2014 IL App (1st) 121302-U

FOURTH DIVISION
September 4, 2014

No. 1-12-1302

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 CR 12097
	)	
AARON SUTTON,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's convictions of possession of a controlled substance with intent to deliver and unlawful use of a weapon by a felon over his contentions that the trial court abused its discretion in denying his request for a *Franks* hearing, and that the statute creating the offense of unlawful use of a weapon by a felon violates the second amendment. We also vacate defendant's $200 DNA fee where he was assessed the fee upon a prior conviction.

¶ 2 Following a bench trial, defendant Aaron Sutton was convicted of possession of more than 400 but less than 900 grams of a controlled substance (cocaine) with intent to deliver and two counts of unlawful use of a weapon by a felon (UUWF). He was sentenced to 15 years'

imprisonment on the possession of a controlled substance with intent to deliver conviction, and 7 years for each UUWF conviction, all terms to be served concurrently. On appeal, defendant contends that the trial court erred in denying his motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), that his UUWF convictions violated the second amendment, and that the court improperly imposed a $200 DNA fee against him. We affirm as modified.

¶ 3 On June 5, 2008, a warrant issued to search defendant and the premises located at 1310 West 73rd Street in Chicago, and to seize one blue steel handgun, any and all documents showing residency, any records showing any purchases of firearms, and any other illegal contraband. The warrant was issued on a complaint signed and sworn to before the issuing judge by Officer Paul Kirner and "John Doe," a confidential informant.

¶ 4 In the complaint, Officer Kirner averred that within the week prior to June 5, 2008, the informant, who was present in court, observed defendant holding a blue steel handgun in his residence at 1310 West 73rd Street. Kirner showed the informant a photo of defendant, and the informant positively identified defendant as the individual possessing the aforementioned firearm. Kirner drove by the subject address with the informant, who pointed out defendant's residence and identified defendant as the black man sitting on the front porch. The complaint further stated that defendant had a previous conviction for UUWF and that he used the address of 1310 West 73rd Street during previous arrests. The issuing judge signed the complaint for the search warrant.

¶ 5 A team of officers executed the search warrant at 1310 West 73rd Street at about 10:30 p.m. on June 5, 2008. In the ensuing search, officers recovered cocaine, a gun, ammunition, a

scale, $27,000 in cash, and four pieces of mail bearing defendant's name and the subject address. These materials provided the basis for the multiple-count indictment against defendant.

¶ 6 Before trial, defendant filed a "motion for a hearing pursuant to *Franks v. Delaware*," to challenge the allegations in the warrant complaint in an effort to quash the search warrant and suppress the evidence obtained during the search. In the motion, defendant claimed that he did not live at the subject address, nor was he there during the week preceding the execution of the warrant when the informant said he saw defendant with the firearm. Further, defendant stated that the informant was not proven reliable by prior contact with the officers or through independent investigation, and that the affiant knowingly, intentionally, or with reckless disregard for the truth, included false statements in the warrant that were necessary to the finding of probable cause. In particular, defendant points out that the informant did not specify when he was allegedly with defendant at the subject residence, other than simply stating that he saw defendant with the gun sometime "within the last week." Moreover, no specific date was provided for when the informant and the officer drove past the residence. In support of his motion, defendant attached his own affidavit, as well as affidavits from his girlfriend (Erica Early), his girlfriend's sister (Kristal Smith), and Smith's boyfriend (William Pugh).

¶ 7 Defendant averred in his affidavit that he lived with Early at 1231 West 107th Place in June of 2008, was never at 1310 West 73rd Street during the week preceding June 5, and never showed a gun to anyone in the 73rd Street residence. Defendant further averred that he spent a significant amount of time with Early, Smith, and Pugh, during the week leading up to the search

running errands to prepare for Smith and Pugh's prom, as well as going to an amusement park on May 31, 2008. Early, Smith, and Pugh's affidavits essentially attested to the same facts.

¶ 8 The State filed a response asserting that *Franks* did not apply because the informant appeared before the magistrate, the complaint demonstrated probable cause, and the defense failed to make a substantial preliminary showing that the warrant contained false statements which were made knowingly and intentionally, or with reckless disregard for the truth.

¶ 9 The trial court denied defendant's *Franks* motion, finding that the information presented in the affidavits attached to the motion did not show that the informant provided inaccurate information, or that those seeking the warrant made false statements or disregarded the truth. The cause then proceeded to trial.

¶ 10 Following a bench trial, the court found defendant guilty of possession of a controlled substance with intent to deliver and two counts of UUWF for the separately recovered firearm and ammunition. At sentencing, the court imposed concurrent terms of 15 years for the possession with intent to deliver conviction, and 7 years for each of the UUWF convictions. The court also imposed on defendant fines and fees, including a $200 DNA fee.

