STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NORMAN BROWN, JR.,

Defendant-Appellee.

UNPUBLISHED
April 2, 2002

No. 233913
Wayne Circuit Court
LC No. 00-012742

Before: O'Connell, P.J., and White and Cooper, JJ.

O'CONNELL, P.J. (*dissenting*).

After a review of the record, I am left with the definite and firm conviction that the trial court mistakenly concluded that Officer Bryan Watson, the affiant in this matter, deliberately or recklessly included false information in the affidavit underlying the search warrant. Because mere negligence will not suffice to establish that an affidavit was procured as a result of official misconduct, I would reverse.

In the instant case, defendant bore the burden of proving by a preponderance of the evidence that Officer Watson knowingly or intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the magistrate's finding of probable cause. *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001). Although mindful of the deference to be accorded to the trial court in suppression hearings, *People v Melotik*, 221 Mich App 190, 198; 561 NW2d 453 (1997), I am not persuaded that defendant has met this burden.

After the March 16, 2001, evidentiary hearing, the trial court concluded that defendant had proven by a preponderance of the evidence that Officer Watson knowingly inserted false statements in the affidavit. After reviewing the record, as well as the basis for the court's opinion, I cannot agree with this conclusion. In support of his motion to suppress, defendant included Watson's November 8, 2000, preliminary examination testimony, copies of Watson's activity logs on July 30 and 31, 2000, as well as other material. During Watson's preliminary examination and *Franks* hearing testimony, it became clear that there were indeed some inconsistencies between information in the affidavit, and Watson's subsequent testimony.

For example, in the affidavit supporting the search warrant, Watson indicated that the source of information (SOI) that he relied on informed him that defendant's home was being

used to store narcotics, and that the narcotics were being "broken down into diminutive packages for distribution." The affidavit further stated that Watson, through his own independent surveillance, had observed people entering defendant's home, staying for a short period of time, and then leaving with a medium sized bag. However, during cross-examination at the preliminary hearing, Officer Watson testified that the SOI told him that "bulk" narcotics were sold from the house. He also testified that he observed people leaving defendant's residence with "small" bags. Pointing to these inconsistencies, as well as others that the majority emphasizes in its opinion, defendant sought suppression of the evidence.

The trial court granted defendant's motion in a March 20, 2001, bench ruling. In its ruling, the trial court emphasized that the SOI was not "registered," and was not reliable or credible. The trial court also repeatedly expressed its concern with Officer Watson's failure to properly record in his activity log his initial meeting with the SOI, as well as his independent surveillance of defendant's home on July 30 and 31, 2000. The trial court also credited the testimony of two former police officers hired by defendant to investigate and verify Watson's surveillance. They both opined that on the basis of Watson's testimony of how and where he observed defendant's home, he would be unable to see persons entering the residence. Moreover, the trial court faulted Watson for not properly recording the descriptions and license plate numbers of the persons and vehicles that visited defendant's residence during surveillance.

In *Franks, supra* at 166, Justice Blackmun, writing for the majority of the United States Supreme Court, observed that the purpose of a hearing challenging the veracity of the affidavit after a search warrant has been executed is to "deter[ ] . . . deliberate or reckless untruthfulness in a warrant affidavit." The *Franks* Court also noted that although the Fourth Amendment's Warrant Clause "takes the affiant's good faith as its premise," *id.* at 164, the scope of a *Franks* hearing is limited, and will not extend beyond "instances of deliberate misstatements, and those of reckless disregard." *Id.* at 170. Specifically, the Court clarified that the magistrate who issues the warrant, rather than the court presiding over a *Franks* hearing, remains the protector of an individual's Fourth Amendment rights where the affiant is merely negligent in an investigation.

> [T]he magistrate is the sole protection of a citizen's Fourth Amendment rights, namely, *in instances where police have been merely negligent in checking or recording the facts relevant to a probable cause determination*. [*Id.*]

In other words, the aim of a *Franks* hearing is not to ferret out "allegations of negligence or innocent mistake," but to deter bad-faith conduct on the part of the affiant resulting in "deliberate falsity or reckless disregard" for the truth. *Id.* at 171.

Quite simply, the record does not support the trial court's conclusion that Officer Watson knowingly and deliberately, or with reckless disregard for the truth, inserted false information in the affidavit. Although the record does indicate that Officer Watson may have been remiss in failing to copiously detail the specifics of his surveillance in his activity log, mere negligence is not enough to warrant the exclusionary rule under these circumstances. Accordingly, I would reverse.

/s/ Peter D. O'Connell