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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5298-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

O.C. HIGHTOWER, a/k/a HIGHTOWER

O.C., a/k/a WEBB WILLIAM,

Defendant-Appellant.

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Submitted June 6, 2017 — Decided December 11, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey,  
Law Division, Mercer County, Indictment No.  
13-12-1515.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Kevin G. Byrnes, Designated  
Counsel, on the brief).

Angelo J. Onofri, Mercer County Prosecutor,  
attorney for respondent (Alycia I. Pollice-  
Beyrouthy, Assistant Prosecutor, of counsel and  
on the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

After the court denied his motion to suppress evidence seized pursuant to a search warrant, defendant O.C. Hightower pleaded guilty to fourth-degree possession of marijuana, and was sentenced to two years of probation. On appeal, he challenges the court's denial of his suppression motion. More particularly, he raises the following points for our consideration:

POINT I

THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AS GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS WAS VIOLATED BY THE ISSUANCE OF A SEARCH WARRANT BASED ON UNRELIABLE EVIDENCE AND FACTUAL MISREPRESENTATIONS THAT WERE MADE WITH KNOWLEDGE THEY WERE FALSE OR WITH RECKLESS DISREGARD OF THE TRUTH.

A. The Trial Court's Finding that the Search Warrant Was Supported by Probable Cause is Erroneous.

B. The Defendant is entitled to a Franks Hearing.

C. The Defendant is Entitled to Discovery of Relevant Evidence to Show that the Affiant's Representations Were False or Made with Reckless Disregard of the Truth.

POINT II

THE DEFENDANT IS ENTITLED TO DE NOVO REVIEW OR THE TRIAL COURT'S CONCLUSIONS OF LAW.

Defendant challenges the Mercer County Prosecutor's Office detective's affidavit in support of the warrants to search defendant's person, as well as two homes. The detective stated

that a reliable confidential informant alleged that defendant sold large quantities of marijuana, using one of the homes as his personal residence, and the other to store drugs and guns that the informant saw defendant possess. The detective recounted, in some detail, three subsequent controlled buys of marijuana in which defendant left his personal residence, entered and exited the other residence, then conducted a transaction with the informant, and returned to his personal residence. The detective also stated that police observed defendant engage in sales to other persons on the porch of the second home. In the subsequent search, police seized marijuana and cash from defendant's person and his personal residence, and a scale and plastic bags from the other residence.

Before the trial court, defendant principally argued that the detective was obliged to corroborate his sworn descriptions of the controlled buys, with logs, lab test results, and other documentation. In an affidavit, defendant denied that he sold drugs "as depicted" by the detective; but he did not flatly deny selling drugs, nor say how the detective's depiction varied with the truth. In a second affidavit, the resident of the second home stated that she never saw defendant sell drugs, but admitted that he entered her home "almost daily" and often met people on the porch.

In a cogent written opinion, Judge Pedro J. Jimenez, Jr., rejected defendant's argument that the detective was required to provide supporting documentation for his assertions of the controlled buys. The judge also concluded that defendant's affidavit was insufficient to justify a Franks hearing, see Franks v. Delaware, 438 U.S. 154 (1978), noting that defendant did not allege specific details in the detective's affidavit that were false.

On appeal, defendant shifts his focus to the informant's reliability. He contends the relatively modest amount of drugs seized, and the failure to uncover guns, demonstrate that the informant was unreliable. He argues the State was required to provide details of the prior cases in which the informant, according to the detective, provided reliable information resulting in arrests. Alternatively, defendant contends that he was entitled to a Franks hearing, or, at a minimum, discovery regarding the "controlled buys" described in the detective's affidavit. We are unpersuaded.

"It is well settled that a search executed pursuant to a warrant is presumed to be valid and that 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.'" State v. Jones, 179 N.J. 377, 388

(2004) (quoting State v. Valencia, 93 N.J. 126, 133 (1983)). "[A]n appellate court's role is not to determine anew whether there was probable cause for issuance of the warrant, but rather, whether there is evidence to support the finding made by the warrant-issuing judge." State v. Chippero, 201 N.J. 14, 20-21 (2009). Therefore, we "accord substantial deference to the discretionary determination resulting in the issuance of the [search] warrant." State v. Sullivan, 169 N.J. 204, 211 (2001) (internal quotation marks and citation omitted).

"When determining whether probable cause exists, courts must consider the totality of the circumstances . . . ." Jones, 179 N.J. at 389 (internal quotation marks and citations omitted). Information from confidential informants may constitute grounds for probable cause if there is "a substantial basis" to credit it. Ibid. In evaluating an informant's tip, "an informant's veracity and his or her basis of knowledge . . . [are] the two most important factors . . . ." Sullivan, 169 N.J. at 212. A trial court may also consider corroborating factors in making its probable cause determination. See Jones, 179 N.J. at 390. "[R]elevant corroborating facts may include a controlled drug buy performed on the basis of the tip, positive test results of the drugs obtained, records confirming the informant's description of the target location, the suspect's criminal history, and the

experience of the officer who submitted the supporting affidavit." State v. Keyes 184 N.J. 541, 556 (2005) (citation omitted).

While a controlled buy, alone, "would not conclusively establish probable cause," it is "persuasive evidence." Jones, 179 N.J. at 392 (internal quotation marks and citation omitted). "[E]ven one additional circumstance might suffice, in the totality of the circumstances, to demonstrate probable cause when the police successfully have performed a controlled drug buy." Ibid. "[T]he test is qualitative and not quantitative." Ibid. In Sullivan, the Court adopted the following description of a controlled buy that may support a probable cause finding:

(1) a police officer meets the informant at a location other than the location where [it is] suspected that criminal activity is occurring; (2) the officer searches the informant to ensure the informant has no drugs on his person and (usually) furnishes the informant with money to purchase drugs; (3) the officer escorts or follows the informant to the premises where it is alleged illegal activity is occurring and watches the informant enter and leave those premises; and (4) the informant turns over to the officer the substance the informant has purchased from the residents of the premises under surveillance.

[169 N.J. at 215 (quoting Commonwealth v. Desper, 643 N.E.2d 1008, 1011 (Mass. 1994)).]

Here, the detective's warrant affidavit satisfied these essential components of a controlled buy. Indeed, there were three controlled buys. The record also reflects additional

corroboration of the informant's veracity and basis of knowledge. The informant provided accurate details about how defendant conducted his drug transactions, utilizing the two residences, which law enforcement later confirmed in observing the controlled buys. The State was not required to provide additional details of the informant's background, or his prior observations of defendant, to establish probable cause.

We also reject defendant's argument that the relatively modest amount of marijuana seized, and the failure to uncover weapons, rendered the informant unreliable. First, the fact that the guns were not present during the search, or that the amount of drugs seized was not commensurate with "large quantities" as the informant alleged, does not prove false the informant's claims. The guns and a quantity of drugs may have been moved to a different location.

Second, even if false, defendant has not established a right to relief because he has not made a "substantial preliminary showing" that the detective, as distinct from the informant, engaged in a "false statement knowingly and intentionally or with reckless disregard for the truth . . . ." See Franks, 438 U.S. at 155. "[T]he deliberate falsity or reckless disregard must be 'that of the affiant, not of any nongovernmental informant' . . . ." Wayne R. LaFave, Search and Seizure § 4.4(b) at 679-80

(5th ed. 2012) (quoting Franks, 438 U.S. at 171); accord State v. Broom-Smith, 406 N.J. Super. 228, 240-41 (App. Div. 2009), aff'd, 201 N.J. 229 (2010); see also United States v. Owens, 882 F.2d 1493, 1499 (10th Cir. 1989) (distinguishing between alleged falsity of informant and that of officer-affiants).

Third, even if the informant's statement about guns and drug quantities were deleted from the affidavit, there was probable cause to issue the warrant based on the evidence of drug distribution. See Franks, 438 U.S. at 156 (stating that "the search warrant must be voided and the fruits of the search excluded" only if "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause"); State v. Howery, 80 N.J. 563, 568 (1979) ("[T]he misstatements claimed to be false must be material to the extent that when they are excised from the affidavit, that document no longer contains facts sufficient to establish probable cause"). Because probable cause existed regardless of the veracity of those statements, a hearing on their veracity was unnecessary.

We also reject defendant's claim that he was entitled to a Franks hearing based on the denials in his affidavit, and the allegations of the resident of the second home. We review the court's decision regarding the need for an evidentiary hearing for an abuse of discretion. See United States v. Arbolaez, 450 F.3d



1283, 1293 (11th Cir. 2006)<sup>1</sup>; cf. Broom-Smith, 406 N.J. Super. at 239 (reviewing for abuse of discretion the judge's ruling denying discovery for purposes of a Franks hearing). We discern none here.

Defendant did not unqualifiedly deny that he sold drugs to the informant in the controlled buys. Rather, he alleged that he did not do so "as depicted" by the detective. The other witness admitted that defendant frequented her apartment and often interacted with people on her porch – actions consistent with the drug dealing alleged in the detective's affidavit.<sup>2</sup> Furthermore, even if defendant flatly denied the truth of the detective's affidavit, that would not be sufficient to justify a hearing. See People v. Flores, 766 P.2d 114, 122 (Colo. 1988) (rejecting as presenting an insufficient basis for a hearing "conclusory

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<sup>1</sup> We recognize that there is an apparent split among federal courts as to the standard of review. See Arbolaez, 450 F.3d at 1293 n.11 (discussing split). However, an abuse-of-discretion standard of review is consistent with our deferential standard of review of a trial court's suppression decision. See State v. S.S., 229 N.J. 360, 379 (2017); State v. Robinson, 200 N.J. 1, 15 (2009).

<sup>2</sup> We recognize that these observations may be consistent with entirely innocent behavior. However, the point is that her observations do not contradict the detective's allegations. Cf. State v. Citarella, 154 N.J. 272, 279-80 (1998) ("The fact that purely innocent connotations can be ascribed to a person's actions does not mean that an officer cannot base a finding of reasonable suspicion on those actions as long as a reasonable person would find the actions consistent with guilt.") (internal quotation marks and citation omitted).

assertions or statements by the accused, and friends and family of the accused"). Again, in addition to showing a statement was false, a defendant must show the affiant made the "false statement knowingly and intentionally or with reckless disregard for the truth . . . ." Franks, 438 U.S. at 155. There is no claim the detective, when he wrote his affidavit, was aware of any of the facts alleged by defendant and his witness.

Finally, we reject defendant's argument that the court erred in denying him discovery. A defendant is "not entitled to turn the discovery process into a fishing expedition." See Broom-Smith, 406 N.J. Super. at 239. Defendant demanded the logs on the purchase and testing of the marijuana he sold in the controlled buys, as well as the dates, times, and amounts of the controlled buys. Defendant alleged no reason to believe the affidavit would be contradicted by this information. Furthermore, disclosure of this information would arguably reveal the identity of the informant. See N.J.R.E. 516. In sum, we discern no abuse of discretion. Broom-Smith, 406 N.J. Super. at 239.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION