

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2009-363 & 3009-364

JUNE TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Addison Circuit
	}	
Kassandra L. Cole	}	DOCKET NO. 419-9-08 Ancr
		Trial Judge: Cortland T. Corsones
State of Vermont	}	
	}	
v.	}	
	}	
	}	
Ronald T. Coble	}	DOCKET NO. 418-9-08 Ancr

In the above-entitled causes, the Clerk will enter:

Defendants in these consolidated appeals contend the trial court erred in denying their motion to suppress evidence seized pursuant to a search warrant. They assert that material information omitted from the underlying affidavit undermined the finding of probable cause. We affirm.

The record evidence may be summarized as follows. On August 27, 2009, a Vermont state trooper made a traffic stop in Rutland and discovered that the driver had an outstanding warrant in New York for a drug-related offense and was driving with a suspended license. The driver was arrested and processed at the State Police barracks, where she surrendered heroin that was in her possession. During her processing, the officer asked the driver where she had obtained the heroin. She responded that it was purchased from several individuals at a trailer in Goshen and described how to drive there. The officer asked her whether she would be willing to make a controlled buy from the same individuals, stating that in return he would speak with the State's Attorney on her behalf. The driver was released without making a firm commitment, but returned the next day and provided a written statement to the officer describing in detail the location of the trailer, the circumstances of her recent heroin purchase and previous purchases, and a description of the sellers. The informant's statement was used to support a successful search-warrant application, which led to the arrest of the two defendants in this appeal and a third individual, Rondelle Esters, on trafficking and possession of drug charges. The affidavit in support of the search warrant did not include any information about the officer's offer to speak to the State's Attorney on behalf of the informant.

Defendants and Esters filed a joint motion to suppress the evidence seized pursuant to the search. The trial court denied the motion, concluding that the informant's statements were reliable and supported a finding of probable cause. Esters appealed, and this Court affirmed.

State v. Esters, No. 2008-522 (Oct. 8, 2009) (unpub. mem.) available at: <http://www.vermontjudiciary.org/d-uepo/eo08-522.pdf>. Thereafter, defendants filed a second motion to suppress, asserting that the omitted information concerning the trooper's offer of leniency undermined the informant's reliability and the finding of probable cause. Following a hearing in April 2009, the trial court issued a written decision, concluding that the officer's omission amounted to a reckless disregard for the truth, but that the additional information did not negate the finding of probable cause. This appeal followed.

The governing principles are well settled. Our review of the trial court's finding of probable cause "is deferential." State v. Robinson, 2009 VT 1, ¶ 6, 185 Vt. 232. Probable cause exists for the issuance of a search warrant where information in an affidavit supports a reasonable conclusion that "a crime has been committed and that evidence of the crime will be found in the place to be searched." State v. Zele, 168 Vt. 154, 157 (1998). Under V.R.Cr.P. 41(c), a finding of probable cause "shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished." Factors supporting an informant's credibility on a particular occasion include whether the informant is identified or has supplied information against his or her penal interest, or whether the police have independently corroborated the information. State v. Goldberg, 2005 VT 41, ¶ 13, 178 Vt. 96. We examine the totality of the circumstances to determine probable cause, keeping in mind that affidavits are to be viewed in a common-sense manner and not subjected to "hypertechnical scrutiny." State v. Ballou, 148 Vt. 427, 434 (1987).

Under Franks v. Delaware, 438 U.S. 154, 155-56 (1978), a finding of probable cause to support a search warrant may be challenged on the ground that the supporting affidavit contains false or misleading information, or that material information has been omitted. See Zele, 168 Vt. at 157 (applying Franks principles). A defendant must establish by a preponderance of the evidence that the government agent "intentionally, knowingly, or with reckless disregard for the truth" included in the affidavit false information or omitted material information. Id. (quotation omitted); accord Franks, 438 U.S. at 155-56. If a defendant satisfies this initial burden, the reviewing court will assess the affidavit as though the false information had not been included, or as though the omitted information had been supplied, to determine whether probable cause was established. Zele, 168 Vt. at 157; accord Franks, 438 U.S. at 156.

As earlier noted, the trial court here ruled that defendants met their initial burden under Franks, having established that the investigating officer acted with reckless disregard in omitting from the affidavit his promises to intervene with the State's Attorney on the informant's behalf. The trial court concluded, nevertheless, that it would have found probable cause even if this information had been included in the affidavit; the court found in this regard that the informant's "hope" of leniency did not undermine her credibility and that her statements admitting to five separate purchases of heroin from defendants were against penal interest.

Defendants argue that, in so ruling, the trial court misapprehended the record in two respects: first, by understating the officer's inducement to the informant, and second, by overstating the extent to which the informant's statements were against penal interest. On the first point, defendants cite the trial court's finding that the officer promised to "try to make [the] DLS 'go away,'" asserting that, in fact, the officer's promises of leniency extended to the drug purchases as well. The court's discussion and findings, however, plainly recognize that the informant was facing an array of charges, including possession of heroin, and that the officer's inducements applied to all of them. The court observed in this regard that the officer recklessly failed to "include anything [in the affidavit] to the effect that he had advised [the informant] that

he would talk to the State’s Attorney about leniency concerning any of [the informant’s] pending charges.”

Defendants also maintain that the trial court erred in characterizing the inducements as offering a mere “hope” or possibility of lenience, noting that at one point during the videotaped processing of the informant the officer told her that he could “probably make this stuff go away for you.” The officer also expressly cautioned the informant during processing that he could not “guarantee” her anything, and testified that he was careful to tell her that he would speak with the State’s Attorney but could not make any promises of leniency. Furthermore, the record shows that the informant revealed the location of the drug buys before the officer made any offers of assistance. Thus, assuming for the sake of argument that such inducements might promote untruthfulness, the record evidence fully supports the trial court’s conclusion that the inducements, while improperly omitted from the affidavit, do not undermine the informant’s basic credibility or the finding of probable cause.

Defendants further claim that the court mischaracterized the informant’s statements as against penal interest and overstated their importance. Defendants correctly note that an informant’s admission against penal interest is just “one [factor] bearing on the informants’ reliability,” see Ballou, 148 Vt. at 435 n.3, and assert that the trial court incorrectly assigned excessive weight to it. Nothing in the trial court’s decision, however, suggests that it improperly inflated this factor in assessing the informant’s credibility or overlooked the possibility that her statements may have been to some degree self-serving. The trial court was in the best position to assess the evidence, and we find no basis to conclude that its findings concerning the informant’s credibility were unsupported or improperly weighted. Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice