2015 IL App (1st) 132793-U

SIXTH DIVISION
DATE: December 4, 2015

No. 1-13-2793

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. 11 CR 16101
	)	
DARRICK JONES,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford concurred in the judgment.
Justice Delort specially concurred.

O R D E R

¶ 1 *Held*: The judgment was affirmed over the defendant's claim that the trial court erred in denying his request for a *Franks* hearing; mittimus corrected.

¶ 2 Following a bench trial, the defendant, Darrick Jones, was found guilty of possession of a controlled substance with intent to deliver, then sentenced to 12 years' imprisonment. In this appeal, the defendant contends that the court erred in denying his motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). For the reasons that follow, we order that the mittimus be corrected, and otherwise affirm the judgment of the trial court.

¶ 3 On August 30, 2011, a warrant issued to search the defendant and his home located at 6459 South California Avenue in Chicago, and to seize a semi-automatic handgun. The warrant was issued based upon a complaint signed and sworn to before the issuing judge by Chicago police officer R. Gallas and "J. Doe," a confidential informant.

¶ 4 In the complaint, Officer Gallas averred that he had been a police officer for nine years and was assigned to the Gang Enforcement Division. On August 29, 2011, he had a conversation with Doe, who told him that, within the last seven days, Doe had visited the defendant's home. Doe stated that he stayed in the residence for "recreational purposes," and during the visit, he observed the defendant in possession of a semi-automatic handgun in his waistband. Doe observed the defendant handle the weapon, and, after a period of time, the defendant went into his bedroom and returned without the weapon.

¶ 5 Doe stated that he had experience with guns and knew that the weapon the defendant possessed was real. Doe also stated that he had been to the defendant's home on more than three occasions and knew that the defendant resided there. Officer Gallas further averred that he showed Doe a system photo, which Doe positively identified as depicting the defendant, the person in possession of the handgun. Officer Gallas then accompanied Doe to the address listed in the complaint and observed the number "6459" affixed above the door on the residence Doe identified. Officer Gallas also averred that the defendant is a convicted felon, that he was most recently convicted of possession of a controlled substance, and used the address of 6459 South California Avenue as his address of residence upon arrest for that offense. Finally, Officer Gallas averred that Doe was present before the issuing judge and available for questioning, and that Doe's criminal history, if any, was made available to the judge.

¶ 6 A team of officers from the Chicago Police Department and the Federal Bureau of Investigation executed the search warrant at the defendant's home on August 31, 2011. They entered the residence through the front door where the officers saw the defendant standing in the entryway of the bedroom. The officers recovered two bundles of United States currency totaling approximately $2,000, the defendant's driver's license, narcotics packing material, and a razor blade with a white powdery substance on it. The officers also recovered a Ziploc bag and a knotted, clear plastic bag, both of which contained suspect cocaine. The defendant was arrested, read his *Miranda* warnings, and transported to the police station where he spoke to an FBI agent while Chicago police officers were present. The defendant told the agent that he regularly purchased cocaine to sell and provided the identity of a shooter in an unrelated, unsolved murder case. He was subsequently charged with possession of a controlled substance with intent to deliver.

¶ 7 Prior to trial, the defendant filed a "Motion To Suppress Evidence Pursuant To An Invalid Search Warrant," which he later characterized as a motion for a *Franks* hearing in his reply to the State's response. In that motion, he contended that Officer Gallas' affidavit contained "deliberate and material" misrepresentations or omissions of fact in "reckless disregard of the truth." He further alleged that the affidavit did not explain how Officer Gallas initially met Doe, whether he was a volunteer informant, or was seized by police and provided information while in custody, and whether Doe was sober, employed, or addicted to drugs.

¶ 8 In support of his motion, the defendant submitted a document titled, "Affidavit," which was signed, but not notarized. In that statement, he contended that, on August 31, 2011, and for two weeks before that, he did not have any visitors to his home. He also stated that he only has visitors at his home on rare occasions, such as for major sporting events, and that those visitors

only enter or leave the home through the back, basement door, and never through the front door on the main level. He further stated that he only entertains visitors in the basement, which has no bedrooms, but has bathrooms and a storage area. He asserted that it is physically impossible to see any of the bedrooms on the upper levels of the house from the basement, and that he owns a dog who barks loudly if anyone who is not a member of the immediate family attempts to go up the stairs to the main level of his home. Finally, he stated that he never possessed any firearms in his home because he has three minor children, and he never walked around his house displaying a firearm.

