IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000403-MR

RICKIE L. MOREHEAD APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 12-CR-00224

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Muhlenberg Circuit Court sentenced Appellant, Rickie L. Morehead, to a total of twenty-four years' imprisonment following his conditional plea of guilty to manufacturing methamphetamine and being a second-degree persistent felony offender (PFO). In connection with his guilty plea, Appellant reserved for appeal the issue of whether the trial court erred in denying his motion to suppress drug-related evidence seized from his residence.

He now appeals as a matter of right, Ky. Const. § 110(2)(b), asserting that 1) the affidavit supporting the search warrant contained intentional misrepresentations that the trial court should have stricken, and 2) the trial court was not constrained to looking at "the four corners" of the affidavit in determining whether probable cause existed for the search warrant because there were material omissions made about the credibility of the informant. For the following reasons, we affirm.

I. BACKGROUND

Detective Troy Gibson of the Pennyrile Narcotics Task Force (the Task Force) received a phone call from dispatch alerting him that Alexis Bosler wanted to talk to him about drug activity. Detective Gibson was familiar with Bosler, having previously arrested him on methamphetamine charges. Detective Gibson picked up Bosler in Central City, Kentucky. In fact, Bosler was scheduled to begin serving a jail sentence that same evening for an unrelated charge, so Detective Gibson offered to drive him to the jail. On the way to the jail, they had a conversation, which was recorded.

Bosler told Detective Gibson that he had drunk two beers earlier in the afternoon. Detective Gibson did not believe Bosler to be intoxicated, as Bosler's speech and gait were normal. Bosler then informed Detective Gibson that he had purchased 0.5 grams of methamphetamine from Appellant at Appellant's house, and that he believed Appellant still had around 0.25 ounces of methamphetamine in the house. Bosler also told Detective Gibson he knew Appellant had been cooking methamphetamine on the property.

Detective Gibson had been acquainted with Appellant for many years, and was personally aware of where Appellant lived, having previously made a drug arrest of an individual leaving Appellant's residence. Detective Gibson had also discovered that Appellant had recently been purchasing Sudafed.[1] Furthermore, Detective Gibson and the Task Force knew that Bosler had been living at Appellant's residence.

[1] Sudafed contains pseudoephedrine, an ingredient used in making methamphetamine.

On the basis of the information provided by Bosler, Detective Gibson prepared an affidavit and sought a search warrant for Appellant's property. The affidavit contained Appellant's address along with a description of Appellant's house and its GPS coordinates. The Muhlenberg Circuit Court issued and served a search warrant. Methamphetamine and various items used in its manufacture and trafficking were found in Appellant's house, including an actively cooking methamphetamine lab. Appellant was arrested, and he admitted to using methamphetamine.

Appellant argued to the trial court that the information contained in Detective Gibson's affidavit was insufficient to establish probable cause for the issuance of the search warrant. Appellant asserted that Bosler was not a credible informant, that Detective Gibson should have further investigated Bosler's credibility, and that Gibson should have driven Bosler by Appellant's house in order to have Bosler more accurately identify it.

After listening to the recorded conversation between Detective Gibson and Bosler, the trial court issued an Opinion and Order denying Appellant's motion to suppress. The trial court rejected Appellant's claims that Bosler lacked credibility, noting that Kentucky law does not require a finding of credibility when the tipster is a known person. The court further found that Detective Gibson's affidavit was sufficient to provide probable cause for the issuance of a warrant. Appellant entered a conditional plea of guilty, reserving his right to pursue appeal of the trial court's denial of his motion to suppress. The trial court entered judgment accordingly, sentencing Appellant to twenty

years' imprisonment for the offense of manufacturing methamphetamine, enhanced by four years by reason of his status as a persistent felony offender in the second degree, for a total of twenty-four years. This appeal followed.

II. ANALYSIS

Appellant makes two arguments on appeal as to why the trial court erred in denying his motion to suppress the drug-related evidence seized from his residence: 1) Detective Gibson's affidavit supporting the search warrant contained intentional misrepresentations that should have been stricken, and 2) the trial court should have looked outside the "four corners" of the affidavit in conducting its analysis of whether probable cause existed for the search warrant because Detective Gibson made material omissions about the credibility of his informant.

A. Intentional Misrepresentations in the Affidavit

Appellant first argues that some of Detective Gibson's statements in the affidavit were intentionally false or made with reckless disregard for the truth. Appellant claims these statements make it appear as though Bosler was Detective Gibson's source of information regarding Appellant's address and the description of the house, while, in reality, Detective Gibson relied on his personal knowledge to supply this information. Therefore, Appellant argues that the address and description of the house contained in the affidavit should be stricken under *Franks v. Delaware*, 438 U.S. 154 (1978),[2] and the

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[2] *Franks* holds that "[s]tatements in an affidavit that are intentionally false or made with reckless disregard for the truth must be stricken."

Commonwealth should be treated as having failed to specify the location altogether.

We begin by noting that Appellant's first argument on appeal exceeds the scope of the argument he made before the trial court. At the trial court level, Appellant never argued that the statements in the affidavit regarding Appellant's residence should be stricken for intentional misrepresentation. He merely argued that Detective Gibson should have conducted further investigation in establishing Bosler's credibility, including driving Bosler by Appellant's house to confirm that it was in fact the place Bosler was referring to. As a result, the trial court's opinion did not address whether intentional misrepresentations were made in the affidavit supporting the search warrant.

This Court is not at liberty "to review issues not raised in or decided by the trial court." *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) (quoting *Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989)). An objection made in the appellate court must be within the scope of the objection made in the trial court, both as to the matter objected to and as to the grounds of the objection, so that the question may be fairly held to have been brought to the attention of the trial court. *Elery v. Commonwealth*, 368 S.W.3d 78, 97-98 (Ky. 2012) (citing *Richardson v. Commonwealth*, 483 S.W.2d 105, 106 (Ky.1972)). In other words, "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1977).

Given that Appellant did not raise the argument at trial that Detective Gibson intentionally made false statements or statements with reckless disregard for the truth in his affidavit, we will not address that argument on appeal. At best, such error is subject to review for palpable error under RCr 10.26. *Elery*, 368 S.W.3d at 98. The palpable error rule allows reversal for an unpreserved error when "manifest injustice has resulted from the error." RCr 10.26. However because Appellant has not requested palpable error review here, we decline to address his claims under this standard.

B. Material Omissions in the Affidavit

Next, Appellant argues that the trial court should have looked outside the "four corners" of the affidavit in making its decision as to whether probable cause existed, because Detective Gibson made material omissions from the affidavit about Bosler's credibility. Appellant asserts that the trial court should have considered that Bosler had never been an informant before, the fact that he was facing impending jail time, and that he was allegedly intoxicated at the time of his conversation with Detective Gibson.

Ordinarily, when faced with a motion to suppress evidence obtained pursuant to a search warrant, the trial court judge should "determine whether under the 'totality of the circumstances' presented within the four corners of the affidavit, a warrant-issuing judge had a substantial basis for concluding that probable cause existed." *Commonwealth v. Pride*, 302 S.W.3d 43, 49 (Ky. 2010). In this case, using the "four corners" approach, the trial court denied Appellant's motion to suppress the evidence seized from his residence after

determining that the affidavit supporting the search established probable cause.

First, the affidavit states that Detective Gibson interviewed Bosler, from which interview he learned that Bosler purchased methamphetamine from Appellant at Appellant's residence. Detective Gibson further learned that Bosler had observed other bags of methamphetamine at Appellant's residence at the time of purchase. Detective Gibson stated in the affidavit that he was aware that Bosler was familiar with methamphetamine due to having previously charged him with possession of the drug. The affidavit also contains a description of Appellant's residence and the address. Looking at the totality of the circumstances within the affidavit, the trial court had a substantial basis for finding probable cause existed to support the search warrant.

However, as Appellant has noted, there is an exception to the "four corners" rule with regard to material omissions. While normally there is no need to question the facts of an affidavit, *Franks* holds that statements in an affidavit must be stricken if they are intentionally false or made with reckless disregard for the truth. *Franks*, 438 U.S. at 154. Once the affidavit has been purged of its falsities, the trial court must then determine whether it still contains a substantial basis for finding probable cause. *Id.*

Franks has been extended to apply to intentional or reckless material omissions. *See Pride*, *supra*, and *Commonwealth v. Smith*, 898 S.W.2d 496 (Ky. App. 1995). An affidavit can be invalidated where a police officer "omitted facts with the intent to make, or in reckless disregard of whether the omission made,

the affidavit misleading and that the affidavit, as supplemented by the omitted information, would not have been sufficient to support a finding of probable cause." *Smith*, 898 at 503 (citing *Franks*, *supra*). Appellant argues that Detective Gibson purposefully or recklessly omitted material facts concerning Bosler's credibility from his affidavit in violation of *Franks*, and therefore the trial court erred in ruling that it was constrained to looking only at the contents of the affidavit.

We first note that Appellant merely argued to the trial court that Bosler was not a reliable informant, and that his veracity was called into question by a number of factors. Appellant did not argue that Detective Gibson purposefully or recklessly omitted these factors with the intention to make the affidavit misleading. Thus, the trial court did not make a decision under *Franks* as to whether material facts were purposefully omitted or omitted with reckless disregard of making the affidavit misleading. *Smith*, 898 S.W.2d at 504.

However, even if we view Appellant's second argument on appeal as coming within the scope of his argument at trial, there is no reason to believe that Detective Gibson made any material omissions in his affidavit with the intent to mislead.

The Sixth Circuit has held that:

> [E]xcept in the *very* rare case where the defendant makes a strong preliminary showing that the affiant *with the intention to mislead* excluded critical information from the affidavit, and the omission is critical to the finding of probable cause, *Franks* is inapplicable to the omission of disputed facts.

Mays v. City of Dayton, 134 F.3d 809, 816 (6th Cir. 1998). The rationale behind this is to avoid placing the burdensome task on law enforcement officers to follow up and include every hunch and detail of an investigation in a warrant affidavit. *Id.*

Appellant did not make the required preliminary showing that Detective Gibson exhibited the intention to mislead in this case. Turning back to Appellant's arguments, the fact that Bosler had never been an informant is irrelevant to his credibility and there was no need for Detective Gibson to acknowledge it in his affidavit. As stated by the trial court, if an informant's name is given, hearsay information can be the basis of probable cause to search and there is no need for a specific showing of a named informant's reliability. *Edwards v. Commonwealth*, 573 S.W.2d 640 (Ky. 1978); *Embry v. Commonwealth*, 492 S.W.2d 929 (Ky. 1973); *Commonwealth v. Hubble*, 730 S.W.2d 532 (Ky. App. 1987).

Furthermore, the fact that the information given by Bosler was against his penal interest goes toward the veracity of his statement. *United States v. Harris*, 403 U.S. 573, 583 (1971). There is no evidence that Bosler was receiving any kind of help from Detective Gibson for giving this information, in fact, during their conversation, Detective Gibson was driving Bosler to the jail in order to serve his impending sentence.

Finally, Detective Gibson testified that Bosler's speech and gait appeared normal and that he did not believe him to be intoxicated. Their conversation was recorded and reviewed by the trial court. There is no evidence that

Detective Gibson was intentionally omitting anything about Bosler's sobriety in order to create a misleading affidavit. Thus, the trial court did not need to consider these extrinsic factors in determining whether probable cause existed, and was correct in not considering them. The trial court properly acknowledged that it was constrained to "the four corners" of the affidavit when determining whether probable cause existed for the search of Appellant's residence.

On review of a suppression hearing ruling regarding a search pursuant to a warrant, the proper test is to determine first if the facts found by the trial judge are supported by substantial evidence, RCr 9.78, and then to determine whether the trial judge correctly determined that the issuing judge did or did not have a substantial basis for concluding that probable cause existed. *Pride*, 302 S.W.3d at 49 (citing *Illinois v. Gates, 462* U.S. 213, 236 (1983) and *Beemer v. Commonwealth*, 665 S.W.2d 912, 915 (Ky. 1984)). All reviewing courts must give great deference to the warrant-issuing judge's decision. *Id.*

Here, the trial court made its decision after reviewing the affidavit, Detective Gibson's testimony, and Bosler's recorded statement. We believe this evidence to be substantial in supporting the trial court's findings of fact. Furthermore, given the contents of the affidavit as stated above, we believe that the trial court correctly determined that the warrant-issuing judge did have a substantial basis for concluding that probable cause existed.

III. CONCLUSION

For the reasons set forth above, we determine that the trial court did not err in denying Appellant's motion to suppress the evidence seized from his residence pursuant to a search warrant. The judgment of the Muhlenberg Circuit Court is, therefore, affirmed.

All sitting. All concur.

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