DIVISION ONE
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>NOEL VELASCO-FELIX,<br><br>Appellant. | ) | 1 CA-CR 08-0208<br><br>DEPARTMENT D<br><br>**MEMORANDUM DECISION**<br><br>(Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-008681-028 DT

The Honorable Thomas W. O'Toole, Judge

**AFFIRMED**

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Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

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**O R O Z C O**, Judge

**¶1** Noel Velasco-Felix (Defendant) argues that the trial court erred in refusing to hold an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), on his allegation that the applications for wiretap warrants contained material misstatements and omissions. Defendant also contends the trial court committed error when it denied his motion to suppress the wiretap evidence on the ground that affiants failed to show the requisite necessity for wiretaps under Arizona Revised Statutes (A.R.S.) section 13-3010 (2010).[1] Finding no error, we affirm.

**FACTS AND PROCEDURAL HISTORY**

**¶2** A prior wiretap investigation revealed that "Leonel" supplied large quantities of methamphetamine from a lab in Mexico to a subordinate, Oscar Baez-Duarte (Duarte), in Phoenix. Duarte collected money from the sale of the drugs by his subordinates and sent it to Leonel in Mexico. Intercepted calls between Duarte and Adrian Barraza-Mendoza (Neja), Jorge Jesus Zabada-Corrales (Chuy) and accompanying physical and electronic surveillance, led investigators to believe that Chuy and Neja were Durate's customers. Investigators also believed that Neja and Chuy were major distributors of methamphetamine in the Phoenix area, and primarily used telephones to conduct their drug business. Investigators sought to obtain evidence leading

[1] Unless otherwise specified, we cite to the current versions of the applicable statutes when no revisions material to this decision have since occurred.

to the identification, indictment, and conviction of all members of the drug-trafficking organization. They also wanted information on the sources of supply, customers, financiers, transporters, dealers, money couriers and stash house operators, methods and locations used to distribute and conceal drug-trafficking operations, including proceeds, transportation routes and methods of transportation. Maricopa County Superior Court Judge Brian K. Ishikawa granted the initial wiretap warrant for the phone numbers used by Neja and Chuy (target lines 1 and 2), on March 27, 2006. Between April 6, 2006 and May 19, 2006 eight amended orders authorizing the interception of additional target lines were issued.

**¶3** On May 24, 2006, Maricopa County Superior Court Judge James H. Keppel granted the tenth amended wiretap order, authorizing an interception of target lines 13, 14, 15, and 16 used by others alleged to be participants in the drug-trafficking organization. This order extended the previously approved wiretaps on target lines 10, 11, and 12, and terminated those not already terminated on previously approved wiretaps of target lines 1 through 9. Defendant had been intercepted over various lines discussing the progress of drug transactions, collections of proceeds, the arrest of the organization's drug courier and efforts to replace the courier.

**¶4** Before trial on drug-trafficking charges arising from

the wiretap investigation, Defendant and his co-defendant Amando Gamboa-Molina, joined by Mario Velasco-Felix (Defendant's brother), moved to suppress the fruits of the wiretap order. They also requested an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, on the grounds that investigators made misleading statements in the affidavits supporting the wiretap warrants and failed to meet the necessity showing required by A.R.S. § 13-3010. The trial court denied both motions for lack of evidentiary and legal support.

**¶5** The matter proceeded to trial. Defendant waived his right to a trial by jury and was found guilty on seventeen various drug-trafficking charges. He was sentenced to a combined term of twenty years' imprisonment. Defendant filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 and -4033.A.1 (2010).

## DISCUSSION

### Denial of the *Franks* Hearing

**¶6** Defendant argues that the trial court erred when it denied his request for a *Franks* hearing, alleging affiants' material omissions and misstatements in the applications for wiretap warrants, coupled with the proffered photos of residences associated with phones used and called by the alleged drug traffickers, demonstrated that affiants had recklessly

misled the judges who issued the warrants. We disagree.[2]

**¶7** If evidence is seized pursuant to a warrant, a trial court must suppress the evidence "if a defendant proves, by a preponderance of the evidence, that the affiant knowingly, intentionally, or with reckless disregard for the truth made a false statement to obtain the warrant *and* that the false statement was necessary to a finding of probable cause." *State v. Nordstrom*, 200 Ariz. 229, 245, ¶ 42, 25 P.3d 717, 733 (2001). "[I]nnocent or negligent mistakes in an affidavit will not satisfy the first prong of the *Franks* test." *State v. Carter*, 145 Ariz. 101, 109, 700 P.2d 488, 496 (1985). Proof is required that, at a minimum, the affiant entertained serious doubts about the truth of his avowals. *Id*.

**¶8** A defendant is entitled to a *Franks* hearing if he "is able to make a substantial preliminary showing that the false statement [or material omission] was made knowingly and intentionally, or with reckless disregard for the truth, and that the false statement [or material omission] is necessary to a finding of probable cause." *State v. Poland*, 132 Ariz. 269,

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[2] Because we reject Defendant's claims of error in the denial of the *Franks* hearing and motion to suppress on their merits, we do not address the State's arguments, that (1) Defendant lacked standing to object to the original wiretap application because he had no privacy interest in the calls sought to be intercepted thereby; and (2) Defendant had the burden of proving that the sixth, eighth, and ninth amended wiretap orders, which initiated the interceptions of his calls but were not before the trial court when it entertained the suppression motion, were invalid.

279, 645 P.2d 784, 794 (1982). To make the substantial preliminary showing necessary to warrant an evidentiary hearing, "[a]ffidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Franks*, 438 U.S. at 171. The absence of an affidavit or sworn statement is sufficient to defeat the demand for an evidentiary hearing. *U.S. v. Ruddell*, 71 F.3d 331, 334 (9th Cir. 1995). We review the denial of a requested *Franks* hearing de novo. *See U.S. v. Gonzalez, Inc.*, 412 F.3d 1102, 1110 (9th Cir. 2005); *cf. State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991) (noting that a trial court's finding that affiant deliberately misstated facts is a factual determination that will be upheld unless clearly erroneous).

**¶9** In this case, Defendant failed to make the "substantial preliminary showing" of deliberate or reckless materially misleading omissions or false statements necessary to warrant a *Franks* hearing. In his motion, he alleged investigators misled the court, warranting a *Franks* hearing, by: (1) deliberately installing a pole camera at an inferior position outside Neja's residence, and misrepresenting the usefulness of installing one in front of Chuy's apartment; (2) failing to specifically disclose that several cell phones contacted by Neja and Chuy were linked to legitimate addresses susceptible to traditional investigative techniques; (3) failing

to disclose that a search of a stash house used by Neja recovered evidence providing insight into the Neja drug organization; and (4) falsely claiming that they lacked potential informants, despite the alleged availability of L.V.[3] and three other individuals stopped and/or arrested during this investigation.

**¶10** In support of these claims, however, Defendant submitted photographs of the front of Neja's residence, Chuy's apartment, and four other referenced residences, to illustrate that pole cameras in different places and physical surveillance would have been useful. He later submitted a portion of an affidavit in a different wiretap investigation that identified L.V. as a "major distributor of methamphetamine in the Metro-Phoenix area," in support of his claim that affiants falsely claimed they knew of no one they could utilize as an informant. Defendant did not, however, submit any sworn affidavits or other offers of proof in support of his claims that investigators deliberately or recklessly misled the issuing judges. Instead, he stated that he intended to submit documents and evidence from the prior wiretap and call a retired drug enforcement agent to testify as an expert at the *Franks* hearing in support of these claims.

[3] Defendant alleges L.V. was an possible informant who was already cooperating with law enforcement in unrelated cases.

**¶11** The failure of Defendant to submit *any* sworn statements or offers of proof to the trial court in support of his claim that the affiants deliberately misled the judges who issued the wiretap warrants defeats his argument that he was entitled to a *Franks* hearing. As the Supreme Court explained in *Franks*:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

438 U.S. at 171. Because Defendant failed to submit any such "[a]ffidavits or sworn or otherwise reliable statements of witnesses," or an explanation of why he had failed to submit such statements, the trial court did not err when it did not conduct a *Franks* hearing. *See id.*[4]

[4] Defendant's reliance on *Gonzalez, Inc.* is misplaced. In *Gonzalez, Inc.*, the appellant submitted *100 pages of documents* supporting his claims that the affiant had made misrepresentations and omissions in the wiretap application. 412 F.3d at 1110-11. Here, Defendant failed to submit any such

**¶12** This is not a case like *United States v. Carneiro*, 861 F.2d 1171 (9th Cir. 1988), on which Defendant relies. In *Carneiro*, one of the affidavits issued failed to inform the issuing court that *no* investigation had been conducted of the subject's criminal activities before seeking a wiretap on his telephone line; the affidavit affirmatively misled the court with respect to what had been tried. 861 F.2d at 1180-81. In this case, Defendant's claims were, for the most part, claims without any support beyond sheer speculation that the affiants should have done more with, and said more about, the use of traditional investigative methods than they did. Moreover, Defendant did not offer any evidence that might show that the affiants *deliberately* or *recklessly* omitted material facts or made false statements regarding their use of traditional investigative methods. Nor did Defendant demonstrate that any alleged omissions or misstatements were so significant that the judges would not have issued the wiretap warrants without them.

**¶13** The State also refuted in detail Defendant's claims that affiants actually made any misstatements or material omissions, arguing that investigators: (1) installed the pole camera in front of Neja's home was in the best position to gain information, and alternatively conducted surveillance of Chuy's

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documentation and failed to satisfactorily explain the absence of such supporting documentation. *See Franks*, 438 U.S. at 171.

apartment by renting the apartment across from his; (2) did not deliberately mislead the issuing judges as to the legitimacy of any of the addresses connected with the cell phones, and conducted extensive physical surveillance as appropriate, as evidenced throughout the applications; (3) specifically outlined, in their affidavits and the interim ten-day reports, the evidence seized from search warrants and the limited usefulness that the warrants provided in furthering the goals of this investigation; and (4) stated affiants knew of no informants that could provide useful information of the drug-trafficking organization, including L.V., whose attorney submitted an affidavit avowing that she had no information on the participants in this organization. On this record, the trial court did not err in finding that Defendant had failed to make the requisite "substantial preliminary showing" and, as a result, denying a *Franks* hearing.

**Denial of Motion to Suppress**

**¶14** Defendant next argues that the trial court erred in denying his motion to suppress, because affiants' applications for wiretap warrants failed to demonstrate the requisite necessity to conduct a wiretap investigation under A.R.S. § 13-3010. We review the denial of a motion to suppress wiretap evidence for an abuse of discretion. *State v. Ring*, 200 Ariz. 267, 273, ¶ 14, 25 P.3d 1139, 1145 (2001), *rev'd on other*

*grounds, Ring v. Arizona*, 536 U.S. 584 (2002). We limit our review to the affidavits submitted in support of the original wiretap application and the tenth amended wiretap application. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996) (appellate courts limit review of orders on suppression motions to evidence admitted at hearings on same); *see U.S. v. Nelson-Rodriguez*, 319 F.3d 12, 33 n.3 (1st Cir. 2003) (an appellate court limits its review of necessity for wiretap to face of applications).

**¶15** Applications for wiretap warrants must include "[a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." A.R.S. § 13-3010.B.3. A judge may approve such application in pertinent part if he determines on the basis of the application that "[n]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." A.R.S. § 13-3010.C.3. These two provisions comprise the so-called "necessity" requirement, which our supreme court has further defined as follows:

> The necessity requirement is designed to assure that the highly intrusive wiretap is not used in situations where conventional investigative techniques would be adequate to uncover the crime. Thus, wiretaps are

> not to be used routinely as the first step in criminal investigations. Nonetheless, the necessity requirement is to be interpreted in a commonsense fashion with an eye toward the practicalities of investigative work. Thus, a wiretap need not be used only as a last resort.

*State v. Hale*, 131 Ariz. 444, 447, 641 P.2d 1288, 1291 (1982) (internal citations omitted); *see also Ring*, 200 Ariz. at 273, ¶ 15, 25 P.3d at 1145; *State v. Politte*, 136 Ariz. 117, 129, 664 P.2d 661, 673 (App. 1982).

**¶16** In his motion to suppress, Defendant alleged affidavits to the application for the wiretap warrants failed to demonstrate necessity for the wiretap under A.R.S. § 13-3010 because investigators (1) could have placed a pole camera in another location near Chuy's apartment to increase visibility, and could have placed one almost directly in front of Neja's residence; (2) failed to offer any evidence that they asked any informants or undercover agents if they were willing to pose as buyers or sellers of drugs in order to penetrate the organization; (3) conducted only two trash runs; (4) failed to elaborate on why grand jury investigations and search warrants would be ineffective; and (5) failed to fully use GPS tracking devices on vehicles.

**¶17** The trial court denied the motion, reasoning that necessity had been demonstrated by the detailed avowals showing that traditional means had been tried but failed to achieve the

goals of the investigation and that other methods were unlikely to succeed. Defendant was simply second-guessing police methods without making any showing that "the other investigative techniques would likely have achieved the listed goals of the investigation." The trial court also noted that Defendant failed to show that L.V., or the other persons he suggested as potential informants, had any knowledge or would have been of any use as informants. L.V. also avowed through her attorney that she had no personal knowledge of Defendant or the organization.

**¶18** We disagree with Defendant's assertion that the investigators failed to demonstrate necessity. Affiants devoted most of the eighty pages of the first affidavit and fifty-one pages of the second affidavit to explaining what they learned from extensive use of previously approved wiretaps. The affidavits also indicated the reason they believed that further use of these techniques would not achieve their goal of dismantling the drug-trafficking organization.

**¶19** In the first affidavit, affiants avowed that other methods of investigation already used, including intercepted calls pursuant to other wiretap orders, three months' use of pen registers and trap-and-trace devices, more than fifty hours of physical surveillance, trash runs, pole cameras, and search warrants, had not provided sufficient evidence to meet their

goals. The affidavit further stated that they were not likely to meet their goals, without intercepting the communications between the parties involved in the drug investigation. Affiants further avowed that the use of informants and undercover agents was not feasible because they knew of no one who could be introduced to the targets of the investigation, and the highly compartmentalized nature of the business made it unlikely that any one informant would be able to provide information on the multiple participants.

**¶20** In the second affidavit, affiants again avowed that traditional methods of investigation had already been tried and failed, were unlikely to succeed or were too dangerous. They noted that subjects of the surveillance had discovered and removed GPS tracking devices from their vehicles, and, after the arrest of Neja, had been warned to switch to different telephones. They further avowed that they continued to find, as outlined in their application for the original warrant, that "most cellular telephones and vehicle license plates being utilized by the [o]rganization are fraudulent or fictitious," and had further found that "[m]embers of the [o]rganization have detected officers conducting surveillance, thus impeding your [a]ffiants' efforts."

**¶21** Affiants also avowed that although physical surveillance and the execution of search warrants had been

somewhat successful,[5] they had not provided sufficient evidence to complete the original goals of identifying, prosecuting and convicting the principals of the organization and dismantling the entire alleged drug-trafficking organization. They avowed that none of the eleven persons ultimately arrested during the investigation were willing to talk to police, nor did they identify any new sources of information about the organization principals or operations, and they believed that they would face similar limitations with the use of informants and undercover investigations as outlined in the original affidavit.

**¶22** Affiants' applications for the wiretap warrants set forth sufficient facts from which the issuing judges could find that wiretaps were necessary to achieve the goals of dismantling this drug-trafficking organization, which relied in great part on the use of cell phones to conduct most of its business. The facts in this case are distinguishable from those in *Gonzalez, Inc.*, on which Defendant relies. In *Gonzalez, Inc.*, the affidavit indicated that only three traditional investigative methods were used before the wiretap was sought: "(1) five-days-worth of pen register analysis; (2) an equally short use of trap-and-trace analysis; and (3) limited physical surveillance."

[5] The search warrants lead to the seizure of ten kilograms of cocaine, twenty-five pounds of methamphetamine, two pounds of crack cocaine, in excess of $400,000 in cash, and the arrest of five people.

412 F.3d at 1112. Here, affiants engaged in numerous traditional methods of investigation, including extensive physical surveillance of the targeted subjects and analysis of telephone records for three months prior to seeking the initial wiretap warrant. They continued to couple physical surveillance with wire interception during the first thirty days of the investigation, and engaged in other forms of investigation, including the execution of search warrants and arrests, before seeking to add additional telephone lines to the wiretap in their tenth amended application. The trial court did not abuse its discretion in denying the motion to suppress on this ground. *See State v. Olea*, 139 Ariz. 280, 288-89, 678 P.2d 465, 473-74 (App. 1983) (holding that affidavits in support of wiretap of drug-trafficking organization had adequately established necessity with similarly detailed avowals).

## CONCLUSION

**¶23** For the foregoing reasons, we affirm Defendant's convictions and sentences.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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MAURICE PORTLEY, Presiding Judge

/S/
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MARGARET H. DOWNIE, Judge