DIVISION ONE
FILED: 12/20/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0837
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
GREGORY JOE LUNSFORD JR.,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-048543-001

The Honorable Roger E. Brodman, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Nicholas Klingerman, Assistant Attorney General — Tucson
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Gregory Lunsford appeals his convictions and sentences for drug and paraphernalia possession and misconduct

involving weapons. He contends that the trial court erred by failing to suppress the search warrant. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Phoenix police responded to a shooting call at an apartment complex. They found a victim lying in a stairwell with a trail of blood leading to Lunsford's apartment. When Lunsford responded to their knock and opened the door, the officers noticed blood inside the apartment and asked if they could conduct a protective sweep. Lunsford consented, and no one else was found inside. The apartment was then secured while other officers got a search warrant for evidence relating to the homicide.

¶3 While executing the warrant, police officers saw illegal drugs and obtained a supplemental warrant. They then seized zip-lock bags containing marijuana and crack cocaine, glass pipes, small scales, a measuring cup and razor blade with white residue, a loaded .22 caliber handgun, and an unloaded .38 caliber handgun. Lunsford was indicted, and subsequently tried and convicted of possession of a narcotic drug for sale, possession of marijuana for sale, two counts of misconduct

involving weapons,[1] and two counts of possession of drug paraphernalia. We have jurisdiction over his appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033 (West 2012).

DISCUSSION

¶4 Lunsford contends that the trial court erred by finding the affidavit supporting the original warrant did not contain intentional, knowing, or reckless misstatements and omissions of fact under *Franks v. Delaware*, 438 U.S. 154 (1978). We review whether the court abused its discretion in resolving "whether the affiant deliberately included misstatements of law or excluded material facts" and will affirm unless clearly erroneous. *State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991).

¶5 In *Franks*, the U.S. Supreme Court held that evidence seized through a warrant will be inadmissible if a defendant can establish by a preponderance of the evidence that (1) the affiant made a false statement which was knowingly or intentionally false or which was made in reckless disregard for the truth, and (2) the affidavit's remaining content is insufficient to support probable cause. 438 U.S. at 171-72. "In order to show that the affiant acted with reckless disregard

[1] At the time of the incident, Lunsford was a prohibited possessor pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3101(A)(7) (West 2012).

for the truth, we have required proof that the affiant entertained serious doubts about the truth of the affidavit." *State v. Carter*, 145 Ariz. 101, 109, 700 P.2d 488, 496 (1985). "Merely innocent or negligent mistakes in an affidavit will not satisfy the first prong of the *Franks* test." *Id.* (citing *Franks*, 438 U.S. at 171). And, "if a magistrate has found probable cause, a warrant should not be invalidated by a hypertechnical interpretation." *In re One 1970 Ford Van, I.D. No. 14GHJ55174, License No. CB 4030*, 111 Ariz. 522, 523, 533 P.2d 1157, 1158 (1975) (holding an affidavit "must be tested in a common-sense and realistic fashion").

¶6 Lunsford contends that the affidavit falsely stated that (1) he was hesitant to open his door for the officers, and (2) there were multiple drops of blood, blood smears and bloody handprints inside the apartment. The affidavit, which was prepared by a detective from the telephonic information the officers provided, states in relevant part that:

> The officer located a blood trail from the victim to the Apartment #208. Officers contacted the residence [sic] of apartment #208, identified as [Lunsford]. [Lunsford] was hesitant to open his door for officers. Officers were able to see blood drops inside apartment #208. Officers conducted a protective sweep of Apartment #208 and observed what appeared to be blood smears and bloody hand prints inside the apartment.

¶7 At the suppression hearing, the police officer testified that when the officers knocked on the door, Lunsford "was kind of hesitant to give [them] any information," did not open his door all the way, and attempted to hide the blood near the threshold. The officer also testified that the officers observed "a *drop* of blood on the inside the door threshold," and "*a blood smudge* on the wall" which looked like "somebody had put their hand [there]." At the conclusion of the hearing, the court found that although the affidavit contained misstatements, there was "no indication that the information was intentionally, knowingly, or even recklessly . . . false" but instead had been "miscommunicated" between the time it was observed and the time the affidavit was drafted.[2] Additionally, the court noted that the affidavit's account of Lunsford's uncooperativeness with the officers was consistent with the police reports.

¶8 We find no error with the court's ruling. Although Lunsford contends that the information in the warrant was misleading, he provided no evidence which suggested that the account of his "hesitat[ion] to open his door for officers" in the affidavit was inconsistent with the officer's testimony. *See In re One 1970 Ford Van, I.D. No. 14GHJ55174, License No. CB 4030*, 111 Ariz. at 523, 533 P.2d at 1158 (holding an affidavit

[2] The affidavit was prepared by a detective offsite based on information relayed from an officer at the crime scene.

"must be tested in a common-sense and realistic fashion"). And, despite the fact that the affidavit stated that there were "blood drops" and "bloody smears" — in the plural — rather than a singular bloody drop, smear, and handprint, there was no evidence that the officers "entertained serious doubts" that what they saw in Lunsford's apartment was blood. *See Carter*, 145 Ariz. at 109, 700 P.2d at 496. Because there was sufficient evidence to support the finding that the misstatements were "innocent or negligent mistakes," the court did not abuse its discretion by finding that the warrant affidavit did not contain intentional, knowing, or reckless misstatements under *Franks*. *Id.*

¶9 Lunsford also argues that the affidavit omitted the material fact that the police knew his apartment was not the location of the shooting.[3] Contrary to his claim, the officers observed what appeared to be the victim's blood inside his apartment and were not required to accept his explanation for its presence before conducting an investigation. Consequently, the court did not err by denying Lunsford's *Franks* challenge to the affidavit. *See id.*

[3] Lunsford told the officers that there was blood inside his apartment because the victim entered the apartment after the shooting.

CONCLUSION

¶10 Based on the foregoing reasons, we affirm Lunsford's convictions and sentences.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Judge

/s/
_____
RANDALL M. HOWE, Judge