STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NORMAN BROWN, JR.,

Defendant-Appellee.

UNPUBLISHED
April 2, 2002

No. 233913
Wayne Circuit Court
LC No. 00-012742

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver at least 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant challenged the affidavit supporting the search warrant under *Franks v Delaware*.[1] After a *Franks* hearing, the circuit court found that defendant had shown by a preponderance of the evidence that the affiant had either inserted false material into the affidavit or acted with reckless disregard of the truth, and that the untainted information was insufficient to support a finding of probable cause. The evidence seized pursuant to the search warrant was suppressed and an order entered dismissing the case, without prejudice. The prosecution appeals as of right. We affirm.

We review the circuit court's findings of fact in deciding a motion to suppress for clear error; and the court's ultimate decision to suppress seized evidence de novo. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001); *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997). A ruling is clearly erroneous if it leaves this Court with a definite and firm conviction that the lower court made a mistake. *People v Hampton*, 237 Mich App 143, 148; 603 NW2d 270 (1999).

> "[I]f false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed *if the false information was necessary to a finding of probable cause.* In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured

[1] 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

> with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit *and that the false material was necessary to a finding of probable cause.* [*People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997), quoting *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992), citing *Franks, supra*. Emphasis supplied in *Melotik, supra*.]

"The rule from *Franks* has been extended to material omissions from affidavits." *Stumpf, supra* at 224.

"The Michigan Constitution provides that a search warrant may issue only on a showing of probable cause, supported by oath or affirmation." *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995); Const 1963, art 1, § 11. Probable cause exists when the facts and circumstances would allow a person of reasonable prudence to believe that the evidence of a crime or contraband sought is in the stated place. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation. *Sloan, supra* at 167-168.

> "The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or belief. An affidavit made on information and belief is not sufficient. The affidavit should clearly set forth the facts and circumstances within the knowledge of the person making it, which constitute the grounds of the application. The facts should be stated by distinct averments, and must be such as in law would make out a cause of complaint. *It is not for the affiant to draw his own inferences. He must state matters which justify the drawing of them."* [*Sloan, supra* at 169, quoting *People v Rosborough*, 387 Mich 183, 199; 195 NW2d 255 (1972), quoting 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 868, p 1129. (Emphasis in original.)]

The affiant's experience is relevant to the establishment of probable cause. *Darwich supra*, at 639.

MCL 780.563 provides that if information is supplied to the complainant by an unnamed person, "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." A finding of personal knowledge should be derived from the information provided and not merely from a recitation that the informant had personal knowledge. *Stumpf, supra* at 223.

I

The affiant officer's affidavit in support of the search warrant stated in pertinent part:

> The affiant is currently a member of the Detroit Police Department assigned to the Narcotics Division. The affiant has been a member for the past seven (7) years, with the endmost (2 ½) years experienced in narcotics investigations. The affiant has received specialized training in various aspects of drug law enforcement and

drug related asset investigations, including the identification, locating, seizure and forfeiture of proceeds derived from violations of State and Federal narcotics laws. The affiant has personally been involved in numerous drug investigations both as a uniform and in an uncover [sic] capacity. The affiant has attended schools and seminars dealing with the use, sale, manufacture, identification and distribution of controlled substances.

The affiant is working in conjunction with credible SOI [source of information] that the affiant has been utilized [sic] by the affiant on over three (3) occasions, resulting in over (3) arrests, with over three convictions in Circuit court. As a result of the information supplied by SOI the affiant has recovered significant amounts of both cocaine and marijuana. The SOI has assisted in narcotics investigations in the recent past and, therefore knows the terminology used by traffickers and can identify both cocaine and marijuana by sight. The affiant has confirmed information supplied by SOI and found that all the information has been true and accurate.

On Sunday, July 30, 2000, the affiant met with the informant to discuss facts relating to 19323 Snowden. The informant stated that within fifty hours (50) of the signing of this search warrant he/she was inside 19323 Snowden. While inside 19323 Snowden the SOI stated that he/she observed a large amount of cocaine and marijuana that was being broken down into diminutive packages for distribution. The SOI stated that Norman Brown, Jr. is the main trafficker operating out of 19323 Snowden and that 19323 Snowden is used to store cocaine and marijuana and no sales are conducted from the premises**.** The SOI stated that only selected persons are allowed inside 19323 Snowden, therefore, traffic is kept to a minimum.

On Monday, July 31, 2000, the affiant again spoke with the SOI. The SOI stated that at least (5) ounces of cocaine and (8-9) eight to nine pound [sic] of bulk marijuana would be found at the target location. On this same date the affiant set up surveillance on 19323 Snowden for (45) forty-five minutes. During this time affiant observed (3) persons alone and indepently [sic] approach the front door of the target location and be allowed entry into the location by a person fitting the description of Norman Brown, Jr. These persons stayed in the target location for approximately 4-5 minutes, then exit the location carrying a medium sized brown bag. These subjects would then immediately leave the area. Affiant observed this activity to be consistent with narcotics and it's trafficking [sic]. Affiant also observed the dark grey, Chevrolet Suburban truck, bearing plate number "NO LUV" parked in the rear of the location, during this time.

The affiant conducted an independent investigation of the information and found that it was true and accurate. The information that was received and investigated is as follows. The informant stated that Norman Brown, Jr. is driving a dark grey colored, Chevrolet Suburban truck, which is owned by Mr. Brown and his alleged wife, Angela Brown. On several different occasions the affiant observed a dark grey colored Chevrolet truck, 2000 Michigan plate "NO LUV", parked in the rear of 19323 Snowden. The license plates were found registered to Norman and

> Angela Brown, of 19323 Snowden. The affiant also discovered that the utilities (Michcon Gas and Ameritech Phone Services) inside 19323 Snowden are in the name of Norman Brown, Jr. The informant stated that Angela Brown is fully aware that narcotic trafficking is flourishing out of 19323 and that Norman Brown, Jr. is the violator

A

Defendant filed a motion to suppress, and attached portions of the preliminary examination transcript to his motion as "Exhibit 1." Defendant's motion noted:

> The affidavit is so completely refuted by the officers' sworn testimony in Court, that in this case it destroys, [sic] prior credible information leading to arrests. Further, there is no independent information regarding his veracity. The only verifiable information, disclosed in the affidavit is obtainable by way of a police computer check. No special knowledge or skill is needed to obtain the information. Therefore, the affidavit lacks any information which would demonstrate the informant's credibility or special knowledge regarding the event which allegedly transpired on Snowden. The affidavit failed the first and second prong of the [People v] Sherbine, [421 Mich 502, 509-510; 364 NW2d 658 (1984)] test [discussed earlier in defendant's brief]. Consequently, the search warrant lacked probable cause, and the evidence discovered through its execution must be suppressed as fruit of the poisonous tree Wong Sun v. United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441.
>
> Search was illegal because warrant was obtained by way of known falsities or reckless disregard for the truth.
>
> The search warrant in this case contains averments which are the basis for the warrant being issued [that] are refuted by the sworn testimony of the officers in Court. Officer Watson testified at the Preliminary Examination in Court that the informant told him that "bulk" sales (p. 11 L. 15-17) were occurring at 19323 Snowden. He described bulk sales as being "pounds, kilos" [Exhibit #1, p. 25 L.6-8]. This is directly contrary to the sworn affidavit submitted to the magistrate issuing the warrant. In the affidavit he sowre [sic] that the informant said no sales occurred form 19323 Snowden.
>
> In Court during his testimony, officer Watson testified he saw people leaving the home on July 31, 2000 carrying "little paper bags" [Exhibit #1, p. 27 L.5-13]. In the affidavit for the search warrant he says the bags were "medium" sized. However, on the officers' official activity log sheet for July 31, 2000, there is absolutely no mention of the number of people allegedly approaching and leaving the home, and, absolutely no mention that any carried a bag, at all [Exhibit #2].
>
> The affidavit states that officer Watson met with the informant on July 31, 2000. The official activity logs bear no record of the meeting.

The affiant, officer Watson stated that he conducted surveillance for a forty five minute period on July 31, 2000. However, there are no surveillance notes and records. The official activity log sheet for July 30 and July 31, 2000 indicated that there was surveillance by the entire crew at 19323 Snowden, of which Sgt. Belcastro was in charge. However, during sworn testimony, Sgt. Belcastro refuted that he ever participated in any surveillance [Exhibit #1 p. 62 L.3-8] and contrary to the log sheet, officer Watson was alone [Exhibit #1 p. 66 L. 15-24]. The affidavit contains no identification number for the informant, which is the practice of informants commonly used by the Detroit Police Department's Narcotics Section [Exhibit # 6]. The practice is called registering informants [Exhibit #2]. According to Sgt. Belcastro's sworn testimony the informant was cooperating with, and the investigation was developed by officer Watson [Exhibit #1 p. 62 L.3-6], and Watson, alone. Officer Watson's partner Geel Hood doesn't know the informant [Exhibit # 1 p. 36 L.1-2]. Watson, who has exclusive control and knowledge of the alleged informant failed to know, and falsely testified in Court that the informant was registered with the Narcotics Section, when he was not [Exhibit #1, p.30 L.8-14].

Watson testified that he saw foot traffic and vehicular traffic at the Snowden address during his surveillance. When asked whether he recorded any license plate numbers of vehicles, he testified "no" [Exhibit #1 p. L.]. He did not stop any of the vehicles or call for a marked scout car to stop any the [sic] persons or vehicles he believed to be carrying contraband. When asked why he did not stop any suspects he testified that he was unable to because they "never worked as a team" [Exhibit #1 p.28 L.3-4]. This false testimony is impeached by the official activity log sheet which shows that his entire crew and two vehicles being used [sic], either of which could have called for a marked scout car to make a traffic stop a distance form the Snowden address, a common police practice. Further, the surveillance if done by Watson alone appears to be in violation of Narcotics Section Rules [of the DPD]. [Exhibit #7]

P.O. Watson testified that he began to work on the case approximately one month earlier, but produced no logs, records or notes to support this fact, which if true, should have been recorded.

Finally, in the affidavit police officer Watson testified that during the purported surveillance he saw a person fitting the description of Norman Brown, admitting people into the home on July 31, 2000. That, the people would stay a short while and then leave carrying bags. First, even if it were true, there was an equally innocent explanation for the activity because on July 31, 2000, the Brown's [sic] celebrated the birthday of their son, Desmond [Exhibit #3]. But more importantly, two expert witnesses, retired Detroit Police Supervisors with Internal Affairs experience went to 19323 Snowden and investigated whether a person answering the door at 19323 Snowden to allow a visitor into the home would be visible to those parked on the street. They will testify that Watson's statement in the affidavit is absolutely, totally and unequivocally false, based upon their investigations and his preliminary examination testimony [Exhibit #4]. An

> affidavit submitted with known falsities or in reckless disregard of the truth is invalid Franks v. Delaware, 438 US 154 (1978).
>
> Further evidence of unreliability
>
> This informant in the case was new, and unregistered. He had not been registered through the Narcotics Section Requirements. The registration process is designed to assist the police in accessing [sic] his credibility and reliability. Further, that although the informant was new and unregistered the officers failed to take the meager step to assure his credibility and never observed him enter or leave 19323 Snowden. These officers could not attest that he had ever been inside the premises, nor did they ask him to at least describe the interior of the home where he allegedly observed the illegal activity. Further, from the in Court testimony of police officer Watson, the informant said sales were occurring, yet he never made the simple attempt to verify the information by making a controlled buy. Finally, there was never an observations [sic] of the informant person or search of the informant to assure that he was not actually bringing the controlled substances into the premises. Each of these things are common precautions taken to insure the integrity of even the most commonly used, registered informants and these facts are commonly included in search warrant affidavits, none are stated as having been done in the affidavit.

At a March 9, 2001 hearing, the circuit court concluded that defendant had made a substantial preliminary showing that Officer Watson made false statements in the affidavit and that the statements were necessary to a probable cause finding. The court granted defendant a *Franks* hearing.

B

At the *Franks* hearing, defendant called Officer Watson, and two former DPD officers. Both of the former police officers testified that they had experience in surveillance and opined that an observer could not identify the person at defendant's door unless the observer stood near the front of the door or in the driveway. The officers took twenty-two photographs of defendant's front door from many different vantage points on defendant's street, which were admitted at the hearing but are not before us.

The affiant officer testified at the hearing that the SOI was "his," i.e., that he had developed the SOI, and that he, Watson, had stated in the search warrant affidavit that he spoke to the SOI on July 31, 2000. Watson admitted that the activity log sheets of his crew for July 30 and July 31, 2000, which were admitted into evidence, did not reflect any information regarding informants or any conversations with an informant. Watson also admitted that there was no documentation to show that he had communicated with the SOI about a month before the incidents at issue, as Watson had testified.

Watson testified that on July 31, 2000, he alone surveilled defendant's house from three different vantage points on defendant's street, for a total of thirty-five to forty-five minutes. Watson testified that his surveillance began at around 6:00 pm, that it was daytime, and that his vantage points were about 25-30 yards away from defendant's front door. Watson admitted at

the hearing that the July 31, 2000 activity log showed only that the *crew* he was working with was "in the vicinity" of defendant's house. He admitted that two of the three general areas that the crew he was with were in according to the log sheet, Ivanhoe and Ironwood, were a substantial distance from defendant's house on Snowden. He admitted that the activity log did not show: that Watson himself (or any other crew member) did any surveillance of defendant's house, what time Watson got to defendant's block, what time he left, that he saw any persons approach defendant's house or any automobiles, that he recorded any license plates, or that any person entered defendant's home and emerged carrying anything. Watson admitted that he made no notes and had no records regarding his surveillance of defendant's home.

At the preliminary examination, Watson had testified that he had conducted surveillance of defendant's home with another officer, on at least one occasion, that he did not use binoculars because he did not need to, and further testified:

> *Q.* You indicated you had used that – [Strike that]. Had you used that S.O.I. before?
>
> *A.* Yes.
>
> *Q.* On how many occasions?
>
> *A.* On three occasions.
>
> *Q.* On three occasions?
>
> *A.* Huh huh.
>
> *Q.* Had you ever had any warrants issued as a result of that of his work?
>
> *A.* Yes.
>
> *Q.* How many?
>
> *A.* Three.
>
> *Q.* Three warrants, what ---
>
> *A.* It resulted in three arrests, yes.
>
> *Q.* Now, were all those arrests out of one warrant, two warrants or three, do you know or was it one for each warrant?
>
> *A.* Two warrants, one and one conviction. Oh, I'm sorry, three convictions on the second warrant.
>
> *Q.* All of the S.O.I.'s in the Detroit Police Department have an identification number, is that true?
>
> *A.* Yes, some.

Q. Some.

A. Some are registered and some are not.

Q. Is this a registered or unregistered S.O.I.?

A. Registered.

C

The circuit court read its decision from the bench on March 20, 2001. The court stated the applicable law, set forth in detail the testimony before it and discussed the evidence admitted at the *Franks* hearing. The court then stated:

> The S.O.I. was supplied with – has supplied information for three search warrants. Two of these search warrants resulted in no arrests and no conviction. And since there was no mention of any drugs or contraband confiscated, the Court assumes there were no drugs. Thus, the S.O.I.'s record is only one out of three.
>
> This is not an indication of reliability or credibility. I do not find that the S.O.I. is either reliable or credible. Further, he is not registered and his record cannot be verified.
>
> The S.O.I.'s information on July 31, 2000, that there were at least five ounces of cocaine and eight to nine pounds of marijuana at 19323 Snowden is not verified and there is nothing in the affidavit which indicates this information was based on personal knowledge. The S.O.I. did not say he saw the drugs or where the drugs were located or what was being done with the drugs. There is no indication he was inside 19323 Snowden on July 31, 2000.
>
> The only corroboration of the S.O.I.'s information is Sergeant Watson's alleged surveillance on July 31, 2000.
>
> On November 8, 2000 [at the preliminary examination], he [Watson] incorrectly testified that another officer participated in the surveillance. He made no notes. He failed to describe any of the people who allegedly entered the house even by gender, race, height or weight, all of which would be readily – he would be able to readily see in the summertime. He failed to describe any of the vehicles which allegedly pulled up in front of the house or note any license plate numbers.
>
> Most troubling to this Court is the difference between the log sheet notes and Officer Watson's testimony. According to the log sheets, at 3:00 he and other crew members did surveillance of "Operation Hat Trick" blitz. At 5:50 they returned from surveillance and noted that they had checked Snowden and addresses on Ironwood and Elmhurst. However, Officer Watson testified that at 5:30 he left and went to Snowden, arrived about 6:00 and then did surveillance for 35 to 45 minutes ending about 6:45.

According to the log sheets, he was back at base at 6:00 working on search warrants and affidavits. Thus, the Court has no reliable information on when this surveillance took place.

The affidavit states that Officer Watson saw quote "Someone who looked like Norman Brown," closed quote, answer the door and admit three persons. The officer's testimony that he could see a person who looked like Norman Brown is contradicted by two former police officers with years of surveillance experience and the photographs. The photographs which tend to corroborate the inability of anyone to see the doorway because of the distance, trees and lighting available.

The log sheets of this crew blatantly disregard the police department's rules and regulations in numerous ways. The Court notes only a few of the requirements that were ignored. 18.3, The activity log should be concise and shall include all unusual activities and pertinent observations throughout the surveillance operations. 32.1, Accuracy and completeness are of the utmost importance. 32.2, Precise times of all activities and runs shall be used. 32.2, Complete identifying data, name, address, et cetera, of all persons encountered or contacted in the course of official duties shall be included.

Finally, the statement of the S.O.I. in the affidavit that, quote "19323 is used to store cocaine and marijuana, no sales are conducted from 19323 Snowden," closed quote, further casts down doubt on Officer Watson's testimony that he conducted a surveillance and saw three people arrive at 19323 Snowden, stay four or five minutes, and then leave with a brown paper bag. He is describing common drug sales. The S.O.I. says no sales are done at this location.

There is absolutely no corroboration that officer Watson conducted a surveillance, and many contradictions that belie the truthfulness of this statement.

The Court finds that the defendant has shown by a preponderance of the evidence that no surveillance was conducted on July 31, 2000 where three persons were seen to make drug purchases, and the statements and the search warrant affidavit are knowingly false.

Thus, there was no corroboration of the S.O.I'.s statements concerning 19323 Snowden as set forth. Above S.O.I., is not reliable and credible based on his prior record of providing information, the affidavit and untruthfully [sic] stated that he or she had over three arrests and over three convictions and there were just three testified to by Officer Watson. There is not showing that these – that his statements were based on personal knowledge.

The affidavit contained insufficient truthful information to support a finding of probable cause and search warrant must be suppressed and it is so ordered.

The prosecution stated that given the circuit court's determination, it would not be prepared to proceed to trial. Defense counsel made a motion to dismiss, and the circuit court granted it.

II

The prosecution first argues that the circuit court clearly erred in excluding statements from the affidavit in support of the warrant on the basis of its finding that the affidavit falsely related the informant's history of supplying information, and that the circuit court erroneously considered testimony from the preliminary examination. It argues that no questions were asked at the *Franks* hearing regarding the informant's prior record of providing information and results therefrom, that the parties had not stipulated to the circuit court that the preliminary examination transcript be used, and that defendant did not move for admission of the preliminary examination transcript into evidence. The prosecution notes that even if defendant had moved to admit the transcript, Officer Watson's testimony would have been inadmissible hearsay because he was available as a witness at the *Franks* hearing. Thus, the prosecution argues, defendant did not carry his burden because he did not offer evidence to show that Watson included in the affidavit a false statement regarding past information supplied by the informant.

A

Defendant's motion to suppress, quoted *supra*, heavily relied on, cited, and attached portions of the preliminary examination testimony.[2] The prosecution did not object to use of the preliminary examination testimony in the challenge under *Franks, supra*, but rather, argued that the inconsistencies defendant raised between the affiant officer's affidavit and preliminary examination testimony were insubstantial. At the conclusion of the *Franks* hearing, defense counsel initially relied on his brief, which included extensive references to the preliminary examination and drew the court's attention to the inconsistencies. In response to the prosecution's argument at the close of the hearing, defense counsel stated:

> The testimony that was given in court in two scenarios, two settings, two hearings completely contradicts the affidavit.

The prosecution did not object to the reference to the earlier hearing, or object to the court considering the testimony given at that hearing. Further, in deciding the motion to suppress, the circuit court did not rely exclusively on the preliminary examination testimony. Under these circumstances, we find no error in the court's considering the affiant's testimony at the preliminary examination.

B

Alternatively, the prosecution argues that even if the court properly considered the preliminary examination transcript, that transcript did not support the circuit court's finding that

---

[2] Defendant also attached six other exhibits to his motion, including: police investigator's activity logs for July 30 and July 31, 2000 for the crew Watson worked with on those days; affidavits of the two former police officers that testified at the *Franks* hearing that "you could not identify the sex or the identity of the person standing in the doorway greeting a visitor who is on the porch, based upon the officers testimony of having been at distance away [sic] from the front door;" the DPD's chapter on "Source of Information Procedures;" the search warrant and affidavit; and the DPD's "Surveillance Crew" procedures.

the informant's record "is only one out of three," and the circuit court thus clearly erred in its findings on the SOI's track record. The prosecution notes further that no evidence existed to contradict Watson's statement in the affidavit that as a result of information supplied by the SOI Watson had recovered significant amounts of both cocaine and marijuana.

We reject this argument. Even though Watson's testimony at the preliminary examination was not a model of clarity on the number of warrants and arrests emanating from his use of the SOI, it was contrary to what Watson stated in the affidavit, and the circuit court's conclusions are supported by the testimony. Also, the affidavit does not indicate that the cocaine and marijuana recovered through use of the informant were recovered in an incident different from the "over three occasions" referred to in the affidavit.

