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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 08 CR 5962 |
| |) | |
| SHAHINE YOUNGER, |) | Honorable |
| |) | Michael Brown, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Robert E. Gordon and Palmer concurred in the judgment.

ORDER

¶ 1 *HELD:* The trial court properly denied defendant's motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), when defendant failed to make a substantial preliminary showing that a false statement was, knowingly and intentionally or with a reckless disregard for the truth, included in the warrant affidavit.

¶ 2 Defendant Shahine Younger was charged with possession of cannabis with intent to deliver and unlawful use of a weapon by a felon. Prior to trial, he filed a motion pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), challenging the veracity of the confidential informant. After the trial court denied the motion, the matter proceeded to a bench trial where defendant was found guilty and sentenced as a Class X offender, because of his background, to six years in prison. On appeal, defendant contends that he was entitled to a *Franks* hearing because he established that the confidential informant was coerced into lying by the police. We affirm.

¶ 3 On March 6, 2008, Officer Jeremy Sikorski submitted a complaint and affidavit for a search warrant to the circuit court. Both Sikorski and a person identified as John Doe appeared before the issuing judge. In the complaint, Sikorski stated that on the previous day he had met with this John Doe, who told Sikorski that on March 2, 2008, Doe had visited defendant at a residence located at 742 West 117th Street in Chicago.

¶ 4 Doe stated that during the visit, defendant pulled a 9 mm semi-automatic handgun from underneath the mattress in defendant's bedroom, and stated that he had the gun for protection against rival gang members. Doe explained that he had visited defendant at this address "regularly" for several years and knew the bedroom belonged to defendant.

¶ 5 The complaint further stated that Sikorski took Doe to 742 West 117th Street where Doe identified the building as the residence of defendant inside which Doe observed the 9 mm semi-automatic handgun. After Doe identified the residence, which appeared to be a single-family home, Doe and Sikorski returned to a police station where Sikorski obtained a photograph of defendant which he showed to Doe. Doe identified the person in the photograph as defendant, who lived at 742 West 117th Street and was in possession of a 9 mm semi-automatic handgun.

¶ 6 On September 26, 2008, defendant moved for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), to quash the search warrant and suppress the evidence seized during the execution of the warrant. The motion alleged that the John Doe informant in this case was defendant's nephew, Robert Higgenbottom, Jr. (Robert), and that the police had coerced him into making the statement. At a subsequent hearing, the trial court asked the State whether it conceded that Robert was, in fact, the confidential informant. The State did not concede this point.

¶ 7 The defense then filed an amended motion, supported by the affidavit of Robert Higgenbottom, Sr. In his un-notarized affidavit, Higgenbottom, Sr. averred that after police

officers arrested his son Robert for a curfew violation, their home was searched. When ammunition belonging to Higgenbottom, Sr. was recovered, officers threatened to take Robert to jail unless Robert "gave" them someone with "more guns." After Robert said he did not know anyone with guns, officers took Robert to another location and told him to sign a statement indicating that he had seen guns at defendant's house. Robert complied. Higgenbottom, Sr. was not present for this conversation.

¶ 8 At a hearing on defendant's amended motion, the State argued that defendant had not made the required preliminary showing because Higgenbottom Sr.'s affidavit did not indicate the date upon which the events occurred and failed to explain how he knew Robert was coerced, as he was not present at that conversation. The State further argued that the motion did not establish, factually, that the events described in the complaint for a search warrant could not have taken place because there was no indication as to defendant's whereabouts on March 2, 2008. The State finally highlighted that the motion did not allege that Robert lied in front of a judge. Defense counsel responded that Higgenbottom, Sr. was present at the hearing and willing to testify that the same officers involved in this case took Robert into custody and threatened him. The trial court denied the motion, holding that the affidavit in support of the amended motion did not rise to the level of "substantial probability" required to obtain a *Franks* hearing.

¶ 9 Defendant then filed a motion to reconsider as well as an amended motion supported by Robert's affidavit and handwritten letter. The contents of Robert's affidavit were identical to that of Higgenbottom Sr.'s affidavit—the only difference was that the "Sr." had been scratched out and replaced with "Jr." Robert's affidavit was not notarized. Also attached to the motion was Robert's handwritten letter indicating that after he was taken into custody, police officers threatened to take him to jail unless he gave them someone with guns. Ultimately, he agreed to lie "in front of a man in a[n] office" and say that he had seen a gun in defendant's house.

¶ 10 At the hearing on the motion to reconsider, defense counsel argued that defendant had made the substantial preliminary showing needed to warrant a *Franks* hearing by identifying the confidential informant and presenting a letter in which that individual admitted that he lied. The trial court denied the motion for reconsideration.

¶ 11 The matter proceeded to a bench trial. Officer Jeremy Sikorski testified that on March 6, 2008, he executed a search warrant at 742 West 117th Street in Chicago. While engaged in surveillance of the single-family residence, Sikorski saw defendant leave. At this point Sikorski and his partner broke surveillance and took defendant into custody. Sikorski and other officers then made a forced entry into the building. The officers discovered two children and two adults inside. These four individuals and defendant were held in the dining room area while the house was searched. Cannabis and two firearms were subsequently recovered. When defendant was later questioned about how much cannabis was in the house, he said "seven." Defendant also indicated there were only two firearms in the home.

¶ 12 During cross-examination, Sikorski admitted that he did not actually see defendant exit the residence; rather, defendant was observed exiting the area in front of the residence. By the time Sikorski and his partner reached defendant, defendant was in a van. The search of the residence recovered "close" to eight pounds of marijuana. Although Sikorski asked defendant whether there were any other weapons in the house, defendant was not asked whether the guns were his.

¶ 13 Officer Americo Gonzalez testified that during processing defendant identified his residence as 742 West 117th Street.

¶ 14 Defendant then testified that he lived with his parents at 11907 South Normal. Lashawn Harper, the mother of defendant's children, and his children lived at 742 West 117th Street. Although defendant paid the light, gas and cable bills at 742 West 117th Street, the mortgage was

in Lashawn's name and he did not have house keys. On the day in question, he did not go inside when he dropped off his sons. He went to his van and was about to leave when an unmarked police car drove up and he was instructed to get out of the van. Defendant was handcuffed and taken into the house. He denied saying "seven," or making any statements in this case.

¶ 15 During cross-examination, defendant admitted that his voter registration card indicated that his address was 742 West 117th Street, but asserted that this was a mistake. He also admitted that the cable and phone bills at 742 West 117th Street were in his name, but was not certain about the other utilities. He denied telling officers that he lived at 742 West 117th Street. He did not know who Lashawn permitted to stay there because they were not "together."

¶ 16 Ultimately, the court found defendant guilty of possession of cannabis with intent to deliver and not guilty of unlawful use of a weapon by a felon finding, in pertinent part, that defendant's testimony that he did not live at 742 West 117th Street was not credible. Defendant was subsequently sentenced, because of his background, to a Class X sentence of six years in prison.

¶ 17 On appeal, defendant contends that the trial court erred when it denied him a *Franks* hearing because he identified the confidential informant and established that the informant was coerced into lying by police officers.

¶ 18 Initially, the State contends, based upon defendant's trial testimony that he did not live at 742 West 117th Street, that he lacks standing to challenge the search warrant. The State argues that because defendant asserted that he did not live at the residence that was the subject of the search warrant, he cannot now claim that he had an expectation of privacy at the residence. However, in *People v. Rosenberg*, 213 Ill. 2d 69, 79 (2004), our supreme court noted that in *Simmons v. United States*, 390 U.S. 377, 394 (1968), the Supreme Court held that where a defendant testifies at a hearing on a motion to suppress evidence on fourth amendment grounds,

his testimony may not be admitted against him at trial on the issue of guilt, unless the defendant fails to object. Therefore, a defendant can testify at a suppression hearing on the issue of his expectation of privacy without fear that his testimony would later be used to convict him, although it can be used to attack his credibility. *Rosenberg*, 213 Ill. 2d at 79-80. Similarly, in *People v. Sturgis*, 58 Ill. 2d 211, 216 (1974), our supreme court held that while the testimony of a defendant or documents "voluntarily attested" to by the defendant in conjunction with a motion to suppress may not be used by the State in its case-in-chief, the testimony or documents may be used to impeach the defendant should he testify at trial. Accordingly, this court rejects the State's standing argument.

¶ 19 Turning to the merits of defendant's contention on appeal, defendant challenges the veracity of the statements in the warrant affidavit. Defendant contends that the police coerced his nephew Robert into saying that guns were present at 742 West 117th Street.

¶ 20 In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court recognized the existence of a limited right to challenge the veracity of the affidavit supporting a search warrant. In order to overcome the presumption of validity that attaches to a warrant affidavit and obtain a *Franks* hearing, a 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 that "the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. A "substantial preliminary showing" is made where the defendant offers proof that is "somewhere between mere denials on the one hand and proof by a preponderance on the other." *People v. Lucente*, 116 Ill. 2d 133, 151-52 (1987).

¶ 21 The trial court determines whether there has been a substantial preliminary showing by balancing the statements in the warrant affidavit against those submitted in support of the

defendant's challenge to the warrant. *Lucente*, 116 Ill. 2d at 152. Whether the defendant has made a "substantial preliminary showing" is a matter within the trial court's discretion, and its determination will not be disturbed absent an abuse of that discretion. *People v. Antoine*, 335 Ill. App. 3d 562, 575 (2002). A trial court abuses its discretion when its ruling is arbitrary, unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Sutherland*, 223 Ill. 2d 187, 272-73 (2006).

¶ 22 Defendant urges this court, relying upon federal caselaw, to subject the trial court's decision denying him a *Franks* hearing to *de novo* review. However, a trial court's discovery order is reviewed for an abuse of discretion. *People v. Creal*, 391 Ill. App. 3d 937, 942 (2009). In this case, defendant sought discovery in order to advance his attack on the search warrant pursuant to *Franks*, and it was within the trial court's discretion to determine whether defendant made a showing sufficient to warrant such a hearing (see *People v. Gorosteata*, 374 Ill. App. 3d 203, 212 (2007)).

¶ 23 This court notes that the State contends, relying on *People v. Gorosteata*, 374 Ill. App. 3d 203, 215 (2007), that this case falls outside the scope of *Franks* because the confidential informant in the instant case appeared before the issuing magistrate to testify regarding the allegations contained in the complaint for a search warrant. However, in *People v. Caro*, 381 Ill. App. 3d 1056, 1065-66 (2008), this court held that the fact that an informant testified before the issuing magistrate did not categorically preclude a *Franks* hearing. Therefore, this court will address the merits of defendant's contentions.

¶ 24 Initially, this court notes that both parties cite, and rely upon, cases where a defendant challenges the veracity of a warrant affidavit through an alibi. In other words, a defendant asserts that the facts recounted in a warrant affidavit could not have taken place and supports that with an alibi and affidavits in support. See, e.g., *People v. Hoyer*, 311 Ill. App. 3d 843, 845 (2000)

(defendant made the preliminary showing required for a *Franks* hearing after filing affidavits from himself, his current wife, and his daughter, each averring that the affiant recognized the signature on the "Jane Doe" affidavit as belonging to the defendant's ex-wife Jamey Knight, that Knight was not in the defendant's house or garage on the date specified in the application for a search warrant or 48 hours prior to that date, and that Knight had never been inside the house or the garage). However, in the case at bar, defendant does not seek to convince this court that the alleged meeting between himself and John Doe could not have taken place because he was not home or because John Doe could not have been inside defendant's home on the day in question. Rather, here, defendant contends that he was entitled to a *Franks* hearing because he identified the confidential informant as his nephew Robert, and presented Robert's recantation to the trial court thereby establishing that false statements were deliberately included in the warrant affidavit. Therefore, the cases cited by both parties are largely inapposite.

¶ 25 However, there is no indication in the record that the State ever conceded that Robert was in fact John Doe. Even were this court to assume that defendant correctly identified John Doe, he did not make the required substantial preliminary showing necessary to warrant a *Franks* hearing because the evidence supporting his motion was not accompanied by "[a]ffidavits or sworn or otherwise reliable statements of witnesses." See *Franks*, 438 U.S. at 171. Although the parties focus on the fact that the affidavits were not notarized, it is the content of those documents, rather than the lack of a notary's stamp that doomed defendant's motion.

¶ 26 Putting aside the fact that the evidence in support of defendant's motion was from family members (see *Gorosteata*, 374 Ill. App. 3d at 212 (characterizing affidavits from family members as "suspect")), the material contained in the affidavits and Robert's letter was not sufficient to warrant a *Franks* hearing. Neither the affidavits nor Robert's letter indicate the date that Robert was taken into custody. Robert's affidavit was merely a copy of Higgenbottom, Sr.'s, earlier

affidavit in which Higgenbottom, Sr. admitted that he was not present when police officers coerced Robert into saying defendant had guns, and that his only knowledge of that conversation came from Robert. Although Robert's letter indicated that the police told him to either sign a statement saying that defendant had guns or go to jail, the letter did not indicate the dates that he was allegedly taken into custody or swore, before a man in an office, that he had seen a gun at defendant's house. In determining the level of evidence necessary in order to be granted a *Franks* hearing, there must be a careful balancing of the statements in the warrant affidavit against those in support of defendant's challenge. *Lucente*, 116 Ill. 2d at 152. Here, the trial court ultimately had to balance the detailed description of John Doe's meeting with defendant at 742 West 177th Street contained within the complaint for a search warrant against the undated statements of defendant's nephew. Given these facts, the trial court did not abuse its discretion when it determined that a *Franks* hearing was not warranted. See *Antoine*, 335 Ill. App. 3d at 575.

¶ 27 Defendant next contends that the trial court improperly imposed the three-year term of Mandatory Supervised Release (MSR) that accompanies a Class X felony when he is only subject to a two-year term of MSR based upon his conviction for the Class 1 felony of possession of cannabis with intent to deliver.

¶ 28 Before addressing the merits of defendant's contention, this court recognizes the State's argument that defendant has forfeited review of this issue by failing to object to the three-year term of MSR at sentencing or in a motion to reconsider sentence. See, e.g., *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Bannister*, 232 Ill. 2d 52, 76 (2008) (to preserve a claim of sentencing error, a defendant must object at sentencing and include the issue in a motion to reconsider sentence). Defendant also acknowledges that he failed to object to the three-year term of MSR before the trial court; however, he contends that this issue is not forfeited for purposes of appeal because the sentence is void. See *People v. Roberson*, 212 Ill. 2d 430, 440 (2004) (a void

sentence may be challenged at any time). This court will address defendant's voidness argument as it is dispositive.

¶ 29 Section 5-5-3(c)(8) of the Unified Code of Corrections provides that a defendant, over the age of 21, who is convicted of a Class 1 or Class 2 felony shall be sentenced as a Class X offender if he has prior convictions for two Class 2 or higher class felonies arising out of a different series of acts. 730 ILCS 5/5-5-3(c)(8) (West 2008). The MSR term attached to a Class X sentence is three years. 730 ILCS 5/5-8-1(d)(1) (West 2008).

¶ 30 This court has previously held that when Class X treatment is accorded to a defendant, the MSR term applicable to such a sentence is automatically imposed (*People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995)), *i.e.*, a Class X offender receives both an enhanced prison term and an enhanced MSR term (*People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000)). See also *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009).

¶ 31 Defendant acknowledges that *Anderson*, *Smart*, and *Watkins* reached a result contrary to his argument, but argues they were wrongly decided in light of our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000). However, this court's decisions in *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011), and *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010), considered, and rejected, similar arguments. Thus, we continue to adhere to this court's decision in *Anderson*.

¶ 32 Accordingly, as defendant was sentenced as a Class X offender pursuant to section 5-5-3(c)(8), he received both an enhanced term of imprisonment and an enhanced MSR term (see *Smart*, 311 Ill. App. 3d at 417-18). Therefore, the three-year term of MSR was properly imposed by the trial court.

¶ 33 For the reasons stated above, the judgment of the trial court is affirmed.

¶ 34 Affirmed.

1-10-2296