

Double Murder; Alleged Murder Weapon Suppressed; First-Degree Murder Charges Dismissed

BACKGROUND:

A 16-year-old girl and her mother were found, shot to death in their home. The victims' home was 0.3 miles from where M.S. lived. The police suspected M.S. of murdering the victims. As part of their effort to build a case against M.S., a police officer filed an application with the trial court for a search warrant in the hope of finding the murder weapon. The trial court granted the police officer's request for a search warrant, the police searched M.S.'s home and found a .22 rifle. The State's ballistics tests confirmed that the rifle was the murder weapon.

TRIAL COURT DECISION:

Frank was appointed by the Court to represent M.S. Frank filed a motion to suppress the .22 rifle that the police had seized from M.S.'s home and that had been confirmed by ballistics tests to be the murder weapon. Frank argued that the police officer that filed the application for the search warrant with the trial court lied to the trial court. Frank argued that, without the lie, the trial court would not have had probable cause to issue the search warrant. Frank further argued that, as a consequence of the police officer's lie, the State should not be allowed to offer the murder weapon in evidence against M.S. at the trial. The trial court agreed that the police officer had lied to the trial court in his search warrant application, that the murder weapon should be suppressed and that the State should not be allowed to offer the murder weapon as evidence against M.S. at the trial.

APPELLATE COURT DECISION:

The State filed an appeal, arguing that it could not win its case without the murder weapon and that the murder weapon should be admitted into evidence against M.S. at trial. Frank represented M.S. on appeal. The Iowa Supreme Court agreed with the trial court that the murder weapon should be suppressed and not admitted into evidence against M.S.

POSTSCRIPT:

After losing the appeal, the State dismissed both first-degree murder charges against M.S.

See the Court's decision below.

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341 N.W.2d 420, *; 1983 Iowa Sup. LEXIS 1740, **

STATE OF IOWA, Appellant, v. M W S , Appellee

No. 237 / 68535

Supreme Court of Iowa

341 N.W.2d 420; 1983 Iowa Sup. LEXIS 1740

November 23, 1983, Filed

PRIOR HISTORY: [1]**

Appeal from Iowa District Court for Henry County, William Cahill and John C. Miller, Judges. State appeals in advance of final judgment from two orders suppressing evidence in a criminal case.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

CASE SUMMARY

PROCEDURAL POSTURE: The State of Iowa sought review of an order from the Iowa District Court for Henry County, which granted defendant's motion to suppress evidence after he was charged with first-degree murder.


OVERVIEW: Defendant was charged with first-degree murder. Several months after his indictment, defendant filed two separate motions to suppress evidence. The first motion sought the suppression of all testimony from two prospective witnesses. The motion was predicated upon the contention that both of the witnesses, at the behest of the State, had undergone hypnosis in an effort to enhance their memories of events material to the homicide investigation. The second motion related to evidence seized during the execution of a search warrant at the residence where defendant resided with his father and stepmother. The trial court granted both motions. On appeal, the court found that the trial court properly granted defendant's motion to suppress evidence seized during the search. The averments of the affidavit were insufficient to establish probable cause for the issuance of the warrant. However, the court found that the State should have been given an opportunity to demonstrate to the trial court's satisfaction that the testimony of the hypnotized witnesses was substantially the same as that provided in statements to the police and others prior to their being hypnotized.


OUTCOME: The court affirmed the trial court's order suppressing evidence seized during the search of defendant's residence. The court reversed the order suppressing all testimony from the two prospective witnesses. The court remanded the case for further proceedings.


CORE TERMS: hypnosis, homicide, memory, locket, probable cause, search warrant, recollection, hypnotized, admissibility, ammunition, hypnotic, caliber, suppression hearing, rifle, box, motion to suppress, reliability, suspicion, fruits, evidence seized, deposition,


similarity, hypnotist, recalled, missing, pseudo, warrant application, suppression, unreliable, subjected


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HN1  Under the Franks standards, intentionally false statements and false statements made with a reckless disregard for the truth are treated the same. Under the Franks standards, the remedy for both intentionally false statements and false statements made with a reckless disregard for the truth is not to invalidate the search warrant. Rather, the Franks standards provide that the false statements should be excised from the affidavit and that the presence of probable cause be redetermined based upon that which remains. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN2  It is well established that a court may consider only the information contained in the affidavit in determining whether probable cause was shown for a warrant to issue. It may not consider other relevant information in the record that was not presented to the magistrate. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN3  The probable cause determination in response to a motion to suppress must be made upon the basis of the information that was presented to the magistrate at the time the warrant was issued; a defective warrant cannot be resuscitated by consideration of additional information now available or even of information available when the warrant was obtained but which was not communicated to the magistrate. In determining whether probable cause has been established for the issuance of a search warrant, the test is whether a person of reasonable prudence would believe a crime was being committed on the premises to be searched or evidence of a crime could be located there. The quantum of proof or probability determination that is required to satisfy the Fourth Amendment is not a variable one depending on multifarious circumstances. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN4  Probable cause to search, in contrast to probable cause to arrest, requires a probability determination as to the nexus between criminal activity, the things to be seized, and the place to be searched. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN5  Even if there is probable cause, or even absolute certainty, that certain described items are presently to be found in a certain described place, a lawful basis for search has not been established unless it is also shown to be probable that those items constitute the fruits, instrumentalities, or evidence of crime. In the absence of such a showing, the described items are not a legitimate object of a search. Mere suspicion that the objects in question are connected with criminal activity will not suffice. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN6  Common rumor or report, suspicion, or even strong reason to suspect is not adequate to support a warrant. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

HN7 It is only when no reasonable trier of fact could believe that the witness perceived what he claims to have perceived that a court may reject the testimony. Not improbability, but impossibility is the test. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: Thomas J. Miller, Attorney General, Michael Jordan, Assistant Attorney General, and Michael Riepe, County Attorney, for Appellant.

John W. Logan and Frank J. **Nidey**, Cedar Rapids, for Appellee.

JUDGES: Reynoldson, C.J., and McCormick, Schultz, Carter, and Wolle, JJ.

OPINIONBY: CARTER

OPINION: [*423] The State has made application for, and has been granted, permission to pursue by discretionary review an appeal seeking relief from two pretrial rulings of the district court in this criminal case. Both of the rulings for which review has been sought involve the suppression of evidence which the State wishes to offer at the trial of the criminal action.

On August 10, 1981, the defendant, MWS , was charged by indictment with murder in the first degree in the deaths of C A B and K E B , both of whom were found shot to death in their home in , Iowa, on , 1978. Several **[**2]** months after his indictment, defendant filed two separate motions to suppress evidence. The first of these motions sought the suppression of all testimony from two prospective witnesses, S G and M B . The motion was predicated upon the contention that both of these witnesses, at the behest of the State, had undergone hypnosis in an effort to enhance their memories of events material to the pending homicide investigation. The defendant asserts in his motion to suppress that the effect of such hypnosis renders their prospective testimony so inherently unreliable that its admission would deprive him of a fair trial.

At the hearing on this motion, defendant presented the testimony of Dr. Martin T. Orne, a recognized expert in the field of hypnosis. Dr. Orne testified generally that hypnosis is not a reliable or scientifically accepted means of generating accurate recall on the part of a subject. In addition, he testified that as to matters which have been recalled by a witness prior to hypnosis, the hypnotic process thereafter warps the witness's perception of what really occurred by creating "pseudo memories."

Partially in response to the testimony of the defendant's **[**3]** expert, the State offered the deposition of D. Eric Elster, the hypnotist who had sought to enhance the memories of S G and M B . This witness gave his views on the reliability of hypnosis. He indicated the extent of such reliability is directly dependent upon the opportunity for external corroboration of the information gleaned from the subject under hypnosis. He did not testify concerning the dangers of "pseudo memories" resulting from the hypnotic process.

On this record, the district court found that as a result of the continuing effects of hypnosis on their memories, the reliability of the testimony expected from these two witnesses was sufficiently suspect that they should not be permitted to testify at the trial with respect to the subject matter of the pending criminal prosecution or any issue therein. Other facts relevant to the court's ruling on this issue are discussed in connection with the legal issue which we hereafter consider.

The second motion to suppress involved in the present appeal relates to evidence seized

during the execution of a search warrant at the residence where defendant resided with his father and stepmother. Defendant's motion to **[**4]** suppress evidence obtained during this search and the fruits thereof was granted by the trial court on the ground that the affidavit presented in support of the search warrant had contained intentionally false statements. The facts surrounding the application for the search warrant, the testimony given at the suppression hearing with respect to the source and accuracy of said information, and other matters bearing on the issue are more fully developed in our discussion of the legal issues which have been presented by the State's appeal of that issue.

We separately consider the district court rulings on the two suppression-of-evidence issues. The issue relating to the search and seizure will be considered first.

I. The Search and Seizure Issue.

The trial court granted defendant's motion to suppress all items seized by law enforcement officers from the S residence and surrounding premises on , 1979. Also ordered suppressed were the fruits of such search to the extent that **[*424]** additional information was obtained as a result of the evidence seized at the S residence. At the time of the search, however, defendant was in jail awaiting trial on another homicide. **[**5]** While defendant was in jail and prior to the issuance of the search warrant, a request by law officers that defendant's father or stepmother voluntarily produce a rifle belonging to defendant was refused. A search warrant for the premises was then obtained and the search in question conducted. The rifle in question was found and seized.

Among the several grounds advanced in the motion to suppress this evidence was the claim that the affidavit offered in support of the State's application for the warrant contained "intentional false or untrue statements." At the hearing on the suppression motion, this claim focused on the following statement contained in the affidavit of A H , an officer of the Police Department:

During the 1979 search of the residence [the S residence], sheriff D observed a locket in a metal box in the upstairs bedroom similar to the one believed missing in the B homicide case.

The earlier search referred to was related to the other homicide investigation in which defendant was suspected.

The quoted statement is the last paragraph contained in the affidavit in support of the warrant application. **[**6]** While the rest of the affidavit is typed, that paragraph is handwritten. It was the testimony of Officer H at the suppression hearing that the affidavit was supplemented by adding this paragraph at the time he appeared before a district judge seeking issuance of the warrant.

When questioned about the source of the information concerning Sheriff D ' observations of the locket, H testified that while he and agent G of the Division of Criminal Investigation were preparing the warrant application, the sheriff briefly entered the room and asked if a locket was missing in the B investigation. The sheriff then stated that in a search of the S premises in connection with another homicide investigation he had discovered a metal box which contained a heart-shaped locket.

H testified at the suppression hearing that he had been present during the previous

search when the box had been discovered by the sheriff and had viewed the contents of the box at that time. Hagers did not recall seeing a locket in the box. Agent G testified at the suppression hearing that he was aware of a missing locket in connection with the B homicide. He vaguely recalled [**7] that Sheriff D came into the room while he and H were preparing the warrant application. He could not, however, recall the substance of the conversation which took place at that time.

Sheriff D testified as follows at the suppression hearing:

Q. Were you at that time or from then on or up until this year aware that any other authorities, and I'm talking about police department, DCI were, in fact, looking for a locket in connection with the B homicide?

A. Not that I can recall at all, no, sir.

Q. Can you recall them ever giving you a description of a locket for which they were looking?

A. No, sir.

Q. Can you ever recall telling any other law enforcement authorities that you had observed a locket on , 1979, during the search?

A. No, sir.

Sheriff D testified that the first he had learned about the fact that a locket was missing in the B homicide or that he was claimed to have noticed a similar locket at the S residence was when defendant's counsel informed him of these claims prior to his testifying at the suppression hearing.

Based on this evidence, the trial court found that H statement in the affidavit concerning [**8] the sheriff finding the locket was deliberately false. The court invalidated [**425] the warrant and ordered suppression of items seized pursuant thereto, together with any fruits of the search.

The trial court's order suppressing this evidence was based upon its belief that this was required by our holding in *State v. Boyd*, 224 N.W.2d 609, 616 (Iowa 1974). *Boyd* involved our interpretation of the proper procedures to be employed in challenging the accuracy of search warrant applications under both the federal and state constitutions. In the case of *State v. Groff*, 323 N.W.2d 204, 206-08 (Iowa 1982), decided after this appeal was taken and after the appellant filed its brief, we recognized that our determination in *Boyd* was contrary to the current interpretation of the federal constitution in *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978), decided four years after *Boyd*. In *Groff*, we decided that the procedures approved by the Supreme Court in *Franks* should be applied in determining challenges to search warrant applications under both the federal and state constitutions.

We believe the *Franks* standards [**9] should be applied in determining the validity of the search warrant in the present case even though not expressly argued in the State's brief. That brief was also filed before our decision in *Groff* which rejected the prior *Boyd* standards. In addition, we are influenced by the fact that this is an appeal in advance of final judgment. One of the purposes of granting such appeals is to assure that the case is determined under correct legal standards in the trial court. For this reason, we avail ourselves of the opportunity to secure a determination of these important issues according to the legal standards currently in force.

The *Franks* standards will have two significant effects on the issue presented. First, ^{HNI} under *Franks*, intentionally false statements and false statements made with a reckless

disregard for the truth are treated the same. We therefore need not consider whether the evidence sustained the trial court's finding that the challenged statement in the H affidavit was deliberately false; if the evidence fails to show that it was, we find that it nevertheless clearly shows that the statement was made with a reckless disregard for the truth. Second, under **[**10]** the *Franks* standards, the remedy for both intentionally false statements and false statements made with a reckless disregard for the truth is not to invalidate the warrant. Rather, the *Franks* standards provide that the false statement should be excised from the affidavit and that the presence of probable cause be redetermined based upon that which remains.

The trial court in the present case never determined whether the warrant application was supported by a showing of probable cause in the absence of the challenged statement concerning Sheriff D 's discovery of the locket at the S residence. n1 We have previously quoted the portion of the affidavit which must be excised. In the absence of that information, the remainder of the affidavit reads as follows:

That K and C B , Iowa, were found dead at their residence by M B , father and husband to the deceased in the early morning hours after 1:00 AM on /78. Investigation by Police and medical authorities who were notified at 1:42 AM on /78, revealed that the victims had been shot to death with 22 caliber CCI ammunition and that K B , age 17, **[**11]** had been sexually molested in close proximity to death and was found partially clad. The investigation of the two homicides is still open and no arrests have been made.

M S , age 18, of , Iowa, is under arrest in connection with the homicide of **[*426]** S W , age 32, who died 1979 after suffering a severe beating. The assault took place in the early morning hours of , 1979 at the , Iowa.

Investigation of the B homicide revealed that M S was living at , Iowa on , 1978 and that he was employed at the . This information was obtained from him in an interview conducted on , 1978 at 8:30 PM by BCI agents and Police. S advised he did own a 22 caliber rifle. S further stated that he was home the night of October 29th, 1978. His stepmother, Sharon could only verify that he was at home at 10:00 PM on , 1978. She did not see him after he went to bed. She left for work at 10:40 PM.

The S residence is only three-tenths (3/10) of a mile from the **[**12]** B residence.

The High School records indicate that M S and K B were in the same speech class in October of 1978.

While executing a search warrant at in regard to the W homicide on , 1979, a 22 caliber Mossberg rifle was observed disassembled and in a suitcase also containing the clothes of M S . M 's father, Harry , advised that the weapon belonged to M . This was also confirmed by Sharon . Officers further observed a plastic box containing CCI 22 caliber ammunition.

Juvenile authorities advised investigating officers that M S has had a prior history of delinquency and that he has been a patient at the Mental Health Institute in .

A locket belonging to K B silver in color with a heart and flower design, on an 18 to 20 inch chain is missing and presumed taken at the time of her murder.

BCI lab technicians observed a belt buckle type impression in blood on the shirt of K B that was possibly made by a large western type buckle with a

