Circuit Court for Carroll County
Case No.: 06-K-15-046485

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 648

September Term, 2020

MICHAEL VICARINI

v.

STATE OF MARYLAND

Fader, C.J.,
Kehoe,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: October 27, 2021

Michael Vicarini, the appellant, entered a conditional guilty plea in the Circuit Court for Carroll County to three counts of armed robbery and two counts of use of a firearm in the commission of a crime of violence. With the consent of the parties, the circuit court later granted Mr. Vicarini's petition for postconviction relief and afforded him the right to file a belated appeal from his convictions. Before us, Mr. Vicarini contends that the suppression court erred in denying his request for a *Franks*[1] hearing to challenge the sufficiency of a search warrant. Finding no error, we will affirm.

BACKGROUND

On March 24, 2016, the circuit court conducted a hearing on Mr. Vicarini's motion to suppress evidence at which three police officers testified.[2] We will summarize the information conveyed by each.

Officer Small's Hearing Testimony

On May 11, 2015, at approximately 4:30 p.m., Baltimore County Police Officer Zachary Small, while off-duty and driving eastbound on Route 140 at its intersection with Green Mill Road, observed a white male wearing a dark colored hooded sweatshirt and carrying a small blue bag, "running from a shopping center where Little Vinny's is" in Carroll County. Officer Small observed the individual jump the guardrail at the intersection, run through a small patch of woods, and enter the front passenger seat of a white Chevrolet Impala that was parked on Old Westminster Pike.

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

[2] Although Mr. Vicarini was tried separately from his co-defendant, Louis Vicarini, the suppression hearing was conducted jointly.

Officer Small called 911 to report what he had seen and was informed that there had been an armed robbery at the nearby Finksburg Pharmacy. He provided the 911 operator with the license plate of the Impala. Officer Small then remained on the 911 call and drove in his personal vehicle to the intersection, where he observed the white Impala, occupied by two white males, turn onto eastbound Route 140.

Officer Small approached Officer Silas Phillips of the Baltimore City Environmental Police, whom he had observed driving a marked police vehicle, and directed Officer Phillips's attention to the approaching Chevrolet Impala. Officer Phillips activated his vehicle's lights and sirens and effectuated a stop of the Impala. Officer Small obtained a shotgun from Officer Phillips's vehicle and assisted with the vehicle stop. The two officers detained the driver, Mr. Vicarini, and the passenger, Louis Vicarini. According to Officer Small, the vehicle was cleared to ensure no one else was inside but was not searched at the scene.

On cross-examination, Officer Small described the suspect as wearing a "black or a dark colored hooded sweatshirt" and "capri pants" that "weren't quite shorts but they weren't quite full length pants either[,]" which were made of "bungee material" or denim. Officer Small stated that when he was "clearing the vehicle," he observed "in plain view" "a hoodie in the backseat on the floor board of the vehicle" and "the blue bag" that he had observed the suspect holding while running across Route 140. Officer Small stated that he opened the trunk to clear it of other individuals or threats. He could not recall whether he had observed any evidence of a crime in the trunk. Carroll County police deputies arrived and assisted with the arrests.

Officer Phillips's Hearing Testimony

Officer Phillips testified that, on May 11, 2015 shortly after 4:30 p.m., he was in the area of Route 140 and "the Baltimore-Carroll County line" when he heard Carroll County dispatch announce an armed robbery at the Finksburg Pharmacy. Officer Phillips monitored his police radio and determined that the suspects were headed toward him in a white Impala with a Maryland registration. He waited at the county line for the suspect vehicle to cross into Baltimore County.

Officer Phillips observed the suspect vehicle approach and confirmed that the vehicle's registration and the two occupants matched the descriptions provided in the broadcast. At Officer Small's direction, Officer Phillips activated his emergency lights and initiated a traffic stop of the Impala. After the driver and passenger were handcuffed, the officers cleared the car. Officer Phillips stated that he opened the trunk and left it open. Officer Phillips participated in the show-up identification by removing Mr. Vicarini from his police vehicle and presenting him for purposes of identification.

