

SUPERIOR COURT OF NEW JERSEY
VICINAGE 1

Mark. H. Sandson
Judge

Atlantic County
Criminal Courts Complex
4997 Unami Boulevard
Mays Landing, N.J. 08330-2054
(609) 909-8137

March 10, 2014

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Re: State v. Adam Malkin
Indictment No. 13-04-1042C
Motion to Suppress With a Warrant

Dear Counselors:

This letter opinion is rendered in response to a Motion to Suppress With a Warrant by Defendant Adam Malkin (hereinafter "Defendant"). The Court has considered the briefs submitted by both sides together with sworn testimony and oral arguments before the Court on October 25, 2013 and January 28, 2014. The Court has decided to GRANT Defendant's Motion for the reasons set forth in this letter.

FINDING-OF FACTS

On January 31, 2013, DEA agents received information from a confidential informant that a FedEx package scheduled for delivery to Clayton's Self Storage "possibly" contained narcotics. Special Agent McCaffrey informed Detective William Carew of the Atlantic County Prosecutor's Office of this suspected delivery. Detective Carew was informed of the tracking number.

On February 1, 2013, Detective Carew, along with additional personnel, conducted surveillance at Clayton's Storage. The detectives saw a FedEx delivery and approached the Clayton's Storage employee to confirm the tracking number of the package delivered. It was then learned that the package was addressed to Adam Malkin. The Clayton's Storage employee then showed Detective Carew an image of Adam Malkin. Shortly thereafter, Defendant arrived to pick up the package.

Upon Defendant exiting Clayton's Storage with his package, Detective Carew approached Defendant, and asked him if he was Adam Malkin. Defendant said he was. Detective Carew informed Defendant that he believed something illegal was contained within the package, and Defendant responded that if the detective was going to arrest him, to do so, but Defendant wants his attorney. Defendant subsequently stated that he did not know what was located within the package, and denied possession.

Officer D'Esposito of the Galloway Township Police Department thereafter arrived on scene with his canine, Zito. Officer D'Esposito testified to the training, experience, and certifications of both Zito and himself.

The package was then brought back inside Clayton's Storage where Canine Zito conducted a sniff test. Canine Zito indicated a positive reaction of contraband from the package. The package was then brought to the Atlantic County Prosecutor's Office where Detective Carew sought a search warrant. On February 1, 2013, Detective Carew had sworn an affidavit before the Honorable Bernard E. DeLury, Jr., J.S.C. Judge DeLury then issued a search warrant for the search of the brown cardboard box delivered by FedEx to Clayton's Storage.

The sworn affidavit contained nine paragraphs, two of which, paragraph 4 and paragraph 6, were admittedly, as of the date of the hearing, erroneous.

In response to the State's assertion should there have been an initial threshold hearing, this Court did find that there had been a showing of material misstatements in the affidavit to obtain a search warrant. As a result, the Court gave additional time to the parties to supplement the record. The State and Defendant refused the opportunity to submit any additional evidence. Accordingly, the legitimacy of the search undertaken can be ruled on in this matter.

DEFENDANT'S ARGUMENT

In Defendant's initial brief, Defendant argued that critical facts contained in paragraphs 4, 6, and 8 of Detective Carew's affidavit, all of which are indispensable to a probable cause finding, are materially false. Therefore, there is a substantial showing of deliberate falsification and material misstatements, which mandated a testimonial hearing.

Thereafter, Defendant's supplemental brief argues that the State conceded during oral argument, held on October 25, 2013, to errors in paragraphs 4 and 6, thereby, paragraph 8 alone is an insufficient basis for probable cause. New Jersey Constitution provides greater individual protection on the issues before the Court than does the most recent decision of the United States Supreme Court in Florida v. Harris, 133 S.Ct. 1050 (2013).

