

**IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA**

State of North Dakota,

Appellee/Plaintiff,

vs.

Todd Ebel,

Appellant/Defendant.

Supreme Court File No. 20050440/41/42/43

BRIEF FOR THE APPELLANT

Appeal from Conviction and Order Denying Franks Hearing
From the Richland County District Court

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I. STATEMENT OF ISSUES

- A. WHETHER THE DISTRICT COURT WAS PRESENTED WITH SUFFICIENT INFORMATION TO SUPPORT PROBABLE CAUSE UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 8 OF THE NORTH DAKOTA CONSTITUTION.
- B. WHETHER THE DISTRICT COURT ERRED BY DENYING EBEL'S REQUEST FOR A FRANKS HEARING.

II. STATEMENT OF THE CASE

A. PREVIOUS PROCEEDINGS

On January 3, 2005, law enforcement executed a search of the Todd Ebel residence based on a search warrant issued by Judge Richard Grosz ("Judge Grosz"). Appendix at 45 (Transcript of Preliminary Hearing at 7). As a result of the search Defendant Todd Ebel ("Ebel") was placed under arrest for possession of drug paraphernalia. On March 18, 2005, Ebel moved the Court to suppress the evidence against him based upon an illegal search. Appendix at 7 (Motion to Suppress at 1). That motion was assigned to Judge Ronald Goodman ("Judge Goodman") who later signed an Order denying that motion on May 31, 2005. Appendix at 11 (Order Denying Motion to Suppress). At the October 4, 2005, status conference, Ebel raised a Franks issue, and requested a hearing. Appendix at 61-62 (Transcript of Status Hearing 2, 3). Judge Grosz granted Ebel an opportunity to file a motion and request a hearing. Appendix at 63. On October 26, 2005, Judge Goodman denied Ebel's motion to reconsider a Franks hearing. Appendix at 13 (Order Denying Motion to Reconsider at 1). Subsequently, Ebel entered conditional guilty pleas on two counts for possession of drug paraphernalia and one count for possession of a controlled substance. Appendix at 6 (Conditional Guilty Plea at 1). The court sentenced Ebel to be committed to the custody of the North Dakota Department

of Corrections and Rehabilitation for imprisonment of one year for each of three separate convictions. Appendix at 14 (Criminal Judgment and Commitment at 1).

B. FACTUAL BACKGROUND

On December 29, 2004 at 8:10 p.m. Officer Dustin Hill from the South East Multi County Agency Narcotics Task Force contacted Judge Richard Grosz of the Richland County District Court via telephone in order to obtain a search warrant for the residence of Todd Ebel. Appendix at 26 (Transcript of Application for Search Warrant at 1).

Officer Hill requested the warrant because he believed that the residence was the site of a methamphetamine lab. Id.

Hill offered various items of information in support of his contention that Ebel's residence was a methamphetamine lab. See generally Appendix at 26-40 (stating the reasons why Hill applied for the search warrant). First, Hill offered information he received from Deputy Shane Orn of the Richland County Sheriff's Department. Appendix at 26-28. Deputy Orn stated that "he has received several complaints of come and go traffic, loud parties and strange activity" going on at the residence. Appendix at 27. Hill further stated that Deputy Orn pulled over two individuals leaving that house, and that "these two individuals are known to the drug task force as drug users, stating 'we have basic intelligence about them.'" Id. However, Judge Grosz stated that the information Hill provided regarding the two drug users did not allow him to make a determination. Appendix at 28.

In support of his allegation regarding come and go traffic, Hill offered testimony that he observed two vehicles make short stops at the residence earlier that day. Appendix at 29-30. This was the only day that Hill conducted surveillance on the

residence. Id. Hill offered testimony that others have observed come and go traffic “for months,” but offered no specific information to support his contention. Appendix at 30.