Detective Kriete's Hearing Testimony

Detective Douglas Kriete of the Carroll County Sheriff's Office testified that he heard the broadcast of an armed robbery at the Finksburg Pharmacy on May 11, 2015 at 4:30 p.m. and the broadcast description of a white Chevrolet Impala occupied by two white males traveling eastbound on Route 140. After observing the Impala come to a stop on the shoulder of Route 140, Det. Kriete approached the vehicle to assist Officers Phillips and Small. Det. Kriete approached the vehicle to take photos of it, at which time he observed "a black sweater in the rear . . . like behind the driver's seat portion of the car and then

there was a blue bag on the floor as well[.]" Det. Kriete stated that he cleared the vehicle by opening the trunk and checking for other individuals or threats. He then closed the trunk, removed the keys from the ignition, locked the doors, and secured the vehicle for towing. The detective did not search the vehicle or the containers in the vehicle. On cross-examination, Det. Kriete testified that it was actually Officer Phillips who had opened the trunk.

Det. Kriete completed an application for a search and seizure warrant in which he averred the following:

> The off duty Baltimore County Police Officer was able to positively identify Louis VICARINI as the subject that ran across MD 140 and enter[ed] the passenger side of the Chevy Impala. He advised that the subject was wearing a black hoodie and long blue jean shorts. He advised that the subject was also carrying a blue bag. He stated that the vehicle was parked in a position for a quick getaway.
>
> Contact was made with Raimon Buell CARY 4th who is the Pharmacist for the Finksburg Pharmacy. He advised that at approximately 1635hrs, a male entered the store displayed a handgun and stated "This is a robbery; don't touch any button or anything!" He described the subject as a white male wearing long jean shorts and a black hoodie. He advised that subject was wearing a mask with eye cutouts. The subject pointed the gun at CARY and he demanded Oxycodone, OxyContin, Xanax, and Hydrocodone. CARY advised that all the removed items were placed inside a blue drawstring bag. He advised that all the above was provided to the suspect and the suspect yelled, "If you call the police, we will come back."
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> *** * ***
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> CARY was transported to the scene in an attempt to make positive identification. CARY advised that Louis VICARINI statu[r]e and shorts were the same, but he was unable to see the suspect['s] face during the incident.
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> *** * ***

> Upon looking into the Chevy Impala, I observed a blue drawstring bag located behind the driver side seat. In addition, I observed a black hoodie located in the rear seat of the vehicle. The vehicle was secured and towed to the Tow Lot.

Det. Kriete confirmed that a "blue bag" was recovered from the back seat of the vehicle and "two hoodie sweatshirts" were recovered from the trunk.

The Suppression Court's Ruling

Following the suppression hearing, Louis Vicarini submitted an additional motion to suppress evidence (the "Second Motion"), requesting a *Franks* hearing to challenge the sufficiency of the search warrant, which Mr. Vicarini adopted. The State filed a response to the Second Motion. On April 11, 2016, the suppression court entered an opinion and order denying Mr. Vicarini's request for a *Franks* hearing.

On September 1, 2021, with the consent of the parties, the circuit court granted Mr. Vicarini's petition for postconviction relief in the form of a right to file this belated appeal.

DISCUSSION

Mr. Vicarini contends that the suppression court erred in denying his request for a *Franks* hearing because Det. Kreite's statements in the application in support of the search warrant contained factual discrepancies which were either deliberate falsehoods or misstatements made with reckless disregard for the truth. He contends that the false statements contained in the application were necessary to the finding of probable cause, and absent those statements, the application lacked sufficient probable cause to justify issuance of the warrant.

The State responds that the court did not err in denying Mr. Vicarini's request for a *Franks* hearing because Mr. Vicarini did not make a substantial showing that Det. Kriete's statements in support of the search warrant were intentionally or recklessly false. The State argues that even if the disputed information were removed from the application, other information contained in the application provided sufficient probable cause to justify issuance of the warrant.

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. When reviewing an issuing judge's approval of an application for a search warrant, a court ordinarily is limited to the "four corners" of the affidavit supporting the warrant. *Greenstreet v. State*, 392 Md. 652, 669 (2006). We recognize that "an affidavit underlying a search warrant is presumptively valid." *Holland v. State*, 154 Md. App. 351, 386 (2003); *Dashiell v. State*, 143 Md. App. 134, 149 (2002) (stating that "facts included in the application for the search warrant are deemed credible, reliable, and trustworthy"), *aff'd*, 374 Md. 85 (2003).