Due to the State's concession, the only facts upon which to evaluate probable cause is that Defendant picked up a package delivered by FedEx to Clayton's, which resulted in a positive indication by canine Zito. The testimony of Officer D'Esposito makes clear why the singular alert by Zito cannot possibly transmute into a finding that the package "probably contained" CDS. Unlike the other New Jersey decisions, this incident was not similar to a motor vehicle roadside stop. This package has been outside of the control and possession of the Defendant from its inception to the point of delivery at Clayton's. It has been combined with innumerable packages into an unknown amount of storage facilities, trucks, and the like. Officer Esposito confirms, and as the Court confirmed in Florida v. Harris, a canine's positive indication can and will be made if there is even a "residual odor" on the package.

Finally, the Court would never have issued a warrant without the ability to find "reasonable suspicion" to conduct a canine sniff in the first instance. In New Jersey, there must be factual circumstances, which in view of the "totality" make objectively reasonable the detention of Defendant and property in order to conduct a canine sniff. Therefore, here, there are no facts supporting reasonable suspicion of Defendant's package. The necessary and indispensable requirement of reasonable suspicion to conduct the sniff is entirely absent.

STATE'S ARGUMENT

In the State's initial brief, the State argued that the Defendant has not made a substantial showing (or any showing) of falsity in the search warrant to justify a hearing on this matter. There is no evidence that Detective Carew "knowingly or with reckless disregard for the truth" made a misstatement in his affidavit.

More recently, in the State's supplemental brief, the State argued that the Defendant has failed to show that the misstatements in the warrant went towards Judge DeLury's decision to find probable cause.

Additionally, the totality of the circumstances are clearly in favor of a properly conducted dog sniff. Officer D'Esposito testified that he and his K-9 partner have undergone extensive training. Further, Officer D'Esposito testified how specific the sniff test was executed. There was nothing to suggest that the sniff test was done improperly.

Finally, in the State's third supplemental brief limited solely on the issue of reasonable suspicion to conduct a dog sniff, the State argues that the combination of the information provided by the confidential informant, along with Defendant's actions after picking up the package, constitutes reasonable suspicion to allow the police to conduct a canine sniff of the package.

ANALYSIS

1. The Defendant Has Made A Substantial Preliminary Showing of Material Misstatements in Paragraphs 4 and 6 of the Affidavit.

There is a presumption of validity with respect to an affidavit supporting a search warrant. Franks v. Delaware, 438 U.S. 154, 171 (1978); See also State v. Howery, 80 N.J. 563, 568 (1979)(adopting Franks). However:

"Where the defendant makes 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, the Fourth Amendment requires that a hearing be held at the defendant's request. 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."

Franks at 155-56.

To mandate an evidentiary hearing, the attack must be more than conclusory and be supported by more than a desire to cross examine. Id. at 171. For example, there must be allegations of deliberate falsehood or a reckless disregard for the truth accompanied by an offer of proof. Id. The allegations must specify the portion of the affidavit claimed to be false and be accompanied by a statement of supporting reasons, such as affidavits or otherwise reliable witness statements, or their absence satisfactorily explained. Id. Allegations of negligence or innocent mistake are insufficient and the rule only applies to the affiant and not any non-governmental informant. Id.; See also State v. Martinez, 387 N.J. Super. 129, 141 (App. Div. 2006)(a

"good-faith" mistake insufficient to invalidate a search warrant).

"The limitations imposed by Franks are not significant. First, the defendant must make a "substantial preliminary showing" of falsity in the warrant. Howery at 567 (quoting Franks at 681). In keeping with the purpose of the exclusionary rule as a deterrent to egregious police conduct, the defendant cannot rely on allegations of unintentional falsification in a warrant affidavit. He must allege "deliberate falsehood or reckless disregard for the truth," pointing out with specificity the portions of the warrant that are claimed to be untrue. These allegations should be supported by an offer of proof including reliable statements by witnesses, and they must be proved by a preponderance of the evidence. Howery at 567-68. Finally, the misstatements claimed to be false must be material to the extent that when they are excised from the affidavit, that document no longer contains facts sufficient to establish probable cause. Id. at 568 (citing Franks at 171)."

Therefore, if the requirements for an evidentiary hearing are met and if, when the alleged false material is set to one side, there remains sufficient content in the affidavit to support a finding of probable cause, no hearing is required. Franks at 172; Howery at 568. The principles of Franks and Howery equally apply to attacks on search warrant affidavits that are facially sufficient but omit material facts. State v. Sheehan, 217 N.J. Super. 20, 25 (App. Div. 1987).

Here, Detective Carew of the Atlantic County Prosecutor's Office testified that he was informed by Special Agent McCafferty that a package was to be delivered to 2141 Absecon Boulevard, Atlantic City, New Jersey [Clayton's Storage] that contained marijuana. Detective Carew was also informed over the phone by the special agent that Defendant had been arrested in Iowa in 2012, when Defendant was in possession of marijuana and approximately \$84,000.00 was seized. Detective Carew then wrote in paragraph 4 of the affidavit that "a package of marijuana was being delivered by FedEx to 2141 Absecon Boulevard...", and in paragraph 6 that "Special Agent McCafferty advised Malkin was arrested in May of 2012 in Iowa. During that arrest Malkin was in possession of marijuana and approximately \$84,000..."

Through Detective Carew's testimony at the January 28, 2014 hearing, it was discovered that at the point of creating the affidavit, Detective Carew did not do any further research into the information received from the special agent. Detective Carew relied on the special agent's information over the phone, including failing to request the report of the Iowa incident and failing to request the report on the informant's tip regarding the package being delivered. Detective Carew then included that information within the affidavit, and presented it to Judge DeLury as a basis for the issuance of the search warrant. The two reports were not requested until months after the warrant was issued.

As a result, while this Court does not find that Detective Carew knowingly and intentionally included false statements within the affidavit, this Court does find

that Detective Carew did include false statements with reckless disregard for the truth. Detective Carew should have conducted further research, possibly including requesting the reports prior to executing the affidavit. If the reports were received prior to the issuance of the search warrant, or more detailed notes were taken during Detective Carew's telephone conversation with Special Agent McCafferty, it very likely would have been discovered that after reading the Iowa incident report, Defendant was never arrested in Iowa. Additionally, upon further investigation, it would have been revealed that the Iowa officers only found a "small" amount of marijuana in Defendant's control, which is a substantial difference from the image that paragraph 6 of the affidavit creates. Finally, it would have likely been learned, or possibly Detective Carew was actually told over the telephone by the special agent but failed to take notes, that the informant indicated that a package being delivered to Clayton's Storage "possibly" contained marijuana. Therefore, Defendant made a substantial showing that Detective Carew included false statements, with reckless disregard for the truth, in the warrant affidavit.

2. In Considering the Totality of the Circumstances, After Paragraphs 4 and 6 Are Excised, The Affidavit Lacks Probable Cause For a Search Warrant To Be Issued.

In considering the adequacy of probable cause contained in an affidavit in support of a search warrant, "courts must consider the totality of the circumstances, and they must deal with probabilities." Schneider v. Simonini, 163 N.J. 336, 361 (2000)(citing Illinois v. Gates, 462 U.S. 213, 230-31, 238 (1983)). "Probable cause exists if at the time of the police action there is 'a 'well grounded' suspicion that a crime has been or is being committed.'" State v. Sullivan, 169 N.J. 204, 211 (2001)(quoting State v. Waltz, 61 N.J. 83, 87 (1972)). The New Jersey Supreme Court has explained that probable cause requires nothing more than "a practical, common-sense decision whether, given all the circumstances... there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Johnson, 171 N.J. 192, 214 (2002)(quoting State v. Demeter, 124 N.J. 374, 380-81 (1991)).

The United States Supreme Court recently held that "if a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs." Florida v. Harris, 133 S. Ct. 1050, 1057 (2013). "A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses." Id. "The question... is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent

person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test." Id. at 1058.

The New Jersey Supreme Court has not yet ruled whether a canine sniff, in isolation, is sufficient to establish probable cause. However, New Jersey Appellate Division has established in State v. Cancel, 256 N.J. Super. 430 (App. Div. 1992), that more than a trained canine's positive alert to a sniff is required to establish probable cause. In Cancel, the Appellate Division held that "the dog's positive reaction to defendant's suitcase and the discrepancy between her name and the name on her ticket gave the police probable cause to arrest her and obtain a warrant to search the suitcase." Id. at 433.

