2015 IL App (1st) 131020-U

FOURTH DIVISION
June 18, 2015

No. 1-13-1020

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 3557
	)	
GERARDO FERRER,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held*: At *Franks* hearing, defendant did not show by preponderance of evidence that police officer seeking search warrant intentionally or knowingly included false statements in affidavit offered in support of warrant. Denial of motion to quash affirmed. Conviction for being armed habitual criminal affirmed.

¶ 2 Following a bench trial, defendant Gerardo Ferrer was convicted of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)) and was sentenced to six years in prison. Before defendant's trial, the circuit court granted the defense's request for a hearing pursuant to

Franks v. Delaware, 438 U.S. 154 (1978), to determine the veracity of the statements of an informant included in a police officer's affidavit in support of the search warrant used to recover weapons from defendant's residence. After the *Franks* hearing, the circuit court denied the defense's motion to quash the search warrant and suppress evidence of the weapons. On appeal, defendant contends his conviction should be reversed because the officer displayed a reckless disregard for the truth in relying on the informant's account and because the remainder of the complaint was insufficient to establish probable cause for the search. We affirm.

¶ 3 On February 16, 2011, Chicago police officer Nick Zattair submitted a complaint for a search warrant to the circuit court. Officer Zattair stated in the complaint that on February 13, 2011, he had a conversation with a person to whom he referred as John Doe. John Doe told the officer that in the previous week, he had been with defendant inside a residence at 3757 West 78th Place in Chicago. John Doe related that defendant took him to an upstairs bedroom to smoke cannabis. While in the bedroom, defendant showed John Doe a "semi-auto" pistol, which defendant claimed as his own, and put it in his waistband. John Doe said he had been inside the residence numerous times in the last few weeks and observed defendant in possession of a weapon on some of those occasions. Defendant also took John Doe to a detached garage on the property and showed him a handgun.

¶ 4 The complaint further stated that Officer Zattair drove John Doe past the residence at 3757 West 78th Place in Chicago. John Doe identified the brick single-family residence and detached garage as the locations where he observed defendant in the possession of the weapons in the week prior to February 13, 2011, as well as at other times in the past. Officer Zattair consulted the website of the Cook County Assessor and found the structure at that address to be a brick structure with a detached garage. The officer also showed to John Doe a photo of defendant

obtained from the Chicago Police Department data warehouse, whom John Doe identified as the person he saw in possession of the weapon. Officer Zattair searched defendant's criminal record and determined that defendant had a prior felony conviction. Defendant was the listed owner of a vehicle with a license plate registered to 3757 West 78th Place. Based on those facts, Officer Zattair requested the issuance of a search warrant for defendant, the residence at 3757 West 78th Place and the garage at that address, based on a belief that an illegal firearm was stored there. The officer and John Doe appeared before Judge Tommy Brewer, who issued the search warrant.

¶ 5 The search warrant was executed on February 19, 2011. An arrest report contained in the record indicates defendant was arrested at 12:55 p.m. on that day after police recovered two handguns and a box of ammunition from the property. Defendant was charged with being an armed habitual criminal and unlawful use of a weapon by a felon based on his knowing possession of two different firearms, having been previously convicted of aggravated battery with a firearm and robbery.

¶ 6 On November 10, 2011, defendant filed a motion for a *Franks* hearing, asserting John Doe made intentionally false statements to the judge issuing the search warrant. Defendant contended John Doe's statements were untruthful because John Doe had not been inside his home at any time during the week of February 7 through February 13, 2011. He also claimed that, contrary to John Doe's claim that the two of them had smoked cannabis in defendant's bedroom the previous week, in fact smoking was forbidden in his household. Defendant further contended that Officer Zattair did not corroborate John Doe's statements other than asking John Doe to identify defendant's residence and photograph. Defendant argued he made a substantial preliminary showing of the falsity of John Doe's statements so as to warrant a *Franks* hearing.

¶ 7 In support of his motion, defendant attached his own affidavit attesting he lived at 3757 West 78th Place in Chicago. Defendant stated that during the week of February 7 to February 11, 2011, he was employed by a construction company and was away from home from approximately 6 a.m. to 4:30 p.m. After arriving home, he would go to the Chicago Boxing gym from 6 to 8 p.m. Upon returning home, he would cook dinner and go to sleep between 10:30 and 11:30 p.m. On February 11, Joseph Gutierrez and defendant's cousin, Enrique Diaz, were playing video games when defendant arrived home from work. Reuben Herrera arrived between 6 and 6:30 p.m. to play video games. Defendant stated he was arrested in the early morning hours of February 12. (Because defendant's search warrant in this case was not executed until one week later, defendant's February 12 arrest is apparently unrelated to John Doe's affidavit.)

¶ 8 In his affidavit, defendant denied showing anyone a gun at his home or garage or smoking marijuana with John Doe in an upstairs bedroom during the week of February 7 to February 13. Defendant attested he did not have any guests over to his home from February 7 to February 10 because he was busy with his work and gym schedules, and he stated that smoking of any kind is prohibited in the house.

¶ 9 Along with his own affidavit, defendant submitted affidavits from Joseph Morris (his brother-in-law), Monica Morris (sister), Enrique Diaz (cousin), Adrian Ferrer (brother), and Gutierrez. Those affiants stated defendant did not have visitors at the house during the week in question and could not have smoked marijuana in his bedroom with John Doe because of a rule against smoking in the house.

¶ 10 In response, the State asserted in a written motion that John Doe appeared before the judge issuing the search warrant, thus allowing the judge to assess his veracity. The State argued defendant's motion merely denied the charge and did not make a substantial preliminary showing

that Officer Zattair knowingly or intentionally included false statements by John Doe or exhibited a reckless disregard for the truth in preparing his complaint for a search warrant. The State noted the affidavits were from defendant's family members and friends, thus limiting their credibility, and did not preclude the possibility of John Doe's encounter with defendant as described in the complaint.

¶ 11 The trial court ruled that a *Franks* hearing was warranted. The court noted, however, that its principal concern in deciding to hold this hearing was not that he suspected perjury in the securing of the affidavit but because he had yet to see a signed copy of the subject affidavit.

¶ 12 The court then held an evidentiary hearing in accordance with *Franks*. The defense presented testimony of the family members and friends who provided affidavits in support of the *Franks* motion. Monica Morris testified that in February 2011, she and her husband, Joseph, worked for Amtrak and lived part of the time at 3757 West 78th Place in Chicago. Defendant and their brother and cousin also lived at that house. Monica testified that during the week of February 7 through February 11, defendant left for his job at a construction company at 6 or 6:30 a.m. and after returning home, defendant would go to a gym and then cook dinner for the family. She could not recall anyone other than a family member being at the house during that week and that there was a rule against smoking anything, including cigarettes, in the house. She arrived at the house at about 6:30 p.m. on February 11, and no one was home. At about 2 a.m., she was notified that defendant had been arrested. On cross-examination, Monica admitted she did not have knowledge of defendant's activities at all times.

¶ 13 Joseph Morris testified consistently with his wife as to defendant's work and gym schedule. He stated that defendant did not have any guests that week; however, he acknowledged

he was not at the house on February 11. He testified he generally did not go into defendant's bedroom and had never seen defendant with a gun.

¶ 14 Adrian Ferrer testified that he was defendant's brother and lived at 3757 West 78th Place but was not home every evening. He never observed defendant bring anyone to the house. He acknowledged speaking to defendant and Monica about the case.

¶ 15 Ramon Ayala testified that he was defendant's foreman at Wright Construction Company in 2011 and they worked out at the boxing gym together. Ayala testified defendant worked every day from February 7 through February 11 from 7 a.m. to 3:30 p.m. Ayala had been to 3757 West 78th Place to drop off tools but had not been in a bedroom. Ayala said he had not seen a weapon in the house. Gutierrez, who was mentioned in defendant's affidavit, testified he and defendant went to defendant's house on February 11 and played video games with Diaz until 7:30 or 8 p.m.

¶ 16 Defendant testified as to his regular work and gym schedules. He stated he was arrested on February 12 and released on February 14 and therefore was in Cook County Jail for two days of the time period described by John Doe. Defendant testified he did not have guests in his bedroom between February 7 and February 13 or smoke marijuana in his bedroom in that period.

¶ 17 The State presented the testimony of Officer Zattair, who recounted the process described in the complaint for a search warrant. The officer testified he initially spoke to John Doe on the telephone and then spoke to him in person on February 13. John Doe identified a picture of defendant and identified 3757 West 78th Place as the location where he saw defendant with the weapons. Officer Zattair reviewed defendant's criminal background and determined that defendant had a previous conviction for aggravated battery with a firearm. The officer testified that he presented John Doe to a judge on February 16 to obtain the search warrant, and the judge

questioned John Doe. On cross-examination, Officer Zattair testified he had talked to John Doe several times before February 13. Doe told the officer the day and time that he saw the gun.

¶ 18 The circuit court denied the motion to quash the search warrant and suppress evidence of the weapons. The court acknowledged that it had restricted defense counsel's examination of Officer Zattair to protect the informant's identity. The court also noted the State had now provided him with a copy of the complaint for a search warrant signed by the officer and John Doe.

¶ 19 The court further stated:

> "I'm told that the officer before he made any seizures in this case talked to J. Doe, verified certain information, what has been described as static information about [defendant]; took J. Doe to 51st Street, found Judge Brewer in his chambers, conversed with Judge Brewer, and that the judge swore both J. Doe and the officer to the contents of the affidavit and he talked to them. He talked to J. Doe. The judge believed him. The officer got permission from the judge to go into the house and make a seizure.
>
> This business about whether there is smoking marijuana in the house or not, I don't know how crucial that is to what we have in front of us. I am persuaded that J. Doe knew that there were some guns or some kind of firearms there and wanted the police to know that. The police dotted the I's and crossed the T's, they did some homework, verified the static information and then took J. Doe before a judge before any seizures were made.
>
> I cannot say that looking at the totality of the evidence that I find infirmities in the warrant."

¶ 20 The defense filed a motion to reconsider, asserting the testimony of the defense witnesses established by a preponderance of the evidence that John Doe provided intentionally false statements. The defense asserted Officer Zattair did not corroborate any of John Doe's allegations. The circuit court denied the motion to reconsider, stating as follows: "I don't believe that it was established to me that either John Doe or Officer Zatara lied, or recklessly disregard[ed] the truth. These are factual findings I'm making."

¶ 21 The case proceeded to a bench trial in January 2013, at which two Chicago police officers testified they executed a search warrant on defendant's residence. One officer testified that two guns, a .357 revolver and a semi-automatic handgun, were recovered from the mattress in defendant's bedroom. Police also recovered from that bedroom a utility bill and a phone bill in defendant's name, along with two work identification cards bearing defendant's name and photograph. Certified copies of defendant's prior convictions for robbery and aggravated battery with a firearm were admitted into evidence. The trial court found defendant guilty of being an armed habitual criminal. Defendant's motion for a new trial was denied, and the circuit court imposed a six-year sentence.

¶ 22 On appeal, defendant contends the circuit court erred in denying his motion to quash the search warrant based on the testimony at the *Franks* hearing. Defendant argues Officer Zattair displayed a reckless disregard for the truth in providing John Doe's account in support of the complaint. The State responds that a *Franks* hearing was not warranted and, moreover, the evidence presented at the hearing did not demonstrate the officer offered or sponsored false information.

¶ 23 An affidavit supporting a search warrant is presumed to be valid. *Franks*, 438 U.S. at 171. The fundamental purpose of a *Franks* hearing is to challenge the veracity of the statements

made by the affiants in a complaint for a search warrant. *People v. Lucente*, 116 Ill. 2d 133, 153 (1987); *People v. Economy*, 259 Ill. App. 3d 504, 509 (1994). At the hearing, the defendant is required to show, by a preponderance of the evidence, that the police officer either knowingly and intentionally, or with reckless disregard for the truth, included false statements in his affidavit in support of a search warrant, and that these false statements were necessary to a finding of probable cause. *Franks*, 438 U.S. 155-56; *People v. Caro*, 381 Ill. App. 3d 1056, 1066 (2008). Allegations of negligence or innocent mistake will not suffice. *Franks*, 438 U.S. at 171. If the defendant carries his burden of proof, the focus turns to the remaining information, if any, in the affidavit; if, with the false statements set aside, the remaining information fails to independently establish probable cause, the search warrant is voided and the fruits of the search excluded from evidence. *Id*. at 156.

¶ 24 The defendant's challenge must be to the representations of the government agent, not of the informant. *Id*. at 171. If the defendant claims that the source of the false statements was the informant—that the officer did not himself or herself lie but, instead, relied on false statements by the informant—then the defendant must prove that the officer acted with reckless disregard for the truth in accepting those false statements and including them in the affidavit. *Lucente*, 116 Ill. 2d at 152. In the context of a *Franks* hearing, a "reckless disregard for the truth" has been defined as requiring proof either: (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). The greater the showing that the informant blatantly lied or gave obviously false testimony, the greater the likelihood that the officer exhibited a reckless disregard for the truth in including the informant's statements in the affidavit. *Lucente*, 116 Ill. 2d at 152.

¶ 25 In 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. *Lucente*, 116 Ill. 2d at 155; *People v. McCarty*, 223 Ill. 2d 109, 148 (2006). The ultimate determination of whether the evidence should have been suppressed, after application of those factual findings, is a question of law we review *de novo*. *McCarty*, 223 Ill. 2d at 148.

¶ 26 Thus, the issue before us is whether the defense proved that Officer Zattiar, as the affiant, intentionally included false statements in the warrant affidavit or acted with a reckless disregard for the truth, and, if so, whether those false statements were necessary to establish probable cause for the search. *Lucente*, 116 Ill. 2d at 150. Defendant contends that Officer Zattair demonstrated a reckless disregard for the truth because the complaint for the search warrant did not include specific facts, such as a precise date and time that John Doe saw the gun or a listing of who else was present in the residence at that time. Defendant asserts the officer merely corroborated details of defendant's identity and residence and did not confirm that John Doe had ever been inside that residence. He further contends the officer did not indicate John Doe had provided reliable information on prior occasions. Finally, defendant argues that, although John Doe appeared before a circuit judge, Officer Zattair "did *not* testify that Doe was sworn-in by the judge or that Doe provided his information under oath." (Emphasis in original.)

¶ 27 As a preliminary matter, we take issue with two evidentiary points raised by defendant. First, defendant claims that John Doe did not specify a time, or even a specific date in the previous week when he met with defendant and saw the contraband. But the record discloses otherwise. At the *Franks* hearing on cross-examination, Officer Zattair testified that he was reluctant to include a specific date and time in the affidavit for fear that it would reveal the identity of John Doe and jeopardize his safety. When questions about specific dates and times

were made during the *Franks* hearing, the State objected for this reason, and the trial court sustained those objections. But then the following colloquy occurred:

> [Defense Counsel]: Without you revealing to us, Officer Zattair, did J. Doe tell you the day and time that he or she allegedly saw this gun?
>
> THE COURT: Just yes or no without details. You can answer that.
>
> THE WITNESS: Uhm, yes.

The record therefore reveals that, in fact, the confidential information did provide a specific date and time in which he or she witnessed defendant in possession of the contraband—the trial court simply did not permit the officer to specify that date or time in open court, as an understandable protective measure.

¶ 28 Defendant also is incorrect when he claims that Officer Zattair never testified that John Doe was sworn in by the trial judge that heard the probable cause request. Defendant points to one point in the record where Officer Zattair merely agreed that "John Doe provided his information to the judge," but later in the testimony the officer testified that "[t]he judge swore him in first." The trial judge subsequently made a factual finding that, when Judge Brewer met with the officer and John Doe, "the judge swore both J. Doe and the officer to the contents of the affidavit and he talked to them. He talked to J. Doe. The judge believed him."

¶ 29 Based on the totality of the circumstances, we affirm the trial court's finding that defendant failed to prove by a preponderance of the evidence that Officer Zattair knowingly lied or acted with reckless disregard for the truth, and thus we affirm the trial court's finding of probable cause as well. The complaint for a search warrant indicated that, on February 13, 2011, Officer Zattair heard John Doe describe his observation of defendant with multiple weapons and ammunition during the previous week. The officer drove John Doe past the residence to confirm

where John Doe observed that activity and also established defendant's identity by showing John Doe a photograph. In addition, Officer Zattair determined that a vehicle in defendant's name was registered at the subject address. The officer was given a specific date and time in the previous week that the informant had viewed the contraband but chose not to include that level of specificity in the affidavit to protect the safety of his informant. Finally, John Doe appeared before a judge, provided information to that judge, and was sworn to the contents of the affidavit.

¶ 30 This court recently found an affidavit was sufficient to show the existence of probable cause to believe a defendant had contraband in his residence when the police officer learned of that activity from an unnamed informant and took steps identical to those taken by Officer Zattair in this case. See *People v. Kornegay*, 2014 IL App (1st) 122573, ¶¶ 24-26. In *Kornegay*, the officer drove the informant past the address where the informant said he met with the defendant and purchased cannabis. The officer also showed the informant a picture of the defendant taken from a police database and confirmed the defendant's identity. In addition, the informant appeared before the court, as did John Doe in the instant case. *Id*.

¶ 31 Nor do the affidavits presented by defendant contradict John Doe's account that defendant possessed a weapon on the subject premises during the period of time in question and displayed the weapon to John Doe. Although the various attestations of defendant's family and friends set out that defendant went to work and the gym on a regular basis and that they were in the house with defendant at several points during that week, those affidavits did not preclude the possibility that defendant had the time to display a weapon to John Doe in his bedroom. The accounts of those affiants left open numerous windows of time during the week described in John Doe's affidavit during which defendant would have been able to display a weapon to John Doe. See, *e.g.*, *People v. Phillips*, 265 Ill. App. 3d 438, 445 (1994) (affirming denial of *Franks*

hearing where affidavits "do not establish that the defendant could not have sold cocaine to the informant on the day in question"); *People v. McCoy*, 295 Ill. App. 3d 988, 997 (1998) (affirming denial of *Franks* hearing where affidavits "did not establish that it was impossible for the informant to have bought heroin from the defendant as he described"); *People v. Tovar*, 169 Ill. App. 3d 986, 992 (1988) (affirming denial of *Franks* hearing where affidavits "did not establish an impossibility of the informant having access to the apartment" in question at the time in question). Moreover, this court has long held in cases involving *Franks* hearings that an affidavit from an interested party—in this case, defendant's family and friends, as well as defendant himself—carries less weight than one of a neutral affiant. See *Lucente*, 116 Ill. 2d at 154; *People v. Voss*, 2014 IL App (1st) 122014, ¶ 24; *Phillips*, 265 Ill. App. 3d at 445; *Tovar*, 169 Ill. App. 3d at 992. Those affidavits do not demonstrate Officer Zattiar's disregard for the truth or show that the officer intentionally made false statements in his complaint for a search warrant.

¶ 32 Defendant relies on *People v. Damian*, 299 Ill. App. 3d 489 (1998), but we find that decision inapposite for several reasons. First, in that case, the trial court suppressed the evidence based on a lack of probable cause, and the appellate court properly noted that it owed deference to those findings, which would only be disturbed if they were against the manifest weight of the evidence. *Id.* at 491. Here, in contrast, the deference works against defendant; the trial court found that probable cause existed and that no perjury was associated with the probable-cause affidavit, and we will overturn those factual findings only if they are against the manifest weight of the evidence. *McCarty*, 223 Ill. 2d at 148; *Lucente*, 116 Ill. 2d at 155. Second, *Damian* did not involve a *Franks* hearing or any claim of perjury in the securing of a warrant.

¶ 35 We also find *Damian* distinguishable on the facts. In that case, the police officer had conducted a single controlled buy of narcotics six weeks prior to the date that his informant told him the defendant was once again selling drugs. The informant provided no other information; he did not say that he had recently seen the defendant with drugs, nor did the informant even say that the defendant possessed those drugs at the address that the police later searched. The informant had also demonstrated his unreliability by missing an appointment with the officer and essentially disappearing for six weeks. *Id*. at 492. Nor was the informant taken before a neutral magistrate. *Id*. at 493. Given the complete lack of detail in the informant's current information, and the fact that the controlled buy had taken place six weeks earlier, the trial court's finding of a lack of probable cause was not against the manifest weight of the evidence. *Id*. None of the facts weighing against the credibility of the informant in *Damian* are present here.

¶ 36 We find nothing in the record or in the case law cited by defendant to convince us to overturn the trial court's factual findings here. The trial judge specifically found no perjury in the securing of the affidavits and found probable cause. The court's factual findings were not against the manifest weight of the evidence. The court's ultimate finding of probable cause was correct. We affirm the trial court's judgment in all respects.[1]

¶ 37 Accordingly, the judgment of the circuit court is affirmed.

¶ 38 Affirmed.

[1] In light of our disposition of this case, we need not consider the State's additional argument that defendant failed to put forth a sufficient showing to warrant a *Franks* hearing in the first instance.