C

The prosecution further asserts that the circuit court "further compounded its error by not considering whether Officer Watson knowingly and intentionally, or with reckless disregard for the truth, included a false statement regarding the informant's track record in the affidavit," and that instead, the circuit court "made an independent determination of the informant's credibility." The prosecution notes that even assuming that Officer Watson falsely stated that he had utilized the SOI on "over" three occasions, resulting in "over" three arrests and convictions, he did not deliberately misstate the informant's history and, at most made an innocent mistake that would not support striking the statement from the affidavit.

This argument is unpersuasive and mischaracterizes the record. It is clear from the court's decision that the court concluded that Watson's misstatements and inaccuracies were deliberate and not simply inadvertent or negligent. Further, the circuit court did not make an independent determination of the informant's credibility; rather, as is appropriate in a *Franks* hearing, the circuit court's focus was on the **affiant's** credibility, not on the informant's credibility. See Gillespie, Michigan Criminal Law and Procedure (2d ed), Search and Seizure, §§ 3.55, 3.56, pp 3-87 – 3-90. The circuit court explained at length its factual findings, noting the many inconsistencies in the affiant officer's testimony in comparison to his statements in the search warrant affidavit, and noting other inconsistencies, including those between the activity log sheets and the search warrant affidavit. We find no error in the circuit court's findings of fact, and no error of law in the court's analysis or conclusions.

III

The prosecution next contends that the untainted information in the affidavit established probable cause for the search and that the evidence seized was therefore admissible. The prosecution notes that although the circuit court found that information other than regarding the informant's track record "was false or not based on personal knowledge, that information was not necessary to a finding of probable cause."

The affiant officer testified that he set up the informant, and that he had first spoken to the informant about one month before the incident at issue. The affidavit stated that the affiant officer and the informant met or spoke on two occasions, July 30, 2000 and July 31, 2000. However, contrary to departmental procedures, no documentation existed of any meeting or conversation with the informant, either in departmental activity logs, notes, or otherwise. The

affiant had testified at the preliminary examination that the informant was registered, when in fact he/she was not. The affidavit stated that the affiant spoke with the informant on July 31, 2000 and that the informant stated that there was bulk cocaine and marijuana at the target location. However, the affidavit does not establish personal knowledge of the informant for the July 31 information. There is nothing reflecting how the informant obtained that knowledge, and nothing reflecting that the informant had been in defendant's home on that date.

The affidavit also stated that the affiant and informant spoke on July 30, 2000, and that on that date the informant stated that he/she had been inside defendant's home "within fifty hours (50) of the signing of this search warrant," and that while inside observed "a large amount of cocaine and marijuana that was being broken down into diminutive packages for distribution." While the requisite personal knowledge is established here, there was no record of the conversation in the officer's activity log.

The affidavit also stated that on July 31, 2000, the affiant officer set up surveillance at defendant's home. However, no documentation existed to support that he had conducted such surveillance, he recorded no descriptions of the persons he saw or license plates of their vehicles, and no attempt was made to stop these persons or to verify that they emerged from defendant's home with contraband. The departmental log sheet for that day contradicted the affiant's testimony regarding the timing of the surveillance.

The affiant stated in the affidavit that he conducted an "independent investigation of the information and found that it was true and accurate," however, the extent of this investigation was that the affiant observed a truck the informant had described parked in the rear of defendant's home, the license plates were registered to defendant and his wife, and gas and phone services were in defendant's name. The affiant did not corroborate any material information provided by the informant.

In light of the foregoing, we find no error. There was sufficient evidence that the affiant officer knowingly and intentionally, or recklessly, inserted false material into the affidavit. The court was justified in excluding information from the warrant on this basis. The court properly excluded all information regarding the surveillance. The court also properly concluded that there was no personal knowledge established for the July 31 information attributed to the informant. As to the July 30 information, the court properly concluded that the information was not verified as reliable, as the only verification concerned the ownership of the car and house. Thus, the remaining question is whether the court erred in concluding that the credibility of the informant was insufficiently established. We note that the court seemed to question whether the affiant met with the informant at all on July 30. As to the informant's credibility, the court determined that the account of his track record was false. If this material is excluded, the informant's credibility is not established. If the track record is taken as established at the preliminary examination, we conclude that the circuit court did not err in concluding that a one out of three record in a new

and unregistered informant is insufficient to establish the informant's credibility without any additional information showing the reliability of the information.

Affirmed.

/s/ Helene N. White
/s/ Jessica R. Cooper