In support of his application for the search warrant, Hill then offered statements made by Joseph O’Meara (“O’Meara”), the town Mayor and neighbor to the Defendant. Hill related that O’Meara, as a member of the fire department, had received a three hour law enforcement course on identifying possible methamphetamine labs. Appendix at 39. Hill then related O’Meara’s statements that he “had several problems with the individual across the street, which included come and go traffic.” Appendix at 30. Hill stated:

“[O’Meara] said it’s just non-stop. He said it’s just cars coming and going at all hours of the night. He specifically stated that people would leave the house at 11 o’clock at night ... or they would get there at 11 o’clock at night and be coming and going until four or five in the morning.”

Id.

When asked how many people visited the residence in a night, Hill stated, “[O’Meara] did not specifically quantify your Honor. He just stated for the city of Hankinson, it was a large amount of traffic, come and go traffic, from one residence.” Appendix at 31. Hill then offered an account of a confrontation between O’Meara and Ebel that occurred at 4 o’clock one morning. Appendix at 31-32. Hill stated:

“[Ebel] was in his underwear, standing outside in the cold, singing with his dog and he [O’Meara] stated that the individual [Ebel] could not look into his eyes. He was jittery. He had all the signs of what was described to him through his training of an individual being under the influence of methamphetamine.”

Appendix at 32.

Hill additionally offered important information provided by Ron Hubrig (“Hubrig”), the City Water Supervisor. Appendix at 32-33. According to Hill, the city

experienced a problem with drains clogging in the city water system and they had worked with the Mayor to figure it out. Id. Hill stated that the city had “slowly traced it back over a year’s time to, within the last two weeks, . . . that shop towels and rubber gloves have been coming into the pump station.” Appendix at 33. Hill further stated that the city traced these items “directly back to a manhole cover” near Ebel’s residence. Id. According to Hill, “this is a closed sewer system” and “the only other individual [other than Ebel] who has access to that is across the street, the Mayor.” Id. When Judge Grosz asked Hill whether the sewer items “could have only come from either the Mayor’s house or Mr. Ebel’s house,” Hill responded, “That’s correct your Honor.” Appendix at 35.

However, Hubrig denied reaching the conclusion that Hill had reported to Judge Grosz concerning the origin of the shop towels and rubber gloves. Appendix at 5 (Affidavit of Ron Hubrig). In fact, Hubrig specifically stated, “I did not tell law enforcement officers that the gloves, and rags I found in the net of the manhole would have only come from the Mayor’s house or Todd Ebel’s house.” Id. Further, Hubrig stated, “It would be incorrect to categorize my statement regarding the rubber gloves and towels to say they could have only come from one of these two houses.” Id. According to Hubrig, at no time did he did he give any indication to Hill that the sewer items could have only originated from Ebel’s or the Mayor’s residence. Id.

Hill then proffered observations made by the Mayor’s wife. Appendix at 35 (Transcript of Application for Search Warrant at 11). Specifically, O’Meara told Hill that his wife “viewed [Ebel] bringing cylindrical tanks into the residence.” Id. According to Hill, “those tanks, [the mayor’s wife] was aware through her . . . in direct knowledge to be tanks of . . . used in the illicit manufacturing of methamphetamine.” Id. According to

Hill, “anything can be stored in those tanks.” Appendix at 39. Specifically, Hill stated that the tanks could be holding anhydrous ammonia which can be used in the production of methamphetamine. Appendix at 40.

Hill then offered testimony that “they [the Mayor and his wife] . . . observed several doors and windows in the home open in the cold weather.” Appendix at 36. According to Hill, “this would be an indication to officers through their training and experience that they are airing the residence out. This happens several times . . . this happens during the production of methamphetamine due to the release of noxious chemicals and gases, during the chemical process.” Id.

