

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1799-15T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DORIAN SMITH,

Defendant-Respondent.

Submitted April 19, 2016 – Decided July 5, 2016

Before Judges St. John and Vernoia.

On appeal before Superior Court of New Jersey, Law Division, Essex County, Indictment No. 15-02-0317.

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for appellant (Andrew R. Burroughs, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Law Office of Thomas R. Ashley, attorney for respondent (Thomas S. Mirigliano, on the brief).

PER CURIAM

With leave granted, the State appeals the December 2, 2015 order granting defendant Dorian Smith's motion for an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S.

154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Upon reviewing the arguments advanced on appeal, in light of the record and applicable law, we reverse.

I.

Investigation¹

On September 25, 2014, Detective Peters of the East Orange Police Department received reliable information from a confidential informant (CI). The CI previously provided reliable information to Peters that resulted in the arrests and convictions of numerous narcotic violators. The CI informed Peters that a black male named Dorian was selling marijuana out of an apartment located on South Munn Avenue in East Orange. He described Dorian as about five feet ten inches in height, 225 to 250 pounds, with shoulder-length dreadlocks. The CI stated a controlled purchase would be able to be made from the location.

Peters conducted an in-house Anteon computer check of the apartment address, which identified a black male named Dorian Smith who resided there. Police obtained a photograph of defendant and showed it to the CI who confirmed the individual in the picture was the same male that the CI knew as Dorian, who was selling drugs out of that address.

¹ The record of these events is based on the affidavit provided by Detective Anthony G. Peters.

Peters then arranged for the CI to conduct a controlled buy from defendant at the location. Prior to the buy, Peters searched the CI for currency and contraband with negative results. Peters provided the CI with \$30 taken from a confidential informant account, in order to accomplish the purchase from defendant. Peters and the CI then traveled to the South Munn Avenue address. Peters positioned himself inside the stairwell, staying out of sight, but maintained a "clear and unobstructed view of the target apartment."

The CI approached the apartment, knocked on the door, and a black male known to the CI as Dorian exited the apartment, closed the door, and met with the CI in the hallway. Defendant was wearing a white t-shirt and blue sweatpants. The CI gave the buy money to defendant. Defendant opened the door to the apartment and went inside, leaving the CI in the hallway waiting. After a short time, defendant returned and handed the CI several clear zip-lock bags containing marijuana.

Peters and the CI left the building and responded to a prearranged meeting place. There, the CI provided Peters with the three bags containing marijuana. The CI was again checked for currency and contraband with negative results. The CI was then debriefed on the controlled buy. He told Peters that upon knocking on the apartment door, the black male known to the CI

as Dorian exited. The CI asked for "3 dimes" (meaning three \$10 bags of marijuana), and handed Dorian the \$30 provided to him by Peters. Dorian told the CI "wait here," went inside, and returned with three bags of marijuana which he handed to the CI. Peters conducted a field test, which yielded a positive reaction for marijuana, and logged the three bags into evidence.

The next day, September 26, 2014, Peters met with the same CI and requested him to participate in a second controlled buy from defendant at the same location. Peters began by again searching the CI for currency and contraband with negative results. He then provided the CI with \$20 from the confidential informant account. Peters and the CI proceeded to the South Munn Avenue location. Again, Peters remained in the stairwell, while the CI approached the apartment and knocked.

Shortly thereafter, the same individual identified as Dorian Smith answered, and exited into the hallway. Defendant wore a white t-shirt and jeans. The CI and defendant engaged in a conversation, and the CI provided him with the buy money. Defendant went back into the apartment, leaving the CI in the hallway, and reappeared with several small zip-lock bags containing marijuana.

After the transaction, Peters and the CI left and went to a prearranged meeting place. There, the CI provided Peters with

two bags containing the drugs he purchased. The CI was again checked for currency and contraband with negative results. Again, he was then debriefed on the controlled buy. The CI told Peters that upon knocking on the apartment, the same black male known to the CI as Dorian exited. The CI asked for "2 dimes" (meaning two \$10 bags of marijuana), and handed Dorian the \$20 provided to him by Peters. The CI was told to "wait here," as Dorian went inside the apartment, and returned with two bags of marijuana, which he handed to the CI. After the debriefing, Peters conducted a field test of the marijuana, which yielded a positive reaction, and logged the drugs into evidence.