¶ 11 On appeal, defendant contends that the trial court erred in denying his motion for a *Franks* hearing. He specifically contends that his motion should have been granted where it was supported by sworn affidavits attesting that he did not live at the searched residence, and was not present in that residence for the week leading up to the search. Defendant maintains that the affidavits attached to his motion undermined the credibility and reliability of the confidential informant.

¶ 12 Whether to grant or deny a *Franks* hearing is within the discretion of the trial court. *People v. Caro*, 381 Ill. App. 3d 1056, 1062 (2008) (granted the hearing); *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007) (denied the hearing).

¶ 13 The issuance of a search warrant is premised on a finding of "probable cause, supported by affidavits particularly describing the place to be searched and the persons or things to be seized." Ill. Const. 1970, art I, sec 6. The magistrate decides this issue based on the information contained in the complaint for a search warrant as provided by the affiants. *People v. Tisler*, 103 Ill. 2d 226, 236 (1984). The fundamental purpose of a *Franks* hearing is to challenge the veracity of the statements made by the affiants in the warrant complaint. *People v. Economy*, 259 Ill. App. 3d 504, 509 (1994), citing *People v. Lucente*, 116 Ill. 2d 133, 153 (1987). In the present case, the warrant complaint was attested to by the affiant police officer (Paul Kirner) and by the affiant nongovernmental informant (John Doe). Both affiants personally appeared before the magistrate to obtain a search warrant.

¶ 14 As an initial matter, the State contends that this case falls outside the scope of *Franks* because the affiant informant personally appeared before the issuing judge to testify. The State relies on this court's decision in *Gorosteata* which held that the case was removed from the ambit of *Franks* where the affiant informant personally testified before the magistrate, reasoning that the magistrate had the opportunity to determine the reliability of the informant and the basis of the informant's knowledge. *Gorosteata*, 374 Ill. App. 3d at 213-15.

¶ 15 In contrast, defendant directs attention to our subsequent opinion in *Caro*, which disagreed with *Gorosteata* and held that an informant's testimony was but one factor for the trial

court to consider in determining whether to grant a *Franks* hearing. *Caro*, 381 Ill. App. 3d at 1065.

¶ 16 More recently in May 2014, we rejected the rigid *Gorosteata* holding in *People v. Chambers*, 2014 IL App (1st) 120147, stating that "[t]o the extent that *Gorosteata* stands for the proposition that a *Franks* hearing is never warranted if an informant appears before the magistrate, we reject such a holding." *Id*. ¶ 16. Instead, the *Chambers* court, noting that since *Gorosteata* our courts have declined to follow this bright-line rule, agreed with the reasoning of *Caro*, which warned that the rule in *Gorosteata* "'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.'" *Id.* ¶ 16, quoting *Caro*, 381 Ill. App. 3d at 1066. In accordance with *Chambers*, we decline to follow the bright line rule set forth in *Gorosteata*. As such, even though the informant in this case personally appeared before the issuing judge, we will consider whether a *Franks* hearing should have been granted.

¶ 17 To warrant 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 was 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 makes a substantial preliminary showing where he offers proof that is "somewhere between mere denials on the one hand and proof by preponderance on the other." *Lucente*, 116 Ill. 2d at 151-52.

¶ 18 Defendant asserts that he made that showing by his own affidavit and the other affidavits attached to his motion averring that he did not live at the subject address, and was not there during the week preceding the search when the informant said he saw defendant handle a gun. Furthermore, defendant argues that the informant was not proven to be reliable by prior contact with police, or an independent investigation. We disagree.

¶ 19 We find that the trial court did not abuse its discretion when it denied defendant's request for a *Franks* hearing. 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 suppress the contraband recovered in the search, and the affidavits of his alleged live-in girlfriend, his girlfriend's sister, and the boyfriend of his girlfriend's sister were all biased and interested as they were defendant's friends and girlfriend. See *People v. Phillips*, 265 Ill. App. 3d 438, 445 (1995) ("An affidavit from an interested party tends to be weaker support for a motion to quash the warrant."). Second, the statements in defendant's affidavits were vague and did not preclude the possibility that the informant saw defendant with a gun at 1310 West 73rd Street within the week prior to June 5, 2008. Even defendant's alleged live-in girlfriend attested that "I cannot say that we spent every waking moment together." 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 informant's allegations to be true.

