2014 IL App (1st) 12-1441-U

FIFTH DIVISION
December 19, 2014

No. 1-12-1441

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 8031
	)	
THADDEUS JIMENEZ,	)	
	)	Honorable
Defendant-Appellant.	)	Rosemary Grant Higgins,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: After the defendant was found guilty of possession of a controlled substance, the appellate court held the circuit court did not err in denying defendant's motions to: (1) suppress evidence based on an insufficient search warrant; (2) conduct a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); (3) compel disclosure of the identity of a confidential informant, along with related information; and (4) suppress evidence based on the failure of a judge to recuse himself from ruling on the complaint for a search warrant.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant Thaddeus Jimenez

was found guilty of possession of a controlled substance and sentenced to a closely monitored, expungeable probation. On appeal, Jimenez argues the circuit court erred by denying his motions to: (1) suppress evidence; (2) conduct a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); (3) compel disclosure of the identity of a confidential informant, along with related information; and (4) suppress evidence where the judge who issued the warrant (issuing judge) failed to recuse himself from the matter. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts regarding the complaint for a search warrant, Thaddeus Jimenez's pretrial motions, and the ensuing trial.

¶ 5 The Complaint for a Search Warrant

¶ 6 On April 6, 2010, Chicago police officer Jerry Pentimone and a Jane Doe confidential informant appeared before the issuing judge with a complaint for a search warrant. The complaint sought a warrant to search Jimenez's person and a single-family residence located at 1456 Tyrell Avenue in Park Ridge, Illinois. The complaint sought the seizure of stolen firearms, leather holsters, stolen ammunition and any documents establishing residency which constituted evidence of the offense of possession of stolen property.

¶ 7 In the complaint for a warrant, Officer Pentimone stated that on April 6, 2010, he had a conversation with an individual he referred to as Jane Doe.[1] Doe informed him she was friends with an individual known as "T.J." According to Officer Pentimone, Jane Doe stated she frequently visited T.J at the address identified in the complaint and had visited him at that location for over a year.

[1] According to the complaint, the Jane Doe confidential informant feared reprisals.

¶ 8 Doe related that on April 4, 2010, while she was visiting T.J. at his home, he escorted her to the front bedroom of the residence. Doe also related to Officer Pentimone that T.J. unlocked the door to the bedroom with a key, stating "I keep my room locked, nobody got any business being in here." Doe further related to Officer Pentimone that once inside the bedroom, T.J. stated "Check this s*** out," reached beneath the bed and removed two shiny chrome semiautomatic pistols with two leather gun holsters and placed them on the mattress. Doe additionally related to Officer Pentimone that T.J. reached under the bed again and removed a tube-shaped steel item and stated, "This here is a damn silencer, baby. I had to pay six hundred to get this b***." Moreover, Doe related that T.J. reached under the bed a third time and produced a black fanny pack and six black steel semi-automatic pistols. Doe informed Officer Pentimone that T.J. stated "These missiles are from a cop's crib," which Doe understood to mean weapons from a police officer's residence. Doe further informed Officer Pentimone that T.J. then returned the items under the bed before T.J. and Doe exited the bedroom.

¶ 9 Officer Pentimone stated that he compared the items Doe described to recent reports of residential burglaries in the area. According to Officer Pentimone, he discovered that on March 4, 2010, a police officer reported a residential burglary involving the theft of a black fanny pack, two chrome semi-automatic pistols and two leather holsters, among other items. The site of the reported burglary was within three miles of the address listed in the complaint.

¶ 10 According to Officer Pentimone, Doe related she knew T.J.'s full name was Thaddeus Jimenez. Officer Pentimone was able to obtain arrest information related to Jimenez. According to Officer Pentimone, Doe identified a photograph of Jimenez retrieved from a police database. Officer Pentimone stated he drove Doe past the address listed in the warrant and Doe identified the building as the location where T.J. had shown her the pistols, fanny pack, tube-shaped steel

item, and holsters. Officer Pentimone further stated that an examination of the Illinois Secretary of State's database confirmed Jimenez's residence as the address identified in the complaint.

¶ 11 The complaint for a warrant additionally states Doe was made available to the issuing judge for questioning. The complaint for a warrant bears Doe's signature, as well as the signatures of Officer Pentimone and the issuing judge. The complaint for a warrant indicates it was subscribed and sworn to before the issuing judge at 6:55 p.m. on April 6, 2010.

¶ 12 On April 7, 2010, the State filed complaints against Jimenez alleging: the theft of lost or mislaid property, specifically GPS units (720 ILCS 5/16-2 (West 2008)); possessing a 12-gauge shotgun, .45 caliber Rock Island Armory, .40 caliber Glock and ammunition for each without having a valid firearm owner's identification card (430 ILCS 65/2(a)(1),(2) (West 2008)); and possession of psilocybin with the intent to manufacture or deliver (720 ILCS 570/401(c)(7)(1) (West 2008)). On May 10, 2010, Jimenez was indicted on the charge of possessing less than 50 grams of psilocin with intent to deliver (720 ILCS 570/401(d) (West 2008)).[2]

¶ 13 The Motion for a *Franks* Hearing and to Suppress Evidence

¶ 14 On October 20, 2010, Jimenez filed a motion for a *Franks* hearing and to suppress evidence obtained as a result of the April 6, 2010, search warrant. In the motion, Jimenez asserted there either was no Jane Doe informant and the statements in the complaint for a warrant were concocted or that the informant existed but Officer Pentimone's recitation of facts provided by Jane Doe was in reckless disregard of the truth.

