

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL N. BROWN and DENISE I. HEARD,

Defendants-Appellees.

---

UNPUBLISHED

May 12, 2000

No. 217967

Wayne Circuit Court

LC No. 95-002104

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendants were charged with unlawful manufacture, delivery, or possession with intent to manufacture or deliver more than 225 grams but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and unlawful manufacture, delivery, or possession with intent to manufacture or deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant Brown moved to suppress evidence seized pursuant to a search warrant on the ground that the affidavit supporting the warrant contained false information. The trial court granted an evidentiary hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). After an adjournment and continuation of the hearing, but before the matter was concluded, the trial court dismissed the case without prejudice against both defendants for lack of progress. The prosecution appeals as of right the trial court's dismissal of the case. We reverse and remand to the trial court.

The prosecution argues that dismissal was improper because the trial court attributed the delay in this case to the prosecution's failure to produce witnesses. "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). The factual findings underlying the trial court's ruling are reviewed for clear error. *Id.* at 140; MCR 2.613(C).

We conclude that dismissal was unwarranted. The *Franks* hearing began on November 20, 1998. The court dismissed the case on February 16, 1999, prior to the conclusion of the evidentiary hearing. Testimony was set to resume on that date, and the record indicates that Officer Murphy, the

affiant, was present in the courtroom to continue giving testimony on direct examination. The trial court dismissed the case without hearing testimony from Murphy.

The defense was informed more than two months before the dismissal that the prosecution would not produce Officer Gray to testify at the evidentiary hearing, as desired by the defense, because Gray was retired and living in Florida. The defense bears the burden of proof at a *Franks* hearing. *People v Reid*, 420 Mich 326, 335-336; 362 NW2d 655 (1984). Furthermore, the lower court docket entries indicate that only one adjournment was attributable to the prosecution, compared to at least ten adjournments that were attributable to the court, and at least six that were attributable to the defense. We conclude that the delay in this case was improperly attributed to the prosecution, and dismissal was unwarranted.

The prosecution next argues that defendant failed to make a sufficient showing to warrant a *Franks* hearing. The United States Supreme Court has held that a defendant may challenge the veracity of statements in an affidavit supporting a search warrant. *Franks, supra* at 171. The *Franks* holding was recognized by this Court in *People v Poindexter*, 90 Mich App 599, 604-605; 282 NW2d 411 (1979). “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.” *Franks, supra* at 171; *People v Turner*, 155 Mich App 222, 226-227; 399 NW2d 477 (1986). A defendant must allege that the affidavit derives from “deliberate falsehood or [] reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.” *Franks, supra*, 438 US 171; *Turner, supra* at 227. The prosecution argues that the defense failed to satisfy these requirements. We agree.

The *Franks* opinion expressly held that “[t]he deliberate falsity or reckless disregard whose impeachment is permitted [] is only that of the affiant, not of any nongovernmental informant. *Franks, supra* at 171; *Turner, supra* at 226-227. In this case, the defense proffered affidavits challenging the credibility of the informant, on the basis of the informant’s ability to see into the house, where the drugs were allegedly observed. Even if this evidence is viewed in favor of the defense, a *Franks* hearing was not mandated. The defense has failed to offer more than speculation and conclusory statements to bring the affiant’s credibility into question. We conclude that the defense was not entitled to a *Franks* hearing on this basis.

In light of the trial court’s expressed hostility toward the prosecution, we order this case to be tried before a different judge. *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998).

Reversed and remanded for trial before a different judge. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ David H. Sawyer

/s/ Henry William Saad