STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 20, 2015
v	No. 322655 Wayne Circuit Court
DARIUS LAMARR FRANKLIN, Defendant-Appellee.	LC No. 14-003800-FH

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

The prosecution appeals as of right an order granting defendant's motion to suppress and dismissing the charges against defendant of possession with intent to deliver marijuana, MCL 333.7408(a), felony-firearm, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. We reverse and remand for reinstatement of the charges.

The charges against defendant followed the execution of a search of his residence by warrant, which recovered bags containing 354.4 grams of marijuana and a loaded handgun. Defendant filed a motion to suppress the seized evidence on the ground that the search warrant was invalid. Defendant argued that the search warrant was based on an affidavit that did not establish probable cause for the search. Specifically, the affidavit (1) "lacked sufficient facts to conclude that the confidential informant existed, and if so, that he was credible or reliable," and (2) "lacked corroboration and sufficient probable cause that drugs were inside the home."

With regard to the alleged confidential informant, defendant argued, the "affidavit has bare bones general boilerplate language without any description to form a belief that the confidential informant exists or was speaking with actual personal knowledge." That is, the alleged informant did not name or describe the drug seller, did not indicate that he had purchased drugs, and did not describe the drug packaging. Therefore, there was no basis to conclude that the informant was credible or reliable.

With regard to the alleged corroboration by police investigation, defendant argued, the affidavit lacked "facts to support the allegation that drug activity was occurring at the target address." Only a short surveillance was allegedly conducted and there were no controlled buys. The officer did not observe any hand-to-hand exchanges or see packages of drugs, and he did not verify any drug sales. Therefore, defendant argued, the affidavit lacked corroboration of the alleged confidential informant's information. Because the affidavit failed to establish a

reasonable cause to believe that criminal activity was occurring at the time the warrant was issued, defendant argued that the evidence seized during the illegal search of his house must be suppressed and the charges against him dismissed.

The prosecution responded to defendant's motion, arguing that defendant failed to establish that he was entitled to an evidentiary hearing under *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978), and failed to establish that the search warrant was not supported by probable cause. That is, under *Franks*, an evidentiary hearing challenging the validity of a search warrant may not be granted unless the defendant makes "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and the allegedly false statement was necessary to the finding of probable cause. *Id*. at 155-156. Such allegations must be supported by an offer of proof. *Id*. at 171. And, here, defendant made no offer of proof, but merely offered conclusory and unsupported allegations of falsehoods and omissions that were wholly insufficient to support his request for an evidentiary hearing.

Moreover, the prosecution argued, even a cursory review of the supporting affidavit illustrated that it was sufficient to establish probable cause to believe that drug activity was occurring at the target house at the time of the warrant. The police officer affiant was told that drug trafficking was occurring at the target house by an unnamed informant who the officer had relied upon more than ten times in the past with results that included "confiscations of narcotics, weapons and multiple felony arrests." Further, the officer corroborated the information he received by performing a surveillance of the target house at which time he observed five people within a 30 minute period enter the house and then leave within a minute. The officer approached the last person, asked if he could buy marijuana at that house, and was told that he could. In view of the totality of the circumstances, there was a substantial basis for inferring a fair probability that contraband or evidence of a crime would be found at the target house. Accordingly, the prosecution argued, defendant's motion should be denied.

Thereafter, defendant filed a motion for a hearing to suppress unlawfully seized evidence pursuant to *Franks*, 438 US at 154. Defendant argued that the affidavit's allegations "that a confidential informant existed and that surveillance was conducted were false or made with reckless disregard for the truth." Defendant argued that it was unbelievable that the confidential informant referred to in the affidavit actually existed because specific factual support was lacking, i.e., "anyone can make that statement." Further, although the officer alleged that he conducted surveillance and saw people entering the house through the front door, the front door had not been used for about six months, as defendant stated in his affidavit. And although the officer claimed to have spoken with a person who left defendant's house and said that marijuana could be purchased at that location, such a "phantom street walker" did not exist. In sum, defendant argued, "the officer-affiant provides no truthful facts to support any of his allegations that would make a reasonable person believe that drug activity was occurring at the target location."

Following oral argument on defendant's motion the trial court concluded that, based "on the four corners" of the affidavit, it was sufficient for the issuance of a search warrant, i.e., there was a fair probability that drugs would be found at the target address. However, the trial court granted defendant's motion for a *Franks* hearing to determine whether the officer-affiant lied in

his affidavit regarding the information allegedly obtained from the unnamed confidential informant and the officer's alleged observations during surveillance of the target house.

Thereafter, a *Franks* hearing was conducted. Defendant's neighbor from across the street testified that she never saw anyone go in or out of defendant's front door. However, she admitted, because of where her house is situated, she could not see defendant's front door unless she left her house and stood on the corner of the street. The officer affiant on the search warrant testified that he obtained information regarding the sale of marijuana from an unregistered confidential informant whom he used reliably on more than ten occasions in the past and paid with his own money. He also conducted a thirty-minute surveillance of the target property and witnessed the foot traffic going in and coming out the front door of the house within a minute later. He asked one individual who he saw leave whether they were "still selling trees out of the house down the street" and was told to "just go to the front door and they will hook you up." Defendant testified that people do not use his front door; "the front door is off limits." However, defendant testified, the front door was functional and could be opened.

Following argument, the trial court granted defendant's motion to suppress the evidence obtained during the execution of the search warrant. The trial court held that the unregistered confidential informant did not speak from personal knowledge; thus, it was "careless disregard" for the officer-affiant to use that information to support his request for a search warrant. And if the part regarding the unnamed confidential informant was stricken from the affidavit, the court held, the affidavit was insufficient to provide probable cause for the warrant to issue. In particular, the court noted, although the affiant indicated that he conducted surveillance, no evidence of drug sales was recovered during the search, although two bags of marijuana were seized. The court held that, "based on what was found in the home and the lack of corroboration between any of what [the affiant] claims he observed, amounts to a reckless disregard for the truth. I don't think that it happened." Thus, the court granted the motion to suppress the evidence obtained pursuant to the search warrant and dismissed the charges against defendant. This appeal followed.

The prosecution argues that it was error for the trial court to order a *Franks* hearing and to suppress the evidence recovered pursuant to the search warrant. We agree.

We review for an abuse of discretion the trial court's decision to hold an evidentiary hearing on a challenge to the validity of a search warrant affidavit. *People v Martin*, 271 Mich App 280, 309; 721 NW2d 815 (2006). A trial court's factual findings in support of its decision are reviewed for clear error, but its conclusions of law are reviewed de novo. *Id*. at 309-310.

In this case, the trial court concluded that the search warrant was based on an affidavit that, "on its four corners," sufficiently established probable cause for the search and that decision is not challenged on appeal. However, defendant also challenged the truthfulness of the affidavit's factual statements. As explained by the United States Supreme Court in *Franks*, 438 US at 171:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more

> than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

As stated in *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009): "The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *Id*. at 701.

Here, in support of his motion for a *Franks* evidentiary hearing, defendant alleged that: (1) it was unbelievable that the confidential informant referred to in the affidavit actually existed; (2) although the officer stated that he saw people coming in and out of defendant's front door, the front door of defendant's house is not used, as stated in defendant's affidavit; and (3) although the officer stated that he spoke to a person who left defendant's house about whether marijuana could be purchased there, such person did not exist.

As discussed above, there exists a presumption of validity with respect to the affidavit supporting the search warrant. To mandate a *Franks* hearing, the defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and the allegedly false statement was necessary to the finding of probable cause. *Franks*, 438 US at 155-156. Conclusory allegations, as made by defendant here, are insufficient. That is, defendant claimed that the confidential informant did not exist and the person the officer spoke to about marijuana being sold from defendant's house did not exist. But defendant provided no evidence to support his claims. Further, defendant's affidavit averring that his front door had not been used in about six months was insufficient to support his claim that the affiant lied about seeing people going in and coming out of defendant's house through the front door. There was no evidence that defendant was home, or that the door was not operational, at the time surveillance was being conducted.

In summary, defendant did not make a "substantial preliminary showing" that a false statement necessary to a finding of probable cause was included by the affiant in the search warrant affidavit. See *Martin*, 271 Mich App at 311, quoting *Franks*, 438 US at 155-156. Thus, defendant failed to establish that he was entitled to an evidentiary hearing on the veracity of the affidavit's factual statements and the trial court abused its discretion in conducting such hearing. See *Martin*, 271 Mich App at 309. Accordingly, the trial court's order granting defendant's motion to suppress the evidence obtained pursuant to the search warrant and dismissing the charges against defendant is reversed. And because the prosecution failed to show that remand before a different judge is required, we decline such request. See *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004).

Reversed and remanded for reinstatement of the charges against defendant. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly