegert's telling Remiker that the searchers were "willing" to go to the Avery property does not in and of itself reflect or establish an agency or joint venture relationship.

More to the point and equally clear is the fact that there is no evidence whatsoever in defendant's pleading that Detective Investigator Wiegert intentionally lied about the volunteer searchers. There is no exhibit and there is no statement attributed to Wiegert that either he or any member of the Calumet County Sheriff's Department or Manitowoc County Sheriff's Department ever met with any of the coordinators of the volunteer efforts. No such meeting and no such coordination ever took place. There is nothing more from which one may infer that Wiegert intentionally lied. The defendant's allegations that they were not really volunteers and that the vehicle identification number (VIN) was never confirmed leaving one with the impression that Wiegert lied is unproven, unsupported, and reckless in and of itself. These conclusory statements are hardly "proof" and do not rise to the level of substantial evidence to justify a hearing.

Similarly, defendant challenges the use of the term "matching" by Investigator Wiegert in the affidavit regarding the identification of Teresa Halbach's vehicle. Defendant attempts to muddy the water by challenging whether the color of the vehicle was accurately reported and whether the complete VIN was obtained by the investigators on the scene before the warrant was obtained. Again, the defendant fails to establish by substantial preliminary showing that there was an error or omission. The defendant fails to establish that Investigator Wiegert lied regarding this. The defendant puts forth nothing but conclusory observations and fails to establish any irregularity whatsoever in his pleading. They are simply bald-faced, unsupported assertions.[1] The fact that volunteer searcher Pamela Sturm and her daughter Nikole were unable to originally read the complete VIN is of no consequence to the court's determination. As Investigator Wiegert averred (and the testimony bore him out), Detective Remiker confirmed the complete VIN. The defendant says Wiegert lied or misrepresented the truth; yet defendant's pleading fails to put forth evidence that was the case. In addition, there is no allegation that Wiegert intentionally lied. However, all of this is simply "academic" in that the affidavit, without these "alleged lies," clearly states probable cause notwithstanding the defendant's veiled attempt to assert otherwise.

A search warrant may only issue on the basis of a finding of probable cause by a "neutral and detached magistrate." *Ritacca v. Kenosha County Court,* 91 Wis. 2d 72, 77, 280 N.W.2d 751 (1979). Whether probable cause exists is determined by analyzing the "totality of the circumstances." *Illinois v. Gates,* 462 U.S. 213, 238 (1983).

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[1] We note as an aside the testimony of Investigator Wiegert and volunteer searcher Pamela Sturm supports the state's view there was no evidence to support the assertion that Investigator Wiegert lied; and lied for the purpose of obtaining a warrant for which he could not have obtained through any other means. At this point, however, the court should not consider this testimony in deciding whether defendant's pleading is sufficient to have received that testimony.

> 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, 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.

Illinois v. Gates, 462 U.S. at 238.

The Wisconsin Supreme 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." *State v. Starke,* 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1977). *See also State v. DeSmidt,* 155 Wis. 2d 119, 454 N.W.2d 780 (1990). With these guideposts clearly set forth, we examine the affidavit in this case.

In paragraph 2 it is alleged that Teresa Halbach was reported missing on November 3, 2005, at 5:00 p.m. She had not been heard from or seen since October 31, 2005. It is also asserted that she was driving a 1999 Toyota RAV 4, dark blue in color.

Paragraph 3 of the affidavit includes statements by the defendant acknowledging to Investigator Remiker on November 4 that Teresa Halbach was indeed at the salvage yard and on his property taking photographs of a vehicle he was selling on October 31, the last day she was seen. Setting aside the alleged anomalies in paragraph 5, there is a report that on November 5 a Toyota RAV 4 was located in the Avery Auto Salvage Yard premises. It is further reported that the vehicle was covered up in brush. Lastly, paragraph 7 reports that as of the time the affidavit was prepared, Teresa Halbach had failed to contact her employer or her family members since October 31. Thus, we have a person who has been missing for five days, who was last seen on the defendant's property speaking with the defendant regarding the sale of a vehicle, and who drives a Toyota RAV 4. A Toyota RAV 4 was observed by Investigator Remiker. The RAV 4

was located in the Avery Auto Salvage Yard. It can be inferred that the vehicle found was blue or "blue-enough" in color to garner attention. If it was a red Toyota, there would have been no attention paid in the first place. This evidence alone is sufficient to establish probable cause for the issuance of a search warrant for the defendant's residence, garage, salvage yard, and the RAV 4 which was secreted with brush in the salvage yard. Whether the complete or partial VIN was taken is irrelevant. Quite frankly, even if the last four digits were the only digits obtained, that combined with the evidence described above, moves the quantum of proof beyond the required probable cause to nearly a preponderance of the evidence. Either of which, justify the search. Whether the vehicle "matched" the description of Teresa Halbach's vehicle is a question of hyper technical semantics. The question is: are these facts sufficient to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, or missing person in this context, and that evidence of the missing person was likely to be found in a search of the Avery Auto Salvage Yard. The answer is yes. The conclusion that probable cause exists under these facts is clearly a practical decision based on common sense. The search warrant was properly issued.

In sum, the defendant has failed to plead his case with sufficient accuracy to justify a *Franks* hearing on whether Investigator Wiegert lied or recklessly omitted facts. Moreover, even if the court were to find that there was a lie or an omission tantamount to a reckless disregard for the truth, the affidavit contained sufficient evidence from which this court can conclude there was probable cause to justify the execution of a search warrant. Therefore, the state requests that

the court deny the defendant's motion with respect to the *Franks* challenge without taking further testimony and put the defendant to his proofs on the issue of standing; *i.e.*, whether he has a legitimate expectation of privacy in any of the areas searched that society is prepared to accept as reasonable.

Dated this 4th day of August, 2006.

Respectfully submitted,

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