In *Franks v. Delaware*, 438 U.S. 154 (1978), the United States Supreme Court created a limited exception to the general rule by establishing "a formal threshold procedure [that must be completed] before a defendant will be permitted to stray beyond the 'four corners' of a warrant application[.]" *Fitzgerald v. State*, 153 Md. App. 601, 643 (2003). Pursuant to that exception, a defendant is entitled to a hearing on the application only if the defendant first makes a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth" was made by the

affiant, and establishes that the statement at issue was necessary to the finding of probable cause. *Franks*, 438 U.S. at 155-56. "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." *Id*. at 171. The challenger must allege "deliberate falsehood" or "reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id*.

The *Franks* standard applies to both factual omissions and affirmative misstatements "made intentionally or with reckless disregard for accuracy." *Holland*, 154 Md. App. at 389. A defendant must make "a threshold showing" that the affiant committed perjury "on a material matter." *Fitzgerald*, 153 Md. App. at 638. "[A] *Franks* hearing is a rare and extraordinary exception[,]" permitted only where it has been expressly requested and the rigorous requirements have been met. *Id*. at 642. This Court applies a clearly erroneous standard when reviewing a circuit court's denial of a motion for a *Franks* hearing. *Thompson v. State*, 245 Md. App. 450, 469 (2020), *cert. denied*, 471 Md. 86 (2020), and *cert. denied*, 141 S. Ct. 1741 (2021).

Mr. Vicarini argued before the suppression court that the "warrant contained serious intentional misrepresentations about the identification of suspects[.]" He pointed specifically to Det. Kriete's statement in the affidavit in support of the warrant application that Mr. Cary had described the robber's pants as "long jean shorts" even though the transcript of the 911 call reveals that Mr. Cary had described the robber as wearing "brownish-tan baggy sweatpants." The affidavit further stated that at the "show up," Mr. Cary had advised that Mr. Vicarini's "statu[r]e and shorts were the same, but he was

unable to see the suspect['s] face during the incident." Mr. Vicarini argues that because Det. Kriete had received the information from the 911 call over dispatch, his misstatement about Mr. Cary's initial identification of the robber's pants was necessarily made "either knowingly or, at least, recklessly."

Mr. Vicarini points to two other inconsistencies between the affidavit and the other evidence that he contends favored granting his request for a *Franks* hearing.[3] First, he contends that Det. Kriete's statement in the affidavit that he observed a "black hoodie located in the rear seat of the vehicle" was contradicted by the record of the inventory search of the vehicle, which identified that two hoodies were found only in the trunk. Second, although Det. Kriete stated in the affidavit that Mr. Cary had reported that the robber fled on foot across route 140 and entered a Chevrolet Impala, on the 911 call, Mr. Cary said that he did not know where the robber went after fleeing across route 140 and only speculated that he may have entered a vehicle.[4]

[3] Mr. Vicarini also points to inconsistencies in testimony by the police officers concerning "who opened the [vehicle's] trunk, how long it was left open, and whether it was closed" as a factor he believes the court should have considered in determining the need for a *Franks* hearing. The suppression court found that although the recollection of the three officers differed in those respects, the differences "f[e]ll short of establishing intentional misrepresentation." We discern no error in the trial court's analysis, both because, as Mr. Vicarini acknowledges, the trunk-related inconsistencies do not implicate any statements made in the warrant application and because the suppression court did not clearly err in finding that the seemingly inconsequential inconsistencies did not amount to intentional misrepresentation.

[4] The State contends that these arguments are unpreserved because they were not raised before the circuit court. We disagree. At the suppression hearing, Mr. Vicarini made arguments concerning the inconsistencies in the officers' statements regarding the black hoodie, as well as Mr. Cary's description of the individual's flight route. Because

In a thorough, well-reasoned 19-page opinion, the suppression court found that Mr. Vicarini "fail[ed] to demonstrate a substantial likelihood that either of the co-affiants[5] knowingly or recklessly included false information or made intentional misrepresentations in the [a]pplication," and presented only "conclusory statements" in support of his claims that Det. Kriete had made intentionally false representations. The court also determined that even if Mr. Vicarini had made a substantial preliminary showing that the erroneous description of Mr. Cary in the affidavit was intentionally false, and that statement were stricken from the affidavit, sufficient probable cause existed "based, in large part, on the information attributable to [Officer] Small."

Showing that a statement in an affidavit supporting a warrant application was false is not enough to warrant a *Franks* hearing. There must be some evidence that the inaccurate statement in the warrant application was the result of an intentional or reckless act, rather than a "negligent or innocent mistake" in the drafting. *Wilson v. State*, 87 Md. App. 659, 667-68 (1991) (quoting *Yeagy v. State*, 63 Md. App. 1, 8 (1985)). "[B]are allegations in a motion without affidavits or the like are insufficient to satisfy the stringent threshold requirement which must be met before a defendant may go beyond the four corners of a warrant." *Young v. State*, 234 Md. App. 720, 739 (2017) (noting an absence of witness testimony or other evidence to support defendant's claim that information in an affidavit

the suppression court considered the alleged falsehoods pertaining to Mr. Cary's identification of the robber, we deem Mr. Vicarini's arguments preserved for review.

[5] The affidavit was also sworn by Detective William Murray, a Carroll County Deputy Sheriff. However, the affidavit identifies Det. Kriete as the source of the information Mr. Vicarini challenges.

for a search warrant was knowingly and recklessly false), *aff'd*, 462 Md. 159 (2018); *see also United States v. Slizewski*, 809 F.3d 382, 385 (7th Cir. 2016) ("[A]n affiant's negligence does not justify a *Franks* hearing.").

Here, although Mr. Vicarini identified an error in Det. Kriete's factual recitation with respect to Mr. Cary's original characterization of the pants worn by the robber, Mr. Vicarini did not present any evidence to support that the error was anything more than negligent or careless. Nor did the error itself suggest that it was intentional or reckless. Similarly, although Mr. Vicarini identified an inconsistency between Det. Kriete's statement in the application concerning where he observed a black hoodie (in the rear seat of the vehicle) and where the black hoodies were found in the later inventory search of the vehicle (in the trunk), as well as an inconsistency with respect to which witness saw the robber enter the Impala, Mr. Vicarini did not present any evidence that either inconsistency was the product of an intentional or reckless misrepresentation. Indeed, Mr. Vicarini has not identified any significance of the inconsistency concerning the hoodie, especially in light of the officers' testimony that they looked in both the back seat and the trunk in clearing the vehicle. *See Wilson v. State*, 132 Md. App. 510, 539-40 (2000) ("[M]inor discrepancies in stories or descriptions supplied by different witnesses do not constitute the predicate that would entitle one to a *Franks* hearing[.]"). And it is difficult to discern any indication of intentional deception from the attribution to Mr. Cary of the statement that the robber entered the Impala, because it is undisputed that Officer Small reported that the individual he observed had done so. Absent the requisite showing of intent, Mr. Vicarini failed to meet his burden to entitle him to a *Franks* hearing.

Moreover, even if the erroneous statements were stricken from Det. Kriete's affidavit, we agree with the suppression court that the remaining information in the affidavit was sufficient to support a finding of probable cause for issuance of the warrant. "Probable cause 'exist[s] where the known facts and circumstances are sufficient to warrant a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found.'" *State v. Johnson*, 458 Md. 519, 535 (2018) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). Excising the allegedly false statements, the affidavit still asserted that there was a report of an armed robbery at the Finksburg Pharmacy, that the suspect had fled on foot wearing a dark colored hoodie, that a contemporaneous call was received from an off-duty officer who had observed a white male in a dark-colored hoodie carrying a blue bag flee across Route 140 and enter a white Impala, and that the off-duty officer followed the Impala until it was stopped by Officer Phillips and the occupants were arrested. These facts supported a finding of probable cause that the Impala contained evidence of the armed robbery. Accordingly, the circuit court did not err in determining that Mr. Vicarini failed to satisfy his burden to establish a right to a *Franks* hearing.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.