2018 IL App (1st) 152589-U

No. 1-15-2589

Order filed October 17, 2018

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 1959
	)	
MELVIN BLAKELY,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Timothy Joseph Joyce
	)	Judges, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction where the circuit court properly denied defendant's motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and vacate an improperly-assessed charge.

¶ 2 Following a bench trial, defendant Melvin Blakely was found guilty of, among other offenses, armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2014)) and sentenced to six years' imprisonment. On appeal, he argues the trial court erred in denying his motion for a

hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). He also contends he was improperly assessed a gang-related monetary charge. We affirm, and vacate the improperly-assessed charge.

¶ 3 Defendant was charged by indictment with armed habitual criminal and multiple firearm-related offenses after police executed a search warrant on January 2, 2014, at an apartment in a multi-unit building on South Paxton Avenue (apartment). The warrant was based upon an affidavit signed and sworn to before the issuing judge by Chicago police officer Ruben Sanchez, Star No. 11256, and "J. Doe." It authorized the search of defendant and the apartment for "[o]ne black 9mm semi-automatic handgun, ammunition, any documents showing proof of residency and any illegal contraband constituting evidence of unlawful use of a weapon by a felon."

¶ 4 In the affidavit included in the record, Sanchez averred Doe told him that Doe, on December 31, 2013, visited defendant.[1] Doe stated that defendant showed Doe a black 9mm semi-automatic handgun and told Doe "you ain't gonna catch me lacking," which meant that defendant was not going to be caught without a gun by an opposing gang. Doe knew the handgun was real based upon his experience with guns. Doe further told Sanchez that he had known defendant for over six months and knew that defendant lived in the apartment on South Paxton Avenue.

¶ 5 The search recovered a loaded 9-millimeter blue steel semi-automatic pistol with its serial number scratched off.

[1] As will be addressed *infra* ¶¶ 18-19, it appears the affidavit in the record is incomplete as there is, at a minimum, a page missing.

Further, the affidavit indicates that Sanchez and Doe's conversation took place on "the 2nd of December 2014." However, the parties agree this was a typographical error and the correct date this conversation was alleged to have taken place was on January 2, 2014.

¶ 6 Prior to trial, defendant filed a motion for a hearing pursuant to *Franks* in order to quash the search warrant and suppress the evidence seized.[2] In the motion, defendant alleged that, on the date Doe was alleged to have been visiting with him, defendant was with his sisters in the 7500 block of South Yates Boulevard "all day." Defendant further denied each allegation contained in the affidavit supporting the search warrant. Defendant asserted that the affidavit in support of the search warrant lacks any independent police corroboration of the information other than Doe confirming a picture of defendant and Sanchez driving Doe to the apartment on South Paxton Avenue. According to defendant, he made a substantial preliminary showing that the search warrant contained false statements made either deliberately or with reckless disregard for the truth and these false statements were necessary to a finding of probable cause.

¶ 7 In support of the motion, defendant included affidavits from his sisters Danita Bebley and Monica Blakely (Monica). In their affidavits, both sisters averred that, on December 31, 2013, defendant was with them at Bebley's home in the 7500 block of South Yates "all day and all night *** preparing for, and celebrating, New Year's Eve with family."

¶ 8 The trial court denied the motion for a *Franks* hearing, finding that the address of defendant's sister's residence, where defendant was alleged to have been on December 31, was "eight to ten blocks" and "not far from" the address on the search warrant. It also found that Sanchez took steps to corroborate defendant's identity with Doe by showing a photograph of defendant to Doe and driving Doe to the apartment listed on the search warrant. The court noted that defendant's sisters' affidavits were "barebones" and "merely he said, she said." It concluded

[2] Defendant also filed a pretrial motion to quash the indictment and dismiss the charges based upon alleged deceptive and misleading evidence presented by the prosecutor to the grand jury. The trial court denied this motion, and defendant does not raise this issue on appeal.

the affidavits were "not of the caliber and character that would overcome or meet the defendant's burden for any type of substantial preliminary showing."

¶ 9 The matter then proceeded to trial where defendant was found guilty of all charges, including AHC. Defendant filed a written motion for a new trial, which did not raise the issue that the trial court erred in denying defendant's motion for a *Franks* hearing. The trial court denied the motion and proceeded to sentencing. It sentenced defendant to six years' imprisonment on one count of AHC, having merged all the counts. Defendant filed a timely notice of appeal.

¶ 10 On appeal, defendant argues the trial court erred in denying his motion for a *Franks* hearing where he made a substantial preliminary showing that the affidavit in support of the search warrant contained false information or was made with reckless disregard for the truth. He further contends one monetary charge was improperly assessed and should be vacated.

¶ 11 As an initial matter, we note that defendant did not raise the issue of the denial of the *Franks* motion in a written posttrial motion. Accordingly, defendant has forfeited the issue on appeal. See *People v. Enoch*, 1212 Ill. 2d 176, 186-87 (1988). Defendant does not argue for plain-error review or for any other exception to the forfeiture rule. However, as the State fails to argue against defendant's forfeiture of the issue, we will address the merits of defendant's claim. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46 ("The rules of waiver also apply to the State, and where, as here, the State fails to argue that defendant has forfeited the issue, it has waived the forfeiture"); *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000).

¶ 12 *Franks* gives a defendant a right under limited circumstances to challenge the veracity of an affidavit supporting a search warrant. *People v. Voss*, 2014 IL App (1st) 122014, ¶ 16. A

presumption of validity exists with respect to a search warrant's supporting affidavit. *Franks*, 438 U.S. at 171. Pursuant to *Franks*,

> "where 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 if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.* at 155-56.

¶ 13 The essence of the *Franks* procedure is the requirement of a substantial preliminary showing. *People v. Garcia*, 2017 IL App (1st) 133398, ¶ 28. To make a preliminary showing, the attack on the warrant must involve more than a mere desire to cross-examine and must not be conclusory. *Id.* Therefore, a defendant's burden " 'lies somewhere between mere denials on the one hand and proof by a preponderance on the other.' " *People v. Chambers*, 2016 IL 117911, ¶ 41 (quoting *People v. Lucente*, 116 Ill. 2d 133, 152 (1987)). A trial court's ruling on a motion for a *Franks* hearing is reviewed *de novo*. *Id.* ¶ 79.

¶ 14 Defendant supported his motion for a *Franks* hearing with affidavits from his sisters Danita and Monica, which generally asserted that defendant was at Bebley's home "all day and all night *** preparing for, and celebrating, New Year's Eve with family." These affidavits call into question the truth of Doe's information. They do not, however, show that Officer Sanchez knew or should have known Doe's information might be untrue. The deliberate falsity or reckless disregard for the truth applies only to the affiant, here Officer Sanchez, and not to any nongovernmental informant such as Doe. See *Franks*, 438 U.S. at 167 (the "deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any

nongovernmental informant."). The affidavits do not show that Officer Sanchez provided untrue statements knowingly or with reckless disregard for the truth.

¶ 15 Although the affidavits provided by Danita and Monica support an alibi for defendant, alibi-type affidavits in support of a *Franks* motion are not always sufficient to establish a substantial showing. See *Garcia*, 2017 IL App (1st) 133398, ¶ 36 (citing *Lucente*, 116 Ill. 2d at 152). The affidavits vaguely and improbably assert that defendant, who lived "eight to ten blocks" from his sister's residence by the court's calculation, was present "all day and all night" at his sister's home. Nowhere in the affidavits are the times defendant arrived and ultimately left his sister's home, which would add significant detail and credence to these affidavits. See *Lucente*, 116 Ill. 2d at 154 (noting the affidavits submitted by the defendant "are sufficiently detailed so as to subject the affiants to the penalties of perjury if they are untrue"). These vague assertions, bereft of any detail, do not show that Sanchez was untruthful or that he should have known Doe's statements were false. See *Garcia*, 2017 IL App (1st) 133398, ¶ 32. Given that the warrant is presumed valid (*Franks*, 438 U.S. at 171), we are not persuaded that the affidavits offered in support of the *Franks* motion make a substantial preliminary showing.