¶ 15 For example, Jimenez asserted Officer Pentimone must have taken no steps to verify whether Doe knew him for several years, given that Doe would have had to met him while he

[2] "Psilocin is the metabolite of psilocybin, which is the active ingredient in hallucinogenic mushrooms." *State v. Hotz*, 795 N.W.2d 645, 649 (Neb. 2011).

was incarcerated.[3] Jimenez argued Officer Pentimone could have easily verified whether Doe visited him in prison and learned he had been out for only 11 months. Indeed, Jimenez asserted the news of his release would have been revealed by a simple internet search. Jimenez also argued that Officer Pentimone could have discovered the property at issue had been his address for only 3 months, 17 days—not more than a year as Doe represented—by reviewing public records or contacting the lessor identified in the warrant.

¶ 16 Jimenez additionally observed that April 4, 2010, was Easter Sunday. Accordingly, Jiminez maintained that the date on which Doe claimed to have visited Jimenez's home should have triggered further inquiry by Officer Pentimone.

¶ 17 Jimenez supported his motion with affidavits submitted by Jimenez, his fiancé, his mother, and his sister. These affidavits state Jimenez's bedroom was in the rear northwest corner of the house, the bedroom was unlocked and family members were in and out of the bedroom all day on Easter Sunday. Furthermore, Jimenez's sister and other family members stayed overnight in the house before Easter Sunday, the house was "full of people" as early as 10 a.m. on Easter Sunday, more individuals arrived between 12 and 2 p.m., those in the house dined at approximately 3 p.m. and remained at the house until at least 9 p.m., with several remaining until 11 p.m. The affiants did not believe Jimenez could have brought an additional woman into the house without the woman being observed.

¶ 18 On November 10, 2010, the State filed a response to the motion to suppress, arguing Jimenez was not entitled to a *Franks* hearing as a matter of law and Jimenez had failed to make

[3] A June 3, 2009, order of the circuit court found Jimenez was previously convicted of murder, but granted his petition of innocence, finding he was innocent of all charges and he did not voluntarily bring about his conviction. See 735 ILCS 5/2-702 (West 2008).

the "substantial preliminary showing" necessary to obtain a *Franks* hearing. The State also noted the issuing judge signed a search warrant stating Jane Doe had appeared before him. The State further argued Jimenez's affidavits were executed by interested parties and should be weighed accordingly.

¶ 19 On November 17, 2010, Jimenez filed a reply in support of his motion to suppress, noting the State did not contest any of his assertions regarding the falsity of Doe's representations. Jimenez also asserted there was no evidence that the issuing judge questioned Doe before issuing the search warrant. Jimenez further argued Officer Pentimone's affidavit failed to set forth the underlying circumstances from which he concluded Doe was credible. In addition, Jimenez argued the State's contention regarding the credibility of affidavits from interested parties had been rejected by our supreme court in *People v. Lucente*, 116 Ill. 2d 133 (1987).

¶ 20 On January 5, 2011, the trial court held a hearing on Jimenez's motion for a *Franks* hearing and to suppress evidence. Thomas Salas (Salas), the real estate listing agent for 1456 Tyrell Avenue, testified the property was vacant from October 3 through December 28, 2009.

¶ 21 At the hearing, Victoria Jimenez, defendant's mother (Victoria), testified that on Easter Sunday 2010, she was cooking and cleaning at defendant's home all day long. According to Victoria, there were approximately 25 guests in the house at various times during the day. Victoria did not observe defendant bring any women she did not recognize into his house while she was present. Victoria also testified she could see from the kitchen to defendant's bedroom, but she subsequently acknowledged she could not see from the kitchen into defendant's bedroom. Victoria further testified defendant's fiancée was not in defendant's home for approximately eight or nine hours during the day. Victoria also testified defendant moved into the house prior to December 25, 2009.

¶ 22 Angela Jimenez, defendant's sister (Angela), testified that on April 4, 2010, she was at defendant's home from 12 p.m. through 11:30 p.m. and did not observe defendant with any women she did not recognize. Angela also testified she did not observe defendant's fiancée at defendant's residence during the day.

¶ 23 On March 14, 2010, the trial court ruled on Jimenez's motions for a *Franks* hearing and to compel disclosure of Jane Doe's identity and related information. The trial court denied Jimenez's request for a *Franks* hearing. The trial court observed the search warrant affidavit is entitled a presumption of validity. The trial court also stated that to obtain a *Franks* hearing, Jimenez must demonstrate a false statement was made knowingly and intentionally, or with reckless disregard for the truth. The trial court further stated that a determination as to whether there has been a substantial preliminary showing in a given case must be based on a careful balancing of the statements in the warrant affidavit versus those in support of defendant's challenge to the warrant. The trial court gave the defense affidavits and testimony little weight, based on inconsistencies between defendant's affidavits and the live testimony of the defense witnesses, along with the fact the affidavits were executed by interested parties. The trial court also observed the affidavits did not establish a strong likelihood the informant could not have made the observations contended. The trial court further observed the affidavits did not establish Officer Pentimone acted in reckless disregard of the truth and Officer Pentimone was not required to investigate an informant's claim to the extent suggested by Jimenez. The trial court, however, did find Salas credible and excised the portion of the warrant affidavit claiming Jane Doe had visited Jimenez for more than a year at 1456 Tyrell Avenue.

¶ 24 The Motion to Compel Disclosure of the Informant

¶ 25 On October 20, 2010, Jimenez also filed a motion to compel the State to disclose the

identity of the Jane Doe informant and related information. This motion to compel was based on the allegations in Jimenez's motion to suppress that the Jane Doe informant was nonexistent or untruthful. Jimenez contended the lack of a factual basis for Jane Doe's statements raised a reasonable doubt regarding the State's case and also led to the conclusion that the informant could not possibly fear reprisals.

¶ 26 On November 10, 2010, the State filed a response to the motion to compel disclosure of the identity of the Jane Doe informant and related information. The State argued disclosure of Jane Doe's identity and related information was not required because: (1) the disclosure did not relate to the fundamental question of guilt and innocence; (2) the informant was merely a tipster and neither a participant in nor a material witness to the essential elements of the offense; and (3) the recovery of the ammunition and weapons permitted the court to infer disclosure could jeopardize the informant's safety.

¶ 27 On November 17, 2010, Jimenez filed a reply in support of his motion to compel disclosure of Jane Doe's identity and related information. Jimenez argued that if the court assumed Jane Doe had been truthful, it should also assume Jimenez would know Doe's true identity. Jimenez further argued disclosure is required whenever the confidential communication was the primary basis for establishing probable cause to arrest. Jimenez additionally argued the reasons for nondisclosure offered by the State apply where disclosure is sought regarding a criminal trial, not a *Franks* hearing.

¶ 28 On March 14, 2010, the trial court denied the motion to compel disclosure of Jane Doe's identity and related information. The trial court relied on the State's representation it would not present testimony from the informant at trial. The trial court also observed the informant was a tipster, not a participant in or material witness to the essential elements of the offense. The trial

court further observed the disclosure of Jane Doe's identity would have no impact on the ultimate determination of Jimenez's guilt or innocence, while the informant's safety could be jeopardized if the motion was granted.

¶ 29 The Second Motion to Suppress Evidence

¶ 30 On September 8, 2011, Jimenez filed a second motion to suppress evidence, based on the issuing judge's failure to recuse himself from ruling on the complaint for a search warrant. Jimenez alleged that the issuing judge was formerly an assistant State's Attorney who was involved in the preliminary stages of the prosecution of Jimenez for the murder of Eric Morro, and testified at Jimenez's 1997 sentencing hearing. Jimenez attached a transcript of the issuing judge's 1997 testimony, in which he testified he observed Jimenez raise a clenched fist and run toward the prosecutors in the prior proceedings, only to be tackled by a deputy sheriff. Jimenez also asserted the issuing judge had been listed as a potential witness to testify against him in a related civil action. On September 19, 2011, the State filed a response to the second motion to suppress evidence, arguing Jimenez failed to demonstrate the issuing judge had any personal bias against him or was aware he was named as a potential witness in Jimenez's civil action. On October 17, 2011, Jimenez filed a reply in support of his second motion to suppress evidence, arguing the issuing judge should have recused himself under an objective or subjective standard.

¶ 31 On October 27, 2011, following a hearing on the matter, the trial court delivered an oral decision and a written memorandum denying the second motion to suppress evidence. The oral decision and written memorandum are based on substantially identical reasoning. The trial court found Jimenez had failed to establish the nature of the issuing judge's involvement in the preliminary stages of the prior criminal prosecution of Jimenez. The trial court also found the issuing judge's 1997 testimony regarding his observations was nothing more than routine, brief,

and uneventful. The trial court further noted the issuing judge's involvement in the prior prosecution of Jimenez occurred approximately 12 years before the present case. Lastly, the trial court rejected the argument that being listed as a potential witness would lead a reasonable person to believe the issuing judge could not have been impartial when ruling on the complaint for a search warrant.

¶ 32 Trial

¶ 33 The case proceeded to trial on December 19, 2011. At trial, Officer Pentimone testified regarding the April 7, 2010 execution of the search warrant for 1456 Tyrell Avenue. According to Officer Pentimone, Jimenez was outside the house when the police arrived, and remained outside with several officers while other officers searched the residence. Officer Pentimone testified he entered Jiminez's property and recovered suspected psilocin and marijuana, as well as mail from a nightstand in a bedroom for proof of residency. Officer Pentimone also recovered a shotgun from a bedroom closet. Officer Pentimone further recovered two scales, plastic baggies (some of which had red apple logos), pistols and ammunition from a safe inside the bedroom closet. Four holsters were recovered from the top of the safe. Officer Pentimone additionally recovered six GPS devices from the house.

