Circuit Court for Baltimore County
Case No. 03-K-16-005698

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2048

September Term, 2017

JAAMAL WEEKS

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Beachley,

JJ.

Opinion by Arthur, J.

Filed: December 12, 2018

In an indictment filed in the Circuit Court for Baltimore County, the State charged appellant Jaamal Weeks with possession with intent to distribute heroin, possession with intent to distribute cocaine, illegal possession of ammunition, and related offenses. After the circuit court denied Weeks's motion to suppress, a jury convicted him of all charges. The court sentenced him to an aggregate term of 11 years in prison.

Weeks filed a timely appeal. He presents the following question for our review: Was it error to deny the motion to suppress evidence seized pursuant to a search warrant?

For the following reasons, we shall affirm.

BACKGROUND

According to the affidavit in support of the search warrant in this case, Detective Michael Romano spoke to a confidential informant in September 2016 regarding a suspect whom the informant knew as "Reds." The informant told the detective that the suspect sold crack cocaine and heroin and used a specific cell phone number. After identifying Weeks as the suspect, the detective directed the informant to use that cell phone number to arrange two controlled purchases, in which Weeks sold cocaine and heroin to the informant. The first purchase occurred during the first two weeks of September 2016, the second during the last two weeks of that month.

After recounting the two controlled purchases, the affidavit went on to discuss what it called "Updated Information." That information consisted of the detective's assertion that, "[w]ithin the past 24 hours," the informant told him that Weeks was in possession of cocaine and heroin for distribution.

On the basis of the information in Detective Romano's affidavit, Judge Jan Alexander signed a search warrant for a residence in Rosedale. The detective and a tactical unit executed the warrant on October 21, 2016. The search turned up 30 gel capsules of heroin, 27.2 grams of cocaine, digital scales, a grinder, packaging materials, and unused gel caps, as well as a box of ammunition.

Weeks moved to suppress the evidence that was seized pursuant to the warrant. Among other things, he argued that neither Detective Romano nor Judge Alexander had dated their signatures. Citing the absence of dates, Weeks argued that it was impossible to tell whether the allegations of probable cause were stale, or whether the warrant was "void" because it had been executed more than 15 days after it was issued. *See* Md. Code (2001, 2008 Repl. Vol.), § 1-203(a)(4) of the Criminal Procedure Article. In response, the State defended the adequacy of the averments in the affidavit.

At a hearing before Judge Mickey Norman on Weeks's motion to suppress, Detective Romano testified that, according to his notes, he had prepared the affidavit and presented it to Judge Alexander on October 17, 2016, four days before the search. On cross-examination, the detective testified that he ascertained that date through his practice of scanning warrants into his computer after a judge has signed them. The detective said that he scanned the signed warrant into his computer at 8:00 a.m. on October 18, 2016, the day after Judge Alexander had signed it.

Weeks argued that, in deciding the motion to suppress, the court could not consider the detective's testimony, but could consider only the four corners of the application for the warrant and the warrant itself. Judge Norman, however, entertained

the testimony. On the basis of the testimony, he faulted the detective for "sloppy police work," but was persuaded that his colleague had signed the warrant on October 17, 2016, and hence that it was neither stale nor void.

In addition to attacking the undated warrant, Weeks requested an evidentiary hearing under *Delaware v. Franks*, 438 U.S. 154 (1978), to investigate what he characterized as knowing or reckless falsehoods in the warrant. Weeks specifically cited a reference to a cell phone number, which he said did not belong to him, and an assertion that he lived at the address at which the warrant was executed. Judge Norman concluded that Weeks had not made the required initial showing that the warrant contained any knowing or reckless falsehoods. He also concluded that the warrant contained information, independent of the alleged falsehoods, that would have supported a finding of probable cause. Accordingly, he denied Weeks's request for a *Franks* hearing.

The case proceeded to trial before yet another judge, and the jury found Weeks guilty of all charges.

DISCUSSION

Weeks makes three arguments in favor of reversal. The first two arguments concern the absence of dates on the affidavit and the warrant: Weeks contends that the suppression court was limited to the four corners of the warrant itself to determine whether the affidavit was stale or void. The third argument concerns the suppression court's failure to conduct a *Franks* hearing. We shall consider each in turn.

