

Affirmed and Memorandum Opinion filed July 21, 2020.



In The

Fourteenth Court of Appeals

NO. 14-19-00009-CR

ROBERTO GRIEGO JIMENEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1546794**

MEMORANDUM OPINION

Appellant Roberto Griego Jimenez was indicted for possession of between four and 200 grams of methamphetamine. *See* Tex. Health & Safety Code Ann. § 481.112. Appellant pleaded guilty after the trial court denied his motion to suppress evidence found as a result of a search of his home. In two issues appellant argues the trial court erred in failing to suppress the evidence. We affirm.

BACKGROUND

Appellant was arrested after a search of his house produced methamphetamine. In an affidavit attached to the search warrant executed to search appellant's house Officer Jason Curry averred that on April 4, 2017, he was contacted by a sergeant employed by the Harris County Constable's Office. The sergeant told Curry that he conducted a traffic stop on April 1, 2017 where he recovered 15 Xanax pills. The suspect told the sergeant that he bought the pills from a man going by the name of "Rabbit" who lived at 11026 Sageview Drive in Houston.

On April 5, 2017, four days later, Curry conducted surveillance on the home at 11026 Sageview. A car parked in front of the home was registered to appellant. Curry knew appellant from previous interactions with him. During the surveillance Curry saw a man leave the house, and drive away. Curry saw the driver of that car commit a traffic violation. Another officer conducted a traffic stop and found the driver possessed 1.75 grams of methamphetamine. Curry identified the driver as Michael Tornatore. Tornatore told Curry he was willing to give a written statement that he bought methamphetamine on four different occasions from a man he knew as "Rabbit." Curry showed Tornatore a picture of appellant and Tornatore confirmed appellant was the man he knew as "Rabbit." Tornatore told Curry that he bought the 1.75 grams of methamphetamine from appellant and Tornatore observed approximately one ounce of methamphetamine in the house at 11026 Sageview.

Curry checked the records of the Texas Crime Information Center and found that appellant had been convicted three times of possessing controlled substances in 2011 and 2012. An earlier search at 11026 Sageview produced heroin, which led to one of the convictions in 2012. Curry requested a search warrant based on his belief that narcotics were being sold from 11026 Sageview Drive.

Appellant filed a motion to suppress the evidence recovered as a result of the search warrant. Appellant alleged the affidavit for the search warrant did not provide probable cause because the information in the affidavit was stale and did not provide credible information to show that drugs would be in the home. Appellant also alleged that the affidavit omitted the information about Tornatore's deal with the police officers that Tornatore would not be charged with a crime if he gave a statement that he bought the drugs from appellant. Appellant argued that this deliberate omission materially affected the magistrate's finding of probable cause.

At the hearing on appellant's motion to suppress Curry admitted he made a deal with Tornatore for Tornatore's information. Tornatore agreed to tell Curry where he bought the methamphetamine in exchange for no prosecution on the possession offense. Curry sought permission from the Harris County District Attorney's Office to not charge Tornatore with possession of the methamphetamine. Curry testified that he omitted the no prosecution deal from the affidavit.

Following the suppression hearing the trial court signed detailed findings of fact and conclusions of law including the following pertinent fact findings:

- On April 1st, 2017, Affiant (Sgt. Jason Curry) received information from an unnamed Pct. 8 Constable who received information from and [sic] unnamed informant that contained specific information that identified a specific location where illegal drugs were being sold.
- The unnamed informant said that illegal drugs were being sold at 11026 Sageview Dr., Houston, Harris County, Texas, and the informant identified the name of the male selling drugs there as "Rabbit";
- This was an unverified tip, from an unidentified source who's reliability and veracity were unknown to the magistrate;
- However, the Affiant investigated this information by going to the above stated location on April 5th 2017, and conducting a

surveillance;

- On that same date, Affiant checked the plates of a car parked in the driveway at 11026 Sageview and found that the car was registered to the defendant;
- Affiant saw a male get into another car and drive away from the location;
- Affiant had another officer stop the vehicle for a traffic violation, i.e. failing to signal prior to a left turn;
- The other officer, Arellano, obtained probable cause to search the
- vehicle and found 1.76 g of methamphetamine;
- The driver of the vehicle was identified as Michael Tornatore;
- **The Affiant omitted information from the search warrant affidavit.**
- **The omitted information was as follows: Affiant spoke with an Assistant District Attorney, and in exchange for not charging Tornatore with possession of methamphetamine (meth), Tornatore agreed to give a statement that he purchased meth on four different occasions from “Rabbit”, and on the same day of his traffic stop (on April 5th, 2017) he had purchased 1.75 grams of meth for \$50.00 from “Rabbit”, and that he also observed 1oz of methamphetamine in Rabbit’s residence on that same day.**
- Tornatore identified the defendant, “Robert Jimenez” as the man he knows as “Rabbit” when presented with a photo of the defendant.
- The Magistrate was unaware of Tornatore’s agreement with the State at the time he/she reviewed the affidavit and signed the warrant.
- The Magistrate did not have the opportunity to determine if Tornatore had a motive to lie in order to get a deal from the State to not file charges against him because this information was omitted from the search warrant affidavit. (emphasis in original).

The trial court further determined that the search warrant affidavit presented the magistrate with the following information:

- Tornatore said he purchased meth from “Rabbit” on four different occasions.
- “Rabbit” had been previously identified in an unverified tip to law enforcement as a person selling drugs at 11026 Sageview Drive.
- Affiant had identified one of the cars parked at 11026 Sageview on April 5th, 2017 as registered to the defendant, Roberto Jimenez.
- Affiant had previous interactions with Roberto Jimenez (“Rabbit”)
- Roberto Jimenez (“Rabbit”) had been previously handled by law enforcement when Friendswood Narcotics Unit executed a search warrant at 11026 Sageview Drive and found the Defendant in possession of heroin.
- Roberto Jimenez (“Rabbit”) had been convicted three times for possession of a controlled substance.
- Affiant showed a picture of Roberto Jimenez to Tornatore and Tornatore identified the person in the picture as the male he knows as “Rabbit”.
- The methamphetamine found in Tornatore’s car was bought by Tornatore from “Rabbit” on the same day that Tornatore was stopped by police, and that there was still some methamphetamine inside “Rabbit’s” residence at 11026 Sageview on that same day.

In applying the law to the facts of the case the trial court determined that the magistrate had probable cause to justify issuance of the search warrant to seize illegal drugs at 11026 Sageview Drive. The trial court found that Tornatore’s information was corroborated by (1) the April 1, 2017 information from the unidentified informant that a man named “Rabbit” was selling drugs out of 11026 Sageview; and (2) Curry’s surveillance of the residence showing Tornatore leaving the residence and Tornatore’s possession of methamphetamine when the other officer conducted a traffic stop. The trial court further found that the magistrate could have found

Tornatore's information credible because Tornatore identified a picture of appellant as the man he knew as "Rabbit" and appellant had three prior convictions for possession of a controlled substance, one of which was a result of a search warrant executed at the same residence. (CR 90-91)

Applying the *Franks*¹ analysis to Curry's omission from the affidavit the trial court determined that Curry intentionally omitted the agreement from the affidavit. The trial court, however, found the omitted information did not materially affect the magistrate's finding of probable cause. The omitted information did not by itself "aid in proving the nonexistence of probable cause." The trial court determined that the "fact that Tornatore got a deal to have the State forego filing charges against him if he told police from where he got the drugs that were found in his car, does not, in and of itself, aid the magistrate in finding that there would not be illegal drugs in the defendant's home on April 5th." The trial court recognized that the omitted information may have caused the magistrate to question Tornatore's credibility but that omission does not "in and of itself establish as a fact that Tornatore was not credible such that the magistrate could not find probable cause."

Following the trial court's denial of appellant's motion to suppress he pleaded guilty to the offense of possession of a controlled substance. In two issues appellant challenges the trial court's ruling on his motion to suppress.

ANALYSIS

I. Standard of review

When reviewing a trial court's ruling on a motion to suppress, we generally apply a bifurcated standard of review, giving almost total deference to the trial court's determinations of fact and reviewing de novo the trial court's application of

¹ *Franks v. Delaware*, 438 U.S. 154 (1978).

the law. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). However, where the motion to suppress is based upon a magistrate’s decision to issue a warrant, there are no credibility determinations to which we must defer because the trial court is constrained to the four corners of the affidavit. *Id.*

In *Franks v. Delaware*, the Supreme Court of the United States held that if there is an affirmative misrepresentation in the warrant affidavit and the misrepresentation is material and necessary to establishing probable cause, then the warrant is invalid under the Fourth Amendment. 438 U.S. 154, 155–56 (1978); *see also Aguirre v. State*, 490 S.W.3d 102, 109 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The presumption of validity regarding the magistrate’s probable cause determination may be overcome if the defendant can show the presence of false statements in the search warrant affidavit that were either made deliberately or with reckless disregard for truth. *Franks*, 438 U.S. at 171. Such statements must be purged from the affidavit, and it is then up to the reviewing judge to determine whether probable cause exists absent the excised statements. *Id.* at 171–72.

When portions of a search warrant affidavit have been excised and a reviewing court re-examines the balance of the affidavit, the reviewing court should no longer give deference to the magistrate’s initial probable cause determination—and should therefore abandon the usual “substantial basis” analysis—because the reviewing court is now examining a new, different affidavit. *Hyland v. State*, 574 S.W.3d 904, 911 (Tex. Crim. App. 2019). The question for the reviewing court becomes the same as it would be for a magistrate conducting an initial review of a search warrant affidavit: Whether the remaining statements in the affidavit establish probable cause. In resolving that question, “reviewing courts are still required to read the purged affidavit in accordance with *Illinois v. Gates*[,]” and must therefore undertake a totality-of-the-circumstances approach. *State v. Le*, 463 S.W.3d 872, 877 (Tex.

Crim. App. 2015).

This court has extended the analysis in *Franks* to material omissions from an affidavit in addition to material misstatements. *Melton v. State*, 750 S.W.2d 281, 284 (Tex. App.—Houston [14th Dist.] 1988, no pet.) (“Such omissions are treated essentially the same as claims of material misstatements.”); *see also Islas v. State*, 562 S.W.3d 191, 196–97 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).² If the defendant carries the burden to show the omission was intentional, the reviewing court then reviews the affidavit with the true statement added and must determine whether probable cause for the warrant still exists. *Islas*, 562 S.W.3d at 197.

In this case the trial court found the omission was intentional but not material. No one has challenged the trial court’s finding that the omission was intentional; therefore, we will address the materiality of the omission under the above-described standards.

II. The trial court did not err in finding the magistrate had sufficient information from the search warrant affidavit to find probable cause that drugs would be found in the residence.

Appellant raised two issues on appeal: one asserting violation of the United States Constitution and another asserting violation of the Texas Constitution. In

² The Fifth Circuit as well as other federal courts and State courts of appeal have also held that material omissions are to be treated essentially like material misstatements. *See United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980); accord *United States v. House*, 604 F.2d 1135, 1141 & n. 9 (8th Cir. 1979); *United States v. Collins*, 549 F.2d 557, 561 (8th Cir. 1977); *Darby v. State*, 145 S.W.3d 714, 722 (Tex. App.—Fort Worth 2004, pet. ref’d); *Blake v. State*, 125 S.W.3d 717, 723–24 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Bosquez v. State*, 792 S.W.2d 550, 551 (Tex. App.—El Paso 1990, pet. ref’d); *Heitman v. State*, 789 S.W.2d 607, 610–11 (Tex. App.—Dallas 1990, pet. ref’d). The Court of Criminal Appeals has declined to address this issue, but at least once has assumed, but not decided, that *Franks* applies to omissions of fact within a probable cause affidavit. *See Renteria v. State*, 206 S.W.3d 689, 704 (Tex. Crim. App. 2006) (assuming application of *Franks* to omissions and concluding that even if the information omitted from the affidavit was included, sufficient probable cause existed to issue the search warrant).

arguing his second issue premised on a violation of the Texas Constitution appellant incorporates his arguments from the section asserting violation of the United States Constitution. Because appellant has not argued that the Texas Constitution provides greater protection than the United States Constitution, we will not address his second issue separately. *See Arnold v. State*, 873 S.W.2d 27, 33 (Tex.Crim.App.1993) (an appellant claiming relief under both the federal and state constitutions must analyze, argue or provide authority to establish that his protection under the Texas Constitution exceeds or differs from that provided to him by the Federal Constitution.).

The core of the Fourth Amendment's warrant clause and its Texas equivalent is that a magistrate may not issue a search warrant without first finding probable cause that a particular item will be found in a particular location. *State v. Elrod*, 538 S.W.3d 551, 556 (Tex. Crim. App. 2017). Probable cause exists when the facts and circumstances shown in the four corners of the affidavit would warrant a person of reasonable caution in the belief that the items to be seized were in the stated place. *Lopez v. State*, 535 S.W.2d 643, 647 (Tex. Crim. App. 1976). Therefore, although the magistrate's determination of probable cause must be based on the facts contained within the four corners of the affidavit, the magistrate may use logic and common sense to make inferences based on those facts. *Elrod*, 538 S.W.3d at 556.

The totality of the circumstances in the four corners of the affidavit in this case shows that there was a fair probability that evidence of drugs would be found in the residence when the warrant issued. The magistrate received information that Tornatore, a named informant, told the affiant that a man named "Rabbit" sold him drugs at the residence in question. The affidavit also noted that another person, four days earlier, had illegally purchased Xanax from a man named "Rabbit" at the same location. The unidentified informant corroborated Tornatore's information that illicit

drugs were being sold at this location by “Rabbit.” The magistrate was also provided with information that the affiant saw Tornatore leave the residence and found Tornatore in possession of methamphetamine after leaving the residence. The magistrate’s assessment of Tornatore’s credibility could be based on these facts in the affidavit, which provided sufficient probable cause. The magistrate had a basis to find probable cause because he or she could choose to believe Tornatore despite his no prosecution deal with the police and District Attorney’s office.

Appellant argues the opinion in *State v. Duarte*, 389 S.W.3d 349 (Tex. Crim. App. 2012), supports his position that the omission of Tornatore’s deal from the affidavit rendered the affidavit insufficient to support a finding of probable cause. Appellant urges that the court’s decision in *Duarte* requires this court to reverse the trial court’s decision because the court in *Duarte* contemplated an informant similar to Tornatore. Appellant described Tornatore as “a first-time informant/snitch from the criminal milieu” making a trade to avoid a felony charge.

In contrast to this case, the Court of Criminal Appeals, in *Duarte*, addressed the issue of whether a tip by a first-time confidential informant of unknown reliability, standing virtually alone, provided a sufficient basis for a magistrate’s probable cause determination. *Id.* at 355.

The affidavit at issue in *Duarte* recited that the affiant “receive[d] information from a credible individual who is currently facing pending criminal charges and provided the information with the expectation that his/her cooperation with law enforcement would, if proven valid, be called to the attention of authorities, for the possible dismissal of charges, or a favorable plea bargain sentence.” *Id.* at 352. The affiant in *Duarte* represented that the confidential informant was familiar with cocaine; had told the affiant that he/she had observed Duarte in possession of cocaine within the past 24 hours at a certain address; and the affiant had confirmed that

Duarte did in fact live at that same address. *Id.*

The trial court in *Duarte* granted the motion to suppress on the basis that the affidavit in support of the search warrant did not contain sufficient information to support the magistrate's finding of probable cause. *Id.* at 353. The court noted that probable cause exists if the information given by the informant "is corroborated, is a statement against penal interest, is consistent with information provided by other informants, is a detailed first-hand observation, or is coupled with an accurate prediction of the subject's future behavior." *Id.* at 356. In *Duarte*, the court emphasized that the informant's tip "contained no particular level of detail regarding appellee's premises or his criminal activity." *Id.* at 359.

Here, the magistrate had significantly more information than the magistrate in *Duarte*. Significantly, in this case Tornatore was not a confidential informant. While an unidentified informant corroborated Tornatore's information, the magistrate had more than just a confidential informant's statement to assess probable cause. Information obtained from a named informant is "inherently reliable." *State v. Ford*, 537 S.W.3d 19, 26 (Tex. Crim. App. 2017) ("citizen informants who identify themselves 'are considered inherently reliable'"); see *Taflinger v. State*, 414 S.W.3d 881, 885 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("When a citizen-informant provides self-identifying information that makes himself accountable for the intervention, the degree of reliability of a tip significantly improves."). In this case, the magistrate was able to assess Tornatore's reliability with the details he provided, including first-hand observation, information corroborated by another informant, and detail about appellant's premises and criminal liability.

The detailed statement given by Tornatore, a named informant and witness to the ongoing criminal activity, showed that he had personal and direct knowledge of the matters he asserted. The magistrate, therefore, correctly determined that the facts

that Tornatore gave established a “fair probability” that evidence of a particular crime would likely be found in 11026 Sageview Drive. *See Elrod*, 538 S.W.3d at 560. Appellant met his burden to show that the affidavit should have included the information about Tornatore’s deal of no prosecution in exchange for information. However, when the improperly omitted information is included in the affidavit, the magistrate still had sufficient information to corroborate Tornatore’s statement and determine probable cause. *See Islas*, 562 S.W.3d at 197 (“If the defendant carries that burden, then the false statement is removed from the affidavit . . . and the reviewing court must determine whether probable cause for the warrant still exists.”). We hold the trial court did not abuse its discretion in denying the motion to suppress and overrule appellant’s issues on appeal.

CONCLUSION

Having overruled appellant’s issues, we affirm the trial court’s judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer (Bourliot, J. dissenting opinion to follow).

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