¶ 20 Furthermore, in its ruling, the trial court found defendant had not met his burden for a *Franks* hearing even accepting the affidavits as fact:

> "Even taking those affidavits as fact and not trying to dismiss them because of the potential for bias or prejudice that the various parties might have towards the defendant, they still do not preclude the accuracy of the information that John Doe provided not only to the affiant, but more importantly to the judge that approved the search warrant. *** [T]here has not been a showing by the defendant that there was *** a knowing or intentional false statement provided by those seeking the warrant. And there has been no real showing, even taking those affidavits into consideration, that there was a reckless disregard for the truth."

We thus cannot say that the trial court abused its discretion when it denied defendant's request for a *Franks* hearing. See *People v. McCoy*, 295 Ill. App. 3d 988, 997 (1998) (affirming 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."); *Phillips*, 265 Ill. App. 3d at 445 (finding the defendant was not entitled to a *Franks* hearing where the affidavits were from interested parties and did not establish that the defendant could not have sold cocaine to the informant on the day in question).

¶ 21 In reaching this conclusion, we find *Caro* and *Lucente*, relied on by 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, defendant here offered affidavits from biased and interested parties that cannot sufficiently account for defendant's whereabouts during the week preceding June 5, 2008. Such testimony is not alibi testimony that would make it impossible for the allegations in the warrant affidavit to be true. We further find *People v. Pearson*, 271 Ill. App. 3d 640 (1995), also relied on by defendant, distinguishable from the case at bar. In *Pearson*, this court held that the trial court erred in summarily dismissing the defendant's request for a *Franks* hearing because, although the corroborating affidavits attached to his *Franks* motion were all made by interested parties, "they cumulatively provide[d] an apparently airtight alibi." *Id*. at 644. Here, the interested parties failed to provide an airtight alibi for defendant.

¶ 22 We further find unpersuasive defendant's argument that the police failed to provide evidence of the informant's reliability and failed to corroborate the information provided by him. This court has previously held that "the informant's presence and ability to be questioned were 'themselves indicia of reliability because they eliminate some of the ambiguity that accompanies an unknown hearsay declarant.'" *People v. Smith*, 372 Ill. App. 3d 179, 183-84 (2007), quoting *United States v. Johnson*, 289 F.3d 1034, 1040 (7th Cir. 2002). Defendant points out, however, that there is no indication that the judge questioned the confidential informant at the probable cause hearing, and, as stated in *Smith*, 372 Ill. App. 3d at 184, "the informant's appearance before the magistrate [is] only one factor" in analyzing his reliability. Defendant fails to

acknowledge, however, that the *Smith* court determined that the reliability established by the informant's presence was not destroyed by "the lack of an on-the-record colloquy between the magistrate and the informant." *Id*. Furthermore, the informant's presence before the judge was not the only factor showing the informant was reliable. As defendant admits in his brief on appeal, Officer Kirner showed the informant a photo of defendant, and the informant positively identified him as the person possessing the firearm. Additionally, Kirner went to the subject address with the informant, who pointed out defendant's residence, as well as defendant himself. Therefore, 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. Compare *Smith*, 372 Ill. App. 3d at 184 (the informant's very presence before the issuing judge supports his reliability and the issuance of a search warrant), *with Chambers*, 2014 IL App (1st) 120147 ¶ 21 (a *Franks* hearing should be held where the purported affiant informant provided a subsequent affidavit averring that, in the warrant complaint, he had made false allegations against the defendant because he was threatened by a police officer).

¶ 23 Next, defendant contends that his conviction for UUWF must be vacated because the statute creating the offense (720 ILCS 5/24-1.1 (West 2008)), violates the constitutional right to bear arms for self-defense as it is applied to him and others similarly situated.

¶ 24 After defendant filed his opening brief, our supreme court in *People v. Aguilar*, 2013 IL 112116, ¶¶ 21-22, held that the second amendment protects a person's right to keep and bear arms for self-defense, and, thus, the aggravated unlawful use of weapons statute was

unconstitutional on its face where it banned the possession and use of a firearm for self-defense outside the home. In so holding, however, the supreme court expressly recognized that laws can prohibit felons from possessing firearms. See *Id.* ¶ 26, quoting *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) ("'nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons'"). Therefore, where the State has a valid interest in preventing felons from possessing firearms, defendant's arguments to the contrary fail, and the UUWF statute is valid. See *People v. Neely*, 2013 IL App (1st) 120043, ¶ 12 (following *Aguilar*).

¶ 25 Defendant finally contends, and the State concedes, that the $200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)), should be vacated. We agree that the $200 DNA analysis fee cannot be imposed because defendant was assessed the fee upon a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). We thus vacate that fee.

¶ 26 For the foregoing reasons, we vacate the $200 DNA fee, and affirm his convictions in all other respects.

¶ 27 Affirmed as modified.