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NO. 53401-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOHN WAYNE VINTON,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 18-1-00573-8

BRIEF OF RESPONDENT

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I. INTRODUCTION

Defense counsel sought to investigate whether law enforcement warrantlessly searched the automobile defendant was driving *before* the search warrant for that automobile issued in this case. Defendant had no evidence of this, so a CrR 3.6 suppression hearing was not an available option. To seek that evidence, defense counsel argued that *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) authorized a judicial hearing as a discovery tool. That argument is maintained on appeal.

A *Franks* hearing is not a discovery tool. Its purpose is to test the veracity of a search warrant application. Defense counsel was uninterested in the validity of the search warrant in this case—his stated goal was to use the *Franks* hearing to explore his warrantless search challenge. The veracity of the search warrant application was incidental to that challenge. The trial court concluded that the *Franks* standard had not been met. The trial court should be affirmed.

Defendant's remaining claims are mere conclusory assertions of ineffective assistance of counsel.

II. RESTATEMENT OF THE ISSUES

- A. Did appellant make a record sufficient to warrant a *Franks* hearing?
- B. Did appellant demonstrate either deficient performance or actual prejudice pertaining to defense counsel's motion to suppress evidence?
- C. Are each of appellant's ineffective assistance of counsel claims wholly conclusory and unsupported by the record?

III. STATEMENT OF THE CASE

Prior to trial, John Wayne Vinton (hereinafter "defendant") presented what he called a "motion to suppress the evidence obtained pursuant to the search warrant." CP 20. That introductory sentence did not fairly characterize defendant's motion. The motion is more fairly characterized as a motion for a hearing to determine whether the evidence in this case was obtained pursuant to a warrantless search.

In the motion, defendant argued that "there is good reason to believe that the Chevy Silverado was searched, prior to Deputy Darby obtaining a second search warrant . . ." ¹ CP 27. Defendant argued

The reports surrounding the arrest and search of the [sic] Mr. Vinton and the Chevy Silverado are vague and suggestive of an attempt to conceal times when the search of the Chevy Silverado occurred and when the search warrant for the Chevy Silverado was obtained. Therefore the Defense is requesting a *Franks* hearing to challenge the veracity of the

¹ The same claim was also made at CP 28: "The fact that the second search warrant is not time stamped causes extreme concern for the defense that this was obtained post-seizure and post-search of the Chevy Silverado."

information, contained in the second search warrant application.

CP 30-31. Defendant's concluding sentence was unambiguous: "There are too many unanswered questions related to the search warrants obtained in this matter, suggesting the necessity of a Franks hearing" CP 33.

When presenting the motion, defense counsel was unconcerned about evaluating the sufficiency of the search warrant, with the challenged material in the search warrant application deleted:

THE COURT: But you are not saying -- I'm not understanding that you are saying that if I looked at the four corners of the warrant, the application for the warrant, that there was -- there is no basis or the there is an improper basis for issuing a warrant -- that the judge was wrong in issuing a warrant. What I'm hearing you saying is, you want additional discovery with respect to the background of this thing in order to show that the information provided to the judge was false or mistaken?

1/23/19 VRP 28.

MR. BENJAMIN: Your Honor, what I'm saying is that there appears to be misrepresentations within the four corners of the search warrant itself.

1/23/19 VRP 29.² Defendant argued that misrepresentations to the judge alone were sufficient to warrant a *Franks* hearing. 1/23/19 VRP 29. Defendant was not concerned about the validity of the warrant in this case—he maintained that the search in this case was a warrantless search and that

² Defense counsel never sought to relate the material he alleged to be false to the sufficiency of the search warrant issued in this case. See 1/23/19 VRP 14-47.

the warrant purporting to authorize the search was obtained after the search.³

Defense counsel straightforwardly asserted defendant's version of the purpose of a *Franks* hearing:

It is the defense's contention that given the fact that there appears to be misstatements and also identical information between the two search warrants, they said this is a type of case that warrants a Frank's hearing because we need to get to the bottom as to when these things were observed, whether, in fact, there is a disassembling going on by the detective or not. After all, that is the main purpose of Frank's hearing, is when there has been -- when there is a belief that there is any type of disassembling going on and the issuance of the warrants.

1/23/19 VRP 46-47.

The motion for a *Franks* hearing did not involve the presentation of testimony. 1/23/19 VRP 14-50. Two search warrants and their respective applications were involved. CP 46-71. At the hearing, defense counsel presented argument relating facts, but no supporting evidence.

The trial court denied defendant's motion. 1/23/19 VRP 50. The trial court stated:

I'm not hearing anything here that suggests that anything that's in the declaration is, one, untrue, as I say, except for the Tahoe, but that doesn't look like it was done intentionally or necessary material to find probable cause. I don't know of anything else that would be wrong about it.

³ "That's what my client is contending, Your Honor, is that the Silverado had been removed prior to there being a search warrant for the Silverado." 1/23/19 VRP 31.

1/23/19 VRP 48.

Defendant was subsequently convicted of one count of unlawful possession of a controlled substance with intent to deliver (methamphetamine) and three counts of unlawful possession of unlawful possession of a firearm in the first degree. CP 226-27. Items seized pursuant to the execution of the second search warrant were essential to defendant's convictions on each count.

IV. ARGUMENT

A. The trial court properly denied defendant's motion for a *Franks*⁴ hearing.

"It bears recalling that the purpose of a *Franks* hearing is for a defendant to demonstrate that statements in an affidavit intentionally or recklessly misled [the search warrant issuing] court." *United States v. Thomas*, 788 F.3d 345, 349 (2d Cir. 2015). The purpose of a *Franks* hearing is to test the veracity of an affidavit filed to support a warrant application. See *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997).

The *Franks* hearing is appropriate only (1) if the defendant makes a substantial preliminary showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth included in the warrant

⁴ *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

application; and (2) if the allegedly false statement is necessary to the finding of probable cause.” *Franks*, 438 U.S. at 155-56. The denial of a *Franks* hearing is generally reviewed under an abuse of discretion standard. *State v. Wolken*, 103 Wn.2d 823, 829-30, 700 P.3d 319 (1985).

The *Franks* hearing was properly denied because defendant never demonstrated that any allegedly false statement was necessary to the finding of probable cause for the second search warrant in this case. Neither in his written motion to the trial court,⁵ nor in oral argument,⁶ did defendant argue that the search warrant in this case was insufficient absent the allegedly false material.⁷ This failure should be fatal to defendant’s claim on appeal. *Franks, supra*.

Alternatively, defendant failed to make “a substantial preliminary showing of falsity”⁸ in the second search warrant application. Defendant presented several arguments attempting to demonstrate falsity to the trial court in support of his motion for a *Franks* hearing. Two are presented on

⁵ CP 20-33.

⁶ 1/23/19 VRP 14-50.

⁷ This is likely because defendant’s purported *Franks* motion to the trial court was about something other than the sufficiency of the search warrant: “The problem, again, is that we don’t know exactly when that search warrant was obtained.” 1/23/19 VRP 16-17.

⁸ *State v. Wolken*, 103 Wn.2d at 828 (citing *Franks v. Delaware*, 438 U.S. at 170).

appeal.⁹ Neither of those two arguments justify a *Franks* hearing. Appellant argues that the search warrant application was not date stamped to indicate the time on February 8, 2018 when the second search warrant was obtained. Appellant's Brief at 7. This alleged fact was not "substantial" because it could not possibly have affected the probable cause determination pertaining to the second search warrant (because the probable cause determination had already been made by then). Nor does this alleged fact demonstrate falsity—it only indicates that the warrant was dated, but not time stamped. Defendant's other claim of falsity is based upon the claimed similarity "similarity" between the confidential informant information recited in the first search warrant application and the confidential information recited in the second search warrant information. Appellant's Brief at 7. However, within those similar statements defendant identifies no allegedly false facts.¹⁰ *Id.* Resolving alleged material false

⁹ The arguments presented to the trial court but not presented on appeal are insubstantial. The first search warrant referred to the premises searched as "2924 South Madison Street," while the second search warrant application referred to the premises authorized to be searched as "2924 Madison Street." CP 32 (defendant's motion for *Franks* hearing referring to CP 49 (first warrant) and CP 70 (second warrant application)). The first search warrant also referred to the vehicle to be searched as a 2002 Chevy Suburban, while the second search warrant application referred to the authorized vehicle to be searched as a 2002 Chevy Tahoe. CP 32 (motion referring to CP 49 (first search warrant), CP 70 (second search warrant application)). These mistakes, not relied upon on appeal, are merely negligent and not material to the issuance of the second search warrant.

¹⁰ Defendant did not seek disclosure of the confidential informant. CP 20-33 (Motion to Suppress / Motion for *Franks* hearing).

facts is the entire purpose of a *Franks* hearing. This failure to present a sufficient demonstration of substantial falsity should also be fatal to defendant's claim on appeal. *Franks, supra*.

The third alternative reason why defendant's *Franks* argument should be rejected is that defendant presents no claim that the second search warrant application lacked probable cause. Appellant's Brief at 7-8. Such challenges are the *raison d'etre* of a *Franks* hearing. Since defendant has never sought a *Franks* hearing for a proper purpose, he was never prejudiced by the denial of his bid for a *Franks* hearing. Error without prejudice is not grounds for reversal. *State v. Barry*, 183 Wn.2d 297, 316-17, 352 P.3d 161 (2015) (quoting *State v. White*, 72 Wn.2d 524, 531, 433 P.2d 682, 687 (1967)).

The trial court properly denied defendant's motion for a *Franks* hearing.

B. Defendant has failed to demonstrate ineffective assistance of counsel relating to his pretrial suppression motion.

Defendant argues that "any reasonable counsel would have provided an affidavit/declaration from Mr. Vinton to support the assertions that Mr. Vinton's Counsel made to the Trial Court, but which the Trial Court would not consider as evidence. (VRP 31-32; 50)." This Court should examine the complete (and brief) record presented by defendant as factual support for that conclusory statement:

THE COURT: So you are saying that they arrested him without a warrant -- without a search warrant? Because the first search warrant had lapsed?

MR. BENJAMIN: No, the first search warrant had not lapsed. When they arrested him on the first search warrant, he wasn't in the vehicle that they had the warrant for. He was in a different vehicle. At that point, they had to go get an additional search warrant indicating that he has been seen in this vehicle by the CI.

THE COURT: You are saying that they pulled him over with the first search warrant, realized they couldn't search the car because they didn't have that identified in the first search warrant.

MR. BENJAMIN: That's correct.

THE COURT: They went and made application to the judge to get a warrant that included the vehicle that they were working on now and that they did all of this after they had already searched the Silverado.

MR. BENJAMIN: That's what my client is contending, Your Honor, is that the Silverado had been removed prior to there being a search warrant for the Silverado.

THE COURT: The Silverado had been removed, you said? Did you say "removed" or "moved"?

MR. BENJAMIN: Moved.

THE COURT: They said they saw him in it that day.

MR. BENJAMIN: Pardon, Your Honor?

THE COURT: So you're saying, when he says he saw him in it that day, there's nothing false about that. It's just that he didn't tell the judge, by the way, we have already pulled him over and searched the vehicle.

MR. BENJAMIN: That's, essentially, the search incident -- Your Honor, because my client --

THE COURT: What's the evidence of that other than the idea that it might be possible?

MR. BENJAMIN: Your Honor, the only evidence would be the information that my client has provided to me. The problem, throughout this case has been, the lack of detailed reports. The lack of any details that have been provided --

1/23/19 VRP 31-32.

Defense counsel stated that “the only evidence would be the information that my client has provided to me.” 1/23/19 VRP 32. However, the record does not identify the substance of that evidence. 1/23/19 VRP 31-32. The record only demonstrates defense counsel’s assertion of his client’s conclusory “conten[tion].”¹¹ Any basis for that contention, whether in first-hand knowledge or credibility, is absent from the record below.

“To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct.

¹¹ Such conclusory assertions would not merit consideration in a personal restraint petition. *In re Rhem*, 188 Wn.2d 321, 327-28, 394 P.3d 367 (2017); *In re Williams*, 111 Wn.2d 353, 364, 759 P.2d 436, 442 (1988).

2052, 80 L.Ed. 2d 674 (1984)). Defendant bears the burden of proving deficient performance by a preponderance of the evidence. *State v. Robinson*, 138 Wn.3d 753, 764-65, 982 P.3d 590 (1999).

Appellant has presented a record insufficient to review the error claimed on appeal. It is impossible to evaluate defense counsel's decision not to present defendant's testimony because the record does not reveal the substance of that testimony. Likewise, it is impossible to evaluate how defendant's testimony would have affected the outcome of the suppression hearing in this case without knowing the substance of that testimony. "[T]he burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' counsel's representation was effective. *State v. McFarland*, 127 Wn.2d at 337. (citing *State v. Thomas*, 109 Wash.2d 222, 226, 743 P.2d 816 (1987)). Defendant has failed to present a record sufficient to review his ineffective assistance of counsel claim.

C. Defendant has failed to demonstrate ineffective assistance of counsel relating to pre-trial discovery.

In November, 2018, the parties agreed to a continuance for the following reasons: "Defense not ready for trial. Interview of witnesses & completion of discovery." Supp. CP 167. Appellant's Brief asserts that "Mr. Vinton's counsel admitted at a pre-trial conference in November that he was not ready for trial and had not conducted any witness interviews." Appellant's Brief at 10. To support this assertion, defendant cites to "CP

40.” CP 40 is page 5 of the State’s Memorandum in Opposition to Defendant’s Motion to Suppress. CP 40. Defendant has presented no support for his assertion that defense counsel was unprepared for trial.

At any event, defendant’s trial was continued two months (from November to January) because defense counsel needed time to prepare.¹² CP Supp. CP 167. On appeal, defendant presents neither preparation shortcomings nor prejudice resulting from preparation shortcomings.

Defendant asserts that his trial counsel “failed to satisfy an objectively-reasonable standard of conduct for defense counsel where he failed to perform any pre-trial discovery such that he could put on a defense to the Charges. Appellant’s Brief at 10. This argument assumes—without any basis in fact—that (a) there actually was a defense to the charges; (b) that defense counsel’s discovery of the relevant facts was insufficient; (c) that pre-trial discovery would have revealed that defense; and (d) that the revealed defense would probably have resulted in a not guilty verdict.¹³

Defendant has failed to approach the deficient performance and actual prejudice standards required by *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

¹² Jury selection in defendant’s trial commenced on January 24, 2019. 1/24/19 VRP 97.

¹³ “The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)).

D. Defendant has failed to demonstrate ineffective assistance of counsel relating to the presentation of defense witnesses.

Defendant asserts that his trial counsel's performance was defective because he called no witnesses other than defendant.¹⁴ Defendant does not demonstrate (a) the identity of any missing witness; (b) the substance of any missing witness' testimony; (c) the availability of any missing witness; and (d) how that missing witness' testimony probably would have resulted in a not guilty verdict. Defendant has failed to approach the deficient performance and actual prejudice standards required by *Strickland, supra*.

E. Defendant has failed to demonstrate ineffective assistance of counsel relating to the admission of evidence.

Defendant asserts that his trial counsel's performance was defective because he "did not object to any piece of evidence presented by the State." Appellant's Brief at 11. That statement is factually incorrect because defense counsel did object to evidence presented by the State.¹⁵ Alternatively, defendant does not identify any particular item of evidence which should have been objected to, but was not. This makes it impossible for defendant to prove either the deficient performance prong or the actual prejudice prong required by *Strickland, supra*.

¹⁴ This statement is factually incorrect. Defense counsel did not call Mr. Vinton as a witness at trial. 1/31/19 VRP 492 (Defense rests without calling a witness).

¹⁵ 1/28/19 VRP 56 (objection to testimony as leading); 1/28/19 VRP 93-94 (objection to photographic exhibit); 1/30/19 VRP 352 (objection to testimony as speculative); 1/30/19 VRP 427 (foundation objection to testimony).

F. Defendant has failed to demonstrate ineffective assistance of counsel relating to jury instructions.

Defendant argues that his defense lawyer was ineffective because he did not propose any jury instructions. Appellant's Brief at 10. Defendant does not claim that the jury was instructed improperly in this case. Appellant's Brief at 10-12. Defendant does not present any instruction which should have been given, but was not given. *Id.* Defendant does not demonstrate deficient performance because he points to no error. Defendant does not demonstrate prejudice because he does not demonstrate that there is a reasonable probability, that but for the instruction (given or not given), the outcome of the proceedings would have been different. *State v. Kyllö*, 166 Wn.2d at 862.

V. CONCLUSION

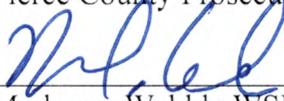
The trial court properly concluded that defendant was not entitled to a *Franks* hearing because defendant failed to demonstrate either substantial falsity of any statement contained in the second search warrant or that the search warrant was insufficient absent any allegedly false statement. Alternatively, defendant was not even challenging the validity of the second search warrant—so the entire premise of the *Franks* hearing was absent in this case. The trial court should be affirmed.

Defendant's ineffective assistance of counsel challenges are wholly
conclusory and insubstantial.

The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of February, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Mark von Wahlde WSB# 18373
Deputy Prosecuting Attorney

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The undersigned certifies that on this day she delivered by E-file or ^{U.S.} mail
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Date

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PIERCE COUNTY PROSECUTING ATTORNEY

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