Affirmed and Majority and Dissenting Opinions filed July 16, 2020.

In the

Fourteenth Court of Appeals

NO. 14-17-00685-CR

NELSON GARCIA DIAZ, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1555099

DISSENTING OPINION

"Citizen informants are considered inherently reliable; confidential informants are not." *State v. Duarte*, 389 S.W.3d 349, 357 (Tex. Crim. App. 2012). Yet the majority fails to properly address this distinction, and in so doing misapplies *Franks v. Delaware*. 438 U.S. 154, 155–56 (1978).

I respectfully dissent.

In *Duarte*, the Court of Criminal Appeals succinctly explained, "The

citizen-informer is presumed to speak with the voice of honesty and accuracy. The criminal snitch who is making a quid pro quo trade does not enjoy any such presumption; his motive is entirely self-serving." 389 S.W.3d at 356. Accordingly, there must be corroborating evidence of a paid confidential informant's credibility. *See id.* at 357–58. Confidential informants "may be considered reliable tipsters if they have a successful 'track record.'" *Id.* at 357. However, "tips from anonymous or first-time confidential informants of unknown reliability must be coupled with facts from which an inference may be drawn that the informant is credible or that his information is reliable." *Id.* at 358.

The affidavit supporting the search warrant states that Angstadt had received "an anonymous tip that an individual known as 'Jessie' was involved in the home invasion." "Jessie" was identified as appellant, and the affidavit containing this "tip" resulted in a search warrant for appellant's phones, leading to the discovery of evidence connecting him with the crime for which he was ultimately convicted.

The problem here is that the "anonymous tip" actually came from a paid Drug Enforcement Agency informant. The trial court's unchallenged findings reflect that "SA Layne told Sgt. Angstadt he was working with a confidential informant who provided him with information on the case, including identifying the suspect as 'Jessie', and providing telephone numbers associated with the suspect." The trial court further found Angstadt's "characterization of the DEA confidential informant as an anonymous tipster was incomplete and not completely accurate."

I agree with the trial court that this evidence shows that Angstadt exhibited, at minimum, a "reckless disregard for the truth" as required by the first prong of

Franks.[1] 438 U.S. at 155–56. I would hold, however, that the misrepresentation is also material, given the differences in the presumptions applied to evidence received from a citizen informant versus a confidential informant, and the lack of requisite corroboration in the affidavit. *See Duarte*, 389 S.W.3d at 356–58.

The second prong of *Franks* requires us to excise the false statement. *See* 438 U.S. at 156. The relevant language from the affidavit states Angstadt had received "an anonymous tip that an individual known as 'Jessie' was involved in the home invasion." Based on the trial court's unappealed findings, the relevant falsity is "anonymous tip"; even when we only remove the word "anonymous" from the affidavit, we are left with "a[ ] tip that an individual known as 'Jessie' was involved in the home invasion." This allegation, however, is insufficient as a matter of law because there is neither corroboration nor information that the confidential informant had a successful "track record." *See Duarte*, 389 S.W.3d at 357. The absence of probable cause after excising the statement satisfies the second prong of *Franks*.

The majority cites *Janecka v. State* for the proposition that "a fabrication intended solely to obscure the identity of an informant for his or her protection is not the type of misrepresentation which offends the Fourth Amendment," and concluding that the misrepresentation here falls outside the scope of *Franks*. 937 S.W.2d 456, 463 (Tex. Crim. App. 1996). *Janecka*, however, is inapposite, as it involved characterizing a citizen as a confidential informant, not misrepresenting a paid informant as merely an anonymous source. *See id.* at 463–64. The majority further determines that any misrepresentation was not material, as "the crucial

[1] Under *Franks*, evidence obtained pursuant to an arrest warrant must be suppressed if (1) the defendant can establish by a preponderance of the evidence that the affidavit supporting the warrant contains a material misstatement that the affiant made knowingly, intentionally, or with reckless disregard for the truth, and (2) excising the false statement, the affidavit's remaining content is insufficient to establish probable cause. *See* 438 U.S. at 155–56.

information identifying appellant and appellant's involvement in the home invasion was essentially true and independently corroborated by Agents Layne and Thompson." Later corroboration, however, does not cure deficiencies in the original affidavit. *See Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate.").

I conclude that the evidence discovered via the warrant was required to be suppressed under *Franks*. I would further hold that failure to suppress this evidence was not harmless, and accordingly, I respectfully dissent.

/s/ Charles A. Spain
Justice

Panel consists of Justices Christopher, Jewell, and Spain (Jewell, J., majority).
Publish — TEX. R. APP. P. 47.2(b).