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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OBIE LEE CRISP III,

Defendant and Appellant.

F065240

(Super. Ct. No. BF135453A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Gillian Black, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Obie Lee Crisp III pled no contest to transportation of cocaine base and admitted a prior strike conviction, in exchange for a stipulated six-year sentence and dismissal of other charges. He appeals, contending the trial court erred in denying an in camera hearing on his motion to suppress and in denying the suppression motion; and abused its discretion in denying his discovery request for samples of the substance obtained in a controlled buy from Crisp by the confidential informant (CI). We disagree with Crisp's contentions and affirm.

FACTUAL AND PROCEDURAL SUMMARY

In January of 2011, Deputy Michael Dorkin of the Kern County Sheriff's Department met with a CI who told Dorkin that a very overweight black male weighing around 500 pounds named "Obie," was selling cocaine from his residence on South Union and was using his mother's residence on Caroline Court as a "stash house" where he kept cocaine and money. Dorkin conducted a records search using the name Obie and the South Union address. The records search brought up Obie Crisp, appellant, showing him as a registered sex offender living at the South Union address. Crisp's record showed a previous arrest at the Caroline Court address.

Dorkin met again with the CI, who identified Crisp from a photograph as the person selling cocaine. The CI agreed to make a controlled purchase from Crisp. The controlled purchase was successfully completed. Based upon these facts, Dorkin applied for and obtained a search warrant for Crisp, Crisp's residence on South Union, the Caroline Court address, and a Nissan Altima vehicle.

The search warrant was authorized on January 26, 2011, and executed on January 28, 2011. In the Nissan, deputies found methamphetamine, cocaine, and \$225 in cash. Crisp later said the methamphetamine was for weight loss and the cocaine was what he gave prostitutes in exchange for sex. At the South Union address, deputies found marijuana, a pipe used for smoking methamphetamine, a pipe used for smoking cocaine,

several packages of cocaine, and a letter addressed to Crisp at the Caroline Court address. A bottle of cocaine and packaging materials were found at the Caroline Court address. A total of 8.97 grams of cocaine and .66 grams of methamphetamine was seized.

Crisp was charged with transportation of cocaine base, possession of cocaine base for sale, possession of cocaine base, selling methamphetamine, possession of methamphetamine, and possession of controlled substance paraphernalia. It also was alleged that Crisp had a prior strike conviction and had served a prior prison term.

On August 10, 2011, Crisp filed a motion to unseal the search warrant affidavit, and to traverse and quash the search warrant. The trial court heard arguments on the motion on August 26, 2011. Crisp's request for an in camera hearing was granted. At the in camera hearing, the trial court examined the sealed affidavit and heard sworn testimony from the affiant, Deputy Dorkin. On August 29, 2011, the trial court released a redacted version of the affidavit, but deferred consideration of the motion to traverse and quash the warrant.

On October 18, 2011, Crisp moved to compel discovery of the substance from the controlled buy. In this motion, Crisp maintained he was entitled to a sample of the substance from the controlled buy and argued that he also was entitled to a second in camera hearing in order to further challenge the veracity of the statements in the warrant and affidavit.

Also on October 18, Crisp moved to quash the search warrant and all evidence seized pursuant to the search. In support of this motion, Crisp asserted there was insufficient information to support a search of the Nissan Altima or the Caroline Court address, and that the CI had not been proven reliable.

A hearing on both these motions was held on October 27, 2011. Crisp testified at this hearing and admitted he was living at the South Union address in January 2011, but testified he did not "sell or provide cocaine or any controlled substance to anyone" during the entire month of January 2011. On cross-examination, Crisp admitted he had visited

the Caroline Court address, but stated he never lived there. Crisp also admitted entering a plea in 2002 or 2003 to a drug-related offense. The trial court took judicial notice of a 1996 drug-related offense. Based upon its review of the sealed affidavit and the evidence presented at the hearing, the trial court denied the request to quash the warrant and suppress the evidence.

A plea agreement was reached in December 2011, but the trial court rejected this plea agreement. On April 6, 2012, Crisp pled no contest to one count of transportation of cocaine base and admitted a prior strike, in exchange for a term of six years in prison and dismissal of the remaining counts. Crisp was sentenced to a term of six years in prison on June 14, 2012, and filed an appeal on June 29, 2012.

DISCUSSION

Crisp contends the trial court abused its discretion when it denied his motion for discovery of the controlled substance. Crisp also contends the trial court abused its discretion in denying him an in camera hearing on his motion to suppress and in denying his motion to suppress. Crisp asks this court to examine the sealed affidavit and determine if it sets forth insufficient probable cause and if so, asks this court to quash the search warrant and suppress the evidence.

I. MOTION TO SUPPRESS

Where a defendant brings a motion to traverse the search warrant and the vast majority of the search warrant affidavit has been ordered sealed due to the People's exercise of their informant's privilege under Evidence Code section 1041, special procedures must be utilized. (*People v. Hobbs* (1994) 7 Cal.4th 948, 972 (*Hobbs*)). When this occurs, the trial court is to deem the preliminary showing ordinarily required under *People v. Luttenberger* (1990) 50 Cal.3d 1 (*Luttenberger*) (namely, to offer evidence that casts some reasonable doubt on the veracity of material statements made by the affiant) satisfied so as to entitle him to in camera review. (*Hobbs, supra*, at p. 972, fn. 6.) The court should then "determine whether the affidavit is properly sealed, i.e.,

whether valid grounds exist for maintaining the informant's confidentiality, and whether the extent of the sealing is justified as necessary to avoid revealing his or her identity.” (*Id.* at p. 973.)

If the affidavit is found to have been properly sealed, and the defendant has moved to traverse the warrant, the trial court should then proceed to determine whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing. Generally, in order to prevail on such a challenge, the defendant must demonstrate that (1) the affidavit included a false statement made “knowingly and intentionally, or with reckless disregard for the truth,” and (2) “the allegedly false statement is necessary to the finding of probable cause.” (*Franks v. Delaware* (1978) 438 U.S. 154, 155-156.)

“If the trial court determines that the materials and testimony before it do not support defendant's charges of material misrepresentation, the court should simply report this conclusion to the defendant and enter an order denying the motion to traverse (Cf. [Evid. Code,] § 1042, subd. (d) [if court determines in camera there is no reasonable possibility that confidential informant is a material witness to defendant's guilt or innocence such that nondisclosure of the informant's identity would deprive defendant of a fair trial, it shall not order disclosure but simply report its finding]; see also *People v. Brown* (1989) 207 Cal.App.3d 1541 [after determining in an in camera hearing that warrant affidavit was not materially false, court properly denied evidentiary hearing and motion challenging warrant's validity]) Such a procedure ‘will assure the defendant of a judicial check on possible police misrepresentations, while preventing both unfounded fishing expeditions and inadvertent revelations of the identity of confidential police informants.’ (*Luttenberger, supra*, 50 Cal.3d at p. 24)” (*Hobbs, supra*, 7 Cal.4th at p. 974.)

With respect to the motions to traverse/quash the search warrant filed by Crisp, the trial court held an in camera hearing, after which it released a redacted version of the sealed affidavit. The redacted affidavit revealed that the CI described Crisp's physical appearance and identified Crisp by his first name, Obie; stated Crisp was engaging in drug sales from his residence on South Union and also from his mother's home on Caroline Court; and at the behest of law enforcement, engaged in a controlled buy of an illegal substance from Crisp. The redacted affidavit was for use in litigating the motion to traverse and quash the warrant.

After releasing the redacted affidavit, the trial court held a hearing on the motion to traverse and quash the warrant, in which Crisp asserted that the warrant lacked sufficient probable cause. At the hearing, Crisp testified that he had not sold any controlled substance to anyone during January 2011.

On appeal, Crisp contends the trial court should have held an in camera hearing to address Crisp's allegations that the affidavit failed to establish probable cause. The trial court was under no obligation to conduct a **second** in camera hearing; the trial court fully complied with the procedures set forth in *Hobbs* and *Luttenberger* when it held the first in camera hearing, released the redacted affidavit, and then held a court hearing with presentation of testimony on the motion to traverse and quash. The trial court clearly had reviewed the entire affidavit, including the sealed portion, and heard sworn testimony from Deputy Dorkin, before releasing the redacted affidavit; and the trial court had before it all the information in the sealed affidavit before making its probable cause determination.

As for whether the affidavit contains sufficient probable cause to issue the search warrant, we agree with the trial court that it does. In support of the search warrant, Dorkin stated that he knew the CI was familiar with narcotics, their packaging and sales; that based upon his experience, he knew drug dealers to secrete drugs in vehicles, including vehicles not registered in their name; and he attached the information set forth

in the sealed affidavit about the CI and the controlled buy. Our review of the sealed affidavit discloses that it provided further details about the location, circumstances, protocol, and timing of the controlled buy, such that Crisp probably could have identified the CI if he had been provided these details. There is no indication the CI was providing the information in exchange for leniency in any criminal case or for financial gain.

There is nothing in the sealed or public portions of the record to suggest that any misrepresentations, material or otherwise, were made by the CI or the affiant, Dorkin, in applying for the search warrant, other than Crisp's own statement. The CI's information about "Obie" was verified by a records review that identified Crisp and connected him to both the South Union and Caroline Court addresses identified by the CI; the CI identified Crisp from a photograph; and a controlled buy was conducted with law enforcement observing Crisp for a period of time, including Crisp's use of a vehicle and the controlled buy. Other evidence presented at the court hearing on the motion to traverse and quash the warrant established that Crisp had two prior convictions for drug-related offenses and connected Crisp to the South Union and Caroline Court addresses. The only testimony challenging the affidavit was Crisp's self-serving statement that he did not engage in any sales of controlled substances in January 2011.

The trial court is not obligated to credit Crisp's statement and thereby automatically reach a conclusion that the search warrant lacked probable cause, which essentially is what Crisp suggests. The trier of fact, in this case the trial court, makes credibility determinations and resolves factual disputes. (*People v. Estrella* (1995) 31 Cal.App.4th 716, 724-725.) An appellate court will not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352.) We accord due deference to the trier of fact. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

The sealed affidavit sets forth the protocol used with the CI for the controlled buy, to insure the reliability of the controlled buy; describes in detail the circumstances

surrounding the controlled buy; and relates the CI's personal knowledge and observations. This satisfies the specificity outlined in *People v. Estrada* (2003) 105 Cal.App.4th 783, 788, upon which Crisp relies.

As for Crisp's contention that the redacted affidavit does not provide a nexus between the alleged drug activity and the places and vehicle to be searched, he is incorrect. The CI provided information that established a nexus between Crisp and the South Union and Caroline Court residences as set forth in the redacted affidavit, plus the records search identified in the redacted affidavit connected Crisp to both locations. To the extent that a vehicle is not specifically mentioned in the redacted affidavit, although a reasonable inference is that Crisp would use a vehicle to travel between the two locations, that nexus is provided in the sealed portions of the affidavit indicating that law enforcement observed Crisp in a vehicle.

All of these facts were known to the trial court when it denied Crisp's motion to traverse and quash the search warrant. Nothing in the sealed affidavit or the public record suggests any misrepresentation, material or otherwise, by the affiant, Dorkin, in applying for the search warrant. (*Franks v. Delaware, supra*, 438 U.S. at pp. 155-156; *Hobbs, supra*, 7 Cal.4th at pp. 976-977.) We conclude the trial court exercised sound discretion in conducting an in camera review of the confidential document, issuing a redacted version of the affidavit, conducting a court hearing on the motion to traverse and quash the warrant, and in finding the affidavit for the search warrant established probable cause for issuance of the warrant. (*Hobbs, supra*, at pp. 976-977; *Luttenberger, supra*, 50 Cal.3d at pp. 20-24.) Accordingly, we reject Crisp's contention that the court erred when it denied his motions to suppress and to quash and traverse the search warrant.

II. MOTION FOR DISCOVERY

As part of his challenge to the validity of the search warrant, Crisp sought discovery of a sample of the substance obtained in the controlled buy for testing, alleging that without proof that the substance was a controlled substance, the warrant lacked

probable cause. Crisp signed a declaration stating he had not sold any controlled substances in the month of January 2011. !(CT 128-136)! The trial court denied the request. !(CT 194)! Crisp contends the trial court abused its discretion under *Luttenberger* when it denied the motion. !(AOB 12-17)!

Whether to order discovery is a matter within the trial court's discretion. (*Luttenberger, supra*, 50 Cal.3d at p. 21.) A trial court's order regarding discovery will be upheld on appeal unless it constitutes an abuse of discretion. (*People v. Moya* (1986) 184 Cal.App.3d 1307, 1312.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

In *Luttenberger*, the California Supreme Court determined the circumstances under which a criminal defendant may obtain discovery of information concerning a CI in order to challenge the accuracy of statements contained in an affidavit in support of a search warrant. (*Luttenberger, supra*, 50 Cal.3d at p. 6.) The court noted that a search warrant affidavit is presumed to be truthful. (*Id.* at p. 21.) Accordingly, "[t]o justify in camera review and discovery, preliminary to a subfacial challenge to a search warrant, a defendant must offer evidence casting some reasonable doubt on the veracity of material statements made by the affiant." (*Ibid.*) The defendant is required to "raise some reasonable doubt regarding either the existence of the informant or the truthfulness of the affiant's report concerning the informant's prior reliability or the information he furnished." (*Id.* at p. 22.) The motion "should include affidavits supporting defendant's assertions of misstatements or omissions in the warrant affidavit." (*Ibid.*) The necessary showing may be made by making "substantial factual assertions casting doubt on the accuracy of the affiant's statements. For example, without knowing the informant's identity, a defendant could nonetheless make factual allegations contradicting statements in the warrant affidavit, or raise inconsistencies on the face of the affidavit." (*Ibid.*)

Under *Franks v. Delaware, supra*, 438 U.S. 154, a defendant has a limited right to challenge the validity of a search warrant by controverting factual allegations made in the affidavit in support of the warrant. (*Luttenberger, supra*, 50 Cal.3d at p. 9.) The defendant is constitutionally entitled to a postsearch evidentiary hearing on the veracity of the affidavit, but only after he or she makes “a ‘substantial preliminary showing’ that (1) the affidavit included a false statement made ‘knowingly and intentionally, or with reckless disregard for the truth,’ and (2) ‘the allegedly false statement is necessary to the finding of probable cause.’” (*Id.* at p. 10, citing *Franks v. Delaware, supra*, at pp. 155-156.) Exclusion of evidence seized pursuant to the warrant is required if, at the evidentiary hearing, the defendant establishes the allegation of perjury or reckless disregard by a preponderance of the evidence, and, with the false material excised, the affidavit’s remaining content is insufficient to establish probable cause. (*Franks v. Delaware, supra*, at p. 156; *Luttenberger, supra*, at p. 10.)

The defendant is not required to show that the alleged inaccuracies in the affidavit resulted from the affiant’s bad faith. However, the defendant “must raise a substantial possibility that the allegedly untrue statements were material to the probable cause determination.” (*Luttenberger, supra*, 50 Cal.3d at p. 23.) Accordingly, “[t]o mandate an evidentiary hearing, the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. 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. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted ... is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements

are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.” (*Franks v. Delaware, supra*, 438 U.S. at pp. 171-172, fn. omitted.)

Here, the trial court did not abuse its discretion in denying the motion. As the trial court stated, the controlled buy was not the sole grounds for a finding of probable cause. The sealed affidavit disclosed that law enforcement arranged for and observed the controlled buy only after the CI informed law enforcement that “Obie” was selling cocaine from his residence on South Union and using the Caroline Court address as a “stash house”; the CI identified Crisp as “Obie”; and a records check connected Crisp to both addresses provided by the CI.

A magistrate’s order issuing a warrant can be set aside only if, as a matter of law, the affidavit does not establish probable cause. (*People v. Superior Court (Corona)* (1981) 30 Cal.3d 193, 203.) That is not the case here.

An affidavit need only contain information “sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present.” (*People v. Kurland* (1980) 28 Cal.3d 376, 384.) Absent the controlled buy, a magistrate reasonably could have found that probable cause existed by virtue of the CI’s observations of Crisp’s activities and Dorkin’s affidavit stating that the CI was a person familiar with narcotics, their sales, and packaging. (See *People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1315 [in determining whether probable cause exists, magistrate may rely on conclusions of experienced law enforcement officers]; *People v. Spears* (1991) 228 Cal.App.3d 1, 17-18 [inferences and deductions apparent to trained law enforcement officers may be considered in determining probable cause].)

Furthermore, in *People v. Kershaw* (1983) 147 Cal.App.3d 750, the appellate court upheld a magistrate judge's determination of probable cause for a search warrant where the affidavit relied on an anonymous informant's detailed statement, detailed activities observed at the defendant's home that indicated drug trafficking, and the defendant's arrest record. (*Id.* at p. 752.) Here, Dorkin's affidavit stated that he ran a records search on Crisp before seeking the warrant; Crisp had a prior arrest for a drug-related offense connected to the Caroline Court address; the CI's information about Crisp's activities was set forth in detail; and law enforcement had observed Crisp for a period of time.

Crisp's reliance on *People v. Broome* (1988) 201 Cal.App.3d 1479 for the proposition that the trial court had no discretion to deny his request for discovery of the controlled substance is misplaced. In *Broome*, the only basis for the issuance of a warrant was the controlled buy. (*Id.* at p. 1497.) As set forth above, that is not the case here.

Crisp's reliance on *People v. Estrada* (2003) 105 Cal.App.4th 783 is equally misplaced. The issue in *Estrada* was whether the trial court had erred in refusing to conduct an in camera hearing. (*Id.* at p. 790.) Again, that is the not the case; the trial court conducted an in camera hearing.

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Gomes, Acting P.J.

Poochigian, J.