FILED
JULY 2, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 30593-7-III
Respondent,	)	(consolidated with
	)	No. 32316-1-III)
v.	)	
	)	
JOHNNIE LLOYD TRAUB,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, C.J. — This case is before us again following a remand for the entry of additional findings and conclusions and such other proceedings as the trial court determined were required.

Johnnie Traub was convicted of one count of possession of a controlled substance (methamphetamine) following a stipulated facts trial. The evidence against him was seized in a search of the upstairs of a home in which he was living. He contends that probable cause supported only a search of the basement of the home, which he contends was a separate apartment. He challenged both the affidavit in support of the search warrant and the conduct of the officers who executed it.

Our review of the record of the suppression hearing led us to conclude that the focus of that hearing and the court's original findings and conclusions was on execution of the warrant. Because we perceived arguable discrepancies between the search warrant affidavit and information on which the officer preparing it claimed to rely, we concluded that further review by the trial court was needed. We remanded with directions to the trial court to determine whether the affidavit was deliberately or recklessly misleading and, if it was, whether a reformed affidavit fairly representing the information available would have established probable cause to search the entire residence or only a basement apartment.

On remand, the trial court found that Mr. Traub did not show that the officer who applied for the warrant intentionally or recklessly omitted material information from the search warrant affidavit. Mr. Traub appeals again, arguing that the trial court abused its discretion in determining that he was not entitled to a *Franks*[1] hearing. We find no abuse of discretion and affirm.

SUPPLEMENTAL FACTS AND PROCEDURE

The facts and procedural background through Mr. Traub's judgment and sentence are adequately set forth in our original decision, *State v. Traub*, noted at 178 Wn. App. 1009, 2013 WL 6244099.

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

Following our remand, the trial court reviewed the original transcript of the suppression hearing, heard the argument of counsel, and concluded that no intentional or reckless disregard for the truth in making application for the search warrant was demonstrated. It therefore denied the defense request for a *Franks* hearing. This was one of the possible outcomes contemplated by our remand.

Mr. Traub appeals, assigning error this time to the following finding of fact and conclusions of law:

> FINDING OF FACT
>
> . . . .
>
> 2. Deputy Stearley referred to the basement of the residence as the basement "apartment." He didn't describe it as an apartment. Deputy Stearley's use of the term "apartment" is a factor to be considered but is not a legal conclusion.[2]
>
> . . . .
>
> CONCLUSIONS OF LAW
>
> . . . .
>
> 2. The Defendant has not made a substantial preliminary showing that the affidavit includes any intentional, deliberate or reckless inaccuracies or omissions.
>
> 3. The Court finds that Detective Tucker's affidavit did not include factual inaccuracies or omissions that were material or made in reckless disregard for the truth.
>
> 4. Even if the information about the reference to an apartment had been included in the search warrant affidavit, Detective Tucker rebutted any concern it was a multi-unit dwelling with his independent research that he conducted. Any omission was not material to a determination of probable cause.

[2] Mr. Traub does not assign error to the first sentence of this finding, but we include it for context.

> 5. The fact that Johnnie Traub let the officers in the basement is consistent with someone who viewed the entire home as a single unit. The evidence indicated that Mr. Traub felt he had a right to open the door and he did. This indicates that he had a right to be in the entire home, including the upstairs and the basement.
> 6. Based on the information available to Detective Tucker at the time he prepared his affidavit in support of the search warrant, no Franks hearing is warranted in this case.

Clerk's Papers at 60-61.

ANALYSIS

Relevant law addressing the constitutional requirement for a search warrant supported by probable cause is adequately addressed in our prior opinion and for the most part will not be repeated. We concluded:

> We begin with the presumption that the affidavit supporting a search warrant is valid. *State v. Atchley*, 142 Wn. App. 147, 157, 173 P.3d 323 (2007). To be entitled to a *Franks* hearing, a defendant must make a substantial preliminary showing that the affidavit includes deliberate or reckless inaccuracies or omissions. "If the defendant makes this preliminary showing, and at an evidentiary hearing establishes the allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit and a determination made whether, as modified, the affidavit supports a finding of probable cause." *[State v.] Chenoweth*, 160 Wn.2d [454], 469[, 158 P.3d 595 (2007)]. The *Franks* test for material misrepresentations also applies to allegations of material omissions. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). If the affidavit, reformed to correct material inaccuracies or omissions, fails to support probable cause, the warrant will be held void and evidence obtained pursuant to it will be excluded. *Chenoweth*, 160 Wn.2d at 469.

State v. Traub, 2013 WL 6244099 at *6.

We review a trial court's denial of a *Franks* hearing for abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985). A trial court's finding on whether an affiant deliberately excluded material facts is a factual determination, upheld unless clearly erroneous. *State v. Clark*, 143 Wn.2d 731, 752, 24 P.3d 1006 (2001). A factual determination is not clearly erroneous if supported by substantial evidence. *State v. Atchley*, 142 Wn. App. 147, 154, 173 P.3d 323 (2007). Substantial evidence exists if there is sufficient evidence in the record such that a fair-minded person would be persuaded of the truth of the finding. *Id.* "[G]reat deference is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity." *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

"To satisfy the *Franks*' intentional . . . requirement for an *omission*, the defendant must show that facts were omitted 'with the intent to make . . . the affidavit misleading.' Stated otherwise, the omission must be '*designed to mislead*' or must be made 'in *reckless disregard of whether [it] would mislead.*'" *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008) (alterations in original) (citation omitted) (quoting *United States v. Colkley*, 899 F.2d 297, 300-01 (4th Cir. 1990)). An omission will be considered to be made in reckless disregard for the truth if the affiant "'"'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit."'" *Clark*, 143 Wn.2d at 751 (quoting *State v. O'Connor*, 39 Wn. App. 113, 117, 692 P.2d 208 (1984) (quoting *United*

States v. Davis, 617 F.2d 677, 694 (D.C. Cir. 1979) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)))). "Such 'serious doubts' are 'shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" *Clark*, 143 Wn.2d at 751 (quoting *O'Connor*, 39 Wn. App. at 117). "Negligent omissions will not undermine the affidavit." *O'Connor*, 39 Wn. App. at 118.

At the 2012 suppression hearing, the trial court heard testimony from Deputy Christopher Stearley, who had responded to a domestic violence call and observed marijuana plants in the basement of the home where Mr. Traub was living; Robert Tucker, a detective with the local drug task force, to whom Deputy Stearley reported what he saw and who thereafter prepared the affidavit in support of a warrant to search the home; and Mr. Traub. The court saw a photograph of the home. Detective Tucker testified to what he knew at the time he wrote the affidavit.

> [DETECTIVE TUCKER] I've been at the actual address off the—Deputy Stearley's report. I checked in our current data base, which is Spillman, and it just showed the—the actual address with no subunits within it.
> [THE STATE] Okay. So you didn't find any, you know, Number One or Number A or anything?
> [DETECTIVE TUCKER] No.
> [THE STATE] Did it distinguish different units within the residence?
> [DETECTIVE TUCKER] No.
> [THE STATE] Did you obtain a map or an earth map of the residence?
> [DETECTIVE TUCKER] Yes. I actually pulled up Yakima County GIS and pulled up the assessor's site on it which listed it just as a single occ— there was no listing as like an apartment or duplex and then the GIS showed it to be like a standard house.

> [THE STATE] Okay. It was listed as a single family dwelling?
> [DETECTIVE TUCKER] I don't recall it actually using those words but it was basically just a residential—it didn't list it out into—normally if you have apartments or duplexes they're kind of specified and then there's separate pictures that indicate that and—especially in the GIS website.
> [THE STATE] Okay. And you didn't have that for this particular address?
> [DETECTIVE TUCKER] No. It just showed the—the residence itself and I believe one large outbuilding.

Report of Proceedings (RP) (Jan. 6, 2012) at 22-23.

While our prior opinion sought clarified findings because of references in Deputy Stearley's report to having responded to a basement apartment, we did not view those references as establishing any intent to mislead or recklessness. They only demonstrated that a potentially material omission had been identified that required review by the trial court.

The trial court's supplemental findings and conclusions do not attach importance to Deputy Stearley's mention of an apartment. More important to the trial court were Detective Tucker's independent research into the character of the residence and the fact that Mr. Traub opened the basement door with a screwdriver so that officers could enter, indicating that he had a right to be in the entire home. Where the trial court has weighed the evidence, our role as a reviewing court is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. We will not substitute our judgment for the trial court's,

weigh the evidence, or adjudge witness credibility. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

There was sufficient evidence in the record to support the trial court's second finding of fact and its implicit finding that Detective Tucker did not intentionally or recklessly omit Deputy Stearley's use of the words "apartment" or "basement apartment." As the court noted in its oral ruling, the deputy *called* the basement area an apartment, but he didn't *describe* it as an apartment. RP (Mar. 17, 2014) at 39. And there was sufficient evidence from which a fair-minded person could be persuaded that Detective Tucker's omission was not made with the intent to mislead. The findings support the trial court's conclusion that Mr. Traub failed to make a substantial preliminary showing that the affidavit includes deliberate or reckless inaccuracies or omissions. On that basis, Mr. Traub was not entitled to a *Franks* hearing.

Mr. Traub makes an alternative argument that there was no probable cause supporting the issuance of a search warrant for the entire home, which he contends was argued by the briefing of his original appeal. But that briefing provides no legal authority or argument as to why, if the home was or was reasonably believed to be a single–occupancy structure or a community living arrangement, the observation of the marijuana plants did not provide probable cause supporting the issuance of a search warrant for the entire structure. Given the absence of citation to any supporting legal authority, we will not consider the argument further. RAP 10.3(a)(6).

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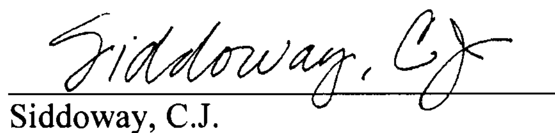
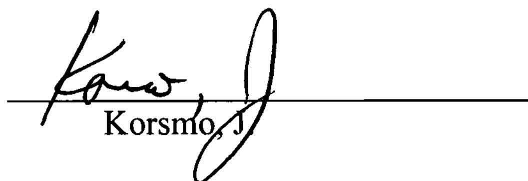
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

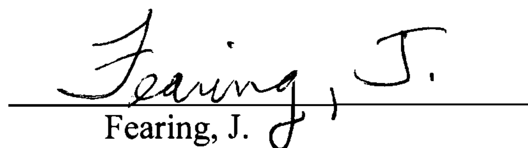


Siddoway, C.J.

WE CONCUR:



Korsmo, J.



Fearing, J.