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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2947-17T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

SHARIF M. AMENHOTEP and HAKEEM
MALONEY,

Defendants-Respondents.

Argued April 30, 2018 – Decided May 24, 2018

Before Judges O'Connor and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
17-07-1975.

Kayla Elizabeth Rowe, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for appellant (Robert D. Laurino,
Acting Essex county Prosecutor, attorney;
Kayla Elizabeth Rowe, of counsel and on the
brief).

Raymond L. Hamlin argued the cause for
respondent Sharif M. Amenhotep (Hunt, Hamlin
& Ridley, attorneys; Raymond L. Hamlin and
Isaac Wright, Jr., of counsel on the brief).

Olubukola O. Adetula, attorney for respondent
Hakeem Maloney, join in the brief of
respondent Sharif M. Amenhotep.

PER CURIAM

By leave granted, the State appeals from an order granting defendants' motion to suppress evidence, including a handgun, seized during the search of a residence authorized by a search warrant. Having considered the record in light of the applicable law, we affirm.

I.

On April 27, 2017, the Essex County Prosecutor's Office requested a search warrant for the residence and detached garage at 77 Lincoln Place in Irvington. The request was supported by a Newark Police Department detective's affidavit describing his training and work experience, and detailing the investigation of a murder.

The affidavit explained that in the early morning hours of April 21, 2017, William Porter IV exited a club, walked into a parking lot, and was fatally shot numerous times by an individual later identified as Rashan Jackson. According to the affiant, video surveillance recordings showed Naim Jones had been a passenger in a van driven by defendant Hakeem Maloney that was registered to Maloney's brother, defendant Sharif Amenhotep, and which arrived in the parking lot after Porter entered into the club. Jackson, driving a Lexus, arrived in the parking lot at the

same time. Maloney, Jones and Jackson spoke in the parking lot and then entered the club.

Jones, Jackson and Maloney later left the club and returned to the parking lot. Jones entered the Lexus, drove around the block and parked on the street in front of the club. Maloney returned to the van's driver's seat, but remained parked in the lot while Jackson hid behind parked vehicles. The affiant explained that when Porter left the club and entered the lot, Jackson stepped from behind the parked vehicles, shot Porter numerous times, and fled on foot. Maloney immediately drove the van out of the parking lot, and stopped to pick up Jackson. They then continued their flight from the scene of Porter's murder in the van. Meanwhile, Jones drove the Lexus into the parking lot, viewed Porter's body, and left the murder scene.

The affiant was familiar with Jones, Jackson and Maloney, and obtained known photographs of each. The affiant compared the photographs with video recordings from the club, and identified each as being involved in the murder captured on the recordings of the parking lot. On April 25, 2017, arrest warrants were issued for Jones, Jackson and Maloney for the crimes of murder, conspiracy to commit murder and weapons offenses.

The affidavit further explained that on April 27, 2017, six days after the murder, neither the Lexus nor van had been located.

The affiant stated the van was "registered at 77 Lincoln Pl[ace]," and there was "probable cause to believe that [the Lexus and van are] being hidden inside the detached garage" at the address. The affidavit stated defendant "Maloney was located in his home at 77 Lincoln Pl[ace] . . . and arrested" pursuant to the arrest warrant. The affiant asserted that based on his training and experience, he had probable cause to believe evidence related to the crimes of murder, conspiracy and weapons possession was in the residence and detached garage at 77 Lincoln Place.

On April 27, 2017, the judge issued the requested search warrant, which was executed later that day at 77 Lincoln Place. A gun was found in the residence during the search,¹ and defendants Maloney and Amenhotep were each subsequently charged in an indictment with one count of first-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(j), and one count of second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b).

Defendants² moved to suppress the evidence seized during the search. They argued the affidavit contained inaccurate information and requested a hearing pursuant to Franks v. Delaware,

¹ The State later confirmed the recovered gun was not used in Porter's murder.

² Amenhotep filed the suppression motion. The court's order suppressing the evidence states that Maloney joined in the motion.

438 U.S. 154 (1978). More particularly, they asserted the search warrant affidavit contained a false representation that the van was registered at 77 Lincoln Place in Irvington when, in fact, the van was registered to an address on Summit Avenue in Newark. They also argued the affidavit did not provide any facts supporting the representation that 77 Lincoln Place was Maloney's "home," and his arrest at the location on April 27, 2017 was insufficient to establish probable cause that the residence or detached garage contained evidence related to the murder.

The State acknowledged the error in the affidavit, and conceded the van was actually registered at the Summit Avenue address. The State claimed the reference to 77 Lincoln Place was the result of a typographical error. The State opposed defendants' request for a Franks hearing, and argued that even if the misstatement concerning the van's registration was disregarded, the affidavit demonstrated probable cause sufficient to support the search of 77 Lincoln Place.³

After hearing argument, the court issued a detailed written decision finding the affidavit's erroneous statement concerning the van's registration address "provided critical linkage to

³ We discern the arguments made to the motion court from the briefs filed in the Law Division that were included in the appendices. The court heard oral argument on the motion, but the State has not provided a transcript of the proceeding.

support probable cause to search . . . 77 Lincoln Place." The court noted the affidavit stated that because the van was registered to the address, the detective had "probable cause to believe that one or more of the subject vehicles [i.e., the Lexus and the van] were being hidden inside the detached garage at 77 Lincoln Pl[ace]."

The court also analyzed the sufficiency of the affidavit without consideration of the misstatement concerning the van's registration. The court observed that the only remaining information in the affidavit providing a nexus between Maloney and 77 Lincoln Place was the statement that "on April 27, 2017, . . . Maloney was located 'in his home' at 77 Lincoln Place . . . and arrested." The court reasoned that although there was probable cause to believe Maloney was involved in Porter's murder, the affidavit did not establish probable cause that 77 Lincoln Place was Maloney's home or there was evidence related to the murder at that location. The court concluded the affidavit was devoid of any facts supporting the affiant's conclusory assertion that 77 Lincoln Place was Maloney's home and, that based on its review of the four corners of the affidavit and excluding the misstatement concerning the van's registration, the affidavit did not present sufficient facts establishing probable cause for the search. The

court entered an order suppressing the evidence seized during the April 27, 2017 search.

On appeal, the State presents the following arguments for our consideration:

POINT I

This Court must grant leave to appeal to review the trial court's pretrial decision to suppress physical evidence.

POINT II

The search warrant executed at 77 Lincoln Place was valid.

A. Defendant failed to show that the affiant intentionally misrepresented the facts or recklessly disregarded them to even justify holding a Franks hearing.

B. Defendant failed to show that the address mix-up was materially fatal to a finding of probable cause and would have failed to make that showing at a Franks hearing.

II.

"A search that is executed pursuant to a warrant is 'presumptively valid,' and a defendant challenging the issuance of that warrant has the burden of proof to establish a lack of probable cause 'or that the search was otherwise unreasonable.'" State v. Boone, ___ N.J. ___, ___ (2017) (slip op. at 10-11) (quoting State v. Watts, 223 N.J. 503, 513-14 (2015)). "[A]n appellate court's role is not to determine anew whether there was

probable cause for issuance of [a] warrant, but rather, whether there is evidence to support the finding made by the warrant-issuing judge." State v. Chippero, 201 N.J. 14, 20-21 (2009). Reviewing courts "accord substantial deference to the discretionary determination resulting in the issuance of [a] warrant." State v. Marshall, 123 N.J. 1, 72 (1991).

"Courts consider the 'totality of the circumstances' and should sustain the validity of a search only if the finding of probable cause relies on adequate facts." Boone, slip op. at 11 (quoting State v. Jones, 179 N.J. 377, 388-89 (2004)). "[T]he probable cause determination must be . . . based on the information contained within the four corners of the supporting affidavit, as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously." Ibid. (alteration in original) (quoting State v. Marshall, 199 N.J. 602, 611 (2009)).

The State first argues defendants were not entitled to a Franks hearing because they made no showing the detective intentionally misrepresented that the van was registered at 77 Lincoln Place. The State also incongruously argues the court should have conducted a Franks hearing to permit the State to establish additional facts supporting probable cause for the

search.⁴ The State's inconsistent arguments are based on an incorrect interpretation of applicable law.

To obtain a Franks hearing, a defendant "must make a 'substantial preliminary showing' of falsity in the" affidavit supporting the issuance of the warrant. State v. Howery, 80 N.J. 563, 567 (1979) (quoting Franks, 438 U.S. at 170). The "defendant cannot rely on allegations of unintentional falsification" but instead "must allege 'deliberate falsehood or reckless disregard for the truth'" Ibid. (quoting Franks, 438 U.S. at 171). In addition, "the misstatements claimed to be false must be material to the extent that when they are excised from the affidavit, that document no longer contains facts sufficient to establish probable cause." Id. at 568; see also State v. Goldberg, 214 N.J. Super. 401, 406 (App. Div. 1986) ("[B]efore a defendant is entitled to an evidentiary hearing to challenge the veracity of the contents of a police officer's affidavit or . . . testimony given in support of a search warrant, it must be demonstrated, among other things, that the allegedly false statements were essential to support a probable cause determination.").

⁴ In its brief, the State asserts both that defendants "failed to make any sort of showing that would justify holding a Franks hearing," and "the court should have held a Franks hearing to assuage its concerns with respect to" the absence of facts in the affidavit supporting probable cause that evidence might be found at 77 Lincoln Place because it was "Maloney's home."

A search warrant may be issued based on the "applicant's affidavit or testimony" or the testimony of any "witness the applicant produces." R. 3:5-3. See Schneider v. Simonini, 163 N.J. 336, 363 (2000) ("[T]he probable cause determination must be made based on the information contained within the four corners of the supporting affidavit, as supplemented by sworn testimony before the issuing judge"). However, the State makes no showing its search warrant application was supported by anything beyond the detective's affidavit, and concedes the affidavit included false information concerning the van's registration. Thus, a Franks hearing was not required, and the court's determination of whether there was probable cause to search 77 Lincoln Place was, by necessity, limited to an analysis of the other information within the four corners of the affidavit.

We reject the State's contention it was entitled to a Franks hearing for two reasons. First, it opposed defendants' request for a Franks hearing before the motion court, and makes the request for the first time on appeal. See State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)) (finding that appellate courts decline to consider arguments "not properly presented to the trial court" that do not "go to the jurisdiction of the trial court or concern matters of great public interest"). Second, the State erroneously contends

it is entitled to a Franks hearing so it can provide additional evidence establishing probable cause for the search. The State asserts the motion court was required to consider the information "in the supporting affidavit, as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously," but ignores that the search warrant judge was presented with only the detective's affidavit.⁵

The purpose of a Franks hearing is to address alleged falsehoods in a search warrant affidavit. See generally Howery, 80 N.J. at 566-68. It is not intended to permit the State to provide evidence supporting a probable cause determination that was never presented to the search warrant judge. Where, as here, a search warrant is based solely on information contained in an affidavit, the court's determination of probable cause is limited to a review of the affidavit's four corners. See Novembrino, 105 N.J. at 128 (limiting the determination of probable cause for a search warrant to the facts presented in the search warrant

⁵ The State argues that in its brief to the motion court, it presented facts that were not included in the affidavit, but which further established probable cause to search 77 Lincoln Place. For example, the State argued in its brief that probable cause was supported by the fact that Maloney registered 77 Lincoln Place as his address with the New Jersey Parole Board. There is no showing that fact was presented to the search warrant judge. "It is not sufficient that police officers are aware of facts adequate to support a warrant if they fail to communicate these facts to the issuing judge." State v. Novembrino, 105 N.J. 95, 128 (1987).

affidavit submitted to the search warrant judge); see also State v. Macri, 39 N.J. 250, 257 (1963) (quoting Nathanson v. United States, 290 U.S. 41, 47 (1993)) ("[A] search warrant may not issue unless the issuing magistrate can find probable cause from the facts or circumstances presented to him under oath or affirmation.").

A "search warrant enables law enforcement to search property where there is reason to believe, to a reasonable probability, that the fruits, instrumentalities, or other evidence of a crime may be found." Chippero, 201 N.J. at 29 n.6. A judge's "inquiry in respect of a search warrant must assess the connection of the item sought to be seized 1) to the crime being investigated, and 2) to the location to be searched as its likely present location." Id. at 29.

The State recognizes the motion court was required to determine whether the accurate information in the affidavit established probable cause to search the residence and garage at 77 Lincoln Place. The information linking Maloney to the address, however, is limited to the detective's statement that 77 Lincoln Place was Maloney's home and he was arrested there.

The detective's conclusory assertion 77 Lincoln Place was Maloney's home is insufficient to establish probable cause that Maloney resided there. The affidavit is bereft of any facts

demonstrating how the detective determined Maloney lived at the address or how the residence might contain evidence pertinent to Porter's murder. See Boone, slip op. at 16 (finding the affidavit for a search warrant for a residence was insufficient because it did not include facts establishing the defendant lived at the residence or the residence otherwise might contain evidence related to the crimes being investigated); cf. State v. Keyes, 184 N.J. 541, 560 (2005) (finding an informant's tip and corroborating evidence showing the defendant distributed drugs in an apartment provided probable cause for a search warrant for the apartment). As the Court explained in Boone, "[a] neutral magistrate, not the police, should determine whether an application for a search warrant is based on sufficient probable cause." Slip op. at 10.

Here, the affidavit failed to provide any facts permitting the court to determine there was probable cause to believe Maloney actually resided at 77 Lincoln Place and that evidence pertinent to Porter's murder might be found there. The State argues the affiant made a "good guess" that the van used in the murder would be located at Maloney's home,⁶ but provided the search warrant

⁶ The court further determined that defendant's arrest on April 27, 2017 at 77 Lincoln Place did not establish probable cause he resided at the location. The State does not challenge that determination on appeal. Any issue not briefed on appeal is deemed waived. Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525

judge with no evidence demonstrating there was reason to believe 77 Lincoln Place was defendant's home. This failure is fatal to the validity of the search warrant. Boone, slip op. at 16.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

n.4 (App. Div. 2008); Zavodnick v. Leven, 340 N.J. Super. 94, 103 (App. Div. 2001). In addition, the affidavit provides no facts concerning the circumstances of Maloney's arrest or any other information demonstrating probable cause to believe evidence concerning Porter's murder might be present at the location of Maloney's arrest. "[P]robable cause to arrest a suspect is not synonymous with probable cause to search that suspect's" residence. Boone, slip op. at 15.