SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3213-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KONSTADIN BITZAS, a/k/a CONSTANTINE BITZAS, CHRISTOS BITZAS, DEAN BITZAS, CHRISTOS DEAN BITZAS, CONSTANTI BITZAS, DINO BITZAS, BEAN BITZAS, and CONSTANI BITZAS,

Defendant-Appellant.

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Argued April 17, 2024 – Decided May 30, 2024

Before Judges Currier and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 14-02-0228.

Eric Victor Kleiner argued the cause for appellant.

William P. Miller, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County

Prosecutor, attorney; William P. Miller, of counsel and on the brief; John J. Scaliti, Legal Assistant, on the brief).

PER CURIAM

This case returns to us for a third time. Defendant Konstadin Bitzas appeals his jury trial convictions for multiple firearms offenses, challenging the municipal court warrant that authorized the search of his home during which the weapons were seized. Defendant contends the State belatedly provided the search warrant affidavit defendant claims to be defective; the search warrant application contained material misrepresentations; the application omitted a critical fact relating to the victim's credibility, and the police affiant improperly discussed the facts of the case with the municipal court judge before he was placed under oath.

In our second opinion, we instructed the trial court to determine whether a Franks[1] hearing is warranted. We also directed the trial court to "consider anew defendant's argument concerning the reliability of [the victim's] statements supporting the warrant." See State v. Bitzas, No. A-5918-17 (App. Div. July 27, 2021) (slip op. at 6). On remand, the trial court convened a testimonial hearing, after which it made findings, including credibility assessments of the State's

[1] Franks v. Delaware, 438 U.S. 154 (1978).

witnesses. The trial court concluded that the search warrant was lawfully issued. After carefully reviewing the record in light of the governing legal principles and the arguments of the parties, we affirm.

I.

We discern the following pertinent facts and procedural history from the record. On August 31, 2013, around 11:30 p.m., Fort Lee police officers responded to defendant's home because of a reported fight. When police arrived, defendant and the victim, P.K.,[2] were outside. Defendant told police that earlier in the evening, he was eating dinner at a restaurant and P.K. arrived on her own. Defendant and P.K. were drinking and defendant left the restaurant. Subsequently, P.K. showed up at defendant's house intoxicated. They argued about defendant's former girlfriend, went outside, and then P.K. called the police claiming defendant assaulted her. Defendant denied assaulting P.K and stated he was not interested in filing charges against her.

The investigation report described P.K. as "extremely emotional, uncooperative, and intoxicated." Police had to "physically grab" her to prevent her from leaving the scene. According to the report, P.K. "became belligerent and ranted about wanting [the police] to search [defendant's] apartment." She

[2] Consistent with our prior opinions, we use initials to protect P.K.'s privacy.

told the police that defendant had attacked her before they arrived and that she was afraid of defendant. She also said defendant's ex-girlfriend beat her up earlier that day. P.K. did not wish to obtain a temporary restraining order (TRO) or complete an affidavit that evening.

Because P.K. was heavily intoxicated, officers called an ambulance, and she was transported to the hospital. P.K. and defendant were told to go to police headquarters if either party changed their mind about filing a complaint.

The next day, September 1, 2013, P.K. went to police headquarters. She apologized for her behavior the night before and admitted she was intoxicated. P.K. spoke with Detective Michele Morganstern[3]—who was not one of the responding officers the night before—claiming defendant assaulted her, pointed a gun at her, and threatened to kill her if she called police. P.K. also informed Morganstern she saw a long gun and a handgun in defendant's home. Morganstern ran a criminal case history (CCH) database query of defendant, which revealed several charges including a January 1997 possession of a handgun charge that had been dismissed.

[3] During the course of this litigation, Detective Morganstern was promoted to sergeant and changed her last name after getting married. For purposes of this opinion, we refer to her by the surname she had in 2013. We mean no disrespect in doing so.

Morganstern drew up a TRO on behalf of P.K. She presented the TRO application to a municipal court judge along with a criminal complaint. The municipal court judge, who we refer to as the warrant judge, issued a probable cause search warrant for weapons and a domestic violence TRO. During the search of defendant's home, police seized an assault rifle, three handguns, a 12-gauge shotgun, and two large-capacity ammunition magazines.

In February 2014, defendant was charged by indictment with second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count one); third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count two); fourth-degree aggravated assault by pointing a firearm at another, N.J.S.A. 2C:12-1(b)(4) (count three); five counts of fourth-degree possession of a handgun following a conviction for possessing a controlled dangerous substance, N.J.S.A. 2C:39-7(a) (counts four, five, six, seven and eight); second-degree possession of an assault firearm, N.J.S.A. 2C:39-5(f) (count nine); and two counts of fourth-degree possession of a large-capacity magazine, N.J.S.A. 2C:39-3(j) (counts ten and eleven).

A jury trial was convened in 2014 after which defendant was convicted of all counts other than those that were dismissed by the trial judge.[4] Defendant was sentenced to an aggregate prison term of thirteen years with eight years parole ineligibility. On appeal, we vacated defendant's convictions and remanded for a new trial, ruling the trial judge abused her discretion by failing to declare a mistrial due to P.K.'s misconduct as a witness. Bitzas, 451 N.J. Super. at 80.

A second jury trial was convened in 2018 and was presided over by a different judge, who we refer to as the trial court. Defendant was convicted on all counts. In July 2018, the trial court sentenced defendant to an aggregate prison term of eleven-and-one-half years with six-and-one-half years of parole ineligibility.

On appeal, we affirmed in part, but remanded for the trial court to determine whether a Franks hearing was warranted to address defendant's contention the search warrant affidavit included material misrepresentations and omissions. We further stated:

> In view of the State's belated disclosure, the [trial] court shall make its own findings of fact and conclusions of

[4] Before jury deliberations, the judge dismissed counts one, two, and three "with prejudice" because of P.K.'s misconduct in the courtroom. See State v. Bitzas, 451 N.J. Super. 51, 58 (App. Div. 2017).

> law, distinct and separate from those of the initial trial judge, who did not "fully" consider the issues now illuminated . . . . The [trial] court shall also consider anew defendant's argument concerning the reliability of P.K.'s statements supporting the warrant.
>
> [Bitzas, slip op. at 7.]

We added, "[s]hould the trial court ultimately determine the warrant is invalid, the evidence seized from defendant's residence shall be suppressed and a new trial granted. If, however, the warrant's validity is established, we affirm defendant's convictions." Ibid.

On remand, the trial court convened a testimonial Franks hearing. Two police witnesses testified for the State. Morganstern testified she worked on the TRO, drew up the criminal complaint, and provided Fort Lee Detective Douglas Cabler information used in the search warrant application.

Morganstern testified that P.K.'s behavior on August 31, 2013 did not give her reason to doubt P.K.'s truthfulness on September 1 at police headquarters. She explained:

> [P.K.] came in in the afternoon and she wanted to explain why she was so uncooperative [the night before], and explained that she was scared. I could see that she was visibly shaken [from] what had happened the night before. That she was afraid of [defendant]. She was afraid of retaliation from [defendant], and she told us what actually occurred at his house . . . .

Morganstern believed P.K.'s version and noticed a bruise on her arm.[5]

Morganstern testified she could not recall what she told Cabler verbatim but "would have relayed [defendant's] criminal history jacket, if he hadn't seen it already, that there [were] multiple charges and one of them was for possession of a handgun." Morganstern believed the weapons charge gave weight to P.K.'s statement that she had seen a firearm in defendant's home and that he had pointed a firearm at her. Morganstern also testified that police "always, . . . had to give [the judge issuing a complaint] the criminal history along with the charges." The trial court found Morganstern "did not tell [the warrant judge] anything about the police response the night before, [P.K.'s] differing accounts of what happened, or [P.K.'s] significant level of intoxication."

Cabler testified that he responded to defendant's home on August 31, 2013. He noted the responding officers "didn't resolve anything between the defendant and the victim that night."

On September 1, 2013, Cabler was tasked with preparing the search warrant application and explained "[t]he probable cause was based on a statement given by [P.K.] to [] Morganstern." Cabler did not have an

[5] The trial court noted in his findings of fact that the bruise on P.K.'s arm "could have been caused by [defendant] or by the officers who had to keep [P.K.] from leaving the scene."

independent recollection of putting the CCH in the packet for the warrant judge. However, he testified that the judge "always wanted a CCH, the computerized criminal history, with a search warrant. So, I am going to say that was also included in . . . the packet." Cabler explained standard procedure would be to put the CCH in the packet.

On the question of whether he had been sworn in by the municipal court judge, Cabler testified as follows:

> [DEFENSE COUNSEL]: Do you think you provided [the warrant judge] with sworn testimony that was substantive, verbal, that day? Do you understand my question? In other words, not just hi, how are you. But swears you in and actually may have asked you questions about the event?
>
> [CABLER]: Before being sworn in, I am giving [the warrant judge] details about the event the day before and the day of.
>
> [DEFENSE COUNSEL]: So, let me just hold you there.
>
> [CABLER]: So, before—
>
> [DEFENSE COUNSEL]: Let me just hold you there.
>
> [CABLER]: Go ahead.
>
> [DEFENSE COUNSEL]: Before you got sworn in by [the warrant judge], you are telling us that you had a back and forth with him about what happened on the

> 31st and the 1st related to this case; is that what you were telling me?
>
> [CABLER]: That's what I am telling you.
>
> [DEFENSE COUNSEL]: Before you were sworn in?
>
> [CABLER]: That's—exactly.

The following colloquy occurred during Cabler's cross-examination:

> [DEFENSE COUNSEL]: Please tell me in your affidavit where it tells us that [P.K.] was heavily intoxicated the night before?
>
> [CABLER]: [It is not in] the affidavit . . . but I am sure that I had told the judge [about] the incident of the night before verbally.
>
> [DEFENSE COUNSEL]: Of a conversation that might have actually happened before you were even sworn in, right?
>
> [CABLER]: That's correct.

On May 23, 2022, trial court entered an order denying defendant's motion to suppress evidence and to dismiss the charges. In its written opinion, the trial court found that "[b]oth witnesses were credible. Their lack of recall was understandable, given the passage of time."[6] The trial court also found:

> Based on [P.K.'s] allegations, Morganstern processed the TRO and filed criminal charges against [defendant]. Morganstern provided [defendant's] CCH to [the

[6] The Franks hearing was conducted nine years after the warrant was issued.

> warrant judge]. Review of the CCH reveals multiple arrests, dismissals, a third-degree conviction for [c]ocaine possession, and a third-degree conviction for receiving stolen property. The conviction for receiving stolen property included an arrest for possession of a handgun and possession of a weapon, which were dismissed. [Defendant] also violated probation in 2008 and was sentenced to a State Prison term. [The warrant judge] reviewed the allegations made in support of the TRO and read the CCH. It was he who concluded that [defendant] had an "extensive criminal history."

The trial court concluded with respect to the criminal history issue:

> [D]efendant argued that the affiant presented false information in support of the search warrant. The court disagrees. [] Cabler's representation that . . . defendant had a history, rather than a conviction, for weapons possession is ambiguous, but it is not false, nor in reckless disregard of the truth, nor exculpatory in some way, as … defendant argues, especially because [the warrant judge] already knew [defendant's] criminal history contained within the CCH. [Morganstern] and Cabler gave no indication to this court that they purposely withheld information or intended to mislead or deceive [the warrant judge].

With respect to the issue of whether Cabler had been sworn in, the trial court found "Cabler drafted the affidavit, appeared before [the warrant judge], and was placed under oath." The trial court's written opinion makes no finding and does not discuss whether Cabler presented information to the warrant judge before being sworn in.

With respect to the relevance of P.K.'s intoxication the night before she went to police headquarters, the trial court found:

> When the police responded to [defendant's] home on August 31, both parties had been drinking. [P.K.] was highly intoxicated, but not incoherent. [P.K.] changed her story several times, but she did tell police that [defendant] had assaulted her and did ask police officers to search [defendant's] home. Both parties were encouraged to return to headquarters if they decided to press charges or ask for a TRO.
>
> [P.K.] did just that. The next day, she returned to headquarters and met with Morganstern, who found [P.K.] lucid. [P.K.] apologized for her conduct the night before. While [P.K.'s] intoxication would be relevant to her reliability on the night of August 31, she was sober when she returned to headquarters on September 1. [P.K.] reported having been assaulted by [defendant] and threatened with a firearm. Her allegation of an assault was consistent with her allegation the prior evening.

This appeal follows. Defendant raises the following contentions for our consideration:

> POINT I
>
> THE LOWER COURT ERRED IN FINDING THAT THE WARRANT APPLICATION DID NOT INCLUDE A MATERIAL MISREPRESENTATION OR OMISSION MADE IN RECKLESS DISREGARD FOR THE TRUTH.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE SEARCH WARRANT APPLICATION CONTAINED SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE WHEN CUMULATIVE ERRORS RESULTED IN A TOTALLY DEFECTIVE WARRANT.

POINT III

NAPUE VIOLATIONS REQUIRE DISMISSAL OF THE ENTIRE MATTER WITH PREJUDICE.

POINT IV

FOURTH AMENDMENT VIOLATIONS REQUIRE SUPPRESSION OF ALL EVIDENCE S[E]IZED AS A RESULT OF THE ILLEGAL SEARCH OF DEFENDANT'S HOME.

Defendant raises the following additional contentions in his reply brief:

POINT I

THE DISMISSAL OF THE WEAPONS CHARGE WAS NOT SUFFICIENTLY COMMUNICATED TO THE WARRANT ISSUING JUDGE.

POINT II

GIVEN THE AFFIANT'S "AMBIGUOUS" DESCRIPTION OF DEFENDANT'S CRIMINAL HISTORY, THE OFFICERS' FAILURE TO COMMUNICATE THE DISPOSITION OF THE WEAPONS CHARGE AMOUNTED TO A MATERIAL OMISSION AND/OR MISREPRESENTATION.

POINT III

THE MUNICIPAL COURT JUDGE'S FINDING OF PROBABLE CAUSE DEPENDED UPON THE "AMBIGUOUS" DESCRIPTION OF DEFENDANT'S CRIMINAL HISTORY.

II.

We first address defendant's contention "the false statements in the search warrant and the affidavit were neither provided to [him] nor disclosed to this [c]ourt until October 27, 2020, after a retrial, late in the process of the second appeal before the remand." In its written opinion, trial court rejected that contention, finding "[defense] counsel's contention that he was never provided with the affidavit in support of the search warrant until October 2020 is mistaken. It was [defendant] who moved to dismiss the indictment during the trial based on his assertion of the insufficiency of the search warrant and he acknowledged having received the affidavit during the hearing."

The trial court's finding with respect to the disclosure of the search warrant affidavit is supported by the record. At an April 12, 2018 hearing before the trial court, the following exchange took place:

> THE COURT: All right, where is the affidavit?
>
> [PROSECUTOR]: The affidavit I believe is in my file.
>
> THE COURT: And the transcript of the

> suppression hearing is in your file.
>
> [PROSECUTOR]: Yes, which the defendant has as well. But I'll get it.
>
> THE COURT: Do you have the transcript—[defendant] do you have the affidavit in support of the warrant?
>
> [DEFENDANT]: Somewhere Judge.

This exchange indicates defendant was provided with the affidavit prior to October 2020.

III.

We turn next to defendant's contention that the search warrant affidavit contained false statements that were either made deliberately or in reckless disregard of the truth. The pertinent portion of the search warrant affidavit prepared by Cabler reads:

> On September 1, 2013, the victim, [P.K.], reported that [defendant] physically assaulted her on August 31, 2013 at approximately 2330 hours at his residence [ ]. She reported that he grabbed her by the arms and dragged her across the floor. While he was dragging her across the floor, she struck her head on the floor and on a counter. He told her he was going to kill her if she called the police. She also reported he pointed a gun at her during this altercation.
>
> During my investigation, I was informed by [ ] Morganstern that [defendant] has a criminal history for possession of firearms and has had firearms in his residence on a previous occasion.

> This request is made as my investigation reveals that [defendant] physically assaulted [P.K.] and pointed an unknown weapon at her while making threats to kill her at [defendant's residence]. Therefore, I am requesting authority to search the residence of [defendant] . . . .

Defendant contends the language in the affidavit concerning defendant's "criminal history" is misleading because he was not convicted of the unlawful possession of a firearm charge.

We begin our analysis by acknowledging the foundational legal principles governing our review of the warrant. A search based on a warrant is presumed valid and the defendant has the burden of proving its invalidity. State v. Sullivan, 169 N.J. 204, 211 (2001). To be valid, a search warrant "must be based on sufficient specific information to enable a prudent, neutral judicial officer to make an independent determination that there is probable cause to believe that a search would yield evidence of past or present criminal activity." State v. Keyes, 184 N.J. 541, 553 (2005).

The scope of our review of a search warrant is limited. State v. Chippero, 201 N.J. 14, 32 (2009). As our Supreme Court stressed in State v. Andrews, "reviewing courts 'should pay substantial deference' to judicial findings of probable cause in search warrant applications." 243 N.J. 447, 464 (2020) (quoting State v. Kasabucki, 52 N.J. 110, 117 (1968)); see also State v. Marshall,

123 N.J. 1, 72 (1991) ("We accord substantial deference to the discretionary determination resulting in the issuance of the warrant.").

When a defendant challenges the veracity of a search warrant affidavit, a hearing is required "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included . . . in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." Franks, 438 U.S. at 155-56. The defendant "must allege 'deliberate falsehood or reckless disregard for the truth,' pointing out with specificity the portions of the warrant that are claimed to be untrue." State v. Howery, 80 N.J. 563, 567 (1979) (quoting Franks, 438 U.S. at 171). Furthermore, only where a defendant also establishes "the allegedly false statement [was] necessary to the [issuing judge's] finding of probable cause, [does] the Fourth Amendment require[ ] that a hearing be held at the defendant's request." State v. Desir, 245 N.J. 179, 196 (2021) (quoting Franks, 438 U.S. at 155-56).

Here, the trial court convened an evidentiary hearing and made credibility assessments of the State's witnesses, including the search warrant affiant, to which we owe deference. See State v. Elders, 192 N.J. 224, 243 (2007) ("[A]n appellate court reviewing a motion to suppress must uphold the factual findings

underlying the trial court's decision so long as those findings are 'supported by sufficient credible evidence in the record.'") (citations omitted).

The State offered evidence that Fort Lee police "always, . . . had to give [the warrant judge] the criminal history along with the charges." See N.J.R.E. 406 ("Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice.") The trial court found that the warrant judge was aware of the information in the CCH and thus would have known that defendant had only been charged with, not convicted of, a prior firearm offense. That finding is supported by credible evidence in the record.

The trial court added that even "if [the warrant judge] was not provided with any information regarding [defendant's] criminal history, there still was ample, credible information provided by Cabler within the four corners of the affidavit to support a search warrant." See Desir, 245 N.J. at 196 (noting the allegedly false statement must be necessary to the finding of probable cause). We agree that the affidavit's reference to defendant's criminal history regarding a prior weapons offense provides no basis upon which to invalidate the search warrant or render the ensuing search unlawful.

IV.

We turn next to defendant's related contention "the affiant omitted key facts impeaching the credibility of the complaining witness P.K., depriving the duty judge assigned to the matter of key facts unsupportive of P.K.'s reliability." A defendant may challenge a warrant affidavit on grounds the affiant made a material omission in the application. State v. Marshall, 148 N.J. 89, 193 (1997) ("Material omissions in the affidavit may also invalidate the warrant."). The Franks "requirements apply where the allegations are that the affidavit, though facially accurate, omits material facts." State v. Stelzner, 257 N.J. Super. 219, 235 (App. Div. 1992). Thus, in considering an alleged material omission, "essentially the same factual predicate must be established [as under the Franks standard,] in order to entitle the defendant to an evidentiary hearing." State v. Sheehan, 217 N.J. Super. 20, 25 (App. Div. 1987). Stated another way, "the defendant must make a substantial preliminary showing that the affiant, either deliberately or with reckless disregard for the truth, failed to apprise the issuing judge of material information which, had it been included in the affidavit, would have militated against the issuance of the search warrant." Ibid.

As we have noted, the trial court did not make a specific finding whether Cabler advised the warrant judge about P.K.'s intoxication while under oath.

Cabler acknowledged he discussed the incident with the warrant judge before being placed under oath but was never specifically asked whether he repeated information about P.K.'s intoxication after being sworn in.

We find troubling the practice of conversing with a judge about a case before being sworn in. The Fourth Amendment and Article I, paragraph 7 of the New Jersey Constitution expressly state that no warrant shall be issued without probable cause "supported by oath or affirmation." Although defendant generally bears the burden of proof when challenging a search authorized by a warrant, see Sullivan, 169 N.J. at 211, we deem it to be the State's burden to produce evidence showing that all information used to support probable cause was tendered to the judge under oath or affirmation. The State failed to meet that burden with respect to P.K.'s intoxication. We therefore presume for purposes of our analysis that police did not present that information within the four corners of the warrant application, thus constituting an omission.

That raises the question whether the omission was material requiring invalidation of the search warrant. We agree with the trial court that P.K.'s intoxication "would be relevant to her reliability on the night of August 31."[7]

[7] In Sheehan, we held a defendant meets the substantial preliminary showing test to get a hearing if police fail to apprise the issuing judge of material

But we also agree with the trial court's finding that P.K. was sober and lucid when she went to police headquarters and conversed with Morganstern. As we have noted, Morganstern, who the trial court found to be credible, believed P.K. was telling the truth at the police station when she reported defendant assaulted her and pointed a gun at her, notwithstanding her intoxication the night before. We add that P.K.'s veracity is assumed because she was an ordinary citizen, not a confidential informant, who personally observed the crime. State v. Belliard, 415 N.J. Super. 51, 79 (App. Div. 2010); see also State v. Basil, 202 N.J. 570, 586 (2010) ("[A]n objectively reasonable police officer may assume that an ordinary citizen reporting a crime, which the citizen purports to have observed, is providing reliable information.").

We are satisfied that P.K.'s statement to Morganstern was sufficient "to make an independent determination that there [was] . . . probable cause to believe that a search would yield evidence of past or present criminal activity." Keyes, 184 N.J. at 553. Stated another way, probable cause to support issuance of the search warrant would still exist had the affidavit revealed that P.K. was

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information which, had it been included in the affidavit, "would have militated against issuance of the search warrant." 217 N.J. Super. at 25. Here, defendant was granted an evidential hearing. The failure to include all information militating against a finding of probable cause does not automatically invalidate a warrant.

heavily intoxicated when the crime occurred. See Sheehan, 217 N.J. Super. at 25. We therefore conclude defendant has failed to establish the warrant was improperly issued and that the fruits of the ensuing search must be suppressed.

Affirmed.