2019 IL App (1st) 163252-U

No. 1-16-3252

Order filed June 28, 2019

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. 15 CR 2293
	)	
BRUCE REED,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), where defendant did not make a substantial preliminary showing that a police officer knowingly swore to false information in obtaining a search warrant for his house.

¶ 2 Following a bench trial, defendant Bruce Reed was convicted of possession of cannabis with intent to deliver and sentenced to three years' imprisonment. His conviction stemmed from an incident in which police officers recovered cannabis and drug paraphernalia from his house

after executing a search warrant. Defendant appeals, arguing that the trial court erred in denying him a pretrial hearing to challenge the validity of the search warrant pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). We affirm.

¶ 3 On January 13, 2015, Chicago police officer Anthony Babicz filed a complaint to obtain a search warrant for defendant and his house in the 600 block of Rice Avenue in Bellwood, Illinois. In support of the warrant application, a confidential informant, referred to as "J. Doe," signed the complaint and appeared with Babicz before a magistrate judge.

¶ 4 In the application, Babicz averred that on January 12, 2015, Doe told him that they had purchased cannabis "within the last 24 hours" from defendant at the Rice Avenue address. Doe had used cannabis for 10 years, and had purchased it from defendant at that location numerous times during the last 2 months. On each occasion, defendant accepted Doe's money at the door, went back in the house, and emerged "less than a minute" later with a Zip-loc bag of cannabis.

¶ 5 According to Babicz, Doe described defendant's house as a single-family, brown brick home with a small set of stairs in front of the door where defendant would accept the money. Babicz and Doe traveled to Rice Avenue and viewed the house, which was consistent with Doe's description. Afterwards, they returned to the police station, where Doe identified defendant from a photograph.

¶ 6 On January 13, 2015, the magistrate judge issued a search warrant for defendant and the house, authorizing the seizure of cannabis, cannabis paraphernalia, cash, records of drug transactions, and documents showing residency. The warrant was executed later that day.

¶ 7 Defendant was subsequently charged by information with one count of armed violence (720 ILCS 5/33A-2 (West 2014)) and one count of possession of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2014)) based on the fruits of the search.

¶ 8 On March 22, 2016, prior to trial, defendant filed an amended motion for a *Franks* hearing, denying "each and every allegation contained in the Complaint for Search Warrant," including that he sold contraband at the Rice Avenue house "to any person *** at any time on January 11, 2015 or January 12, 2015." Defendant further asserted that Babicz filed the warrant application without independently corroborating Doe's claims, and while knowing they were false or having a reckless disregard for the truth.

¶ 9 In support of his motion, defendant attached affidavits from his parents, Bruce Reed Sr. and Lutonya Drakes. Both averred that they lived in the Rice Avenue house, that defendant was not there on either January 11 or 12, 2015, and that no one met with defendant at the home during those days.

¶ 10 The trial court denied defendant's request for a *Franks* hearing. In so ruling, the court noted that Doe and Babicz appeared before the magistrate judge, who had the opportunity to assess their credibility. The trial court also found that the affidavits did not provide sufficient detail to justify a *Franks* hearing, and that, in any event, "[i]t's quite frankly impossible to believe that [defendant's parents] could recollect individual days *** or [state with] a degree of veracity that no one could have possibly have had contact with their son over a two day period in 2015."

¶ 11 At defendant's bench trial, Officers Michael Laurie, Justin Homer, and Steven Vidljinovic testified that they were part of the team that executed the search warrant on the

evening of January 13, 2015. Together, their testimony established that Laurie walked through the living room and found a closed bedroom door to the right. He and another officer, Officer Heffel,[1] entered the bedroom and found defendant lying on the bed with a loaded .45 caliber firearm in his right hand and a cell phone in the other. Defendant immediately put the firearm beneath a pillow. Heffel detained defendant while Laurie recovered the firearm.

¶ 12 Homer entered the bedroom as defendant was being removed by the other officers. He recovered a clear plastic bag containing 10 Zip-loc bags of suspected cannabis and another Zip-loc bag of 10 blue pills from atop a dresser. Inside the dresser, Homer found defendant's social security card, four .40 caliber bullets, a "small" scale, additional Zip-loc bags, and $690 in cash. In the same room, Vidljinovic recovered a shoe box containing sandwich bags with smaller Zip-loc bags inside. He also found a digital scale inside another shoe box, two knotted, clear plastic bags of suspected cannabis, and mail bearing defendant's name and the Rice Avenue address.

