2012 IL App (1st) 102740-U

SECOND DIVISION
JANUARY 24, 2012

No. 1-10-2740

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).

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. 07 CR 23891
	)	
VICTOR HERNANDEZ,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction is affirmed where the trial court properly denied defendant's motion for a *Franks* hearing because defendant failed to make a substantial showing that the police officer who swore out the complaint for the search warrant knowingly, intentionally, or with reckless disregard for the truth, made a false statement that was necessary to the finding of probable cause.

¶ 2 Following a bench trial, defendant Victor Hernandez was convicted of possession with intent to deliver cocaine, possession with intent to deliver cannabis, and six counts of unlawful use of a weapon by a felon for possession of five guns and ammunition. The trial court merged the convictions and sentenced defendant to nine years of imprisonment, plus a consecutive term of one year of imprisonment for violating his probation. On appeal, defendant solely contends that the trial court erred when it denied his pretrial motion for a *Franks* hearing because the supporting affidavits showed that he did not live at the residence named in the search warrant, other similarly-worded complaints for search warrants were filed by the same police officer during the same time period,

and the confidential informant was not reliable. We affirm the judgment of the circuit court of Cook County.

¶ 3 On October 26, 2007, Chicago police officer Russell Bacius (Officer Bacius) and an informant identified as John Doe (Doe) filed a complaint for a search warrant to search defendant and the first floor apartment at 5844 North Harlem Avenue. The items being searched for included cocaine, drug paraphernalia, records of illegal drug transactions, money and any documents showing residency, which constitute evidence of the offense of possession of cocaine. The complaint stated that Doe had been a cocaine user for over two years, and during the prior six months, he bought cocaine from defendant at that apartment. The complaint further indicated that on October 25, 2007, Doe stated that he bought cocaine from defendant at the apartment within the last 48 hours. At that time, Doe saw a clear plastic bag containing numerous smaller bags of suspect cocaine sitting on the bed in the bedroom. After handing Doe several small bags of suspect cocaine in exchange for money, defendant placed the large plastic bag inside a dresser drawer. Defendant told Doe to return any time he needed more drugs. Doe left the apartment, ingested some of the white powder he bought from defendant, and became high as he had on prior occasions when he used cocaine.

¶ 4 The complaint further stated that Doe identified defendant from a police photograph. Officer Bacius then drove Doe to the Harlem Avenue address where Doe identified the apartment as the location where he bought the cocaine from defendant. The complaint also stated that police officer Arnolts (Officer Arnolts) subsequently conducted a surveillance of the apartment at which time he saw defendant exit a vehicle parked in the driveway and use a key from his pocket to enter the apartment. The complaint indicates that both Officer Bacius and Doe appeared before the circuit court to request the search warrant. The search warrant was issued at 9 a.m. on October 26, 2007, and executed by police later that day, resulting in defendant's arrest and the charges in this case.

¶ 5 Prior to trial, defendant filed a motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), to quash the search warrant and suppress the evidence obtained during the search.

Defendant asserted that statements contained in the complaint for the search warrant were false, and that a hearing was needed to determine if Officer Bacius and Doe made such statements knowingly or with reckless disregard for the truth. Defendant alleged that on October 26, 2007, he was an overnight guest at the Harlem Avenue apartment, and that he lived in the basement apartment at 2832 North Mason Avenue. Defendant denied all of the allegations contained in the complaint, specifically denying that he sold cocaine to Doe at the Harlem Avenue address. Defendant noted that Officer Bacius signed the complaint for Doe and argued that there was insufficient indication that Doe actually appeared before the court that issued the search warrant.

¶ 6 Defendant contested Doe's existence, and alternatively argued that if he did exist, he and the officers could not have engaged in their alleged activities on October 25, 2007 and October 26, 2007, as stated in his search warrant and three similar unrelated search warrants he attached to his motion as exhibits. Defendant asserted that the details in the four search warrants showed that it was sworn to by the same "John Doe," and argued that, "[a]s such, he was obviously lying." He further asserted that Officer Bacius knew Doe was lying when he prepared the complaints and presented them to the court, or that he attributed hearsay statements to Doe that Doe had not made. Alternatively, defendant argued that if there was more than one "John Doe," there was not enough time for the officers to complete their alleged actions during the stated time line.

¶ 7 Defendant acknowledged that Officer Arnolts stated that he saw defendant exit a vehicle and enter the apartment with a key, but maintained that there was no independent police corroboration of Doe's hearsay allegations. Defendant asserted that Officer Arnolts' observation must have occurred between midnight and 2:27 a.m. because the complaint stated that Officer Arnolts made the observation on October 26, 2007, and that the complaint was approved by an assistant State's Attorney on that date at 2:27 a.m. Defendant argued that he was denied his right to a fair determination of probable cause due to Officer Bacius' false statements or averments which were made with a reckless disregard for the truth.

¶ 8 Defendant attached to his motion affidavits from himself, his mother, his sister, his brother, his brother's girlfriend and the girlfriend's brother. In his affidavit, defendant averred that he lived in the Mason Avenue apartment with his mother, brother and sister, and that on the evening of October 25, 2007 and into the morning of October 26, 2007, he was an overnight guest at the Harlem Avenue apartment. Defendant stated that he was dropped off at the Harlem Avenue address for a party with his brother Eric Hernandez (Eric) and Eric's girlfriend, Kristina Simkus (Kristina), by Kristina's brother, Joseph Delvalle (Joseph) between 9 p.m. and 10 p.m. on October 25, 2007. Joseph quickly left in the car, and defendant did not have a car at the party. Defendant stated that they were at the apartment attending a birthday party given by Kristina's friend, Amaris, and they spent the night in the living room at Amaris' invitation and with the approval of her roommates. When the police entered the apartment, defendant, Eric and Kristina were waiting for Joseph to pick them up, and Amaris and her roommates had left for work. Defendant stated that he never went outside during the party, and had never used a key to enter the apartment. Defendant further averred that he had never been at the Harlem Avenue address before that date, never sold cocaine to anyone at that address, and he was unaware of the contents of the apartment.

¶ 9 In their affidavits, Eric and Kristina averred to the same facts as defendant regarding defendant's residence on Mason Avenue, their overnight attendance at the party, and that defendant never left the party nor used a key to enter the apartment. Eric and Kristina both stated that, to their knowledge, defendant had never before been to the Harlem Avenue address. Eric further stated that, to his knowledge, defendant never sold cocaine to anyone in that apartment.

¶ 10 Defendant's mother, Antonina Hernandez (Antonina), and his sister, Lucia Hernandez (Lucia), stated in their affidavits that defendant lived with them and Eric on Mason Avenue, and that defendant spent almost every night in their apartment except for October 25, 2007, when he and Eric attended a party. They both stated that, to their knowledge, neither defendant nor Eric had ever visited the Harlem Avenue address prior to October 25, 2007. Finally, Kristina's brother, Joseph,

stated in his affidavit that he drove defendant, Eric and Kristina to a party and dropped them off at the Harlem Avenue apartment between 9 p.m. and 10 p.m. on October 25, 2007. He then left in the car, and when he arrived the next morning to pick them up, the police had already detained them inside the apartment.

¶ 11 Also attached to defendant's motion were the three unrelated search warrants and complaints for those warrants which he claimed were similar to his search warrant and complaint. All three complaints were sworn to by Officer Bacius and someone identified as "John Doe," and all three search warrants were issued on October 26, 2007. The first complaint was to search Pedro Lopez (Pedro) and a second floor apartment on Irving Park Road for the identical items listed in the complaint for defendant (the Pedro complaint). The Pedro complaint stated that Doe had been using cocaine for over two years and bought cocaine from Pedro at the stated address during the prior three months. The complaint further indicated that on October 25, 2007, Doe stated that he bought cocaine from Pedro at the apartment within the last 48 hours. At that time, Doe saw a large bag containing numerous smaller bags of suspect cocaine sitting on a chair in the living room. Pedro gave Doe several small bags of suspect cocaine in exchange for money and told Doe to return any time he needed more. Doe left the apartment, ingested some of the white powder he bought from Pedro, and became high as he had on prior occasions when he used cocaine. The Pedro complaint further stated that on October 25, 2007, Doe identified Pedro from a police photograph, and Officer Bacius then drove Doe to the Irving Park address where Doe identified the apartment as the location where he had bought cocaine from Pedro. The Pedro complaint also stated that Officer Arnolts conducted a surveillance of the apartment on October 25, 2007, at which time he saw Pedro exit the building. The search warrant was issued five minutes after defendant's search warrant was issued by the same court.

¶ 12 The second complaint was to search William Lopez (William) and a first floor apartment on Monticello Avenue for a blue 9-millimeter semi-automatic handgun and ammunition (the William

complaint). Doe stated that he had been an acquaintance of William for over two years. The William complaint further indicated that on October 25, 2007, Doe stated that he had been at the apartment within the last 72 hours and saw the gun and ammunition when William opened a dresser drawer in the bedroom. Doe stated that he saw this same gun stored in the same dresser drawer on two earlier occasions within the prior two weeks. The William complaint further stated that on October 26, 2007, Doe identified William from a police photograph, and Officer Bacius then drove Doe to the Monticello Avenue address where Doe identified the apartment. The William complaint also stated that Officer Arnolts conducted a surveillance of the apartment on October 26, 2007. In addition, the William complaint asserted that William reported the Monticello Avenue address as his home address during his last 10 arrests. The search warrant was issued at 7:30 p.m. on October 26, 2007.

¶ 13 The third complaint was to search Jose Salinas (Salinas) and the top floor apartment of a two-story apartment building at 2832 North Mason Avenue for a blue 9-millimeter semi-automatic handgun and ammunition (the Salinas complaint). Doe stated that he had been an acquaintance of Salinas for over two years. The Salinas complaint further indicated that on October 25, 2007, Doe stated that he had been at the apartment within the last 72 hours and saw the gun and ammunition when Salinas retrieved a shoe box from underneath a bed in the bedroom and opened the box. Doe stated that he saw this same gun stored in the same shoe box under the bed on one earlier occasion within the prior two weeks. The Salinas complaint further stated that on October 26, 2007, Doe identified Salinas from a police photograph, and Officer Bacius then drove Doe to the Mason Avenue address where Doe identified the apartment. The Salinas complaint also stated that Officer Arnolts conducted a surveillance of the apartment on October 26, 2007. In addition, the Salinas complaint said that Salinas reported the Mason Avenue address as his home address during his last arrest in July 2007. The search warrant was issued five minutes after the search warrant for William was issued by the same court.

¶ 14 Defendant asserted that based on the contents of his *Franks* motion and the attached exhibits and affidavits, he made a substantial preliminary showing that false statements made by Officer Bacius, either deliberately, or with reckless disregard for the truth, were included in the complaint for the search warrant pertaining to defendant. He further argued that such statements were necessary to the finding of probable cause that led to the search warrant being issued. Defendant requested a hearing to establish the falsity of the statements in the complaint for the search warrant so the search warrant could be quashed for a lack of probable cause.

¶ 15 In response, the State argued that defendant's motion for a *Franks* hearing should be denied because the facts in the complaint for the search warrant established that probable cause existed based on the totality of the circumstances. The State argued that the court issuing the search warrant had sufficient facts that demonstrated that criminal activity would be found at the Harlem Avenue apartment. The State also asserted that Doe appeared before the trial court with Officer Bacius and personally swore to the veracity of the facts in the complaint. The State argued that, based on Doe's personal appearance before the court, this case fell outside the scope of *Franks*. In addition, the State argued that defendant failed to make any showing whatsoever that the complaint for the search warrant contained false statements that were made knowingly and intentionally, or with reckless disregard for the truth.

¶ 16 The trial court stated that it reviewed all of the search warrants and complaints attached to defendant's motion and compared the timing of when the complaints were approved by the assistant State's Attorneys and when they were presented to the issuing court. The trial court found that all of the observations and drug purchases could have taken place before the warrants were approved and issued, and thus, there was no problem with the timing. The trial court also noted that there were no affidavits from Amaris or her roommates, who defendant alleged lived in the Harlem Avenue apartment. The trial court found that defendant's admission that he was an overnight guest at the apartment corroborated Officer Arnolts' surveillance and observation that occurred before 2 a.m.,

which the trial court noted was also consistent with the timing of the presentation of the search warrant. The trial court further found that defendant made a general denial of the allegations in the complaint. The trial court also found that there was no evidence to support defendant's claims that the informant "was strung out on coke," that Officer Bacius signed the complaint for Doe, that Doe was "obviously lying," and that Officer Bacius knew Doe was lying.

¶ 17 In addition, the trial court rejected defendant's claim that there was no independent corroboration of Doe's information. The trial court noted that the complaint indicated that Doe identified defendant in a police photograph and identified the target apartment. The trial court again noted that Officer Arnolts' sighting of defendant entering the apartment was consistent with the statement in defendant's affidavit that he was there. The trial court also found that all of the affidavits submitted by defendant were from interested parties, and expressly reviewed all of the rules from the relevant case law in detail. In denying defendant's motion for a *Franks* hearing, the trial court concluded that based on its findings and the relevant case law, defendant's motion and affidavits failed to make the required substantial showing that Officer Bacius and Doe made false statements intentionally or with reckless disregard for the truth.

¶ 18 At trial, Officers Arnolts and Bacius testified that on October 25, 2007, they conducted surveillance at the Harlem Avenue apartment. Officer Bacius saw defendant exit a vehicle on Harlem Avenue, then walk down a gangway to the rear of his apartment building. Officer Arnolts then saw defendant walk up the driveway to the rear door of the building. It appeared that defendant used a key to open the door and enter the building. The following day, the officers participated in the execution of the search warrant. After defendant was detained in the dining room, the police asked him if he had any large sums of money, weapons or narcotics in the apartment. Defendant stated that he had two guns in his bedroom, but denied having any money or drugs. In the bedroom, Officer Arnolts recovered a gym bag that contained 2 bags of cannabis, 1 bag containing 14 smaller bags of cocaine, another bag containing 24 smaller bags of cocaine, and an additional 10 bags of

cocaine. Officer Arnolts also recovered three scales that had white residue on them which he suspected to be cocaine. Officer Arnolts recovered a second gym bag that contained several different calibers of ammunition. In the same bedroom, Officer Bacius recovered a duffel bag that contained four handguns and $477. Officer Bacius also recovered an assault rifle from underneath the bed. As they were leaving the apartment, defendant asked for a pair of shoes. The police asked him where his shoes were, and defendant stated that they were in his bedroom and pointed to the rear bedroom where the drugs and guns had been recovered. At the police station, Officer Bacius asked defendant where he lived, to which defendant replied that he lived in the first floor apartment at 5844 North Harlem Avenue.

¶ 19 The parties stipulated that a forensic scientist found that the two bags of suspect cannabis tested positive for 688.7 grams of cannabis. The forensic chemist also tested five bags of the suspect cocaine and found them positive for 191 grams of cocaine. The total weight of the 48 bags of recovered cocaine was 386 grams. In addition, the State submitted a certified copy of defendant's prior felony conviction. The trial court found defendant guilty of possession with intent to deliver between 100 and 400 grams of cocaine, possession with intent to deliver between 500 and 2,000 grams of cannabis, and six counts of unlawful use of a weapon by a felon.

¶ 20 On appeal, defendant solely contends that the trial court erred when it denied his pretrial motion for a *Franks* hearing because the motion made a substantial showing that Officer Bacius knowingly and intentionally, or with reckless disregard for the truth, made false statements that were necessary to the finding of probable cause for the search warrant. Defendant argues that his supporting affidavits showed that he did not live at the Harlem Avenue address, but instead, that he was merely an overnight guest at that apartment when the search warrant was executed. Defendant also argues that his motion showed that three similarly-worded complaints for search warrants relying on information from Doe were filed by Officer Bacius on the same day, which undermined the veracity of the complaint filed for the search warrant in this case. Finally, defendant argues that

the complaint was based entirely on uncorroborated criminal allegations made by Doe, whose reliability was not established.

¶ 21 The State argues that the denial of the motion was proper because defendant failed to show that Officer Bacius knowingly or intentionally included false statements in the complaint, or acted with a reckless disregard for the truth. The State asserts that defendant's affidavits acknowledge that he spent the night at the Harlem Avenue address, and do not preclude the possibility that he met with Doe there prior to the search and arrest. The State also argues that Doe's statements to police were corroborated when Doe identified defendant in a photograph, identified the apartment, and when Officer Arnolts saw defendant enter that apartment with a key. The State maintains that defendant failed to provide a reason why Officer Bacius should have doubted Doe's veracity. The State also points out that defendant challenged the veracity of Doe, not of Officer Bacius.

¶ 22 In *Franks*, the United States Supreme Court held that defendants have a limited right to a hearing to challenge the veracity of statements made by governmental affiants in complaints for search warrants where the defendants make a "substantial 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 such statement was "necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. A defendant makes a "substantial preliminary showing" where he offers proof that is "somewhere between mere denials on the one hand and proof by a preponderance on the other." *People v. Lucente*, 116 Ill. 2d 133, 151-52 (1987). The *Franks* court noted that the affidavit or complaint supporting the search warrant was presumed to be valid. *Franks*, 438 U.S. at 171. To qualify for a hearing, the defendant's challenge "must be more than conclusory," and his claim that false statements were deliberately made must be supported by an offer of proof. *Id.* The *Franks* court further instructed that the only impeachment being permitted was that of the governmental affiant, "not of any non-governmental informant." *Id.*

¶ 23 It is the trial court's duty to determine whether the defendant has made a substantial showing

sufficient enough to justify a hearing, "and to a degree the decision on the issue will be final." *Lucente*, 116 Ill. 2d at 152. In making its determination, the trial court must carefully balance the statements in the complaint for the search warrant against those supporting defendant's challenge to the warrant. *Id.* The court's determination will not be disturbed absent an abuse of discretion. *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Sutherland*, 223 Ill. 2d 187, 272-73 (2006), quoting *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 24 Here, we find that the trial court's denial of defendant's motion for a *Franks* hearing was proper because defendant's motion and supporting affidavits and exhibits failed to show that Officer Bacius knowingly or intentionally included false statements in the complaint for the search warrant, or that he acted with a reckless disregard for the truth. First, we reject defendant's claim that his affidavits sufficiently established that he did not live at the Harlem Avenue apartment, that he was not there when Doe claimed to have purchased cocaine from him, and that he was merely an overnight guest when the search warrant was executed. The trial court found that all of the affidavits were from interested parties, and thus, the credibility of those affidavits was questionable. This court has previously found that affidavits from family members and interested parties are suspect and that their reliability is weakened. *Gorosteata*, 374 Ill. App. 3d at 212; *People v. Tovar*, 169 Ill. App. 3d 986, 992 (1988). We therefore find no error with the trial court's credibility determination.

¶ 25 The record shows that the trial court also found it significant that there were no affidavits from Amaris or her roommates, who defendant alleged lived in the Harlem Avenue apartment. Furthermore, the trial court found that defendant's statement in his affidavit that he was an overnight guest at the apartment corroborated Officer Arnolts' statement that he saw defendant enter the apartment with a key. In fact, all of the affidavits place defendant at the Harlem Avenue apartment on October 25, 2007 and October 26, 2007. Moreover, none of the affidavits preclude the possibility

that defendant sold cocaine to Doe inside that apartment. Nor do the affidavits make any showing that Officer Bacius intentionally made false statements in his complaint for the search warrant. See *Gorosteata*, 374 Ill. App. 3d at 213. Accordingly, we find that the record shows that the trial court properly balanced the statements in the complaint against those in the affidavits when it determined that defendant failed to make a substantial showing that false statements were intentionally made in the complaint.

¶ 26 Next, we reject defendant's contention that the veracity of the complaint for the search warrant was undermined by the fact that three similarly-worded complaints for search warrants relying on information from Doe were filed by Officer Bacius on the same day. Defendant relies on *People v. Gomez*, 236 Ill. App. 3d 283, 290-91 (1992), where the court found that similarities between 11 search warrant complaints completed by the same police officer provided evidence that justified a hearing. In *Gomez*, 9 of the 11 complaints alleged that the offenders who were selling drugs told the informants, in very similar wording, to come back anytime because they always had a good supply on hand.

¶ 27 Here, unlike *Gomez*, we find that the similarities among the four complaints are insignificant. In this case, the complaint against Pedro is similar to the complaint against defendant where both state that Doe bought cocaine from the men within the last 48 hours, and that he saw a large bag containing numerous smaller bags of suspect cocaine while inside both apartments. However, we find nothing suspicious about the fact that Doe, an admitted cocaine user, bought cocaine from two different men during a 48-hour time span. In the other two complaints, Doe stated that he was visiting acquaintances when he observed handguns inside their apartments. There is no mention of drugs in these two complaints. We acknowledge that all four of the complaints state that Doe identified the offenders in police photographs, identified their apartments for Officer Bacius, and that Officer Arnolts conducted surveillance of those apartments. However, we find that these similarities do not raise suspicion, but instead, indicate a similar method used by police to investigate and

corroborate the information provided by Doe. The trial court expressly stated that it reviewed all of the warrants and complaints submitted with defendant's motion and found no issues with the timing or the observations in those complaints. We find no reason to disturb the trial court's determination.

¶ 28 Finally, defendant contends that the complaint for the search warrant was based entirely on "uncorroborated" allegations made by Doe, whose reliability was not established. Defendant then states that the "only corroboration" of Doe's account was Officer Arnolts' claim that he saw defendant enter the apartment during his surveillance, and that Doe identified a photograph of defendant and pointed out the apartment to Officer Bacius. Defendant expressly acknowledges that the complaint for the search warrant indicates that Doe personally appeared before the court and signed the complaint under oath. Defendant concedes that this court has previously found that such facts enhance an informant's reliability. See *People v. Smith*, 372 Ill. App. 3d 179, 182 (2007). However, defendant takes issue with the facts that there is no indication that any buyers were observed coming and going from the apartment, there was no controlled buy by Doe, and there is no indication of Doe's relationship or prior work with the police.

¶ 29 In *Smith*, this court noted that it previously held that when an informant appears before the court, he is under oath, and the court has the opportunity to personally observe his demeanor and assess his credibility, which renders additional evidence regarding his reliability unnecessary. *Smith*, 372 Ill. App. 3d at 182. The *Smith* court also stated that an informant's admission that he is familiar with illegal substances bolsters the reliability of his information because he is making statements against his penal interest. *Id.* at 184.

¶ 30 Here, we find that Officer Bacius sufficiently corroborated Doe's information prior to filing the complaint for the search warrant. As defendant acknowledges above, Officer Bacius had Doe identify defendant from police photographs. The officer then drove Doe to the Harlem Avenue address and viewed the apartment. Shortly thereafter, Officer Arnolts conducted surveillance of the residence at which time he observed defendant use a key to enter the apartment. Although defendant

can point to other actions Officer Bacius could have possibly taken, he has not shown that the officer recklessly disregarded the truth by failing to do so. See *People v. Creal*, 391 Ill. App. 3d 937, 945 (2009).

¶ 31 Accordingly, we find no abuse of discretion by the trial court in determining that defendant's motion and supporting affidavits and exhibits failed to show that Officer Bacius knowingly or intentionally included false statements in the complaint for the search warrant, or that he acted with a reckless disregard for the truth. For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.