Here, after excising paragraphs 4 and 6 from the affidavit, the affidavit is devoid of facts sufficient for an objectively reasonable judge to issue a search warrant based on probable cause. The remaining paragraphs include, the affiant, Detective Carew's education, training, and work experience (paragraph 3), observation and confirmation that the tracked FedEx package was delivered to Clayton's Storage (paragraph 5), Defendant taking possession of the package from Clayton's Storage and his statements, including invoking his right to counsel and subsequent denial of the contents and possession after being approached by Detective Carew (paragraph 7), a canine sniff of the package that gave a positive indication of a presence of narcotics odor (paragraph 8), and a New Jersey Criminal History Detailed Record for Adam Malkin (paragraph 9). As a result, when considering the totality of the remaining affidavit, including paragraphs 3, 5, 7, 8, and 9, facts sufficient to establish probable cause do not remain.

While the State argues that, pursuant to Harris, Galloway Township Officer D'Esposito and canine Zito, an extensively trained canine team, performed reliably in detecting contraband, and thus, there is probable cause based on the canine's positive alert of the cardboard box, this Court respectfully disagrees. The United States Supreme Court in Harris set the 'floor' of what is required. "On multiple occasions the New Jersey Supreme Court has held that the New Jersey Constitution affords its citizens greater protection against unreasonable searches and seizures than the Fourth Amendment". State v. Reid, 194 N.J. 386, 396 (2008). This Court finds that this is one of those occasions. The New Jersey Appellate Division in Cancel previously established that more than a positive alert by a certified canine is required for a finding of probable cause.

The State further argues that based on the totality of circumstances, there was sufficient evidence contained in the affidavit for a finding of probable cause, even without paragraphs 4 and 6, including the reliable canine's positive alert that contraband was contained within the cardboard box (paragraph 8), coupled with Defendant's dishonest demeanor when picking up the package (paragraph 7). However, again, this Court respectfully disagrees.

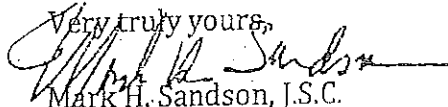
When considering the totality of circumstances, the remaining portions of the affidavit lack probable cause sufficient for a judge to issue a search warrant. While

Officer D'Esposito testified that canine Zito is a dog with extensive training and experience in the field, who conducted a proper pattern search at Clayton's Storage, Defendant successfully undermined the reliability of the canine for this specific sniff test. As Defendant argued, this case is factually dissimilar to Harris, where the sniff test was conducted on a motor vehicle that was in the possession and control of the defendant. Here, the package was shipped from across the country, comingled with other property, and as Officer D'Esposito testified, and Harris pointed out, canine Zito is unable to differentiate residual odors on Defendant's package remaining from other packages from the odors of the targeted package's contents. As a result, in this instance, canine Zito's positive alert is not sufficiently reliable standing alone. Additionally, Defendant's conduct, which is outlined in paragraph 7 of the affidavit, of taking possession of the package, Defendant's invocation of his right to counsel when approached by Detective Carew and subsequent denial of possession and knowledge of package contents is clearly not enough to establish probable cause. Defendant's conduct can be easily understood as retrieving a package simply because it was mailed to him, then when approached by the police, knowing his rights, Defendant invoked right to counsel if Detective Carew wanted to arrest or question him, is not something that can be held against Defendant.

Further, this Court questions whether there was even reasonable suspicion to conduct the canine sniff. In Cancel, supra, the Appellate Division stated that "had [defendant] been detained without reasonable suspicion until a narcotics-sniffing dog was brought to the scene an argument could have been made that the detention was unlawful and the evidence later uncovered should be suppressed." Id. at 435. Here, unlike Cancel, the canine sniff was conducted after the package was in the possession of Defendant. It appears Defendant was detained until the narcotics-sniffing dog was brought to the scene. At that point of detaining Defendant, all Detective Carew knew was that a package was delivered to Clayton's Storage that "possibly" contained narcotics and Defendant's conduct, as outlined above, including invoking right to counsel and subsequent denial of possession and contents of package do not rise to the modest level of reasonable suspicion needed to justify a canine sniff.

