RENDERED: NOVEMBER 14, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002318-MR

TRAVIS SUGGS — APPELLANT

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 01-CR-00184

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

*** *** ***

BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Travis Suggs appeals from a final judgment of the Simpson Circuit Court sentencing him to seven years' imprisonment on a conviction for trafficking in a controlled substance (marijuana) within 1,000 yards of a school building and being a persistent felony offender in the second degree (PFO II) following a jury trial. Suggs challenges the trial court's denial of his motion to suppress evidence obtained in the execution of a search warrant. He also challenges an order of

the trial court denying his motion for a new trial based on the failure of the Commonwealth to disclose the existence of an eye witness prior to trial. We conclude that his arguments are without merit and thus affirm.

In the late afternoon of August 6, 2001, Officers Scott Wade and Brian Smith of the Franklin Police Department were patrolling an area of high drug activity in Franklin, Kentucky. The officers saw Roscoe Clark approach a residence on Breckinridge Street on his bicycle and enter the residence. Officer Wade was familiar with Clark as a drug user from previous encounters with him. A few minutes later, Clark exited the residence.

The police officers stopped Clark when they observed him violate some traffic regulations. When Officer Wade approached him, Clark placed a small bag of marijuana in his mouth, which the officer recovered. When asked about the marijuana, Clark allegedly told Officer Wade that he had just purchased the item at the Breckinridge Street residence from a black male in a white tee shirt and a blue or black hat. After arresting Clark for possession of marijuana, Officer Wade decided to seek a search warrant.

A few hours later, a trial commissioner issued a search warrant based on an affidavit prepared by Officer Wade describing the incident and his discussion with Clark. In the

affidavit, Officer Wade stated that Clark had given him reliable, truthful information in the past. The search warrant authorized a search of the residence for property or things of evidence tending to show crimes related to the sale of drugs and for an unknown black male wearing a white tee shirt and a blue or black hat.[1]

At approximately 9:00 p.m. the same night, Officer Wade and several other police officers executed the search warrant. A young woman answered and allowed them into the residence after Officer Wade knocked on the front door and told her of the search warrant. Upon entering, the police had their guns drawn. They encountered two persons in the kitchen and six persons, including Suggs, in a back entertainment room.

When Officer Wade and another officer entered the back room, Suggs was playing billiards. Officer Wade told the occupants that he had a search warrant and directed them to lie down on the floor and place both of their hands in front of them where they could be seen. Suggs did not lie down on the floor, but he did drop the pool stick and put his hands in front of him. Suggs then started repeatedly placing his right hand behind him and bringing it back in front of him.

[1] Unfortunately, the affidavit and search warrant documents are not included in the appellate record even though they were admitted into evidence at the suppression hearing. Our discussion of these documents is based on testimony at the suppression hearing.

After Officer Wade asked him several times to leave both of his hands in front of him, he allegedly saw Suggs take a large Ziploc plastic bag containing what appeared to be marijuana from behind his back as he was going down on the floor and throw it to his side. At that point, while pointing his gun at Suggs, Officer Wade again told Suggs to lie face down on the ground. Officer Wade then handcuffed Suggs, placed him under arrest, and performed a search of his person.

In the search, Office Wade discovered a small bag of marijuana, $6,072 mostly in $20 bills, and a vial containing several Viagra pills. Officer Wade also retrieved the large bag thrown by Suggs, which later analysis revealed contained 89 grams[2] of marijuana. The search of the residence uncovered various items of drug paraphernalia, including scales and plastic baggies, and a police scanner.

In November 2001, Suggs was indicted on one felony count of trafficking in a controlled substance (marijuana) within 1,000 yards of a school building,[3] one misdemeanor count of prescription drugs in improper container,[4] one misdemeanor count of possession of drug paraphernalia,[5] one misdemeanor count

[2] There are 28 grams in one ounce.

[3] Kentucky Revised Statute (KRS) 218A.1411.

[4] KRS 218A.210.

[5] KRS 218A.500(2).

of possession of a police radio,[6] and being a persistent felony offender in the first degree (PFO I).[7] Suggs subsequently filed a motion to suppress the evidence seized by the police during the search.[8] The trial court conducted a hearing on the motion with Officer Wade as the only witness.[9] Suggs challenged the sufficiency of the description of the reliability of Clark in the affidavit submitted to support the search warrant and the validity of the search of Suggs's person. The trial court denied the motion holding that the search warrant was validly issued and that the search of Suggs was a valid search incident to arrest.

