

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3776-13T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ADAM MALKIN,

Defendant-Respondent.

Submitted November 5, 2014 – Decided November 24, 2014

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment
No. 13-04-1042C.

James P. McClain, Atlantic County
Prosecutor, attorney for appellant (James F.
Smith, Deputy Attorney General, of counsel
and on the brief).

Jacobs & Barbone, P.A., attorneys for
respondent (Louis M. Barbone, on the brief).

PER CURIAM

The State appeals, on leave granted, from an order entered by the Law Division on March 10, 2014, granting defendant's motion to suppress evidence. We reverse and remand for further proceedings.

I.

On January 31, 2013, Joseph McCaffrey ("McCaffrey"), a Special Agent with the federal Drug Enforcement Administration ("DEA") contacted Detective William Carew ("Carew") of the Atlantic County Prosecutor's Office ("ACPO") and informed him that DEA Special Agent Marc Sulkin ("Sulkin"), who was stationed at Newark Airport, had informed him that a twenty-six pound package was being transported to Atlantic City by Federal Express ("FedEx").

McCaffrey told Carew that a confidential informant, who previously had been involved in numerous seizures of narcotics, had informed Sulkin that the package contained marijuana and was going to be delivered to a self-storage facility. The informant had provided the FedEx tracking number for the package and McCaffrey conveyed that information to Carew.

The following morning, Carew conducted surveillance of the storage facility until the FedEx delivery truck arrived. He followed the driver into the building, and spoke with two of the facility's employees. Carew viewed the package and confirmed that its tracking number was the same as the number that McCaffrey had provided to him. Carew also saw defendant's name on the package. One of the employees confirmed that defendant

rented a unit at the facility and had been at the site the previous evening.

Defendant was called and told that the package had been delivered. Defendant said he was on his way to retrieve it. Defendant arrived later. He identified himself and one of the employees gave him the package. As defendant was leaving, Carew approached and asked defendant if he was Adam Malkin. Defendant acknowledged that was his name.

Carew asked defendant if the package belonged to him, and he replied, "Yes." Carew informed defendant that the package likely contained contraband. Defendant told Carew that he wanted his attorney. He said he did not know what was in the package, and then stated that the package was not his. Carew pointed to defendant's name on the package, and defendant told Carew to arrest him if he wished to do so.

Another detective in the ACPO contacted Sergeant Mark D'Esposito ("D'Esposito") of the Galloway Township Police Department. D'Esposito had been assigned to that department's K-9 unit and worked with a dog named Zito, which had been trained for a number of duties, including the detection of the odor of narcotics. D'Esposito was told that detectives from the ACPO wanted a narcotics "sniff" of a suspicious package. He proceeded to the self-storage facility and met the detectives there. The

package with defendant's name was brought outside, and D'Esposito told the detectives to take it back into the building. Inside, Zito sniffed the package and gave a positive indication that it was the source of the odor of narcotics.

Carew returned to his office and prepared an affidavit in support of an application for a search warrant. McCaffrey joined Carew and provided him with additional information he had obtained about defendant. In paragraph four of the affidavit, Carew stated:

On January 31, 2013, a reliable confidential source who has provided information in the past leading to over thirty seizures of narcotics called Special Agent Marc Sulkin of the Drug Enforcement Agency (DEA) Newark Airport Division. The source said a package of marijuana was being delivered by FedEx to 2141 Absecon Boulevard in Atlantic City. The source identified the FedEx tracking number on the package as 801815544028 and the weight of the package to be approximately 26 lbs. Special Agent Sulkin passed this information to Special Agent Joe [McCaffrey] of the DEA located in Atlantic County. Special Agent [McCaffrey] advised this affiant of this information.

Furthermore, in paragraph six of the affidavit, Carew stated that:

Special Agent [McCaffrey] advised [that defendant] was arrested in May of 2012 in Iowa. During that arrest [defendant] was in possession of marijuana and approximately \$84,000 in U.S. currency. Special Agent [McCaffrey] was also able to obtain a picture of [defendant] who is the same

individual who later arrived to 2141 Absecon Boulevard and identified himself as Adam Malkin.

In addition, in paragraph eight of the affidavit, Carew asserted that:

Sergeant Boruch notified Galloway Township K9 officer Mark [D'Esposito]. Officer [D'Esposito] arrived with his K9 Zito and asked to have the package brought inside. Officer [D'Esposito] said his dog gave a positive indication for the presence of a controlled dangerous substance inside the package. Attached here to is the resume of K9 Officer Mark [D'Esposito] detailing his and his partner's experience in narcotics detection.

On February 1, 2013, two warrants were issued: one for the search of the package that was delivered to the storage facility, and the other for the search of defendant's storage unit. A third warrant was issued on February 5, 2013, authorizing a search of defendant's vehicle. The search of the package revealed approximately fourteen pounds of marijuana.

Defendant was charged with possession of more than fifty grams of marijuana, contrary to N.J.S.A. 2C:35-10a(3), and possession of between five and twenty-five pounds of marijuana, with the intent to distribute the same, contrary to N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(10). Thereafter, defendant filed a motion to suppress the evidence obtained in the search

of the package. The judge conducted an evidentiary hearing on the motion.

At the hearing, Carew testified that he did not initially investigate whether the information provided by McCaffrey was accurate. However, after he prepared the affidavit, he obtained a copy of the Iowa incident report. Carew acknowledged that "[i]t was a mistake" to indicate that defendant had been arrested in Iowa. The report indicated that defendant was not arrested, but was given a summons.

Regarding the marijuana possessed by defendant in the Iowa incident, Carew said he included this information in the affidavit because "it lends to probable cause." Although McCaffrey stated that the amount of marijuana was "not pounds," Carew did not ascertain the exact amount involved. Carew also acknowledged that, in his report, which was written several months after the search, McCaffrey said the special agent had contacted him regarding a FedEx package "possibly containing suspected narcotics."

During cross-examination, defendant's attorney asked Carew about the statements regarding the large amount of money seized from defendant in Iowa, and suggested that the amount gave rise to an inference that the amount of marijuana would be consistent with amounts carried for distribution. In response, Carew stated

that he "did not try to do that," and that he "just stated the facts that [he] knew at the time." Carew said the information was relayed to him verbally. Carew testified that he could not remember McCaffrey's exact words.

D'Esposito testified concerning the dog sniff of the package. D'Esposito stated that he and the dog Zito had been working together since January of 2008. During that time, D'Esposito and the dog had conducted "thousands of sniffs" and "approximately 125 searches."

D'Esposito said he responded with the dog to a request to conduct a narcotics sniff of a suspicious package at the self-storage facility on the date in question. After meeting with detectives from the ACPO, D'Esposito asked the detectives to move the package into a self-storage unit.

He explained that this is done so that the package is somewhat hidden from the dog, rather than simply placed in front of the animal. Therefore, it cannot be said the dog was directed to the package. Zito was brought to the room where the package had been placed, and the dog provided a positive indication for narcotics by locating and scratching at the package.

On March 10, 2014, the judge filed a written opinion. The judge noted that in his affidavit, Carew stated that McCaffrey told him a package was being delivered to the self-storage

facility containing marijuana. Carew also stated that McCaffrey told him defendant had been arrested in Iowa in 2012, when he was in possession of marijuana and about \$84,000. The judge found that several statements in the affidavit were false.

Carew did not indicate that the informant reported that the package "possibly" contained suspected narcotics. Moreover, defendant was not arrested in Iowa in 2012. He had been found in possession of a small amount of marijuana and received a summons. The judge found that Carew did not knowingly and intentionally include the false statements in the affidavit, but determined that Carew made the statements with reckless disregard for the truth.