CONCLUSION

False statements, with reckless disregard for the truth, were contained in the affidavit as a basis for the search warrant. After paragraphs 4 and 6 are excised from the affidavit, there are insufficient facts to constitute probable cause for the issuance of the search warrant.

Very truly yours,

Mark H. Sandson, J.S.C.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3776-13T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ADAM MALKIN,

Defendant-Respondent.

Submitted November 5, 2014 – Decided November 24, 2014

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment
No. 13-04-1042C.

James P. McClain, Atlantic County
Prosecutor, attorney for appellant (James F.
Smith, Deputy Attorney General, of counsel
and on the brief).

Jacobs & Barbone, P.A., attorneys for
respondent (Louis M. Barbone, on the brief).

PER CURIAM

The State appeals, on leave granted, from an order entered by the Law Division on March 10, 2014, granting defendant's motion to suppress evidence. We reverse and remand for further proceedings.

I.

On January 31, 2013, Joseph McCaffrey ("McCaffrey"), a Special Agent with the federal Drug Enforcement Administration ("DEA") contacted Detective William Carew ("Carew") of the Atlantic County Prosecutor's Office ("ACPO") and informed him that DEA Special Agent Marc Sulkin ("Sulkin"), who was stationed at Newark Airport, had informed him that a twenty-six pound package was being transported to Atlantic City by Federal Express ("FedEx").

McCaffrey told Carew that a confidential informant, who previously had been involved in numerous seizures of narcotics, had informed Sulkin that the package contained marijuana and was going to be delivered to a self-storage facility. The informant had provided the FedEx tracking number for the package and McCaffrey conveyed that information to Carew.

The following morning, Carew conducted surveillance of the storage facility until the FedEx delivery truck arrived. He followed the driver into the building, and spoke with two of the facility's employees. Carew viewed the package and confirmed that its tracking number was the same as the number that McCaffrey had provided to him. Carew also saw defendant's name on the package. One of the employees confirmed that defendant

rented a unit at the facility and had been at the site the previous evening.

Defendant was called and told that the package had been delivered. Defendant said he was on his way to retrieve it. Defendant arrived later. He identified himself and one of the employees gave him the package. As defendant was leaving, Carew approached and asked defendant if he was Adam Malkin. Defendant acknowledged that was his name.

Carew asked defendant if the package belonged to him, and he replied, "Yes." Carew informed defendant that the package likely contained contraband. Defendant told Carew that he wanted his attorney. He said he did not know what was in the package, and then stated that the package was not his. Carew pointed to defendant's name on the package, and defendant told Carew to arrest him if he wished to do so.

Another detective in the ACPO contacted Sergeant Mark D'Esposito ("D'Esposito") of the Galloway Township Police Department. D'Esposito had been assigned to that department's K-9 unit and worked with a dog named Zito, which had been trained for a number of duties, including the detection of the odor of narcotics. D'Esposito was told that detectives from the ACPO wanted a narcotics "sniff" of a suspicious package. He proceeded to the self-storage facility and met the detectives there. The

package with defendant's name was brought outside, and D'Esposito told the detectives to take it back into the building. Inside, Zito sniffed the package and gave a positive indication that it was the source of the odor of narcotics.

Carew returned to his office and prepared an affidavit in support of an application for a search warrant. McCaffrey joined Carew and provided him with additional information he had obtained about defendant. In paragraph four of the affidavit, Carew stated:

On January 31, 2013, a reliable confidential source who has provided information in the past leading to over thirty seizures of narcotics called Special Agent Marc Sulkin of the Drug Enforcement Agency (DEA) Newark Airport Division. The source said a package of marijuana was being delivered by FedEx to 2141 Absecon Boulevard in Atlantic City. The source identified the FedEx tracking number on the package as 801815544028 and the weight of the package to be approximately 26 lbs. Special Agent Sulkin passed this information to Special Agent Joe [McCaffrey] of the DEA located in Atlantic County. Special Agent [McCaffrey] advised this affiant of this information.

