IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. No. 01120009696
	)	
KEITH C. FROST,	)	
	)	
Defendant.	)	

Date Submitted: September 10, 2002
Date Decided: January 7, 2003

M E M O R A N D U M O P I N I O N

Upon Defendant's Motion for a Franks Hearing - ***DENIED.***

Andrew J. Vella, Esquire, Department of Justice, Carvel State Office Building, 820 North French Street, Wilmington, Delaware 19801, for State of Delaware.

Joseph A. Hurley, Esquire, 1215 King Street, Wilmington, Delaware 19801, for Defendant.

JURDEN, J.

This matter is presently before the Court on the defendant's *Franks*[1] motion (the "Motion"). At issue is whether certain factual statements contained in the Search Warrant Application and Affidavit, leading to the search and seizure of evidence used against the defendant, were deliberately false or made with a reckless disregard for the truth. Following an evidentiary hearing on September 3, 2002, and after carefully considering the written post-hearing submissions of the parties, the Court concludes that the Motion should be **DENIED**.

I. BACKGROUND

At approximately 6:00 p.m. on December 12, 2001, Detectives Gerald Bryda ("Bryda") and Kevin Feeney ("Feeney") of the Newark Police Department Special Investigations Unit were called to the Mailboxes, Etc. store on East Main Street in Newark to investigate a complaint that a customer had left a suspicious package at the store for shipping out of state earlier that day.[2] Both Bryda and Feeney have extensive training in the areas of drug investigation and search warrant applications.[3]

A. The December 12, 2001 Incident

Upon responding to Mailboxes, Inc., Bryda and Feeney interviewed Alison Bauer ("Bauer").[4]

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[1] *See Franks v. Delaware,* 438 U.S. 154 (1978).

[2] *See* Search Warrant Application and Affidavit, paras. 1-3. It was confirmed at the *Franks* hearing that Alison Bauer ("Bauer"), an employee of Mailboxes, Etc., was the cooperating individual ("CI") referred to in the Affidavit. *Franks* Hrg. Tr. at 49 (Sept. 3, 2002). The Search Warrant Application and Affidavit were admitted at the hearing as State's Exhibit 2.

[3] Search Warrant Application and Affidavit, paras. 1-2.

[4] *Franks* Hrg Tr. at 10, 18, 45, 53 (Sept. 3, 2002).

Bauer informed Bryda that earlier that day a customer named "Pete Petty" left a Federal Express box for delivery out of state. Bauer recognized "Petty" as a regular customer of Mailboxes, Etc., and indicated "Petty" had been to the store approximately 10-20 times since September 4, 2001 to ship packages to various locations.[5] At the *Franks* hearing, Bauer identified the defendant, Keith Frost, as "Pete Petty."[6] Bauer testified that "Petty" typically shipped a Federal Express box or United Parcel Service box, or a full size 8-1/2 by 12 envelope, and he usually indicated that the contents of the packages were either CD's, magazines, video cassettes, or manuals.[7]

With respect to the December 12, 2001 package, Bauer showed Bryda that it was a small Federal Express box and the packing slip, hand written by "Pete Petty," described the contents as four CD's.[8] Bauer was suspicious about the contents of this box because there was a "bump" in the middle of it that was inconsistent with the claimed contents. Bauer noticed the inconsistency and, based on that and a prior incident involving "Pete Petty" in which Bauer repackaged the contents of a Federal Express box he dropped off and found the contents suspicious, she informed her boss and store owner, Doug Brown, that she believed "Petty" was shipping drugs.[9] At that point, Mr. Brown

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[5] *Id.* at 8-18.

[6] *Id.* at 14.

[7] *Id.*

[8] *Id.* at 45-47; Def Ex. 19.

[9] *Id*. at 12-13.

called Newark Police to report the incident and he was instructed by the police to hold the package.[10] After he arrived at the scene, Bryda also observed and felt the "bulge" in the center of the box, which he agreed was inconsistent with four flat CD cases.[11]

B. The Prior Repackaging

While discussing the December 12, 2001 incident with Bryda and Feeney, Bauer informed them about the prior repackaging incident mentioned above. Bauer told Bryda and Feeney that "Pete Petty" previously dropped off a Federal Express box and that when Bauer went to process the box for shipping, she realized that Federal Express did not deliver to the rural North Carolina location requested; only United Parcel Service did.[12] Consequently, Bauer then opened the Federal Express box to transfer its contents into a United Parcel Service box[13] and noticed a large tube of white pills with a line going through one side[14] in an orange pharmaceutical container with the label half ripped

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[10] *Id.* at 36-37. By the time Detectives Bryda and Feeney arrived at the store, Mr. Brown had left and he did not speak to the police until the next day, after the search warrant had already been obtained. *Id.* at 42.

[11] *Id.* at 47.

[12] Doug Brown recalled that "Petty" brought the package in on a Friday and requested that it be delivered on Saturday, the next day. Bauer then quoted "Petty" the price and accepted the package for next day delivery. Later, when Bauer entered the delivery order into the Mailboxes, Etc. computer, she realized that Fed Ex did not make Saturday deliveries to the zip code requested. Because the Fed Ex and UPS prices were essentially the same, and because UPS will not accept a Fed Ex box, Bauer decided to repackage it and send it by UPS in order to get it delivered on the date requested. *Id.* at 35-36.

[13] Mr. Brown believed that he was at the store at he time of the prior repackaging and recalled that he opened the package and removed its contents. *Id.* at 39.

[14] Based upon Bauer's description of the pills, and with the aid of the Delaware Poison Control Center, Bryda was able to identify some of the pills as Tylenol with Oxycodone and

off.[15] Bauer did not place the sealed Federal Express box into a United Parcel Service box because the added weight of the Federal Express box would have made the shipment heavier and more expensive.[16] Bauer testified at the *Franks* hearing and told Bryda on December 12 that it was not unusual for her to do such a thing.[17] Doug Brown, the owner of the store, testified that the repackaging was done because "Pete Petty" was a "frequent customer" and he wanted to "give him good customer service."[18]

Regarding the prior repackaging, Bauer testified that she took notes of what was written on the partially torn label on the outside of the pharmaceutical container and took the notes home with her that day.[19] Bauer did not tell Mr. Brown about the notes until he called the Newark Police on December 12. Bauer did not believe that she had the authority to call the police about her suspicions about "Pete Petty" and she was waiting to tell Mr. Brown about the notes until she saw him at the

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Methadone, both Schedule II narcotic controlled substances. Search Warrant Application and Affidavit at para. 7.

[15] *Franks* Hrg Tr. at 9-10 (Sept. 3, 2002). Mr. Brown, however, recalled that the repackaged box contained at least four (4) foil packets of some type of pharmaceutical. *Id.* at 36, 39-40.

[16] *Id.* at 31-32.

[17] *Id.* at 31, 54.

[18] *Id.* at 38.

[19] Bauer must have brought the notes back to work with her at some time because she gave them to Bryda. *Id* at 22-23. Bauer's notes were admitted at the hearing as Defense Exhibit 20.

store the next time they worked together.[20] Coincidentally, that happened to be December 12.

There was a great deal of confusion at the *Franks* hearing about when exactly this repackaging incident took place. Although the Search Warrant Application and Affidavit stated that the prior repackaging took place on September 4, 2001,[21] Bauer initially testified on direct examination at the *Franks* hearing that she was not certain whether she told Bryda the earlier incident took place in September or November.[22] On cross examination, Bauer testified that she thought the repackaging incident took place on November 16 and denied that she told Bryda that the repackaging took place on September 4.[23]

Consistent with the Search Warrant Application and Affidavit, Bryda testified that on December 12, 2001 Bauer told him that the repackaging took place on September 4.[24] However, in preparing his report of the incident after obtaining and executing the search warrant, Bryda spoke to Bauer on the telephone to clarify what he then believed to be an incorrect date of the prior repackaging.[25] Bryda testified that in reviewing his photocopies of the shipping orders,[26] he thought

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[20] *Id.* at 25-26.

[21] Search Warrant Application and Affidavit, paras. 5-8.

[22] *Franks* Hrg Tr. at 9-11 (Sept. 3, 2002).

[23] *Id*. at 19-22, 27.

[24] *Id.* at 54-56.

[25] *Id.* at 50-51, 57-58.

[26] Bryda's testimony was unclear as to whether he had copies of the shipping orders at the time the affidavit was prepared. He recalled making copies but he was unclear as to whether he did so on December 12 or 13. He recalled that he and Feeney reviewed the original shipping

that he might have used the wrong repackaging date in the Search Warrant Application and Affidavit and he asked Bauer to review her records with him over the phone to clarify whether September 4 was the correct date. Bryda recalled that he thought Bauer originally told him that the contents of the repackaged box was a video cassette and according to the shipping order, the alleged contents of the September 4 shipment was a coffee mug.[27] Bryda testified that after going through each of the dates and his copies of the shipping orders with Bauer over the phone, she then told Bryda that November 16 was the correct date of the repackaging incident.[28]

On December 12, Bauer told Bryda and Feeney that she recognized "Petty" from being in the store so many times and that after the repackaging incident she started "keeping her eye on him."[29] Bauer also told the detectives that the package "Petty" brought in on December 12 was similar to the

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orders with Bauer on December 12 and he appeared to testify that he returned to the store the next day to make photocopies of them. *Id.* at 54, 59, 75. Defendant seriously doubts that Bryda waited to make copies of the shipping orders until the next day. *See* Defendant's Memorandum in Support of Suppression at 3-5, n. 6. However, paragraph 4 of the Search Warrant Application and Affidavit seems to clarify the confusion and Bryda's equivocal memory on this issue. In that paragraph, it makes clear that Bryda and Feeney had copies of the shipping orders at the time the affidavit in support of the warrant was made.

[27] *Id.* at 57-58. A review of the September 4, 2001 shipping order indicates that the alleged content of the package was a coffee mug. *Id.* at 18-19; Def. Ex. 1. The November 16, 2001 shipping order indicates that the alleged content of that package were a video cassette and manual or videocassette manual. *Id.* at 28; Def. Ex. 14.

[28] *Id.* at 50-51. Although Doug Brown also recalled a repackaging incident, he was not sure of the exact date. He believed it was "some matter of weeks" earlier. *Id.* at 37-38.

[29] *Id.* at 20-22; Search Warrant Application and affidavit at para. 8.

other packages she personally received from him[30] in that they were already prepackaged, usually in Federal Express or United Parcel Service boxes, and that he would always request a signature release so the addressee of the package would not have to sign for it.[31] Bryda understood that the similarity in the packages referred to by Bauer was limited to the packages Bauer received from "Petty."[32]

When cross examined at the hearing, however, Bryda agreed that some of the language contained in the Search Warrant Application and Affidavit may have been unclear.[33] For example, after being shown how to read the shipping order by counsel for the defendant, Bryda agreed that not all of the 20 or so packages brought in by "Petty" for delivery were prepackaged in a Fed Ex box.[34] Bryda also agreed that not all of the packages were in boxes of the same size.[35] Bryda further agreed that approximately 10 of the approximate 20 packages were not overnight or next day air deliveries.[36] Bryda also testified that he did not know whether "Petty" signed signature waivers for all 20 or so

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[30] Paragraph 8 of the Search Warrant Application and Affidavit states that Bauer told him that she handled seven (7) of the packages. Bryda's testimony at the hearing was consistent with that. *Franks* Hrg Tr. at 72-73 (Sept. 3, 2002). When questioned at the hearing by counsel for the defendant, however, Bauer testified that she recognized her handwriting on ten (10) of the shipping orders. *Id.* at 76-77.

[31] *Id.* at 78-82; Search Warrant Application and Affidavit at para. 11.

[32] *Id.* at 72-73; Search Warrant Application and Affidavit at paras. 8-10.

[33] *Id.* at 60-72.

[34] *Id.* at 60-62; Search Warrant Application and Affidavit at para. 9.

[35] *Id.* at 62-64; Search Warrant Application and Affidavit at para. 9.

[36] *Id.* at 64-65; Search warrant Application and Affidavit at para. 11.

packages he brought in for delivery.[37] Bryda further agreed that at the time he prepared the Search Warrant Application and Affidavit he did not know for sure whether the packages contained false names for both "Petty" and the addressees.[38] The next day, after the search warrant was issued, Bryda confirmed that "Pete Petty" was a false name and learned that the addressees named on the packages were true people.[39] Finally, Bryda agreed that the package delivered by "Petty" on December 12 was not entirely "consistent" with each of the prior packages "Petty" shipped, in terms of the name of the addressee, delivery address, geographical location of the delivery, the size of the box or envelope, the intended delivery company to be used, and the method of delivery.[40] On redirect, however, Bryda clarified that his use of the word "consistent" in paragraph 10 was the term Bauer used when talking to him, and that Bauer told him the December 12 package was "consistent" with the specific packages from "Petty" that she personally handled, not all of the packages "Petty" brought in to be shipped.[41]

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[37] *Id.* at 65-68; Search Warrant Application and Affidavit at para. 11. Bryda was again unable to determine whether waivers were signed for by looking at the shipping orders. Once again, after being shown how to read the shipping orders by counsel for the defendant, Bryda agreed that many of them were silent as to whether "Petty" signed signature waivers. *Id.* at 65-68.

[38] *Id.* at 68-69; Search Warrant Application and Affidavit at para. 12.

[39] *Id.* However, prior to preparing the search warrant affidavit, Bryda did check the *DELJIS* system and was unable to find an individual named "Pete Petty." Bryda was also unable to confirm "Petty's" address by looking at a telephone cross reference directory. Search Warrant Application and Affidavit, para. 13.

[40] *Id.* at 69-72; Search Warrant Application and Affidavit at para. 10.

[41] *Id.* at 72-74.

C. The Search Warrant Application and Affidavit

After speaking to Bauer, and prior to applying for the search warrant, Bryda spoke to Detective Don Pope of the Delaware State Police Special Investigations Unit and Sergeant Robert Agnor of the Newark Police Department. Both Pope and Agnor had extensive experience and training in drug investigations and illicit drug package interdictions.[42]

Bryda testified that he works closely with the Special Investigations Unit of the State Police and that he called Detective Pope, a recognized expert, to inquire about what he should be looking for in this case.[43] Detective Pope informed Bryda that, generally, packages will be brought in with handwritten air bills, they will be paid for in cash, a signature waiver will be signed by the sender so the recipient will not have to sign a receipt, and that the packages will be sent overnight or next day air.[44] Here, Bryda already knew from speaking with Bauer that the December 12 shipping order was hand written by "Pete Petty," he understood that the package was to be sent for next day delivery, the delivery was paid for in cash, and "Petty" had executed a signature waiver."[45]

Sergeant Agnor informed Bryda that it was common for packages to contain false names for both the sender and the recipient.[46] Here, Bryda checked the *DELJIS* system and was unable to find

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[42] *Id.* at paras. 11-12.

[43] *Franks* Hrg Tr. at 51-52 (Sept. 3, 2002).

[44] *Id.*; Search Warrant Application and Affidavit, para. 11.

[45] *Franks* Hrg Tr. at 52-53, 64 (Sept. 3, 2002). The December 12 package was actually a two-day delivery, Def. Ex. 19.

[46] *Id.* at 68; Search Warrant Application and Affidavit, para. 12.

a match for the name "Pete Petty." A check of a telephone cross reference directory also failed to show that "Pete Petty" lived at the address listed.[47] The day after the Search Warrant was issued, Bryda confirmed that the sender, "Pete Petty," was a fictitious name and that the intended addressees were correct names.[48]

As a result of the investigation, and after speaking to Bauer, Detective Pope, and Sergeant Agnor, Bryda and Feeney prepared the Search Warrant Application and Affidavit. Bryda testified that the search warrant was issued following a video phone application and conference.[49] Bryda then executed the search warrant.

II. DISCUSSION

On a *Franks* motion the defendant bears the burden of proof by a preponderance of the evidence.[50] The Court begins its analysis with the fundamental proposition that the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

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[47] Search Warrant Application and Affidavit, para. 13. Paragraph 4 of that document reveals that "Petty" actually used two (2) addresses in his dealings with Mailboxes, Etc. 20 of the packages listed his address as 20 Clarion Court. One (1) package listed his address as 22 Clarion Court. *Id.* It is unclear whether "Petty" intentionally gave the second address or whether it was an inadvertent oversight on his part. It was equally unclear whether Bryda also checked the second address to determine whether "Petty" lived there.

[48] *Franks* Hrg Tr. at. at 68, 69 (Sept. 3, 2002).

[49] *Id.* at 75.

[50] *Franks,* 438 U.S. at 156.

searched and the persons or things to be seized."[51] A search is supported by probable cause if facts are shown making it likely that evidence of a crime will be found in the place to be searched. "Probable cause requires only a 'fair probability' that contraband will be found in a search, not a certainty that it will be found."[52]

In *Franks v. Delaware*[53] the Supreme Court held that a search warrant affidavit, valid on its face, may be challenged by the accused if it can be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit purged of its falsities would not be sufficient to support a finding of probable cause. Under *Franks,* a facially sufficient warrant may be undermined on the ground that it includes deliberate or reckless falsehoods, or omits material information.[54] An affidavit supporting an application for a search warrant must set forth sufficient facts to allow a reasonable person to conclude that a crime has been committed and that the property to be seized would be found in a particular location.[55] Probable cause is established when a nexus appears between the items sought and the place to be searched.[56] When the issuing magistrate makes a

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[51] U.S. CONST. Amend. IV; Del. Const. Art. 1 § 6; 11 *Del. C.* §§ 2306, 2307.

[52] *United States v. Wold,* 979 F. 2d 632, 635 (8th Cir. 1992) (citing *Illinois v. Gates,* 462 U.S. 213 246 (1983)). The Delaware Supreme Court has "consistently held" that a "four corners" test for probable cause is to be utilized. *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000).

[53] 438 U.S. 154 (1978).

[54] *Franks,* 438 U.S. at 171.

[55] *Blount v. State,* 511 A. 2d 1030, 1032-33 (Del. Super. 1986) (citing *Jensen v. State,* 482 A. 2d 105, 110-111 (Del. Super. 1994)).

[56] *Hooks v. State,* 416 A. 2d 189, 203 (Del. Super. 1980).

probable cause determination, a reviewing court will pay great deference to it and accord it a common sense evaluation.[57] However, under *Franks,* a court may look behind a search warrant when the affidavit intentionally or recklessly misleads the magistrate by making an affirmatively false statement or omits material information that would alter the magistrate's probable cause determination.[58]

The Court's inquiry under *Franks* in this case requires an initial determination of whether the Search Warrant Application and Affidavit contained statements that are not truthful. The Court in *Franks* concluded that "truthful" does not require that every fact recited in the affidavit must be necessarily correct. Rather, the information put forth in the affidavit must be believed or "appropriately accepted by the affiant as true."[59] If there are no untruthful statements, the Court's inquiry need go no further.

If "untruthful" statements are contained in the Affidavit, then a determination must be made as to whether those statements were knowingly or intentionally made, or made with a reckless disregard for the truth.[60] Statements made negligently or by an innocent mistake are insufficient to

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[57] *Jensen,* 482 A. 2d at 111; *State v. Backus,* 2002 WL 31814777 at *7 (Del. Super) (there is always a presumption of validity and truthfulness to the affidavit underlying the search warrant).

[58] *Franks,* 438 U.S. at 171; *Jensen,* 482 A. 2d at 113-114; *U.S. v. Kennedy,* 131 F. 3d 1371, 1377 (10th Cir. 1997), *cert. denied,* 525 U.S. 863 (1998).

[59] *Franks,* 438 U.S. at 165; *Jensen,* 482 A. 2d at 114.

[60] *Franks,* 438 U.S. at 165.

successfully attack the affidavit.[61] Finally, the deliberate falsity or reckless disregard whose impeachment is permitted under *Franks* is expressly limited to statements made by the affiant, not of any non-governmental informant.[62]

Here, the defendant alleges that the Search Warrant Application and Affidavit included many "untruthful" statements of fact that would have been known to the police had their investigation moved at a less hasty pace and more appropriate under the circumstances presented to them. It should be pointed out that defendant does not believe that Bryda or Feeney perjured themselves in securing the search warrant.[63] Rather, the defendant contends that the misstatements contained in the affidavit, both by commission and by omission, constituted a reckless disregard for the truth which thereby mislead the Magistrate to conclude there was probable cause and issue the search warrant.[64] To remedy the alleged illegal misconduct by the police, the defendant urges the Court to purge the affidavit of the contaminated untruthful statements. Once the Court undertakes to do that, the defendant asserts that the cleansed affidavit would not have established the requisite probable cause needed for the Magistrate to approve it, thus invalidating the warrant and the subsequently seized evidence.[65]

In its response, the State argues that although there may have been certain factual

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[61] *Id.* at 438 U.S. 171.

[62] *Id; Jensen,* 482 A. 2d at 114.

[63] *See* Defendant's Memorandum in Support of Suppression at 6.

[64] *Id.* at 7-16.

[65] *Id.* at 16-19; *Franks,* 438 U.S. at 156; *Jensen,* 482 A. 2d at 113-114.

inaccuracies in the affidavit in support of the search warrant, those inaccuracies do not constitute "untruthful" statements under *Franks* and *Jensen* because they were not directly attributable to the affiant, Detective Bryda. Rather, the State argues that any factual errors or omissions were attributable to Alison Bauer in her statements to Bryda on December 12, 2001. The State further asserts that Bryda "appropriately accepted" Bauer's statements to him as true and prepared the Search Warrant Application and Affidavit accordingly.[66]

Did the Affidavit Contain Untruthful Statements?

The defendant points to several statements in the affidavit which he claims are untruthful. Specifically, the defendant attacks paragraphs 5-12 of the affidavit as containing numerous "red flags," i.e., false statements which would have been known to Bryda and Feeney if they had taken more time in conducting their investigation prior to preparing the Search Warrant Application and Affidavit.

Paragraphs 5 and 6.

The defendant initially challenges paragraphs 5 and 6 of the affidavit, which pertain to the date of the prior repackaging incident and the content of the repackaged box. Specifically, the defendant points out that the affidavit was untruthful in that the repackaging did not take place on September 4, 2001, and the repackaged box did not contain a coffee mug as asserted in those paragraphs of the affidavit.[67] The defendant argues that if Bauer told Bryda that the repackaged box

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[66] *See* State's Memorandum of Law in Opposition to Defendant's Motion to Suppress at 2-3.

[67] Search Warrant Application and Affidavit at paras. 5-6.

contained a videocassette, the repackaging date could not have been September 4 because the shipping order for that day indicated that box contained a coffee mug. Defendant notes that the shipping orders were reviewed by Bryda and Feeney on December 12 as they spoke to Bauer and he seriously doubts Bryda's testimony that he did not make copies of them until the day after he secured the search warrant.[68] Additionally, the defendant points out that it was obvious that a coffee mug could not have possibly fit into the one pound federal Express box handed over to Bryda on December 12. The defendant argues that the failure of the police to reconcile the obvious discrepancy over the date of the repackaging and the content of the repackaged box until after the warrant was secured "is as reckless as it gets."[69]

Paragraph 7.

The defendant next challenges paragraph 7 of the affidavit regarding conflicting accounts of the content of the repackaged box. The defendant points out that the affidavit and Bauer's testimony at the *Franks* hearing claimed that the repackaged box contained a pharmaceutical container with numerous pills inside.[70] However, the testimony of Mr. Brown, the owner of the store, was quite different on this fact. As noted above, Mr. Brown testified that the repackaged box contained thin, foil packets of some type of pharmaceutical, which, the defendant argues, could not be confused with a pill bottle. On this point, the defendant asserts that Mr. Brown was a much more credible witness than Bauer and the only way to reconcile the different versions of the content of the repackaged box

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[68] Defendant's Memorandum in Support of Suppression at 4, n. 6.

[69] *Id.* at 5, n. 8.

[70] Search Warrant Application and Affidavit at para. 7.

is to conclude that Bauer lied to the Court in her testimony. The defendant asserts that Bauer must have previously opened two of "Petty's" boxes; one when she was alone which contained the pills as she described, and another when Mr. Brown was present with her which contained the foil packets as he described.[71] The defendant's point is that Bryda was not even aware of the differing versions of the content of the repackaged box because he did not interview Mr. Brown until December 13, the day after he and Feeney had spoken to Bauer and prepared the affidavit.

Paragraph 8.

The defendant next assails the assertions in paragraph 8 of the affidavit regarding the number of packages "Petty" brought to the store for delivery and the number of packages personally handled by Bauer. The defendant points out that paragraph 8 is inconsistent in that it initially states that "Petty" "delivered 19 packages" for shipping and then later states that Bauer "handled a total of seven of the 21 packages."[72] As noted at the *Franks* hearing, the shipping orders reveal that Bauer actually handled 10 of "Petty's" packages. Again, the defendant notes that the shipping orders were reviewed by Bryda and Feeney on December 12 when they spoke to Bauer and these facts should have been corrected before they appeared in the affidavit.

Paragraph 9.

The defendant next points to several untruthful statements in paragraph 9 of the affidavit. The defendant initially attacks the first sentence of the affidavit, which states that Bauer told him that

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[71] Defendant's Memorandum in Support of Suppression at 3, n. 4.

[72] *Id.* at 8; Search Warrant Application and Affidavit at para. 8.

"each time ['Petty'] came into the store, the package would already be packaged in a Fed Ex box."[73] The defendant states that this sentence is not truthful because the evidence established at the *Franks* hearing demonstrated that "Petty" used Federal Express boxes as well as several United Parcel Service boxes and a few Federal Express envelopes.

The defendant next attacks the second sentence of this paragraph, which states that Bauer told him "[t]he boxes would always be overstuffed and too small for what ['Petty'] claimed to be in the box."[74] The defendant argues that Bryda should have questioned Bauer further as to how a pharmaceutical pill container could possibly "overstuff" even the smallest Federal Express box admitted into evidence at the hearing.[75] The defendant's point here is that it was not possible and, therefore, not truthful. According to the defendant, Bryda should have known that fact before making the factual assertion in the affidavit and submitted to the Magistrate.

The defendant also attacks the third sentence of this paragraph, which states that Bauer told him "the boxes were always the same size irregardless [sic] of what ['Petty'] stated was in the box."[76] Defendant claims that this sentence was untruthful in that the shipping orders, which were reviewed by Bryda at the store on December 12 prior to the preparation of the affidavit, reflect that

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[73] Search Warrant Application and Affidavit at para. 9.

[74] *Id.*

[75] Defendant's Memorandum on Support of Suppression at 9.

[76] Search Warrant Application and Affidavit at para. 9.

"Petty" used four different size packages.[77] The defendant argues that Bryda should have also known that fact before preparing the affidavit.

Paragraph 10.

The defendant also challenges the last two sentences of paragraph 10 of the affidavit as untruthful insofar as they imply that the December 12 package was "consistent" with other packages. The challenged portion of this paragraph states that Bauer told Bryda "that [the December 12] package was consistent with every package [Bauer] had dealt with in the past from ["Petty"]. This parcel was also consistent with the previous repackaged parcel from September 4th."[78] The defendant challenges the use of the term "consistent" for several reasons. First, the shipping orders demonstrate that "Petty" sent packages to six different addresses in five different geographic regions. Next, the types of packages "Petty" used were different, the sizes of packages were different, and the shipping companies were different. Additionally, the defendant points out that the shipping orders reveal that it is not clear that sender consistently executed signature waivers.[79] The defendant argues that had Bryda carefully reviewed the shipping orders before he prepared the affidavit, he would have discovered these inconsistencies via affidavit before submitting them to the magistrate.

Paragraph 11.

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[77] Defendant's Memorandum in Support of Suppression at 9. As noted above, the shipping orders were admitted into evidence at the *Franks* hearing as Defense Exhibits 1-19.

[78] Search Warrant Application and Affidavit at para. 10.

[79] Defendant's Memorandum in Support of Suppression at 9-10.

The defendant also attacks the factual assertions contained in paragraph 11 of the affidavit pertaining to the statements made to Bryda and Feeney by Detective Pope of the Delaware State Police. Paragraph 11 states that Detective Pope informed the officers about certain general characteristics with respect to drug shipments. Pope informed Bryda and Feeney that dealers commonly send packages using handwritten air bills for overnight or next day air delivery. Pope also informed them that dealers commonly pay for the deliveries in cash and obtain signature waivers so the recipients will not have to sign for the packages upon delivery. The defendant's challenges the last sentence of this paragraph, which states that "[e]ach of the above listed elements have pertained to the packages brought to the store by ['Petty']."[80] The defendant argues that this sentence is untruthful because "each" of the elements referred to by Detective Pope did not pertain to the packages "Petty" brought in for delivery. Specifically, the defendant points out that the shipping orders, which Bryda and Feeney reviewed on December 12, reveal that only 10 of "Petty's" packages were for overnight or next day delivery and that 11, including the December 12 package, were not.[81] Additionally, the defendant argues that 75 percent of the shipping orders are silent as to whether "Petty" signed signature waivers.[82]

Paragraph 12.

Finally, the defendant attacks the last sentence of paragraph 12 of the affidavit pertaining to certain statements by Detective Agnor of the Newark Police Department made to Bryda and Feeney.

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[80] Search Warrant Application and Affidavit at para. 11.

[81] Defendant's Memorandum in Support of Suppression at 10-11.

[82] *Id.*

Paragraph 12 states that Agnor informed the officers about other general characteristics of drug shipments. Specifically, Agnor informed them that "it is also common for these packages to contain false names for both the sender and receiver."[83] The defendant points out that Bryda testified at the *Franks* hearing that it was not until December 13, the day after the search warrant was issued, that he investigated whether that the intended addressees were fictitious names. In fact, they were actual people. Thus, these packages did not fit Agnor's profile of drug shipments.[84] The defendant also assails the "superficial" efforts Bryda set forth in paragraph 13 of the affidavit to imply that "Petty" was a false name.[85] The defendant does not challenge the fact that "Pete Petty" was determined to be a false name. Rather, the defendant argues that Bryda should have done a more thorough check to reach his implied conclusion that "Petty" was a false name rather than a mere check of the *DELJIS* system and a check of a cross reference directory which may have been outdated.[86] The defendant asserts that Bryda should have also checked local telephone,[87] utility, and/or property records before making the implication in the affidavit that "Petty" was a pseudonym.

The Court has carefully considered each of the affidavit statements defendant asserts is untruthful, both individually and collectively, and concludes that although Bryda and Feeney may

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[83] Search Warrant Application and Affidavit at para. 12.

[84] Defendant's Memorandum in Support of Suppression at 11-12.

[85] *Id.*

[86] *Id* at n. 13.

[87] Defendant notes that there was no testimony from Bryda that he attempted to verify the identity of "Petty" by calling the telephone number listed on the shipping orders. *Id.*

have been negligent in preparing the affidavit, they acted in a very hasty manner which resulted in misstatements and inaccuracies in the affidavit, the challenged statements are not "untruthful" under *Franks*. First and foremost, the affidavit and Bryda's testimony at the *Franks* hearing demonstrate that the challenged portions of the affidavit were based on statements made to Bryda and Feeney by others, primarily Bauer, and to a far lesser extent, by Pope and Agnor. *Franks* focuses on the truthfulness of statements made by the affiant, not factual statements made to the affiant by others.[88] Here, as in *Jensen,* there is no indication in the record that Bryda or Feeney did not believe Bauer's statements to them or that they should not have accepted her statements as truthful representations of the facts.[89]

With respect to the challenge to paragraphs 5 - 7 of the affidavit regarding the date of the prior repackaging and the content of the repackaged box, the Court finds that the errors are

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[88] *Franks,* 438 U.S. at 171 ("[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant."); *Jensen,* 482 A. 2d at 114; *State v. Backus,* 2002 WL 31814777 (Del. Super.) at *9 (even if the informant's statements to the police are inaccurate or untruthful, the alleged false statements were not those of the affiant, and cannot establish reckless disregard on the part of the officers.) The Court has also carefully reviewed the decisional law cited by the defendant in his Memorandum and does not find it enlightening in attempting to resolve this matter. Moreover, the *Koons* case discussed at pages 13-14 of defendant's Memorandum does not stand for the proposition asserted by the defendant. *See United States v. Koons,* 2002 WL 1980478, * 3-5 (8th Cir., Aug. 29, 2002). In *Koons*, the Eighth Circuit affirmed the district court's denial of the defendant's motion to suppress on the issue of probable cause for the issuance of a search warrant based upon the corroborated tip of an informant. Defendant's Memorandum as to the substance of the holding in *Koons* is simply wrong and does not rely on the *Franks* analysis at all.

[89] *Jensen,* 482 A. 2d at 114.

insignificant in relation to the remainder of the document.[90] The fact remains that sometime prior to December 12, 2001 (whether it was in September or November), Bauer repackaged a box dropped off by the defendant, the content of which (whether it was a coffee mug or a videocassette) was not what was purported by the defendant to be inside. Rather, the box contained some type of pharmaceutical (either white pills with a line going down one side, or foil wrapped packets) inside, which Bryda confirmed were Tylenol with Oxycodone and Methadone, both Schedule II narcotic controlled substances. Either version of these facts is damaging to defendant for probable cause purposes.

Likewise, the Court finds that the challenge to paragraph 8 of the affidavit regarding the number of packages the defendant brought to the store for shipment (either 19 or 21) and the number of packages handled by Bauer (either 7 or 10 out of the 21 total packages) is a minor numerical error[91] and not detrimental to the overall factual scenario portrayed in the affidavit in support of probable cause. The fact is that on 19 occasions the defendant brought in 21 packages for shipment.[92] Moreover, the fact that Bauer, the confidential informant, actually handled more packages than what the affidavit states may have made the probable cause determination of the Magistrate incrementally easier.

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[90] *State v. Crowe,* 1996 WL 280775 at *5 (Del. Super).

[91] *Id.; Blount v. State,* 511 A. 2d 1030, 1034 (Del. 1986) (an affidavit designed to establish probable cause is to be considered as a whole and not on the basis of a "hypertechnical" analysis of its separate allegations.) (citing *Jensen,* 482 A 2d at 111); *Dorsey v. State*, 761 A.2d at 811 (the affidavit is to be considered as a whole and not on the basis of separate allegations) (citations omitted).

[92] *Franks* Hrg. Tr. at 58-60 (Sept. 3, 2002).

With respect to paragraphs 9 and 11 of the affidavit, these two paragraphs clearly state, in part, that "each time" defendant shipped a Federal Express box, the boxes would "always" be overstuffed, the boxes were "always" the same size, and "each" of the elements mentioned by Detective Pope (specifically, signature releases) pertained to the packages brought in by "Petty." These broad statements are not entirely correct. According to Bryda's testimony, paragraph 9 was based on Bauer's statements to him regarding the particular boxes she handled, not all of the boxes brought in by "Petty" for shipment.[93] Although Bryda mischaracterized Bauer's statements to him in paragraph 9 and overstated paragraph 11 with respect to signature releases (which could have had the effect of making these specific facts appear more egregious for a probable cause determination), the mischaracterization does not rise to the level of a knowing, intentional, or reckless falsehood contemplated by *Franks*.[94] Even if the incorrect statements are removed from these paragraphs, the Court concludes that the Magistrate would not have reached a different conclusion on proximate cause given the totality of the circumstances.

The defendant's challenges to the last two sentences of paragraph 10 of the affidavit and the use of the term "consistent" are likewise unavailing. Bryda testified that Bauer informed him that the December 12 package was "consistent" with the other packages she handled from the defendant and that the package was "consistent" with the previously repackaged parcel. Bauer confirmed this in her testimony and stated that the packages she received from the defendant were similar in that they were all prepackaged, that signature releases were signed, they were usually in Federal Express

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[93] *Id.* at 72-73 (Sept. 3, 2002).

[94] *Jones v. Town of Seaford, Del.,* 661 F. Supp. 864, 874 (D. Del. 1987).

boxes, and that the packages were pretty much the same type.[95] While it is true, the defendant points out, that the packages were not "consistent" in that they were addressed to several different individuals in different geographic regions, that the boxes or envelopes were not all the same size, that the shipping company was not always the same and that the packages were not always sent overnight or next day air, this paragraph is not untruthful under *Franks*. It is based on information provided by Bauer which Bryda believed was truthful and, unlike the challenged portions of paragraphs 9 and 11 discussed above, this paragraph is specifically limited to the packages Bauer handled, not all packages brought in by the defendant for shipping.

The defendant's challenges to paragraph 12 regarding the inference that false names were used by the defendant and for the addressees also fail. Although Bryda could have conducted a more thorough investigation to determine whether "Pete Petty" was a false name, as suggested by the defendant, the Court concludes that there was no error here. First, paragraph 13 of the affidavit makes clear that Bryda did some investigation as to the veracity of the name "Pete Petty." Second, the affidavit is not false. Bryda confirmed the next day that "Pete Petty" was a false name and it does not state that the intended addressees are false names. All paragraph 12 says is that Sergeant Pope informed Bryda of certain general characteristics of drug shipments, i.e., that it is common for packages to bear false names for both the sender and recipient.

The defendant also questions Bryda's testimony that he could not recall whether he made copies of the shipping orders on December 12 after reviewing them with Bauer and Feeney,[96] and

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[95] *Franks* Hrg. Tr. at 78-79 (Sept. 3, 2002).

[96] Defendant's Memorandum in Support of Suppression at 3-4, n. 5-6..

argues that the affidavit was recklessly prepared without the detectives first checking the shipping orders for confirmation of the challenged statements. However, the affidavit itself confirms that Bryda and Feeney had copies of the shipping orders at that time.[97] The Court finds, as revealed by Bryda's testimony at the hearing, that he did not know how to interpret all of the information on the shipping orders to clarify each of Bauer's statements.[98] Indeed, when considering the challenged portions of the affidavit, and comparing them to the correct information on the shipping orders, it is clear that Bryda did not know how to interpret much of the information on the shipping orders. The affidavit and Bryda's testimony confirm that the challenged statements were based on information supplied to the detectives by others and, although this is somewhat of a close case given the nature and number of the inaccuracies, the Court finds that the detectives appropriately believed the information provided to them as truthful. The Court notes that search warrant affidavits are normally drafted by non-lawyers, usually in the midst and in the haste of a criminal investigation. In that regard, "[t]echnical requirements of elaborate specificity"[99] are not always required. Here, the defendant is unable to prove by a preponderance of the evidence that the inaccuracies in the affidavit were recklessly or deliberately made.

The Court certainly does not condone the conduct of the detectives in this regard. Copies of

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[97] Search Warrant Application and Affidavit at para 4.

[98] *Franks* Hg Tr. at 59, 60-62, 65-68 (Sept. 3, 2002). As revealed on page 59 of the transcript, Bryda admitted the following at the hearing: "I don't know how to read the receipts so I'm just going off the handwritten parts." It is clear that is what he did in preparing the affidavit and relied on his notes rather than the shipping orders.

[99] *U.S. v. Brown,* 3 F. 3d 673, 678 (3d Cir. 1993).

the shipping orders should have been carefully reviewed and fully understood by them before the affidavit was prepared. If Bryda and Feeney had done so, most of the statements challenged by the defendant would have been clarified and corrected before the affidavit was presented to a Magistrate. For example, challenges as to the truthfulness of the affidavit pertaining to date of the prior repackaging, the contents of the repackaged box, the number of packages handled by Bauer, the type and size of package used, the carrier used, and the consistency of the packages, would have been eliminated or greatly reduced if the detectives took more time to review and understand the information on the shipping orders. Likewise, if Bryda and Feeney had waited to interview Doug Brown before they prepared the affidavit they would have known that there was a discrepancy about the timing of the prior repackaging incident, the contents of the repackaged box, the notes taken by Bauer, and the presence or absence of Mr. Brown at the time. These factual issues could have, and perhaps would have, been clarified and corrected. Nevertheless, under the facts presented here, the detectives did not inappropriately rely on their notes from their conversation with Bauer.[100]

Regrettably, the factual challenges could have been avoided altogether had Bryda and Feeney just waited until the next day to prepare the affidavit and seek the issuance of the search warrant. The Court heard nothing at the *Franks* hearing from Bryda or the State that would suggest that time was of the essence in this particular investigation. As pointed out by the defendant in his Memorandum,[101] the December 12 package was already in the possession of Bryda and Feeney and

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[100] *Id.* In the *Brown* case, the affiant's reliance on his personal notes, rather than engaging in a potentially time consuming search of records to confirm particular facts supporting the reliability of the informant, was not deemed reckless.

[101] Defendant's Memorandum in Support of Suppression at 6, n. 10.

there was no apparent reason for their haste in applying for the search warrant that evening. Here, completing the investigation the following day and applying for the search warrant at that time would have also allowed the detectives time to confirm that "Pete Petty" was a fictitious name. In sum, the Court concludes that although the investigation was rushed and some of the "facts" in the affidavit were incorrect, the challenged statements are not "untruthful" within the meaning of *Franks*.

Having concluded that the challenged portions of the affidavit are not "untruthful," the Court need not engage in a determination of whether the statements were knowingly or intentionally made or made with a reckless disregard for the truth. However, even if such an exercise was warranted in this case, and the Court deleted the alleged untruthful statements from the affidavit and supplemented them with the correct information,[102] the Court concludes that there would be sufficient factual information upon which the Magistrate could have made a finding of probable cause for the issuance of the search warrant.[103]

III. CONCLUSION

For all of the foregoing reasons, the defendant's *Franks* Motion is **DENIED**.

IT IS SO ORDERED.

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[102] *See Sherwood v. Mulvihill,* 113 F. 3d 396, 400 (3d Cir. 1997) (under *Franks,* the Court may delete false information and supply omitted information to "reconstitute" the affidavit with the correct information.) Other federal jurisdictions unanimously allow courts to supply or add any omitted facts to the information. *Id.* at n. 3.

[103] This conclusion is also based upon the Court's view that the claimed untruthful statements "were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of [Bryda and Feeney], did not go to the integrity of the affidavit." *Rugendorf v. United States,* 376 U.S. 528, 532 (1964). The other substantial elements of the affidavit, once supplemented with the correct factual information, would have been sufficient to support a sufficient probable cause determination by the Magistrate.

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Jan R. Jurden, Judge