¶ 34 The parties then stipulated that if forensic chemist Hasnain Hamayat were called as a witness, she would testify to a scientific degree of certainty that the items received by the Illinois state police crime laboratory from the Chicago police department tested positive for the presence of psilocin and weighed 1.5 grams. Following the close of the State's case, Jimenez moved for a directed verdict. The trial court denied the motion for a directed verdict. Jimenez rested his case without presenting evidence on his behalf.

¶ 35 After the parties presented closing arguments, the trial court found Jimenez not guilty of

possession of a controlled substance with intent to deliver, but guilty of the lesser included offense of possession of a controlled substance.

¶ 36 On April 5, 2012, following a sentencing hearing, the trial court sentenced Jimenez to a closely monitored, expungeable two-year probation. On May 4, 2012, Jimenez filed a timely notice of appeal to this court. On May 22, 2012, Jimenez filed a motion for leave to file an amended notice of appeal, which this court granted on May 24, 2012.

¶ 37 ANALYSIS

¶ 38 On appeal, Jimenez argues the circuit court erred by denying his motions to: (1) suppress evidence; (2) conduct a *Franks* hearing; (3) compel disclosure of the identity of a confidential informant, along with related information; and (4) suppress evidence based on the issuing judge's failure to recuse himself from the matter. We address each of Jimenez's arguments in turn.

¶ 39 Sufficiency of the Complaint for a Warrant

¶ 40 Jimenez first contends that the circuit court erred in denying his motion to suppress the evidence seized under the authority of the search warrant. Jimenez argues the affidavit supporting the complaint for the warrant did not set forth facts sufficient to establish probable cause. In particular, relying upon *Aguilar v. Texas*, 378 U.S. 108, 114-15 (1964), Jimenez argues the police officer's affidavit must recite some of the underlying circumstances from which the officer concluded the informant was credible or the information was reliable. The "*Aguilar* two-pronged test," which sought to independently assess the informant's basis of knowledge as well as the informant's veracity, was abandoned and replaced by a "totality of the circumstances" test in *Illinois v. Gates*, 462 U.S. 213 (1983), due to the inflexible manner in which lower courts had applied the *Aguilar* test. See *People v. Tisler*, 103 Ill. 2d 226, 239-40 (1984) (and cases cited therein). The Illinois Supreme Court has also adopted the *Gates* standard for resolving probable-

cause questions under the Illinois Constitution that involve an informant's tip. *Tisler*, 103 Ill. 2d at 246.

¶ 41 Accordingly:

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed." *People v. Payne*, 239 Ill. App. 3d 698, 704 (quoting *Gates*, 462 U.S. at 238-39).

"Probable cause for issuance of a search warrant exists if facts set forth in an affidavit would cause a reasonable person to believe that an offense has occurred and that evidence of that offense is in the place to be searched." *Payne*, 239 Ill. App. 3d at 704. "Probable cause is not to be a determination by a legal technician but instead by a reasonable and prudent person dealing with the practical considerations of everyday life." *Id.* " 'Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.' " *People v. Stewart*, 104 Ill. 2d 463, 477 (1984) (quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

¶ 42 "In reviewing a circuit court's ruling on a motion to suppress, mixed questions of law and fact are presented." *People v. Lee*, 214 Ill. 2d 476, 483 (2005). When reviewing a motion to quash a search warrant and suppress evidence, the trial court's factual findings will be reversed

only if they are against the manifest weight of the evidence; the trial court's ruling on the motion is a question of law that we review *de novo*. See, *e.g.*, *People v. Caro*, 381 Ill. App. 3d 1056, 1066 (2008) (citing *People v. McCarty*, 223 Ill. 2d 109, 148 (2006)).

¶ 43 Jimenez observes Officer Pentimone did not state how long he had known the informant, whether the informant had previously provided reliable information to him or other police officers, or the circumstances under which the informant had provided the information (*e.g.*, whether the information was provided in return for money, the dismissal of charges or leniency in sentencing in some other matter, etc.). Jimenez also argues Officer Pentimone did not take any step to corroborate the informant's statements.

¶ 44 This court, however, has previously ruled that

> " '[w]hen the informant has appeared before the issuing judge, the informant is under oath, and the judge has had the opportunity to personally observe the demeanor of the informant and assess the informant's credibility, additional evidence relating to informant reliability and corroboration by police as discussed in *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983), is not necessary.' " *People v. Lyons*, 373 Ill. App. 3d 1124, 1128-29 (quoting *People v. Hancock*, 301 Ill. App. 3d 786, 792 (1998)).

"*Gates* discussed the importance of police corroboration of an informant's tip when the issuing court has before it only an affidavit based on hearsay information. When the informant personally appears before the issuing court, such corroboration is unnecessary." *Lyons*, 373 Ill. App. 3d at 1129 (citing *People v. Phillips*, 265 Ill. App. 3d 438, 448 (1994)). In this case, Jane Doe appeared before the issuing judge and was available for questioning. Additionally, Doe subscribed and swore to the complaint for a warrant. Accordingly, although the record does not

indicate whether the issuing judge questioned Jane Doe, additional evidence relating to Doe's reliability and any corroboration by the police as discussed in *Gates* was unnecessary.

¶ 45 Moreover, the record establishes Officer Pentimone took steps to corroborate the informant's statements. According to Officer Pentimone, Doe identified Jimenez in a photograph retrieved from a police database as T.J. Officer Pentimone stated he drove Doe past the address listed in the warrant and Doe identified the home as the location where T.J. had shown her the pistols, fanny pack, tube-shaped steel item, and holsters. Officer Pentimone further stated the Illinois Secretary of State's database indicated Jimenez's listed residence was the address identified in the complaint. In addition, after Doe represented that Jimenez had claimed the items he displayed to Doe came from a police officer's home, Officer Pentimone stated he compared the items Doe described to recent reports of residential burglaries in the area. Officer Pentimone learned that on March 4, 2010, a police officer reported a residential burglary involving similar items. The site of the reported burglary was within three miles of the address listed in the complaint.

¶ 46 Given this record, a reasonable person could believe an offense occurred and evidence of that offense was located at 1456 Tyrell Avenue. Accordingly, Jimenez has failed to demonstrate the circuit court erred in denying his first motion to suppress due to insufficiency.

¶ 47 The Motion for a *Franks* Hearing

¶ 48 Jimenez next contends the circuit court erred by failing to conduct a *Franks* hearing. "[A] sworn complaint supporting a search warrant is presumed valid. [Citations.]" *People v. McCarty*, 223 Ill. 2d 109, 154 (2006). As the *Franks* court observed:

> "In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant

> Clause itself, which surely takes the affiant's good faith as its premise: '[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . .' Judge Frankel, in *United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: '[W]hen the Fourth Amendment demands a factual showing sufficient to comprise "probable cause," the obvious assumption is that there will be a *truthful* showing' (emphasis in original). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 164-65.

In *Franks*, therefore, the United States Supreme Court ruled the Fourth Amendment requires that a hearing be held at the defendant's request if: (1) he or she 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 (2) the allegedly false statement is necessary to the finding of probable cause. *Id*. at 155-56.

¶ 49 "[T]he linchpin of the *Franks* procedure is the 'substantial preliminary showing' requirement." *Lucente*, 116 Ill. 2d at 147. A defendant makes a "substantial preliminary showing" where he offers proof that is "somewhere between mere denials" and "proof by a preponderance." (Internal quotation marks omitted.) *People v. Petrenko*, 237 Ill. 2d 490, 500 (2010) (quoting *Lucente*, 116 Ill. 2d at 151-52). "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." *Lucente*, 116 Ill. 2d at 147 (quoting *Franks*, 438 U.S. at 171).

¶ 50 Where the warrant affidavit was based entirely on information furnished by a *confidential* informant, the *Lucente* court ruled a defendant cannot be required from the outset to establish what an anonymous, perhaps nonexistent, informant did or did not say. See *Lucente*, 116 Ill. 2d at 148, 150 (noting that *Franks* involved named informants and holding that *Franks* does not require defendants faced with anonymous-informant-based warrants to do the impossible). In such cases, "the adequacy of a given proffer may depend on the circumstances of each case." *Id.* at 149. After ruling that "[t]he determination in a given case must be based upon a careful balancing of the statements in the warrant affidavit versus those in support of the defendant's challenge to the warrant," the *Lucente* court added:

> "For example, if an informant is the source of false statements, a defendant may still be entitled to a hearing to show that the officer acted recklessly in using the information received as a basis for the search warrant. The greater the showing that the informant blatantly lied to the officer-affiant, or that the information from the informant is substantially false, the greater is the likelihood that the information was not appropriately accepted by the affiant as truth and the greater the probability that the affiant, in putting forth such information, exhibited a reckless disregard for the truth. This would be especially true where the warrant affidavit recited no independent corroboration of the information relied upon. In such a case, where the defendant's showing refutes the allegations in the warrant affidavit, and the warrant affidavit lacks any independent corroboration, the balancing process may well result in a hearing

being granted." *Id*. at 152-53.

In addition, " '[r]eckless disregard for the truth' has been defined as requiring proof (1) that the affiant entertained serious doubts as to the truth of the allegations in the affidavit, or (2) of circumstances evincing obvious reasons to doubt the veracity of the allegations." *People v. Creal*, 391 Ill. App. 3d 937, 944 (2009) (citing *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984)). "Allegations of negligence or innocent mistake are insufficient" to obtain a *Franks* hearing. *The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant*. (Emphasis added.)" *Lucente*, 116 Ill. 2d at 148 (quoting *Franks*, 438 U.S. at 171).

¶ 51 "The purpose of the 'substantial preliminary showing' requirement is to discourage abuse of the hearing process and to enable spurious claims to 'wash out at an early stage.' " *Lucente*, 116 Ill. 2d at 151 (quoting *Franks*, 438 U.S. at 170). "At the other extreme, *Franks* expressly states that in order to prevail *at the hearing* the defendant must prove his claim of perjury by a preponderance of the evidence." (Emphasis in original.) *Lucente*, 116 Ill. 2d at 151 (citing *Franks*, 438 U.S. at 156). "If the preponderance standard is to apply at the hearing, it follows logically that the threshold requirement must be something less." *Lucente*, 116 Ill. 2d at 151-52. "In the range of cases falling between these limits, the determination as to whether there has been a substantial showing sufficient to warrant a hearing must be made by the trial judge, and to a degree the decision on the issue will be final." *Id.* at 152. The circuit court's "determination in a given case must be based upon a careful balancing of the statements in the warrant affidavit versus those in support of the defendant's challenge to the warrant." *Id*. The *Lucente* court further explained:

"Given the unavoidably subjective nature of these determinations, it may

> well be that in some cases a trial judge will deny a hearing when in fact a warrant was issued on the basis of the false statements. It is also true that the same balancing test may result in an evidentiary hearing being held when none is warranted. So long as the trial court's judgment is exercised within permissible limits, that judgment will not be disturbed." *Id*. at 153.

¶ 52 This court has interpreted *Lucente* for the proposition that the abuse of discretion standard applies to the trial court's ruling on whether to grant or deny a *Franks* hearing. *E.g.*, *People v. Castro*, 190 Ill. App. 3d 227, 236-37 (1989). An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it. *E.g.*, *People v. Rivera*, 2013 IL 112467, ¶ 37. In addition, in this case, the trial court heard testimony in support of the request for a *Franks* hearing. Generally, it is the trial court's province to determine the credibility of witnesses and the weight to be given their testimony, and its findings will not be disturbed upon review unless they are contrary to the manifest weight of the evidence. See *People v. Agyei*, 232 Ill. App. 3d 546, 550 (1992).

¶ 53 Jimenez first contends the circuit court erred in denying his request for a *Franks* hearing by failing to apply the "substantial preliminary showing" standard of proof. Jimenez quotes the trial court's statements that to obtain a *Franks* hearing, Jimenez "must show that a false statement was made knowingly and intentionally, or with reckless disregard," that his evidence "does not sufficiently refute the allegations in the warrant affidavit," and his affidavits "do not establish the impossibility or even the strong likelihood that time [sic] informant *** could not have made the observations claimed" and "do not show that the officer included statements either deliberately or with reckless disregard for the truth [or] any reason that the officer would had to believe that the informant was being untruthful." Jimenez asserts the trial court: conflated the "substantial

preliminary showing" with the preponderance standard applicable after a *Franks* hearing; suggested Jimenez was required to establish that it was impossible for the informant to have made the claimed observations or a strong likelihood the informant could not have made them; and shifted the burden to a consideration of whether the officer subjectively had a basis to doubt the informer.

¶ 54 Jimenez, however, ignores the fact that the trial court cited *Lucente* (which defines a "substantial preliminary showing") and observed "that a determination as to whether there has been a substantial preliminary showing in a given case must be based on a careful balancing of the statements in the warrant affidavit versus those in support of the defendant's challenge to the warrant." The record thus establishes the trial court was aware that Jimenez need only make a substantial preliminary showing to obtain a hearing. The trial court's comments regarding the elements Jimenez was required to show (that a false statement knowingly and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit and was necessary to show probable cause) do not state an incorrect standard of proof for those required elements. The trial court's comments regarding the strength or weaknesses of Jimenez's evidence versus the statement in the complaint for a warrant reflect the balancing the trial court was required to undertake by *Lucente*. Indeed, the *Lucente* court specifically discusses the situation where a "defendant's showing refutes the allegations in the warrant affidavit." *Lucente*, 116 Ill. 2d at 152-53. The trial court's use of such language is thus entirely consistent with *Lucente*. The trial court's comments regarding whether the officer had reason to believe the informant echo the principle that we examine whether the statements are "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. See *Franks*, 438 U.S. at 164-65.

¶ 55 Jimenez next argues his showing of intentional false statements and reckless disregard for the truth was so strong that this court should suppress the evidence and reverse his conviction outright. Jimenez's argument begins by repeating that Officer Pentimone failed to establish the underlying circumstances from which the officer concluded the informant was credible or the information was reliable. Jimenez also observes Officer Pentimone failed to: identify the time of day Jane Doe was allegedly in his home; verify Doe's statements that she had known Jimenez for several years and had visited his home for more than a year; request Doe record a telephone call to verify her statements; attempt a controlled buy of weapons; or attempt to determine whether the items recently stolen from a nearby police officer's residence had been recovered.

¶ 56 The trial court was required to determine whether Jimenez made 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 was necessary to show probable cause. See *Franks*, 438 U.S. at 155-56. Jimenez initially alleged there was no Jane Doe informant, but the record establishes the informant appeared before the issuing judge. Jimenez does not allege or provide any showing that Officer Pentimone knew of any falsehood in Jane Doe's statements and intentionally relied upon them; to the contrary, Jimenez relies upon Officer Pentimone's failure to further verify Jane Doe's statements. Accordingly, as the informant is the source of the asserted false statements, the issue is whether Jimenez made a substantial preliminary showing that Officer Pentimone acted with a reckless disregard of the truth. See *Lucente*, 116 Ill. 2d at 152 (Where an informant is the source of the false statements, the defendant may be entitled to a hearing to show the officer exhibited a reckless disregard for the truth.).

¶ 57 Jimenez was thus required to make a substantial preliminary showing that the affiant

entertained serious doubts as to the truth of the allegations in the affidavit, or of circumstances evincing obvious reasons for Officer Pentimone to doubt the veracity of the allegations. See *Creal*, 391 Ill. App. 3d at 944. Jimenez relies on Officer Pentimone's failure to further corroborate or verify Jane Doe's statements. As previously noted, the record establishes Officer Pentimone took a number of steps to corroborate Doe's statements. *Supra* ¶ 45. The possibility that Officer Pentimone might have taken further steps to corroborate the informant's statements may be part of the trial court's balancing of the evidence, but the existence of that possibility is not determinative. See *Lucente,* 116 Ill. 2d at 154 (commenting on how both sides' positions could have been stronger with further corroboration). Officer Pentimone's failure to seek further corroboration of Jane Doe's statements could be arguably negligent, but " '[a]llegations of negligence or innocent mistake are insufficient' " to obtain a *Franks* hearing. *Id*. at 148 (quoting *Franks*, 438 U.S. at 171).

¶ 58 The record establishes that Jane Doe lied to Officer Pentimone about knowing Jimenez for years, which led the trial court to excise that aspect of the affidavit. The affidavits and testimony submitted by Jimenez, however, do not provide any showing that Officer Pentimone entertained serious doubts as to the truth of the allegations in the affidavit. The affidavits and testimony submitted by Jimenez also do not provide any showing of circumstances from which it could be inferred Officer Pentimone had obvious reasons to doubt the veracity of Doe's statements when he sought the warrant. Indeed, although Jimenez asserts the fact that the date at issue was Easter Sunday should have been a "red flag" for Officer Pentimone, Jimenez's affidavits and witnesses establish Jimenez had female friends in his home on that date. Given this record, we conclude the trial court's ruling that Jimenez failed to make the required substantial preliminary showing that Officer Pentimone acted with a reckless disregard of the

truth was not an abuse of discretion. See *Creal*, 391 Ill. App. 3d at 944.[4]

¶ 59 The Motion to Compel Disclosure of Doe's Identity

¶ 60 Jimenez further contends the circuit court erred in denying his motion to compel the State to disclose the identity of the Jane Doe informant and related information. Illinois Supreme Court Rule 412(j)(ii) (eff. Mar. 1, 2001) states that, if an informant is not to be called as a State witness, "[d]isclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused."

¶ 61 The Supreme Court has provided some guidance on the issue of disclosure of a confidential informant's identity. Jimenez relies upon *Roviaro v. United States*, 353 U.S. 53 (1957), in which the Court examined the disclosure of an informant's identity in the context of a trial. The *Roviaro* Court found that the public interest in protecting the flow of information to the government must be balanced against a defendant's need for disclosure in order to prepare his defense. *Id*. at 62. The Court held that a trial court may require disclosure "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause ***." *Id*. at

[4] The parties devote portions of their brief to discussing a split of authority in the First District of this court regarding whether the presence of the informant before the magistrate upon the application for the search warrant removes this case entirely from the ambit of *Franks*. See *Creal*, 391 Ill. App. 3d at 945-46 (and cases cited therein). Given our conclusion that the trial court did not abuse its discretion in concluding Jimenez failed to make any showing that Officer Pentimone intentionally or recklessly included a falsehood in the warrant complaint, we need not rule upon the issue regarding Doe's appearance before the issuing judge. See *id*.

60-61. As the confidential informant in the case was the sole participant, other than the accused, in the transaction charged, the only witness in a position to amplify or contradict the testimony of government witnesses, and denied knowing petitioner or ever having seen him before, the Court concluded that failure of the trial court to require disclosure of the identity of the informer was reversible error. *Id*. at 64-65.

¶ 62 Although *Roviaro* established a standard for disclosing the identity of an informant at trial, the United States Supreme Court has distinguished the application of that standard in cases involving the disclosure of informants at pretrial hearings. In *United States v. Raddatz*, 447 U.S. 667, 679 (1980), the Court stated:

> "[A]lthough the Due Process Clause has been held to require the Government to disclose the identity of an informant at trial, provided the identity is shown to be relevant and helpful to the defense, *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957), it has never been held to require the disclosure of an informant's identity at a suppression hearing. *McCray v. Illinois*, 386 U.S. 300 (1967). We conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself."

Raddatz relied on *McCray*, in which the Court stated " 'it should rest entirely with the judge who hears the motion to suppress to decide whether he needs such disclosure as to the informant in order to decide whether the officer [the affiant] is a believable witness.' " *McCray*, 386 U.S. at 308 (quoting *State v. Burnett*, 201 A.2d 39, 43-45 (N.J. 1964)).

¶ 63 Illinois law has also long distinguished between the standard for disclosure of an informant's identity at trial as opposed to a preliminary hearing. See *People v. Williams*, 38 Ill. 2d 150, 152-53 (1967) (and cases cited therein). For example, in *People v. Vauzanges*, 158 Ill.

2d 509, 520 (1994), our supreme court adopted a discretionary standard in the context of the production of an informant or the police files on an informant during a *Franks* hearing:

> "When a *Franks* hearing has been granted, the trial court may in its discretion require the production of the informant and/or the police files on the informant for an *in camera* examination or inspection, if under all the circumstances the trial court doubts the credibility of the police officer/affiant with respect to the existence of the informant. Based upon the trial court's findings at the *in camera* examination or inspection, the court may then exercise its discretion in deciding whether to order disclosure of the informant's identity to the defendant."

In so ruling, the *Vauzanges* court added:

> "[T]the trial court is motivated by different concerns in exercising its discretion with respect to production of an informant as opposed to disclosure of an informant's identity. When considering whether to order the production of the informant and/or the police file for an *in camera* examination or inspection, the trial court is concerned with the existence of the informant and with maintaining the integrity of the judicial process. Conversely, when determining whether to disclose the identity of the informant, the trial court is concerned with a defendant's need for disclosure in order to prepare his defense. Therefore, production of an informant for an *in camera* examination should not be confused with disclosure of an informant's identity, since different concerns are at stake." *Id*.

¶ 64 In this case, the trial court denied the motion for a *Franks* hearing, indicating the court did not entertain the requisite doubt about Officer Pentimone's credibility or the existence of the

informant. As a consequence, the trial court could determine that neither production nor disclosure of the informant was necessary. See *id*. Moreover, the trial court denied the motion to disclose information about Jane Doe because Doe was a tipster, not a participant in or material witness to the essential elements of the offense, and disclosure of her identity would have no impact on the ultimate determination of Jimenez's guilt or innocence. The trial court's reasoning was consistent with the *Vauzanges* court's observation that "when determining whether to disclose the identity of the informant, the trial court is concerned with a defendant's need for disclosure in order to prepare his defense." *Id*. Given this record, we conclude the court did not abuse its discretion in denying Jimenez's motion to disclose Jane Doe's identity and related information.

¶ 65 The Second Motion To Suppress

¶ 66 Lastly, Jimenez contends the trial court erred in denying his second motion to suppress evidence, based on the issuing judge's failure to recuse himself from ruling on the complaint for a search warrant. A judge should disqualify himself where his or her impartiality may reasonably be questioned, including instances where the judge has personal knowledge of disputed evidentiary facts concerning the proceeding.. Ill. S. Ct. R. 63(c) (eff. Dec. 5, 2003); *People v. Kliner*, 185 Ill. 2d 81, 169-70 (1998). "This test mandates disqualification when a reasonable person might question the judge's ability to rule impartially." *Barth v. State Farm Fire & Casualty Co*., 228 Ill. 2d 163, 176 (2008). The issue is "whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial." *Leavell v. Department of Natural Resources*, 397 Ill. App. 3d 937, 963 (2010) (citing *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985)). When reviewing a judge's recusal decision, we must determine whether the decision was an abuse of

the judge's discretion. *Barth*, 228 Ill. 2d at 175.

¶ 67 On appeal, Jimenez argues the issuing judge should have recused himself because he testified at Jimenez's 1997 sentencing hearing and had been listed as a potential witness against Jimenez in a related civil action Jimenez filed against the City of Chicago and six police officers. "Merely having a previous involvement with a defendant does not, *per se*, require disqualification." *People v. Del Vecchio*, 129 Ill. 2d 265, 277 (1989). Our supreme court does not presume a failure of impartiality on the part of a trial judge, even under extreme provocation, such as a physical attack by a defendant. See *People v. Hall*, 114 Ill. 2d 376, 406-07 (1986). A judge's previous involvement as an assistant State's Attorney in prior proceedings involving the defendant is not a sufficient basis for disqualification where the judge's involvement was "routine, brief, and uneventful." See *People v. Storms*, 155 Ill. 2d 498, 505 (1993). In *Storms*, our supreme court also found it noteworthy that the prior criminal proceedings involving the defendant occurred almost a decade before the challenged judge sentenced the defendant. *Id*. The *Storms* court further found it significant that neither defendant nor the judge recalled their previous encounters. *Id*. at 506.

¶ 68 In this case, the trial court found the issuing judge's 1997 testimony regarding his observations was nothing more than routine, brief, and uneventful. Jimenez disputes this conclusion, but briefly appearing as a witness under oath is not even a prosecutorial function. Moreover, as the trial court noted, the issuing judge's testimony occurred more than a decade prior to the issuance of the search warrant in this case. Jimenez presented no evidence that the issuing judge was aware he was named as a proposed witness in Jimenez's civil action against the City and six police officers, let alone the subject matter of the testimony which might be sought in the civil action or the issuing judge's recollection thereof. The trial court, being

informed of these facts (or the lack thereof), did not entertain a significant doubt that the issuing judge was impartial. Given this record, we conclude the trial court did not abuse its discretion in denying Jimenez's second motion to suppress.

¶ 69 CONCLUSION

¶ 70 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 71 Affirmed.