¶ 16 Further, the affidavit in support of the search warrant indicates that Doe appeared with Sanchez before the judge issuing the warrant, which would allow the judge to examine the statements made by Doe. See *Garcia*, 2017 IL App (1st) 133398, ¶ 32. Doe's presence would allow the judge to ascertain the scope of the informant's knowledge and to explore any deficiencies in the information provided or ulterior motives concealed by Doe. See *Chambers*, 2016 IL 117911, ¶ 63 (holding the informant's presence before the judge issuing the warrant is a factor in determining whether a defendant has made a preliminary showing).

¶ 17 There is some dispute between the parties regarding whether Sanchez provided corroborating evidence before obtaining the search warrant. Defendant argues that "there is nothing in the complaint indicating that Sanchez took any action to corroborate J. Doe's information." The State claims that Sanchez "confirmed the details with the John Doe by having him view a picture of defendant and going to the address in question," citing to the trial court's comments in denying the motion for a *Franks* hearing.

¶ 18 It appears there is a page missing from the affidavit in the complaint supporting the search warrant included in the record on appeal. In defendant's *Franks* motion, defense counsel wrote, "[t]he complaint for search warrant was co-signed by complaint affiants John Doe and Officer Sanchez, #11256, and lacks any independent police corroboration of the confidential informant's information other than John Doe confirming a picture of Defendant from CLEAR system and Officer Sanchez driving Doe to [the address on the search warrant]." Further, the State, in arguing against the *Franks* motion in the trial court, represented, "[a]nd as the complaint even indicates at the end, John Doe's criminal history, if any, had been presented and made available to the judge." Finally, the trial court recited portions of the affidavit supporting the search warrant in denying the motion, and stated,

> "[t]he officer then took steps to make sure he knew who the person was that the John Doe was describing. He used the CLEAR system, and he located the defendant. He showed the John Doe a photograph, and the John Doe confirmed the photograph as being the defendant or the person who he had this interaction with.
>
> He took the John Doe to the location and drove by, and the John Doe confirmed which building, location, apartment."

¶ 19 However, the affidavit in the complaint for the search warrant contained in the record on appeal does not reflect that Sanchez showed Doe a picture of defendant and drove Doe past the apartment listed on the search warrant, or that the informant's criminal history was presented to the judge issuing the warrant. Further, the one-page affidavit complaint states at the top of the page that it is page "2 of 2." There is no other page containing "1 of 2."[3] Given that the representations by the parties to the trial court and the court's own synopsis regarding the contents of the affidavit are not reflected in the affidavit in the record, and that only one of two pages is included in the record on appeal, we believe at least one page of the affidavit in support of the search warrant is missing from the record on appeal.

¶ 20 It is the burden of defendant, as appellant, to furnish a sufficiently complete record on appeal to support his claims of error. See *People v. Carter*, 2015 IL 117709, ¶ 19. Absent a complete record, we presume the trial court acted in conformity with the law, and any doubts arising from the incompleteness of the record are resolved against the appellant, here defendant. *Id.*

¶ 21 The trial court found, based on the affidavit in support of the search warrant, that Sanchez provided corroborating evidence by having Doe identify a photograph of defendant and driving Doe past the apartment listed on the search warrant. As the record is incomplete, and we resolve the missing page of the affidavit in support of the search warrant against defendant, we presume the court had a basis for this determination and acted in conformity with the law. Therefore, we find the informant's information was not verifiably false, and Sanchez took measures to corroborate it by having Doe identify a photograph of defendant and driving Doe past the

[3] We note the Bates numbers in the common law record are sequential and do not show a missing page in that record.

apartment listed on the search warrant. See *Lucente*, 116 Ill. 2d at 152-54. Accordingly, the trial court properly denied defendant's motion for a *Franks* hearing.

¶ 22 We find *Lucente* and *People v. Caro*, 381 Ill. App. 3d 1056, 1066 (2008), relied on by defendant, to be distinguishable. In *Lucente*, the defendant filed a motion for a *Franks* hearing, asserting that the complainant-officer's statements in the warrant's supporting affidavit were false. In support of his motion, the defendant included three affidavits: from his wife, sister, and himself, which all stated that defendant was with them at a family gathering at the sister's apartment during the time of the alleged drug sale. *Lucente*, 116 Ill. 2d at 140-41. The affidavits all included specific times of day and activities the family members participated in. See *id.* The trial court granted the defendant's motion for a *Franks* hearing, which our supreme court affirmed.

¶ 23 Our supreme court held that all three affidavits were "sufficiently detailed so as to subject the affiants to the penalties of perjury if they [were] untrue" and this "sworn corroboration" was more than a " 'mere denial.' " *Id.* at 154. It found the affidavits presented "essentially an alibi" and noted that "the defendant's showing might have been stronger" or, conversely, the "officer-affiant's position would have been bolstered had he provided some independent corroboration of the informant's statements." *Id.*

¶ 24 Unlike in *Lucente*, the barebones affidavits offered by defendant from his sisters here were not sufficiently detailed so as to establish an alibi for defendant. Lastly, as discussed, Officer Sanchez did provide corroborating evidence by showing a photograph of defendant to Doe, who confirmed it was defendant, and by driving Doe past the apartment listed on the search warrant. Accordingly, *Lucente* is distinguishable.

¶ 25 In *Caro*, the trial court was presented with an affidavit in support of a search warrant, based on information from a confidential informant, that the defendant was involved in a drug transaction at defendant's home. *Caro*, 381 Ill. App. 3d at 1057. The defendant filed a motion for a *Franks* hearing and attached affidavits from himself and his roommates stating that he was at work for most of the day and did not engage in any drug transactions as alleged. *Id.* at 1058-59. The affidavits recounted, in detail, specific times and activities of the day in question. See *id.* In affirming the trial court's grant of the *Franks* motion, the appellate court found that the trial court did not abuse its discretion. *Id.* at 1063. Following *Lucente*, the *Caro* court noted that the defendant presented "essentially an alibi," which was corroborated by affidavits besides his own. *Id.* The court concluded that these three affidavits constituted a substantial preliminary showing that a false statement implicating the defendant in the drug transaction was knowingly, intentionally, or recklessly included by the officer in the affidavit in support of the warrant. *Id.*

¶ 26 The affidavits in *Caro* contained detailed information describing what the affiants were doing during the respective timeframes listed in the affidavits. Here, where defendant provided vague and improbable affidavits from his own sisters, we are not persuaded defendant made the requisite substantial showing necessary for a *Franks* hearing. Thus, *Caro* is distinguishable.

¶ 27 Defendant finally argues, and the State concedes, he was improperly assessed the $100 streetgang fine (730 ILCS 5/5-9-1.19 (West 2014)). Defendant again failed to raise this issue in the trial court and it is therefore forfeited. However, because of the State's failure to argue forfeiture, we will address the propriety of this fine. See *Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Our review of a court-ordered fine or fee is *de novo*. *People v. Smith*, 2018 IL App (1st) 151402, ¶ 7.

¶ 28 We agree with the parties that there was no evidence presented that defendant was a member of a gang when the offense took place, as required to impose this charge. See *People v. Gomez*, 2018 IL App (1st) 150605, ¶ 42; 730 ILCS 5/5-9-1.19 (West 2014). Accordingly, we vacate this assessment. *Gomez*, 2018 IL App (1st) 150605, ¶ 42.

¶ 29 For the reasons set forth above, we vacate the $100 streetgang fine and direct the clerk of the circuit court to modify the fines and fees order accordingly. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 30 Affirmed as modified.