

FOURTH DIVISION
May 1, 2014

No. 1-12-1448

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. 09 CR 11899
)	
CHRISTOPHER HAYWOOD,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's rulings are affirmed. The trial court did not abuse its discretion in denying defendant's request for a *Franks* hearing as defendant failed to make a "substantial preliminary showing" that the statements in the complaint for a warrant were false or made with a reckless disregard for their truth; there was sufficient evidence to convict defendant of possession of a controlled substance with intent to deliver; and it was not improper for the trial court to consider defendant's criminal history in sentencing him to 12 years in prison for his Class X armed habitual criminal conviction. The clerk of the circuit court is ordered to

correct defendant's mittimus to reflect \$2,040 in credits against defendant's fines and fees.

¶ 2 Following a jury trial, defendant, Christopher Haywood, was convicted of one count of armed habitual criminal and two counts of possession of a controlled substance with intent to deliver. He was sentenced to concurrent terms of 12 years, 7 years and 5 years in prison, respectively. Defendant now appeals his convictions claiming that: (1) the trial court erred in denying his request for a *Franks* hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and (2) his conviction on the second count of unlawful possession of a controlled substance with intent to deliver must be vacated because there was insufficient evidence presented at trial to show that he constructively possessed the heroin that was found in the second floor crawlspace. Defendant also claims that the case should be remanded for re-sentencing because the trial court improperly relied on factors that were inherent in his armed habitual criminal offense when sentencing him to 12 years in prison for that conviction, and that his mittimus must be corrected to reflect \$2,040 worth of credit against his fines, fees and other costs totaling \$2,675. For the reasons that follow, we affirm the trial court's rulings and correct defendant's mittimus to reflect \$2,040 of credit.

¶ 3 BACKGROUND

¶ 4 Defendant was convicted in a jury trial of armed habitual criminal, possession of a controlled substance with intent to deliver heroin, more than one gram but less than 15 grams, and possession of a controlled substance with intent to deliver heroin, less than one gram. Defendant was sentenced to concurrent terms of 12 years, 7 years and 5 years, respectively, for the above convictions.

¶ 5 On May 28, 2009, the Chicago police executed a search warrant for a home located at 537 N. Hamlin in Chicago and for the person of defendant. The complaint for the search warrant

included information from a confidential informant that a drug transaction had taken place with defendant at that location the day before. Specifically, the complaint stated:

"On May 28, 2009, [Officer Lipsey] met an individual that for the sake of safety, I will refer to as J. Doe who stated that on 27 May, 2009, J. Doe met with a male black known to J. Doe as 'Da Da' on the 400 block of North Hamlin. J. Doe stated that J. Doe and Da Da went to 537 N. Hamlin, a single family residence and met with a male black known to J. Doe as 'Chris' for the purpose of purchasing Heroin. I [Officer Lipsey] then conducted a computer check and found an I-Clear system photograph of Christopher Haywood, aka 'Chris,' IR# 869692 which J. Doe identified as the same Christopher Haywood, aka 'Chris' that J. Doe and 'Da Da' met with in the single family residence. Computer check also revealed that Christopher Haywood, aka 'Chris' used 537 N. Hamlin on previous arrests as his primary residence.

J. Doe stated that on 27 May 2009 J. Doe met with 'Da Da' on the 400 block of N. Hamlin and handed 'Da Da' \$100.00 USC and stated, 'I'm out.' 'Da Da' then chirped Christopher Haywood aka 'Chris,' on the cell phone and stated, 'we're burnt up.' 'Burnt up' is street terminology for sold out. J. Doe and 'Da Da' then walked to 537 N. Hamlin, a single family residence and met with Christopher Haywood, aka 'Chris' in the living room. J. Doe related that Christopher aka 'Chris' asked 'how much do you want' to 'Da Da.' 'Da Da' stated 'one pack.' 'Da Da' handed \$100.00 USC to Christopher Haywood aka 'Chris.' J. Doe related that Christopher Haywood aka 'Chris' then relocated to an orange couch in the living room, reached between the cushions, and pulled out a plastic bag containing thirteen zip lock bags, each containing suspect heroin. Christopher Haywood aka 'Chris' then handed the same pack to 'Da Da.' J. Doe related that 'Da Da' handed the same clear plastic bag containing suspect heroin to J. Doe on the front porch at 537 Hamlin, a single family residence. J. Doe then departed and took the same clear plastic bag containing thirteen zip lock bags, containing suspect heroin to the 400 block of north Hamlin and resold them to customers on the street for \$10.00 USC each. J. Doe explained using the same heroin on a daily basis and always experiencing a 'high' from using it. J. Doe reported purchasing heroin through 'Da Da' from Christopher Haywood, aka 'Chris' for approximately four months, five weeks and a day. J. Doe further explained that J. Doe makes \$30.00 USC from each pack of Heroin that J. Doe sells on the 400 block of north Hamlin.

On May 28 2009 J. Doe and [Officer Lipsey] relocated to 537 N. Hamlin where J. Doe pointed to a single family residence and stated that this is the same location where Christopher

Haywood, aka 'Chris,' sold 'Da Da' and J. Doe Heroin on 27 May 2009."

The complaint was signed by Officer Lipsey and J. Doe. Based on the information in the complaint, the trial court issued the warrant for 537 N. Hamlin and the person of defendant. As a result of the search, police seized a Colt handgun, a loaded Ruger handgun, a shotgun, ammunition, heroin, cocaine, a bundle of U.S. currency, a digital scale, drug packaging, and several pieces of U.S. mail addressed to defendant. Defendant, who was in the home at the time of the search and attempted to flee, was arrested and charged with the offenses of armed habitual criminal and possession with intent to deliver both heroin and cocaine.

¶ 6 Prior to trial, defendant filed a motion for a *Franks* hearing to challenge the allegations in the warrant complaint in an effort to quash the search warrant and suppress the evidence obtained during the search. Attached to the motion were affidavits from defendant, defendant's brother, Randall Haywood, and defendant's friend, David "Da Da" Madison. Defendant's affidavit stated that he had been home all day on May 27, 2009, but that no one came to the house on that day. Defendant's affidavit further stated that he had not possessed or sold any drugs to anyone at any time. Randall's affidavit stated that he lived at 537 N. Hamlin and he was at home all day with defendant on "May 27, 2010" and that no one came to the house that day. Randall averred that he spent the day with defendant watching television and talking, and that they went to bed around midnight. Da Da's affidavit stated that he had known defendant for 20 years and that they spent a day and a half together after celebrating Da Da's birthday on May 25, 2009. He further stated that he never brought anyone to defendant's house on May 27, 2009, that no one bought drugs from defendant or himself on that day, that he had never seen defendant sell drugs to anyone, and that he had not sold drugs to anyone in the four months proceeding May 27, 2009. Based on the motion and the attached affidavits, defendant argued that he had made a

substantial preliminary showing that the averments in the complaint for a search warrant were false or that Officer Lipsey signed the complaint with reckless disregard for their truth.

¶ 7 The trial court denied defendant's motion for a *Franks* hearing finding that the non-governmental informant who signed the complaint appeared before the judge issuing the search warrant, was available for questioning by the judge, and swore to the allegations in the complaint. The trial court held that since the confidential informant appeared before the trial court judge, this case fell outside the ambit of the *Franks* case and, accordingly, the trial court denied defendant's request for a *Franks* hearing. The trial court further found that the affidavits attached to defendant's motion were from biased and interested parties, and that the averments in the affidavits "amounted to an unsubstantial denial" of the allegations in the warrant complaint. Following the trial court's denial of a *Franks* hearing, defendant requested to proceed *pro se* and did so for the trial.

¶ 8 At trial, the State first called Chicago police officer Brian Cygnar to testify. Cygnar testified that he was one of the police officers who executed the search warrant and was the first officer to enter the residence at 537 N. Hamlin. Upon entering, Cygnar saw defendant run from the living room to the back of the residence with a chrome handgun in his hand. As Cygnar chased defendant, he observed defendant ditch his handgun between two laundry bags in the living room area. Cygnar continued to chase defendant, announcing his office and directing defendant to stop. Defendant then ran through the kitchen where he dropped little bags onto the floor. From his experience as a police officer, Cygnar believed the bags to be bags of heroin. Defendant continued to run to the back porch where he jumped a railing in an effort to enter the basement. When defendant had difficulty opening the basement door, Cygnar and two other officers detained him and placed him under arrest. No one else was in the home at the time the

search was executed.

¶ 9 After the home was secured, evidence technician officer Green and Cygnar went into the house to recover items. Cygnar picked up four small baggies from the kitchen floor that he had seen defendant drop during the chase as well as the handgun that he has seen defendant throw into the laundry area. A canine unit then entered the house to search for narcotics.

¶ 10 Officer Green was then called to testify. Green testified that, as a result of the search, he recovered the following items from the first floor: four plastic baggies of suspect heroin from the kitchen floor, a gun magazine for a handgun containing several live rounds of ammunition, a light colored bag containing multiple live rounds of ammunition, one small blue tinted baggie containing suspected crack cocaine, a .357 magnum revolver with five live rounds that Cygnar saw the defendant drop, a .38 caliber revolver with six live rounds that had been found in a rear bedroom on a shelf, three pieces of U.S. mail addressed to defendant, a State of Illinois I.D. card bearing defendant's name and address on a coffee table in the living room, and a bundle of cash containing \$60 under the couch in the living room. In addition to mail addressed to defendant at 537 N. Hamlin, there was also mail addressed to other persons at the same address.

¶ 11 On the second floor of the house, there was an attic crawlspace where Green located a shoe box containing multiple empty handgun magazines, multiple loose rounds of ammunition, a box of live ammunition, a digital scale and multiple small empty packaging baggies. In the kitchen, Green located a plate with white powdery substance, suspected heroin, along with a razor blade, a bundle of \$250, and some packaging materials. Green also found another box in the crawlspace that contained four strips of tape and six clear plastic baggies with white powder. Green did not recall any door separating the first floor from the second floor. He further found an unloaded shotgun from a closet in the basement. When Green spoke with defendant at the

police station, defendant stated that any weapons found in the home belonged to his deceased grandfather and that he had no knowledge of the drugs found in his home.

¶ 12 Forensic scientist, Cotelia Fulcher, testified that she performed various tests on the substances found in defendant's home, and those substances tested positive for heroin and cocaine.¹

¶ 13 The parties stipulated that defendant had two prior felonies that qualified him for the offense of armed habitual criminal, and that the two qualifying offenses for the armed habitual criminal conviction were second degree murder and unlawful possession with intent to deliver. The jury was not told what the qualifying felonies were. The State then rested.

¶ 14 Defendant called Officer Mireya Lipsey and Officer Renee Daniels as his first witnesses. Both testified about their involvement in the canine search and the positive indications for drugs made by the canines. Although defendant tried to question Lipsey about her interactions with J. Doe, the trial court judge sustained objections to these questions as the issue regarding the confidential informant had already been decided and was subject to a motion *in limine*.

¶ 15 Defendant then called his mother, Geronee Haywood, to testify. Geronee testified that the house at 537 N. Hamlin had been her deceased father's home, but that defendant, her sister Renee Sherrod, her brother Houston Sherrod, and her son Randall Haywood all currently lived there and had keys to the home. She further stated that her brother Ricky Sherrod, her sister Regina Sherrod, and her daughter Donyae Haywood lived there from time to time. Specifically, she testified that Renee stayed in the right rear bedroom on the first floor, Houston stayed in the basement, defendant stayed in the bedroom on the left side of the first floor, Randall occupied the second floor, and Regina would stay on the second floor when she was in town. Geronee

¹ The white substance on the plate in the upstairs kitchen, which was initially thought to be cocaine, was not any controlled substance.

testified that there were separate gas and electric bills for first and second floors. Geronee also identified in photos two gas meters located in the front of the home as well as two circuit boxes in the home, one located on the second floor and the other in the basement. Geronee testified that as of May 28, 2009, her deceased father had a shotgun and a .38 caliber handgun that he kept locked in the basement, but that he had passed away in 2004. Geronee did not know who owned the .357 magnum revolver and she had no knowledge of the narcotics that were found in the home.

¶ 16 Defendant then called his brother, Randall Haywood, to testify. Randall testified that as of May 28, 2009, he owned ammunition, bullets, clips, .38 shells, and .22 shells, and that he kept these items in a black bag in a box on the second floor. He testified that he occupied the second floor of 537 N. Hamlin and that sometimes his uncle occupied that space with him. He, his aunt and uncle received mail at 537 N. Hamlin, and the mail was placed on a table on the first floor when it arrived. Randall testified that he had a F.O.I.D. card that had expired, and that in May of 2009 he did not own any guns. Randall identified a magazine of a gun that he owned as well as bullets and stated that he had packed them in the attic in 2000. Randall identified a shotgun in a photograph and testified that it belonged to his deceased grandfather. He was also shown another picture of a gun, the .357 magnum, but did not recognize it. When shown a picture of a scale and numerous plastic baggies, Randall testified that they did not belong to him.

¶ 17 Defendant rested and did not testify. The jury found him guilty of armed habitual criminal, possession of a controlled substance with intent to deliver heroin one gram or more but less than 15 grams, and possession of a controlled substance with intent to deliver heroin less than one gram. The jury found defendant not guilty of possession of a controlled substance with intent to deliver, cocaine. Defendant filed a motion for a new trial, which was denied.

¶ 18 At the sentencing hearing, defendant presented the following mitigating evidence: that he had graduated from high school and earned an electrical technician certificate; had maintained a job with Caterpillar, but was laid off in 2008; was 42 years old, married but separated, and had two adult children; and that he pretty much supported himself. In aggravation, the State informed the trial court that defendant had six prior felony convictions. The State argued that defendant had not learned from his past convictions, which included second degree murder and other drug-related offenses, and that during the commission of his most recent crime, defendant was carrying a gun while the police were chasing him. The trial court judge sentenced defendant to twelve years on the armed habitual criminal conviction, with three years of mandatory supervised release, seven years on the conviction for possession of a controlled substance with intent to deliver between one and fifteen grams of heroin, and five years on the conviction of possession of a controlled substance with intent to deliver less than one gram of heroin. The prison terms were to run concurrently. In determining this sentence, the trial court judge made the following comments about his considerations:

"Okay, in sentencing I have to craft a sentence that is fair, that's fair for the defendant, fair for society and commensurate with the crime that was committed.

There are matters in mitigation that I will address. It does appear the defendant has been employed at times in his life. The defendant does have a family, albeit he is separated from his wife for an extended period of time, and also had adult children.

I find the defendant, frankly, to be a fairly intelligent man. He was able to represent himself better than most people have, and I take into consideration that he does, in fact, have some schooling post high school.

In mitigation—I'm sorry, in aggravation I find the defendant is apparently a career criminal. I have—the defendant's criminal background dates back to 1994 where he received six years on a second degree murder charge. In 1994, the same date it looks like, there was a concurrent sentence, a manufacture and deliver of a controlled substance between 1 and 15 grams for three years. In 1997, after being released from the penitentiary, he

committed the offense of possession of a controlled substance, receiving four years from Judge Bolin. That being August of 1997. He received one year Illinois Department of Corrections on a case in October of 1997 before Judge Kazmierski. In 2002— what is this charge [sic] 01 CR 19476 * * * Delivery and receiving found years in the penitentiary –strike that –five years in the penitentiary. And again, subsequent to his serving the sentence and release from the penitentiary, he picks up another drug offense which apparently is a Class IV offense, two years Illinois Department of Corrections.

* * *

The defendant was found guilty on three of four counts that was presented to this particular jury, guilty of armed habitual criminal, guilty of possession of a controlled substance between 1 and 15 grams of heroin, guilty of possession with intent to deliver heroin, and the jury acquitted him on the possession of a controlled substance with intent to deliver cocaine and possession of a controlled substance. * * * The fact of the matter is Mr. Haywood is now * * * 42 years old. He's not a young gentleman anymore. I would expect, at least I would hope that he would be aging out of the criminal justice system. Often times people do that.

While I do note that most of [defendnat's] convictions are for drug offenses, I do note that defendant has been convicted of a violent offense of second degree murder and has since been to the penitentiary at least three separate times, only to return—actually it looks like four separate times, only to return to his life of crime.

Obviously I consider a person as a first time offender different than a person who I believe is a career criminal. I believe a sentence is appropriate not only for punitive purposes but also the fact that I believe society has to be protected by some people who continually violate our laws."

¶ 19 Defendant did not file a motion to reconsider his sentence, and the parties agree that the trial court judge did not admonish defendant that he could file such a motion. Instead, defendant requested leave to file his notice of appeal, along with a request that the State Appellate Defender be appointed to represent him on appeal. Defendant appeals his convictions claiming that: (1) the trial court erred in denying his request for a *Franks* hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and (2) his conviction on the second count of unlawful possession of a controlled substance with intent to deliver must be vacated because there was

insufficient evidence presented at trial to show that he constructively possessed the heroin that was found in the second floor crawlspace. Defendant also claims that the case should be remanded for re-sentencing because the trial court improperly relied on factors that were inherent in his armed habitual criminal offense when sentencing him to 12 years in prison for that conviction, and that his mittimus must be corrected to reflect \$2,040 worth of credit.

¶ 20 ANALYSIS

¶ 21 *Franks* Hearing

¶ 22 At the outset, we must determine what standard of review to apply to the trial court's denial of a *Franks* hearing. Defendant argues that we should apply a *de novo* standard of review, as the Ninth Circuit Court of Appeals did in *United States v. Hornick*, 864 F. 2d 899, 904 (9th Cir. 1992). The State argues that we should apply the abuse of discretion standard as our Illinois courts have routinely done in the past. We agree that the abuse of discretion standard is the proper standard of review. Illinois courts have consistently applied the abuse of discretion standard when reviewing the trial court's ruling on a *Franks* motion. See, e.g., *People v. Lucente*, 116 Ill. 2d 133, 153 (1987) ("So long as the trial court's judgment is exercised within permissible limits, that judgment will not be disturbed"); *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007) (applying abuse of discretion standard to trial court's decision declining to grant defendant a *Franks* hearing); *People v. Castro*, 190 Ill. App. 3d 227, 236–37 (1989) ("the determination of whether a defendant has made a substantial showing sufficient to trigger an evidentiary hearing is within the trial court's discretion and will not be disturbed on review absent an abuse of discretion"). Thus, we review defendant's request for a *Franks* hearing under the abuse of discretion standard. An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would

agree with it. *People v. Rivera*, 2013 IL 112467, cert. denied, 134 S. Ct. 201 (2013).

¶ 23 The Fourth Amendment of the United State Constitution states that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amends. IV, XIV. The Illinois Constitution similarly states, "[n]o warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." Ill. Const. 1970, art. I, § 6.

¶ 24 A "detached judicial officer" resolves the question of whether probable cause exists justifying the issuance of a warrant. *People v. Tisler*, 103 Ill. 2d 226, 236 (1984). The decision is based on the information contained in sworn statements or affidavits presented to the magistrate. *Id.* at 236. Whether probable cause exists depends on the totality of the circumstances known to the officers and court at the time the warrant is sought. *Id.* Before a trial court orders a *Franks* hearing, a defendant must meet two requirements: (1) the defendant must show that allegations necessary to a finding of probable cause contained in the informant's affidavit are false, and (2) the defendant must allege or make an offer of proof showing that the officer-affiant by presenting the false affidavit acted intentionally or with reckless disregard for the truth. *People v. Adams*, 259 Ill. App. 3d 995, 1002 (1993).

¶ 25 Prior to *Franks*, attacks on warrant affidavits were precluded. *Lucente*, 116 Ill. 2d at 146. In *Franks*, however, the United States Supreme Court recognized a limited right to attack the veracity of a warrant affidavit. The Court held that to overcome the presumption of validity that attaches to a warrant affidavit and obtain a *Franks* hearing, 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*, 438 U.S. at 155–56. Defendant makes a “substantial preliminary showing” when he offers proof that is “somewhere between mere denials on the one hand and proof by a preponderance on the other.” *Lucente*, 116 Ill. 2d at 152. As such, in an effort to make a “substantial preliminary showing” it is necessary for the defendant not only to deny the allegations in the affidavit supporting the search warrant, but also to provide convincing proof that such allegations could not have taken place. *People v. O’Neill*, 135 Ill. App. 3d 1091, 1098 (1985).

¶ 26 Here, defendant argues that he was entitled to a *Franks* hearing because: (1) he made a “substantial preliminary showing” that the complaint contained false information by producing three affidavits stating that no drug transaction took place on May 27, 2009, and (2) he made a showing that the officer acted with reckless disregard for the truth because reliability of the confidential informant was never corroborated. The State, in turn, cites to *People v. Gorosteata*, 374 Ill. App. 3d 203 (2007), and argues that because the complaint at issue contained information from a non-governmental informant who presented himself before the issuing judge, it falls outside the scope of *Franks*, thus precluding the need for any hearing. The State further argues that even if the complaint fell within the scope of *Franks*, defendant failed to make a “substantial preliminary showing” because the three affidavits provided by defendant were from biased and interested parties, making them unreliable, and the affidavits merely asserted that defendant “didn’t do it,” which is insufficient to warrant a *Franks* hearing. For the reasons that follow, we affirm the trial court’s ruling denying defendant’s request for a *Franks* hearing.

¶ 27 Preliminarily, to the extent that *Gorosteata* stands for the proposition that a *Franks* hearing is never warranted if a nongovernmental informant appears before the magistrate, we reject this bright-line rule. Since *Gorosteata* was decided, our courts have strayed away from

adopting such a bright-line rule (see *People v. Caro*, 381 Ill. App. 3d 1056, 1066 (2008) (declining to follow *Gorosteata* because "*Franks* simply contains no language precluding an attack on the warrant affidavit when a nongovernmental informant testifies before the issuing judge")), and warned that adopting such a bright-line rule "defeats the purpose of *Franks* by allowing a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, to stand beyond impeachment as long as the nongovernmental informant testified before the judge issuing the search warrant." *Caro*, 381 Ill. App. 3d at 1066. Accordingly we decline to follow the bright-line rule set forth in *Gorosteata* because the informant's appearance before the judge at the time of the issuance of the warrant does not necessarily preclude the possibility that the affiant-police officer knows that the informant's allegations are false when he is seeking a search warrant. If the defendant has evidence that the affiant-officer acted intentionally or with reckless disregard for the truth by presenting a warrant affidavit with false allegations, he or she should be given the opportunity to present that evidence before the trial court. As such, even though the confidential informant presented himself before the issuing judge, we find that defendant must still make the requisite "substantial preliminary showing" as required by *Franks*, and evaluate that issue below.

¶ 28 Although we disagree with the trial court's initial reason for denying the *Franks* hearing based on the *Gorosteata* decision, we may affirm a trial court's ruling based upon any reason found in the record. *People v. Merz*, 122 Ill. App. 3d 972, 976 (1984). Here, the trial court stated two reasons for denying defendant's request for a *Franks* hearing: (1) the confidential informant appeared before the issuing judge and was available to questioning, and (2) defendant failed to meet his burden and make a "substantial preliminary showing" that the allegations in the warrant affidavit were false. We find that the trial court did not abuse its discretion when it

denied defendant's request for a *Franks* hearing based upon the second stated reason—that defendant failed to make the requisite "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*, 438 U.S. at 155–56. First, defendant's affidavits were from biased and interested parties. Defendant's own affidavit clearly contained testimony of an interested party as he was seeking to challenge his convictions; the affidavit of defendant's friend "Da Da" was interested and biased as "Da Da" was defendant's friend of 20 years and he was the other person implicated in the May 27, 2009 drug transaction; and the affidavit of defendant's brother was biased and interested as he was the defendant's brother and lived in the house where the illegal drugs and weapons were found. See *People v. Phillips*, 265 Ill. App. 3d 438, 445 (1994) ("An affidavit from an interested party tends to be weaker support for a motion to quash the warrant."). Second, the statements in the affidavits were vague and did not preclude the possibility that the drug transaction occurred on May 27, 2009 as described by the confidential informant. Defendant's affidavit confirms that he was home all day on May 27, 2009. Defendant's brother's affidavit vaguely states that he was home all day with his brother,² but doesn't state where they were in the home or if he had a clear view of the door and defendant at all times. And, the affidavit of "Da Da" avers that he was no longer with defendant on May 27, 2009. As such, not only were defendant's affidavits from interested and biased parties, but the information contained within the affidavits did not make it impossible for the confidential informant's allegations to be true. See *Phillips*, 265 Ill. App. 3d at 446 (finding no substantial preliminary showing where the trial court was presented with "affidavits from interested parties

² The information in Randall's affidavit refers to "May 27, 2010," which is not the date at issue here.

*** [that] do not establish that it was impossible for an informant to have access to [the] apartment.").

¶ 29 The facts of this case are analogous to numerous Illinois cases in which the appellate court affirmed the trial court's denial of a *Franks* hearing because the affidavits provided in support of a *Franks* hearing were submitted from interested parties, and the affidavits themselves did not make the confidential informant's testimony impossible and, thus, were akin to "I didn't do it" affidavits. See *Phillips*, 265 Ill. App. 3d at 438; *People v. McCoy*, 295 Ill. App. 3d 988 (1998); *People v. Tovar*, 169 Ill. App. 3d 986 (1988); *People v. Torres*, 200 Ill. App. 3d 253 (1990); see also *Gorosteata*, 374 Ill. App. 3d at 203 (defendant was not entitled to a *Franks* hearing where affidavits were suspect because they were from interested parties and where the affidavits "do not preclude the possibility that defendants executed a narcotics transaction with [the confidential informant] to [the police officer who signed the complaint]"). In *Phillips*, the trial court noted that the affidavits offered by the defendant in support of his request for a *Franks* hearing "were all from interested parties." *Phillips*, 265 Ill. App. 3d at 445. Further, the court noted, "[m]ore importantly, the affidavits do not establish that that the defendant could not have sold cocaine to the informant on the day in question." *Id.* In analogizing its case to *Tovar*, where the appellate court affirmed the trial court's ruling denying a *Franks* hearing, the *Phillips* court emphasized that "the affidavits did not establish that it was impossible for an informant to have access to the apartment [and] the affidavits were akin to 'I didn't do it' affidavits." *Id.* at 446. Similarly, in *McCoy*, the appellate court affirmed the trial court's denial of a *Franks* hearing because "[n]ot only were the affidavits from interested parties, but they did not establish that it was impossible for the informant to have bought heroin from the defendant as described." *McCoy*, 295 Ill. App. 3d at 997. As such, because defendant offered affidavits solely from

biased and interested parties that only provided vague assertions that defendant was home all day and no one came to the house—in essence, "I didn't do it" assertions—we cannot say that the trial court abused its discretion when it denied defendant's request for a *Franks* hearing. See *Phillips*, 265 Ill. App. 3d at 438; *McCoy*, 295 Ill. App. 3d at 988; *Tovar*, 169 Ill. App. 3d at 986; *Torres*, 200 Ill. App. 3d at 253; *Gorosteata*, 374 Ill. App. 3d at 203.

¶ 30 While defendant argues that this case is analogous to *Caro* and *Lucente*, we find those cases distinguishable from the case at bar. Not only did each of those cases involve the appeal of a trial court's allowance of a *Franks* hearing, as opposed to a denial of a *Franks* hearing, which is what we are presented with herein, but, in each of those cases, the trial court was presented with affidavits containing alibi testimony that made it impossible for the confidential informant's testimony to be true. In *Caro*, the trial court was presented with a complaint with information from a confidential informant that did not specify when the drug transaction occurred and, in opposition to the complaint, affidavits from defendant and his two roommates stating that defendant was at work for a majority of the day, and when he returned home, there were no visitors to the home. *Caro*, 381 Ill. App. 3d at 1063 ("As in *Lucente*, defendant's showing was essentially an alibi, and he corroborated that alibi with two affidavits besides his own."). In *Lucente*, the trial court was presented with affidavits stating that defendant was at his sister's house during the time when the informant claimed to have purchased drugs from defendant at his home. *Lucente*, 116 Ill. 2d at 140. In contrast, defendant here offered three affidavits from biased and interested parties that state defendant was home on the date of the alleged drug transaction, but that no such drug transaction occurred. Such testimony is not alibi testimony that would make it impossible for the allegations in the warrant affidavit to be true and, as such, *Caro* and *Lucente* are distinguishable from the case at bar.

¶ 31 As to the second requirement of *Franks*—that the affiant knowingly or recklessly included the false information in the warrant affidavit—defendant argues that the police failed to provide evidence of the confidential informant's reliability and failed to corroborate the information provided by the confidential informant. We disagree. First, when "the informant is under oath, and the judge has had the opportunity to personally observe the demeanor of the informant and assess the informant's credibility, additional evidence relating to informant reliability is not necessary. [Citations]." (Internal quotation marks omitted.) *People v. Smith*, 372 Ill. App. 3d 179, 182 (2007). And second, here, Officer Lipsey showed the confidential informant a photograph of defendant, and the confidential informant identified the person in the photograph as "Chris." Officer Lipsey also drove the confidential informant to 537 N. Hamlin, where the confidential informant identified 537 N. Hamlin as the house where he purchased heroin from "Chris" on May 27, 2009. Thus, in the instant case, the informant's information was corroborated prior to the request for a search warrant, and defendant's failure to provide evidence to suggest otherwise is sufficient on its own to affirm the trial court's decision to deny his request for a *Franks* hearing.

¶ 32 Based upon the above, we conclude that defendant did not overcome the presumption of validity of the search warrant and the trial court correctly denied defendant's request for a *Franks* hearing. Defendant failed to make the "substantial preliminary showing" that the affiant included a false statement in the warrant affidavit "knowingly and intentionally" or "with reckless disregard for the truth."

¶ 33 Class 1 Unlawful Possession of Heroin with Intent to Deliver

¶ 34 Defendant was convicted of a Class 1 felony offense of unlawful possession with intent to deliver heroin based upon a quantity of the drug that had been found in a crawlspace on the

second floor of his home. The heroin was found packaged in small plastic baggies attached to strips of tape and weighed more than one gram but less than 15 grams. Defendant claims that there was insufficient evidence to convict him of this Class 1 felony offense because the State failed to prove that he was in possession of the heroin found on the second floor of 537 N. Hamlin, which defendant maintains was an entirely separate apartment occupied by his brother.³ The State argues that defendant had constructive possession over the heroin in the second floor crawlspace because he lived at 537 N. Hamlin, was found with keys to 537 N. Hamlin, received mail at that address, was present at 537 N. Hamlin at the time the search was conducted, and there was no evidence to show that defendant was restricted in any way from accessing the second floor or the second floor crawlspace. The State also argues that defendant's decision to flee from the house when the police arrived further shows that he was aware of the presence of drugs in the home. For the reasons that follow, we affirm defendant's Class 1 conviction of unlawful possession of heroin with intent to deliver.

¶ 35 When considering the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Young*, 128 Ill. 2d 1, 49 (1989). We will not reverse a conviction on grounds of insufficient evidence unless that evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt. *People v. Furby*, 138 Ill. 2d 434, 455 (1990).

¶ 36 Although defendant does not challenge the finding that he intended to deliver the drugs found on the second floor of 537 N. Hamlin, we briefly address that issue here before moving on

³ Defendant was also convicted of Class 2 possession with intent to deliver heroin weighing less than one gram, which was based on four baggies of heroin that were found on the kitchen floor after Cygnar saw them dropped there by defendant. Defendant does not challenge this Class 2 conviction.

to analyze possession in this case. Although the inference of the intent to deliver is most frequently raised by an amount of drugs in excess of what is reasonable for personal use, other factors may also raise the inference. *People v. Parich*, 256 Ill. App. 3d 247, 250 (1994). The packaging of the controlled substance into separate baggies raises an inference of an intent to deliver. *Id.* Here, the heroin found on the second floor was found separated into small plastic baggies, which is sufficient to raise an inference of defendant's intent to deliver the controlled substance.

¶ 37 To sustain a charge of unlawful possession of a controlled substance, the State must prove knowledge of the possession of the substance and that the narcotics were in the immediate and exclusive control of defendant. *People v. Macias*, 299 Ill. App. 3d 480, 484 (1998). The element of knowledge is rarely susceptible to direct proof and is usually established by circumstantial evidence. *People v. Sanchez*, 375 Ill. App. 3d 299, 301 (2007).

Where narcotics are found on premises that are under defendant's control, it may be inferred that he had the requisite knowledge and possession, absent other facts and circumstances which might create a reasonable doubt as to defendant's guilt. *People v. Denton*, 264 Ill. App. 3d 793, 798 (1994).

¶ 38 Possession may be actual or constructive. *People v. Morrison*, 178 Ill. App. 3d 76, 90 (1988). Constructive possession exists where there is no actual personal present dominion over the contraband, but defendant has an intent and a capability to maintain control and dominion over the contraband. *Macias*, 299 Ill. App. 3d at 484. Drugs found on premises controlled by the defendant give rise to an inference that he knowingly possessed the drugs. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). One way to prove the necessary control over the premises is to show the defendant lived there. *People v. Nettles*, 23 Ill. 2d 306, 308 (1961). Proof of

residency in the form of rent receipts, utility bills and clothing in closets is relevant to show the defendant lived on the premises and therefore controlled them. *Morrison*, 178 Ill. App. 3d at 91; *People v. Lawton*, 253 Ill. App. 3d 144, 147 (1993). As our supreme court observed in *Nettles*, “[h]uman experience teaches that narcotics are rarely, if ever, found unaccountably in a person's living quarters.” *Nettles*, 23 Ill. 2d at 308.

¶ 39 Here, defendant does not contest that he resides at 537 N. Hamlin; rather, he argues that the second floor was a separate apartment and, as such, there was insufficient evidence to show that he had control over the second floor and, consequently, the drugs located on the second floor. However, there was no indication that 537 N. Hamlin was separated into apartments: the mail that was delivered to 537 N. Hamlin did not distinguish separate units, officer Green testified that he did not recall any type of a door separating the first and second floors, and there was no evidence to show that defendant was limited in any way from entering the second floor. The evidence presented at trial only shows that defendant had unfettered access to the second floor of 537 N. Hamlin. The fact that there were separate utility bills for the first and second floors, or separate circuit boxes or gas meters for the floors, does not negate the fact that defendant's access to the second floor was unrestricted, and the mere fact that others had access to the second floor does not defeat a finding of constructive possession. See *People v. Bui*, 381 Ill. App. 3d 397 (2008) (“[I]t is well settled that mere access to an area by others is insufficient to defeat a charge of constructive possession.”); see also *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999); *People v. Hill*, 226 Ill. App. 3d 670, 673 (1992). Thus, because it is undisputed that defendant lived at 537 N. Hamlin and there is no evidence to show that his access to the second floor was limited in any way, we cannot say that no reasonable trier of fact would have found that defendant had control over the drugs found on the second floor and,

therefore, find defendant was guilty of the Class 1 felony offense of unlawful possession with intent to deliver heroin. See *People v. Ortiz*, 196 Ill. 2d 236, 259 ("It is the trier of fact's responsibility to determine the witnesses' credibility and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence; we will not substitute our judgment for that of the trier of fact on these matters."). As a result, we must affirm the trial court's conviction.

¶ 40 We further note that defendant's reliance on *People v. Gore*, 115 Ill. App. 3d 1054 (1983), and *People v. Wolski*, 27 Ill. App. 3d 526 (1975), is misplaced. *Gore* involved a search and seizure that occurred in a car with multiple passengers, and not a search of the defendant's residence, as is the case here. *Gore*, 115 Ill. App. 3d at 1055-56. *Wolski* involved a search and seizure of an apartment shared by brothers where the defendant brother was not present at the time of the search and had not been present in the apartment for several days preceding the search. *Wolski*, 27 Ill. App. 3d at 527. As such, those cases are distinguishable from the case at bar.

¶ 41 Sentencing on Armed Habitual Criminal Conviction

¶ 42 After the jury found defendant guilty of armed habitual criminal, a Class X felony punishable by 6 to 30 years in prison (see 720 ILCS 5/24-1.7 (2009); 730 ILCS 5/5-8-1(3) (2009)), the trial court judge sentenced defendant to 12 years in prison for that conviction. Defendant argues that his case should be remanded for re-sentencing because the trial court judge improperly considered factors that were inherent in his armed habitual criminal conviction when he sentenced defendant to 12 years in prison for that conviction. Defendant further contends that the trial court judge failed to admonish him that he could file a motion to reconsider his sentence as required by Illinois Supreme Court Rule 605(a). See Ill. Sup. Ct. R.

605(a) (eff. 1967). For the reasons that follow, we find that the trial court judge's sentence of 12 years in prison for defendant's armed habitual criminal conviction was proper.

¶ 43 Generally, a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense. *People v. Ferguson*, 132 Ill. 2d 86, 96 (1989). Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing “a harsher sentence than might otherwise have been imposed.” *People v. Gonzalez*, 151 Ill. 2d 79, 83–84 (1992). Such dual use of a single factor is often referred to as a “double enhancement.” *Gonzalez*, 151 Ill. 2d at 85. The prohibition against double enhancements is based on the assumption that, in designating the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense. *People v. Rissley*, 165 Ill. 2d 364, 390 (1995). The double-enhancement rule is one of statutory construction (*id.* at 390), and the standard of review therefore is *de novo*. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996).

¶ 44 A reasoned judgment as to the proper penalty to be imposed must be based upon the particular circumstances of each individual case. *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986). Such a judgment depends upon many *relevant* factors, including the defendant's demeanor, habits, age, mentality, credibility, general moral character, and social environment as well as the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant." (Internal citations and quotation marks omitted) *Saldivar*, 113 Ill. 2d at 268-69. These factors also include the defendant's criminal history, the defendant's potential for reform, and the recognized interest in protecting the public and in providing a deterrent. *People v. Wilson*, 257 Ill. App. 3d 670, 704-05 (1993). The trial

court is in the best position to balance the appropriate factors and tailor a sentence to the needs of the case. *Id.* at 704.

¶ 45 The jury found defendant guilty of armed habitual criminal, which requires a finding that defendant received, sold, possessed or transferred any firearm after being convicted of at least two other offenses as enumerated in the armed habitual criminal statute. See 720 ILCS 5/24-1.7 (West 2008).⁴ Here, the trial court judge made it clear at the sentencing hearing that he considered all the mitigating factors along with the aggravating factors when determining an appropriate sentence for defendant. In aggravation, the trial court judge noted defendant's tendency to engage in criminal activities despite being punished for those criminal activities in the past. This past criminal history, which was recited by the trial court judge at the sentencing hearing, included the two offenses that were used to convict defendant of Class X armed habitual criminal. However, the trial court judge noted that he referenced those convictions for the purpose of demonstrating defendant's longstanding criminal tendency, apparent inability to rehabilitate, and need to protect society. Such considerations in sentencing defendant to 12 years in prison—a sentence that is far closer to the minimum sentence allowed of 6 years than the maximum sentence allowed of 30 years—were proper because they dealt with defendant's likelihood to engage in criminal activity in the future, his inability to rehabilitate and learn from prior punishments, and the judge's concern to protect society. The convictions were not listed merely to show that defendant had previously been convicted of second degree murder and other drug-related offenses. In *People v. Thomas*, 171 Ill. 2d 207 (1996), our supreme court found that "while the *fact* of a defendant's prior convictions determines his eligibility for a Class X

⁴ The parties here stipulated that defendant committed at least two of the crimes enumerated in the armed habitual criminal statute, namely second degree murder and possession with intent to deliver.

sentence, it is the *nature and circumstances* of these prior convictions which, along with other factors in aggravation and mitigation, determine the exact length of that sentence." (Emphasis in original.) *Thomas*, 171 Ill. 2d at 227-28. Accordingly, the *Thomas* court went on to find that the trial court's consideration of the convictions at sentencing was appropriate: "[t]he sentencing court then 'reconsidered' defendant's two prior convictions, as part of defendant's entire criminal history, in performing its constitutionally mandated duty to assess defendant's rehabilitative potential in order to fashion an appropriate sentence. This exercise of judicial discretion was entirely proper and does not constitute an enhancement." *Thomas*, 171 Ill. 2d at 229. As such, the trial court's consideration of defendant's criminal history, which included six prior felony convictions, in this case was not improper in sentencing defendant to 12 years in prison for his Class X armed habitual criminal conviction.

¶ 46 As for defendant's argument regarding the trial court's failure to admonish him of his right to challenge his sentence in a motion to reconsider pursuant to Illinois Supreme Court Rule 605(a), the State concedes that the trial court judge failed to give such admonishments.

However, since we have found that the trial court did not err in sentencing defendant to 12 years in prison for his armed habitual criminal conviction, there was no resulting prejudice as a result of the trial court's failure to properly advise defendant of his right to challenge his sentence. See *People v. Henderson*, 217 Ill. 2d 449, 466 (2005) ("where a defendant is given incomplete Rule 605(a) admonishments regarding the preservation of sentencing issues for appeal, remand is required only where there has been prejudice or a denial of real justice as a result of the inadequate admonishment.").

¶ 47 Correcting Mittimus to reflect \$2,040 in credit against defendant's fines

¶ 48 The State and defendant agree, and the record reflects, that defendant spent 1,052 days in

custody prior to sentencing for which he should be granted a credit of \$5 per day. As such, defendant's mittimus should be corrected to reflect a \$2,040 credit against defendant's fines and fees.

¶ 49 CONCLUSION

¶ 50 For the reasons stated above, we affirm the trial court's denial of defendant's request for a *Franks* hearing, conviction of Class 1 possession of heroin with intent to deliver, and sentence of 12 years on defendant's armed habitual criminal conviction. Defendant's mittimus is corrected to reflect \$2,040 of credit against his fines.

¶ 51 Affirmed.