

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

v

LARRY THOMAS,

Defendant-Appellee.

UNPUBLISHED
February 22, 2002

No. 234604
Wayne Circuit Court
LC No. 01-000749

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order dismissing the charges of possession with intent to deliver at least 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b, against defendant. The trial court dismissed the case without prejudice when the prosecution failed to comply with the court's order to produce a confidential informant. We reverse and remand.

Detroit Police Officer Todd Eby presented a sworn affidavit in support of his request for a warrant to search defendant's residence. The affidavit relied heavily on information received from a confidential informant. A magistrate issued a search warrant for defendant's residence on the basis of the affidavit. Pursuant to the warrant, police searched defendant's residence and recovered cocaine and a firearm resulting in the charges against defendant.

Defendant moved to suppress the evidence seized at his residence. Defendant challenged the veracity of the information contained in the officer's search warrant affidavit and moved for a *Franks*¹ evidentiary hearing on the matter. In support of his motion, defendant submitted his own affidavit denying the allegations in Eby's affidavit and attesting that only defendant's girlfriend visited him at his residence on the day the informant purported to have been there. The trial court granted defendant's motion for an evidentiary hearing. Before taking any testimony, the court ordered the prosecution to produce the confidential informant. When the prosecution refused to comply, the trial court dismissed the case without prejudice.

¹ *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

The prosecution contends that the court erred in ordering the production of the informant because defendant failed to make the requisite showing that Officer Eby knowingly and intentionally included a false statement in the search warrant affidavit and also because the court had not taken testimony from Officer Eby. We review a trial court's decision to order the production of an informant for an abuse of discretion. *People v Thomas*, 174 Mich App 411, 416; 436 NW2d 687 (1989). To the extent that our review concerns the trial court's interpretation or application of law, our review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001); *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

Before the court will require the production of an informant, a defendant must first make a substantial preliminary showing of deliberate falsity to warrant an evidentiary hearing on the matter. *People v Poindexter*, 90 Mich App 599, 609; 282 NW2d 411 (1979). "To mandate an evidentiary hearing, defendant's attack must be more than conclusory, if possible, and must be supported by more than a mere desire to determine who the informant was." *Poindexter, supra* at 609. A defendant must make specific allegations of "deliberate falsehood or of reckless disregard for the truth," and those allegations must be accompanied by an offer of proof and supporting reasons. *Id.* A defendant should also provide reliable witness' statements to support his claim, and in the absence of witness' statements, a defendant should satisfactorily explain their absence. *Id.* If the defendant meets these requirements to the trial court's satisfaction and the remaining content within the affidavit is insufficient to support a finding of probable cause,² the defendant is entitled to a *Franks* hearing regarding the veracity of the affidavit.³ *Id.*

During the *Franks* hearing, the court should question the officer to determine if he is being truthful regarding the existence of the informant. *Poindexter, supra* at 610. The court should deny the defendant's request for production of the informant if, after questioning the officer, the court is convinced of his truthfulness regarding the existence of the informant. *Id.* However, if the court has some doubt as to the officer's credibility, it has wide discretion to

² We assume without deciding that the affidavit supporting the search warrant, which was largely based upon the information provided by the confidential informant, could not support a probable cause determination.

³ The prosecution appears to confuse the distinction between the threshold requirements to warrant an evidentiary hearing, and then once a hearing is granted, under what circumstances the court may order the production of an informant as explained in *Poindexter, supra*. In its brief on appeal, the prosecution argues that defendant failed to make the requisite showing of deliberate falsity in the affidavit supporting the search warrant. *Poindexter, supra* at 609-610. The prosecution maintains that defendant's affidavit does not amount to a substantial showing that Officer Eby recklessly or intentionally made false statements in support of a probable cause finding. *Poindexter, supra* at 605, 609-610. Although the prosecution's argument on this point has merit, the prosecution makes this argument in the context of its challenge to the trial court's decision to order production of the informant. The prosecution does not expressly challenge the trial court's decision to grant an evidentiary hearing. Accordingly, we limit our review to the prosecution's sole allegation of error, i.e., the trial court's order to produce the informant.

require production of the informant. *Poindexter, supra* at 609 n 4, 610, citing *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978).⁴

In this case, the trial court erred in ordering the production of the informant without first conducting an evidentiary hearing to ascertain whether Officer Eby was being truthful regarding the existence of the informant. *Thomas, supra* at 416-417; *Poindexter, supra* at 610. The procedure outlined in *Poindexter* requires the court to question the officer involved and consider any other relevant evidence prior to ordering production of the informant. *Poindexter, supra* at 610. Only after questioning the officer, if the officer's testimony convinces the trial court that there is some doubt as to his credibility, may the court require production of the informant. *Thomas, supra* at 417; *Poindexter, supra* at 610. By ordering production of the informant without first hearing testimony from Officer Eby and making a determination regarding his truthfulness, the trial court improperly denied the prosecution the opportunity to establish his credibility. *Thomas, supra* at 418. Accordingly, we conclude that the trial court's order for production of the informant was premature and the trial court abused its discretion in dismissing the charges against defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

⁴ Our Supreme Court has recognized that an in camera hearing is the most effective means of striking the appropriate balance between the competing interests of the parties:

. . . [W]here the government invokes the privilege in the face of a defense request for disclosure, and where the accused is able to demonstrate a possible need for the informant's testimony, the trial judge should require production of the informant and conduct a hearing in chambers, and out of the presence of the defendant. At this hearing the court will have an opportunity to examine the informant in order to determine whether he could offer any testimony helpful to the defense. A record should be made of the in camera session and its contents sealed so that only an appellate court will have access thereto. [*People v Underwood*, 447 Mich 695, 706; 526 NW2d 903 (1994), quoting *People v Stander*, 73 Mich App 617, 622-623; 251 NW2d 258 (1977).]