

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

VS.

No. 09-20123-SHM-cgc

EDWIN MARK KING,

Defendant.

REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS

Before the Court by way of Order of Reference for report and recommendation is Defendant Edwin Mark King's May 4, 2010¹ Motion to Suppress from evidence items and statements obtained as a result of the search warrant issued on January 13, 2009. (D.E. # 275) King argues that the Affidavit in Support of the Search Warrant contains a materially false statement regarding King's address and that the Affidavit failed to include any information regarding the confidential informant's criminal history and how the informant was being compensated. Motion p 1; Supp. Motion p 1. The United States counters that the search warrant comports with the Fourth Amendment in that there was "a substantial basis for the state court

¹ A suppression hearing was scheduled in this case for June 18, 2010. After his opening statement and consultation with King, counsel for King requested that the hearing be continued to allow time to supplement the Motion. On June 23, 2010, the Motion was supplemented (D.E. # 313) and the United States filed a response to the supplement on June 29, 2010 (D.E. # 321). On July 2, 2010, the undersigned received letters from King addressed to the undersigned and to his attorney, Kemper Durand, which contained King's concerns regarding his representation (D.E. # 322). Mr. King also filed a pro se motion to dismiss counsel (D.E. # 324) District Judge Mays allowed Mr. Durand to withdraw and Mr. Irby was appointed to succeed him. (D.E. #328 and 330). On July 27, 2010, Mr. Irby requested a copy of the transcript of the June 18, 2010 hearing and additional time to prepare for the motion. (D.E. 346) Mr. Irby has requested three extensions of time to investigate and prepare for the Motion. (D.E. #361, 372, 413). The Motion was supplemented on January 3, 2011 (D.E. # 414) and the United States filed a response to the supplement on January 6, 2011 (D.E. # 418).

judge to presume that law enforcement would find evidence of wrongdoing at 428 North Wilson.” Response p 3. The United States also argues that King is not entitled to a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978) because King cannot show that the warrant affidavit included improper information that was essential to the determination of probable cause. Response p 4. Based on the information in the Motion, Supplemental Motion, Responses, and supplemental filings, the undersigned recommends that the Motion and Supplemental Motion be DENIED.

Attached as Exhibit A to the Motion to Suppress is the Affidavit in Support of Search Warrant for the location 428 North Wilson Street, Halls, TN. The Affidavit executed on January 13, 2009 by Investigator Terry Williams of the Halls Police Department states in pertinent part that

- Williams received “information from a confidential reliable and credible informant in reference to an unknown amount of crack cocaine at the residence of 428 North Wilson St. in Halls, TN”
- the informant had provided reliable information in the past to Williams and other law enforcement officers that had proven to be correct and led to multiple arrests and convictions in Dyersburg, Dyer County and Lake County on drug related cases
- within the past sixty hours, the informant observed “a quantity of crack cocaine in the possession of Edwin M. King at the residence of 428 North Wilson Street while making an undercover purchase”
- Edwin M. King was observed coming from and to this residence on several occasions

- “Records show that Mr. Edwin M. King’s physical address shows to be 428 North Wilson St.”

The affidavit was presented to a Lauderdale County, Tennessee circuit court judge who signed it on January 13, 2009.

King argues in his Motion that he did not live at 428 North Wilson, “that [he] did not hold himself out as living at 428 N. Wilson,...that Michael Maclin lived at 428 N. Wilson and that [King] only had a temporary, overnight license to stay at 428 N. Wilson due to family coming from out of town for a visit...” Motion, p 1. Thus, according to King, the affidavit is factually incorrect with regard to the assertion that 428 N. Wilson was King’s physical address.

In *Franks*, the Supreme Court held that 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. *Id.* at 155-56. Thus, under *Franks*, a defendant is entitled to a hearing challenging “the sufficiency of an executed search warrant” if “(1) there is a substantial preliminary showing that specified portions of the affiant's averments are deliberately or recklessly false and (2) a finding of probable cause would not be supported by the remaining content of the affidavit when the allegedly false material is set to one side.” *United States v. Atkin*, 107 F.3d 1213, 1216-17 (6th Cir. 1997)(quoting *United States v. Campbell*, 878 F.2d 170, 171 (6th Cir. 1989))(emphasis in original).

While King characterized the statement in the affidavit regarding 428 N. Wilson being his physical address as a “false statement”, there is no showing by King that the remaining content of the affidavit is rendered insufficient to establish probable cause. Indeed, this

statement could be removed from the affidavit and the remaining content would contain adequate information for a neutral and detached judge to find that probable cause existed to believe that drug trafficking activity was ongoing at 428 N. Wilson. Because the purportedly “false statement” is not necessary for a finding of probable cause, it is not an adequate basis for King to meet the threshold for conducting a *Franks* hearing to determine the sufficiency of the search warrant.

King’s assertion that the affidavit lacked probable cause because it did not include information regarding the informant’s criminal history and compensation is without merit. When an affidavit relies on hearsay information from a confidential informant, the judicial officer (and reviewing court) must consider the veracity, reliability, and basis of knowledge for that information as part of the totality-of-the-circumstances review. *United States v. Helton*, 314 F.3d 812, 819 (6th Cir.2003) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). “[W]hile an affidavit must state facts supporting an independent judicial determination that the informant is reliable, those facts need not take any particular form.” *United States v. McCraven*, 401 F.3d 693, 697 (6th Cir.2005). In fact, independent corroboration of the tip by police is not required when the court is provided with assurances that the informant is reliable. *United States v. Allen*, 211 F.3d 970, 976 (6th Cir.2000) (en banc). “[I]f the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required.” *Helton*, 314 F.3d at 820. In this case, the informant made a firsthand observation of drug sales activity at the target location and the affiant made personal observations of heavy traffic at the target location. This is sufficient to provide the issuing judge with a substantial basis to conclude that a search of the specified premises would uncover evidence of wrongdoing. *United States v. Sonagere*, 30 F.3d 51, 53 (6th Cir.1994).

Finally, King states that he will offer witnesses to the affiant's "lack of truthfulness and concealment on other issues while functioning as a police officer and whose actions at that time and that incident could be characterized, possibly, as obstruction of justice". *Franks* cautions that "the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. ... Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained". *Franks* at 171. King does not support his conclusory allegations with affidavits from his witnesses as required by *Franks*.

For the reasons above, the undersigned finds that there is no cause to hold a *Franks* hearing and recommends that the motion to suppress (D.E. #275) and supplemental motion (D.E. # 313) be DENIED.

Signed this 21st day of April, 2011.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE SAID OBJECTIONS OR EXCEPTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.