

No. 1-10-2981

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. 08 C6 60192
)	
REGINALD JACKSON,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

¶1 *Held:* Where defendant denied drug transactions and challenged police detective's affidavit on grounds that detective did not personally witness transactions inside defendant's apartment, defendant failed to make "substantial preliminary showing" that a false statement was made in support of search warrant; trial court did not abuse discretion in denying defendant's request for a *Franks* hearing.

¶2 Following a bench trial, Reginald Jackson, the defendant, was convicted of the possession of between 400 and 900 grams of cocaine with intent to deliver, which is a Class X offense. Defendant was sentenced to 14 years in prison. The drugs were obtained from defendant's apartment after the execution of a search warrant. On appeal, defendant contends the trial court erred when it

denied his request for a hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), to challenge the veracity of the information provided in support of the search warrant. We affirm.

¶ 3 On December 3, 2007, Blue Island police detective Jeff Werniak appeared before the trial court and presented a complaint for a search warrant. In the complaint, Detective Werniak stated that on November 20, 2007, he spoke to a confidential source who described the sale of narcotics by defendant at 1900 Canal Street, Apartment 3D, in Blue Island. The confidential source told Detective Werniak that he had known defendant for more than eight months and had purchased cocaine from defendant more than 20 times during that period that provided the confidential source with the same "high feeling" that he had previously experienced. The complaint stated that on eight previous occasions, the confidential source provided reliable information to Detective Werniak that resulted in arrests and the seizure of cocaine and cannabis.

¶ 4 The complaint described two controlled purchases that the confidential source made from defendant on November 29, 2007, and December 2, 2007, under police supervision. The complaint states that in each instance, the confidential source was provided with \$100 in pre-recorded funds and "while under constant surveillance," the confidential source went to defendant's apartment, where defendant met him at the door and left him in the living room. The confidential source left defendant's apartment and proceeded to an arranged meeting place where he handed Detective Werniak a clear plastic bag containing a substance identified as 3.4 grams of cocaine. The complaint named defendant, described his height, weight and date of birth, and indicated the confidential source had identified defendant from a photograph prior to the controlled purchases.

¶ 5 The trial court granted the search warrant. On December 4, 2007, the search warrant was executed, and police recovered from defendant's apartment 10 clear plastic bags containing suspect cocaine, digital scales and packaging material, and \$1,675.

¶ 6 Defendant was charged with possession of between 400 and 900 grams of cocaine and also with the possession of that amount of cocaine with intent to deliver. After defendant was charged, defense counsel appeared in court and requested the police reports and other documentation pertaining to the eight prior occasions not involving defendant in which Detective Werniak had implemented controlled transactions by the confidential source. The State refused that discovery request, citing the need to protect the confidential source's identity. In its subsequent written response to defendant's discovery request, the State asserted that defendant had failed to make any showing, as required by *Franks*, that Detective Werniak deliberately or recklessly provided false information in the affidavit in support of the search warrant.

¶ 7 On the same day, the State filed its written refusal of the defendant's discovery request, defense counsel filed a motion to compel discovery requesting the reports for the November 29 and December 2 controlled transactions involving defendant that were described in the search warrant. After a hearing at which defense counsel clarified that he sought only the documentation relating to the November 29 and December 2 incidents, and not the records relating to the prior eight occasions, the trial court denied the defendant's motion to compel discovery of those records.

¶ 8 The court continued the matter for the State to provide those records for an *in camera* review to determine if the records contained discoverable information. At subsequent court dates, the State indicated no police reports had been prepared as to the November 29 and December 2 controlled transactions. Cindy Sarno, the head of records for the Blue Island police department, testified that no records existed as to those incidents, and Detective Werniak also testified that no reports were created. The trial court performed an *in camera* inspection of the police file, and the court informed counsel for both sides that the file contained evidence receipts but did not contain police reports on the controlled buys.

¶ 9 Defendant moved for a hearing pursuant to *Franks*, to quash the search warrant and to suppress the evidence obtained from his apartment. In defendant's motion, he stated the complaint for a search warrant falsely stated that Detective Werniak kept the confidential source under "constant surveillance" and personally observed defendant meet the confidential source at the door of his apartment. In support of the motion, defendant provided his own affidavit stating that the door to his residence was accessed through a main entry door to the building and a common stairway leading to his unit. Defendant attested he had no visitors on November 29 and December 2, 2007, and defendant denied conducting any narcotics sales from the residence. He said, though, that he met with a person named Hoy at a parking lot at 127th and Ashland. Defendant observed an unmarked police car in the lot and again as he drove home.

¶ 10 The State filed a response to the motion, stating defendant had not met his burden of showing that a false statement was made in support of the affidavit and that such a statement was made knowingly, intentionally or with a reckless disregard for the truth. The State asserted defendant's affidavit merely served as a denial of criminal conduct and did not support his motion for a *Franks* hearing.

¶ 11 At a hearing on the motion, defense counsel questioned how during the November 29 and December 2 transactions, Detective Werniak could have observed his confidential source at the door of defendant's residence because the multi-unit building could be accessed at street level only by a locked door. Counsel asserted the portion of the search warrant in which the detective stated that the confidential source was under constant watch was untruthful. Defense counsel further argued that no police reports were made documenting the acts of the confidential source.

¶ 12 In response, the State argued the search warrant did not indicate that Detective Werniak observed the confidential source enter defendant's apartment but, rather, as to both transactions, the source was kept under constant surveillance as he entered and exited the building and met the

detective at a pre-determined location to provide the substance he purportedly received from defendant. The State asserted that the absence of police reports as to those transactions did not invalidate the search warrant. In denying defendant's motion for a *Franks* hearing, the court concluded defendant did not establish that Detective Werniak lied or acted in disregard for the truth in providing the facts in support of the search warrant.

¶ 13 The case proceeded to trial at which Detective Werniak testified as to the execution of the search warrant and the items recovered as a result. The State also presented evidence that the 10 bags recovered from the residence contained close to 900 grams of cocaine. The trial court found defendant guilty of both possession and the possession with intent to deliver. After hearing evidence in aggravation and mitigation of defendant's sentence, including defendant's prior convictions, the trial court merged the two counts and sentenced defendant to 14 years in prison on the count of possession with intent to deliver.

¶ 14 On appeal, defendant contends his conviction and sentence should be vacated and this case should be remanded for the trial court to hold a *Franks* hearing. As a threshold matter, defendant contends this court should review the denial of his request for a *Franks* hearing using a *de novo* standard, thus giving no deference to the trial court's decision. Defendant asserts, and our research reveals, that a noted disagreement exists among federal courts as to the appropriate standard of review on this point. See, e.g., *United States v. Lebowitz*, 676 F.3d 1000, 1010 n.1 (11th Cir. 2012); *United States v. Arbolaez*, 450 F.3d 1283, 1293 n.11 (11th Cir. 2006) (and cases cited therein). However, as defendant acknowledges, courts in Illinois consistently have applied an abuse of discretion standard in reviewing a trial court's refusal to hold a *Franks* hearing. See *People v. Lucente*, 116 Ill. 2d 133, 153 (1987); *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007); *People v. Antoine*, 355 Ill. App. 3d 562, 575 (2002); *People v. McCoy*, 295 Ill. App. 3d 988, 998 (1998);

People v. Pavone, 241 Ill. App. 3d 1001, 1006 (1993). In the absence of any contrary Illinois authority, we apply an abuse of discretion standard in this case.

¶ 15 Under *Franks*, a defendant has a limited right to challenge the veracity of information offered in support of a search warrant. *Franks*, 428 U.S. at 156; *People v. Petrenko*, 237 Ill. 2d 490, 500 (2010). To overcome the presumption of validity that attaches to an affidavit supporting a search warrant and thereby obtain a *Franks* hearing, a defendant must 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 the "allegedly false statement is necessary to the finding of probable cause." *Franks*, 428 U.S. at 155-56. A "reckless disregard for the truth" in this context has been defined as requiring proof: (1) that the affiant entertained serious doubts as to the truth of the allegations in the affidavit, or (2) of the circumstances evincing obvious reasons to doubt the veracity of the allegations. *People v. Creal*, 391 Ill. App. 3d 937, 944 (2009) (citing *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984)). If, after the alleged untruths in the warrant affidavit are set aside, the remaining statements in the affidavit are sufficient to establish probable cause, no *Franks* hearing is required. *Franks*, 428 U.S. at 171-72.

¶ 16 For a defendant to make a "substantial preliminary showing" that a false statement has been offered in support of a search warrant, the defendant must accompany his allegations with an offer of proof, such as an affidavit, or explain why it was not furnished. *Franks*, 428 U.S. at 171. The defendant must offer proof that is "somewhere between mere denials" and proof by a preponderance of the evidence. *Petrenko*, 237 Ill. 2d at 500, quoting *Lucente*, 116 Ill. 2d at 151-52. "Put another way, the preliminary burden must be sufficiently rigorous to preclude automatic hearings in every case, but not so onerous as to be unachievable." *Lucente*, 116 Ill. 2d at 152. The defendant's attack on the information in support of the search warrant "must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Franks*, 428 U.S. at 171.

¶ 17 Defendant argues a *Franks* hearing was required because the November 29 and December 2 controlled transactions, on which the search warrant was based, were not described or memorialized in any police reports. He also contends that the State did not produce a copy of the form defendant signed to waive his *Miranda* rights. Defendant argues that in the absence of such documentation, the trial court had reason to believe the controlled drug purchases did not occur. Those assertions do not imply that false information was affirmatively given in support of the search warrant. Rather, defendant's argument appears to be that the State lacked sufficient corroboration of the information provided by the confidential source and to which the detective attested.

¶ 18 Defendant further contends Detective Werniak's statements in support of the search warrant were not credible because the detective did not witness what occurred inside defendant's apartment and thus lacked personal knowledge of the transaction. To review, Detective Werniak's statements in support of the search warrant indicated that in the transaction on November 29, the confidential source was "under constant surveillance" when he went to defendant's address and when he "exited the residence" and met the detective at a pre-determined location. The detective's statements as to the December 2 transaction indicated that the confidential source "while under constant surveillance" by the detective "went to the upstairs door of the residence and exited approximately five minutes later." In both instances, the confidential source reported to Detective Werniak that defendant let the source into defendant's residence and the source purchased the bagged substance that he then handed to the detective.

¶ 19 Defendant points out that Detective Werniak claimed he had the confidential source under continuous surveillance even though the confidential source actually was out of the detective's sight when the source purportedly entered the building, went to defendant's residence inside the building and completed the drug transaction. However, Detective Werniak did not offer an intentional or knowing false statement or display a reckless disregard for the truth, as is required to support a

Franks hearing, when the detective attested that the confidential source was "under constant surveillance." A common-sense reading of the detective's statements in support of the search warrant reveals that the surveillance was conducted outside the building; indeed, it would have been difficult for police to have accompanied the confidential source to defendant's apartment.

¶ 20 To the extent that defendant contends that Detective Werniak was required to attest to his personal knowledge of the drug sales to the confidential source, a police officer's attestations in support of a search warrant may be based on hearsay, *i.e.*, the representations of a confidential source, as occurred here, if the court is provided with information from which it can make an independent evaluation of both the reliability of the source and the conclusion that the items to be seized are what the informant indicates they are. See *People v. Gales*, 248 Ill. App. 3d 204, 219 (1993). Here, both a statement as to the reliability of the confidential source in this case and a statement by the confidential source to the detective that the items defendant sold him were narcotics are referenced in the attestations in support of the search warrant.

¶ 21 The detective's statements in the warrant affidavit must be balanced against those advanced by the defendant in his challenge to the affidavit. *People v. Pearson*, 271 Ill. App. 3d 640, 643 (1995). Whether a defendant has met the burden of proof required to make a substantial showing of a false statement so as to require a hearing under *Franks* is a subjective assessment made by the trial court and absent an abuse of discretion, the decision will not be disturbed on review. *Pearson*, 271 Ill. App. 3d at 643 (citing *Lucente*, 116 Ill. 2d at 153). Here, defendant's challenge to the search warrant consisted of his lone affidavit in which he denied the drug transactions occurred; that summary contention is insufficient to support a *Franks* hearing. See *Petrenko*, 237 Ill. 2d at 500; *Lucente*, 116 Ill. 2d at 151-52 (a defendant must offer more than a mere denial to challenge an affidavit in support of a search warrant, *e.g.*, defendant in *Lucente* offered alibi corroborated by two additional affidavits); *People v. Caro*, 381 Ill. App. 3d 1056, 1063 (2008) (defendant's affidavit

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stating he was at work when informant made drug purchase, corroborated by affidavits of two roommates was sufficient for substantial preliminary showing that false statement was offered to implicate defendant in drug transaction, thus warranting *Franks* hearing).

¶ 22 In conclusion, the facts presented to the trial court established that defendant failed to make a substantial preliminary showing, as required by *Franks*, that Detective Werniak made a knowing, intentional or recklessly false statement in support of the search warrant in this case. The trial court did not abuse its discretion in denying defendant's request for a *Franks* hearing.

¶ 23 Accordingly, the judgment of the trial court is affirmed.

¶ 24 Affirmed.