IN THE COURT OF APPEALS OF IOWA

No. 7-474 / 06-1147
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellant,

vs.

REGGIE RAY BRANNON,
Defendant-Appellee.

Appeal from the Iowa District Court for Lee (North) County, William L. Dowell, Judge.

Interlocutory appeal from court's decision to compel the State to reveal the identity of its confidential informant. **REVERSED.**

Thomas J. Miller, Attorney General, Karen Doland and Mary Tabor, Assistant Attorneys General, and Michael P. Short, County Attorney, for appellant.

Clemens A. Erdahl, Cedar Rapids, and Eric D. Tindal, Williamsburg, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

In this interlocutory appeal, the State challenges the district court ruling requiring the State to reveal whether one specific person was the confidential informant in a search warrant application. We reverse.

I. Background Facts and Prior Proceedings

In December of 2005 a person approached Stacy Weber, a deputy at the Lee County Sheriff's Department, with information that Reggie Ray Brannon was manufacturing and trafficking marijuana. After a brief investigation, Weber prepared an application for a warrant to search Brannon's residence. Weber also prepared an affidavit in support of the warrant application. A portion of the affidavit appears below:

> Reggie Ray Brannon has a long history of growing and trafficking in marijuana. He was convicted of possession with intent to deliver marijuana in April, 1996 [in] North Lee County, Iowa. Intelligence information has continued to indicate that Brannon is still involved in trafficking in marijuana.
>
> An informant who requests to remain anonymous for fear of retaliation has provided detailed information. Part of this information has been cooberated [sic] by others. I believe that this information is creditable [sic] because of the detail and the partial cooberation [sic].
>
> This confidential informant indicates that the informant has first hand personal knowledge of Reggie Brannon manufacture and trafficking in marijuana. The informant has been to Brannon's on a regular basis, at least one time a week, through this week. Reggie grows marijuana in several small patches. He sells both small and large amounts. The detail comes from where he keeps his marijuana. It is in a barrel buried in the ground underneath a silver Toyota parked at the Brannon residence. The informant indicates that there would be multiple pounds of marijuana in the barrel. He keeps his money in a hole in the wall, off the basement stairs. He has a triple beam balance scales which he keeps in a little green outbuilding, under a false bottom of a cabinet.
>
> This informant also provided information regard [sic] Jenny Fraise and Steve Morris, two individuals the task force believes to be engaged in the manufacture of methamphetamine. Morris has a

> warrant for his arrest out of Missouri. The informant advised the location where Fraise and Morris were living and that Morris was using the name Cory Younck. This location was on Apple River Rd., in Hancock County, Illinois. Deputy Chuck Sirey went to that location, confirmed that people fitting the description of Jenny Fraise and Steve Morris were living in a trailer, stealing water from the property owner. There was a note signed by "Cory Younck." This informant also knew that Fraise and Morris had been at the Woods motel in Donnellson. That information has already been confirmed by the task force.

A district court judge approved the application, finding probable cause to search Brannon's home. As a result of the items found in the search, Brannon was charged with possession with intent to deliver marijuana, a drug tax stamp violation, keeping a drug house, and possession of methamphetamine.

Brannon's attorney filed a motion to suppress the evidence obtained pursuant to the warrant, claiming he had discovered the informant's "probable identity" and therefore there were "numerous grounds, not included in the warrant affidavit, for the Judge to find the informant not credible."

At the suppression hearing, the State asked that the motion be dismissed because Brannon had not filed an affidavit or any other documentation necessary to meet the preliminary requirements for a *Franks v. Delaware* proceeding challenging the veracity of a warrant application.[1] In spite of Brannon's failure to file an affidavit or make an offer of proof to support his motion, the court allowed Brannon to present evidence.

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[1] When a defendant challenges a search warrant, a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), is required if the defendant makes a substantial preliminary showing that (1) a knowingly and intentionally false statement, or a statement made with reckless disregard for the truth, was included by the affiant and (2) the statement was necessary to the finding of probable cause. *State v. Groff*, 323 N.W.2d 204, 208 (Iowa 1982). If that hearing firmly establishes the falsity of the challenged information, such information must be disregarded in the court's ultimate determination of probable cause. *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676, 57 L. Ed. 2d at 672.

Brannon's attorney called Weber to the stand and proceeded to question him on the statements made by the confidential informant. The questions then turned to whether Weber knew that Brannon had accused a woman named P.C. of stealing $6000 from him. Weber confirmed that he knew this information before he applied for the search warrant. He was then asked whether he knew that P.C. had been recently released from a hospital psychiatric ward to Brannon's care. Weber denied knowing that information. Brannon's attorney then asked Weber whether P.C. was the confidential informant in this case. The State immediately objected, citing the State's privilege to maintain the confidentiality of its informants.

Brannon's attorney responded to the objection by telling the court he had discovered the confidential informant's identity by reading a trial information in a different case and noticing a "coincidence" between the two cases.

The court did not rule on the State's objection. Instead, it ended the proceeding and gave Brannon "one week to file appropriate documents supporting the Motion to Suppress, as required by *Franks*, and any documents needed to divulge the identity of the confidential informant, and any motions or pleadings with respect to the mental health files."

Brannon's attorney filed three documents with the court. The first was a "Statement of Supporting Reasons to Hold Evidentiary Hearing" whereby he alleged he had met the premilinary showing requirement under the *Franks* doctrine. Specifically, he claimed Weber did not inform the court that Brannon had accused P.C. of stealing approximately $6000 and that P.C. had been

involuntarily committed and recently released to Brannon's care. Brannon also submitted an affidavit affirming these accusations.

Brannon's attorney also filed a "Motion to Compel Disclosure of Confidential Informant" and alleged that he had made "a significant showing that the Confidential Informant was likely [P.C.]." The motion also indicated that if P.C. was the confidential informant, then "disclosure of her identity is necessary for the Defendant to have a meaningful hearing on [his] motion to suppress."

Brannon's third document asked the court to consider P.C.'s commitment files in-camera to determine whether that information "may have impacted [the court's] determinations about [P.C.]'s credibility and reliability under the totality of the circumstances."

At the subsequent hearing, the court first ruled on the motion to compel disclosure of the informant's identity by stating:

> Based upon the record before the Court, what the Court is going to do is not require the State of Iowa to disclose the identity of the confidential informant specifically, but to state whether [P.C.] was the confidential informant.
>
> . . . .
>
> What I'm saying is the State of Iowa is going to be required to state whether or not P.C. was the confidential informant.

The State then immediately moved for an interlocutory appeal, and the court ended the hearing without entertaining the remaining motions.

Our supreme court granted the application for interlocutory appeal.

II. Standard of Review

This is an interlocutory appeal from the district court's ruling requiring the State to disclose the identity of a confidential informant. Because a constitutional issue is raised by Brannon's allegation that the deputy obtained the search

warrant without properly including all pertinent information about the credibility of the confidential informant, our review of the court's ruling is de novo. *See State v. Robertson*, 494 N.W.2d 718, 722 (Iowa 1993).

III. Merits

Procedurally, we note that Brannon's motion to compel does not exist in a vacuum; it only applies to the question of whether the informant's identity is necessary so that Brannon can have a "meaningful" *Franks* hearing. Therefore, we will first set forth Brannon's burden on the motion to compel, and then address whether he meets this burden in light of its stated purpose—to make "a substantial preliminary showing" that Weber made a false statement or misrepresentation in the warrant affidavit.

Brannon's motion to compel the State to reveal the informant's identity confronts the well-established principle that the State is privileged to withhold the identity of a person who furnishes information relating to violations of the law. *Id*. This privilege is based on the public interest in maintaining the flow of information essential to law enforcement. *Id.* This privilege is also based on the idea that "[c]ommunications of this kind ought to receive encouragement" and an informer "will usually condition his cooperation on an assurance of anonymity-to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him." *Id.* (quoting 8 J. Wigmore, *Evidence* § 2374, at 761-62 (1961)).

However, this privilege is not absolute. The State's interest in the privilege must be balanced against the defendant's need for the informant's identity. *Id*. at 723. The defendant bears the burden of showing the necessity for disclosure of

the confidential informant's identity. *Id.* The extent of this burden varies depending on the stage of the criminal proceedings. *Id.* A defendant's burden to disclose the identity of an informant at a pretrial hearing on a motion to suppress is higher than when the same motion is made in the course of the criminal trial. *Id.* at 723-24. In *McCray v. Illinois*, 386 U.S. 300, 307, 87 S. Ct. 1056, 1060, 18 L. Ed. 2d 62, 68 (1967) (citation omitted), the United States Supreme Court recognized this distinction when it stated:

> We must remember also that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege. Here, however, the accused seeks to avoid the truth. The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, not because its probative force is diluted in the least by the mode of seizure, but rather as a sanction to compel enforcement officers to respect the constitutional security of all of us under the Fourth Amendment.

See State v. Hoskins, 711 N.W.2d 720, 729-30 (Iowa 2006) (quoting same). As a result, our courts have consistently held that proof the identity of the informer "might be helpful" to the defense is not sufficient to meet this elevated burden. *State v. Todd*, 468 N.W.2d 462, 467 (Iowa 1991).

To impeach a search warrant under the *Franks* doctrine, a defendant must make the following "substantial" preliminary showing:

> 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. . . . Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

Franks, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682. The *Franks* doctrine also applies to situations involving the omission of crucial information from a warrant application. *State v. Poulin*, 620 N.W.2d 287, 289 (Iowa 2000).

Brannon claims Weber's affidavit recklessly omitted information. He proffers two reasons why his motion to suppress hinges on the informant's identity: (1) if P.C. was the confidential informant, then Weber should have disclosed that she had been involuntarily committed only months prior to the warrant application and (2) if P.C. was the confidential informant, then the officer should have included information that Brannon had previously accused P.C. of stealing his money in the affidavit.

Even if we assume, arguendo, that P.C. was the confidential informant, we find both proffered reasons would be insufficient to impeach the warrant because neither proves Weber recklessly omitted information in his affidavit.

Involuntary Commitment. Weber's testimony indicates he had no knowledge of the alleged commitment proceedings prior to the time he drafted the warrant application. Therefore, there is no basis to Brannon's claim that Weber recklessly omitted such information from the warrant application.

We also reject Brannon's claim that Weber *should have known* about the commitment proceeding and therefore included this information in the warrant application simply because the county attorney's office handled the involuntary commitment proceeding. While Weber did receive some assistance from someone in the county attorney's office, there is no reason to impute knowledge of the involuntary commitment proceeding to everyone in the county attorney's office.

Because Weber did not have any knowledge of this alleged mental health issue, Brannon cannot prove Weber recklessly omitted this information from the warrant application. Likewise, we will not invalidate the warrant simply because the confidential informant may have suffered from an undisclosed mental heath problem.

Theft Allegations. We also conclude the failure to disclose the theft allegation was not reckless within the contemplation of *Franks* because exclusion of the theft allegation may have been a necessary precaution to mask the identity of the informant. If Weber had included the theft allegation in the search warrant, Brannon would have readily identified P.C. as the confidential informant. We find this was a valid reason not to place the theft allegation in the search warrant application and therefore not an omission constituting a material misrepresentation. *See United States v. Strini*, 658 F.2d 593, 597 (8th Cir. 1981) (indicating a failure to reveal informant's identity is not a false statement within the contemplation of *Franks* when the omission was intended to protect the informant, not to enhance the contents of the affidavit).

Finally, even if the theft allegation had appeared in the warrant application, we find it would have had no effect on the probable cause determination in this case. *See Poulin*, 620 N.W.2d at 289 ("When such omissions are established, a court reviewing a magistrate's finding may determine the probable-cause issue by considering both the information contained in the warrant application and the omitted information deemed to be significant."). The test for probable cause is whether a person of reasonable prudence would believe a crime was committed on the premises or that evidence of a crime could be located there. *State v.*

Weir, 414 N.W.2d 327, 329-30 (Iowa 1987). In this case, the confidential informant gave a detailed, first-hand description of the marijuana operation. Also, other information provided by the informant was corroborated through other channels. The informant's information, even when considered in light of the informant's possible motive to fabricate, provided more than sufficient evidence for a reasonably prudent person to conclude evidence of a crime could be located at the Brannon residence. *See Illinois v. Gates*, 462 U.S. 213, 234, 103 S. Ct. 2317, 2330, 76 L. Ed. 2d 527, 545 (1983) ("[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case."). Therefore, even if P.C. was the confidential informant, Brannon's claims would still not impeach the validity of the search warrant.

IV. Conclusion

Because Brannnon failed to demonstrate how the informant's identity would help him impeach the warrant, we conclude the State's interest in protecting the confidentiality of its informants outweighs the need to disclose the informant's identity at this stage in the proceedings. Therefore, we reverse the trial court's order compelling the State to reveal whether P.C. was the confidential informant.

REVERSED.