¶ 13 Chicago police officer Ignatius Goetz testified that he advised defendant of the *Miranda* rights and interviewed him at the police station later that day. Defendant told Goetz that he purchased the recovered firearm from someone on the street for $500.

¶ 14 The State entered a stipulation that the suspected narcotics recovered from defendant's bedroom tested positive for a total of 52.1 grams of cannabis.

¶ 15 The court found defendant guilty of armed violence and possession of cannabis with intent to deliver. However, at the hearing on defendant's motion for a new trial, the court vacated its finding as to armed violence because it determined that there was an insufficient nexus

[1] The transcript does not contain Heffel's first name.

between defendant's possession of the firearm and the cannabis. After a hearing, the court sentenced defendant to three years' imprisonment.

¶ 16 Defendant now appeals, arguing that the trial court erred in denying him a *Franks* hearing. In particular, he contends that he made a substantial showing that the warrant application contained deliberate falsehoods in light of his parents' affidavits.

¶ 17 The fourth amendment to the United States Constitution protects against unreasonable searches and seizures, and provides that "no warrant shall issue, but upon probable cause, supported by oath or affirmation[.]" U.S. Const., amends. IV, XIV; see also Ill. Const. 1970, art. I, § 6. A "detached judicial officer" must decide whether there is probable cause to issue a warrant based on the totality of the circumstances and the sworn affidavits used to support the warrant application. *People v. Tisler*, 103 Ill. 2d 226, 236 (1984).

¶ 18 An affidavit supporting a search warrant is presumed valid. *People v. Chambers*, 2016 IL 117911, ¶ 35. However, under *Franks*, a defendant has the limited right to challenge its veracity. *Franks*, 438 U.S. at 155-56. To do so, the defendant must first make a "substantial preliminary showing" that the affidavit includes statements that the affiant either knew to be false or made with a reckless disregard for the truth. *Id.* If the defendant meets this burden, and the allegedly false statements were necessary to show probable case, the court must hold a hearing to determine the truth of the information at the defendant's request. *Chambers*, 2016 IL 117911, ¶ 35.

¶ 19 In order to make the requisite preliminary showing, the defendant's attacks on the veracity of the affidavit must be "more than conclusory and must be supported by more than a mere desire to cross-examine." *Id.* Instead, there must be allegations of deliberate falsehood or a

reckless disregard for the truth on the part of the affiant, and such allegations must be accompanied by an offer of proof. *Franks*, 438 U.S. at 171. Defendant's evidence must be more than mere denials, but may be "something less" than a preponderance of the evidence. *Chambers*, 2016 IL 117911, ¶ 41.

¶ 20 Where, as here, the affiant's allegedly false information came from a confidential informant, the fact that the informant appeared before the magistrate judge is "a factor to be considered" when determining whether the defendant made a substantial preliminary showing. *Id.* ¶ 63. Other circumstances a court should consider include whether (1) the defendant provided objective evidence to corroborate the supporting affidavits; (2) the affidavits came from family members or disinterested third parties; (3) the affidavits, if true, conclusively render the informant's allegations impossible; (4) the informant had provided reliable information in the past; (5) the police took steps to corroborate the informant's information; (6) the informant's allegations were facially plausible; and (7) any other circumstances counsel against believing the informant. See *People v. Voss*, 2014 IL App (1st) 122014, ¶ 22 (listing factors).

¶ 21 Although a defendant may establish a preliminary showing through an "alibi-type" affidavit, as opposed to a general denial, such support is not necessarily sufficient. See *People v. Garcia*, 2017 IL App (1st) 133398, ¶ 36 (stating that untimely affidavits from the defendant, his mother, and a neighbor, even if considered, would not have entitled him to a *Franks* hearing because their detailed description of events that occurred several years before was not credible, they did not negate all possibility that the information in the warrant application was true, and they revealed no reason why the officer-affiant was reckless in believing the confidential

informant). Whether the defendant made a substantial preliminary showing is reviewed *de novo*. *Chambers*, 2016 IL 117911, ¶ 79.

¶ 22 Here, on balance, the relevant factors demonstrate that defendant was not entitled to a *Franks* hearing. Although Babicz did not aver that Doe had provided reliable information in the past, Doe's information in the present case was not implausible on its face and defendant has shown no reason to infer that Babicz knew the information was false or was reckless to believe it. We also note that Babicz had Doe sign the warrant application, appear before the issuing magistrate judge, and corroborate his account by identifying defendant from a photograph and identifying defendant's house in-person.

¶ 23 Additionally, there are at least two notable issues with the affidavits provided by defendant. First, these affidavits came from his parents, and are therefore more suspect than if they came from disinterested parties. See *People v. McCoy*, 295 Ill. App. 3d 988, 997 (1998). Second, the affidavits, like the allegations in the motion itself, give almost no detail and equate to little more than a general denial of Doe's claims. See *Chambers*, 2016 IL 11791, ¶¶ 35, 41 (conclusory statements and mere denials are insufficient to entitle a defendant to a *Franks* hearing). Neither defendant nor his parents explained, for example, where defendant was or what he was doing during the time of the alleged drug sale. Similarly, although defendant's parents averred that they lived in the Rice Avenue house, they did not assert that they were home at all relevant times or explain how they otherwise could have known that defendant and Doe were never present. See *Lucente*, 116 Ill. 2d at 154 (noting approvingly that the affidavits submitted by the defendant were "sufficiently detailed so as to subject the affiants to the penalties of perjury if they [were] untrue"). Thus, the bare-boned affidavits do not show that Babicz was deliberately

untruthful or that he should have known Doe's statements were false. See *Garcia*, 2017 IL App (1st) 133398, ¶ 32.

¶ 24 As a final matter, we find *Lucente* and *People v. Caro*, 381 Ill. App. 3d 1056 (2008), relied on by defendant, to be distinguishable from the present case. In *Lucente*, the defendant filed a motion for a *Franks* hearing on the grounds that an officer-affiant made false statements in the warrant application. The defendant supported his motion with affidavits from his wife, sister, and himself in which they all averred, detailing specific times and activities, that the defendant was 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 trial court granted the defendant's motion for a *Franks* hearing, and the State appealed. *Id.* at 141.

¶ 25 Our supreme court affirmed the trial court's decision to grant a *Franks* hearing, stating that the three affidavits were "sufficiently detailed so as to subject the affiants to the penalties of perjury if they [were] untrue," making them more than "mere denial[s]." *Id.* at 154. The court also found that "the officer-affiant's position would have been bolstered had he provided some independent corroboration of the informant's statements." *Id.*

¶ 26 Here, unlike in *Lucente*, the vague affidavits offered by defendant were not sufficiently detailed so as to establish his alibi. Additionally, as noted, Babicz provided corroborating evidence by showing Doe a photograph of defendant and driving him to the house listed on the search warrant. Thus, *Lucente* is distinguishable.

¶ 27 In *Caro*, the police obtained a search warrant based on information from a confidential informant that he was involved in a drug transaction with the defendant at the defendant's apartment. *Caro*, 381 Ill. App. 3d at 1057. The defendant filed a motion for a *Franks* hearing in

the trial court and attached affidavits from himself and his two roommates averring that he was at work most of the day and did not participate in the drug transaction as alleged. *Id.* at 1058-59. These affidavits recalled, in considerable detail, what took place at the apartment on the day of the alleged sale, including specific times and activities. *Id.* The trial court granted the defendant's *Franks* motion, the State appealed, and this court found that the trial court did not abuse its discretion. *Id.* at 1063.

¶ 28 Here, unlike in *Caro*, the trial court did not grant defendant a *Franks* hearing, and, in any event, we do not give any deference to the trial court's decision because our review is *de novo*. See *Chambers*, 2016 IL 117911, ¶¶ 65, 79 (noting that several appellate decisions have employed an abuse of discretion standard, but clarifying that the proper standard is *de novo*). Additionally, the affidavits in *Caro* contained detailed information about what the affiants, including the defendant, were doing during the relevant times. Here, the affidavits from defendant's parents were bereft of any such details, and we find that defendant did not make the substantial preliminary showing necessary for a *Franks* hearing.

¶ 29 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 30 Affirmed.