Based on the above information the court issued a warrant to search the residence of Todd Ebel. Appendix at 40. The court stated “[t]here is probable cause to search for a meth lab based on the gloves and the shop towels and the tanks. The other information is also corroborative information. But the primary probable cause would be the tanks going in recently.” Id. The court further stated:

There is probable cause to search based on the open windows during the winter in combination with the tanks going into the house recently and the rubber gloves and the shop towels being found in the sewer that can be traced only to Mr. Ebel’s residence. The other information also is corroborative of a possible methamphetamine lab distribution. So based on that I will find probable cause.

Appendix at 41.

Officers served the search warrant on January 3, 2005. Appendix at 45 (Transcript of Preliminary Hearing at 7). Officers located methamphetamine paraphernalia in the form of glass pipes with residue and alleged snort tubes. Appendix at 45-46. Officers also located several baggies with residue that field tested positive for

methamphetamine. Id. Finally, officers located a triple beam scale, a small amount of marijuana, and marijuana paraphernalia. Id. Subsequent to the search of Ebel's residence, he was placed under arrest.

III. ARGUMENT

The district court committed two errors in this case. First, the district court made an errant finding of probable cause on the basis of the evidence before it. Second, the district court wrongly denied Ebel a Franks hearing after it had learned that Hill had made false statements as well as key omissions in his telephonic warrant application. Probable cause did not exist to allow the district court to issue a search warrant. However, in the alternative, should this court find that probable cause existed, then it must order the district court to hold a Franks hearing to determine whether sufficient probable cause existed in light of Hill's false statements and omissions.

A. THE DISTRICT COURT WRONGLY ISSUED A SEARCH WARRANT BECAUSE PROBABLE CAUSE DID NOT EXIST.

"The existence of probable cause to issue a search warrant is a question of law." State v. Driscoll, 2005 ND 105, ¶ 6, 697 N.W.2d 351, 355 (quoting State v. Nelson, 2005 ND 59, ¶ 3, 693 N.W.2d 910, 913). Questions of law are entitled to *de novo* review. See Bertsch v. Bertsch, 2006 ND 31, ¶ 6 (listing the various standards of review for questions of law, fact, and discretionary matters). "On appeal . . . the totality-of-the-circumstances test [is used] to review the sufficiency of the information before the magistrate independent of the court's decision" when analyzing issues of probable cause. Driscoll, at ¶ 6 (quoting Nelson, at ¶ 3).

The right of citizens to be free from baseless and groundless searches is constitutionally protected. See U.S. CONST. amend. IV; see also N.D. CONST. art. 1, § 8.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV; N.D. CONST. art. 1, §8. “Probable cause to search exists ‘if the facts and circumstances relied on by the magistrate would warrant a person of reasonable caution to believe the contraband or evidence sought probably will be found in the place to be searched.’” Nelson, at ¶ 3 (quoting State v. Corum, 2003 ND 89, ¶ 22, 663 N.W.2d 151). “Probable cause to search exists if it is established that certain identifiable objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place.” Id. (quoting State v. Damron, 1998 ND 71, ¶ 6, 575 N.W.2d 912). “All of the information presented to establish probable cause should be taken together, not analyzed in a piecemeal fashion, and the magistrate is to make a practical commonsense decision whether probable cause exists to search that particular place.” Id.

A suspect’s reputation may be used in determining whether probable cause exists when used in conjunction with other evidence. State v. Roth, 2004 ND 23, ¶ 18, 674 N.W.2d 495, 502 (quoting State v. Hage, 1997 ND 175, ¶ 23, 568 N.W.2d 741). “A person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause.” State v. Thieling, 2000 ND 106, ¶ 12, 611 N.W.2d 861, 865 (quoting Ybarra v. Illinois, 444 U.S. 85, 90 (1979)). Furthermore, suspicions that a person with a criminal history visited the home of another does not provide the necessary justification for issuing a search warrant. See Roth at ¶ 19 (quoting State v. Ballweg, 2003 ND 153, ¶ 23, 670 N.W.2d 490) (stating “[m]ere suspicion that

persons visiting the premises are connected with criminal activity will not suffice for issuance of a warrant to search the premises”). “In order to find probable cause based on association with persons engaging in criminal activity, some additional circumstances from which it is reasonable to infer participation in criminal enterprise must be shown.” Thieling at ¶ 12 (quoting United States v. Ingrao, 897 F.2d 860, 864 (7th Cir. 1990)).

Officer Hill’s presentation of facts to the district court did not rise to the level of probable cause. Officer Hill presented the following facts to the district court in his telephonic application for a search warrant of Ebel’s residence: 1) allegations of loud parties, come and go traffic, and strange behavior, 2) known drug users visiting the Ebel residence, 3) O’Meara’s belief that Ebel was suffering the effects of a methamphetamine experience, 4) the city water supervisor’s statement that shop towels and rubber gloves had been retrieved from the closed sewer system near Ebel’s residence, 5) O’Meara’s wife’s observation of welding tanks in Ebel’s home, and 6) the observation of open window’s during winter time. A brief, succinct analysis of all six alleged facts indicates that probable cause could not have existed.

1. O’Meara’s Observations Do Not Provide Probable Cause

a. O’Meara

O’Meara’s statements and observations play a critical role in Hill’s application for a search warrant. Hill relied on the following pieces of evidence from O’Meara: 1) allegations of loud parties, 2) his wife’s observation of welding tanks in the Ebel residence, 3) open windows during the winter time, 4) come and go traffic, 5) the observation of “strange behavior,” and 6) the belief that Ebel had been suffering a methamphetamine high. Furthermore, Hill stated to Judge Grosz in his warrant

application that he had personally trained O'Meara regarding the signs and symptoms of methamphetamine use. See Appendix at 54 (Transcript of Preliminary Hearing, pg. 21, lns. 4-14) (stating that Hill was in charge of conducting methamphetamine training to the Hankinson Fire Department and had personally trained the neighbors of Ebel). None of this hearsay type evidence supplied to Hill by O'Meara is sufficient in achieving the probable cause standard.

In certain instances an informant's observations may be sufficient enough to rise to the level of reasonable suspicion. See Anderson v. Director, N.D. Dep't of Trans., 2005 ND 97, ¶ 10, 696 N.W.2d 918, 920 (quoting State v. Miller, 510 N.W.2d 638, 640 (N.D. 1994)) (discussing whether an informant's tip was reliable enough to not require an officer's actual observation of a person violating the law). The Supreme Court has identified three types of informants that have varying degrees of reliability: citizen informants, confidential informants, and anonymous informants. Roth, at ¶ 9, 674 N.W.2d at 500. A citizen informant is someone that volunteers information without expecting any type of compensation and does not risk going to jail. State v. Anderson, 2006 ND 44, ¶ 15 (quoting Roth, at ¶ 10). The information provided by citizen informants is presumed reliable. Id. But, even though the information provided by citizen informants is presumed reliable, the reliability of the provided information "should be evaluated from the nature of their opportunity to observe and . . . verified by independent investigation." State v. Utvick, 2004 ND 36, ¶ 10, 675 N.W.2d 387, 393 (quoting State v. Hage, 1997 ND 175, ¶ 16, 568 N.W.2d 741, 745) (emphasis added).

We have described reasonable suspicion simply as a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are

sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.

State v. Bartelson, 2005 ND 172, ¶ 30, 704 N.W.2d 824, 833 (quoting Ornelas v. United States, 517 U.S. 690, 695-96 (1996)). Ebel is willing to concede that O'Meara, and his wife, are citizen informants for the purposes of this argument. However, despite O'Meara's classification as a citizen informant, Hill had a duty to pursue further investigation into the matter to corroborate O'Meara's information.

Sufficient information, rather than a 'bare bones' affidavit, [is required to be] presented to the magistrate to allow that official to determine probable cause. That determination cannot be a mere ratification of the bare conclusions of others. We have often emphasized that an affidavit expressed in conclusions without detailing underlying information is insufficient for probable cause.

Roth, at ¶ 20, 674 N.W.2d at 502 (quoting State v. Ennen, 496 N.W.2d 46, 50 (N.D. 1993)) (emphasis added). Without corroborating the information supplied by O'Meara, there is no way Hill possessed the known facts and circumstances necessary to obtain the warrant.

Hill corroborated only one portion of the evidence offered by O'Meara in support of the warrant application. Specifically, Hill stated that he observed Ebel's residence for one portion of a day prior to applying for the search warrant. In that time, Hill testified that he witnessed two people enter and leave Ebel's home, but failed to state how long their presence lasted. See Appendix at 29 (Transcript of Proceedings, pg. 4) (stating a woman had entered with a child and left the home, and another individual came and went shortly thereafter). According to Hill's training, the short visits that he observed during an unspecified amount of time amounted to a drug transaction. Id. Hill also offered the observations of Deputy Orn in furtherance of his contention regarding the alleged stop

and go traffic at Ebel's residence. Id. Nothing in Hill's telephonic application suggests that these visits were for anything more than social interaction.

Hill also relied on O'Meara's belief that Ebel had been suffering the effects of a methamphetamine hit one morning. O'Meara had allegedly witnessed Ebel outside of his residence one morning in underwear singing to his dog. O'Meara further believed that Ebel was unable to look him in the eye after O'Meara had approached Ebel. According to Hill, Ebel's inability to look O'Meara in the eye was attributable to the effects of the methamphetamine high Ebel may have been suffering at the time. It is difficult to discern from the record whether O'Meara actually believed Ebel was suffering the effects of methamphetamine, or whether Hill had reached that conclusion for O'Meara in the warrant application. Hill asserted that O'Meara's methamphetamine training allowed him to make the determination. But for an unknown reason O'Meara did not report this "strange" behavior to authorities on the date it occurred. Instead, O'Meara offered the information at a much later date in support of the search warrant.

None of O'Meara's observations provide the adequate weight to achieve probable cause. What O'Meara did observe amounted to an informant's uncorroborated observations and constituted "bare bones conclusions" at best, which is a standard far below probable cause. Without the corroboration of Hill or other law enforcement officials, O'Meara's information is insufficient grounds for obtaining a search warrant.

b. O'Meara's Wife

Mrs. O'Meara allegedly told her husband that she had witnessed the presence of tanks inside of Ebel's home. According to Hill, Mrs. O'Meara had allegedly witnessed Ebel bringing cylindrical tanks into his home. Appendix at 35 (Transcript of Application

for Search Warrant, pg. 11, Ins. 13-19). Hill offered his training in methamphetamine detection, and that of Mrs. O'Meara, to explain the presence of welding tanks and the belief that methamphetamine production was taking place. However, as stated above, Ebel's profession was a welder. The presence of welding tanks in his home was perfectly natural because of his profession.

Finally, Mrs. O'Meara alleges that she saw the windows and doors open at Ebel's residence during the winter. Mrs. O'Meara allegedly saw the windows open on the Sunday prior to the issuance of the search warrant. However, nothing in Hill's warrant application states what Mrs. O'Meara's belief was regarding the open doors and windows. Instead Hill inserts his training as a law enforcement officer in place of Mrs. O'Meara's beliefs and opinions. Appendix at 36 (Transcript of Proceedings, pg. 12, Ins. 18-24). Hill did not personally observe the open windows and doors, nor was a call placed to local law enforcement reporting this behavior. As such, the observations open doors and windows on a winter day provided nothing more than baseless fodder.

Mrs. O'Meara's observations, along with her husbands, provide nothing substantive to Hill's warrant application. And even if any of the alleged observations were true, Hill and other law enforcement officers failed to corroborate them beyond the limited surveillance of come and go traffic at Ebel's residence. Hill's reliance on and submission of the O'Meara observations do not rise to the level of probable cause.

2. The Shop Towels and Rubber Gloves Do Not Provide Sufficient Probable Cause

The district court stated in its Memorandum Opinion that "[t]he primary basis for Judge Grosz finding that there was probable cause to believe that methamphetamine was being manufactured at Ebel's residence was that rubber gloves and shop towels found in

the sewer system could be traced to Ebel” Appendix at 9 (Memorandum Opinion, pg. 4, lns. 9-11); see also Appendix at 51-52 (Transcript of Preliminary Hearing, pgs. 18-19) (stating the reasons for why the search warrant had been issued). However, as the city water supervisor testified to in an affidavit, the shop towels and rubber gloves could have come from any of the seven houses linked to the particular sewer at issue.

Furthermore, the gloves and towels had been in the sewer for a substantial amount of time. This time frame ranged from one year prior to the discovery of the shop towels and rubber gloves, to two weeks prior to the discovery. However, the city water supervisor was unable to make that determination. The presence of shop towels and rubber gloves that had been deposited into a nearby sewer by one of seven households within one year does not constitute a fact worthy of consideration when making a probable cause determination.

The city water supervisor stated that he was unable to trace the towels and gloves directly to any one residence. The only type of evidence that might have been able to corroborate the “sewer towels & gloves” would have been the discovery of similar items within Ebel’s residence. The searching officers did not locate any shop towels or gloves in Ebel’s residence. Hill’s allegation that the shop towels and rubber gloves could only have come from one of two houses was a conclusion unsupported by the facts.

An officer’s training regarding the symptoms, signs, clues, and presence of a methamphetamine lab are valid considerations in a probable cause determination, but not the only consideration. Aside from Hill’s reckless disregard for the truth, as discussed in the next section regarding the Frank’s issue, the limited probability that the sewer items can be traced directly to Ebel’s residence must be weighed against a law

enforcement officer's training. The fact that the sewer items came from one of the seven houses linked to the closed sewer, and were deposited anytime between two and fifty-two weeks prior to their discovery, far outweighs the training of any law enforcement officer. The district court's totality-of-the-circumstances analysis must fail due to its misplaced reliance on the weak evidentiary weight of the sewer items. No probable cause existed with or without the presence of the rubber gloves and shop towels because these sewer items did not provide the necessary evidentiary weight to reach the appropriate standard.

B. THE DISTRICT COURT ERRED BY DENYING EBEL'S REQUEST FOR A FRANKS HEARING

In Franks v. Delaware, the United States Supreme Court held:

[W]here 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 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. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, 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.

438 U.S. 154, 155-56 (1978).

Suppression of evidence is necessary in at least three circumstances. First where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." United States v. Leon, 468 U.S. 897, 924 (1984) (quoting Franks, 438 U.S. at 155-56). Second if the affidavit is "so lacking in indicia

of probable cause as to render official belief in its existence entirely unreasonable.” Brown v. Illinois, 422 U.S. 590, 610-611 (1975). Third, if the warrant is “so facially deficient - *i.e.*, in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid.” State v. Thompson, 369 N.W.2d 363, 371-72 (N.D. 1985) (citing United States v. Leon, 468 U.S. 897 (1984)).

The burden is on the defendant to establish perjury or reckless disregard by a preponderance of the evidence. Franks, 438 U.S. at 156. The defendant must prove that (i) the challenged statements are in fact false; and (ii) that their inclusion in the affidavit (or in oral testimony) amounted to perjury or reckless disregard for the truth. State v. Padgett, 393 N.W.2d 754, 756 (N.D. 1986) (citing W. LaFave, Search and Seizure, § 4.4(d) (1978)). Under Franks a statement is considered false when it “misleads the neutral and detached magistrate into believing the stated facts exist, and those facts in turn affect the magistrate’s” determination of probable cause. State v. Donovan, 2004 ND 201 ¶ 7, 688 N.W.2d 646, 650. Neither negligence nor innocent mistake is sufficient to establish recklessness or deliberate falsity. Id.

According to Franks, if an officer omits critical information from a search warrant application, yet still obtains a warrant, the search may be considered unreasonable under the Fourth Amendment. 438 U.S. at 164-65. “To prevail on a Franks claim based on omissions of fact, [a defendant] must prove first that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading, and, second, that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause.” United States v. Allen, 297 F.3d 790, 795 (8th Cir. 2002); see

State v. Donovan, 2004 ND 201, ¶ 7, 688 N.W.2d 646, 650 (quoting State v. Ballweg, 2003 ND 153, ¶ 14, 670 N.W.2d 490, 495).

In State v. Padgett, 393 N.W.2d 754, 756 (N.D. 1986), the North Dakota Supreme Court stated that before an evidentiary hearing is required under Franks, there must be allegations of deliberate falsehood or of reckless disregard for the truth accompanied by an offer of proof. The allegations should specify which statements are claimed to be false; and they should be accompanied by a statement of supporting reasons. Id. Affidavits or other reliable non-conclusory statements of witnesses should be furnished, or their absence satisfactorily explained. Id.

The Order denying Ebel's Motion to Suppress specifically states:

The primary basis for Judge Grosz finding that there was probable cause to believe that methamphetamine was being manufactured at Ebel's residence was that rubber gloves and shop towels found in the sewer system could be traced back to Ebel and Ebel was witnessed carrying acetylene tanks into his home. Testimony indicated that these types of gloves and towels are commonly used in the manufacturing of methamphetamine. Officer Hill also testified that acetylene tanks may be used to hold anhydrous ammonia, an ingredient of methamphetamine. In addition to this 'primary evidence,' Judge Grosz also acknowledged that other corroborative evidence, such as stop and go traffic in front of Ebel's home and the windows being open during the winter indicated drug activity.

In the present case, Ebel can point to two specific instances that constitute Hill making false statements. First, Hill misled Judge Grosz to believe that the acetylene tanks spotted on Ebel's property were surely being used to transport anhydrous ammonia. Secondly, Hill made misleading assertions that Ron Hubrig, the city water and sewer supervisor, stated that the shop towels and gloves found in the sewer system could

have only come from either Ebel's or O'Meara's residence. The inclusion of these two statements constitute false assertions and amount to a reckless disregard for the truth pursuant to Franks.

. 1. Hill Recklessly Omitted Pertinent Information Regarding The Acetylene Tanks Spotted At Ebel's Residence.

Regarding the observation of acetylene tanks on Ebel's residence, Hill failed to inform the Judge that the tanks at issue were common welding tanks and that Ebel in fact was employed as a welder. The affiant leads Judge Grosz to believe that Ebel likely had anhydrous ammonia by stating that based on his training and experience these tanks can be used to transport anhydrous ammonia. If Ebel were not a welder by trade the tanks may appear more suspicious, but it certainly is not very suspicious for a welder to have a welding tank. Judge Grosz's lack of knowledge that Ebel was a welder, who possessed welding tanks, caused the Judge to rely heavily on the welding tanks as one of the two "primary" reasons that there was probable cause to issue the warrant. Had Hill conducted further investigation he could have determined that Ebel was a welder and could have notified the judge of this fact. Instead, Judge Grosz was led to believe that the only use Ebel had for such tanks was the transportation of anhydrous ammonia. Before making arbitrary conclusions, Hill should have further investigated what other uses Ebel may have had for the tanks. Had Hill investigated Ebel's occupation, he would have found out that as a welder, Ebel had a perfectly reasonable and legal use for the welding tanks. Instead, when applying for the search warrant, Hill either left out pertinent facts, or was ill prepared to provide Judge Grosz with all relevant information. Pursuant to Franks,

Hill's conduct constituted a "reckless disregard for the truth" and a Franks hearing is required.

2. Hill Recklessly Mislead Judge Grosz Regarding The Origin Of The Gloves And Shop Towels Found In The Sewer.

A Franks hearing is also required for Hill's misleading statements regarding the shop towels and gloves found in the sewer system. When applying for the search warrant, Hill told the court that the items (rubber gloves and shop towels) were "traced directly back to a manhole cover . . . just to the west . . . of Mr. Ebel's residence." Appendix at 33 (Transcript of Application for Search Warrant at 9). Further, Hill stated that "the only other individual [other than Ebel] who has access to that is across the street, the Mayor." Id. Accordingly, the court asked Hill if the gloves and shop towels "could have only come from either the Mayor's house or Mr. Ebel's house." Id. at 11. Hill, who was allegedly relying on information provided to him by Hubrig, responded by saying, "That's correct your Honor." Id.

Hubrig refuted Hill's statement to Judge Grosz by stating in an affidavit, "I did not tell law enforcement officers that the gloves, and rags I found in the net of the manhole would have only come from the Mayor's house or Todd Ebel's house." Appendix at 5 (Affidavit of Ron Hubrig at 1). Hubrig further stated that "It would be incorrect to categorize my statement regarding the rubber gloves and towels to say they could have only come from one of these two houses." Id. In fact, Hubrig believed that there are actually seven households from which the gloves and towels could have originated. Id.

Hill's statements to Judge Grosz regarding the items found in the sewer are precisely the type of misleading statements that require a Franks hearing. See State v.

Donovan, 2004 ND 201, ¶ 13, 688 N.W.2d 646, 651 (once statements have been found false or misleading, those statements should be set aside). Hubrig, who Hill claimed was a “reliable, decent citizen,” directly refuted all of Hill’s reckless statements regarding the items found in the sewer. A Franks hearing would be appropriate because the items found in the sewer were one of the court’s “primary” reasons for determining probable cause and Hill provided the court with false statements to believe the items came from Ebel’s residence.

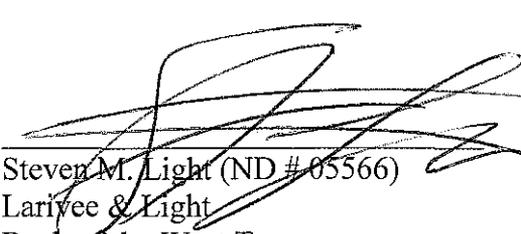
This court has held that if judges are to perform their neutral and detached functions, and not become a rubber stamp for police, then the judges must be provided with more details than just the mere conclusions or beliefs of the affiant or informer. State v. Berger, 285 N.W.2d 533, 537 (1979) (citing United States v. Ventresca, 380 U.S. 102, 108-09 (1965)). The idea that judges make an independent determination of probable cause is an underlying factor in Franks, because if defendants were not allowed to challenge the accuracy of an affidavit, police would always be able to get around the probable cause requirement simply by misleading judges and thereby always getting the search warrant they are seeking. Allowing the system to be circumvented in this way defeats the purpose of police needing to secure a warrant prior to searching.

IV. CONCLUSION

Officer Hill misled the district court using arbitrary conclusions and a reckless disregard for the truth. As a result, the district court erred in two specific determinations. First, the district court erred in finding that probable cause existed for the issuance of a search warrant. Second, the district court erred in denying Defendant’s motion for a Franks hearing. Officer Hill misled the issuing judge on issues that were of “primary

concern” regarding the Judge’s decision to issue a search warrant. Should this court find that no probable cause existed, it must vacate the defendant’s sentence. However, if in the alternative this court finds probable cause to exist, the district court’s order must be reversed, and a new hearing ordered to determine whether probable cause existed without the inclusion of the false statements.

Dated this 16 day of March, 2006.



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