2013 IL App (3d) 110718-U

Order filed January 4, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellant,	)	
	)	Appeal No. 3-11-0718
v.	)	Circuit No. 07-CF-2163
	)	
TIMOTHY M. SMITH,	)	Honorable
	)	Amy Bertani-Tomczak,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in quashing the warrant and suppressing the evidence where officer's search warrant affidavit contained statements that were included with reckless disregard for the truth and that were necessary for a finding of probable cause.

¶ 2 Defendant Timothy M. Smith was charged with unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2006)), armed habitual criminal (720 ILCS 5/24-1.7 (West 2006)) and unlawful possession of a weapon by a felon

(720 ILCS 5/24-1.1(a) (West 2006)). Following a hearing, the trial court granted defendant's motion to quash the search warrant and suppress evidence pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The State appeals, and we affirm.

¶ 3 On October 19, 2007, Will County Deputy Joel Mantia filed a complaint for a search warrant, naming defendant and describing a residence located at 409 Sehring, Joliet, Illinois. The complaint listed various items, including drug paraphernalia and other evidence of possession and delivery of a controlled substance.

¶ 4 In the complaint, Deputy Mantia stated that he had been a police officer for more than 10 years and had extensive training in narcotics investigation. He further stated that the information contained in the complaint was based on his own observations, as well as information provided to him by a confidential informant, referred to as Pat Doe. The complaint indicated that Mantia had met with the confidential informant "within the last (7) seven days" and stated that the informant had "prior knowledge/experience with cocaine and can recognize cocaine by its texture, color, odor and packaging." The complaint further provided that, within the last five days, the confidential informant had been inside 409 Sehring and had seen three to four baggies of crack cocaine in the living room. The confidential informant told Mantia that defendant was the one dealing cocaine at the house. He described defendant's physical build to Mantia and stated that he had previously seen defendant dealing cocaine in and outside the residence at 409 Sehring. In addition, the complaint stated that Mantia showed the informant a photograph of defendant and that the confidential informant identified defendant as the person who was selling cocaine at the residence. Mantia averred that he ran defendant's name in the Will County correctional

institution database and the Secretary of State's drivers license database and confirmed that defendant lived at 409 Sehring.

¶ 5 The trial court issued the search warrant on October 19, 2007. Officers executed the warrant that same day and recovered several items, including three plastic baggies containing a white powdery substance, a .357 magnum handgun, a bullet-proof vest, 23.5 grams of a green leafy substance, a marijuana grinder, $1,032 in United States currency, and mail addressed to defendant. Defendant was arrested and charged with three felony offenses.

¶ 6 On November 8, 2007, defendant filed a motion to quash the search warrant, quash the arrest and suppress the evidence. Defendant requested a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), alleging that "the affiant engaged in intentional perjury or acted with reckless disregard for the truth." Defendant also claimed that the allegation that he was at the location listed in the warrant within five days prior to the search was a fabrication.

¶ 7 The State filed a motion to strike, arguing that defendant failed to make a preliminary showing. In response, defendant filed an amended motion to quash. In the amended motion, defendant asserted that Deputy Mantia did not independently corroborate the informant's allegations and that Mantia had knowledge that the allegations in the complaint were false or made with reckless disregard for the truth. The amended motion included the following attachments: (1) an affidavit signed by defendant denying the allegations in the complaint for search warrant; (2) a dated vehicle rental record showing that defendant returned a rental vehicle in Joliet on October 19, 2007; (3) a copy of a credit card bill indicating a U-Haul

payment made on October 12, 2007, in Glendale, Arizona; and (4) a copy of a bill for vehicle service in Phoenix, Arizona, dated October 14, 2007. Defendant also included affidavits from his brother and his mother, who lived with defendant, stating that he was not present at the residence in question during the five-day period preceding October 19, 2007, and that drugs were not sold, packaged or stored at the residence. Three additional affidavits from other family members were attached in support of the motion. One, submitted by defendant's cousin Derrius Sims, stated that he was in a vehicle with defendant traveling back to Illinois and was stopped by an Oklahoma police officer on October 17, 2007.

¶ 8 On March 26, 2009, the trial court held a first stage *Franks* hearing. At the hearing, defendant argued that the affidavits showed that he was out of the state during the five-day period provided in the complaint. Defendant noted that the search warrant had been issued on October 19, that officer affiant specified that the confidential informant had been in the house within the past five days, and that he had established, through affidavits and other documents, that he did not return to his residence until October 19. The trial court found that defendant had made a substantial preliminary showing and therefore was entitled to an evidentiary hearing.

¶ 9 At the evidentiary hearing, Deputy Mantia testified as to the contents of the complaint. Oklahoma Trooper Joseph Kimmons testified that he stopped defendant's vehicle in Oklahoma for a minor traffic offense on October 17, 2007, at 2:00 a.m. Defendant was driving, and he had two passengers in the car. Defendant's family members also testified on defendant's behalf. All of them testified that defendant was not at his residence during the five-day period provided in the search warrant complaint.

¶ 10 Following arguments, the trial court stated:

> "Well, the officer is not necessarily sure when he wrote the search warrant, but it was somewhere either the 19th or the 18th, maybe even the 17th. I am not sure. We have you were [sic] client's documented last whereabouts in Arizona on the 14th and on the 16th at 2:00 o'clock in the morning in Oklahoma. I am denying the motion."

The trial court then found that defendant failed to meet his burden to show that there had been reckless disregard for the truth or that the officer deliberately lied in obtaining the search warrant and denied defendant's motion to quash.

¶ 11 Defendant filed a motion to reconsider the denial of his motion to quash. At the hearing, defense counsel argued that Officer Mantia should have done more to verify the information provided by the confidential informant. Counsel cited *People v. Caro*, 381 Ill. App. 3d 1056 (2008), in support of his position and asked the court to reverse its earlier ruling.

¶ 12 At the conclusion of the reconsideration hearing, the trial court noted that evidence regarding defendant's location between October 14 and October 19, 2007, had not been impeached. The court stated that Deputy Mantia should have done more to corroborate the statements provided by the informant and granted the motion to reconsider. The court entered an order granting defendant's motion to quash the search warrant and suppress evidence.

¶ 13 I

¶ 14 The State argues that defendant failed to make the "substantial preliminary showing" necessary to obtain a *Franks* hearing.

¶ 15 Prior to Franks, attacks on search warrant affidavits were absolutely precluded under Illinois law. *People v. Bak*, 45 Ill. 2d 140 (1970). In *Franks*, the United State Supreme Court recognized a limited right to attack the veracity of a warrant affidavit. To overcome the presumption of validity that attaches to an 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. The 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." *People v. Lucente*, 116 Ill.2d 133, 152 (1987).

¶ 16 A defendant's unsubstantiated denial of statements contained in a search warrant affidavit is not enough to make the necessary preliminary showing. *Lucente*, 116 Ill. 2d at 151. Affidavits of sworn or otherwise reliable statements of sworn witnesses should be furnished, or their absence satisfactorily explained. *Franks*, 438 U.S. at 171. Further, *Franks* only permits a challenge to the deliberate falsity or reckless disregard for the truth by the affiant, not by a nongovernmental informant. *Id.*

¶ 17 Nevertheless, an alibi-type showing may be sufficient to warrant a *Franks* hearing. If an informant is the source of the false statement, a defendant may still be entitled to a hearing to show that the officer acted recklessly in using the information received as a basis for the search warrant. *Caro*, 381 Ill. App. 3d at 1065-66. "The greater the showing that the informant blatantly lied to the officer-affiant, or that the information from the informant is substantially false, the greater is the likelihood that the information was not appropriately

accepted by the affiant as truth and the greater the probability that the affiant, in putting forth such information, exhibited a reckless disregard for the truth." *Lucente*, 116 Ill. 2d at 152. The determination in a given case must be made based upon a careful balancing of the statements in the warrant affidavit versus those in support of the defendant's challenge to the warrant. *Id*. Where the defendant's response refutes the allegations in the search warrant affidavit, and the affidavit lacks any independent corroboration, the balance may well lie in favor of a hearing. *Id*. at 152-53; *Caro*, 381 Ill. App. 3d at 1063. The determination of whether a defendant made the necessary showing to warrant a *Franks* hearing is within the discretion of the circuit court and will not be disturbed absent an abuse of discretion. *People v. Gorosteata*, 374 Ill. App. 3d 203 (2007).

¶ 18 In *Lucente*, a police officer filed a complaint for a search warrant. In his supporting affidavit, the officer stated that a confidential informant told him that he had gone to Lucente's apartment at approximately 8:30 p.m. the night before and that Lucente let him in. The informant also told the officer that he had purchased marijuana in the apartment. Lucente filed a *Franks* motion alleging the officer's warrant affidavit was false and included an affidavit stating that he and his wife were with his sister from 6:30 p.m. to 10 p.m. His wife and sister also filed affidavits averring that they were at the sister's house from 6:30 p.m. to 10 p.m. The trial court granted a *Franks* hearing and quashed the warrant and suppressed the evidence. *Lucente*, 116 Ill. 2d at 140-41.

¶ 19 On appeal, our supreme court affirmed, noting that Lucente did not simply deny the allegations, but supported his showing with an alibi and corroborated the alibi with two affidavits in addition to his own. The court concluded, "[i]n our view, the presence of such

sworn corroboration elevates this showing above the level of 'mere denial'." *Lucente*, 116 Ill. 2d at 154.

¶ 20 In *Caro*, the defendant filed an affidavit stating that he was at work on the day the informant stated he made a drug purchase from the defendant at the defendant's apartment. The defendant further claimed that when he came home from work, he ate dinner, watched TV and went to bed. The defendant's two roommates filed affidavits stating that when defendant arrived home from work, no one other than the defendant and his roommates were present. Both roommates also denied seeing the defendant selling illegal drugs at the apartment. The *Caro* court noted that all three affidavits were sufficiently detailed so as to subject the affiants to the penalties of perjury if they were untrue and that taken together, they constituted a substantial preliminary showing that a false statement implicating defendant was knowingly, intentionally or recklessly included by the officer in the warrant affidavit. *Caro*, 381 Ill. App. 3d at 1063; but see *People v. Creal*, 391 Ill. App. 3d 937 (2009) (finding several affidavits in support of defendant's whereabouts disproving the informants claims were not sufficient to constitute a substantial preliminary showing that the officer recklessly disregarded the truth in the warrant complaint.)

¶ 21 Here, as in *Lucente* and *Caro,* defendant provided a denial affidavit, an alibi, documentation to support the alibi and several affidavits in support of his claim that he was not at the residence during the period specified in the search warrant complaint. According to the complaint, the informant told the officer that he saw defendant at the Joliet residence within five days of October 19, and defendant presented information outlining that it was impossible for the confidential informant to have seen him at the residence between October

14 and October 19. On balance, the showing made at the first stage was such that the trial court could permissibly conclude that an evidentiary hearing was warranted.

¶ 22 The State claims that defendant's showing fails to demonstrate that the officer knowingly lied or acted recklessly. We disagree. In this case, defendant provided the court with several documents in addition to his affidavit and the affidavits of others indicating that the information from the confidential informant was substantially false. Thus, there is a greater likelihood that the information was not appropriately accepted by the affiant and a greater probability that the officer exhibited reckless disregard for the truth. See *Lucente*, 116 Ill. 2d at 152-53. Since the only corroboration outside the conversation with the informant was the officer's brief review of government records to establish residency, the balancing process should weigh in favor of a hearing.

¶ 23 We also disagree with the State's claim that even without the "five-day period" there was independent evidence in the complaint to support probable cause for the search warrant. The basis of the complaint was that defendant sold drugs from his residence at 409 Sehring, that the informant had witnessed him doing so, and that the informant had been at defendant's house within the past five days. The statements considered together created probable cause that defendant was selling cocaine at 409 Sehring between October 14 and October 18 to support the search warrant. Without evidence suggesting that defendant sold drugs at the residence during that five-day period, probable cause could not have been established.

¶ 24 Defendant made a substantial preliminary showing that false statements were included in the warrant affidavit with reckless disregard for the truth and that the allegedly false statement was necessary for the finding of probable cause. Thus, the trial court did not

err in granting a *Franks* hearing.

¶ 25 II

¶ 26 Next, the State argues that the trial court erred in quashing the search warrant and suppressing the evidence. Specifically, the State claims that the trial court erred in finding that Deputy Mantia exhibited a reckless disregard for the truth in failing to corroborate the information provided by the confidential source.

¶ 27 When reviewing a motion to suppress, the trial court's factual findings will be reversed only if they are against the manifest weight of the evidence. The trial court's ultimate ruling on the motion is a question of law that we review *de novo*. *People v. McCarty*, 223 Ill. 2d 109 (2006). In a *Franks* hearing, the relevant inquiry is whether defendant proved, by a preponderance of the evidence, that the affiant included false statements in the warrant affidavit with reckless disregard of the truth and that the statements were necessary to the finding of probable cause. *Franks*, 438 U.S. at 155-56.

¶ 28 The evidence at the hearing supports a finding that the warrant affidavit contained false statements that the affiant included with reckless disregard for the truth. Specifically, the officer's affidavit contained the confidential informant's statements to the officer that he had seen drugs at the defendant's residence between October 14 and October 18, 2007, and that he knew the person selling the drugs to be defendant. The trial court found that defendant was not at his residence during the time period listed in the search warrant complaint and that the confidential informant's statements regarding the five-day period were false. The trial court's factual findings were supported by the affidavits of defendant, his brother and mother, physical documents and the testimony of an Oklahoma State Trooper.

¶ 29 Further, the testimony at the hearing supported the trial court's finding that Deputy Mantia did not properly investigate the truthfulness of the informant's allegations. Although Mantia verified defendant's place of residence, he failed to go beyond that preliminary investigation of residency to verify illegal activity. He did not conduct any surveillance of defendant's house. He did not interview neighbors. He did not attempt a controlled purchase of marijuana or cocaine. He merely took the statements of a confidential informant and filed a search warrant complaint. The officer's conduct demonstrated that he acted with reckless disregard for the truth or falsity of the statements provided by the informant. The trial court's decision was not against the manifest weight of the evidence. Accordingly, we find no error in the trial court's order quashing the search warrant and suppressing the evidence.

¶ 30 III

¶ 31 The State argues last that Deputy Mantia's reliance on the search warrant executed in this case was objectively reasonable. Therefore, even if the warrant is ultimately found to be defective, the good faith exception should apply.

¶ 32 The purpose of the exclusion of evidence rule is to deter future constitutional violations by law enforcement officers. In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court determined that the application of the exclusionary rule would not serve to deter future constitutional violations by police where the officer acted in objectively reasonable reliance on a technically invalid warrant. *Leon*, 468 US. at 897. In such cases, the good faith exception applies to the exclusionary rule.

¶ 33 In applying the good faith exception, it is important to consider the objective reasonableness, not only of the officer who eventually executed the warrant, but also of the

officer who originally obtained it or who provided information material to the probable cause determination. See *Leon*, 468 U.S. 920-23. Good faith on the part of the executing officer does not prevent suppression where the procuring officer knowingly or recklessly submits a false affidavit. See *People v. Turnage*, 162 Ill. 2d 299 (1994).

¶ 34 Here, the trial court determined that the officer affiant recklessly submitted a false affidavit, and we have determined that the trial court's finding was not against the manifest weight of the evidence. The good faith exception therefore does not apply; the evidence must be excluded to deter future constitutional violations by officers who provide information material to the probable cause determination.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Will County is affirmed.

¶ 37 Affirmed.