

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROBERT SPERO,
Appellant.

No. 2 CA-CR 2019-0218
Filed December 2, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20175406002
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Acting Chief Counsel
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Erin E. Duffy, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

BREARCLIFFE, Judge:

¶1 Robert Spero appeals from his conviction after a jury trial of multiple drug and firearms-related offenses. The trial court sentenced him to enhanced, concurrent prison terms, totaling fourteen years. On appeal, Spero contends the court erred in denying his motion to strike the search warrant and suppress evidence. We affirm.

Factual and Procedural Background

¶2 We review the facts in the light most favorable to sustaining the convictions, *State v. Robles*, 213 Ariz. 268, ¶ 2 (App. 2006), and affirming the denial of the motion to suppress, *State v. Goudeau*, 239 Ariz. 421, ¶ 26 (2016). In reviewing a ruling on a motion to suppress evidence, we consider the facts presented to the trial court at the suppression hearing. *Id.* Some facts adduced at trial are recited below but are not relevant to our decision.

¶3 Beginning in 2016, Tucson police officers started surveilling a home on Sparkman Boulevard in Tucson (“Sparkman home”). On August 1, 2017, an officer saw a Ford Ranger stop at the home. A man got out of the Ranger, went into the home for about five minutes, then returned and drove away. After the Ranger left the house, Officer Herrera stopped the truck and spoke with the driver, Roy Cox. Methamphetamine was found behind the driver’s seat.

¶4 Cox first told Herrera that he had purchased the methamphetamine that day “near the intersection of Fort Lowell and Country Club.” Herrera then “implemented a ruse,” telling Cox, although not true, that officers had been watching that intersection all day and had not seen Cox’s vehicle. Cox then changed his story and said he had purchased the drugs at an apartment complex. Eventually, Cox “stated that he purchased [the methamphetamine] from somebody named York at the Sparkman address.” Cox “also gave a very thorough physical description

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of Mr. Spero and identified him as York”; the description matched what Herrera knew of Spero.

¶5 Officer Herrera then sought a telephonic search warrant for the Sparkman home, for two vehicles, and for Robert Spero and one other person. In the recited warrant affidavit, Herrera told the judge that “Cox admitted to purchasing 20 dollars of . . . methamphetamine, from a large, heavy-set white . . . male nicknamed ‘York’ at Sparkman and Glenn.” Herrera did not tell the judge of Cox’s first two statements as to where he bought the drugs or that Herrera had used a ruse while talking to Cox. Herrera also stated officers had “had previous contact with subjects leaving [the Sparkman home], most of whom had narcotics.” When the judge asked Herrera to estimate the amount of traffic seen at the Sparkman home, Herrera stated that, on July 28, 2017, officers “probably observed at least five different vehicles come and go.” The judge found probable cause and issued the warrant.

¶6 When officers searched Spero, they found \$571 in cash, bound with a rubber band in his pocket. Officers discovered heroin and methamphetamine on the person of another in the home. When they searched the home, they found a lock box containing a digital scale “with residue on it,” heroin, and methamphetamine. Officers also found bundles of cash, drug paraphernalia, firearms, and a ledger.

¶7 Spero was charged with one count of possession of a narcotic drug for sale; one count of possession of a dangerous drug for sale; one count of possession of drug paraphernalia; two counts of possession of a deadly weapon during the commission of a felony drug offense; one count of money laundering to conceal proceeds; and two counts of possession of a deadly weapon by a prohibited possessor, which were severed before trial. After trial, the jury found Spero guilty of the six remaining charges. The trial court sentenced him as described above, and this appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

¶8 On appeal, Spero argues, as he did in his motion below, that in obtaining the warrant, Officer Herrera omitted material information regarding Cox’s credibility, and intentionally or recklessly provided two false statements about what was observed at the Sparkman home. Evidence seized pursuant to a search warrant is inadmissible if the defendant proves by a preponderance of the evidence that: (1) “[t]he affiant made a false

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statement which was knowingly or intentionally false or which was made in reckless disregard for the truth"; and (2) "[a]fter the false statement is excised, the affidavit's remaining content is insufficient to support a finding of probable cause." *State v. Carter*, 145 Ariz. 101, 108 (1985) (quoting *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978)). "A trial court's finding on whether the affiant deliberately included misstatements of law or excluded material facts is a factual determination, upheld unless 'clearly erroneous.'" *State v. Buccini*, 167 Ariz. 550, 554 (1991).

¶9 In applying for the search warrant, Officer Herrera did not tell the issuing judge that Cox had first told Herrera two other stories about where he purchased the methamphetamine, and had only admitted to purchasing drugs at the Sparkman home after Herrera's ruse. Spero claims this was an omission of material information because it bore on Cox's credibility. Spero also claims that Herrera's statements that, on July 28, 2017, officers "probably observed at least five different vehicles come and go," and that most of the people leaving the Sparkman home "had narcotics" were intentionally or recklessly false.

¶10 To prove an affiant acted with reckless disregard for the truth, a defendant must show that "the affiant entertained serious doubts about the truth of the affidavit." *Carter*, 145 Ariz. at 109. Such doubts can be evidenced by "actual deliberation" or by "obvious reasons to doubt." *State v. Poland*, 132 Ariz. 269, 279 (1982) (quoting *United States v. Davis*, 617 F.2d 677 (D.C. Cir. 1979)).

¶11 At the hearing challenging the warrant below, Herrera testified that he believed Cox when he said he purchased methamphetamine from Spero at the Sparkman home, and that he had no serious doubts as to the truth of the facts in his affidavit. He testified that he did not include Cox's two stories about where he bought the methamphetamine or the ruse Herrera used on Cox because he "presented the most credible information that [he] had to the judge." The trial court determined that there was probable cause for the search warrant, and that the omissions of Cox's first two statements to Herrera were "in no way fatal," and the description of the vehicles frequenting the Sparkman home was only made in response to the issuing judge's questions. The court determined that "there was nothing that was inaccurate or that amounted to false information" and denied the motion.

¶12 We agree with the trial court. No evidence from the hearing suggests that Herrera had reason to doubt that Cox was being truthful when he stated, ultimately, that he had purchased the methamphetamine

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at the Sparkman home. Cox had been seen at the Sparkman home immediately before the traffic stop, and Cox was able to “identif[y] several cars that the surveillance officer had seen in front of the [Sparkman] residence.” “[Cox] also gave a very thorough physical description of Mr. Spero and identified him as York.” Prior to Cox’s final explanation as to where he acquired the drugs, Herrera had not given him any information about Spero, his physical description, or mentioned the Sparkman home. On this record, we cannot say that Herrera had reason to doubt the truth of Cox’s final statement or to credit the first two, and we cannot conclude the court erred in finding that there was no material omission.

¶13 As to Herrera’s statements about the vehicles seen at the Sparkman home, Herrera testified at the hearing that this number of cars was his estimation and that he did not “intentionally exaggerate the number of cars that were seen on that day.” In fact, as the trial court found, Herrera’s estimation was given in response to the judge asking him to provide such an estimation. While the event chronology shows that only one vehicle went to the Sparkman home, Herrera explained that, even if something was not stated within the period of the event chronology, “that doesn’t mean that something else didn’t happen outside of [it].” Furthermore, Officer Kerns testified that, when a team is observing a location, an officer will record notes and times of traffic, but “it’s not . . . required.” No evidence from the hearing suggests that Herrera’s estimation, even if incorrect, was anything other than an innocent or negligent mistake. Innocent or negligent mistakes in a search warrant affidavit are, without other evidence, insufficient to prove an affiant acted with reckless disregard for the truth. *Carter*, 145 Ariz. at 109; *see also Frimmel v. Sanders*, 236 Ariz. 232, ¶ 31 (App. 2014).

¶14 As to Officer Herrera’s statement that most of the people leaving the Sparkman home, “had narcotics,” Herrera testified at the *Franks* hearing that this statement “[came] from the duration of the . . . surveillance on Mr. Spero’s residence . . . further than just 2017, back into 2016.” Herrera further explained that this information was gathered not only from his own observations, but from the observations of other officers. Spero asserts that this “was patently false information not supported by the record.” While the event chronology shows only four stops and no arrests from March through July 2017, Officer Kerns explained that the surveillance team would try to have marked units conduct traffic stops on people who left the Sparkman home, but the unit would then document the location of the stop, not the location the vehicle was coming from, suggesting that stops where narcotics are found might not always be documented in the surveillance event chronology. Spero provides no evidence other than the absence of

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narcotics findings noted on the event chronology to suggest this was a false statement.

¶15 Based on the evidence and testimony presented at the hearing, we cannot conclude that the trial court erred in determining that Officer Herrera made no false statements or material omissions in securing the warrant. Therefore, the trial court did not err in denying the motion to strike the warrant and suppress evidence.¹

Disposition

¶16 For the foregoing reasons, we affirm the trial court's denial of the motion to strike the warrant and suppress evidence and affirm Spero's convictions and sentences.

¹Spero also claims that, "absent the false and misleading information and considering the multiple stories Mr. Cox gave for where he got the drugs, there is insufficient evidence to support a finding of probable cause." This claim is conditioned on the conclusion that material facts were omitted from and false statements were included in the affidavit. Because we affirm the trial court's finding that no material facts were omitted from the affidavit and no false statements were included in it, we need not address the issue of residual probable cause.