¶ 9 The defendant also submitted "affidavits" from his mother, his sister, two of his friends, and his live-in girlfriend, who is also the mother of his three children. Like the defendant's statement, these documents were labeled "Affidavit" and were signed, but not notarized. The defendant's girlfriend corroborated the assertions that the defendant made in his statement regarding the frequency of visitors to their home and the layout of the premises. The defendant's mother, sister, and his two friends each stated that they always entered the defendant's home through the back, basement door, and never went to any other level of the home. They also stated that there are no bedrooms on the basement level and that a dog barks at anyone who attempts to ascend the stairs to the main level of the home.

¶ 10 In reply, the State argued that *Franks* was inapplicable because Doe had been brought before the issuing judge, and that judge had the opportunity to assess Doe's credibility, demeanor, and reliability. The State noted that Doe's credibility had been corroborated by his identification of the defendant's address and photograph. The State also asserted that the "affidavits" attached to the defendant's motion were "general denials" from interested parties, which were insufficient to make the preliminary showing required for a *Franks* hearing.

¶ 11 In denying the defendant's motion, the trial court observed that Doe appeared before the judge and swore, under oath, to the contents of the complaint for the search warrant, which the issuing judge found sufficient for probable cause. The court stated that it could not think "what else [the police could] have done in this case." The court also acknowledged that the officers found narcotics while they were looking for a gun, but found "that doesn't matter anyway."

¶ 12 As to the "affidavits," the trial court recognized that they were not notarized, but assuming they were, the court found that they were merely denials, which were insufficient to warrant a *Franks* hearing, especially when coming from family and friends. The court also noted that the officers acted in good faith in reliance on the warrant and followed the proper procedures for obtaining and executing the warrant. The court, therefore, denied the motion to suppress evidence, and the request for a *Franks* hearing. At the ensuing trial, the court found the defendant guilty of possession of a controlled substance with intent to deliver; then, sentenced him to 12 years' imprisonment. This appeal followed.

¶ 13 On appeal, the defendant contends that the trial court erred in denying his motion for a *Franks* hearing. Although the defendant argues that we should review this claim under the "mixed standard of review" of *Ornelas v. United States*, 517 U.S. 690 (1996), citing federal cases from the Second and Third Circuits, our supreme court has found that there is a presumption of validity with respect to an affidavit supporting a search warrant, and, "[s]o long as the trial court's judgment is exercised within permissible limits, that judgment will not be disturbed." *People v. Lucente*, 116 Ill. 2d 133, 153 (1987). Thus, when a defendant challenges a trial court's denial of a *Franks* hearing, the standard of review is whether the court abused its discretion in finding that the defendant was not entitled to a hearing. *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007). An abuse of discretion occurs where the court's ruling is " 'arbitrary, fanciful or

unreasonable to the degree that no reasonable person would agree with it.' " *People v. Voss*, 2014 IL App (1st) 122014, ¶ 17, quoting *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 14 In order to obtain a *Franks* hearing, a defendant is required to make a substantial preliminary showing that the affiant made a false statement knowingly and intentionally, or with reckless disregard for the truth 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; *People v. Creal*, 391 Ill. App. 3d 937, 943 (2009). A defendant's attack on the affidavit "must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Franks*, 438 U.S. at 171.

¶ 15 The defendant first contends that he made the required substantial preliminary showing through his own "affidavit" and the other "affidavits" attached to his motion, which showed that Doe could not have seen the defendant enter the bedroom with a handgun because he only entertains guests in the basement, where there are no bedrooms, and no one is allowed upstairs. He asserts that these statements render the informant's account "impossible."

¶ 16 We initially note that the evidence in support of this assertion came from family members and close friends, which this court has previously noted are inherently suspect. *Gorosteata*, 374 Ill. App. 3d at 212. In addition, the statements, although labeled as "affidavits," were not notarized, and, therefore, are not valid. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003), citing *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 496 (2002). We observe that *Franks* requires a defendant to submit "[a]ffidavits or sworn or otherwise reliable statements of witnesses" (*Franks*, 438 U.S. at 171), and a writing that has not been sworn before an authorized person does not constitute an affidavit (*People v. Tlatenchi*, 391 Ill. App. 3d 705, 714 (2009)).

¶ 17 The defendant argues that even if we do not consider the statements to be affidavits, they are nonetheless sufficient to meet the *Franks* standard because they are "otherwise reliable." He

asserts, without citation to authority, that the statements were not "risk-free" because the parties risked a conviction for obstruction of justice. Notwithstanding, we find, for the reasons to follow, that their contents were insufficient to warrant a *Franks* hearing.

¶ 18 In *Voss*, 2014 IL App (1st) 122014, ¶ 22, this court identified ten factors that a court may consider in determining whether to grant or deny a defendant's motion for a *Franks* hearing, including whether the defendant's affidavits were from interested or disinterested third parties, whether he has any objective evidence to corroborate the affidavits, and whether the matters asserted by him are in the nature of an alibi or a general denial that he engaged in conduct giving rise to probable cause. In the instant case, as the trial court noted, the defendant's "affidavits" amount to no more than "general denials" which are insufficient to warrant a *Franks* hearing. *Id*. at ¶ 26, citing *Lucente*, 116 Ill. 2d at 153-54. Despite the defendant's contentions to the contrary, the "affidavits" do not provide an alibi; rather, they attempt to deny the information in the complaint by stating that, aside from immediate family, no one goes upstairs in the defendant's house, that no one visited the house in the two weeks preceding August 31, 2011, and that the defendant has never carried a gun.

¶ 19 The defendant also failed to include any objective corroborating evidence. Although this is not a prerequisite to satisfying the substantial preliminary showing standard required by *Franks*, it would have bolstered his ability to make that showing. *Voss*, 2014 IL App (1st) 122014, ¶ 24. Thus, as presented, the statements provided by the defendant and his family and close friends do not show that Officer Gallas necessarily or deliberately included false statements in his affidavit in support of the warrant, or included averments with reckless disregard for the truth. *Gorosteata*, 374 Ill. App. 3d at 213. Moreover, even if the "affidavits" were taken as true,

they do not show that Doe's allegations were so contradictory or outrageous that Officer Gallas would have engaged in misconduct merely by believing him. *Id*.

¶ 20 The defendant, nonetheless, contends that Officer Gallas failed to disclose anything suggesting that he found Doe reliable. The record shows, however, that Doe was present in court at the time the judge issued the warrant, and Officer Gallas averred that Doe was available for questioning at that time. Although not dispositive, Doe's appearance before the issuing judge is a factor in determining whether to grant a *Franks* hearing. *Voss*, 2014 IL App (1st) 122014, ¶ 20; *People v. Caro*, 381 Ill. App. 3d 1056, 1065 (2008). The defendant points out that there is no indication that the judge questioned Doe at the probable cause hearing, and argues that the lack of questioning gives this factor only "slight weight." Additionally, he argues that Doe's appearance before the issuing judge is only one factor used in the analysis of his reliability. We note, however, that an informant's reliability may be judged based upon whether the warrant affiant took steps to corroborate the informant's information. *Voss*, 2014 IL App (1st) 122014, ¶ 22. In this case, Officer Gallas showed Doe a photograph of the defendant, and Doe positively identified him as the person possessing the firearm. Additionally, Officer Gallas went to the subject address with Doe, and Doe confirmed that it was the defendant's home.

¶ 21 Although corroborating innocent and static details alone, such as an address, do not establish an informant's reliability (*People v. Nitz*, 371 Ill. App. 3d 747, 752 (2007)), given the narrative presented by Doe, and the corroboration of that information, the facts presented by the defendant in the "affidavits" do not show that Doe's allegations were so contradictory or outrageous that Officer Gallas would have engaged in misconduct merely by believing him (*Voss*, 2014 IL App (1st) 122014, ¶ 28). Doe's information was corroborated prior to the request for a search warrant, and the defendant has failed to show that Doe was somehow unreliable.

¶ 22 Although there is no record of Officer Gallas having any prior experience with Doe that would enhance his reliability, there is likewise no record or any other indication that Officer Gallas knew the information provided by Doe was false or that he acted in reckless disregard for the truth. *Voss*, 2014 IL App (1st) 122014, ¶ 28. The majority of the *Voss* factors thus weigh against finding that the defendant made a substantial preliminary showing that the statements set forth in the complaint for the warrant were false or made with reckless disregard for the truth, and, affording the trial court's decision significant deference under the abuse of discretion standard, we cannot say that the court abused its discretion when it denied the defendant's motion for a *Franks* hearing. *Id.* ¶ 29.

¶ 23 In reaching this conclusion, we find *Caro* and *Lucente*, relied on by the defendant, 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, as is the case here, 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* and *Lucente*, the defendants provided alibis, supported by affidavits, for their whereabouts at a different location during the supposed drug transactions. *Caro*, 381 Ill. App. 3d at 1063; *Lucente*, 116 Ill. 2d at 153-54. In contrast, the defendant here offered "affidavits" from biased and interested parties that cannot sufficiently account for his whereabouts during the week preceding August 29, 2011. Although both the defendant and his live-in girlfriend stated that no one was at the house for the two weeks preceding August 31, 2011, such testimony is not alibi testimony that would make it impossible for the allegations in the warrant affidavit to be true. As for the defendant's reliance on *United States v. Glover*, 755 F. 3d 811 (7th Cir. 2014), we note

that state courts are not bound by the decisions of the federal district courts or the circuit courts of appeal. *Hinterlong v. Baldwin*, 308 Ill. App. 3d 441, 452 (1999).

¶ 24 The defendant next contends that the trial court misapplied *Franks* law. He maintains that the good faith of the officers in reliance on the warrant is irrelevant, and that it is relevant to Doe's credibility that no gun was found. These contentions, however, do not make a substantial preliminary showing that Officer Gallas included a false statement knowingly and intentionally, or with reckless disregard for the truth, in the warrant affidavit. *Creal*, 391 Ill. App. 3d at 943. In dismissing the defendant's motion, the trial court mentioned the good faith of the officers in procuring and executing the warrant and the fact that no gun was found; however, the record also shows that the court considered proper *Franks* factors in determining whether to grant or deny the defendant's motion for a hearing. The court noted that Doe had appeared before the issuing judge and swore to the contents contained in the warrant complaint under oath, and found that the defendant's "affidavits" contained no more than general denials from interested parties, which are insufficient. *Voss*, 2014 IL App (1st) 122014, ¶ 22. We thus find that the court exercised its discretion within permissible limits, and its references to the officers' good faith do not require reversal of its determination. *Lucente*, 116 Ill. 2d at 153.

¶ 25 The defendant finally contends that his mittimus should be corrected to reflect that he was convicted of possession of a controlled substance with intent to deliver, not manufacture or delivery of a controlled substance. We agree that the defendant is entitled to a corrected mittimus reflecting his proper conviction for possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2012)) and order the clerk of the circuit court of Cook County to correct it in that manner (*People v. Harper*, 387 Ill. App. 3d 240, 244 (2008)). Although the defendant contends that we should remand the matter to the trial court with

instructions to issue a corrected mittimus, remand is unnecessary where this court has the authority to order the clerk of the circuit court to make necessary corrections to the mittimus. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 26 Accordingly, we order that the mittimus be corrected in accordance with this order, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 27 Affirmed; mittimus corrected.

¶ 28 JUSTICE DELORT, specially concurring:

¶ 29 I concur completely with the majority's order but write separately to emphasize one particular point. The defendant contends that our decision in *People v. Chambers*, 2014 IL App (1st) 120147, *appeal pending*, No. 117911 (Sept. 24, 2014), supports his position. However, his reliance on that precedent is misplaced. In *Chambers*, we held that the defendant had made a sufficient showing to require a *Franks* hearing. There, we declined to follow the "bright-line rule" of *Gorosteata* that the appearance of a confidential information before the warrant-issuing judge bars defendants from obtaining a *Franks* hearing. We instead held:

> "An informant's appearance before a 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, and, 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 should be given the opportunity to present that evidence before the trial court." *Id.* ¶ 17.

There are several crucial distinctions between the facts of *Chambers* and this case. In *Chambers*, unlike here, the defendant's affidavits made a substantial showing that the police officer had a

questionable history regarding search-and-seizure violations and that the officer actually knew his and the informant's assertions regarding the defendant's criminal activity were manifestly untrue. Also, the defendant's affidavits in *Chambers* were properly sworn to under oath thereby subjecting the affiant to the penalties of perjury. *Id*. ¶ 21. As noted above, the "affidavits" here are merely unsworn statements. Finally, the defendant in *Chambers* submitted an additional affidavit from an individual claiming to have been the confidential informant, recanting the assertions he made in support of the search warrant, and stating that he had lied to the warrant-issuing judge under threat of bodily harm from the allegedly lying police officer. *Id.* ¶ 11. Those unusual facts distinguish this case from *Chambers* and require us to affirm the decision below.