

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

DERRICK SMITH

No. 12 CR 175

Judge Sharon Johnson Coleman

GOVERNMENT'S SUBMISSION REGARDING FEBRUARY 14 HEARING

The UNITED STATES OF AMERICA, by its attorney, GARY S. SHAPIRO, United States Attorney, files this submission as directed by the Court, and in support of its position that no pre-*Franks* hearing is necessary.

INTRODUCTION

As directed by the Court, counsel for the government and defendant Smith have conferred and are unable to reach agreement regarding the nature of the hearing set for February 14. The government requests that on February 14 the Court hear argument about whether to hold a pre-*Franks* hearing, as described in *United States v. McMurtrey*, --- F.3d ---, 2013 WL 105787 (7th Cir. January 10, 2013). The parties disagree as to the need for a pre-*Franks* hearing, and also disagree about the scope of such a hearing, including appropriate witnesses who may be called should such a hearing be held. If a pre-*Franks* hearing is ordered, the government requests that, based on an offer of proof from defendant, the Court determine which witnesses are relevant to the narrow inquiry dictated by *McMurtrey*.

At the February 14 hearing, the government will take the position that no pre-*Franks* hearing is necessary because the defendant cannot meet his burden on at least

one of the three elements required to obtain a *Franks* hearing: the defendant cannot show that the inaccurate statements in the affidavit undermined the probable cause set forth in the Complaint. The recorded conversations set forth in the Complaint overwhelmingly demonstrate probable cause, and do so without reliance upon the credibility of the confidential source precisely because the defendant's own words and deeds were recorded. Because the parties agree the Complaint contained two inaccurate statements, the Court should now consider whether the Complaint contains probable cause. That inquiry is limited to the four corners of the Complaint, with the addition of the correct information about the informant's background. *See, McMurtrey*, at *5 ("To obtain a [*Franks*] hearing, the defendant must also show that if the deliberately or recklessly false statements were omitted, or if the deliberately or recklessly misleading omissions included, probable cause would have been absent).

I. No Pre-*Franks* Hearing Is Necessary To Determine Probable Cause

A. Background

Defendant moved to quash his March 13, 2012 arrest based on inaccurate statements contained in the March 12, 2012 complaint affidavit. (R.61). The motion is fully briefed with the filing of the government's response (R. 71) and defendant's reply (R.74). Defendant argues that the inaccurate statements in the affidavit entitle him to a finding that the warrant was invalid under *Franks v. Delaware*, 438 U.S. 154 (1978).

B. Legal Standard

“In order to obtain a [*Franks*] hearing, . . . a defendant must make a ‘substantial preliminary showing’ that: (1) the affidavit contained a material false statement; (2) the affiant made the false statement intentionally, or with reckless disregard for the truth; and (3) the false statement was necessary to support the finding of probable cause.” *United States v. Maro*, 272 F.3d 817, 821 (7th Cir. 2001) (quoting *Franks*, 438 U.S. at 155-56). “This burden is substantial, and *Franks* hearings are rarely required.” *United States v. Johnson*, 580 F.3d 666, 670 (7th Cir. 2009); see also *United States v. Swanson*, 210 F.3d 788, 790 (7th Cir. 2000) (“These elements are hard to prove, and thus *Franks* hearings are rarely held.”).

In *McMurtrey*, the Seventh Circuit recognized that a defendant claiming an affidavit contained false statements may be entitled to a *pre-Franks* hearing to allow the defendant to “supplement or elaborate on the original motion.” *McMurtrey*, at *1. But the Court was clear that the “option to hold such a hearing belongs to the district court. If the defendant’s initial *Franks* motion does not make the required “substantial preliminary showing” the court need not hold a *pre-Franks* hearing to provide the defendant with an opportunity to do so.” *Id.* at *2. Defendant Smith has not made such a showing; but more importantly he cannot succeed in doing so. Therefore the Court should not exercise its discretion to offer him a hearing.

The *McMurtrey* court observed that it is “not always easy to draw the *Franks* line between sufficient and insufficient showings, so in some cases district courts have

held “pre-*Franks*” hearings.” *Id.* at *1. In this case, the line can easily be drawn because defendant cannot show that absent the inaccurate information, the Complaint would have lacked probable cause. Therefore, a pre-*Franks* hearing would be superfluous to the issue that the Court must decide.

C. Analysis

Defendant seeks to support his filings with a *pre-Franks* hearing. However, none of the contemplated testimony will aid the Court’s evaluation of two of the elements which must be considered before granting a full *Franks* hearing. First, the parties agree that two statements in the Complaint regarding the confidential source (“CS-1”) were inaccurate.¹ Therefore defendant has met his burden on this element and no pre-*Franks* hearing is necessary on this point.

Second, the Court already has before it accurate information to correct both statements about CS-1. Therefore, the Court may consider whether the Complaint contains probable cause in light of this accurate information. If the Court determines that the defendant has failed to make a substantial showing that the Complaint lacks probable cause, then no hearing, pre-*Franks* or *Franks*, is required. Unlike in *McMurtrey*, where the “apparently false information went to the heart of probable cause,” the probable cause in the Complaint was grounded on the numerous recordings in which the defendant’s own words and deeds provide abundant probable cause.

¹ The Complaint contains two inaccurate statements, both contained in footnote 1 on page 3 as described more fully in the government’s response. (R. 71 at p. 5).

In evaluating probable cause, this Court must consider “whether the content of the affidavit, setting aside the false material (or including the omitted material), is sufficient to establish probable cause.” *United States v. Prideaux Wentz*, 543 F.3d 954, 962 (7th Cir. 2008). “[A]n unimportant allegation, even if viewed as intentionally misleading, does not trigger the need for a *Franks* hearing.” *Swanson*, 210 F.3d at 791.

“To find probable cause, there need only be a probability or a substantial chance that criminal activity exists.” *Id.* Under *Franks*, “if probable cause to issue the warrant would still exist even if the false statement or material omission were corrected, then no *Franks* hearing is required.” *United States v. Carmel*, 548 F.3d 571, 577 (7th Cir. 2008); accord *McMurtrey* at *5. The Complaint in this case set forth extensive evidence gathered by the FBI over three months, including numerous recorded conversations, which: (1) overwhelmingly established probable cause, without regard to the information provided by CS-1; and (2) provided strong corroboration for the limited information from CS-1 that was included in the Complaint. Further, the Complaint included facts bearing on CS-1’s motivation and bias. Based on this record, the relatively minor inaccuracies do not diminish the abundant probable cause contained in the Complaint.

The two inaccurate statements in the Complaint related solely to CS-1’s credibility, which was not a critical issue in the probable cause determination. As set forth in the government’s response to defendant’s motion, (R. 71, pp. 8-9), probable cause can be established by independent evidence, even where an affidavit contains

inaccuracies about the background of an informant. In *United States v. Singleton*, 125 F.3d 1097 (7th Cir. 1997), law enforcement obtained a search warrant based on an affidavit that failed to disclose the informant's criminal history and other matters that could affect his credibility. In *Singleton*, the court affirmed the district court's denial of a *Franks* hearing, reasoning that the affidavit did not rely solely on the informant's information; it included surveillance and recordings made by the informant. *Id.* at 1104. The Complaint here relied almost entirely on recordings of defendant Smith. In this case the credibility of CS-1 has little, if any, impact on the probable cause presented in the Complaint. Based on the evidence of defendant's own words in the Complaint, the evidence of probable cause is overwhelming and defendant's motion for a *Franks* hearing must be denied.

CONCLUSION

For the reasons set forth above, the Court should not grant defendant a pre-*Franks* hearing, and should deny defendant's motion to quash his arrest and his request for a *Franks* hearing.

Respectfully submitted,

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Dated: February 7, 2013

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

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was served on February 7, 2013, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

Respectfully submitted,

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