

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| UNITED STATES OF AMERICA | : | CRIMINAL ACTION |
| | : | |
| v. | : | NO. 13-572-01 |
| | : | |
| JOSEPH HARVEY | : | |

MEMORANDUM OPINION

Savage, J.

March 6, 2014

Moving to suppress a sample of his DNA taken pursuant to a search warrant, the defendant Joseph Harvey contends that the warrant was issued without probable cause and on the basis of material falsehoods and omissions in violation of the Fourth Amendment.¹ He relies upon *Franks v. Delaware*, 438 U.S. 154 (1978), which requires suppression of evidence secured pursuant to a search warrant issued on the basis of false material statements or omissions made either knowingly and intentionally, or with reckless disregard for the truth. *Id.* at 155-56; *United States v. Brown*, 631 F.3d 638, 642 (3d Cir. 2011) (citing *Franks*, 438 U.S. at 155-56).

Considering the evidence presented at the hearing, including the warrant and the affidavit of probable cause, I find there were no material false statements and omissions that were made knowingly and intentionally or recklessly so as to invalidate the warrant. I also conclude that there was probable cause to support the issuance of the warrant. Therefore, I shall deny the motion.

¹ For Fourth Amendment purposes, “using a buccal swab on the inner tissues of a person’s cheek in order to obtain DNA samples is a search.” *Maryland v. King*, 133 S. Ct. 1958, 1968-69 (2013) (citation omitted).

The Investigation

The investigation leading up to the application for the search warrant was instigated by a complaint made to the police on October 9, 2009.² After responding to a radio call, Philadelphia Police Officer Perry reported that a twenty-one year-old female complained that during a drug raid in the Kensington section of Philadelphia earlier that day, a police officer had masturbated in front of her, ejaculating onto her jeans.³

At the direction of his supervisor, Perry transported the complainant and her jeans to the Internal Affairs Division of the Philadelphia Police Department (“IAD”).⁴ Lieutenant Joseph Martin of IAD interviewed the complainant, who repeated, in more detail, her complaint to Perry.⁵ She related that three officers in plain clothes forcibly entered the second floor bedroom in which she and a male friend were located.⁶ She stated that after her male friend was taken out of the room, one of the officers made her take off her clothes and then masturbated.⁷

The complainant told Martin that she and her male companion called 911 immediately after the encounter.⁸ Martin secured a tape recording of the call, corroborating

² Defense Ex. 4 (Complaint or Incident Report) (D-4).

³ *Id.*

⁴ Hr’g Tr. 101:7-11, Feb. 10, 2014.

⁵ Defense Ex. 5 (Statement of Michelle Cipriano) (D-5).

⁶ *Id.* at 1-2.

⁷ *Id.* at 2.

⁸ *Id.* at 2-3.

the complainant's claim that she had made the call.⁹

Martin determined that three undercover police officers had conducted a drug investigation at 2817 "D" Street in the late night of October 8, 2009.¹⁰ He interviewed two of Harvey's fellow officers, Hayden Smith and Curtis McKee, and their supervisor, Sergeant Jesus Serrano.¹¹

Smith and McKee confirmed that they and Harvey had entered an abandoned property on "D" Street and that Harvey was alone with a female for a period of time in that property.¹² Neither one reported that Harvey had assaulted the woman or otherwise did anything improper in the property.¹³

In the meantime, IAD submitted the complainant's jeans for testing.¹⁴ The test was positive for the presence of sperm.¹⁵ Martin also took a sample of her DNA which he had tested.¹⁶

Martin later presented to the complainant a photo array of eight police officers in uniform, which included Harvey's photograph.¹⁷ The complainant did not pick Harvey's

⁹ 2/10/2014 Hr'g Tr. 103:5-12.

¹⁰ Defense Ex. 3 at 3-4 (Search Warrant and Affidavit of Probable Cause) (D-3).

¹¹ Government Ex. 5 (Statement of P/O Hayden Smith) (G-5); Government Ex. 1 (Statement of P/O Curtis McKee) (G-1); Hr'g Tr. 105:5-12, Feb. 10, 2014.

¹² G-5 at 2; G-1 at 2.

¹³ Hr'g Tr. 21:10-22:2, Feb. 10, 2014; Hr'g Tr. 12:15-24, Feb. 20, 2014.

¹⁴ D-3 at 3.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.*; Defense Ex. 6 (Photo Array) (D-6).

photo out of the array. She circled photos of two other officers, stating that they looked familiar but she was not sure.¹⁸

After concluding his investigation, Martin applied for a search warrant, Warrant Control No. 148051, to secure a DNA sample from Harvey on February 17, 2010.¹⁹ The warrant was approved and issued on the same day. The DNA sample was taken later that evening.

Assertions

The affidavit of probable cause in the warrant application recites the results of Martin's investigation in support of probable cause. Harvey challenges three statements in the affidavit as false.²⁰ They are: (1) Officers Smith, McKee and Norman Camacho reported to Serrano that "P/O Joseph Harvey may be engaging in criminal acts"; (2) Harvey "may have sexually assaulted a female inside of an abandoned property"; and (3) Smith told Serrano that "on the day of the event, the officer had decided to investigate an abandon (sic) property. Once inside they observed a male [Pat] and female [Complainant Witness] on the floor, semi-nude. They asked them for identification, following which the officers walked outside with the male leaving the female inside, as she had requested time to put her clothes back on. The officers engaged the male in conversation concerning drugs being used in the property. During this conversation, P/O Harvey announced that he was going back inside the property to look for drugs. Several minutes passed and then

¹⁸ D-6.

¹⁹ D-3 at 1.

²⁰ Mem. in Supp. of Mot. to Suppress Evidence, at 19-21, 13-CR-572-01 (Doc. No. 30).

P/O Harvey exited.”²¹

The first statement is not accurate. Smith, Camacho and McKee did not inform Serrano that Harvey “may be engaging in criminal acts.”²² It appears Martin surmised from the statements of those three officers that Harvey was taking money from drug suspects.²³ The officers deny having told Serrano that Harvey was taking money.²⁴ Yet, in Smith’s statement to Martin, he did relate information that could raise a suspicion that Harvey was taking money.²⁵ Nevertheless, the statement in the affidavit had nothing to do with the complaint under investigation, that is, sexual assault.

The second challenged statement is also not true. Nothing in the investigation supports the statement in the affidavit that Smith informed Martin that Harvey “may have sexually assaulted a female inside of an abandoned property.”²⁶ Nor did Smith ever make that statement to Serrano.²⁷ Smith merely opined, drawing on his recollection of October 8, 2009 and from the questions being asked, that IAD’s investigation concerned the events surrounding the drug raid on that date.²⁸

The third statement challenged is not false. It is attributed to the wrong person. No

²¹ *Id.* at 19-21 (quoting [D-3 at 4]).

²² Hr’g Tr. 21:10-22:2; 53:10-54:10, Feb. 10, 2014; Hr’g Tr. 12:15-24; 25:2-10, Feb. 20, 2014.

²³ Hr’g Tr. 118:1-22, Feb. 10, 2014.

²⁴ G-1 at 3; G-5 at 3-4; Hr’g Tr. 28:14-18, Feb. 10, 2014; Hr’g Tr. 25:2-10, Feb. 20, 2014.

²⁵ G-5 at 3-4.

²⁶ D-3 at 4.

²⁷ G-5 at 3; Hr’g Tr. 21:10-14, Feb. 20, 2014.

²⁸ G-5 at 2-3.

matter who reported the facts, the accuracy of the statement is not affected. Indeed, Harvey does not challenge the contents of the statement as false.²⁹ Even if Smith had not seen the complainant, McKee did. It was McKee who provided the information that is contained in the challenged statement to Serrano.³⁰ In short, the attribution to Smith rather than McKee is not a material misrepresentation in the context of the investigative results. The attribution was a mistake.³¹ The substance of the report was accurate.

Omissions

The *Franks* rule applies not only to false statements, but also to omitted material statements. *Sherwood v. Mulvihill*, 113 F.3d 396, 400 (3d Cir. 1997) (citations omitted). The police cannot present only inculpatory evidence to the magistrate. *Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000). The applicant for a warrant must include all material information that has a bearing on the probable cause determination and can affect that determination. See *Franks*, 438 U.S. at 165, 171. Yet, this does not mean that the affidavit need recite every fact or provide a complete rendition of the investigation. *Id.* at 165; *Wilson*, 212 F.3d at 787-88.

The test is whether the missing information is capable of casting doubt on probable cause. Is it information that could undermine a finding of probable cause? Certainly, exculpatory evidence could affect the probable cause determination. *Wilson*, 212 F.3d at 790. Examples are a recantation by an essential witness, a witness identifying someone else as the perpetrator, and a witness's outright denial that the person to be searched was

²⁹ Hr'g Tr. 199:19-200:2, Feb. 10, 2014.

³⁰ Hr'g Tr. 129:17-130:15; 197:8-19, Feb. 10, 2014.

³¹ Hr'g Tr. 129:17-130:15; 197:21-198:12, Feb. 10, 2014.

the perpetrator of the crime.

Harvey contends that there were three material facts that were omitted from the affidavit of probable cause.³² They were Martin's failure: (1) to mention the complainant's drug addiction and use of drugs on the day of the incident; (2) to note that the complainant had circled two photos, neither of which were Harvey's, in the photo array; and (3) to point out the discrepancy between the complainant's physical description of the offending officer given to Perry and Harvey's actual description.³³

With respect to the complainant's drug use, there was no necessity to mention it in the affidavit. There was nothing to indicate to Martin that the complainant was under the influence of narcotics to the extent that it impaired her sensual capabilities. She did not claim a lack of recollection or express any doubt as to what had happened.³⁴ Consequently, there was no need to include in the affidavit that she admitted to having taken six Xanax pills on the previous Thursday.

Although the complainant had circled two photographs in the photo array, neither of whom was Harvey, she did not identify either one of those persons depicted in the circled photos as having been the officer whom she said masturbated. She stated that those two officers looked familiar, but she was "not sure" if either one was the perpetrator.³⁵ Significantly, the affidavit clearly informed the issuing authority that the complainant was

³² Mem. in Supp. of Mot. to Suppress Evidence, at 26-29.

³³ *Id.*

³⁴ See Hr'g Tr. 165:17-166:13, Feb. 10, 2014.

³⁵ D-6.

unable to identify Harvey from the photo array.³⁶

The discrepancies between the initial description given Perry and Harvey's actual physical description are not significant. The complainant's estimates of the perpetrator's age and height were off the mark. However, her description that the perpetrator was a white male, of medium build and having light brown hair were accurate. In any event, the discrepancies are immaterial because the complainant's description was not essential to placing Harvey in the room. Harvey's two fellow officers placed him alone with the complainant in the house on the night of the event.³⁷

Recklessness

Harvey claims that the statements and answers "were not made negligently, but rather resulted from either intentional conduct or recklessness on the part of Sergeant Serrano, the affiant, or both."³⁸

It is not enough for Harvey to show that a material statement was false. He must also demonstrate that the statement was made either knowingly and intentionally or with reckless disregard for the truth. *Franks*, 438 U.S. at 155-56, 171; *Brown*, 631 F.3d at 642.

Having determined that the first and second challenged statements are not accurate and are material to a finding of probable cause, I must determine whether they were made knowingly and intentionally or with reckless disregard for the truth. There is no evidence, direct or indirect, that Martin, the affiant, made false statements knowingly and intentionally. Consequently, I proceed to the recklessness inquiry.

³⁶ D-3 at 5.

³⁷ G-5 at 2; G-1 at 2.

³⁸ Mem. in Supp. of Mot. to Suppress Evidence, at 30.

“An assertion is made with reckless disregard 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.’” *Wilson*, 212 F.3d at 788 (citation omitted). Conduct is reckless when either the affiant “actually entertained serious doubts” or there were “obvious reasons” for him to doubt, permitting the fact finder to infer a “subjectively reckless state of mind.” *Brown*, 631 F. 3d at 645.

The analysis comes down to whether the affiant had justification for making the statement, either from first-hand observation, third-party source, or “some textual source.” *Id.* at 648. The affiant may not speculate or supply facts that he believes exist. *Id.* at 648-49. He must have a sufficient basis grounded in fact to make the assertion. *Id.* at 649. In sum, one may infer that the affiant “acted with reckless disregard for the truth where his affidavit contains an averment that was without sufficient basis at the time he drafted it.” *Id.* Stated differently, “the total lack of an evidentiary basis for making an averment can constitute an obvious reason for doubting that averment’s veracity” *Id.* at 650.

Smith told Martin that he believed that Harvey was taking money during drug stops.³⁹ He related instances where Harvey had acted suspiciously.⁴⁰ Smith was uncomfortable working with Harvey.⁴¹ As Smith acknowledged, Harvey’s conduct, as described in his statement to Martin, was criminal.⁴² Thus, Martin’s statement in the affidavit was correct, though not relevant to the crime under investigation.

³⁹ G-5 at 3.

⁴⁰ *Id.* at 3-4.

⁴¹ *Id.*

⁴² Hr’g Tr. 25:2-13, Feb. 20, 2014.

It is not certain that the statement “wherein P/O Harvey may have sexually assaulted a female inside an abandoned property” was Martin’s deduction or Smith’s statement. In any event, the statement is not necessarily false. That the precise statement was made by Smith may be wrong. But, if the statement was based on Martin’s deduction, it would not have been a false statement. Rather, it would have been a mistaken or unwarranted conclusion.

The first and second challenged statements, though not true, were not made in reckless disregard for the truth. They may have been negligently made. But, erroneous or mistaken statements negligently made in an application for a warrant do not require suppression of the search pursuant to the warrant. *Herring v. United States*, 555 U.S. 135, 145 (2009) (citing *Franks*, 438 U.S. at 171).

Here, there were no materially false statements made knowingly and intentionally or with reckless disregard . Nor were there any misleading omissions. Thus, in performing the probable cause analysis, we need not perform the *Franks* excision or addition exercise.⁴³

Probable Cause

“Great deference” is to be given to a magistrate’s determination of probable cause. *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *United States v. Stearn*, 597 F.3d 540, 554 (3d Cir. 2010). Although the deference required is not a “rubber stamp,” *United States v. Whitner*, 219 F.3d 289, 296 (3d Cir. 2000) (quoting *United States v. Jones*, 994 F.2d 1051,

⁴³ Materially false statements that were made knowingly and intentionally or with reckless disregard for the truth must be excised from the affidavit before making the probable cause determination. *Franks*, 438 U.S. at 156, 171. In the case of omissions which are found to have been deliberately misleading and affecting the probable cause determination, those omissions must be read into the affidavit. See *United States v. Calisto*, 838 F.2d 711, 716 (3d Cir. 1988).

1055 (3d Cir. 1993)), the warrant must be upheld “as long as there is a substantial basis for a fair probability that evidence will be found” where the affiant contends it will. *United States v. Conley*, 4 F.3d 1200, 1205 (3d Cir. 1993). Thus, the magistrate must have a “substantial basis” for concluding that the affidavit in support of the warrant established probable cause. *Jones*, 994 F.2d at 1054, 1055.

Probable cause for the issuance of a warrant exists when the totality of the circumstances leads to the conclusion that “there is a fair probability that . . . evidence of a crime will be found in a particular place. *Gates*, 462 U.S. at 238. “The supporting affidavit must be read in its entirety and in a common sense and non-technical manner.” *Whitner*, 219 F.3d at 296 (citing *Conley*, 4 F.3d at 1206)).

In this particular case, even if we excise the first and second challenged statements in the affidavit of probable cause, the warrant is supported by probable cause. The complainant reported that three undercover police officers forcibly entered the abandoned property at 2817 “D” Street where she was on the second floor with a male friend. One of the officers left the premises with the male friend while she remained inside. Harvey was alone with the complainant in the property for a period of time during which he masturbated. The complainant’s version that Harvey was with her is partially corroborated by Harvey’s fellow officers to the extent that Harvey was alone with the complainant inside the premises. Forensic testing confirmed the presence of sperm on the complainant’s jeans as she had described.

These facts establish probable cause without the references that Harvey “may be engaging in criminal acts” and/or “may have sexually assaulted a female inside an abandoned property.” Therefore, Harvey’s motion to suppress the DNA sample taken

pursuant to the warrant will be denied.