At the trial on August 15, 2002, Officers Wade and Smith testified about the events involving the search. Suggs testified and admitted having the small bag of marijuana and cash but denied ever possessing or handling the large bag of marijuana. During the defense case, Clark testified that he did not tell Officer Wade that he had purchased marijuana from a person at 528 Breckinridge Street and denied ever having been at

---

[6] KRS 432.570.

[7] KRS 532.080.

[8] The written motion only requested suppression of the money seized, but Suggs's attorney later orally expanded the request.

[9] Roscoe Clark had escaped from jail and his whereabouts was unknown. Therefore, he was not available for the hearing.

that residence. Clark also stated that his girlfriend was with him on August 6 when he was stopped and arrested by Officer Wade. Prior to submitting the case to the jury, Suggs orally renewed his motion to suppress without stating the grounds for the motion, and the trial court summarily denied the request. The jury found Suggs guilty of trafficking in a controlled substance (marijuana) and being a PFO II and recommended a seven-year sentence.[10]

Suggs filed a motion for a new trial that included, among others things, alleged error in the denial of his earlier motion to suppress. The motion cited the trial testimony of Clark as support. On October 7, 2002, the trial court conducted a hearing on sentencing and the new trial motion. Suggs's attorney argued that the affidavit for the search warrant was insufficient, the Commonwealth should have given the defense information that Clark's girlfriend was with him when he was stopped, and the police used excessive force in executing the search warrant. The trial court denied the new trial motion stating the police had acted properly in executing the search warrant and the defense had not established that Clark's

[10] Prior to submitting the case to the jury, the Commonwealth had moved to dismiss the charges of prescription drugs in an improper container and possession of a police radio, and had moved to amend the original PFO I charge to PFO II. The trial court also had granted the defendant's motion for directed verdict in part by dismissing the charge of possession of drug paraphernalia.

girlfriend would have provided exculpatory evidence. Suggs was sentenced to seven years' imprisonment on trafficking in a controlled substance (marijuana) and being a PFO II. This appeal followed.

On appeal, Suggs first contends the police officers violated his Fourth Amendment rights in the manner in which they executed the search warrant. Suggs questions the actions of the police in displaying their weapons and ordering the occupants to get down on the floor. He asserts that there was no threat or danger to the police to justify their actions and that their actions constituted an illegal arrest of him. With respect to denial of a motion to suppress, an appellate court reviews the trial court's factual findings for clear error and the legal issues de novo. See Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 79 (2002); United States v. Miller, 314 F.3d 265, 267 (6th Cir. 2002).

The Fourth Amendment of the United States Constitution prohibits unreasonable search and seizures. See United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984)(Fourth Amendment protects against both illegal searches and seizures). A person whose liberty is restrained by means of physical force or show of authority and is not free to leave a residence while officers are conducting a search is "seized" for purposes of the Fourth Amendment. See Michigan v. Summers, 452

U.S. 692, 696, 101 S.Ct. 2587, 2590-91, 69 L.Ed.2d 340 (1981)(citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Generally, a seizure amounting to an arrest must be supported by probable cause. See, e.g., Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

However, the Supreme Court has held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Summers, 452 U.S. at 705, 101 S.Ct. at 2595. Justification for this incremental intrusion on personal liberty when a search of a home has been authorized by a valid warrant includes the substantial law enforcement interest in preventing the flight of a suspect in the event incriminating evidence is found, protecting the safety of the officers, and the orderly completion of the search. Id. at 703, 101 S.Ct. at 2594.

The Fourth Amendment also protects against the use of excessive force in the manner of executing a search warrant or making an arrest or investigatory detention. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); Ingram v. City of Columbus, 185 F.3d 579, 596 (6th Cir. 1999). The right to make an arrest or investigatory stop, however, necessarily carries with it the right to use some degree of physical coercion or threat to affect it. Graham, 490 U.S. at 396, 109

S.Ct. at 1872. In deciding whether the amount of force was excessive, courts examine the totality of the circumstances to determine whether the countervailing government interests justify the intrusion on the person's Fourth Amendment interests. See, e.g., Pray v. City of Sandusky, 49 F.3d 1154, 1158 (6th Cir. 1995). The test is an objective one based on reasonableness from the perspective of a reasonable police officer on the scene. Graham, 490 U.S. at 396-97, 109 S.Ct. at 1872; Gross v. Pirtle, 245 F.3d 1151, 1158 (10th Cir. 2001). Factors relevant to the inquiry include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to flee or interfere with the officer's execution of his duties. See Graham, supra; Jacobs v. City of Chicago, 215 F.3d 758, 773 (7th Cir. 2000); Scott v. Clay County, Tennessee, 205 F.3d 867, 876-77 (6th Cir. 2000).

