

No. 1-10-0576

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FIRST DIVISION
DATE June 13, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 21731
)	
TED KOZAK,)	Honorable Bertina E.
)	Lampkin and Domenica A.
Defendant-Appellant.)	Stephenson, Judges
)	Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justices HOFFMAN and ROCHFORD concurred in the judgment.

O R D E R

HELD: The trial court properly denied defendant's motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), when defendant failed to make a substantial preliminary showing that a false statement was, knowingly and intentionally or with a reckless disregard for the truth, included in the warrant affidavit.

Defendant Ted Kozak was charged with several counts of the unlawful possession of a weapon. Prior to trial, he filed a motion pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), challenging the veracity of the confidential informant. After the trial court denied the motion, the matter proceeded to a jury trial where defendant was convicted and ultimately sentenced to four years in prison. On appeal, defendant contends that he was entitled to a *Franks* hearing because he established that the confidential informant lied about meeting him at his home. We affirm.

On September 6, 2006, Officer Lionel Piper submitted a complaint and affidavit for a search warrant to the circuit court. In the complaint, Piper stated that on the previous day he met with a confidential informant who had, during the prior three months, provided information that resulted in three "positive" search warrants, i.e., the seizure of weapons and narcotics. During the meeting, the confidential informant told Piper that on September 4, 2006, he met with a man named Ted at 4138 West Barry Avenue in Chicago.

The confidential informant described Ted as a white male approximately 50 years of age and stated that he went to the multiunit building to look at a firearm for sale. When he arrived, Ted escorted him upstairs. Ted then went to a rear bedroom and reappeared less than a minute later with a .38

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caliber revolver. Ted told the confidential informant that this gun was "clean," would not "come back" to anyone, and cost \$250. The confidential informant explained that "clean" was a street term indicating that a gun's serial numbers had been removed. When the confidential informant examined the gun, he saw scratches where the serial numbers should be located. The confidential informant, who had experience with handguns, believed that Ted had shown him a "real" gun.

The complaint stated that Officer Piper searched the Illinois Secretary of State database and learned that defendant lived at 4138 West Barry. The complaint further stated that Piper acquired a driver's license photograph of defendant which he showed to the confidential informant. The confidential informant identified the person in the photograph as Ted, who had shown him the handgun. Piper then took the confidential informant to the 4100 block of West Barry Avenue, where the confidential informant identified 4138 as the building inside which Ted showed him a .38 caliber handgun.

On May 16, 2007, defendant filed a motion to quash arrest and suppress evidence alleging the confidential informant had lied because defendant worked a 24-hour shift as a firefighter beginning at 7 a.m. on September 4, 2006. In other words, defendant was not at home on the day the confidential informant alleged the meeting occurred.

Defendant's affidavit, attached to the motion, averred that he left his daughter Lisa's house at approximately 4:30 a.m. on September 4, 2006, arrived at the firehouse around 5:45 a.m., and stayed with his company until 8 a.m. the next morning. He denied being present at 4138 West Barry at any time on September 4, 2006. An affidavit from Lisa averred that defendant had left her home "sometime early" on the morning of September 4, 2006.

Also attached to the motion were affidavits from four members of defendant's engine company averring that they worked with defendant on September 4, 2006, and did not recall defendant leaving the presence of the "unit." The affidavits indicated that defendant arrived at the firehouse sometime between 6:45 and 7 a.m. for the 8 a.m. roll call.

On July 16, 2007, the trial court held a hearing on defendant's motion. Defendant argued he had made a substantial preliminary showing, based on the submitted affidavits, that he was not at home on the day in question; rather he was at his daughter's home between midnight and 4:30 a.m. and at work for the rest of the day. He further argued that Piper failed to include the time of the alleged meeting in the complaint for a search warrant and to conduct an independent investigation of the confidential informant's allegations before applying for the warrant. The State responded that defendant had not presented

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unbiased evidence regarding his whereabouts between midnight and 7 a.m.

The trial court denied the motion, holding that even assuming that the confidential informant lied to Piper, there was no way for Piper to have known of the lie. Accordingly, Piper did not exhibit reckless disregard for the truth when he acted upon the confidential informant's information. The court also denied defendant's motion to reconsider, and his subsequent motion to reconsider in light of *People v. Caro*, 381 Ill. App. 3d 1056 (2008).

The matter then proceeded to a jury trial. Officer Lionel Piper testified that on September 7, 2006, he executed a search warrant at defendant's residence, 4138 West Barry; second floor, Chicago. Defendant was not home when the officers arrived. Defendant's mother, who lived on the first floor, let the officers in. During the search, Piper recovered mail addressed to defendant and encountered a large locked gun safe in the second bedroom's closet. When the safe was ultimately opened, it contained "a number of firearms." The firearms removed from the safe included a Thompson submachine gun, a Sten submachine gun, an Enfield rifle, and a Webley revolver. Magazines for the submachine guns were also recovered. Defendant was subsequently taken into custody.

Piper admitted that defendant possessed a valid Firearm Owners Identification Card (FOID card) at the time of his arrest. However, he also testified that a FOID card does not permit a person to carry or possess a machine gun.

Defendant testified that his friend Norbert Handley, a retired Chicago police detective, asked him to store certain guns. Defendant placed a cloth laundry bag containing the guns in his safe. Handley died before retrieving the guns.

Eileen Curtis, Handley's daughter, testified that when she spoke to defendant at her father's wake defendant did not indicate that he was in possession of her father's firearms.

Officer Piper then testified in rebuttal that no laundry bag was recovered from defendant's gun safe.

Defendant was ultimately convicted of the unlawful possession of a weapon and sentenced to four years in prison.

On appeal, defendant contends that the trial court abused its discretion when it denied him a Franks hearing because he established that the confidential informant lied about meeting him at his home on September 4, 2006.

Pursuant to Franks, a defendant is entitled to an evidentiary hearing to attack the veracity of statements made in an application for a search warrant when he makes a substantial preliminary showing that (1) a false statement was included in the warrant affidavit knowingly and intentionally or with a

reckless disregard for the truth, and (2) the alleged false statement was necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). Our supreme court subsequently determined, in *People v. Lucente*, 116 Ill. 2d 133, 148 (1987), that in some circumstances a defendant could make this preliminary showing in the form of an alibi which tended to show that either the informant or the officer lied about the incident described in the warrant affidavit. A defendant meets this burden by showing something "between mere denials on the one hand and proof by a preponderance on the other." *Lucente*, 116 Ill. 2d at 152. The trial court determines whether there has been a substantial preliminary showing by balancing the statements in the warrant affidavit against those submitted in support of the defendant's challenge to the warrant. *Lucente*, 116 Ill. 2d at 152.

It is within the court's discretion to determine whether a defendant has made a showing sufficient to warrant a *Franks* hearing and that decision will not be disturbed absent an abuse of that discretion. *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007). A trial court abuses its discretion when its ruling is arbitrary, unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Sutherland*, 223 Ill. 2d 187, 272-73 (2006).

Here, based upon the affidavits contained in the record, the trial court did not abuse its discretion when it found that defendant failed to make the required substantial preliminary showing because defendant could not establish that Piper either knowingly and intentionally or with a reckless disregard for the truth included a false statement in the complaint for a search warrant. See *Franks*, 438 U.S. at 155-56; *Gorosteata*, 374 Ill. App. 3d at 212-13 (finding that the defendant failed to make a substantial preliminary showing in part because the affidavits accompanying his request for Franks hearing did not show that the officer deliberately included false statements in his warrant affidavit). The complaint for a search warrant indicated that on three prior occasions the confidential informant's information had resulted in "positive" warrants. Defendant fails to highlight any reason that Piper should have doubted the confidential informant's veracity during the instant encounter. See *People v. Creal*, 391 Ill. App. 3d 937, 944 (2009) (finding reckless disregard for the truth required proof that the affiant had serious doubts about the veracity of the allegations contained in the affidavit or there were circumstances showing "obvious reasons" to doubt them). Rather, defendant asserts, relying on the affidavits in support of his motion, that he established the confidential informant lied about meeting him in his home on September 4, because he was not at home that day.

Although the affidavits of defendant's coworkers place him at the firehouse after 7 a.m., his offer of proof for the prior seven hours of the day consisted of Lisa's affidavit averring that he left her home "sometime" during the early morning hours of September 4, 2006 and his affidavit averring that he went directly from Lisa's home to work. However, these affidavits do not preclude the possibility that defendant met with the confidential informant at his home sometime between midnight and 7 a.m. It was within the trial court's discretion to find that defendant's denial regarding the meeting did not constitute the required preliminary showing. See *Lucente*, 116 Ill. 2d at 153-54 (finding that sworn corroboration elevates a defendant's proffer of evidence to more than a mere denial). Given these facts, the court did not abuse that discretion when it determined, after balancing the statements in the complaint for a search warrant against the affidavits submitted in support of defendant's motion, that a Franks hearing was not warranted. See *Lucente*, 116 Ill. 2d at 152.

Defendant, on the other hand, contends that the seven hours were not a sufficient reason to deny him a Franks hearing because he was able to account for his time and there was no indication when the alleged meeting occurred. Defendant relies on *People v. Caro*, 381 Ill. App. 3d 1056 (2008).

In *Caro*, the trial court held a Franks hearing after the defendant filed an affidavit averring that he was at work on the day of the alleged drug purchase. *Caro*, 381 Ill. App. 3d at 1063. This affidavit was supported by the affidavits of the defendant's roommates averring that no one was present in the apartment, other than its occupants, when the defendant came home and they did not see him sell any drugs. *Caro*, 381 Ill. App. 3d at 1063. This court determined on appeal that the defendant provided an alibi corroborated by two affidavits in addition to his own and that these affidavits contained details sufficient to subject the affiants to perjury charges if they contained false information. *Caro*, 381 Ill. 3d at 1063. Because the affidavits, taken as a whole, constituted a preliminary showing that a false statement implicating the defendant was knowingly, intentionally, or recklessly included in the warrant affidavit, the trial court did not abuse its discretion when it determined that a Franks hearing was warranted. *Caro*, 381 Ill. App. 3d at 1063.

In the instant case, as in *Caro*, the complaint for a search warrant contained a date, but not a time. However, this court rejects defendant's argument that the unaccounted for time in the instant case was "not a sufficient reason" to deny him a Franks hearing. Rather than asserting that Piper lied or acted with a reckless disregard for the truth, defendant essentially argues that the trial court abused its discretion when it did not find

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that defendant's uncorroborated statement that he was not at home between midnight and 7 a.m. constituted a sufficient preliminary showing as to warrant a Franks hearing. We disagree.

Here, the trial court determined that defendant failed to make a preliminary showing when, even assuming that the confidential informant lied to Piper, there was no way for Piper to have known of the lie. Although defendant offered corroboration for his whereabouts after 7 a.m., he only offered his own unsubstantiated denials with regard to the hours between midnight and 7 a.m. *Lucente*, 116 Ill. 2d at 153-54. Based on these facts, the trial court's determination that defendant failed to make the necessary showing to warrant a Franks hearing was not an abuse of its discretion. *Caro*, 381 Ill. App. 3d at 1062.

For the reasons stated above, the judgment of the trial court is affirmed.

Affirmed.