

IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-0162

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JESSE JON HARBACH,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DELAWARE COUNTY
THE HONORABLE MONICA L. ZRINYI WITTIG, JUDGE

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

- I. The district court's ruling that there was a *Franks* violation misapplied the applicable case law and contained erroneous findings of fact that are clearly not supported by the evidence.**

Authorities

Franks v. Delaware, 438 U.S. 154 (1978)
Illinois v. Gates, 462 U.S. 213 fn. 6 (1983)
United States v. Butler, 594 F.3d 955 (8th Cir. 2010)
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State v. Paterno, 309 N.W.2d 420 (Iowa 1981)

ROUTING STATEMENT

The State does not seek retention. This appeal can be decided based on existing legal principles and transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3); *Franks v. Delaware*, 438 U.S. 154, 155 (1978); *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998); *State v. Niehaus*, 452 N.W.2d 184, 186 (Iowa 1990).

STATEMENT OF THE CASE

Nature of the Case

The State appeals after the district court granted Defendant Jesse Harbach's motion to suppress evidence seized pursuant to a search warrant. The Honorable Monica Zrinyi Wittig presided over the relevant proceedings.

Facts & Course of Proceedings

The motion to suppress record reveals the following facts: Delaware County Deputy Mitch Knipper is a ten-year veteran who has handled numerous investigations involving drunk driving. MTS Tr. p.21, lines 20-p.22, lines 15. On May 21, 2021, at about 5:30 p.m., Deputy Knipper was dispatched to a single vehicle rollover accident near Dehli, in Delaware County. *Id.*p.4, lines 19-24; p.9, lines 1-3. When he arrived at the scene of the crash, paramedics were already

attending to the person involved in the accident. *Id.*p.5, lines 1-9.

State Exhibit 4 includes video from Deputy Knipper's body camera.

See State Ex.4. As captured by the video, Deputy Knipper approaches and talks briefly with Harbach as he is being attended to by paramedics. Harbach informs Deputy Knipper that there was a problem with his brakes that led to the crash. *See* State Ex.4 at 0:36-0:55; MTS Tr.p.5, lines 14-24.

Deputy Knipper then proceeds to investigate the crash as paramedics move Harbach from the roadside to the ambulance. He observes that Harbach's vehicle had veered off the road as it was turning the corner. *See* State Ex.4 at 4:28-7:25.

After Harbach had been moved to the ambulance, Deputy Knipper entered the back of the ambulance, where Harbach was located, and made further contact with Harbach. MTS Tr.p.6, lines 17-19. He observed that Harbach "had watery, bloodshot eyes" and his speech was somewhat mumbled and slurred. He also "detected the odor of alcoholic beverages coming from his person." *Id.*p.6, lines 17-23. Deputy Knipper asked Harbach his date of birth and where he was coming from; Harbach responded by providing his date of birth but stated he could not talk at that point because it hurt to talk. *See* State

Ex.4 at 9:03-10:02. The video then shows that Deputy Knipper stepped out of the ambulance briefly before coming back in to make more inquiry. *Id.* at 10:56-12:07. Deputy Knipper asks Harbach once again about his whereabouts, but Harbach just shakes his head and refuses to answer. *Id.* He also refuses to answer whether he had anything to drink. *Id.* Harbach was then transported to the hospital.

Based on his observations, Deputy Knipper went to the Sheriff's applied for a search warrant at about 6:00 p.m. MTS Tr.p.9, lines 1-7. The warrant stated that at about 17:45 hours, Deputy Knipper observed the following signs of impairment exhibited by Harbach: bloodshot eyes, watery eyes, slurred speech and smell of alcoholic beverage coming from [Harbach's] person. *See* State Ex.1; Exh. App. 4-10.; MTS Tr.p.22, lines 16-p.23, lines 20.

On October 11, 2021, the State charged Harbach by trial information with the offense of operating while intoxicated in violation of Iowa Code § 321J.2. *See* OWCR014367 Trial Info (10/11/2021); App. 4-5. On December 13, 2021, Harbach filed a motion to suppress. *See* Motion to Suppress (12/13/2021); App. 11-12. The motion stated that Deputy Knipper lacked "probable cause to request a horizontal gaze nystagmus test and/or a preliminary breath

test” and that without those tests, “there was no probable cause to support a warrant for a blood test.” *Id.* at ¶ 16; App. 12. The motion further alleged that the warrant application “contained a false allegation that the Deputy smelled alcohol, when the test results ultimately showed that there was no alcohol in the blood.” *Id.* at ¶ 17; App. 12. Harbach then argued in the motion that because the warrant “was ill-gotten, and because there was no probable cause to support either warrant or search,” the blood draw should be inadmissible. *Id.* at ¶ 18; App. 12.

The State resisted. *See* Resistance (12/16/2021); App. 13-14. In its resistance, the State denied that Deputy Knipper had made false statements in the affidavit. *See Id.* at ¶ 1. Citing to *Franks v. Delaware*, the State argued that Harbach could not show that Deputy Knipper had **(1)** intentionally made false or untrue statements or otherwise practiced fraud upon the magistrate; or **(2)** that a material statement made by such agent or representative is false, whether intentional or not. *Id.* at ¶ 2; App. 13. The State further argued that Harbach’s “medical records from [the first hospital he was taken to] show[ed] that he had an ethanol level of 42 (.042) on May 21, 2021, at

6:30 p.m.” thus supporting the Deputy’s observation that Harbach smelled of alcohol. *Id.* at ¶.4; App.13-14.

In an order filed on January 13, 2022, the court granted Harbach’s motion to suppress, finding “The Defendant has established by a preponderance of the evidence that the warrant contained false statements. The offensive statements extracted from the application leaves the remaining contents lacking in probable cause.” *See* Order Mot. To Suppress (1/13/2022); App. 15-18. In the ruling on the motion to suppress, the court made the following findings of fact:

On May 21, 2021, Deputy Sheriff Mitch Knipper was dispatched to a roll-over motor vehicle accident at the area of 230th Avenue and 250th Street in Delaware County, Iowa. Upon arrival he observed skid marks on the roadway with a path that could be traced back to the corner intersection leading to the location of the Defendant’s vehicle. The 2000 Chevrolet Silverado pick-up had rolled over and was on its top. There were EMT personnel attending the Defendant. His head was in a neck brace and he was on a stretcher. One of the EMT indicated the Defendant said he was avoiding an Amish buggy that was in the roadway. As this conversation occurred, the Defendant indicated his brakes were shot. He said, “I hit the brakes and it went to the floor.” He said he almost made it. Then the truck rolled. He stated the truck landed on my back. He was only one in the vehicle. Witnesses were working in the area. They heard the squeals of the tires and walked toward the scene. They saw the truck tipped over and saw the Amish buggy, which was parked on the side of the road. The driver of the buggy took off and left the scene.

The deputy asked if the men knew who the person on the ground was and they indicated it was Jesse Harbach.

See Order Mot. To Suppress (1/13/2022); App. 15-18. Additionally, the court concluded that Deputy Knipper included false statements in the warrant application. The court stated,

The Court's observation of the body cam video does not show a person with bloodshot or watery eyes. The Defendant's speech was not slurred. At times he was muttering due to the pain but other times he was forceful in asking that someone have the questioning stop due to the pain. The deputy stated he smelled gasoline in the outdoor space surrounding the location of the Defendant. The deputy was inside the ambulance for a very short period of time. Due to the fact the EMTs were attempting to render aid and use appropriate equipment, the deputy testified he did not know if the ethanol level is the same as a BAC. deputy was asked to exit, as he was in the way of their efforts. He left the ambulance. But, before it left the scene, he entered one final time. Again, it was a very short period of time. It is unclear what he could smell in the ambulance given all the medical supplies contained inside and the equipment being used on the Defendant.

Id.; App. 16-17. Therefore, the court concluded: "The Defendant has established by a preponderance of the evidence that the warrant contained false statements." *Id.* at ¶ 3; App. 15. After excising those statements, the court found the warrant lacked probable cause and ordered all evidence suppressed. *Id.*

ARGUMENT

- I. The district court’s ruling that there was a *Franks* violation misapplied the applicable case law and contained erroneous findings of fact that are clearly not supported by the evidence.**

Preservation of Error

Error was preserved. Harbach moved to suppress on grounds that the State lacked probable cause to support a warrant for a blood draw. Though he claimed the warrant application “contained a false allegation that the Deputy smelled alcohol,” his motion did not allege a *Franks* violation, and it did not cite to *Franks v. Delaware*, nor did it allege an intentional false statement. The State resisted. And following a suppression hearing, the district court ruled that there had been a *Franks* violation.¹ That ruling preserved error for review by this Court.

¹ The State questions whether Harbach should have received a *Franks* hearing in the first place. The defendant is not entitled to an evidentiary hearing until he makes a “substantial preliminary showing” of falsity in the warrant application. *Franks v. Delaware*, 438 U.S. 154, 170 (1978). “[T]he challenger’s attack must be more than conclusory.” *Id.* at 171. The allegations of deliberate falsehood or of reckless disregard for the truth “must be accompanied by an offer of proof” and should “point out specifically the portion of the warrant affidavit that is claimed to be false.” *Id.* Harbach’s challenge did not meet the substantial showing to require an evidentiary hearing. His motion to suppress included nothing more than a conclusory allegation that “The warrant request contained a false allegation that the Deputy smelled alcohol, when the test results ultimately showed there was no

Standard of Review

“We review questions of a constitutional dimension de novo, based on the totality of the circumstances.” *State v. McNeal*, 867 N.W.2d 91, 99 (Iowa 2015) (quoting *State v. Johnson*, 756 N.W.2d 682, 686 (Iowa 2008)) “However, we do not make an independent determination of probable cause; rather, we determine ‘whether the issuing judge had a substantial basis for concluding probable cause existed.’” *Id.* (quoting *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997)).

Merits

In *Franks v. Delaware*, 438 U.S. 154, 155 (1978), the United States Supreme Court determined that a person could challenge the veracity of a police affiant where 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 statement was necessary

alcohol in the blood.” Motion to Suppress (12/13/2021); App. 11-12. He did not argue that the information he claimed was false, was intentionally falsified and did not provide an offer of proof to support his allegation, so his *Franks* challenge should not have proceeded to an evidentiary hearing. However, the State did not challenge the sufficiency of Harbach’s pleadings.

to a finding of probable cause. The Iowa Supreme Court recognized the *Franks* test in *State v. Paterno*, 309 N.W.2d 420, 424 (Iowa 1981) and adopted it in *State v. Groff*, 323 N.W.2d 207 (Iowa 1982). The burden is on the defendant to demonstrate by a preponderance of the evidence that a warrant was obtained by intentional or material misrepresentations such that the officer “was purposely untruthful with regard to a material fact in his . . . application for the warrant. . . .” *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998) (citing *State v. Niehaus*, 452 N.W.2d 184, 186 (Iowa 1990)); see also *State v. Barger*, 511 N.W.2d 632 (Iowa App. 1993). “To impeach a search warrant, the burden rests on the defendant to show ‘allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.’” *State v. Green*, 540 N.W.2d 649, 656 (Iowa 1995) (quoting *Franks v. Delaware*, 438 U.S. 154, 155 (1978)). “The officer's conduct must be more than negligence or mistake.” *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998). Under this standard, an innocent or negligent misstatement is inadequate to challenge the validity of a search warrant. *State v. Niehaus*, 452 N.W.2d at 187.

Again, no *Franks* hearing was requested in this case and no preliminary showing of substantial falsehood was made. The court did not specifically find any statement by Deputy Knipper to be an “intentional” falsehood. However, one of the statements that the court finds false is the deputy’s statement that he smelled alcohol emanating from the body of the defendant. *See* Order Mot. To Suppress (1/13/2022); App. 15-18. Citing the blood test results obtained pursuant to a second warrant, the court asserts that “it begs the question, how can one smell what is not present.” *Id.* This statement is problematic in many respects. First, it violates the cardinal rule that the court does not consider matters that are subsequent to the warrant to determine the validity of the issuance of the warrant. “It is a truism that search warrant is valid only if probable cause has been shown to the magistrate and that an inadequate showing may not be rescued by post-search testimony on information known to the searching officers at the time of the search.” *Illinois v. Gates*, 462 U.S. 213, 294 fn. 6 (1983) (Stevens, J. dissenting) (citations omitted). The State submits an adequate showing of probable cause is not undermined by subsequent information either. Second, it is axiomatic that alcohol in the blood

dissipates over time. *State v. Johnson*, 744 N.W.2d 340, 342 (Iowa 2008) (alcohol naturally dissipates from the body shortly after its consumption). The record indicates that the second blood sample for testing was withdrawn several hours after the accident. MTS Tr.p.9, lines 1-p.10. lines 14; p.11, lines 23-p.12, lines 22. That no alcohol was present then is no indicator of the presence of alcohol at an earlier time. Certainly, no expert evidence was offered to establish that alcohol if present at the scene would have been present in the system hours later. Finally, if evidence obtained subsequent to the warrant can be considered by the court in assessing the officer's credibility, the court's "question" is answered by the blood test result obtained pursuant to the first warrant. *See Davis v. State*, 144 S.W.2d 192, 201-02 (Texas Ct. App.-Waco 2004) (recognizing court is not limited to four corners of warrant application in *Franks* challenge). Exhibit 3 admitted at the suppression hearing reveals the presence of ethanol in the defendant's blood at 18:30 or 6:30 p.m. on May 21, 2021, less than an hour after the accident. *See also* MTS Tr.p.9, lines 1-p.10. lines 14; p.11, lines 23-p.12, lines 22; p.26, lines 11-23.

The State submits the record does not support the district court's conclusion that the officer lied in other statements that he

made as well. Critically, the court based this determination of its own review of the body camera video of Deputy Mitch Knipper. *See* Order Mot. To Suppress (1/13/2022); App. 15-18. The warrant application recited that the deputy had observed bloodshot and watery eyes and slurred speech. *See* State Ex.1; Exh. App. 4-10. The court concluded: “The Court’s observation of the body cam video does not show a person with bloodshot or watery eyes. The Defendant’s speech was not slurred.” *See* Order Mot. To Suppress (1/13/2022); App. 15-18. The court does acknowledge that the defendant “muttered” while speaking but attributes that to the pain he was experiencing. *Id.* The state would submit this is a difference of opinion, not fact, and should not permit a finding that the officer was being deceitful.

A similar criticism can be leveled at the conclusion that the video does not reveal bloodshot or watery eyes. The video is good but nowhere on the video is there any closeup of the eyes that would permit a definitive conclusion on this matter. The State submits that the best view of the defendant’s eye appears at approximately 11:14 on the video counter. It appears that at approximately 11:17, a tear runs from the corner of the defendant’s eyes. Additionally, he is blinking in a manner at that time that suggests watery eyes. Finally, the image is

simply not clear enough to conclude whether the eyes are bloodshot or not. Even if the court believed the video did not show the facts to which the officer testified; it does not follow that the officer made an intentional false statement. These are facts upon which reasonable people could disagree.

To even warrant a *Franks* hearing, the defendant must make a “substantial preliminary showing” of a deliberate falsehood or reckless statement. *Franks*, 438 U.S. at 155–56; *Groff*, 323 N.W.2d at 208. The defendant offered nothing in his motion to suppress and never requested a *Franks* hearing. Viewing the video creates, at best, ambiguity over what is revealed and does not point substantially to falsehood. As this Court emphasized in *Goff*:

To mandate an evidentiary hearing the challenger's [preliminary showing] must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished or their absence satisfactorily explained.

Groff, 323 N.W.2d at 209 quoting *Franks*, 438 U.S. at 171-72. The motion to suppress, which was not a request for a *Franks* hearing,

made only a conclusory allegation that the officer lied about the smell of alcohol. The motion did not even challenge the assertions of blood shot and watery eyes or slurred speech. The State did not object to the litigation of the *Franks* claim, but to be fair there was no request for a *Franks* hearing. At any rate, the evidence did little to further the allegations that would have supported the grant of a hearing in the first place. The standard requires the court to find circumstances evincing an obvious reason or reasons to doubt the veracity of the allegations. *State v. Niehaus*, 452 N.W.2d 184, 187 (Iowa 1990). “A showing of deliberate or reckless falsehood is not lightly met.” *United States v. Butler*, 594 F.3d 955, 961 (8th Cir. 2010). Further, the court does not actual satisfy the standard in this case. While the court finds the defendant has sustained his burden, it does not actually find that the statements were “intentional” false statements. They could be false without being intentionally false. They could just be wrong. To the extent the district court found that the officer did not state in his application whether Harbach was in pain, the officer applying for a search warrant “is not required to present all inculpatory and exculpatory evidence to the magistrate,” only that evidence which would support a finding of probable cause. *State v. Johnson*, 312,

N.W.2d 144, 146 (Iowa Ct. App. 1981). In sum, because the district court erred in misapplying the applicable case law and made erroneous fact findings that are not clearly supported by the evidence, this Court should reverse the order suppressing evidence seized during the execution of the search.

CONCLUSION

For all the reasons stated above, the State respectfully requests this Court to reverse the district court ruling suppressing evidence of Harbach's blood draw.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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