

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KIMBERLY STERNBERG,

Defendant-Appellee.

UNPUBLISHED
September 3, 1999

No. 217022
Oakland Circuit Court
LC No. 97-154094 FH

Before: Gribbs, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's order granting defendant's motion to suppress her blood test results. We reverse.

The prosecution argues that the trial court erred in granting defendant's motion to suppress her blood test results because the affidavit in support of the search warrant for the blood test established probable cause. We agree. This Court reviews a trial court's findings of fact regarding a motion to suppress evidence for clear error. *People v Echavarria*, 233 Mich App 356, 366; ___ NW2d ___ (1999). The trial court's ultimate decision regarding a motion to suppress is reviewed de novo. *Id.*

First, the trial court concluded that defendant's statement, that she had consumed two glasses of wine before the accident, was taken in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and that it could not be used in the underlying affidavit. We do not agree. "*Miranda* violations do not abridge the Fifth Amendment constitutional privilege against self-incrimination, but instead involve prophylactic standards laid down to safeguard that privilege." *People v Melotik*, 221 Mich App 190, 199; 561 NW2d 453 (1997), quoting *United States v Patterson*, 812 F2d 1188 (CA9, 1987). The "*Miranda* presumption", accordingly, does not require that statements taken in violation of *Miranda* are "inherently tainted" for all purposes. *Id.* Further, even assuming arguendo that defendant's statements were properly deleted from the affidavit, the affidavit was still sufficient to support issuance of the warrant here.

The trial court also concluded that it was a significant omission amounting to a material misrepresentation for Sergeant Schettenael not to include in the affidavit his observation that defendant's

watery eyes and flushed face were a result of her emotional condition. As a result, the trial court struck the information concerning defendant's physical manifestations from the affidavit.

In *Franks v Delaware*, 438 US 154, 155; 98 S Ct 2674, 2676; 57 L Ed 2d 667 (1978), the United States Supreme Court ruled that a defendant could challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. In order to obtain an evidentiary hearing, the defendant must make a substantial showing that the affiant intentionally and knowingly or with reckless disregard for the truth included a false statement in the affidavit. *Id.* If the defendant is able to establish by a preponderance of the evidence his allegation of perjury or reckless disregard, the affidavit is considered without the false statement. *Franks, supra*, 438 US 155-156. If the affidavit without the false statement is insufficient to establish probable cause, the search warrant is void and the fruits of the search are excluded. *Franks, supra*, 438 US 155-156. This Court has extended the *Franks* rule to omissions in *People v Kort (On Remand)*, 162 Mich App 680, 686; 413 NW2d 83 (1987). *People v Chandler*, 211 Mich App 604, 612-613; 536 NW2d 799 (1995); *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). In the case of an omission, the remedy is to reconsider the affidavit including the omission. *Kort, supra*, 686.

Sergeant Schettenael, the affiant, testified that he did not include the fact that defendant was upset and crying at the scene because "[t]hose would have been conclusions or just opinions of myself rather than facts that directly led to intoxication." Sergeant Schettenael denied leaving out this information in hopes that the magistrate would be more likely to find probable cause. Sergeant Schettenael did not perform any field sobriety tests on defendant because of her "highly emotional condition." Sergeant Schettenael testified that it was hard to evaluate how much of defendant's emotional state was related to the accident itself and how much was related to her level of intoxication.

With regard to this issue, the trial court stated the following:

In the affidavit used to obtain the warrant, the affiant alleged that Defendant's watery eyes and flushed face was evidence that Defendant's blood contained evidence of a crime. Conversely, the affiant testified before this Court that Defendant's watery eyes and flushed face were a result of Defendant's heightened emotional condition over the accident itself and about the victim's condition.

This factual finding is clearly erroneous. *Echavarria, supra*, 366. Sergeant Schettenael did not testify that defendant's watery eyes and flushed face were a result of her emotional condition. Rather, Sergeant Schettenael testified that it was unclear whether defendant's watery eyes, flushed face and emotional condition were more closely related to the events of the accident or her level of intoxication. Defendant did not establish by a preponderance of the evidence that Sergeant Schettenael intentionally and knowingly or with reckless disregard for the truth omitted a material statement from the affidavit. *Franks, supra*, 438 US 155-156; *Kort, supra*, 686.

Further, defendant has not shown that the allegedly omitted information eroded the magistrate's finding of probable cause. *Chandler, supra*, 613. The affidavit stated that there was an accident, defendant was the driver of the automobile involved in the accident, defendant had an odor of

intoxicants emanating from her, and defendant had watery eyes and a flushed face. Even considering that defendant was highly emotional, a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause to believe that evidence of a crime would be found in defendant's blood. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995). Accordingly, the results of defendant's blood test should not have been suppressed.

Reversed.

/s/ Roman S. Gribbs

/s/ Michael R. Smolenski

/s/ Hilda R. Gage