IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellant,

v.

DARREN CHAD TICHENOR,
Appellee.

No. 2 CA-CR 2015-0380
Filed August 4, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20150939001
The Honorable Christopher C. Browning, Judge

REVERSED AND REMANDED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Appellant

Law Office of Scott A. Ewing, PLC, Tucson
By Scott A. Ewing
Counsel for Appellee

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Appellee Darren Tichenor was charged with multiple drug-related offenses after marijuana, hashish, and firearms were seized from his home pursuant to a search warrant. Relying on *Franks v. Delaware*, 438 U.S. 154 (1978), Tichenor moved to suppress the evidence, arguing a detective had applied for the warrant using false information and an unreliable informant's tip. The trial court granted the motion and dismissed the case. In this appeal pursuant to A.R.S. § 13-4032(6), the state argues the court erred when it concluded that, after removing the unreliable and false information, the affidavit did not support a finding of probable cause. For the following reasons, we reverse the court's order and remand for further proceedings.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the trial court's order granting the motion to suppress. *State v. Vera*, 196 Ariz. 342, ¶ 3, 996 P.2d 1246, 1247 (App. 1999). In February 2015, Tucson Police Department Detective Mark Ewings received an anonymous tip that Tichenor was cultivating marijuana in his home. The informant stated Tichenor had only one arm, the "residence had been involved with illegal drug sales for approximately 30 years," there were "over 100 plants, roughly 4 feet tall," in the home, and the odor was "apparent from the street." The informant also stated there were "numerous firearms in the residence."

¶3 During the investigation that followed, Ewings and other law enforcement officers conducted in person and video surveillance of the home "for several days." The video showed "interactions" occurring between people at the property, but the

officers could not determine "the nature of those interactions." The officers also conducted two traffic stops of individuals leaving the home, but no narcotics were found. However, Ewings obtained electricity bills for Tichenor's home, as well as three neighboring homes, and determined that Tichenor had "a very high utility usage."

¶4 On February 18, 2015, Ewings conducted a "knock and talk" investigation at Tichenor's residence. Tichenor answered the door, came out of the house, and locked the door behind him. While the door was open, Ewings smelled "a strong odor of fresh marijuana." Tichenor explained that he was authorized to possess marijuana under the Arizona Medical Marijuana Act (AMMA)[1] and had one ounce of marijuana in his home. He then took out his wallet and presented a valid card identifying him as a registered qualifying patient but not authorizing him to cultivate marijuana. Ewings also noticed that, in the wallet, Tichenor had "a large amount of U.S. currency."

¶5 When Tichenor declined to consent to a search of his home, Ewings contacted a magistrate to obtain a search warrant and gave the following telephonic affidavit:

> Law Enforcement received an anonymous tip stating that . . . Tichenor was illegally cultivating marijuana at his residence . . . . A records check on that residence showed that . . . Tichenor does own that location.
>
> A records check on his electricity usage and his utilities showed extremely high usage for the past twelve months. Similar houses in the neighborhood were compared. The electric usage here . . . is approximately 4 to 5 times higher than any of the other residences. Your honor, based

[1]A.R.S. §§ 36-2801 through 36-2819.

on my training and experience, I know that marijuana grows require a large amount of electricity due to the types of equipment that is used to cultivate marijuana indoors.

Your honor, we began conducting surveillance at this location. We did make two traffic stops on previous days. No narcotics were located during those stops.

Your honor, additionally with that tip that we received, it stated that there were approximately 80 to 100 marijuana plants growing at this location and that Tichenor has been growing for a long period of time. The tip also stated that there were numerous firearms in the residence and additionally that he was contacted here at this residence in 2011 by Tucson Police Department. At that time he did have a rifle here at the residence.

Your honor, on today's date we did conduct a knock and talk at the residence. On top of the front door there was a surveillance camera mounted. We did make contact with . . . Tichenor, who opened the door. As he exited the residence, he locked the door behind him. When he did open the door I could smell a very strong odor of fresh marijuana coming from inside the residence. I spoke with him briefly. He stated that he had an ounce of marijuana inside the residence. He denied that he was cultivating marijuana. He did present us with a valid medical marijuana card that shows he is a patient and that he is not authorized to cultivate marijuana. I did notice as he was obtaining this that he had a large amount of what

> appeared to be U.S. currency inside of his wallet.
>
> He would not consent to a search of the residence. He stated that the reason that his utilities were high was because he had a large house. The listed car that I described is parked in front of the residence. And your honor, overall the evidence in this case, based on my training and experience, is more consistent with a large amount of marijuana or a marijuana cultivation operation rather than one ounce of personal use marijuana inside the residence.

The magistrate issued the search warrant, and officers seized drugs and other evidence from Tichenor's home. A grand jury indicted Tichenor for possession of marijuana for sale, production of marijuana, possession of a narcotic drug, possession of drug paraphernalia, and seven counts of possession of a deadly weapon during the commission of a felony drug offense.

¶6 Tichenor filed a motion to suppress and requested a hearing pursuant to *Franks*, arguing the anonymous tip was unreliable and Ewings had misrepresented the electricity usage at Tichenor's residence. During his testimony at the evidentiary hearing, Ewings conceded that much of the informant's tip could not be corroborated or was simply untrue. He acknowledged the physical description given by the informant was not accurate as Tichenor in fact had both his arms. Ewings also admitted he could not smell marijuana from the street; surveillance efforts had not revealed any apparent drug transactions; and, during an unrelated search of Tichenor's home in 2011, officers had found no evidence of marijuana cultivation, thereby contradicting the claim that Tichenor had grown marijuana for thirty years. Accordingly, the trial court found the tip was unreliable.

¶7 Ewings also admitted during the hearing that he had misrepresented or omitted some facts regarding Tichenor's

electricity bills. Ewings conceded that Tichenor's electricity bill was actually "3.8 times higher than the average of the utilities in the other [homes] that [he] had collected," not four to five times higher. And, Ewings had failed to include in his affidavit a portion of Tichenor's explanation for the high bills: He "worked on cars" at the residence.

¶8 After hearing arguments, the trial court granted the motion to suppress, relying in part on our recent decision in *State v. Sisco* (*Sisco I*), 238 Ariz. 229, 359 P.3d 1 (App. 2015), which has now been vacated by our supreme court in *State v. Sisco (Sisco II)*, 239 Ariz. 532, ___ P.3d ___ (2016). The court further noted that there was no "evidence to show that [Ewings] can quantify the amount of marijuana which might be in a residence, or in anywhere, by the . . . strength of the odor."

¶9 The state moved to dismiss the charges without prejudice and initiated this appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4032(6).

Discussion

¶10 The state argues the trial court erred by granting the motion to suppress on the basis that the underlying affidavit lacked probable cause. We will not disturb the court's factual determinations on whether the affidavit deliberately included misstatements or excluded material facts unless clearly erroneous. *State v. Buccini*, 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991). But we review de novo the court's legal determination whether the remaining facts in the affidavit establish probable cause. *Id.* at 555, 810 P.2d at 183.

¶11 The Fourth Amendment of the United States Constitution requires that search warrants be issued upon a showing of probable cause supported by an oath or affirmation. U.S. Const. amend. IV; *see also* U.S. Const. amend. XIV, § 1. Arizona provides similar protections. *See* Ariz. Const. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); A.R.S. § 13-3913 ("No search warrant shall be issued except on probable cause, supported by affidavit . . . .").

Once issued by a magistrate, search warrants, and their supporting affidavits, are presumed valid. *State v. Ault*, 150 Ariz. 459, 466-67, 724 P.2d 545, 552-53 (1986).

¶12 In this case, Tichenor sought to rebut the presumption of the warrant's validity on two grounds. First, he challenged the reliability and credibility of the anonymous informant. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (magistrate's probable cause determination must include consideration of "'veracity' and 'basis of knowledge' of persons supplying hearsay information"); *State v. Crowley*, 202 Ariz. 80, ¶¶ 12-13, 41 P.3d 618, 623-24 (App. 2002) (same). As noted above, the trial court found that the tip was not reliable. The state does not challenge this determination on appeal.

¶13 Second, Tichenor challenged Ewings's statements regarding the amount of electricity used at the residence. A defendant may challenge an affiant's statements at an evidentiary hearing after establishing by a preponderance of the evidence, that the affiant "knowingly and intentionally, or with reckless disregard for the truth" made a false, material statement or omitted a material fact in the affidavit. *State v. Poland*, 132 Ariz. 269, 279, 645 P.2d 784, 794 (1982); *see State v. Spreitz*, 190 Ariz. 129, 145, 945 P.2d 1260, 1276 (1997); *Frimmel v. Sanders*, 236 Ariz. 232, ¶ 27, 338 P.3d 972, 979 (App. 2014). "While every fact in the affidavit need not be true, law enforcement officers are not permitted to exaggerate known facts to falsely substantiate the magnitude of a crime or create probable cause where none exists." *Frimmel*, 236 Ariz. 232, ¶ 35, 338 P.3d at 980 (internal citation omitted). If the trial court finds the affiant intentionally or recklessly made a false material statement or omitted a material fact, the court then must redraft the affidavit by removing the false statement or adding the omitted fact before determining whether sufficient probable cause remains to support the warrant. *State v. Carter*, 145 Ariz. 101, 109, 700 P.2d 488, 496 (1985). If there is insufficient probable cause after the warrant is redrafted, all evidence seized pursuant to the warrant must be excluded. *Frimmel*, 236 Ariz. 232, ¶ 28, 338 P.3d at 979.

¶14 The state argues "there is no *Franks* issue" in this case because the trial court concluded Ewings did not "act[] in bad faith in applying for the warrant." But "bad faith" is not the dispositive

factor a court uses to determine the validity of a warrant's supporting affidavit. "The Court in *Franks* stressed that the showing for probable cause must be 'truthful, in the sense that the information put forth is believed or appropriately accepted by the affiant as true.'" *Buccini*, 167 Ariz. at 555, 810 P.2d at 183, *quoting Franks*, 438 U.S. at 165. The court here did not make findings of fact as to whether the officer's statements regarding electricity usage were intentional or reckless. However, because Ewings testified that the affidavit was inaccurate, and because the court granted Tichenor's motion to suppress, the court necessarily found Ewings intentionally or recklessly included false statements in his affidavit. *See id.* at 554 n.5, 810 P.2d at 182 n.5. The state provides no further argument as to why we should conclude otherwise, and therefore we do not address the issue further.

¶15 Accordingly, under *Franks*, as did the trial court, we must "redraft" the warrant affidavit and consider whether it nevertheless supports a finding of probable cause. *Carter*, 145 Ariz. at 109, 700 P.2d at 496. Whether an officer presented information legally sufficient to establish probable cause is a question of law we review de novo. *See State v. Blackmore*, 186 Ariz. 630, 632, 925 P.2d 1347, 1349 (1996). "[U]nder the totality-of-the-circumstances test, probable cause exists if, 'given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Crowley*, 202 Ariz. 80, ¶ 12, 41 P.3d at 623 (second alteration in *Crowley*), *quoting Gates*, 462 U.S. at 238. This analysis is "not technical" and turns on "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Moran*, 232 Ariz. 528, ¶ 10, 307 P.3d 95, 99 (App. 2013), *quoting State v. Dixon*, 153 Ariz. 151, 153, 735 P.2d 761, 763 (1987).

¶16 To redraft the affidavit in this case, we first remove the unreliable informant's tip from the affidavit. Second, we replace Ewing's original claim regarding Tichenor's electricity bills with Ewings's testimony that Tichenor used 3.8 times more electricity than the other residences—testimony that Tichenor did not challenge during cross-examination at the *Franks* hearing or on appeal. Third, we add Tichenor's explanation for the high electricity

usage: he works on cars at his home. Thus, the redrafted affidavit includes the following material information: (1) Officers watched Tichenor's home for several days and conducted two traffic stops of persons leaving the home, but found nothing incriminating; (2) Ewings obtained Tichenor's electricity bills, and, in the past twelve months, his usage was 3.8 times higher than three "[s]imilar" houses in the neighborhood; (3) Ewings stated that marijuana cultivation requires "a large amount of electricity due to the types of equipment that is used to cultivate marijuana indoors"; (4) Tichenor explained the high bills were due to his large house and the fact that he worked on cars at his home; (5) Ewings noticed a surveillance camera on Tichenor's home, "a very strong odor of fresh marijuana" from inside, and "a large amount of . . . U.S. currency" in Tichenor's wallet; and (6) Tichenor stated he had only one ounce of marijuana inside and presented a valid medical marijuana card, but the card did not authorize cultivation.

¶17 In its consideration of the "redrafted" affidavit, the trial court concluded that "the primary basis for the granting of the . . . warrant was the amount, or the strength of the odor coming from the house." It apparently discounted the other circumstances, noting, for example, "[t]he fact that he's got money in his wallet may or may not be significant, but there's no law against having a bunch of cash." Further, the court relied on this court's decision in *Sisco I*, 238 Ariz. 229, ¶ 36, 359 P.3d at 12, and concluded "there is no way to quantify by the odor or the strength of the odor how much marijuana we're talking about."

¶18 On appeal, the state argues that, even after "disregard[ing] all of the information about the tip in the affidavit" and correcting the information regarding Tichenor's electric bills, the affidavit supports a finding of probable cause. We agree.

¶19 In reviewing the sufficiency of an affidavit, a reviewing court must consider the factual circumstances as a whole and may not conduct a "piecemeal evaluation of the innocence of each individual factor." *State v. Fornof*, 218 Ariz. 74, ¶ 7, 179 P.3d 954, 956 (App. 2008) (applying totality-of-the-circumstances test in context of reasonable suspicion); *see United States v. Arvizu*, 534 U.S. 266, 274 (2002) (same; prohibiting "divide-and-conquer" analysis). Here, the

affidavit established that Ewings knew Tichenor was not authorized to cultivate marijuana, but the combination of a surveillance camera, the high electricity usage, and the large amount of currency in his wallet indicated Tichenor was cultivating and selling marijuana. *See Fornof*, 218 Ariz. 74, ¶ 7, 179 P.3d at 956. It is irrelevant to our analysis that the money, security camera, and high electricity bills could, independently, have innocent explanations, such as the fact that Tichenor "worked on cars." *See United States v. Clark*, 31 F.3d 831, 835 (9th Cir. 1994) (high electricity bill, coupled with uncorroborated anonymous tip, does not support probable cause); *Sisco I*, 238 Ariz. 229, ¶ 32, 359 P.3d at 11 (lawful marijuana dispensaries required to install video surveillance).

¶20 As for the strong odor of fresh marijuana, both parties and the trial court discussed *Sisco I* at length during the evidentiary hearing below and the parties have revisited the issue on appeal, but our supreme court recently vacated that opinion. *See Sisco II*, 239 Ariz. 532, ¶ 30, ___ P.3d at ___. In *Sisco I*, this court considered whether an affidavit based on "an 'overpowering' or 'strong odor of fresh marijuana'" coming from a warehouse in a four-unit complex supported a finding of probable cause. 238 Ariz. 229, ¶ 3, 359 P.3d at 4. We determined that, after the enactment of the AMMA, probable cause for a marijuana-related offense must be determined from "an odor-plus standard" to "distinguish probable criminal behavior from noncriminal activity." *Id.* ¶ 26. In other words, we held the odor of marijuana alone was insufficient to support the finding of probable cause. *Id.* ¶ 28.

