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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-456

Filed: 18 February 2020

Wake County, Nos. 16 CRS 222977-78

STATE OF NORTH CAROLINA

v.

BROCK ALLEN CLARK, Defendant.

Appeal by Defendant from orders entered 10 October 2017 and 25 September 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert T. Broughton, for State-Appellee.

Tarlton Polk PLLC, by Raymond C. Tarlton, for Defendant-Appellant.

COLLINS, Judge.

Defendant Brock Allen Clark appeals two orders denying motions to suppress evidence obtained during a search of his residence. Defendant argues that the search warrant application did not support a finding of probable cause and that the officer deliberately left out information, making his application for the warrant misleading. Because we conclude that the affidavit in support of the search warrant application

was sufficient to establish probable cause and did not contain deliberate falsehoods that rendered it misleading, we affirm.

I. Procedural History

Defendant was indicted on 7 February 2017 on charges of trafficking cocaine by possession, trafficking heroin by possession, possession with intent to sell or deliver marijuana, felony maintaining a dwelling for the keeping or selling of controlled substances, and possession of drug paraphernalia.

On 26 April 2017, Defendant filed a motion to suppress evidence collected from his residence on the grounds that the evidence was obtained as the result of a search warrant that was not supported by probable cause. After conducting a hearing, the trial court entered an order denying the motion (“Probable Cause Order”).

On 8 January 2018, Defendant filed a second motion to suppress the same evidence collected from his residence, alleging that the search warrant contained deliberate falsehoods and requesting a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). After conducting a *Franks* hearing, the trial court entered an order denying the motion (“*Franks* Order”).

Defendant pled guilty to trafficking by possession greater than 28 but less than 200 grams of cocaine and trafficking by possession greater than 14 but less than 28 grams of heroin. Defendant expressly stated in the plea arrangement that he intended to appeal the trial court’s orders denying his motions to suppress evidence.

The trial court entered judgment on 14 February 2019, sentencing Defendant to 90 to 120 months' imprisonment. Defendant gave oral notice of appeal in open court.

II. Factual Background

The record on appeal contains evidence of the following: Detective Scott Schulz of the Cary Police Department responded on 26 November 2016 to a report of a drug overdose at the Hampton Inn in Cary, North Carolina. Schulz had worked for the Cary Police Department for many years, holding various jobs in which he investigated drug activity, conducted surveillance, and executed numerous search warrants. When Schulz arrived at the Hampton Inn that night, police officers were in the parking lot and in the hotel room where the overdose occurred. First responders finished administering CPR on the female overdose victim, then transported her to the hospital.

Susan Berry, a friend of the overdose victim who had been in the hotel room with her, was waiting in another room. Schulz went to speak with Berry, asked her what happened, and explained to her that he was investigating drug activity. Berry told Schulz that she was under the influence of heroin and crack at that time, as she and the overdose victim had been using heroin earlier that night. Berry admitted that she was a prostitute and a heroin addict.

Schulz asked Berry if she knew of any drug activity in Cary. Berry gave Schulz information about people in the area involved in drugs. Berry was familiar with the

small wax bags used for heroin packaging and local pricing of heroin at around \$7 a bag, and she told Schulz that most heroin comes into Cary from Henderson, North Carolina, and that the supply in Henderson comes from New Jersey. This information was consistent with Schulz's knowledge that the heroin supply in Cary came from Henderson and originated in New Jersey.

Schulz testified at the 2017 motion hearing that Berry told him on the night of the overdose that, at around 10:00 that morning she had engaged in sex as a prostitute with a tall, bald, black man who identified himself as "Dee" at his residence at 146 Madison Square Lane in Cary. Afterward, Dee showed her a plastic grocery bag above the refrigerator in the kitchen containing approximately ten pounds of brown, white, and gray dope or heroin, which Berry described as the most dope she had ever seen in her life. Berry explained that Dee offered to sell her some of the drugs, which she refused, and that she knew of another person to whom Dee had sold drugs.

Berry described Dee's residence at 146 Madison Square Lane to Schulz as follows: an end-unit townhouse with a driveway; a first-floor containing stairs behind the door leading to the second floor; a second floor with a kitchen, dining room area, and a living room containing outdoor furniture; and a third floor with a master bedroom directly at the top of the stairs that contained a computer desk, a hallway

with a half-height wall on one side, and a second bedroom down the hallway containing a dog, which was a pit bull or pit bull mix.

The details Berry provided about Dee's residence, including the presence of a pit bull, were consistent with Schulz's memory, as Schulz had been in the 146 Madison Square Lane townhouse in 2015. At that time, Schulz executed a search warrant there and arrested Defendant for several drug-related offenses involving heroin and marijuana.

Berry also showed Schulz her cell phone, including text messages from earlier that day between herself and a phone number containing 208, wherein she and Dee had planned their date. The text messages included the location of their meeting as 146 Madison Square Lane. Berry explained that the phone number she used to contact Dee did not register as belonging to a person named Dee, which Schulz later verified.

After Berry described Dee and his residence to Schulz, Schulz showed her a picture of Defendant, whom Berry identified as the man she called Dee.

After interviewing Berry, Schulz entered the 146 Madison Square Lane address into a law enforcement database and learned that animal control had responded to a call regarding a pit bull at the residence. Schulz also learned that Defendant had been charged by the Cary Police Department with solicitation of prostitution in 2014.

On 27 November 2016, Schulz applied for a search warrant of Defendant's residence at 146 Madison Square Lane, providing a signed affidavit containing information he learned during and after his interview with Berry. A magistrate granted a search warrant for the residence, which was executed on 27 November 2017. During the search of Defendant's residence, officers discovered heroin, cocaine, marijuana, \$28,000 in cash, and six cell phones. Defendant was arrested for multiple drug-related offenses.

III. Discussion

Defendant argues that the trial court erred by denying his motions to suppress evidence obtained during a search of his residence. Our review of an order denying a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

A. Probable Cause

Defendant first argues that "the trial court erred by holding that the warrant application provided a substantial basis to support the magistrate's finding of probable cause where the tip had limited reliability and police failed to corroborate the informant's allegation of criminal activity."

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An application for a search warrant must include (1) a probable cause statement indicating that the items specified in the application will be found in the place described; and (2) “one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched.” N.C. Gen. Stat. § 15A-244 (2016). *See State v. Taylor*, 191 N.C. App. 587, 589, 664 S.E.2d 421, 423 (2008). In determining whether to issue a warrant, the magistrate must “make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citation omitted).

When a motion to suppress is based upon the defendant’s contention that the search warrant obtained was not supported by probable cause, the trial court must determine whether, based on the totality of the circumstances, “the evidence as a whole provides a substantial basis for concluding that probable cause exists.” *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (internal quotation marks and citation omitted).

Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause, nor does it import absolute certainty. . . . If

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the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant.

State v. Campbell, 282 N.C. 125, 128-29, 191 S.E.2d 752, 755 (1972) (internal quotation marks and citation omitted).

The experience and expertise of the affiant officer may be taken into account in the probable cause determination, so long as the officer can justify his belief to an objective third party.

Timely information tied to the specific premises to be searched can support a finding of probable cause. Concerning the reliability of the informant's information *Gates* teaches that "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case."

State v. Barnhardt, 92 N.C. App. 94, 97, 373 S.E.2d 461, 462-63 (1988) (internal quotation marks and citations omitted) (referencing *Illinois v. Gates*, 462 U.S. 213, 234 (1983)).

In *Barnhardt*, this Court held that a detective's affidavit based on information obtained from an unfamiliar, confidential informant provided a sufficient basis to support a magistrate's finding of probable cause. *Id.* at 95, 373 S.E.2d at 462. The affidavit included: (1) the credentials of the affiant, a detective with experience in drug investigations and arrests who was familiar with drug activity in the area; (2) a

statement of the informant's personal observation within the previous 24 hours of a large amount of cocaine at the defendant's residence; (3) the informant's description of the location and exterior of the residence, including the street address; (4) the informant's knowledge of what cocaine looks like based on personal experience using and buying cocaine; and (5) an accounting of the detective's verification of the location and owner of the residence identified by the informant. *Id.* at 97-98, 373 S.E.2d at 463.

Based on this affidavit, the magistrate found probable cause to issue a search warrant for the defendant's home. On appeal, we held that the affidavit provided a sufficient basis to support a finding of probable cause because it provided "timely information [and] exact detail of the premises to be searched," "described the informant's ability to identify cocaine," and was "supplemented by the officer's credentials and experience." *Id.* at 98, 373 S.E.2d at 463. Accordingly, we affirmed the trial court's denial of the defendant's motion to suppress. *Id.*

In this case, Paragraph A of Schulz's affidavit states Schulz's credentials as a law enforcement officer with the Cary Police Department, whose job functions have included locating suspects; assisting drug investigators with drug purchases, surveillance, and search warrants; participating in gang investigations; collecting, verifying, and disseminating criminal information; investigating numerous crimes including drug-related crimes; serving numerous search warrants; conducting

surveillance; and completing over 1000 hours of law enforcement training that included “advanced training in the area of drugs and gangs.”

Paragraph B of the affidavit describes the activities of 26 November 2016 at the Hampton Inn in Cary and the information Berry provided, as follows:

The person who found the victim of the overdose, hereafter referred to as the source, was debriefed on the events that took place. The following is a summary of events given by the source:

The source and the overdose victim have been close friends for a long time. Both the source and the overdose victim have been dealing with heroin addiction. Both the source and the overdose victim have been “clean” for approx[imately] one year, but decided to get heroin from a friend tonight. The source and the overdose victim spent \$80.00 for 0.38 grams of heroin. Both the source and the overdose victim used the heroin tonight. The source did not have a negative reaction from the heroin, however the overdose victim became unresponsive after using the heroin. The source called 911.

The source agreed to give information about heroin use and sales both related to and not related to this incident. The source stated he/she was aware that most of the heroin in the area comes out of Henderson NC. The source further stated most of the heroin in Henderson NC comes out of New Jersey. The source was familiar with common heroin packaging and packaging weights. The source stated most heroin that comes out of Henderson NC is sold in “bags”. “Bags” is a common term used for heroin packaging, as it is a small wax paper bag. The source stated the price of a bag and the weight of a bag varied depending on what area you were in. The source stated a bag in New Jersey would have 0.05 grams of heroin in it and sell for an average price of \$3.00 a bag. The source stated bags in this area weigh less than that, by up to half the weight, and sell for an average price of \$7.00 per bag. Based on my training and experience, I am aware heroin packaging is commonly

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referred to as "bags". Heroin bags in this area have 0.02 - 0.04 grams of heroin in them and sell for \$7.00 - \$10.00 per bag. Most of the heroin in this area comes from Henderson NC, and much of Henderson NC is supplied through New Jersey.

The source stated he/she works as a prostitute. The source stated he/she usually has regular clients but will occasionally advertise on Backpage, mainly to let the regular clients know he/she is back in town. The source stated they met the new client in Cary within the past 72 hours. The source stated they met the new client, who went by the name of "Dee", at the address of 146 Madison Square Ln. in Cary NC. The source stated he/she contacted Dee at the phone number of 919-208-7303. The source stated the phone number was not registered to Dee and came back to another person. The following is a summary of events given by the source:

The source went to 146 Madison Square Ln Cary NC. 146 Madison Square Ln is an end unit townhouse. The source parked in the driveway as no other cars were in the driveway. The source knocked on the front door and "Dee" answered it. The source was invited in. The source and "Dee" went up a set of stairs to the left side of the hallway to the second floor of the townhouse. Once on the second floor of the townhouse, the source could see a kitchen, a dining area, and a living room area. The source remembered the living room having an outdoor chair in it. Dee and the source went up another set of steps to the third floor of the townhouse. There was a room directly by the top of the stairs. There was also another room on the third floor. To get to this room, you would make a 180 degree turn at the top of the steps. There is a half wall or railing going along the top of the steps that makes a hallway. At the end of the hallway is another bedroom. The source and Dee went into the bedroom directly at the top of the stairs. This room was the master bedroom. There was a computer table in the room to the left of the door. There was a bathroom in this room. The toilet was to the left when you walk in the bathroom. The bedroom at the other end of the hall had a dog in it. Dee told the source the dog was a "Pit

Mix” and was a rescue dog. During the visit, Dee pulled down a grocery bag from above the refrigerator. The grocery bag was full of heroin, more than the source had “ever seen in my life”. There was brown heroin, white heroin, and grey heroin. The source estimated the weight of the heroin in pounds. Dee offered to sell the source heroin, but the source declined the request. Dee did not provide the heroin the overdose victim used and did not have anything to do with the overdose at the hotel.

I, the affiant, am familiar with 146 Madison Square Ln Cary NC. On 11/25/2015 I executed a search warrant at this address and arrested Brock Clark for trafficking heroin, PWISD heroin, felony maintaining a dwelling, possession of $\frac{1}{2}$ to $1\frac{1}{2}$ ounces of marijuana, and possession of marijuana paraphernalia. I know this address is an end unit townhouse with three (3) levels. Clark operates a white pickup truck and parks it to the side of the townhouse and not in the driveway. When you enter 146 Madison Square Ln there is a stairway to the left side of the hall that leads to the second level. The second level of the townhouse has a kitchen, a living room area, a dining area, and a single bath. There is a deck that is accessed on this level. The third floor of the townhouse has the master bedroom and a second bedroom. The master bedroom is directly at the top of the stairs. When the search warrant was executed on 11/25/2015, there was a wooden computer desk to the left as you entered the master bedroom. The toilet to the master bathroom is to the left as you walk in from the master bedroom. The second bedroom on the third floor is down the hall from the master bedroom. There is a full wall on one side of the hallway, and a half wall that runs parallel with the steps on the other side of the hallway. When the search warrant was executed on 11/25/2015, the second third floor bedroom had no furniture in it with the exception of a desk chair. There was a dog at this address on 11/25/2015 that appeared to be a Pitbull or Pitbull mix. The call history for this address shows a “Pitbull X” by the name of “Baby Girl” at this address as of 11/01/2016. Clark is currently on probation for PWISD Schedule I as a result of the charges from this

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search warrant. The phone number used to contact “Dee” came back to a subject other than “Dee” and other than Brock Clark. The source identified a photo of Brock Clark as “Dee”.

On 05/20/2014 Brock Clark was charged for soliciting prostitution. This charge was from the Cary Police Department on a prostitution sting. This charge was later dismissed.

The source gave information that could be self-incriminating related to the overdose that occurred at the hotel. The source admitted to buying and using heroin with the overdose victim. The source knew common heroin packaging, packaging terms, packaging weights, and prices of heroin in the local area and in New Jersey. This information has been validated through my training and experience. The source gave information of being a prostitute. The source gave the address of a new client who the source met. The source gave intimate knowledge of the layout of the townhouse. The source gave firsthand knowledge of the Pitbull/Mix that lives there. This information was validated through the affiant executing a search warrant at this address on 11/25/2015 and knowing the layout of the townhouse. The phone number given to communicate with Clark (aka “Dee”) came back to someone other than Clark, as the source said. Clark has a history of using prostitutes as he was charged with solicitation of prostitution on 05/20/2016.

Based on the information the source gave being able to be validated, I, the affiant, feel the source’s statement of seeing heroin in the residence in the kitchen in a bag stored over the refrigerator to be credible as well.

Based upon this affidavit, the magistrate determined that there was probable cause to issue the search warrant. The trial court subsequently ruled that the magistrate had properly granted the warrant, concluding that, “[g]iven the totality of the circumstances, the search warrant contained sufficient facts to establish a fair

probability that evidence of a crime, to wit: possession of a controlled substance, would be found at 146 Madison Square Lane.”

On appeal, Defendant argues that because Berry had no track record of making reliable tips, was unfamiliar to Schulz, and had only one face-to-face interaction with Schulz, she was untrustworthy, and the trial court erred in relying on her contribution to the search warrant application. We disagree.

Berry’s firsthand, detailed description of having recently seen heroin inside Defendant’s residence entitles this tip to greater weight than we might otherwise give it upon any doubt about her motives. *See Barnhardt*, 92 N.C. App. at 97, 373 S.E.2d at 462-63. Additionally, Schulz’s experience and expertise, including investigation, surveillance, and advanced training in the area of drug crimes—which Schulz identified and described in the affidavit—may be considered in the probable cause determination because Schulz justified his belief to the magistrate, an objective third party. *See id.* at 97, 373 S.E.2d at 462.

Schulz’s affidavit is substantially and materially similar to the affidavit in *Barnhardt*. Schulz’s affidavit includes: (1) Schulz’s credentials as a law enforcement officer with experience investigating drug activity and making arrests, who was familiar with drug activity in Cary; (2) Berry’s statement describing her recent personal observation of a large amount of heroin at Defendant’s residence; (3) Berry’s description of the layout of Defendant’s residence at 146 Madison Square Lane; (4)

Berry's knowledge of what heroin looks like and how it is packaged in bags, based on her personal experience using and buying heroin; and (5) Schulz's validation of the information provided by Berry, including the description of Defendant's residence, the presence of the pit bull, the fact that Defendant had been charged with soliciting prostitution, and the fact that the number Berry used to contact Dee did not trace to Defendant.

In light of the totality of the circumstances alleged in Schulz's affidavit, we conclude that it provided a sufficient basis to support a finding of probable cause because it included timely information about drugs located at a precise location, details of the premises to be searched, Berry's ability to identify the drugs, and Schulz's credentials and experience investigating drug activity in the area. Accordingly, we affirm the trial court's Probable Cause Order denying Defendant's motion to suppress.

B. Franks v. Delaware

Defendant next argues that the trial court erred by denying his second motion to suppress evidence because "Schulz deliberately left out information that made his application for a search warrant misleading." Defendant specifically argues that "Schulz knew facts showing the informant had serious credibility issues, some of which were not included in the search warrant affidavit."

“It is elementary that the Fourth Amendment’s requirement of a factual showing sufficient to constitute ‘probable cause’ anticipates a truthful showing of facts.” *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (citing *Franks*, 438 U.S. at 164-65). “[T]ruthful” in this context means “that the information put forth is believed or appropriately accepted by the affiant as true.” *Franks*, 438 U.S. at 165. There is a presumption of validity with respect to the affidavit supporting the search warrant. *Id.* at 171. Before a defendant is entitled to a hearing on the issue of the veracity of the facts contained in the affidavit, he must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit. *Id.* at 155-56.

Upon an evidentiary hearing, the only person whose veracity is at issue is the affiant himself. *Id.* at 171. “A claim under *Franks* is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.” *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358 (citation omitted). In the context of an omission, a violation occurs where an “affiant[] omit[s] material facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading.” *U.S. v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (internal quotation marks and citation omitted).

N.C. Gen. Stat. § 15A-978 codifies the rule enunciated in *Franks* as follows:

(a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

N.C. Gen. Stat. § 15A-978(a) (2019); *see also Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358.

In this case, Defendant moved to suppress evidence seized from his residence on the ground that Schulz's affidavit was false because Schulz:

- a. Deliberately and knowingly made a statement that was not truthful and was made with reckless disregard for the truth when he stated that he believed the source was credible, even though the source stated she saw "po[u]nds of heroin, the most she had ever seen," in the residence and declined Defendant's offer to provide heroin.
- b. Failed to include in the Affidavit that the Source was neither a confidential nor reliable informant of himself or the Cary Police Department.
- c. Failed to state in the Affidavit that it "would be odd" for a drug trafficker to show pounds and pounds of heroin to a stranger.
- d. Failed to put in the Affidavit that the Source was under the influence of heroin and crack; was scared, upset and worried about a B-2 homicide charge in connection with the overdose of her friend.
- e. Failed to inform the magistrate that neither he nor the Cary Police Department took any specific investigative

measures to corroborate the truth of the Source's statement.

f. Failed to inform the magistrate that Mike Yagoda was the Source of the heroin that led to the overdose.

g. Failed to inform the magistrate that the text message between the Defendant and Source tends to confirm that the Source was unable to meet with the Defendant.

Attached to Defendant's *Franks* motion was an affidavit from Berry dated 5 September 2017 in which she averred, among other things, that on the night she spoke with Schulz:

- "I was under the influence of heroine and crack cocaine at the time of this incident."
- "I was highly distressed and I felt very sure I was going to get in trouble."
- "Due to the severity of the situation, the police insinuated that I could be in a lot of trouble."
- "They found an address in my text messages that belonged to a client (not a client but a potential client. We had agreed to meet but due to my timing being late, we were unable to."
- "So I just told the police all the lies they wanted to hear to protect myself."
- "I am clean from drugs now Now that I am able to think clearly, It was very important to me to clear the confusion and lies."
- "I never met Mr. Clark prior to this day in Nov 2016. I never went in his house. I never saw or bought any drugs from this man. On the contrary actually."
- "Unfortunately fear and drugs clouded my judgements. The cops knew I was a strung out drug addict whore—literally. And they used my weakness to their liking."

- “The police even contacted me in March of 2017 to tell me that my life was in danger because they had information that he was going to kill me.”

The trial court held a *Franks* hearing, at which Schulz testified to the information upon which his affidavit was based. In its *Franks* Order, the trial court made findings of fact as to Schulz’s allegedly untruthful statement as well as each of Schulz’s alleged omissions, as follows:¹

The Affidavit clearly sets forth the relationship between the Cary Police Department and the Source. The Source was a witness to her friend’s overdose, who met in person with Detective Schultz and agreed to provide information related to drug activity in the area. The fact that Detective Schultz did not inform the magistrate that the Source was not a confidential or reliable informant of is not a material fact that was knowingly omitted. Absent such a representation by Detective Schultz, a reviewing judicial would not treat a source as a confidential or reliable informant. As such, the Court finds that this omission is not material and did not make the Affidavit misleading.

Defendant’s contention that the failure to state in the Affidavit that it “would be odd” for a drug trafficker to show pounds and pounds of heroin to a stranger was a knowingly and intentional omission which makes the Affidavit misleading must also fail. First, Detective Schultz testified that “it could be odd” not that it “would be odd”. Second, Detective Schultz further testified that despite the fact that “it could be odd”, some drug dealers do like to boast, brag, show and intimidate. As such, the Court finds that Defendant has failed to prove by a preponderance of the evidence that Detective Schultz’s failure to state that it “could be odd” for a drug trafficker to show po[u]nds of heroin to a stranger was made with the

¹ We note that Schulz’s name is misspelled throughout the trial court’s order. For ease of reading this opinion, we have not corrected the spelling.

intent to make the Affidavit material misleading or with reckless regard to the same. Moreover, given the totality of the facts contained in the Affidavit, even if the omission was knowing or with reckless disregard, the Court finds that it is not material being that Detective Schultz informed the magistrate of the Source's statements as to weight and that it was "more than she had ever seen."

Defendant's assertion that the failure to include in the Affidavit that the Source was under the influence of heroin and crack; was scared and upset and worried about a B-2 homicide charge in connection with the overdose of her friend warrants suppression of the Affidavit. It is clear from Detective Schultz's Affidavit that his interview of the Source occurred at the hotel room in the immediate aftermath of the overdose. Furthermore, Detective Schultz disclosed to the magistrate that the Source was an addict and had used heroin that evening. The magistrate could logically infer from the facts that the Source would be scared and concerned for her friend, as she was the source of the 911 call. Furthermore, the magistrate could infer from the facts that the Source could be concerned about criminal liability as she made statements against penal interest and admitting to helping procure the heroin that led to the overdose. There is no credible evidence to show that the Source was concerned about a homicide charge as her friend was still alive at the signing of the Affidavit. The Court concludes that these omissions were neither intentional nor made with reckless disregard nor did their omission make the Affidavit misleading.

As to Detective Schultz's alleged failure to inform the magistrate that neither he nor the Cary Police Department took any specific investigative measures to corroborate the truth of the Source's statement, there is no credible evidence to support a finding that this was an intentional material omission or an omission made with reckless disregard for the truth rendering the Affidavit misleading. The Affidavit discloses that Detective Schultz did review the call history to the address which demonstrated that at least three weeks earlier a dog similar to one seen by the Source was located at the home.

The Affidavit also contained information that Dee had been charged with solicitation of prostitution at this address and that Detective Schultz determined that the phone number used to contact Dee came back to a subject other than Dee or Brock. Finally, Detective's Schultz's description in the Affidavit of his knowledge of Clark and the residence, obtained independently from the Source, corroborated the information given by the Source. The failure of Detective Schultz to state he did not take any additional steps is not an omission of a material fact as the only conclusion that the magistrate could draw from the Affidavit was that no additional specific investigative measures were taken other than what was already set forth in the Affidavit

Defendant's contention that the failure to inform the magistrate that Mike Yagoda was the source of the heroin that led to the overdose was intentional, reckless, material and somehow makes the Affidavit misleading is similarly without merit and not supported by the evidence as the Affidavit makes clear that Dee was not the source of the heroin that caused the overdose.

Defendant's contention that Detective Schultz intentionally or with reckless disregard for the truth, failed to inform the magistrate that the text message chain between the Defendant and the Source tended to confirm that the Source was unable to meet with the Defendant is not supported by the evidence. Detective Schultz did not see that portion of the text and thus had no basis to inform the magistrate of the same. Ironically, Defendant is accusing Detective Schultz of doing what the Defendant is doing in this argument and that is omitting certain portions of the text chain. While it is true that if Detective Schultz had had access to the entire chain of text messages he would have seen that the Defendant stated he was going to pick up his mother. Detective Schultz would have also seen the very last text, which was from the Source to the Defendant and sent 4 minutes after the Defendant said he had to get his mom. In the last text, the Source told the Defendant that she would wait for him at his place.

Finally, Defendant has failed to prove by a preponderance of the evidence that Detective Schultz

deliberately and knowingly made a statement that was not truthful and was made for reckless disregard for the truth when he stated that he believed the source was credible, even though the source stated she saw “pounds of heroin”, “the most she had ever seen,” in the residence and declined Defendant’s offer to sell heroin. The Affidavit and testimony makes clear that Detective Schultz relied on a myriad of factors in determining the Sources credibility including but not limited to: the Sources statements against penal interest and her knowledge about drugs in the area and in New Jersey. Detective Schultz also relied upon her detailed, intimate and accurate knowledge of the Defendant’s townhouse and the dog that lived there as well as other factors.

The trial court also summarily found as follows: “Defendant has failed to show that the information put forth by Detective Schultz was not believed or appropriately accepted by him. Defendant has also failed to establish the materiality of any alleged omitted information in light of the facts recited in the Affidavit as a whole.”

To the extent Defendant has specially challenged the evidence supporting these findings, our review of the record—including Schulz’s probable cause affidavit, the transcripts from the 27 September 2017 probable cause hearing and the 4 September 2018 *Franks* hearing, the string of text messages between Berry’s phone and another phone revealing that Berry planned to meet another person earlier on 26 November 2016 at 146 Madison Square Lane in Cary, and Berry’s affidavit—reveals that competent evidence supports each of these findings of fact; they are thus binding upon us. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. As the trial court found, the evidence does not establish that Schulz “deliberately and knowingly made

a statement that was not truthful and was made for reckless disregard for the truth when he stated that he believed the source was credible[.]” Moreover, as the trial court found, each of Schulz’s alleged omissions was one or more of the following: not, in fact, an omission; not material; not intentional; not made with reckless disregard for the truth; and did not render the affidavit misleading. Furthermore, the findings support the trial court’s conclusions of law that “Defendant has failed to establish a violation of N.C. Gen. Stat. § 15A-978, *Franks v. Delaware*, 438 U.S. 154 (1978)[,] or his Fourth Amendment rights under the United States Constitution.”

Defendant argues on appeal that the trial court erred by failing to give greater weight to Berry’s affidavit in the *Franks* hearing. Defendant specifically argues,

If [Berry’s] affidavit is in fact the “no credible evidence” of [Schulz] knowingly making misleading statements in his application that the trial court used to deny [Defendant’s] challenge to the warrant, then the trial court effectively agreed with [Defendant’s] initial challenge to the search warrant that any allegations from this informant is unreliable and substantial corroboration was required.

In this same vein, Defendant further argues that the trial court failed to “properly analyze the veracity” of other statements made by Berry contained in the affidavit. We disagree.

The only person whose veracity is at issue in this *Franks* challenge is the affiant, Schulz, not the nongovernmental informant, Berry. *See Franks*, 438 U.S. at 171; *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358. Moreover, Berry’s affidavit neither

establishes that she was lying when she spoke with Schulz, nor that she was being truthful in her affidavit. The self-serving nature of her affidavit is apparent on the face of her affidavit, in which she states, “The police even contacted me in March of 2017 to tell me that my life was in danger because they had information that [Defendant] was going to kill me.” “Because the trial court, as the finder of fact, has the duty to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom,” *State v. Robinson*, 255 N.C. App. 397, 408, 805 S.E.2d 309, 317 (2017) (internal quotation marks and citation omitted), the trial court had the authority to determine that Berry’s affidavit was not credible evidence.

As the trial court properly determined that Defendant failed to meet his burden of proof under *Franks*, he has failed to overcome the search warrant’s presumption of validity. *See Franks*, 438 U.S. at 155-56, 171. Accordingly, we affirm the trial court’s *Franks* Order denying Defendant’s motion to suppress.

IV. Conclusion

Because the affidavit in support of the search warrant was supported by probable cause and was not misleading, the trial court did not err by denying Defendant’s motions to suppress. The orders denying the motions to suppress are affirmed.

AFFIRMED.

STATE V. CLARK

Opinion of the Court

Judges BRYANT and HAMPSON concur.

Report per Rule 30(e).