A. Staleness

"The Fourth Amendment to the United States Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *State v. Johnson*, 458 Md. 519, 533 (2018) (quoting U.S. Const. amend. IV). "'[R]easonableness generally requires the obtaining of a judicial warrant.'" *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2482 (2014) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)); *accord State v. Johnson*, 458 Md. at 533. "When the State seeks to introduce evidence obtained pursuant to a warrant, 'there is a presumption that the warrant is valid[,]' and '[t]he burden of proof is allocated to the defendant to rebut that presumption by proving otherwise.'" *Volkomer v. State*, 168 Md. App. 470, 486 (2006) (quoting *Fitzgerald v. State*, 153 Md. App. 601, 625 (2003)).

An appellate court does not conduct a plenary, *de novo* review of a lower court's decision to issue a search warrant. Instead, "[w]e determine first whether the issuing judge had a substantial basis to conclude that the warrant was supported by probable cause." *Greenstreet v. State*, 392 Md. 652, 667 (2006). "The substantial basis standard involves 'something less than finding the existence of probable cause,'" *State v. Coley*, 145 Md. App. 502, 521 (2002) (quoting *State v. Amerman*, 84 Md. App. 461, 470-71 (1990)), "and 'is less demanding than even the familiar "clearly erroneous" standard by which appellate courts review judicial fact finding in a trial setting.'" *Id.* (quoting *State v. Amerman*, 84 Md. App. at 472); *accord State v. Faulkner*, 190 Md. App. 37, 47 (2010). Under this forgiving standard, a judge at a suppression hearing "may well be called upon to uphold the warrant-issuing judge for having had a substantial basis for issuing a

warrant even if the suppression hearing judge himself [or herself] would not have found probable cause from the same set of circumstances." *State v. Johnson*, 208 Md. App. 573, 578 (2012).

Probable cause is a "'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (further citations and quotation marks omitted)). This standard "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Id*. at 371. Ultimately, probable cause concerns "a reasonable ground for belief of guilt," that "must be particularized with respect to the person to be searched or seized." *Id*. (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

Staleness is an aspect of probable cause. *See Fone v. State*, 233 Md. App. 88, 103 (2017). "'There is no "bright-line" rule for determining the "staleness" of probable cause; rather, it depends upon the circumstances of each case, as related in the affidavit for the warrant." *Id*. (quoting *Connelly v. State*, 322 Md. 719, 733 (1991)). In assessing staleness, we consider whether "'the "event[s] or circumstance[s] constituting probable cause, occurred at . . . [a] time . . . so remote from the date of the affidavit as to render it improbable that the alleged violation of law authorizing the search was extant at the time[.]"'" *Id*. at 103-04 (quoting *Patterson v. State*, 401 Md. 76, 92 (2007) (further citations omitted)). "The question of staleness is a question of law requiring the application of facts." *Greenstreet v. State*, 392 Md. at 667.

For purposes of evaluating whether a judge had a substantial basis to conclude that there was probable cause for the issuance of a warrant, a reviewing court ordinarily cannot consider "evidence that seeks to supplement or controvert the truth of the grounds stated in the affidavit." *See Valdez v. State*, 300 Md. 160, 168 (1984). Instead, the court is confined to the four corners of the affidavit in support of the warrant. *Greenstreet v. State*, 392 Md. at 669; *see State v. Faulkner*, 190 Md. App. at 49 ("[u]nder the 'four corners' rule, an issuing judge's decision as to whether probable cause exists for a search warrant for a particular location must be made solely from the contents of the affidavit submitted in support of the warrant request").[1]

In arguing that the affidavit was stale, Weeks primarily relies on *Greenstreet v. State*, 392 Md. 652 (2006). In that case, the affidavit in support of a search warrant was signed on April 15, 2004, but the affidavit stated that it was based on observations that were made a year earlier, on April 14, 2003. *Greenstreet v. State*, 392 Md. at 658. At a hearing on Greenstreet's motion to suppress, the State conceded that the affidavit was "stale on its face," but asserted that it contained "a typographical error" and that the observations had really occurred in 2004 rather than 2003. *Id*. at 661-62. The Court of Appeals held, however, that the circuit court properly precluded testimony regarding

[1] In other cases involving warrants, this Court has permitted the use of testimony for purposes other than evaluating the existence of probable cause. In *Thompson v. State*, 139 Md. App. 501, 524 (2001), we held that, where the original warrant had been lost and the only copy or copies were unsigned, the State could introduce testimony to prove that a judge had signed it before it was executed. In *State v. Brown*, 129 Md. App. 517, 528 (1999), we recognized that a police officer could authenticate a copy of a warrant. Those considerations do not apply in this case.

whether the affidavit erroneously misstated the date of the affiant's observations. *Id*. at 669. To permit a police officer to testify that his observations occurred on a date other than the one recorded in the affidavit, the Court explained, "would be to allow him to controvert his statement in the affidavit – an unsanctioned violation of the four corners rule[.]" *Id.* at 671.

In this case, it is at least debatable whether the detective's testimony violated the four corners rule. On one hand, the detective did not "controvert" the affidavit by testifying, for example, that when he wrote about observations that had occurred in September, he really meant that they had occurred in October. Similarly, the detective did not "supplement" the affidavit by testifying that he knew of additional bases for the issuance of the warrant besides the ones that he had listed in the affidavit. On the other hand, however, the testimony did add missing details that are useful in supplying temporal context for the observations reported in the affidavit. If a court could not hear about the corrected date in *Greenstreet,* then it is unclear how could the court could hear about the omitted dates here. Consequently, we shall assume, for the sake of argument, that the detective's testimony supplemented the affidavit in violation of the four corners rule.[2]

[2] Citing *State v. Brown*, 129 Md. App. 517, 528 (1999), which held that a police officer could authenticate a copy of a warrant, the State argues that the detective's testimony was permissible because he merely "authenticated the date of issuance of the warrant." That argument is flawed. Authentication involves proving that a piece of evidence is what its proponent claims. *See* Md. Rule 5-901(a). A party authenticates evidence; a party does not authenticate dates.

Even if we assume that the four corners rule prohibited the court from considering the detective's testimony, we may still uphold the judgment on any ground adequately shown by the record. *Rush v. State*, 403 Md. 68, 103 (2008). In our view, the record is adequate for us to consider the legal question of whether Judge Norman was required to find that the affidavit was stale in the absence of Detective Romano's testimony.[3]

On this record, it is undisputed that the warrant was executed on October 21, 2016. In addition, Weeks does not contend that Judge Alexander signed the warrant after it was executed. *Compare Thompson v. State*, 139 Md. App. 501 (2001). Therefore, even without Detective Romano's testimony, we know that Judge Alexander could not have signed the warrant any later than October 21, 2016. Accordingly, the question becomes, whether the judge would have had "a substantial basis to conclude that the warrant was supported by probable cause" (*Greenstreet v. State*, 392 Md. at 667) on October 21, 2016, or whether the assertions in the affidavit would have been too stale to supply a substantial basis for a finding of probable cause as of that date.

Under the highly deferential standard of review that we are required to apply in deciding that question (*see State v. Faulkner*, 190 Md. App. at 47), we conclude that Judge Alexander would have had a substantial basis to conclude that the warrant was supported by probable cause even if he saw the affidavit no earlier than October 21, 2016. It is true that the two controlled purchases were rather remote in time by that date,

[3] Although the State might be said to have tacitly conceded that issue by not addressing it in the brief, we are not bound by any such concession. *See Greenstreet v. State*, 392 Md. at 667.

the most recent of them having occurred anywhere between three to five weeks in the past. It is also true that the warrant authorized the seizure of items (drugs and drug paraphernalia) that are "easily transferable" – a factor that may hasten the onset of staleness. *See Andresen v. State*, 24 Md. App. 128, 172 (1975). On the other hand, "'the thing to be seized, while easily transferable, was just as easily replaced.'" *Peterson v. State*, 281 Md. 309, 321 (1977) (quoting the unreported opinion of this Court). Moreover, the "updated information" in the affidavit suggests that, at some point after the second controlled purchase in the second half of September, Weeks had replenished his inventory and had acquired additional contraband for sale. In other words, the affidavit suggests that the criminal conduct was continuous and recurring and that it was not a mere "random criminal episode." *See State v. Amerman*, 84 Md. App. at 479 ("[t]hat the investigation is of an ongoing criminal activity rather than of a random criminal episode is a significant factor in the probable cause/staleness equation"). Indeed, "[b]y its nature, traffic in illegal drugs is ordinarily a regenerating activity[.]" *Peterson v. State*, 281 Md. at 321. On these facts, Judge Alexander might not have been required to find the existence of probable cause, but it would certainly have been permissible for him to do so. *See id.* at 320-22 (holding that probable cause was not stale even though last observed sale of narcotics occurred five weeks before warrant was issued and last observed sale at premises to be searched occurred two months before warrant was issued).

Notably, Weeks does not argue that the affidavit would have been stale on October 17, 2016, the date when Detective Romano says that he presented it to Judge Alexander.

But if the affidavit was not stale on that date, it is hard to see how it became stale because of the passage of only four more days. Judge Norman, therefore, did not err in denying the motion to suppress on grounds of staleness.

B. Section 1-204 of the Criminal Procedure Article

In addition to arguing that the information in the affidavit was stale, Weeks argued that the warrant was not served in accordance with § 1-203(a)(4) of the Criminal Procedure Article. In general, § 1-203(a)(4) states that a search warrant is "void" unless it is executed within 15 calendar days after it is issued. In brief, Weeks argues that because the warrant is undated, it is impossible to tell whether it was executed before the expiration of the 15-day deadline.

In cases concerning § 1-203's predecessor statutes, Article 27, § 306, of the Code that was in effect in 1950, and Article 27, § 551, of the Maryland Code (1957, 1996 Repl. Vol.), Maryland appellate courts have held that the absence of a date does not invalidate the warrant. In *Bell v. State*, 200 Md. 223, 225 (1952), the Court of Appeals stated that an "omission to date the warrant was an immaterial clerical error, which violated no requirement of the constitution or the act and did not invalidate the warrant." The Court added that, "[i]f the legislature had intended that 'an undated search warrant shall be null and void,' it would have been easy to say so[.]" *Id.* Similarly, in *Thompson v. State*, 139 Md. App. 501, 529 (2001), this Court stated that "the clerical omission of a date on the warrant does not automatically give rise to an exclusion of evidence."

No case holds that the four-corners rule bars testimony about when an undated warrant was signed, for the purpose of determining whether it is "void" under § 1-

203(a)(4). To the contrary, in *Thompson v. State*, 139 Md. App. at 530, this Court envisioned that a trial court could consider a detective's testimony in deciding when he had signed it – in particular, whether he had signed the warrant before it was executed. In view of *Thompson*, we see no reason why Judge Norman could not consider Detective Romano's testimony that Judge Alexander signed the warrant on October 17, 2016, for the purpose of determining whether it was executed within 15 days thereafter.

C. *Franks* Hearing

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court stated:

> [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 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 the defendant 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.

Franks, 438 U.S. at 155-56.

This Court has described the threshold as "daunting." *Fitzgerald v. State*, 153 Md. App. 601, 643 (2003), *aff'd*, 384 Md. 484 (2004). "[T]he challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Id.* at 171. "Allegations of negligence or innocent mistake are insufficient." *Id.*; *accord McDonald v. State*, 347 Md. 452, 471 n.11 (1997) (stating that "[n]egligence or innocent mistake resulting in false statements in the affidavit is not sufficient to establish the defendant's burden").

Weeks contended that he was entitled to a *Franks* hearing on his motion because of what he characterized as false statements in the affidavit. In support of his contentions, he cited certified records from a cellular telephone provider that established that the phone number in the application belonged to someone in Kentucky, not to him. In addition, he argued that the affidavit contained only a conclusory assertion that he lived at the house that was searched. In our view, neither basis was sufficient to entitle Weeks to a *Franks* hearing.

Although the telephone number was registered to someone in Kentucky, it hardly follows that Weeks would have been unable to use it. In fact, Weeks does not dispute that the informant called that number to arrange two controlled purchases from him, as the affidavit asserts. In these circumstances, Weeks has not shown that the statements about the telephone number were false, much less that they were knowing and intentional falsehoods or that they were made with reckless disregard for the truth. *See United States v. Adams*, 305 F.3d 30, 36 n.1 (1st Cir. 2002) (noting that "[m]ere inaccuracies, even negligent ones, are not enough" to warrant a *Franks* hearing).

The same is true with respect to Weeks's assertions concerning the allegations that he lived at the house that was named in the affidavit. Weeks does not dispute that the detective saw him leave that house before both of the two controlled purchases, which is at least some basis to infer that he lived there. Nor does Weeks offer any reason to conclude that the detective had actual, subjective knowledge that he did not live at that house, or that the detective acted with reckless disregard for the truth when he asserted that Weeks lived there. *See generally Holmes v. State*, 368 Md. 506, 522 (2002) (stating

that "[d]irect evidence that contraband exists in the home is not required for a search warrant; rather, probable cause may be inferred from the type of crime, the nature of the items sought, the opportunity for concealment, and reasonable inferences about where the defendant may hide the incriminating items"). In short, Weeks did not meet the burden to establish his entitlement to a *Franks* hearing.

In any event, even if one were to disregard the assertions that Weeks characterizes as false or conclusory, Judge Norman correctly recognized that the affidavit's remaining content was sufficient to establish probable cause. The affidavit established that the detective had arranged and observed two controlled purchases, before both of which Weeks emerged (with illegal drugs) from the house that was searched. The affidavit also established that, within 24 hours of when Detective Romano completed the main body of the affidavit, Weeks was again in possession of cocaine and heroin. Again, Weeks did not meet the burden to establish his entitlement to a *Franks* hearing.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.