¶21 In *Sisco II*, however, our supreme court rejected the "odor-plus" standard and instead adopted an "odor unless" standard. 239 Ariz. 532, ¶¶ 21-22, 27, ___ P.3d at ___. It explained that, even after the enactment of AMMA, "the odor of marijuana in most circumstances will warrant a reasonable person believing there is a fair probability that contraband or evidence of a crime is present." *Id.* ¶ 16. Therefore, an officer can still "rely on his or her senses, including the sense of smell, to establish probable cause." *Id.* ¶ 9. But the court also acknowledged that "a reasonable officer cannot ignore indicia of AMMA-compliant marijuana possession . . . that could dispel probable cause." *Id.* ¶ 18. The court emphasized

that "[t]he ultimate inquiry" is the totality of the circumstances. *Id.* ¶ 20. It therefore explained:

> Presentation of a valid AMMA registry identification card . . . could indicate that marijuana is being lawfully possessed or used. Such information could effectively dispel the probable cause resulting from the officer's detection of marijuana by sight or smell, *unless* of course other facts suggest the use or possession is not pursuant to AMMA.

Id. (emphasis added).

¶22 Our decision in this case is consistent with *Sisco II*. First, Ewings's affidavit does not rely on the odor of marijuana alone. Thus, we disagree with the court's conclusion that odor was the "primary basis" of the warrant.[2] Second, although Tichenor presented his AMMA card to Ewings and asserted he possessed only one ounce, the "very strong odor of fresh marijuana," coupled with the security camera, the large amount of cash, and the high electricity bills, belied Tichenor's claim. Accordingly, Ewings had "other facts suggest[ing] the . . . possession [was] not pursuant to AMMA." *Id.* Third, Ewings's ultimate conclusion in the affidavit—

[2] We acknowledge Ewings's testimony at the evidentiary hearing emphasized that he did not believe Tichenor's claim regarding the amount of marijuana in the home due to the strength of the odor he detected. But, for the probable-cause analysis here, *Franks* directs the courts to consider the remaining circumstances laid out in the redrafted affidavit, not those discussed during the evidentiary hearing. *See Franks*, 438 U.S. at 156 (inquiry is whether, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause"); *see also State v. Jung*, 19 Ariz. App. 257, 259, 506 P.2d 648, 650 (1973) ("[W]e must confine our consideration to the affidavit alone since no other evidence was presented to the issuing magistrate at the time the search warrant was issued.").

that "the evidence in this case, based on [his] training and experience, is more consistent with a large amount of marijuana"—implicitly suggested a correlation between the strength of the odor and the quantity of marijuana.[3] We therefore conclude the redrafted affidavit supports a finding of probable cause. *See Crowley*, 202 Ariz. 80, ¶ 12, 41 P.3d at 623. The trial court therefore erred by granting the motion to suppress.[4] *See Buccini*, 167 Ariz. at 554, 810 P.2d at 182.

Disposition

¶23 For the foregoing reasons, we reverse the trial court's ruling and remand the case for further proceedings.

---

[3]Nor would the record support the contrary conclusion, that the implied correlation was "a knowing, intentional, or reckless misstatement of fact." *Buccini*, 167 Ariz. at 554, 810 P.2d at 182; *cf. State v. Torrez*, 112 Ariz. 525, 530, 544 P.2d 207, 212 (1975) (rejecting argument that affidavit defective for including opinion of officer). During the evidentiary hearing, Ewings testified he had received training "in the smell . . . of marijuana" and the "amount[] of marijuana" can "impact the smell that you detect." He concluded, based on his training and experience, that he had smelled "a lot more than an ounce" of marijuana "unless [Tichenor] was holding it directly under [Ewings's] nose."

[4]Because we conclude the affidavit supported a finding of probable cause, we need not address the state's argument regarding the good-faith exception to the warrant requirement.