Warrant and Motion

On October 1, 2014, Peters provided a sworn affidavit in support of a warrant to search the South Munn Avenue apartment. In it, he alleged that defendant was selling marijuana from that apartment. Peters described details of the CI's tip and the corroboration, with descriptions of the two controlled buys that served as the basis for supporting probable cause to search the residence. The affidavit also provided an overview of Peters' nineteen years' experience in law enforcement: seven years with the Violent Crimes Task Force, three years with the Community Enhanced Safety Team, three years in the uniformed patrol division, two years in the Street Crime Assertion Team, five

months in the Essex/Union County Auto Theft Task Force, and four years with the community services unit. He explained his experience in numerous controlled buys, search warrants, and narcotics arrests and investigations. A judge signed the search warrant the same day. A subsequent search of the South Munn Avenue apartment resulted in the seizure of drugs, weapons, and other evidence.

On February 11, 2015, an Essex County grand jury returned Indictment No. 15-02-0317 charging defendant with third and fourth-degree controlled dangerous substances (CDS) offenses, contrary to N.J.S.A. 2C:35-10a, N.J.S.A. 2C:35-5a(1), b(3), b(11), and N.J.S.A. 2C:35-7a (counts one through nine); second-degree weapons and ammunition offenses, contrary to N.J.S.A. 2C:39-5b, N.J.S.A. 2C:39-4.1a, and N.J.S.A. 2C:39-3f (counts ten through twelve); and second-degree child endangerment offenses, contrary to N.J.S.A. 2C:24-4a (counts thirteen and fourteen).

On September 25, 2015, defendant filed a motion to determine the validity of the search warrant pursuant to Franks, supra, based upon defendant's contention that Peters, in seeking the search warrant, made material misleading or false statements in the supporting affidavit. Specifically, defendant argued, based on the certification of Rashid Sabur, a retired Newark detective and investigator with Comprehensive Investigation

Services, LLC, that Peters could not observe the controlled buys from the stairwell. Sabur certified that there is not a clear and unobstructed view of the apartment and that the stairwell door would have to be completely open for Peters to have made his observations, which would give away his presence.

In opposing the motion, the State argued that search warrants are presumptively valid and that defendant has the burden of providing the court with proof, by a preponderance of evidence, that "the warrant was procured by way of making a willfully false statement or one in reckless disregard for the truth." Further, Sabur's certification did not conclusively support that Peters could not view the buys. Lastly, the State contended that even if those portions of the affidavit were excised, there were more than sufficient facts to support probable cause to issue the warrant.

After hearing oral argument by counsel on December 2, 2015, the trial court granted defendant's motion and scheduled an evidentiary hearing for January 7, 2016. The court found defendant had made a substantial preliminary showing to warrant a hearing. The judge concluded:

the ability of the officer to view alleged transactions and the location of those transactions as stated in the affidavit would have been necessary to the court's finding of probable cause. Defendant Smith did supply to this court and counsel

photographs of the site set forth in the State's proofs. The court finds that to determine whether the affiant's statements in reference to what can be observed from this location are true, an intentional falsehood, or show reckless disregard for the truth, the Fourth Amendment requires that a hearing be held

[(citations omitted).]

On January 6, 2016, we granted the State leave to appeal the interlocutory order.

On appeal, the State presents the following issue for our consideration:

POINT ONE

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED A FRANKS HEARING.

II.

The decision whether to grant an evidentiary hearing is reviewed for abuse of discretion. State v. Frank, 280 N.J. Super. 26, 43 (App. Div. 1995). A reviewing court may find an abuse of discretion when a decision "rest[s] on an impermissible basis" or was "based upon a consideration of irrelevant or inappropriate factors." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (citations and quotations omitted). As the trial court in this case made no factual or credibility findings, its decision, on matters of law, is reviewed de novo.

Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The State argues the order should be reversed because the court did not base its decision upon any evidence of wrongdoing or error by Peters, requiring an evidentiary hearing, but accepted defendant's "self-serving . . . conclusory allegations of falsehoods."

It is well-settled that we "accord substantial deference to the discretionary determination resulting in the issuance of the [search] warrant." State v. Keyes, 184 N.J. 541, 554 (2005) (citation omitted). "[A] search executed pursuant to a warrant is presumed to be valid and . . . a defendant challenging its validity has the burden to prove that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable." Ibid. (internal quotations omitted).

A defendant is not entitled to a "Franks hearing" unless he makes "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause[.]" Franks, supra, 438 U.S. at 155-56, 98 S. Ct. at 2676, 57 L. Ed. 2d at 672 (1978); accord State v. Howery, 80

N.J. 563, 566-68, cert. denied, 444 U.S. 994, 100 S. Ct. 527, 62 L. Ed. 2d 424 (1979).

"The requirement of a substantial preliminary showing" is designed "to prevent the misuses of a veracity hearing for purposes of discovery[.]" Franks, supra, 438 U.S. at 170, 98 S. Ct. at 2684, 57 L. Ed. 2d at 681. Defendant's "attack must be more than conclusory and must be supported by more than a mere desire to cross examine [The defendant's] allegations must be accompanied by an offer of proof Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." State v. Broom-Smith, 406 N.J. Super. 228, 240-41 (App. Div. 2009) (quoting Franks, supra, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682), aff'd, 201 N.J. 229 (2010). Thus, defendant's allegations "should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons." Franks, supra, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682.

Defendant asserts Peters materially misrepresented that he had a clear and unobstructed view of the apartment to witness the controlled buy. Defendant provided photographs and Sabur's certification allegedly showing that Peters made a deliberate or

reckless misstatement. The Court in Franks refused "to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard," and made clear it does not encompass "instances where police have been merely negligent in checking or recording the facts relevant to a probable-cause determination." Franks, supra, 438 U.S. at 170, 98 S. Ct. at 2683, 57 L. Ed. 2d at 681. "[A] Franks hearing is not directed at picking apart minor technical problems with a warrant application; it is aimed at warrants obtained through intentional wrongdoing by law enforcement agents and requires a substantial preliminary showing." Broom-Smith, supra, 406 N.J. Super. at 240.

However, if probable cause exists despite the errant information, the search warrant remains valid and no hearing need be conducted. Franks, supra, 438 U.S. at 171-72, 98 S. Ct. at 2685, 57 L. Ed. 2d at 682; see Howery, supra, 80 N.J. at 568. Additionally, statements in the affidavit alleged to be false "must be material to the extent that when they are excised . . . , that document no longer contains facts sufficient to establish probable cause." Ibid.

In considering the adequacy of probable cause contained in an affidavit in support of a search warrant, we employ a totality of the circumstances test in assessing whether warrants

are based on probable cause. Keyes, supra, 184 N.J. at 554 (citing State v. Novembrino, 105 N.J. 95, 122 (1987)). Probable cause may be based on information police receive from confidential informants so long as there is substantial evidence in the record to support the informant's statements. Id. at 555. Our Supreme Court has explained that probable cause requires nothing more than "'a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" State v. Johnson, 171 N.J. 192, 214 (2002) (quoting State v. Demeter, 124 N.J. 374, 380-81 (1991)).

Under this lens, there was ample probable cause, even without Peters' alleged inability to view the apartment, to support the issuance of a search warrant.² The reliable CI gave a tip, which was corroborated through two controlled buys. The CI did not have any currency or contraband on him before the buys. He was given \$30 on the first day and \$20 on the second from the informant account. The CI went to the apartment where defendant lived, and he knew someone to be selling narcotics, with money to purchase drugs, a person matching defendant's

² There is nothing in the record to support defendant's conclusory statement that Peters would need to have the door from the stairwell ajar in order to witness the buy, which would expose his presence to defendant, but given our decision no inquiry is necessary.

physical description was found to live there, and defendant supplied the CI with marijuana after receiving money. After, Peters inspected the CI and found the amount of drugs corresponding to the money given to defendant. Each time the marijuana tested positive. The CI conducted two separate buys, each with the same results.

"Relevant corroborating facts may include a controlled drug buy performed on the basis of the tip, positive test results of the drugs obtained, records confirmed the informant's description of the target location . . . , and the experience of the officer who submitted the supporting affidavit." State v. Jones, 179 N.J. 377, 390-91 (2004). Even if Peters' statements in the affidavit that he watched the transaction are excised, there still exists probable cause based on the CI's corroboration of the tip. Therefore, the search warrant is valid and no Franks hearing is warranted as there is sufficient evidence in Peters' affidavit to support probable cause. Franks, supra, 438 U.S. at 171-72, 98 S. Ct. at 2685, 57 L. Ed. 2d at 682.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.


CLERK OF THE APPELLATE DIVISION