

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERMALINDO DUARTE SALINAS,

Defendant-Appellant.

UNPUBLISHED

July 29, 2004

No. 247664

Muskegon Circuit Court

LC No. 02-047140-FC

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i), delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to twelve to thirty years' imprisonment for the possession with intent to deliver more than 650 grams conviction, six months to twenty years' imprisonment for the delivery of less than fifty grams conviction, and two years' imprisonment for the felony firearm conviction. Defendant appeals as of right, and the prosecution has filed a crossappeal challenging defendant's sentence. We affirm defendant's convictions, but remand for resentencing.

Police arrested Jose Vallejo for a drug offense. Vallejo disclosed that he recently began selling drugs at the request of a longtime friend. Vallejo agreed to participate in a controlled buy with his friend and supplier, defendant. Vallejo was searched and given \$500 in marked bills to purchase ½ ounce of cocaine. Vallejo was observed entering and exiting defendant's home. Vallejo produced ½ ounce of cocaine at the prearranged meeting place following the drug transaction. Vallejo reported that defendant was at home dining with a woman, and the cocaine was on the table when he arrived. Vallejo gave the \$500 cash to defendant, and defendant gave the money to the female.¹ Based on the controlled purchase, police obtained a search warrant for

¹ The parties stipulated that the entire transcription of the lower court proceedings was unnecessary for preparation of the claim of appeal. Consequently, the only transcribed proceedings consist of two hearings, the preliminary examination, and the sentencing. During the hearings, it was alleged that only part of the marked money was found on the female, and defendant had some of the marked bills at his home. Because the bench trial was not transcribed,

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defendant's premises. During the execution, a large quantity of cocaine and cash² were discovered in defendant's home. Additionally, it was alleged that defendant held a substantial amount of equity in his home. Following a bench trial, defendant was convicted as charged. However, the trial court did not sentence defendant in accordance with the sentencing structure in effect at the time of the commission of the offense. Rather, the trial court opted to apply statutory amendments retroactively. The prosecution's crossappeal challenges the trial court's imposition of sentence.

Defendant first alleges that the trial court erred when it refused to hold an evidentiary hearing regarding the motion to suppress evidence based on statements contained within the search warrant. We disagree. In *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), the United States Supreme Court delineated the standard for holding an evidentiary hearing:

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. 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. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. *The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.* Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. [Emphasis added.]

"The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001). This standard is also applied to allegations of material omissions from affidavits. *Id.* A trial court's factual findings in deciding

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the statement of facts is taken from the evidence presented at the preliminary examination and at the evidentiary hearing.

² Because the trial transcript was not presented on appeal, the final tabulation with regard to the cocaine and cash was not presented. However, the allegations in the preserved record indicated that defendant had anywhere from thousands to \$100,000 in cash. The alleged quantity of cocaine was estimated as high as 820 grams.

a motion to suppress are reviewed for clear error. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001).

Under the facts of this case, we cannot conclude that the trial court's factual determination, that defendant failed to meet his burden of proof with regard to entitlement to an evidentiary hearing, was clearly erroneous. *Franks, supra*; *Sobczak-Obetts, supra*. Review of the record reveals that defendant did not submit the affidavit in support of the search warrant to challenge the statements contained within it. *Franks, supra*. Rather, the defense submitted a police report prepared *after* the execution of the search warrant by an officer other than the affiant to the search warrant. Thus, there was more information contained within that report than was available at the time of the presentation of the search warrant, and defendant did not challenge the falsity or omissions by the affiant as set forth in *Franks*. While the defense contends that the trial court should not have rejected the challenges to omissions and falsehood without an evidentiary hearing, the lower court correctly noted that the defense principally sought to "edit" the warrant because it did not reference events and allegations with regard to defendant's supplier. These omissions from the search warrant did not alter the basic fact that a controlled buy occurred, and the informant told police that cocaine would be provided with advance warning. Defendant contends that the purpose of the alleged omissions was to "deliberately bolster the probable cause to search." However, based on the evidence presented and the experience of police that additional evidence of drug trafficking would be found in the home, additional information was unnecessary. The affidavit need only contain sufficient information to demonstrate to the magistrate that probable cause to search exists based on the facts presented. MCL 780.653. There is no requirement that additional information regarding other possible sources be presented to the magistrate. *Id.* Accordingly, it was unnecessary to hold an evidentiary hearing where defendant failed to meet his burden, by making an offer of proof with reference to the warrant affidavit with regard to omissions or falsehood. *Franks, supra*; *Ulman, supra*.

Defendant next alleges that there was insufficient evidence presented at the preliminary examination to support the charge of felony-firearm. However, "the evidentiary error committed at the preliminary examination stage ... does not require automatic reversal of the subsequent conviction absent a showing that defendant was prejudiced at trial." *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). Defendant does not allege any prejudicial error at trial such that this Court should examine the sufficiency of the proofs presented at the preliminary examination. See also *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003) ("If defendant went to trial and w[as] found guilty, any subsequent appeal would not consider whether the evidence adduced at the preliminary examination was sufficient to warrant a bindover.") Moreover, possession may be actual or constructive, and constructive possession of a firearm occurs if the location of the weapon is known and is reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 437-438; 606 NW2d 645 (2000). The testimony at the preliminary examination revealed that defendant was the sole occupant of the home, and the firearm was found in the primary bedroom. Thus, there was sufficient evidence to support the bindover.

Lastly, the prosecution alleges that the trial court erred in retroactively applying the statutory changes to the drug laws where the offense date occurred prior to the effective date of the statutory amendments. We agree. The plain language of the statute does not provide for

retroactive application. See *People v Dailey*, 469 Mich 1012; 678 NW2d 439 (2004)³; *People v Doxey*, ___ Mich App ___; ___ NW2d ___ (2004) (Docket No. 247767), slip op p 5; *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004). Accordingly, we vacate the sentences imposed and remand for resentencing in accordance with the statute in effect at the time of the offense.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello

³ Although only an order, an order of the Supreme Court is binding precedent where the rationale can be understood. See *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996). In *Dailey*, our Supreme Court held that the plain language of MCL 769.34 provided that courts shall sentence in accordance with the guidelines in effect on the date of commission of the crime, and the guidelines were inapplicable to a crime that predated the statutory amendment.