The judge wrote that Carew should have undertaken further research, and possibly requested reports concerning the informant's tip and the Iowa incident before executing the affidavit. The judge stated that if those reports had been reviewed, he "very likely" would have discovered that defendant was never arrested in Iowa, and he was found only with a "small" amount of marijuana. Moreover, Carew would likely have learned that the informant had only reported that the package "possibly contained marijuana."

The judge also stated that, if the paragraphs containing the aforementioned false statements are "excised," the affidavit

failed to establish probable cause for the issuance of the search warrants. The judge found that defendant had "successfully undermined" Zito's reliability for "this specific sniff." The judge stated that, standing alone, the canine sniff was not sufficiently reliable to support a finding of probable cause.

In addition, the judge wrote that defendant's conduct after taking possession of the package was insufficient to support the issuance of the search warrant. The judge noted that defendant had invoked his right to counsel when Carew approached him and, while defendant initially acknowledged ownership of the package, he later denied that it was his.

The judge wrote that defendant's conduct could be "easily understood" as the actions of a person who was merely retrieving a package that was mailed to him. The judge said that the invocation of the right to counsel is "not something that can be held against [d]efendant."

The judge entered an order dated March 10, 2014, granting defendant's suppression motion. We thereafter granted the State's motion for leave to appeal.

II.

The State argues that the motion judge erred by finding that Detective Carew included false statements in his search

warrant application and, in doing so, acted in reckless disregard of their truth or falsity.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In addition, the New Jersey Constitution provides that a warrant authorizing law enforcement officers to conduct a search may not issue "except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized." N.J. Const. art. I, para. 7.

"When determining whether probable cause exists, courts must consider the totality of the circumstances, and they must deal with probabilities." State v. Jones, 179 N.J. 377, 389 (2004) (quoting Schneider v. Simonini, 163 N.J. 336, 361 (2000)), cert. denied, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001)). See also State v. Novembrino, 105 N.J. 95, 122 (1987) (adopting totality of the circumstances standard). Probable cause "is said to be a reasonable basis for the 'belief' that a crime has been or is being committed." State v. Burnett, 42 N.J. 377, 386 (1964).

An affidavit supporting a search warrant enjoys a presumption of validity. Franks v. Delaware, 438 U.S. 154, 171,

98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667, 682 (1978). To overcome this presumption and challenge the veracity of statements made in an affidavit, a defendant must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant. . . ." Id. at 155-56, 98 S. Ct. at 2674, 57 L. Ed. 2d at 672.

"[I]f the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Ibid. If the defendant successfully establishes at the hearing intentional falsehood or reckless disregard for the truth by a preponderance of the evidence, the false statements should be excised from the affidavit. Id. at 156, 98 S. Ct. at 2674, 57 L. Ed. 2d at 672.

Furthermore, if "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Ibid. New Jersey courts have adopted the Franks analysis. State v. Howery, 80 N.J. 563, 568 (holding that "New Jersey courts, in entertaining veracity challenges, need go no further than is required as a matter of Federal Constitutional

law by Franks v. Delaware[.]"), cert. denied, 444 U.S. 994, 100 S. Ct. 527, 62 L. Ed. 2d 424 (1979)).

To demonstrate that a statement was made with reckless disregard for the truth, the defendant must show that the statements or omissions went beyond "unintentional falsification in a warrant affidavit." State v. Sheehan, 217 N.J. Super. 20, 25 (App. Div. 1987) (citing Franks, supra, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682). See also State v. Martinez, 387 N.J. Super. 129, 141 (App. Div. 2006) (explaining that, within the context of a Franks analysis, "a good faith mistake is insufficient to strike down [a] warrant.") (citing Franks, supra, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682).

The standard for what constitutes reckless disregard for the truth "means different things when dealing with omissions and assertions[.]" Wilson v. Russo, 212 F.3d 781, 787 (3d Cir. 2000). Omissions are made with reckless disregard for the truth where the affiant omits a fact that "any reasonable person would have known [to be] the kind of thing the judge would wish to know." Id. at 787-88 (quoting United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993)).

On the other hand, assertions are made with reckless disregard for the truth when "viewing all the evidence, the

affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." Id. at 788 (quoting United States v. Clapp, 46 F.3d 795, 801 n.6 (8th Cir. 1995)).

As stated previously, here, the motion judge found that Carew did not knowingly or intentionally include erroneous or incomplete statements in the affidavit, but concluded that the detective made those statements with reckless disregard for the truth. The record does not support that finding.

Carew testified that McCaffrey told him that a confidential informant had informed the DEA that FedEx was going to deliver a package to a self-storage facility in Atlantic City and the package contained marijuana. McCaffrey also told Carew that defendant had previously been arrested in Iowa in 2012 while in possession of marijuana and about \$84,000.

When he prepared his affidavit, Carew was not told that the informant had reported that the package "possibly" contained marijuana, although McCaffrey said so in a report he wrote several months after the search warrants were issued. Moreover, Carew was not informed that defendant had not been arrested in Iowa in 2012, or that he had only been in possession of a small amount of marijuana and received a summons.

Carew had no reason to seriously doubt the veracity of the information that McCaffrey provided to him. He had no obvious reason to doubt the truth of what he had been told about the package or the 2012 motor vehicle stop in Iowa. Carew also did not have a reasonable basis to believe that he was omitting facts from the affidavit that a judge would wish to know when evaluating the search warrant application.

The motion judge found that Carew acted with reckless disregard for the truth because he failed to "conduct further research" into the information that McCaffrey provided to him. According to the judge, Carew should have requested the Iowa incident report or a report from McCaffrey concerning the informant's tip.

However, Carew was under no obligation to undertake the research described by the judge. Indeed, under Franks, "the failure to investigate fully is not evidence of an affiant's reckless disregard for the truth." United States v. Brown, 631 F.3d 638, 648 (3d Cir. 2011) (citing United States v. Dale, 991 F.2d 819, 844 (D.C. Cir. 1993)). See also United States v. Ranney, 298 F.3d 74, 78 (1st Cir. 2002) (noting that the affiant's "failure to probe further does not amount to reckless disregard."); State v. Niehaus, 452 N.W.2d 184, 187-88 (Iowa

1990) (finding that law enforcement had no duty to investigate facts supporting statements in an affidavit).

The motion judge also stated that Carew should have taken better notes of his conversations with McCaffrey, implying that Carew may have been told accurate facts about the Iowa incident and the informant's statements concerning the package. However, while Carew did not recall the exact words McCaffrey used during their conversations, he testified that he based his affidavit on the facts as he knew them at the time. Better note taking would not have made any difference.

We conclude that the judge erred by finding that Carew acted with reckless disregard for the truth when he included the erroneous or incomplete statements in his affidavit.

III.


The State also argues that, even if the erroneous statements regarding the 2012 incident in Iowa are excised, and the affidavit indicated that the informant said the package "possibly" contained marijuana, there was probable cause to issue the warrant. In support of this argument, the State cites the following facts: the tip from a reliable DEA informant that a package was being delivered to Atlantic City and "possibly" contained narcotics; the tracking number for the package; the delivery of the package with defendant's name on it; defendant's

history in New Jersey of arrests for burglary, theft and the possession of marijuana; defendant initially told the detective that the package belonged to him, and said it was not his after being told it might contain contraband; defendant told the detective to arrest him; and the dog's positive indication that a controlled dangerous substance was in the package.

We agree with the State that the totality of these circumstances established a well-grounded suspicion that the package in question contained contraband, which was probable cause for the issuance of the search warrant. See State v. Marshall, 199 N.J. 602, 610-11 (2009); State v. O'Neal, 190 N.J. 601, 612 (2007). Although the motion judge stated that, standing alone, the dog's sniff was not sufficiently reliable to establish probable cause, here Carew's affidavit provided sufficient facts, in addition to the information regarding the sniff, to support a finding of probable cause. The judge erred by concluding otherwise.

Reversed and remanded to the trial court for further proceedings in conformity with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION