

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CASE NO. ST-2016-CR-0000085
Plaintiff,	)	
vs.	)	V.I. Code Ann. tit. 14, §§ 921, 922(a)(1);
	)	921, 922(b); 2253(a) (3 Counts); 295(1);
MALAKAI GEORGE,	)	297(a)(2)
(D.O.B.: 07-26-85)	)	
	)	JURY TRIAL DEMANDED
Defendant.	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion for a *Franks* Hearing, filed on June 6, 2016; Plaintiff's Opposition to Defendant's Motion for *Franks* Hearing, filed on June 20, 2016; and Defendant's Reply to Government's Opposition to Defendant's Motion for *Franks* Hearing, filed on June 28, 2016. A hearing was held on Defendant's Motion on June 21, 2016. After the parties made oral arguments on the record, the Court reserved its ruling on Defendant's Motion and directed Defendant to file a Reply, if any, by June 27, 2016 to Plaintiff's Opposition. Having considered the premises, the Court will deny Defendant's Motion because Defendant has not made a substantial preliminary showing that the affiant in the warrant affidavit made a false statement knowingly and intentionally, or with reckless disregard for the truth.

BACKGROUND

On February 17, 2016, Defendant Malakai George was arrested and charged with: (1) Murder in the First Degree in violation of V.I. CODE ANN. tit 14, §§ 921, 922(a)(1); (2) Murder in the Second Degree in violation of V.I. CODE ANN. tit. 14, §§ 921, 922(b); (3) Unauthorized Use of a Firearm during the Commission of a Murder in violation of V.I. CODE ANN. tit. 14 § 2253(a); (4) First Degree Assault in violation of V.I. CODE ANN. tit. 14, 295(1); (5) Unauthorized Use of a Firearm during the Commission of a First Degree Assault in violation of V.I. CODE ANN. tit. 14, §2253(a); (6) Third Degree Assault in violation of V.I. CODE ANN. tit. 14, § 297(a)(2); and (7) Unauthorized Use of a Firearm during the Commission of a Third Degree Assault in violation of V.I. CODE ANN. tit. 14, §2253(a). The charges were based upon an affidavit submitted in support of an arrest warrant dated February 2, 2016. Defendant now moves the Court to conduct a *Franks* hearing on the grounds that there were several false assertions and omissions in the affidavit used to support the arrest warrant.

FRANKS HEARING STANDARD

The Supreme Court of the United States' decision in *Franks v. Delaware* established a procedure by which a defendant may challenge whether a warrant was obtained with deliberately false information.¹

To obtain a *Franks* hearing, the defendant 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, and if the allegedly false statement is necessary to the finding of probable cause."² To meet this threshold, a challenger must present more than conclusory statements that the affidavit contains false statements or omissions.³ The challenger must specifically identify the allegedly false statements or omissions in the affidavit and provide a statement of reasons supporting the argument.⁴ The challenger must also provide an offer of proof or give a satisfactory explanation for the absence of proof.⁵ Sworn affidavits or reliable statements from witnesses are examples of offers of proof sufficient to satisfy the substantial preliminary showing.⁶

If the challenger provides sufficient proof and obtains a *Franks* hearing, the challenger must prove by a preponderance of the evidence that (1) the affiant made false statements or omissions intentionally, knowingly, or with reckless disregard for the truth, and (2) such statements were material to the probable cause determination.⁷ If the challenger satisfies this burden, the Court will excise the false statements and omissions from the affidavit and assess whether the corrected affidavit establishes probable cause.⁸

ANALYSIS

As a threshold matter, the Court will address an argument raised by the People. The People argue that Defendant has not cited a single case that demonstrates that a *Franks* motion can be used to challenge an arrest warrant.⁹ There is no question that *Franks* involved a search warrant. However, virtually every Circuit Court of Appeals has explicitly applied *Franks* to affidavits made in support of arrest warrants.¹⁰ Therefore, the Court will determine whether Defendant is entitled to a *Franks* hearing.

¹ *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

² *Franks*, 438 U.S. at 155-56; *United States v. Yusuf*, 461 F.3d 374, 383 (3d Cir. 2006).

³ *Franks*, 438 U.S. at 171; *Yusuf*, 461 F.3d at 383 n.8.

⁴ *Franks*, 438 U.S. at 171.

⁵ *Id.*

⁶ *Id.*; *Yusuf*, 461 F.3d at 383 n.8.

⁷ *Id.*

⁸ *United States v. Heilman*, 377 Fed. Appx. 157, 177, 2010 U.S. App. LEXIS 8496, *35-37 (3d Cir. Pa. 2010).

⁹ Opp. to Mot. for Franks Hearing, 2, June 20, 2016.

¹⁰ See, e.g., *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980); *United States v. Colkley*, 899 F.2d 297 (4th Cir. 1990); *United States v. Rodriguez*, 2009 U.S. Dist. LEXIS 122901, 2009 WL 5174685 (D. Mass. Dec. 18, 2009); *United States v. McKnight*, 568 Fed. App'x. 178, 181 (3d Cir. 2014); *United States v. McWhorter*, 515 Fed. Appx. 511, 2013 U.S. App. LEXIS 3822 (6th Cir. 2013); *United States ex rel. Coleman v. Chandler*, 843 F. Supp. 2d 880, 886 (N.D. Ill. 2012); *United States v. Smith*, 715 F.3d 1110, 1118 (8th Cir. 2013); *United States v. Wright*, 2015 U.S. Dist. LEXIS 170150 (D. Nev. Oct. 28, 2015); *United States v. Knittel*, 562 Fed. Appx. 630, 2014 U.S. App. LEXIS 7496, 2014 WL 1465720 (10th Cir. 2014); *United States v. Kapordelis*, 569 F.3d 1291, 1309 (11th Cir. 2009).

Defendant argues that some of the assertions included in the affidavit showed a reckless disregard for the truth and that there were several omissions in the affidavit. The Court will address each argument, herein.

I. DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE AFFIANT MADE FALSE STATEMENTS KNOWINGLY AND INTENTIONALLY OR WITH A RECKLESS DISREGARD FOR THE TRUTH.

In order to receive a *Franks* hearing, a defendant must first make a substantial preliminary showing that the affiant's statement was deliberately false or demonstrated reckless disregard for the truth.¹¹ For example, in *United States v. Novaton*, the Court of Appeals for the Eleventh Circuit found that the defendant had made a substantial preliminary showing when an officer misrepresented past cooperation of informants in the affidavit.¹² Similarly, in *United States v. Reinholz*, the Court of Appeals for the Eighth Circuit held that a substantial preliminary showing was made when an officer misrepresented the nature of the source by implying that the informant had personal knowledge of defendant's drug use and distribution.¹³ Here, the Court must consider whether the affiant, Detective Dwight Griffith ("Detective Griffith"), made false statements knowingly and intentionally, or with reckless disregard for the truth.¹⁴

Defendant challenges several paragraphs of the affidavit, which include statements made by Rajesh "Texi" Maharaj ("Maharaj") to Detective Griffith. Specifically, Paragraphs 4, 7, 9-13, and 17 because such assertions were allegedly made with a reckless disregard for the truth.

First, Paragraph 4 provides,

That on Friday, September 7, 2012, he [Maharaj] and Malak[a]i George [] were dropped off at St. Paul's Baptist Church, which is located in Anna's Retreat, at approximately 10:00 pm by Pastor Lawrence Turnbull.

However, Defendant argues that the affidavit from Pastor Lawrence Turnbull stated that "although initially when I was contacted by detectives as to whether or not I had dropped [Maharaj] and Mr. George into Anna's Retreat on the night of September 7, 2012 I [] subsequently learned after speaking to another pastor who also attended the event that prompted me to drop the young

¹¹ *Franks*, 438 U.S. at 155-56.

¹² *United States v. Novaton*, 271 F.3d 968, 987 (11th Cir. 2001).

¹³ *United States v. Reinholz*, 245 F.3d 765, 774 (8th Cir. 2001) (preliminary showing made because officer misrepresented nature of source by implying informant had personal knowledge of defendant's drug use and distribution).

¹⁴ *United States v. West*, 520 F.3d 604, 612 (6th Cir. 2008) (preliminary showing made when officer did not inform magistrate that witness could not corroborate informant's testimony because officer knew affidavit was misleading and incomplete); *United States v. Harris*, 464 F.3d 733, 738-39 (7th Cir. 2006) (preliminary showing made because officer did not corroborate anonymous tip in original affidavit, despite corroboration in supplemental affidavit); *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1110-11 (9th Cir. 2005) (preliminary showing made because defendant made substantial showing that supported finding of recklessness concerning omissions and misstatements in affidavit), amended by 437 F.3d 854 (9th Cir. 2006); *United States v. Avery*, 295 F.3d 1158, 1166-67 (10th Cir. 2002) (preliminary showing made because officer failed to mention in affidavit confidential informant's lengthy criminal history).

people home, that in fact the event had actually occurred a few weeks prior to September 7, 2012.”¹⁵ Therefore, Defendant contends that Paragraph 4 is a statement made with a reckless disregard for the truth.

Second, Paragraphs 9-11 provides,

9) That Texi stated that when Mr. Payne came out of his house, he observed him with a laundry basket in his hands, and he observed when Malak[a]i began to shoot at Mr. Payne.

10) That the first shot hit between the door and the wall of Mr. Payne’s residence and that Malak[a]i continued to shoot at Mr. Payne as he continued to walk onto Mr. Payne’s property.

11) That Texi stated that Mr. Payne began to run and he observed when one of the bullets struck Mr. Payne in his head as he attempted to jump over his front porch railing.

With respect to Paragraphs 9-11, Defendant argues that according to the affidavit “Mr. Payne was first shot as he exited his house with a laundry basket and he was fatally shot in the head as he tried to jump over his front porch.”¹⁶ This is contradicted by the fact that Mr. Payne’s baseball cap was located quite a distance from his house up hill near the road where his truck was parked and the blood found on the porch railing suggests that Mr. Payne originally fled from the direction of his vehicle down the grassy slope as evidenced by his hat on the hillside and the blood stains on the railing before collapsing on his front porch.”¹⁷ Due to the alleged contradiction, Defendant argues that such statements were made with a reckless disregard for the truth.

Third, Paragraph 12 provides,

12) That . . . Texi stated he observed Malak[a]i walk over to Mr. Payne’s body to see if he was dead, and at that time, the unknown Rasta male emerged from the shadows of the bushes, asked Malak[a]i, “what it is you dealing with?” and Malak[a]i replied, “just wait.”

With respect to Paragraph 12, Defendant argues that there was an unknown Rasta male that ran through a shortcut. The People had statements from an eyewitness Jenile Jackson as well as surveillance video showing the person that ran through the shortcut.¹⁸

Fourth, Paragraph 13 provides,

¹⁵ See Affidavit of Pastor Lawrence Turnbull, 1, May 18, 2016. At the motion hearing, Defendant’s counsel argued that the church event actually occurred the year before in September 2011.

¹⁶ Def. Mot. for Franks Hearing, 4, June 6, 2016.

¹⁷ *Id.*

¹⁸ *Id.*

13) That the unknown Rasta male continued to walk towards Mr. Payne's body, and upon reaching him, Texi observed the unknown Rasta male remove some of Mr. Payne's jewelry. Texi stated that the unknown Rasta male removed two (2) chains and one (1) ring from Mr. Payne's body.

With respect to Paragraph 13, Defendant argues that Payne was still wearing a heavy 32-inch gold chain.¹⁹ At the hearing, Defendant argued that the fact that Payne was only wearing one gold chain demonstrated that such an assertion in the affidavit was false.²⁰

Next, Paragraphs 17-18 provides,

17) That . . . [one] Gerald Lewis was interviewed and stated that on September 7, 2012, he heard approximately five (5) to seven (7) shots while he was in the area of Anna's Retreat.

18) That approximately five (5) to ten (10) minutes after hearing the above-mentioned shots, he observed Javier Liburd, aka "Scrappy's", silver Equinox pull up in the area known as the "turf", which is located in Anna's Retreat.

With respect to Paragraphs 17-18, Defendant argues that the People "knew that Javier Liburd was not on island at the time of the killing as they had flight information to that effect and a statement from him that the only other person that drives his car is his mother."²¹

The People rely on *Rugendorf v. United States*,²² to counter that factual inaccuracies in an affidavit do not destroy probable cause where the inaccuracies are only of a peripheral relevancy.²³ The People also argue that Defendant has not made a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by Detective Griffith in his arrest warrant, and that the allegedly false statement is necessary to the finding of probable cause.²⁴

In *Franks*, the Supreme Court of the United States made it very clear that a defendant's challenge must be directed at the veracity of the affiant, not the veracity of governmental informants.²⁵ The question is whether Detective Griffith accurately and truthfully represented what Maharaj told him, not whether the informant may have lied to Detective Griffith.²⁶ With this distinction in mind, the Court finds that Defendant has not made a substantial preliminary showing

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Rugendorf v. United States*, 376 U.S. 528 (1964).

²³ Opp. to Def. Mot. for Franks Hearing, 4, June 20, 2016.

²⁴ *Id.* at 6.

²⁵ *Franks*, 438 U.S. at 171.

²⁶ *Brown*, 3 F.3d at 677-678 ("The Tenth Circuit affirmed the district court's denial of the defendant's request for a *Franks* hearing, holding that under *Franks* the defendant must first make a substantial showing that the *affiant* knew of or recklessly disregarded the informant's lack of truthfulness, and that it was not enough to show simply that the *informant* may have lied."); See also *United States v. Perdomo*, 800 F.2d 916, 921 (9th Cir. 1986) (affirming denial of *Franks* hearing where proof offered reflected only on veracity of informant and not on veracity of affiant).

of deliberate falsehood or reckless disregard for the truth on the part of Detective Griffith because Defendant has not challenged the veracity of the affiant.²⁷

II. DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE AFFIANT KNOWINGLY AND INTENTIONALLY OR WITH A RECKLESS DISREGARD FOR THE TRUTH OMITTED A MATERIAL FACT OR INCLUDED A FALSE STATEMENT IN THE AFFIDAVIT.

When demonstrating that the affiant omitted a material fact or included a false statement with the requisite *mens rea*, it is insufficient to prove the affiant acted with negligence or made an innocent mistake.²⁸ Omissions are made with reckless disregard if an officer withholds a fact that “any reasonable person would have known that this was the kind of thing the judge would wish to know.”²⁹ In *Jacobs*, the Court of Appeals for the Eighth Circuit concluded that the officer acted with reckless disregard when he told the magistrate that a drug sniffing dog showed “interest” in the bag of the defendant but failed to inform the magistrate that [the dog] had not gone into “alert.”³⁰ “Because of the highly relevant nature of the omitted information,” the Court held that “the omission occurred at least with reckless disregard of its effect upon the affidavit.”³¹

Here, Defendant argues that the affidavit consists of several omissions. First, that Rashaun Lindquist, a next door neighbor to Payne, said that on September 7, 2012, he got up after hearing a noise and observed a slim black male in a black shirt walking towards the dead end.³² Second, that the People have a statement from an individual named Keil Spencer that he almost collided into a red Toyota Corolla that was coming up the hill from where Jenile Jackson indicated someone had come over the wall.³³ In addition, according to Spencer, the car was traveling without lights at a high rate of speed.³⁴ Third, Defendant argues that the person shown on the video is undoubtedly not the Defendant because that person had short dreadlocks.³⁵ Fourth, that Defendant has filed numerous internal affairs complaints against Officer Jose Allen and Officer Nicolas Francois.³⁶

However, an arrest warrant need not include all potentially exculpatory information.³⁷ For example, the Court of Appeals for the Fourth Circuit provides,

A requirement that all potentially exculpatory evidence be included in an affidavit would severely disrupt the warrant process. The rule would place an extraordinary burden on law enforcement officers, who might have to follow up

²⁷ *United States v. Brian*, 507 F. Supp. 761, 764 (D.R.I. 1981); *See also United States v. Barnes*, 604 F.2d 121, 152-53 (2nd Cir. 1979); *United States v. Edwards*, 602 F.2d 458, 465 (1st Cir. 1979).

²⁸ *Yusuf*, 461 F.3d at 383.

²⁹ *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993).

³⁰ *Id.* at 1234.

³¹ *Id.*; *See also United States v. Tate*, 524 F.3d 449, 457 (4th Cir. 2008) (preliminary showing made when officer omitted from affidavit facts that suggested unconstitutional police trespass).

³² Def. Mot. for a Franks Hearing, 5, June 6, 2016.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 6.

³⁷ *United States v. Colkley*, 899 F.2d 297, 303 (4th Cir. 1990).

and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded. It would perforce result in perniciously prolix affidavits that would distract police officers from more important duties and render the magistrate's determination of probable cause unnecessarily burdensome. In addition, a broad duty of inclusion would turn every arrest or search into a warrant contest. Such consequences would, in turn, discourage reliance on warrants, a result the Supreme Court has stated should be avoided in shaping Fourth Amendment doctrine.³⁸

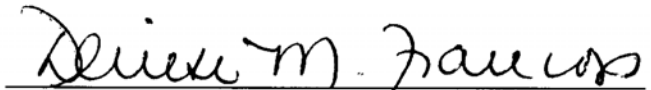
Further, even if the Court were to assume that such omissions were made recklessly, the Court is not convinced that such evidence was material.³⁹ To determine the materiality of the misstatements and omissions, the Court must excise the offending inaccuracies and insert the facts recklessly omitted, and then determine whether or not the "corrected" warrant affidavit would establish probable cause.⁴⁰ Probable cause exists if there is a "fair probability" that the person committed the crime at issue.⁴¹ Therefore, the Court finds that even if such omissions were inserted into the affidavit, probable cause would still remain.

Accordingly, it is hereby

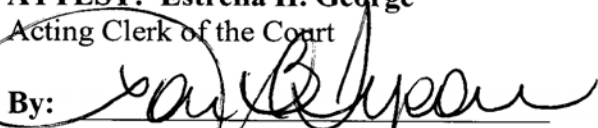
ORDERED that Defendant's Motion for *Franks* Hearing is **DENIED**; and it is further

ORDERED that a copy of this Order shall be directed to counsel of record.

DATED: September 6, 2016


DENISE M. FRANCOIS
Judge of the Superior Court of the Virgin Islands

ATTEST: Estrella H. George
Acting Clerk of the Court

By: 

Lori Boynes-Tyson
Acting Chief Deputy Clerk 9/7/16

³⁸ *Id.*

³⁹ *United States v. Gary*, 528 F.3d 324, 328 (4th Cir. 2008) (no hearing required when officer omitted non-material facts from affidavit because omissions not necessary to finding probable cause); *U.S. v. Graham*, 275 F.3d 490, 506 (6th Cir. 2001) (no hearing required because, even if agent recklessly made false statements, remainder of affidavit contained sufficient probable cause).

⁴⁰ *Gary*, 528 F.3d at 400.

⁴¹ *Id.*