Suggs's claim that the police officers used excessive force in executing the search warrant is unpersuasive. The warrant involved a search for drug contraband at a residence known for drug activity. The courts have recognized that weapons are "tools of the trade" for drug traffickers and that drug dealing is a "crime infused with violence." See Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 203 (1993); United

States v. Brown, 188 F.3d 860, 865 (7th Cir. 1999)(quoting United States v. Gambrell, 178 F.3d 927, 929 (7th Cir. 1999)).

There were nine persons in the residence at the time the search warrant was executed. The police knocked on the door, were allowed in, and pronounced that they were serving a search warrant. Based on Officer Wade's testimony, the trial court found that the police feared for their safety and that Suggs was uncooperative in failing to lie down on the floor and placing his right hand behind his back several times where it could not be seen.

Suggs's assertion that the police officer's pointing of their guns at him constituted an arrest is erroneous. Several courts have held that if the circumstances give use to a justifiable fear for personal safety, a seizure effectuated with weapons drawn is proper and does not constitute excessive force or convert it into an arrest. See, e.g., Sharrar v. Felsing, 128 F.3d 810 (3d Cir. 1997); Jackson v. Sauls, 206 F.3d 1156 (11th Cir. 2000); United States v. Hardnett, 804 F.2d 353, 357 (6th Cir. 1986). Viewing the totality of the circumstances in this particular case, we believe the trial court's factual findings were not clearly erroneous and the police did not use excessive force and acted reasonably in executing the search warrant.

Suggs also claims the trial court erred in denying him a new trial because the Commonwealth failed to provide him with the identity of Clark's girlfriend. Suggs contends he was entitled to this information under Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), which held that due process requires the government to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment, regardless of the good faith or bad faith of the prosecution. See also Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994). Impeachment evidence as well as exculpatory evidence falls within the Brady doctrine. See United States v. Begley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Strickler v. Green, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); Mounce v. Commonwealth, Ky., 795 S.W.2d 375 (1990). Evidence is material if there is a reasonable probability the result of the trial would have been different had the evidence been disclosed. Begley, supra; Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Taylor v. Commonwealth, Ky., 63 S.W.3d 151 (2001). In addition, the evidence must be within the exclusive possession of the government and not available to the defense in the exercise of due diligence. See, e.g., Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998); Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 410 (2002).

The defendant bears the burden of establishing that the undisclosed evidence was favorable to the accused because it was exculpatory or impeaching; that it was suppressed by the government, either willfully or inadvertently; and that prejudice ensued. Strickler, 527 U.S. at 282-83; 119 S.Ct. at 1948. With respect to the timing of the disclosure, as long as the defendant possesses the Brady material in time for its effective use, the government has not deprived the defendant of due process simply because it did not produce it sooner. See United States v. Coppa, 267 F.3d 132, 144 (2d Cir. 2001); United States v. Patrick, 965 F.2d 1390, 1400 (6th Cir. 1992); See v. Commonwealth, Ky., 746 S.W.2d 401 (1988). Although a new trial motion usually is reviewed for an abuse of discretion, a trial court's denial of a new trial based on an alleged Brady violation is reviewed de novo. See United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001); United States v. Quintanilla, 193 F.3d 1139, 1146 (10th Cir. 1999).

While Suggs relies on Brady, his claim implicates the Supreme Court's decision in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). In Franks, the Court modified the previous rule that any challenge to an affidavit for a search warrant could be made only to the adequacy of the matters stated in the affidavit and not the validity of the contents. See also Wanda Ellen Wakefield, Annotation,

Disputation of Truth of Matters Stated in Affidavit in Support of Search Warrant—Modern Cases, 24 ALR 4th 1266 (1983). The Court recognized a strong presumption of validity for an affidavit supporting a search warrant and created a narrow rule of limited scope permitting challenge to the affidavit that includes both a subjective and objective component. Franks, 438 U.S. at 171, 98 S.Ct. at 2682.

In order to obtain even a hearing on the integrity of the affidavit, a defendant first must make "a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the warrant affidavit." Id. at 155-56, 98 S.Ct. at 2676-77.[11] This preliminary showing must be more than conclusory and must include a detailed offer of proof such as affidavits or sworn testimony or a satisfactory explanation for their absence. Id. at 171, 98 S.Ct. at 2684; United States v. Anderson, 243 F.3d 478, 482 (8th Cir. 2001).

Second, no hearing is required unless the false information was necessary or material to issuance of the warrant, which involves whether the affidavit would be

[11] Franks involved only affirmative statements in the affidavit, but subsequent cases have extended its application to situations of alleged omissions in the affidavit. See, e.g., United States v. Atkins, 107 F.3d 1213 (6th Cir. 1997); United States v. Colkey, 899 F.2d 297 (4th Cir. 1990); United States v. Stanert, 762 F.2d 775 (9th Cir. 1985).

sufficient to establish probable cause if the alleged false material is redacted or excluded. Franks, 438 U.S. at 171-72, 98 S.Ct. at 2684-85. United Sates v. Chavez-Miranda, 306 F.3d 973, 979 (9th Cir. 2002). If a defendant makes an adequate preliminary showing for a hearing, he must then satisfy a higher burden of establishing both of the two elements of falsity and necessity or materiality by a preponderance of the evidence in order to justify voiding the search warrant. Franks, 438 U.S. at 156, 98 S.Ct. at 2676. Mere negligence or innocent mistake is insufficient to void a warrant, and the deliberate falsehood or reckless disregard involves only that of the affiant and not any nongovernmental informant. Id. at 171-72, 98 S.Ct. at 2684-85.

If the defendant satisfies his burden of proof, then the evidence gathered pursuant to the warrant must be suppressed under the exclusionary rule. Id.; United States v. Graham, 275 F.3d 490, 505 (6th Cir. 2001); United States v. Mick, 263 F.3d 553, 563-64 (6th Cir. 2001). On appellate review of a trial court's decision on suppression under the Franks standard, its findings on the falsity of statements in the affidavit and the reckless character of any misrepresentations or omissions are reviewed for clear error, but its legal conclusion on materiality is reviewed de novo. See, e.g., United States v.

Elkins, 300 F.3d 638, 649 (6th Cir. 2002); United States v. Graham, 275 F.3d 490, 505 (6th Cir. 2001).

Suggs's challenge to the search warrant based on the Commonwealth's failure to disclose the existence of Clark's girlfriend fails for several reasons. First, he relies on the Brady doctrine, but it is unsettled whether that doctrine even applies in this situation. There is a split in the cases on whether Brady applies to suppression hearings. See, e.g., United States v. Scott, 245 F.3d 890 (7th Cir. 2001)(discussing split in cases). A few courts have applied Brady to information relevant to a suppression hearing. See, e.g., Smith v. Black, 904 F.2d 950 (9th Cir. 1990); United States v. Lanford, 838 F.2d 1351 (5th Cir. 1988); United States v. Gomez-Orduno, 235 F.3d 453 (9th Cir. 2000). Only one court has suggested that Brady's principles should be applied to suppression hearings involving a challenge to the truthfulness of allegations in a search warrant affidavit. See United States v. Barton, 995 F.2d 931 (9th Cir. 1993)(applying rationale of Franks to use of destruction of evidence as impeachment evidence for challenge to allegations in search warrant affidavit).

Two other courts have questioned the application of Brady to challenges of search warrants under Franks because of differences in the requirements and the protected interests involved under the principles established in the two cases. See

Mays v. City of Dayton, 134 F.3d 809 (6th Cir. 1998); United States v. Colkley, 899 F.2d 297 (4th Cir. 1990). For instance, Brady concerns ensuring due process through fair criminal trials while protecting the presumption of innocence without regard to the good or bad faith of the prosecution; whereas, probable cause does not involve an adjudication of guilt or innocence, Franks requires a showing of intent by the police affiant and is based on the search and seizure clause of the Fourth Amendment. Nevertheless, even if the Brady principles apply to a challenge to the truthfulness of allegations in a search warrant affidavit, those principles should be applied consistent with the requirements and within the framework of Franks, so a defendant would need to show a reasonable probability that a failure to disclose favorable evidence would have affected the outcome of the Franks suppression proceeding. See, e.g., United States v. LaRouche Campaign, 695 F.Supp. 1290 (D. Mass. 1988)(stating failure to satisfy Franks rendered Brady claim insufficient because of failure to establish materiality); Owens v. United States, 236 F.Supp.2d 122 (D. Mass. 2002)(same).

Assuming that Brady applies to Franks type challenges, Suggs has not shown the requirements necessary to establish a due process violation by the Commonwealth's failure to affirmatively identify Clark's girlfriend in discovery. First, Suggs has not shown that the girlfriend's identity was within

the exclusive possession of the Commonwealth and not discoverable by Suggs through due diligence. Clark obviously had this information and, although he was unavailable at the time of the suppression hearing due to his having escaped from jail, he was available for a period of time prior to trial. Even though Officers Wade and Smith testified at trial that there was a female with Clark at the time he was stopped, there is no evidence that they obtained her name or identity at the time. Second, Suggs did become aware of her identity in time for its effective use through Clark's trial testimony. This information consequently was available for any post-trial motions and challenges to the search warrant.

As the trial court noted, perhaps the most significant deficiency in Suggs's position is his failure to demonstrate that Clark's girlfriend possessed and would have provided favorable material evidence. "There is no general constitutional right to discovery in a criminal case, and Brady did not create one . . . ." Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). The duty to disclose the identity of a potential witness is derived from that witnesses' ability to provide favorable material evidence. See, e.g., United States v. Clark, 988 F.2d 1459 (6th Cir. 1993). The mere speculation that a witness may have some evidence helpful to the defendant's case is not sufficient to show the need for disclosure. See, e.g.,

United States v. Jiles, 658 F.2d 194, 197 (3d Cir. 1981). Cf. United States v. Van Brocklin, 115 F.3d 587, 594 (8th Cir. 1997)(mere application that police file may contain impeaching information is insufficient). The fact that Clark provided testimony impeaching Officer Wade's search affidavit concerning his statements to Wade does not establish that his girlfriend would have provided identical testimony. Suggs merely assumes that the girlfriend would corroborate Clark's testimony.

In addition, even if Clark's girlfriend could have provided impeaching testimony, it was not material because it was not sufficient to have altered the outcome of the suppression hearing under a Franks analysis. While Clark's trial testimony may have been sufficient to justify a Franks hearing, see, e.g., State v. Walls, 170 W.Va. 419, 294 S.E.2d 272 (1982), in order to void the warrant, the defendant must show by a preponderance of the evidence that the police officer deliberately included false material[12] statements in the search warrant affidavit.

At the trial, both Officers Wade and Smith testified to the truthfulness of the statements in the affidavit. During the new trial hearing, the trial court discounted Clark's impeachment testimony and reaffirmed its denial of the

[12] This court is unable to determine whether the alleged false statement in the affidavit was material or not because the affidavit is not included in the appellate record.

suppression motion. The trial court's credibility assessment is entitled to great weight. While a fuller Franks hearing would have been beneficial, Suggs did not request such a hearing and did not produce an affidavit or live testimony from Clark's girlfriend concerning her purported impeachment evidence.

Under these circumstances, Suggs has not shown by a preponderance of the evidence that the search warrant affidavit contained deliberate falsehoods so as to justify voiding the search warrant. See, e.g., State v. Wood, 177 W.Va. 352, 352 S.E.2d 103 (1986)(upholding denial of suppression motion under Franks where trial court found informants impeaching testimony not credible); Johnson v. State, 472 N.E.2d 892 (Ind. 1985)(conflicting evidence from police affiant and informant did not establish falsehood in affidavit); United States v. Brown, 3 F.3d 673 (3d Cir. 1993). As a result, Suggs has not established that the undisclosed information was material under Brady in that the outcome of a Franks hearing would have been different. Given Suggs's failure to satisfy his burden of proof under Brady and Franks, we conclude that the trial court did not err in denying his motion for a new trial.

For the foregoing reasons, we affirm the judgment of the Simpson Circuit Court.

TACKETT, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Morris Lowe
Dixie Satterfield
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

N. Susan Roncarti
Assistant Attorney General
Frankfort, Kentucky