

No. 1-08-3153

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
FEBRUARY 10, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 08 CR 635
)	
PAUL CARTER,)	Honorable
)	John T. Doody, Jr.,
Defendant-Appellee.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

O R D E R

HELD: The circuit court properly held a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), but erred in ultimately suppressing the evidence when probable cause existed even absent the challenged statement.

Defendant, Paul Carter, was charged with two counts of possession of a controlled substance with the intent to deliver.

After a hearing, held pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), the circuit court ultimately granted defendant's motion to suppress evidence. The State appeals; we reverse and remand.

Although defendant has not filed a brief in response, we may proceed under the principles set forth in *First Capitol Mortgage Corp., v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976). See *People v. Cosby*, 231 Ill. 2d 262, 285 (2008).

On December 8, 2007, Officer Brian Leahy submitted a complaint and affidavit for a search warrant to the circuit court. In the complaint, Leahy stated that he had a conversation with a John Doe who related to him that for the previous three months, Doe had been buying cocaine from defendant at a single family home located at 5087 #C West Gladys in Chicago.

When Doe was at the house on December 7, defendant showed him a large plastic bag holding approximately 300-400 yellow tinted ziplock bags. Each ziplock bag contained a white rock-like substance. Defendant then handed Doe several of the ziplock bags and stated, "these dubs, but I also sell dimes." "Dimes" are \$10 bags of cocaine and "dubs" are \$20 bags. Doe watched defendant put the large plastic bag in a shoe box in his bedroom. Doe then smoked the contents of two of the bags given to him by defendant, and felt the same euphoric feelings as when he had previously used cocaine.

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The complaint further stated that Doe had accompanied Leahy to 5087 #C West Gladys. There, Doe identified the building where he was in the company of defendant and from where defendant sold drugs. Doe also identified defendant from a photograph.

The complaint finally stated that when Leahy returned to the police station, research revealed that defendant had previously been arrested for narcotics violations and that defendant's driver's license indicated a residential address of 5087 #C West Gladys. The complaint was signed by John Doe.

On June 19, 2008, defendant filed a motion to quash arrest and suppress evidence alleging that although the complaint for a search warrant indicated that defendant had previously been arrested for narcotics violations, defendant did not have any prior narcotics arrests. The motion also alleged that defendant's father, Roosevelt Carter, was at home during the time of the alleged narcotics transaction, and that no one, other than family members, had entered or exited the house. Attached to the motion was the affidavit of Roosevelt Carter, averring that he did not leave 5087 #C West Gladys between midnight on December 7, and 9 p.m. the next day. He further averred that the house had a security system which notified him if someone entered the house; only his wife and defendant entered during that time.

On September 18, 2008, the circuit court held a hearing on defendant's motion. Defendant argued that information on the

face of the complaint for a search warrant was untrue, as defendant did not have a history of narcotics related arrests. The State conceded the factual inaccuracy in the complaint, but asserted that John Doe had attested to the facts in the complaint. The circuit court granted defendant a *Franks* hearing, as there was a false statement on the face of the complaint.

At the hearing, the following evidence was adduced. Defendant's father, Roosevelt Carter, testified that he lived in the townhouse at 5087 #C West Gladys with his wife and defendant. Defendant sometimes lived in the basement bedroom. Defendant stored many shoe boxes, dating back to defendant's high school days, containing old shoes in his bedroom.

The townhouse had a security system that was connected to the front and back doors, the only two entrances to the building. If someone were to enter the house with a key, the alarm system would make a noise, *i.e.*, the alarm sounds each time either door opens. The alarm does not indicate who is entering the house or whether that person is alone.

Carter was at home between midnight on December 7, and midnight the next day. No one, other than family members, entered the house during that time. On December 7, he got up at 5:30 a.m. when his wife went to work. That afternoon, defendant visited. Carter did not see anyone with defendant. Although he

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did not remember when he went to bed that night, Carter testified that he would have known if someone entered the house.

Around 9 p.m. on December 8, officers "bust[ed] in" while Carter and his wife were watching television. Although defendant was not there when the officers arrived, defendant was placed under arrest upon his return home.

Officer Brian Leahy testified that he, along with other officers, executed the search warrant at 5087 #C West Gladys. As a result of the search, narcotics were recovered from the basement bedroom. Leahy had used information related to him by a John Doe when requesting the search warrant. He met with Doe on December 8, after Doe was brought to the police station.

During the meeting, Doe indicated that he had purchased narcotics from defendant the previous day at 5087 #C West Gladys. Doe had been defendant's customer for three months and had been using crack cocaine for at least three months. Doe stated that defendant had indicated that he kept "the bundles of rocks," *i.e.*, large packages of narcotics ready for street level distribution, at the house. Doe told Leahy that defendant had shown him hundreds of ziplock bags containing cocaine, and that defendant sold \$20 bags of heroin and \$10 bags of cocaine. Doe further indicated that defendant stored the narcotics in a Nike shoe box in the basement bedroom.

Leahy obtained a photograph of defendant and showed it to Doe. Doe identified defendant from that photograph. Although Leahy did not conduct surveillance or a controlled buy at 5087 #C West Gladys, he did take Doe to the address. Once there, Doe confirmed the home was the place where he met with defendant. Leahy also ascertained that the Gladys address was the address listed on defendant's driver's license.

Leahy then took the complaint for a search warrant and Doe before a judge. The judge swore in both men. Leahy swore everything in the complaint for a search warrant was truthful to the best of his knowledge. The judge asked Doe how he knew defendant and how he knew that defendant lived at 5087 #C West Gladys. Leahy was not asked any questions. Before signing the search warrant, the judge had Doe sign the complaint.

Although Leahy had used this John Doe several times in the past when obtaining search warrants for narcotics, he had not registered the man as an informant with the police department. Each time that he had used Doe in the past, the search warrants resulted in the recovery of narcotics.

Leahy testified that although he was sworn to the contents of the complaint for a search warrant by the judge, he did not sign the complaint. Rather, Doe signed it in the presence of the judge. Leahy admitted that the information in the warrant indicating that defendant had previous narcotic arrests was

incorrect. Leahy explained that while he was preparing the complaint for a search warrant, he had a copy of defendant's rap sheet next to a copy of John Doe's rap sheet. He inadvertently attributed the information contained in Doe's rap sheet to defendant when drafting the complaint. Leahy did not recall how many narcotics related arrests were contained in Doe's background, but he believed that he had arrested Doe once.

At the conclusion of the evidence, the circuit court first noted that the complaint for a search warrant contained an error on its face, *i.e.*, Doe's narcotics background was ascribed to defendant. The court also highlighted that the warrant did not contain any information regarding the past reliability of John Doe. The court then granted defendant's motion to suppress evidence.

On appeal, the State contends that the circuit court erred when it granted defendant a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The State further contends that even if a *Franks* hearing was warranted, the circuit court erred when it ultimately granted defendant's motion to suppress evidence.

In *Franks*, the Supreme Court held that a defendant is entitled to an evidentiary hearing to attack the veracity of statements made in an application for a search warrant when that defendant makes a substantial preliminary showing that a false

statement was, knowingly and intentionally or with a reckless disregard for the truth, included in a warrant affidavit and the alleged false statement was necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). A defendant meets this burden by showing something "between mere denials on the one hand and proof by a preponderance on the other." *People v. Lucente*, 116 Ill. 2d 133, 152 (1987). It is within the circuit court's discretion to determine whether a defendant has made a showing sufficient to warrant a *Franks* hearing. *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007).

The State contends, relying on *People v. Gorosteata*, 374 Ill. App. 3d 203 (2007), that the instant case falls outside the scope of *Franks* because John Doe appeared before the issuing magistrate to testify regarding the allegations contained in the complaint for a search warrant. However, in *People v. Caro*, 381 Ill. App. 3d 1056 (2008), this court held that the fact that an informant testified before the issuing magistrate did not categorically preclude a *Franks* hearing. *Caro*, 381 Ill. App. 3d at 1065.

Here, the circuit court did not abuse its discretion when it held a *Franks* hearing. The State admitted that the complaint for a search warrant contained a factual error on its face, *i.e.*, defendant had no previous narcotics related arrests. Defendant's father also submitted an affidavit averring that he was home at

the time of the alleged narcotics transaction and only family members entered the home. Based on the factual inaccuracy on the face of the complaint and defendant's father's affidavit, the circuit court's determination that a *Franks* hearing was warranted was not an abuse of its discretion. *Caro*, 381 Ill. App. 3d at 1065.

The State next contends that even if the *Franks* hearing was properly held, the circuit court erred when it quashed the search warrant and suppressed evidence.

When reviewing a motion to suppress, this court reverses a circuit court's factual findings only when they are against the manifest weight of the evidence; the court's ultimate ruling on the motion is a question of law subject to *de novo* review. *Caro*, 381 Ill. App. 3d at 1066. Here, the question is whether defendant proved, by a preponderance of the evidence, that the affiant included false statements in the complaint for a search warrant with reckless disregard for the truth and that the statements at issue were necessary to the finding of probable cause. *Caro*, 381 Ill. App. 3d at 1066.

Probable cause exists, in a particular case, when the totality of the facts and circumstances within the affiant's knowledge at the time of the warrant application was such that a reasonable person would believe that the law had been violated and that the evidence of the violation was located in the place

to be searched. *People v. McCarthy*, 223 Ill. 2d 109, 153 (2006). This court reviews a probable cause determination for whether the issuing magistrate had a substantial basis for determining probable cause existed. *People v. Meyer*, 402 Ill. App. 3d 1089, 1094 (2010). A tip which includes detailed information regarding the alleged criminal activity suggests that the informant obtained the information in a reliable manner. *Meyer*, 402 Ill. App. 3d at 1094. When analyzing the complaint for a search warrant, the judge may also consider the basis of the informant's knowledge and whether the informant made an admission against interest. *Meyer*, 402 Ill. App. 3d at 1095.

Even accepting that Leahy's misstatement in the complaint for a search warrant was made with reckless disregard for the truth, defendant has failed to prove that the misstatement regarding his arrest history was necessary to the finding of probable cause. *Caro*, 381 Ill. App. 3d at 1066. Here, the information contained in the complaint for a search warrant indicated that Doe had firsthand knowledge that defendant was engaged in criminal activity at 5087 #C West Gladys because (1) he had been buying drugs from defendant for three months, (2) he had purchased drugs from defendant at that location the previous day, and (3) he had seen defendant's narcotics inventory and where it was stored at that location. The issuing magistrate had a substantial basis upon which to issue a warrant, even without

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the complained of statement regarding defendant's arrest history. *Meyer*, 402 Ill. App. 3d at 1094.

Based on our *de novo* review, we find that the circuit court erred when it granted defendant's motion to suppress evidence when, even without the misstatement regarding defendant's arrest history, probable cause existed based upon Doe's description of the location of defendant's drug inventory and his admission that he had purchased drugs from defendant multiple times. *Caro*, 381 Ill. App. 3d at 1066. Accordingly, we reverse the circuit court's order and remand this cause for further proceedings.

Reversed and remanded.