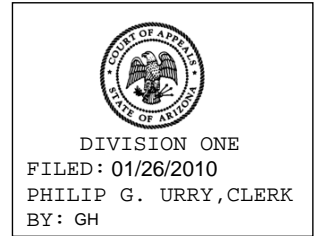


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 08-0807
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
MARK ALAN KEITZ,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Yavapai County

Cause No. V-1300-CR-0820060780

The Honorable Warren R. Darrow, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

Emily L. Danies Tucson
Attorney for Appellant

N O R R I S, Judge

¶1 Mark Alan Keitz appeals his convictions and sentences for sale or transfer of methamphetamine, possession for sale of methamphetamine, possession of marijuana, possession of drug paraphernalia, and misconduct involving weapons during the

commission of a drug offense. Keitz contends the superior court should have granted his motion to suppress evidence obtained when detectives searched his home pursuant to a search warrant obtained after they had surveilled his home and then stopped a car containing two women who admitted they had just purchased methamphetamine from him. For the following reasons, we hold the superior court properly denied Keitz's motion to suppress and affirm his convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶12 Keitz moved to suppress evidence recovered from his home, contending the search warrant was not supported by probable cause. Following a suppression hearing, the superior court took the matter under advisement and then ultimately concluded probable cause existed to issue the search warrant, and denied the motion to suppress. Keitz timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2003), 13-4031 and -4033 (2001).

DISCUSSION

¶13 On appeal, Keitz generally argues the search warrant was not supported by probable cause under the totality of the circumstances and more specifically argues the search warrant contained unreliable and omitted material information and was therefore invalid.

¶4 A search warrant is deemed void and the fruits of the search should be excluded if (1) the affiant knowingly, intentionally, or with reckless disregard for the truth included material misstatements in or omitted material facts from the affidavit; and (2) the material misstatements or omitted material facts were necessary to the finding of probable cause. *State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182-83 (citing *Franks v. Delaware*, 438 U.S. 154, 155, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667 (1978)). The defendant must establish this first prong of the test by a preponderance of the evidence before the court must redraft the affidavit deleting falsehoods and adding omitted material facts; the court then reviews the redrafted search warrant affidavit under the totality of the circumstances to determine whether it is sufficient to establish probable cause.¹ *Buccini*, 167 Ariz. at 554, 810 P.2d at 182 (citing *State v. Carter*, 145 Ariz. 101, 109, 700 P.2d 488, 496 (1985)). We first turn to Keitz's *Franks/Buccini* argument as

¹In *Franks/Buccini* cases when the first prong has been established, the court no longer gives deference to a magistrate's earlier determination of probable cause, and a "doubtful or marginal case" should be resolved in the defendant's favor." *Buccini*, 167 Ariz. at 558, 810 P.2d at 186 (quoting 2 Wayne R. LaFave, *Search & Seizure* § 4.4 at 199 (2d Ed. 1987)). As we discuss *infra* Part I, Keitz failed to establish the first prong under *Franks/Buccini*. We also note, as discussed *infra* Part II, this is not a doubtful or marginal case.

our resolution of that issue will resolve Keitz's totality of the circumstances argument.

I. Knowing, Intentional, or Reckless Disregard Prong

¶15 The superior court found Keitz had not established by a preponderance of the evidence Detective J. "knowingly, intentionally, or with reckless disregard for the truth included any material false statement or omitted any material facts." Not only does Keitz fail to contest this finding on appeal, but the record supports the superior court's finding. See *Buccini*, 167 Ariz. at 554, 810 P.2d at 182 ("[a] trial court's finding on whether the affiant deliberately included misstatements of law or excluded material facts is a factual determination, upheld unless 'clearly erroneous'" (internal citations omitted)).

II. Probable Cause

¶16 Keitz contends the affidavit contained "stale," that is, outdated information and omitted material information pertinent to the credibility of the women in the stopped car. We review the legal determination of probable cause de novo.² *Buccini*, 167 Ariz. at 558, 810 P.2d at 186. Although we would not normally reach the second *Franks/Buccini* prong based on our

²"An officer has probable cause to conduct a search if a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with criminal activity and that they would be found at the place to be searched." *Carter*, 145 Ariz. at 110, 700 P.2d at 497.

resolution of the first prong here, we nonetheless redraft the affidavit to exclude the alleged material misstatements and include omitted material facts to address Keitz's totality of circumstances argument. See *id.* at 554, 810 P.2d at 182 (citing *Carter*, 145 Ariz. at 109, 700 P.2d at 496).

¶7 Keitz's stale information argument rests on references in the affidavit to (1) an April 2006 tip from a "concerned citizen" regarding high levels of vehicle traffic, leaving within minutes, at Keitz's home; and (2) a May 2006 purchase of methamphetamine from Keitz arranged by narcotics detectives who engaged a "[c]onfidential [i]nformant" to make the buy. Although we agree with Keitz these two events ("April-May events") occurred around six months before the date the warrant was issued and could be viewed as stale, these events were immaterial to a determination of probable cause; at most, these events merely provided background information as to why the officers were conducting surveillance.³

¶8 The information in the affidavit relevant to the determination of probable cause came from Detectives J. and R.'s

³Keitz also argues the affidavit omitted the fact the confidential informant "never gained reliability." Because we determine the April-May events were immaterial to a determination of probable cause, and we excise them when we redraft the affidavit, we do not reach this argument. Moreover, we also note the narcotics officers dealt directly with the informant who purchased drugs from Keitz and turned the contraband over to them.

surveillance of Keitz's home. As the affidavit explained, the detectives directly observed a car pull onto Keitz's property; the passenger, later identified as M.V., got out of the car and went into Keitz's house while the driver, later identified as K.T., remained in the car. A few minutes later, M.V. returned to the car; Keitz then approached the driver's side of the car and "made contact" with the driver.

¶9 The affidavit further explained the car left Keitz's property, and the detectives stopped it for a cracked windshield. K.T. consented to a search and Detective R. located a "plastic bindle" containing methamphetamine on her person. Detective R. advised K.T. of her rights, and K.T. explained she had given M.V. \$100 to purchase methamphetamine from "Mark"; M.V. had walked inside Keitz's house; then Keitz had walked up to K.T.'s car and handed her the methamphetamine. The affidavit further stated the interview of M.V. corroborated K.T.'s version of the events.⁴

¶10 The affidavit did not, as Keitz argues on appeal, reveal M.V. and K.T. had a long history of criminal activity. This omission fails to negate probable cause. First, the record contains no evidence, as the superior court found, to support the allegations of prior criminal activity. Detectives J. and

⁴Indeed, M.V. explained K.T. gave her the \$100; M.V. then went inside "Mark's" residence and placed the money down on the counter and went back outside.

R. both testified at the suppression hearing they did not have any information about prior criminal history for M.V. or K.T. at the time Detective J. presented the search warrant to the magistrate. Second, we note, as did the superior court, prior criminal history involving drug transactions could lead to the inference of a greater likelihood of involvement in another drug transaction, counteracting the effect of negative credibility.

¶11 Keitz also argues the affidavit failed to disclose the detectives had promised M.V. and K.T. "favorable treatment." Specifically, he notes the affidavit did not disclose (1) K.T. was initially "deceptive" when asked where she had come from, (2) Detective R. confronted K.T. with his surveillance observation, and (3) after Detective R. discovered methamphetamine on K.T., he stated, "as a narcotics task force supervisor it is our goal to eliminate individuals who are actively selling. It is not our goal to actively arrest people who are using methamphetamine."⁵

¶12 These omissions also fail to negate probable cause. Detective R.'s use of his surveillance observations to confront K.T.'s deceptiveness did not script her response; and Detective

⁵Detective J. testified he generally uses the "fish analogy"; i.e., he is not after smaller fish, but rather he is "looking for the bigger fish who [are] selling the drugs." Detective J. did not recall if he had specifically used this analogy with either M.V. or K.T.

R.'s spoken interest in eliminating drug dealers was neither a promise nor coercive. Although the affidavit would have been more informative had it contained more detail about the conversation between the detectives and M.V. and K.T., this detail was not necessary to a determination of probable cause. M.V. and K.T. provided additional explicit detail that coincided exactly with what the detectives had observed during their surveillance.

¶13 In sum, after excising the April-May events and including details of the detectives' dialogue with M.V. and K.T., the redrafted affidavit meets the requirements of probable cause under the totality of the circumstances. The November 8 surveillance and traffic stop, in particular the discovery of methamphetamine on K.T., combined with her and M.V.'s detailed description of the drug transaction supplied ample probable cause to search Keitz's home.

CONCLUSION

¶14 For the foregoing reasons, we affirm Keitz's convictions and sentences.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge