UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0956

September Term, 2014

STEVEN WAYNE BAXTER

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: July 23, 2015

Steven Baxter, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of several drug and handgun charges relating to the execution of a "no-knock" warrant for his home and subsequent seizure of drugs and a gun.[1] Appellant asks one question on appeal: Did the suppression court commit reversible error by refusing to hold a *Franks*[2] hearing? We believe the trial court did err and so shall issue a limited remand for a *Franks* hearing.

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review. *State v. Rucker*, 374 Md. 199, 207 (2003). We extend great deference to the fact finding of the suppression judge and accept the facts as found, unless clearly erroneous. *Carter v. State*, 367 Md. 447, 457 (2002); *Riddick v. State*, 319 Md. 180, 183 (1990). In addition, we review the evidence in the light most favorable to the prevailing party, in this case, the State. *Cartnail v. State*, 359 Md. 272, 282 (2000); *Riddick*, 319 Md. at 183. Nevertheless, this Court must make its own independent constitutional appraisal by reviewing the law and applying it to the facts of the

[1] Specifically, the jury convicted appellant of possession of heroin, possession of marijuana, possession of a regulated firearm by a disqualified person, and possession of a regulated firearm after having been convicted of a crime of violence. The court sentenced appellant to 15 years of imprisonment, all but eight years suspended and the first five years to be served without the possibility of parole, for possession of a regulated firearm after having been convicted of a crime of violence; four years for possession of heroin; one year for possession of marijuana; and five years for possession of a firearm by a disqualified person. All sentences to be served concurrently.

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

case. *Jones v. State*, 111 Md. App. 456, 466, *cert. denied*, 344 Md. 117 (1996) (*citing Ornelas v. United States*, 517 U.S. 690 (1996)).

FACTS

Because appellant's sole question on appeal relates to the suppression hearing, we shall provide only a brief recitation of the facts elicited at trial to place the question posed in context. During the early morning hours of February 20, 2013, officers with the Prince George's County Police Department executed a "no-knock" search warrant at appellant's home at 2544 Iverson Street in Temple Hills, Maryland. After securing appellant and his wife, who were the only occupants in the home, the police searched the home. The police recovered, among other things, 15 baggies of heroin (totaling 1.04 grams); marijuana (totaling 1.2 grams); drug paraphernalia (three digital scales, a "marijuana grinder," and 300 glassine baggies); ammunition; $430 in U.S. currency; and a 9 mm handgun.

SUPPRESSION HEARING FACTS

Prior to trial, appellant filed a suppression motion in which he requested a *Franks* hearing. In support of his request, he attached a 13-page property record form and a chain of custody lab report form that he had received from the State during discovery.

At the subsequent suppression hearing, defense counsel argued that the affidavit submitted by Detective Shaw with the Prince George's County Police Department in support of the search warrant made a material misrepresentation. Defense counsel pointed out that in the affidavit Detective Shaw stated that a confidential informant made a controlled buy of

suspected heroin from appellant's home "within 10 days prior to the February 14th, 2013, date of the affidavit." Defense counsel argued, however, that the controlled buy actually occurred on September 1, 2012, five to six months before the affidavit was submitted and the warrant was executed. To support his argument, defense counsel pointed to the property record form that listed on separate pages the items recovered from appellant's home pursuant to the search warrant. Each page stated, however, that the items recovered came from a controlled buy by a confidential informant on September 1, 2012. Additionally, defense counsel pointed to a chain of custody lab report form on which a handwritten note stated that Detective Shaw received evidence from a confidential informant on September 1, 2012. Defense counsel argued that he was entitled to a *Franks* hearing as he had presented a "substantial" preliminary showing of a deliberate and material false statement without which the affidavit was insufficient to establish probable cause.

The State responded that there was no false statement. The State explained that the controlled buy by the informant had occurred in February as stated in the affidavit. He further explained that the property sheet and chain of custody forms listing the date of the controlled buy as occurring in September were incorrect and were the result of procedures put in place to protect the identify of the confidential informant. The State explained that Officer Shaw had used a "dead CCN number" on the property sheet form to protect the identify of the confidential informant. By using that dead CNN number, the computer supplied an incorrect date on the property sheet. According to the State, before submitting

the warrant affidavit for approval, the officer tried to fix the date on the property sheet to show the correct February date but could not change the date.

After hearing the parties' arguments, the court denied the motion to suppress, stating: "Well, the question before the court is whether the affiant clearly committed the error, made a misstatement, was reckless intentionally and knowingly. And so, on the basis of the document that you've submitted to the court, I can't make that determination." The court added: "I just don't believe that the document you presented should be the end all of the determination, and on that basis, I'm not going to suppress the search warrant."

DISCUSSION

Appellant argues that the suppression court committed reversible error when it refused to hold a *Franks* hearing. He argues that he was entitled to a *Franks* hearing because he: 1) made a "substantial preliminary showing" that the warrant affidavit contained an intentional or a reckless disregard of the truth of a material fact, 2) produced evidence that the date of the controlled buy shown in the affidavit in support of the search warrant did not match the date listed on documents produced by the State in discovery, and 3) without that evidence, the warrant affidavit was stale. The State argues that the suppression court committed no error. Specifically, the State argues that appellant had produced no evidence of deliberate falsehood, arguing that the affidavit date was correct and appellant has "offered no reason that [we] should credit the property records over the" affidavit.

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, proscribes the issuance of any warrant "but upon probable cause[.]" "Article 26 of the Maryland Constitution is *in pari materia* with the fourth amendment." *Holland v. State*, 154 Md. App. 351, 384-85 (2003)(quotation marks and citation omitted). Absent certain exceptions not relevant here, the police must obtain a search warrant before conducting a search and the warrant must be based upon probable cause "to justify its issuance as to each person or place named therein." *Id*. at 385. (quotation marks and citation omitted). When reviewing a 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. *Abeokuto v. State*, 391 Md. 289, 338 (2006). The "four corners" doctrine is firmly-established and rigorously applied. *Fitzgerald v. State*, 153 Md. App. 601, 639 (2003), *aff'd*, 384 Md. 484 (2004). In *Franks v. Delaware*, *supra*, however, the United States Supreme Court created an exception to the four corners doctrine.

In *Franks*, the Supreme Court set out the following procedure before which a defendant would be permitted to "stray beyond the four corners" of a warrant application to examine live witnesses in an effort to establish that a warrant application was tainted by perjury or a reckless disregard of the truth.

> [W]here the defendant 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 [search] warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment *requires* that a hearing be held at the defendant's request.

> In the event that at that hearing the allegation of perjury or reckless disregard is established by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56 (emphasis added). The Supreme Court added:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. 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. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They 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. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Id. at 171-72 (footnote omitted). *See also King v. State*, 434 Md. 472, 487 (2013)("[I]t is [the defendant's] burden to demonstrate by a preponderance of the evidence that the supporting warrant affidavit is tainted by allegations of deliberate falsehood or with reckless disregard for the truth.")(quotation marks and citation omitted).

We are persuaded that appellant made a substantial preliminary showing of a intentional or reckless falsehood in the warrant affidavit as to when the buy occurred. The State argues that appellant's attack on the warrant affidavit is based on conclusory arguments and without affidavits or sworn testimony, appellant has not sufficiently supported his argument. The State is wrong. In *Franks*, defense counsel proffered that the conversations the police had with persons who knew appellant and who described his appearance were false. Defense counsel presented no affidavit or written material to shoulder his burden, only a proffer of what he expected to show if he were allowed to call witnesses on the issue of the falsehood in the warrant affidavit. Moreover, it appears that if the date of the controlled buy in the warrant affidavit is omitted, the affidavit is insufficient to support a finding of probable cause. *Cf. Peterson v. State*, 281 Md. 309, 320-21 (1977) (affirming the validity of a warrant issued about a month after the last-mentioned sale of narcotics by the defendant), *cert. denied*, 435 U.S. 945 (1978); and *Johnson v. State*, 14 Md.App. 721, *cert. denied*, 266 Md. 738, *cert. denied*, 409 U.S. 1039 (1972)(upholding the validity of a warrant issued twenty-six days after the facts and circumstances that formed probable cause). Under the circumstances, the defense shouldered its burden and the suppression court should have ordered or proceeded to a *Franks* hearing. The State's proffer as to how Detective Shaw would have explained the date discrepancy is a non-issue for that was a credibility determination based on argument not facts, and without a hearing, the defense had no opportunity "for cross-

examination or the presentation of contradicting evidence[.]" *Edwards v. State*, 350 Md. 433, 450 (1998).

Because the motions court erred when it refused to grant a *Franks* hearing, we shall order a limited remand pursuant to Md. Rule 8-604(d).[3] *See Ford v. State*, 184 Md. App. 535, 557 (2009)(ordering a limited remand for new suppression hearing because motions court erred in concluding that defendant lacked standing to challenge search of vehicle). *See generally Southern v. State*, 371 Md. 93, 104-05 (2002)(limited remands are not available for parties who fail to meet their burdens of proof but are available where question was not previously discussed by lower court because of an error of law). If, upon remand, the court determines that the affidavit does not contain a material and intentional or reckless falsehood, appellant's conviction will stand. If, on the other hand, the motions court determines that the affidavit does contain a material and intentional or reckless falsehood, and without the

[3] Rule 8-604(d) provides:

> If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

falsehood the warrant affidavit lacks probable cause, appellant's convictions should be vacated.

CASE REMANDED, WITHOUT AFFIRMANCE OR REVERSAL, TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR THE PURPOSE OF CONDUCTING A *FRANKS* HEARING.

THE JUDGMENT OF CONVICTIONS REMAINS IN EFFECT PENDING FURTHER PROCEEDINGS.

COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.