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SEARCHES AND SEIZURES—PROBABLE CAUSE—DEFENDANTS MAY CHALLENGE THE VERACITY OF SEARCH WARRANT AFFIDAVITS IF THEY OFFER PROOF OF INTENTIONAL OR RECKLESS MISSTATEMENTS MADE BY THE AFFIANT.

Petitioner was convicted in a Delaware trial court of first degree rape, second degree kidnapping and first degree burglary.¹ Petitioner appealed his convictions to the Delaware Supreme Court, contending that the trial court erred in refusing to hear testimony at the suppression hearing which would have attacked the truthfulness of the affidavit² underlying the search warrant upon which evidence had been seized.³ The Supreme Court of Delaware affirmed the convictions, holding that no challenge may be made to the veracity of an affidavit upon which probable cause for the issuance of a search warrant had been founded.⁴ The United States Supreme Court reversed and *held* that when a criminal defendant makes a substantial preliminary showing that intentional or reckless misstatements, necessary to a finding of probable cause, were made by the affiant in a search warrant affidavit, the fourth amendment to the United States Constitution mandates that an evidentiary hearing be held at the defendant's request. *Franks v. Delaware*, ___ U.S. ___, 98 S. Ct. 2674 (1978).

1. *Franks v. Delaware*, ___ U.S. ___, 98 S. Ct. 2674 (1978).

2. The affidavit is reproduced at ___ U.S. at ___, 98 S. Ct. at 2685-87 app. A.

3. *Franks v. State*, 373 A.2d 578, 579 (Del. 1977). On March 5, 1976, Mrs. Cynthia Bailey reported to the police that she had been sexually assaulted and gave the police a description of the assailant and the clothing he had worn. The same day, petitioner, while awaiting a bail hearing for an unrelated assault involving a Brenda B. _____, indicated to a youth officer that he thought the hearing was about Bailey rather than Brenda B. _____. When the officer subsequently happened to mention the incident to a detective, Brooks, the investigation of the Bailey assault focused on petitioner. On March 9th, Bailey and another detective submitted a sworn affidavit in application for a warrant to search petitioner's apartment for certain described clothing and a knife. The affidavit, on the basis of which a search warrant was issued and articles similar to those described were found, stated that the affiant had been told by two persons at the youth center where petitioner worked that petitioner often wore clothing like that described by the victim. At a suppression hearing before trial, petitioner's attorney contended that the search warrant did not on its face show probable cause and orally amended his challenge to include an attack on the veracity of the affidavit. Defense counsel asserted that the two persons allegedly contacted by Brooks would testify that they did not talk to Brooks, but that they may have talked to another police officer. In addition, they would testify that what they told the officer was "somewhat different" from what was stated in the affidavit. The prosecution's objection to the veracity challenge attempt was sustained by the trial court. ___ U.S. at ___, 98 S. Ct. at 2677-79.

4. 373 A.2d at 579-80.

The fourth amendment to the United States Constitution assures the right of the people to be secure against unreasonable searches and seizures and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." ⁵ In 1914, the United States Supreme Court established the rule that a defendant's constitutional rights are denied by a denial of his petition before trial for return of property secured through an illegal search or seizure conducted by federal authorities.⁶ The exclusionary rules thus established was held applicable to the states by the Court's holding that "all evidence obtained by searches and seizures in violation of the Constitution was inadmissible in a state court."⁷ The United States Supreme Court has established the rule that "[u]nder the [f]ourth [a]mendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation."⁸ Whether, and under what circumstances, a criminal defendant has the right to challenge the veracity of the facts or circumstances presented in an application for a search warrant is an issue that, prior to the opinion in *Franks*, had not been decided by the United States Supreme Court. This issue had been a subject of conflict in both the state and federal courts.⁹

Early cases held that a defendant is not entitled to go behind the search warrant and attack the affidavits upon which probable cause had been founded.¹⁰ At the time of the *Franks* decision all of the federal circuit courts of appeal, except one, had allowed veracity challenges.¹¹ The state courts, however, had been more divided on the issue.¹²

5. U.S. CONST. amend. IV.

6. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

7. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

8. *Nathanson v. United States*, 290 U.S. 41, 47 (1933).

9. ___ U.S. at ___, 98 S. Ct. at 2679.

10. *Kenney v. United States*, 157 F.2d 442 (D.C. Cir. 1946); *United States v. Burnett*, 53 F.2d 219, 225 (W.D. Mo. 1931). In *Kenney*, the court stated that a warrant upon which evidence was seized leading to a conviction of operating a lottery and possessing materials therefore was sufficient if the affidavit showed probable cause at the time the warrant was issued. 157 F.2d at 442. The court in *Burnett* stated that "[t]he 'probable cause' required by the fourth amendment is that shown by an affidavit." 53 F.2d at 225.

11. ___ U.S. at ___, 98 S. Ct. at 2678-79 n.4. The Court of Appeals for the District of Columbia had not allowed veracity challenges. See *United States v. Branch*, 545 F.2d 177, 180 n.2 (1976).

12. ___ U.S. at ___, 98 S. Ct. at 2687-89 app. B. The appendix lists the status of the states at the time of the opinion on the issue of permitting veracity challenges. According to the appendix, fourteen states permit veracity challenges, as opposed to twelve which do not. The practice of four other states may be based on statute. The Court lists two other states which may permit challenges and lists six states which avoided determining the issue on various grounds. The Court also mentions two states which have prohibited challenges that were seemingly directed against the conclusory nature of the affidavits rather than their veracity. *Id.* The Supreme Court of North Dakota has not decided the issue.

A leading case which held that no veracity challenge may be made was *State v. Petillo*.¹³ In *Petillo*, the defendant appealed his conviction on gambling charges, contending that the trial court should have granted his motion to suppress evidence obtained under a search warrant because facts in the affidavit upon which probable cause was founded were false.¹⁴ The New Jersey Supreme Court held that the truth of factual assertions contained in affidavits submitted in support of an application for a search warrant may not be controverted in a subsequent motion to suppress evidence.¹⁵

In support of its holding, the court in *Petillo* concluded that the fourth amendment's probable cause requirement for the issuance of a search warrant is met "if a judicial mind decides that the sworn factual allegations set out in the affidavit or testimony sworn to before him show the required probable cause."¹⁶ The *Petillo* court reasoned that the judge is trusted to evaluate the credibility of the affiant and the legal sufficiency of the facts to which the affiant swears.¹⁷ The court also pointed out that sufficient deterrence of perjury exists because the officer must swear to the testimony and is subject to perjury, contempt charges, and civil suit.¹⁸ Furthermore, the added burden placed on the judicial system from allowing veracity challenges would surpass any protective value, especially since adequate deterrence already exists and the question of guilt or innocence is not being determined.¹⁹

Most of the courts which have decided to allow veracity challenges have dealt perfunctorily or not at all with the issue of why veracity challenges must be allowed.²⁰ These courts quickly

13. 61 N.J. 165, 293 A.2d 649 (1972).

14. *Id.* at ____, 293 A.2d at 651. The affidavit stated in part that the officer had dialed a phone number listed in defendant's name and an informant then placed bets. At the suppression hearing, defendant was allowed to present as a witness a phone company employee who testified that the phone number had been changed and if the officer had dialed that number, he would have been answered by an intercept operator. The employee admitted that it might have been possible for defendant to have overcome the intercept. After the suppression hearing, the trial court denied defendant's motion to suppress, finding no perjury was committed and probable cause existed. *Id.*

15. *Id.* at ____, 293 A.2d at 653. The New Jersey Supreme Court held that the trial court should not have allowed any challenge to the affidavit at the suppression hearing. The defendant was granted a writ of habeas corpus by the New Jersey federal district court in *United States ex rel Petillo v. State of New Jersey*, 400 F. Supp. 1152 (D.N.J. 1975). The district court held that defendant was denied due process because he did not receive a full and fair hearing in state court. *Id.* at 1188.

16. 61 N.J. at ____, 293 A.2d at 653.

17. *Id.*

18. *Id.* at ____, 293 A.2d at 653-54.

19. *Id.* at ____, 293 A.2d at 655-56.

20. Herman, *Warrants for Arrest or Search: Impugning the Allegations of a Facially Sufficient Affidavit*, 36 OHIO ST. L. J. 721 (1975). Herman states that "cases that permit a sub-facial attack are about as poorly reasoned as cases prohibiting it." *Id.* at 728. Herman deals thoughtfully and at length with fourth amendment rationales for requiring sub-facial warrant challenges. See Forkosh, *The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment*, 34 OHIO ST. L.J. 297 (1973) for a discussion, with special emphasis on the history of the fourth amendment, of the constitutional issues involved in search warrant veracity challenges.

moved on to questions of when the challenges were to be allowed and what form the challenges were to take.²¹ In support of allowing veracity challenges, one court reasoned that the obvious assumption behind the fourth amendment requirement of a factual showing sufficient to comprise probable cause was that the showing would be truthful.²² Courts often argued that allowing sub-facial attacks on warrants were necessary for the deterrence of official misconduct.²³

In allowing veracity challenges, the courts must also decide under what circumstances alleged misrepresentations require the invalidation of search warrants based on such false affidavits. Generally, the courts agree that some initial showing of falsity in the affidavit must be made before a defendant would be entitled to a hearing to decide whether falsity actually existed.²⁴ There has been more disagreement by the courts on the issue of the circumstances, once falsity has been proven, which entitle a defendant to suppression of evidence. Two major differing positions on the issue had been developed by the federal circuit courts of appeal.

In *United States v. Carmichael*,²⁵ the Court of Appeals for the Seventh Circuit announced the rule that any deliberate government perjury, even if immaterial to the establishment of probable cause, mandates the suppression of evidence seized upon the perjured search warrant.²⁶ Furthermore, if the falsity is material, reckless error shall mandate suppression, but mere negligent or innocent mistake, even if material, will not.²⁷ The court reasoned that innocent errors do not justify suppression because no deterrent purpose is served and reasonable error does not negate probable cause.²⁸ The *Carmichael* court could find no

21. *See, e.g.*, *United States v. Marihart*, 492 F.2d 897, 899-900 (8th Cir. 1974), *cert. denied*, 419 U.S. 827 (1974); *United States v. Carmichael*, 489 F.2d 983, 988-89 (7th Cir. 1973).

22. *United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966).

23. *See, e.g.*, *United States v. Belcufine*, 508 F.2d 58, 63 (1st Cir. 1974). Courts often argue that the *ex parte* nature of the warrant-issuing procedure increases the necessity of deterrence measures. However, as Herman points out, veracity challenge rationales based upon deterring official misconduct by employing the exclusionary rule often miss a step in their analysis. The exclusionary rule and the deterrence rationale should not come into play until a fourth amendment violation has first been established. Herman, *supra* note 20 at 728-29.

24. *See, e.g.*, *United States v. Carmichael*, 489 F.2d at 989; *United States v. Halsey*, 257 F. Supp. at 1006.

25. 489 F.2d 983 (7th Cir. 1973). The standards set out in *Carmichael* have been adopted by two other circuit courts. *See United States v. Lee*, 540 F.2d 1205, 1209 (4th Cir. 1976), *cert. denied*, 429 U.S. 894 (1976); *United States v. Marihart*, 492 F.2d 897, 900 (8th Cir. 1974), *cert. denied*, 419 U.S. 827 (1974). The Court of Appeals for the Sixth Circuit has apparently adopted the same standards. *United States v. Luna*, 525 F.2d 4, 8 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).

26. 489 F.2d at 989.

27. *Id.* at 988-89.

28. *Id.* "If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken, he has probable cause to believe that a crime has been committed." *Id.* at 989.

workable test to distinguish between innocent and negligent mistake, therefore, it concluded that negligent error, whether material or not, should not mandate suppression.²⁹ However, the court found that where deliberate perjury has occurred, "[t]he fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing."³⁰

The Court of Appeals for the Fifth Circuit reached somewhat different conclusions in *United States v. Thomas*.³¹ The *Thomas* court held that affidavits containing misrepresentations are invalid if the error is material or the deception was intentional on the part of the agent-affiant.³² Therefore, the *Thomas* court reached the same conclusion as *Carmichael* in that any intentional deception mandates suppression.³³ The *Thomas* decision, however, differed from *Carmichael* in that *Thomas* allowed suppression when any falsity, even innocent error, is necessary to a finding of probable cause.³⁴

In order to reconcile the conflicting views of the lower courts, the United States Supreme Court in *Franks* addressed the issue of the effect of affidavit falsity on suppression attempts.³⁵ In finding that under some circumstances veracity challenges must be allowed, the *Franks* court concluded that when a defendant makes a substantial preliminary showing that a false statement, necessary to the finding of probable cause, was intentionally or knowingly included by the affiant in a search warrant affidavit, the fourth amendment requires that a hearing be held at the defendant's request.³⁶ The Court limited its holding to misrepresentations by warrant affiants, excluding misrepresentations by nongovernmental informants.³⁷ Furthermore, before a defendant is

29. *Id.* The court recognized that negligent misrepresentations are theoretically deterrable. Herman, arguing that the innocence-negligence line is commonly drawn in civil litigation, disagreed that a workable test for separating innocent and negligent error could not be found. Herman, *supra* note 20 at 750.

30. 489 F.2d at 989. The Court of Appeals for the First Circuit evidently employs a slightly different standard. That court stated that it saw "no supportable alternative to suppression of evidence obtained pursuant to a warrant based on an affidavit containing an intentional, relevant, and non-trivial misstatement." *United States v. Beleufine*, 508 F.2d at 63 (emphasis added). Thus, the *Beleufine* court, unlike the *Carmichael* court, stated that even deliberate perjury must be relevant and non-trivial in order to mandate suppression.

31. 489 F.2d 664 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975).

32. *Id.* at 669.

33. *Id.*

34. *Id.*

35. ____ U.S. at ____, 98 S. Ct. at 2679.

36. *Id.* at ____, 98 S. Ct. at 2676-77. Because the trial court did not examine petitioner's offer of proof, the Court remanded the case to allow them to do so. The Court stated that "[s]ince the framing of suitable rules to govern proffers is a matter properly left to the States, we decline ourselves to pass on petitioner's proffer." *Id.* at ____, 98 S. Ct. at 2685. Nevertheless, the Court did set forth several standards which such proffers should meet. In particular, the allegations of intentional or reckless falsehood should specifically point out the portion of the affidavit claimed to be false and should be accompanied by supporting reasons and affidavits, sworn statements or other reliable statements of witnesses, or an adequate explanation for the absence of such testimony. *Id.*

37. *Id.* The Court discussed *Rugendorf v. United States*, 376 U.S. 528 (1964), which dealt with

entitled to an evidentiary hearing on his allegations of falsity, the content remaining in the affidavit after the alleged falsity is set to one side must be insufficient to support a finding of probable cause.³⁸ The majority in *Franks* also considered what standard is to be utilized at the suppression hearing once the defendant has made a satisfactory offer of proof.³⁹ The Supreme Court concluded that the defendant must establish the falsity by a preponderance of the evidence.⁴⁰

The Supreme Court's reasoning in allowing veracity challenges appears to have consisted of two major premises. First, the Court found that the language of the Warrant Clause of the fourth amendment is premised upon the affiant's good faith.⁴¹ The Court pointed out that probable cause is based on a truthful showing⁴² and material in the affidavit "is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true."⁴³

The Court's second major premise was that in order for the fourth amendment's probable cause requirement to be effective, the deterrents of veracity challenges and suppression of evidence must be allowed in some situations.⁴⁴ The Court found that the search warrant application hearing before a magistrate, because of its *ex parte* and often urgent nature, is not adequate to discourage or discover lawless and reckless misconduct.⁴⁵ Furthermore, if no

alleged search warrant affidavit falsity. In *Rugendorf*, the Court held that the defendant's claim that certain double hearsay statements made by law enforcement agents were false would not destroy probable cause because the statements did not go to the integrity of the warrant. *Id.* at 532. The Court in *Franks* stated that "[i]n characterizing the affidavit in *Rugendorf* as raising no question of integrity, the Court took as its premise that police could not insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity." *Id.* at _____. 98 S. Ct. at 2680-81 n.6. Thus, it appears that information supplied to the affiant by other law enforcement officers may be subject to a veracity challenge under the *Franks* guidelines.

38. *Id.* at _____. 98 S. Ct. at 2685.

39. *Id.* at _____. 98 S. Ct. at 2677.

40. *Id.* The Court stated the following:

In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id.

41. *Id.* at _____. 98 S. Ct. at 2681.

42. *Id.*, citing *United States v. Halsey*, 257 F. Supp. 1002 (S.D.N.Y. 1966).

43. _____. U.S. at _____. 98 S. Ct. at 2681. The dissent reached a different conclusion on the warrant requirement, arguing that "[i]f the function of the warrant requirement is to obtain the determination of a neutral magistrate as to whether sufficient grounds have been urged to support the issuance of a warrant, that function is fulfilled at the time the magistrate concludes that the requirement has been met." *Id.* at _____. 98 S. Ct. at 2689. (Rehnquist, J., Burger, C.J., dissenting).

44. *Id.* at _____. 98 S. Ct. at 2683-84.

45. *Id.* at _____. 98 S. Ct. at 2683. The dissent, acknowledging that not every determination of the magistrate will be correct, concluded as follows:

[U]nless we are to exalt as the *ne plus ultra* of our system of criminal justice the absolute correctness of every factual determination made along the tortuous route from the

veracity challenges were permitted, police officers intent upon obtaining a search warrant would have little to lose by lying to magistrates, and everything to gain if the ploy went undetected.⁴⁶

The Court in *Franks* engaged in little discussion of the reasons behind the specific requirements it set forth which the defendant must meet in order to receive a hearing and be granted evidentiary suppression.⁴⁷ Prior to the decision in *Franks*, the courts and commentators had disagreed on whether to require the defendant to make a substantial preliminary showing of falsity.⁴⁸ In addition, disagreement existed as to whether suppression was required when the affidavit contained reckless, material misstatements while suppression would not be required for negligent, material misstatements.⁴⁹ Also, the courts which have allowed veracity challenges generally reached a different conclusion than *Franks* on the priority of requiring suppression when the affiant makes intentional but immaterial misstatements.⁵⁰

Two issues in particular were left to be decided after *Franks*. The Court stated that the statements which are allowed to be impeached in accordance with the holding in *Franks* are only those of the affiant, not of any nongovernmental informant.⁵¹ Thus, the issue of whether and when a defendant may challenge the veracity of statements made by nongovernmental informants, which are

filing of the complaint or the issuance of an indictment to the final determination that a judgment of conviction was properly obtained, we shall lose perspective as to the purposes of the system as well as of the warrant requirement of the [f]ourth and [f]ourteenth [a]mendments.

Id. at ____ 98 S. Ct. at 2689 (Rehnquist, J., dissenting).

46. *Id.* at ____ 98 S. Ct. at 2683. The Court in *Franks* noted that "alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap." *Id.* at ____ 98 S. Ct. at 2684.

47. ____ U.S. ____, 98 S. Ct. 2674.

48. *See, e.g.*, *United States v. Belufine*, 598 F.2d at 63; *United States v. Halsey*, 257 F. Supp. at 1006; Herman, *supra* note 20 at 759. Herman argued that a procedural rule requiring a preliminary showing would effectively bar sub-facial attacks in most cases because the demonstration of misrepresentation "cannot feasibly be made without conducting a 'fishing' interrogation of the informant or affiant" who would be unlikely to cooperate voluntarily. Herman, *supra* note 20 at 759. The court in *Belufine* stated that because an initial showing of intentional falsity presumably could not be made easily in most cases, it saw little danger to the warrant process from frequent challenges of intentional misstatements. 508 F.2d at 63.

49. *See, e.g.*, *United States v. Carmichael*, 489 F.2d at 988-89; Herman, *supra* note 20 at 745-50; Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825, 831-32 (1971).

50. *See, e.g.*, *United States v. Thomas*, 489 F.2d at 669; *United States v. Carmichael*, 489 F.2d at 989. The *Belufine* court, which stated that suppression should be allowed for intentional, non-trivial misstatements, argued as follows:

Were the judicial response to be merely the elimination of the false statements and the assessment of the affidavit's adequacy in the light of the remaining averments, enforcement officers would be placed in the untoward position of having everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy.

508 F.2d at 63.

51. ____ U.S. at ____ 98 S. Ct. at 2685.

relied upon to find probable cause for the issuance of a search warrant, was not answered by the Court.⁵² In addition, the Court did not decide whether the identity of an informant must be revealed once a preliminary showing of falsity has been made.⁵³ As noted in *Franks*,⁵⁴ the Court's earlier decision on informant identity disclosure held only that the Due Process Clause of the fourteenth amendment did not require the disclosure of an informant's identity routinely, upon the defendant's mere demand, when ample evidence existed at the probable cause hearing to show the informant reliable and the information credible.⁵⁵ Therefore, it is unclear whether the informant's identity must be revealed when the veracity of the affidavit has been preliminarily challenged successfully.⁵⁶

The *Franks* decision was the first Supreme Court decision to permit criminal defendants to challenge the veracity of material included by affiants in search warrant affidavits.⁵⁷ However, since the Court established strict requirements which must be met before evidentiary hearings and evidence suppression are mandated,⁵⁸ it is unlikely that the courts will be overwhelmed by a large increase of veracity challenges and hearings.

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52. *Id.* The Court found the warrant requirement of the fourth amendment to have been violated in *Franks* because of the lack of a "truthful showing." The Court stated that it meant truthful "in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Id.* at _____. 98 S. Ct. at 2681. (emphasis added). The Court also stated that "truthful" does not mean that every fact is true, for probable cause may be founded upon information received from informants. *Id.* Thus, the Court may be indicating that an informant's misrepresentation may not violate the warrant requirement. *See also* *Rugendorf v. United States*, 376 U.S. 528 (1964), in which the Court stated that alleged falsities by informants in the search warrant affidavit "were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." *Id.* at 532.

53. _____. U.S. at _____. 98 S. Ct. at 2684. The Court stated that "we need not decide and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made." *Id.* It appears the Court may be indicating that a threshold requirement to disclosure would be a "substantial preliminary showing of falsity." Presumably that showing would be equivalent to the showing required to mandate a veracity challenge hearing.

54. *Id.*

55. *McCray v. Illinois*, 386 U.S. 300 (1967).

56. The fact that the defendant's burden of proving the falsity will usually be very difficult to meet, and often impossible, if he cannot cross-examine the affiant's informant, may mandate disclosure in some cases. Otherwise the decision in *Franks* would likely have little practical application or deterrent effect in cases in which unnamed informants supplied the information relied upon to find probable cause. *See supra* note 51.

57. _____. U.S. _____. 98 S. Ct. 2674.

58. *Id.* at _____. 98 S. Ct. at 2685.