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Division II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DHENA RAYNE ALBERT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01893-7

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR¹

- I. **The trial court properly denied Albert’s motion for a *Franks* hearing because Albert failed to meet her burden of proof.**
- II. **Albert fails to make a cognizable argument with citation to authority regarding the video surveillance footage from inside her apartment.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Dhena Rayne Albert was charged by second amended information with Possession of a Controlled Substance with Intent to Deliver – Methamphetamine and Unlawful Possession of a Firearm in the First Degree on or about August 25, 2017 following the execution of a search warrant on that same day. CP 104-06, 154-55. The drug count also included a school bus route stop enhancement, a firearm enhancement, and alleged the “major violation of the Uniform Controlled Substances Act” aggravator. CP 154. Prior to trial, Albert filed a number of motions to include a motion for a *Franks* hearing. CP 11-14. The trial court, the

¹ As a preliminary matter, Appellant assigns error to a number of decisions by the trial court but then fails to either 1) provide argument associated with the assignment of error (assignments of error No. 1, 4, 5, 8, and 9); or 2) cite any authority for the argument associated with the assignment of error (assignments of error No. 1, 3, 4, 5, 8, and 9). RAP 10.3(a)(6), 10.3(g). If an appellant’s brief does not include argument or authority to support its assignment of error, the assignment of error is waived. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The State’s brief will address Appellant’s assignments of error that are argued.

Honorable Robert Lewis, denied these motions in total during a hearing on May 2, 2018. CP 258-59; RP 36-37.

The case proceeded to a jury trial, which commenced on May 7, 2018 and concluded on May 9, 2018. RP 96-430. The jury found Albert guilty as charged to include the enhancements, while the trial court dismissed the alleged aggravating factor after the State rested its case. CP 193-95, 197; RP 393, 430-33. The trial court sentenced Albert to 170 months of total confinement. CP 267-278; RP 462. Albert filed a timely notice of appeal. CP 283.

B. FACTUAL HISTORY

On August 25, 2017, Vancouver police officers executed a search warrant at 2600 T Street, apartment No. 146 in Vancouver, Washington. RP 111, 119, 140, 155, 167. The officers knocked on the door of the apartment and announced their presence at least twice. RP 140-41, 155-56, 168, 303-04. Nobody from inside responded to the door, but the officers did hear what sounded like people moving inside. RP 140-41, 303-04. As a result, the officers forced entry into the apartment by utilizing a ramming type tool. RP 155-56, 168. Upon entering the apartment, the officers noticed that the front door was reinforced with two much larger than normal steel, striker plates. RP 169, 304-05. They also observed that a multi-camera surveillance system had been setup with cameras pointed at

the entry way, parking lot, outside stairwell, and inside the apartment. RP 181-82, 258-59. A monitor showing all of the camera views was stationed on the kitchen counter. RP 258-59.

The apartment itself was quite small as it contained only one bedroom and one bathroom. RP 111. Thus, the officers were able to swiftly locate and contact the three individuals who were present at that time. RP 112, 156-57, 163. One male was found in the bedroom, while Albert was discovered in a locked bathroom—wet, with a towel wrapped around her body—and another male was found fully clothed standing in the shower in the same bathroom. RP 112, 156-57, 163. The three individuals were then taken out of the apartment so that the search could commence.

While outside, Albert asked an officer to retrieve two special necklaces of hers that were located in the apartment. RP 113-14. Albert told the officer to “[g]o into my bedroom and they’re in a Tupperware.” RP 114-15. She then explained that Tupperware was in the fourth drawer down of a five drawer, bedside dresser. RP 114-15.

By the time the search of the apartment was completed the police found the following evidence that established Albert’s dominion and control of the residence: (1) Albert’s DOL identification card with the address listed as 2600 T Street, Apt. 146; (2) framed pictures that included

Albert in the bedroom, hallway, and kitchen ; (3) mail addressed to Albert that included the 2600 T Street address; (4) a prescription drug bottle in Albert's name in a drawer in the bedroom dresser; (5) Albert's purse; and (6) only female clothing in the bedroom. RP 122-24, 128-130, 176-180, 182, 258, 277-78. The police also found the following drug and firearm evidence: (1) approximately 800 grams of methamphetamine, discovered as an approximately one-pound "brick" and in two similarly weighted baggies inside a locked safe, and in a silver, sparkly zipper pouch in the living room; (2) thousands of dollars in US currency found within the same safe; (3) boxes of plastic baggies; (4) multiple digital scales including one large, operable scale with methamphetamine residue on it; (5) an empty baggie floating in the toilet; (6) two glass smoking pipes that appeared used; (7) a "drug note;" and (8) a Ruger 9mm handgun with a loaded magazine in the safe. RP 125-26, 131-35, 147-49, 160-62, 165, 170, 175-76, 182-88, 190-91, 194, 206-211, 235-37, 261-62, 265, 269-270, 287-89, 292-97. Because Albert had a previous conviction for a serious offense she was not lawfully allowed to possess a gun. RP 363.

Albert was arrested and taken to jail. RP 309. At the jail, Albert was served forfeiture paperwork regarding the money that was seized and she initiated a conversation with the serving officer. RP 309-310. She told the officer that she "stays" at the 2600 T Street apartment. RP 310-311.

After Albert's arrest, the investigating detectives also searched Albert's cellphone, which the detectives seized when they had executed the search warrant. RP 311-13, 319-321. On Albert's phone, between the dates of August 10, 2017 and August 25, 2017, the detectives found a large amount of drug transaction messages, messages referring to a firearm, and internet searches for "police scanner," "money counter," and "Swann security camera." RP 322-42, 344-55.

At the time of the execution of the search warrant the officers seized a DVR (digital video recorder) that was attached to the aforementioned surveillance system. RP 258-260. Officers, however, were unable to view or gain access to the recorded content on the DVR until after the State had rested its case. RP 396-400. Once officers obtained the correct software they were able to view a recording on the DVR from August 22, 2017 that showed Albert in the kitchen area with a gallon-size bag of methamphetamine on the kitchen counter along with the large scale. RP 397. After some discussion about the late-arriving, inculpatory evidence the trial court ruled that the evidence would only be admissible as rebuttal evidence if Albert "g[ot] up and testif[ied] about things related to the immediate incident that the State clearly has rebuttal evidence for. . . ." RP 401-03. Albert did not testify and the State was not allowed to

reopen its case to admit the DVR evidence or admit the DVR evidence as rebuttal evidence in response to the defense witnesses that Albert did call.

ARGUMENT

I. **The trial court properly denied Albert’s motion for a *Franks* hearing because Albert failed to meet her burden of proof.**²

The search warrant that the police executed at Albert’s residence was supported by an affidavit that described that a confidential, reliable informant (“CRI”) conducted a controlled buy for methamphetamine from Albert at the 2600 T Street apartment between August 16, 2017 and August 18, 2017. CP 99-103. The affidavit also established the CRI’s reliability and basis of knowledge, related the reason for which he or she was working with the police (favorable consideration on a criminal charge), and included the CRI’s criminal history. CP 100-02. Albert argues that a *Franks* hearing should have been granted on the sole basis that because Albert’s cellphone location data between August 16, 2017 and August 18, 2017 showed that she was not ever-present at her apartment during that time period that she had, therefore, “provide[d]

² Albert now also claims that the trial court “would not allow disclosure of the informant” and “denied an in-camera interview of the informant.” Br. of App. at 5, 10-13. But Albert never sought either of these things nor did the trial court rule on them. CP 11-14, 41-42, 258-59; RP 1, 30-36. Instead, Albert sought a *Franks* hearing and an in camera review of “records of the CRI’s allegations to compare to Defendant’s declaration and see if the records conflict.” CP 11, 14. Thus, any arguments related to disclosure of the informant’s identity or for an in camera interview of the informant are waived. RAP 2.5(a)(3).

information which casts a reasonable doubt on the veracity of the information in the search warrant affidavit. . . .” Brief of Appellant at 13; CP 41-45, 135-142; RP 30-36. In other words, she argues that because she left her apartment from time to time that there is reason to believe that CRI was not being truthful when he or she reported buying drugs from her at the apartment at some point during the relevant time frame. This argument is without merit.

A *Franks* hearing is a “special evidentiary hearing” where a defendant is “entitled to challenge a finding of probable cause [in a search warrant] . . . if he [or she] makes a substantial preliminary showing that the affiant lied or acted in reckless disregard for the truth in obtaining the search warrant.” *State v Casal*, 103 Wn.2d 812, 817, 699 P.2d 1234 (1985) (internal quotation omitted). Reckless disregard for the truth is shown where the affiant “in fact entertained serious doubt as to the truth of the fact or statements in the affidavit.” *State v. O’Conner*, 39 Wn.App. 113, 692 P.2d 208 (1984) (citation omitted). A trial court’s denial of a *Franks* hearing is reviewed for an abuse of discretion. *State v. Wolken*, 103 Wash.2d 823, 830, 700 P.2d 319 (1985).

Crucially, a *Franks* hearing is specifically limited to cases “where the defendant challenges the *affiant’s* descriptions of what the *affiant personally* observed.” *Casal*, 103 Wn.2d at 817 (some emphasis added). A

defendant who only attacks an informant's credibility, however, does not impeach the credibility of the affiant and is not entitled to a *Franks* hearing. *State v. Harris*, 44 Wn.App. 401, 406, 722 P.2d 867 (1986).

Harris is instructive. There the court noted that:

Testimony of witnesses offered by Harris in support of his motion to require disclosure amounts to nothing more than a denial that any drug transaction could have taken place in Harris' residence during the time the informant is alleged to have witnessed such a transaction. This evidence attacks the informant's credibility or accuracy, but only by giving evidence to the contrary. There is nothing in the testimony that is material to the issue of the credibility of Detective Sgt. Joe Sanford, the officer who signed the affidavit.

44 Wn.App. at 406. In light of whose credibility the defendant's witnesses were attacking and the nature of said attack *Harris* concluded "that the testimony of the witnesses in support of Harris' motion, limited as it is to the probable cause issue, falls short of the substantial preliminary showing necessary to require an in camera hearing or disclosure of the informant's identity." *Id.*

Here, the trial court did not abuse its discretion in denying Albert a *Franks* hearing because Albert failed to meet her burden "to make a substantial preliminary showing that the affiant lied or acted in reckless disregard for the truth in obtaining the search warrant." *Casal*, 103 Wn.2d at 817; CP 259. Instead of attacking the credibility of the affiant, Albert attempted to attack the credibility of the CRI by claiming that she (Albert)

was not the person who sold the CRI the methamphetamine during the controlled buy and attempted to buttress her claim by the use of her cell phone location records. But her claim fails because she did not “challenge[] the affiant’s descriptions of what the affiant *personally* observed” as required in order to warrant a *Franks* hearing and because the evidence she presented did not in any way actually contradict any of the information provided in the search warrant affidavit whether its source was the CRI or the affiant. *Id.* (emphasis in original). More specifically, Albert’s own evidence, the cell phone location data, puts her at her apartment for a substantial amount of time during the time period in which the CRI made a controlled buy of methamphetamine from Albert. *See* RP 374-77; CP 135-142. Thus, the trial court properly denied Albert’s motion for a *Franks* hearing and this Court should affirm.

II. Albert fails to make a cognizable argument with citation to authority regarding the video surveillance footage from inside her apartment.

The State is unable to respond in substance to Albert’s “Assignments of Error No(s) 1, 3, 4” because no cognizable argument is advanced. Br. of App. at 14-16. Albert cites no relevant case law, statutory authority, RAP, or portion of the court record to advance her request that the trial court somehow erred in its determination that the video surveillance could be admissible as rebuttal evidence. Rather, Albert asks

a series of perhaps rhetorical questions, briefly argues that she received the ineffective assistance of counsel, and then concludes she must be able to accept a plea offer that was made prior to trial. Br. of App. At 14-16. This Court should deny Albert the relief she seeks because she has failed to provide argument and authority for her position. RAP 10.3(a)(6).

CONCLUSION

For the reasons argued above Albert's convictions should be affirmed.

DATED this 3rd day of May, 2019.

Respectfully submitted:

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