Furthermore, in paragraph six of the affidavit, Carew stated that:

Special Agent [McCaffrey] advised [that defendant] was arrested in May of 2012 in Iowa. During that arrest [defendant] was in possession of marijuana and approximately \$84,000 in U.S. currency. Special Agent [McCaffrey] was also able to obtain a picture of [defendant] who is the same

individual who later arrived to 2141 Absecon Boulevard and identified himself as Adam Malkin.

In addition, in paragraph eight of the affidavit, Carew asserted that:

Sergeant Boruch notified Galloway Township K9 officer Mark [D'Esposito]. Officer [D'Esposito] arrived with his K9 Zito and asked to have the package brought inside. Officer [D'Esposito] said his dog gave a positive indication for the presence of a controlled dangerous substance inside the package. Attached here to is the resume of K9 Officer Mark [D'Esposito] detailing his and his partner's experience in narcotics detection.

On February 1, 2013, two warrants were issued: one for the search of the package that was delivered to the storage facility, and the other for the search of defendant's storage unit. A third warrant was issued on February 5, 2013, authorizing a search of defendant's vehicle. The search of the package revealed approximately fourteen pounds of marijuana.

Defendant was charged with possession of more than fifty grams of marijuana, contrary to N.J.S.A. 2C:35-10a(3), and possession of between five and twenty-five pounds of marijuana, with the intent to distribute the same, contrary to N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(10). Thereafter, defendant filed a motion to suppress the evidence obtained in the search

of the package. The judge conducted an evidentiary hearing on the motion.

At the hearing, Carew testified that he did not initially investigate whether the information provided by McCaffrey was accurate. However, after he prepared the affidavit, he obtained a copy of the Iowa incident report. Carew acknowledged that "[i]t was a mistake" to indicate that defendant had been arrested in Iowa. The report indicated that defendant was not arrested, but was given a summons.

Regarding the marijuana possessed by defendant in the Iowa incident, Carew said he included this information in the affidavit because "it lends to probable cause." Although McCaffrey stated that the amount of marijuana was "not pounds," Carew did not ascertain the exact amount involved. Carew also acknowledged that, in his report, which was written several months after the search, McCaffrey said the special agent had contacted him regarding a FedEx package "possibly containing suspected narcotics."

During cross-examination, defendant's attorney asked Carew about the statements regarding the large amount of money seized from defendant in Iowa, and suggested that the amount gave rise to an inference that the amount of marijuana would be consistent with amounts carried for distribution. In response, Carew stated

that he "did not try to do that," and that he "just stated the facts that [he] knew at the time." Carew said the information was relayed to him verbally. Carew testified that he could not remember McCaffrey's exact words.

D'Esposito testified concerning the dog sniff of the package. D'Esposito stated that he and the dog Zito had been working together since January of 2008. During that time, D'Esposito and the dog had conducted "thousands of sniffs" and "approximately 125 searches."

D'Esposito said he responded with the dog to a request to conduct a narcotics sniff of a suspicious package at the self-storage facility on the date in question. After meeting with detectives from the ACPO, D'Esposito asked the detectives to move the package into a self-storage unit.

He explained that this is done so that the package is somewhat hidden from the dog, rather than simply placed in front of the animal. Therefore, it cannot be said the dog was directed to the package. Zito was brought to the room where the package had been placed, and the dog provided a positive indication for narcotics by locating and scratching at the package.

On March 10, 2014, the judge filed a written opinion. The judge noted that in his affidavit, Carew stated that McCaffrey told him a package was being delivered to the self-storage

facility containing marijuana. Carew also stated that McCaffrey told him defendant had been arrested in Iowa in 2012, when he was in possession of marijuana and about \$84,000. The judge found that several statements in the affidavit were false.

Carew did not indicate that the informant reported that the package "possibly" contained suspected narcotics. Moreover, defendant was not arrested in Iowa in 2012. He had been found in possession of a small amount of marijuana and received a summons. The judge found that Carew did not knowingly and intentionally include the false statements in the affidavit, but determined that Carew made the statements with reckless disregard for the truth.

The judge wrote that Carew should have undertaken further research, and possibly requested reports concerning the informant's tip and the Iowa incident before executing the affidavit. The judge stated that if those reports had been reviewed, he "very likely" would have discovered that defendant was never arrested in Iowa, and he was found only with a "small" amount of marijuana. Moreover, Carew would likely have learned that the informant had only reported that the package "possibly contained marijuana."

The judge also stated that, if the paragraphs containing the aforementioned false statements are "excised," the affidavit

failed to establish probable cause for the issuance of the search warrants. The judge found that defendant had "successfully undermined" Zito's reliability for "this specific sniff." The judge stated that, standing alone, the canine sniff was not sufficiently reliable to support a finding of probable cause.

In addition, the judge wrote that defendant's conduct after taking possession of the package was insufficient to support the issuance of the search warrant. The judge noted that defendant had invoked his right to counsel when Carew approached him and, while defendant initially acknowledged ownership of the package, he later denied that it was his.

The judge wrote that defendant's conduct could be "easily understood" as the actions of a person who was merely retrieving a package that was mailed to him. The judge said that the invocation of the right to counsel is "not something that can be held against [d]efendant."

The judge entered an order dated March 10, 2014, granting defendant's suppression motion. We thereafter granted the State's motion for leave to appeal.

II.

The State argues that the motion judge erred by finding that Detective Carew included false statements in his search

warrant application and, in doing so, acted in reckless disregard of their truth or falsity.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In addition, the New Jersey Constitution provides that a warrant authorizing law enforcement officers to conduct a search may not issue "except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized." N.J. Const. art. I, para. 7.

"When determining whether probable cause exists, courts must consider the totality of the circumstances, and they must deal with probabilities." State v. Jones, 179 N.J. 377, 389 (2004) (quoting Schneider v. Simonini, 163 N.J. 336, 361 (2000)), cert. denied, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001)). See also State v. Novembrino, 105 N.J. 95, 122 (1987) (adopting totality of the circumstances standard). Probable cause "is said to be a reasonable basis for the 'belief' that a crime has been or is being committed." State v. Burnett, 42 N.J. 377, 386 (1964).

An affidavit supporting a search warrant enjoys a presumption of validity. Franks v. Delaware, 438 U.S. 154, 171,

98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667, 682 (1978). To overcome this presumption and challenge the veracity of statements made in an affidavit, a 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. . . ." Id. at 155-56, 98 S. Ct. at 2674, 57 L. Ed. 2d at 672.

"[I]f the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Ibid. If the defendant successfully establishes at the hearing intentional falsehood or reckless disregard for the truth by a preponderance of the evidence, the false statements should be excised from the affidavit. Id. at 156, 98 S. Ct. at 2674, 57 L. Ed. 2d at 672.

Furthermore, if "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." Ibid. New Jersey courts have adopted the Franks analysis. State v. Howery, 80 N.J. 563, 568 (holding that "New Jersey courts, in entertaining veracity challenges, need go no further than is required as a matter of Federal Constitutional

law by Franks v. Delaware[.]"), cert. denied, 444 U.S. 994, 100 S. Ct. 527, 62 L. Ed. 2d 424 (1979)).

To demonstrate that a statement was made with reckless disregard for the truth, the defendant must show that the statements or omissions went beyond "unintentional falsification in a warrant affidavit." State v. Sheehan, 217 N.J. Super. 20, 25 (App. Div. 1987) (citing Franks, supra, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682). See also State v. Martinez, 387 N.J. Super. 129, 141 (App. Div. 2006) (explaining that, within the context of a Franks analysis, "a good faith mistake is insufficient to strike down [a] warrant.") (citing Franks, supra, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682).

The standard for what constitutes reckless disregard for the truth "means different things when dealing with omissions and assertions[.]" Wilson v. Russo, 212 F.3d 781, 787 (3d Cir. 2000). Omissions are made with reckless disregard for the truth where the affiant omits a fact that "any reasonable person would have known [to be] the kind of thing the judge would wish to know." Id. at 787-88 (quoting United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993)).

On the other hand, assertions are made with reckless disregard for the truth when "viewing all the evidence, the

affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." Id. at 788 (quoting United States v. Clapp, 46 F.3d 795, 801 n.6 (8th Cir. 1995)).

As stated previously, here, the motion judge found that Carew did not knowingly or intentionally include erroneous or incomplete statements in the affidavit, but concluded that the detective made those statements with reckless disregard for the truth. The record does not support that finding.

Carew testified that McCaffrey told him that a confidential informant had informed the DEA that FedEx was going to deliver a package to a self-storage facility in Atlantic City and the package contained marijuana. McCaffrey also told Carew that defendant had previously been arrested in Iowa in 2012 while in possession of marijuana and about \$84,000.

When he prepared his affidavit, Carew was not told that the informant had reported that the package "possibly" contained marijuana, although McCaffrey said so in a report he wrote several months after the search warrants were issued. Moreover, Carew was not informed that defendant had not been arrested in Iowa in 2012, or that he had only been in possession of a small amount of marijuana and received a summons.

Carew had no reason to seriously doubt the veracity of the information that McCaffrey provided to him. He had no obvious reason to doubt the truth of what he had been told about the package or the 2012 motor vehicle stop in Iowa. Carew also did not have a reasonable basis to believe that he was omitting facts from the affidavit that a judge would wish to know when evaluating the search warrant application.

The motion judge found that Carew acted with reckless disregard for the truth because he failed to "conduct further research" into the information that McCaffrey provided to him. According to the judge, Carew should have requested the Iowa incident report or a report from McCaffrey concerning the informant's tip.

However, Carew was under no obligation to undertake the research described by the judge. Indeed, under Franks, "the failure to investigate fully is not evidence of an affiant's reckless disregard for the truth." United States v. Brown, 631 F.3d 638, 648 (3d Cir. 2011) (citing United States v. Dale, 991 F.2d 819, 844 (D.C. Cir. 1993)). See also United States v. Ranney, 298 F.3d 74, 78 (1st Cir. 2002) (noting that the affiant's "failure to probe further does not amount to reckless disregard."); State v. Niehaus, 452 N.W.2d 184, 187-88 (Iowa

1990) (finding that law enforcement had no duty to investigate facts supporting statements in an affidavit).

The motion judge also stated that Carew should have taken better notes of his conversations with McCaffrey, implying that Carew may have been told accurate facts about the Iowa incident and the informant's statements concerning the package. However, while Carew did not recall the exact words McCaffrey used during their conversations, he testified that he based his affidavit on the facts as he knew them at the time. Better note taking would not have made any difference.

We conclude that the judge erred by finding that Carew acted with reckless disregard for the truth when he included the erroneous or incomplete statements in his affidavit.

III.

The State also argues that, even if the erroneous statements regarding the 2012 incident in Iowa are excised, and the affidavit indicated that the informant said the package "possibly" contained marijuana, there was probable cause to issue the warrant. In support of this argument, the State cites the following facts: the tip from a reliable DEA informant that a package was being delivered to Atlantic City and "possibly" contained narcotics; the tracking number for the package; the delivery of the package with defendant's name on it; defendant's

history in New Jersey of arrests for burglary, theft and the possession of marijuana; defendant initially told the detective that the package belonged to him, and said it was not his after being told it might contain contraband; defendant told the detective to arrest him; and the dog's positive indication that a controlled dangerous substance was in the package.

We agree with the State that the totality of these circumstances established a well-grounded suspicion that the package in question contained contraband, which was probable cause for the issuance of the search warrant. See State v. Marshall, 199 N.J. 602, 610-11 (2009); State v. O'Neal, 190 N.J. 601, 612 (2007). Although the motion judge stated that, standing alone, the dog's sniff was not sufficiently reliable to establish probable cause, here Carew's affidavit provided sufficient facts, in addition to the information regarding the sniff, to support a finding of probable cause. The judge erred by concluding otherwise.

Reversed and remanded to the trial court for further proceedings in conformity with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION