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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARRYL M. BUTTS, Defendant and Appellant.	B241495 (Los Angeles County Super. Ct. No. MA052482)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas R. White, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Darryl Butts appeals from the denial of his motions to quash and traverse a search warrant. Following the denial of his motions, defendant pleaded "no contest" to one count of possession of a firearm by a felon. (Pen. Code, § 12021, subd. (a)(1).)[1] The trial court placed defendant on formal probation for three years and ordered him to serve the equivalent of time served in county jail.

Defendant appeals on the grounds that the search warrant should be traversed and quashed, evidence of the firearm and ammunition found should be suppressed, and he should be allowed to withdraw his plea.

FACTUAL AND PROCEDURAL HISTORY

Los Angeles County Deputy Sheriff Rodney Huff executed a search warrant on defendant's residence on April 13, 2011.[2] Before the search, Deputy Huff asked defendant if he had firearms inside, and defendant admitted to having shotguns and handguns. The search yielded "numerous firearms and approximately 2,000 rounds of ammunition" inside the house and in the several trailers and outbuildings on the property.[3] A certified criminal history for defendant showed a 1981 felony conviction of possession of marijuana for sale in violation of Health and Safety Code section 11359.

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

[2] Because defendant pleaded no contest before the trial, we obtain the facts from the transcript of defendant's preliminary hearing.

[3] According to defendant's probation report, police found the following items in the search: one ".410 shotgun" with four live rounds; one ".22 riffle" [*sic*]; one "[]12 gauge Mossberg shotgun"; one ".36 caliber black powder revolver"; one ".22 caliber pistol magazine"; one "9MM Smith and Wesson pistol magazine"; 1,581 "[]12 gauge shotgun rounds"; 219 "[]16 gauge shotgun rounds"; 124 "20 gauge shotgun rounds"; "(numerous) .22 caliber live rounds of ammunition"; 170 ".410 shotgun rounds"; 159 ".25 caliber auto rounds"; 58 "7.62/39MM live rounds of ammunition"; 200 "9MM pistol rounds"; 100 ".38 caliber rounds"; 80 "7.62/51MM live rounds of ammunition"; 100 ".357 caliber rounds of ammunition"; 40 ".270 caliber rounds of ammunition"; and a "bag of various caliber rounds."

Defendant was arraigned on one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)) and one count of possession of ammunition by a felon (§ 12316, subd. (b)(1)).[4] Defendant filed a motion to unseal, quash, and traverse the search warrant on the ground that the confidential informant provided misleading and false information, which the deputies used to apply for and obtain a search warrant for defendant's residence. At the hearing, the parties stipulated that defendant had a reasonable expectation of privacy in the area searched. The parties also stipulated that defendant suffered a felony conviction on June 22, 1981, for possession of marijuana for sale. The trial court denied defendant's motions.

DISCUSSION

I. Defendant's Argument

Defendant contends that his motions to quash and traverse the search warrant should have been granted. According to defendant, once the false information is excised, the remaining information in the affidavit is insufficient to justify a probable cause finding to support the search warrant.[5] Defendant also asserts that the deputy intentionally or recklessly put false information in the affidavit and statement of probable cause.

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[4] Count 2 was eventually dismissed pursuant to defendant's plea bargain.

[5] The affidavit and statement of probable cause stated in pertinent part: "My partner (Deputy Brian Mohr) and I, were given information from a CRI describing a specific person (Darryl Mark Butts MW/01-05-57) in possession of stolen and illegal firearms. The CRI described seeing Darryl Butts with (2) stolen .45 caliber handguns and (2) assault weapons, M-16 type. The CRI described seeing thousands of live rounds of ammunition. The CRI recently observed the weapons/ammo at the felons residence at 200 East Ave G-6, Lancaster. The CRI stated the weapons were in the possession of the suspect, who is a convicted felon for weapons related charges and assaults with deadly weapons. The CRI stated Darryl Butts is selling weapons from his residence. The CRI stated Darryl Mark Butts is an active member of the known criminal motorcycle gang 'Vagos.' The CRI has given my partner and I information in the past on different individuals and we recovered firearms and narcotics from the information provided. It is my opinion that the CRI is credible based on the above."

II. Proceedings Below

The trial court addressed defendant's motion to quash based on the argument that the four corners of Deputy Huff's affidavit failed to establish probable cause for the search as a matter of law. Counsel contended that the affidavit did not establish the reliability of the informant, the basis of the informant's knowledge, and the timeliness of the information obtained. In addition, the affidavit was misleading and contained falsehoods that could have been and should have been discovered by the affiant and corrected before the affidavit was presented to the magistrate, such as the nature of defendant's prior convictions and defendant's alleged membership in the Vagos motorcycle gang. Counsel argued that the good faith exception did not apply because no reasonable officer could have relied on the warrant given the lack of detail and corroboration.

After hearing argument, the trial court stated, "in my analysis of the situation for purposes of quash, the defendant's challenge of the sufficiency of the affidavit on its face causing me to assume truth of the averment within it, again, within the four corners of the document, is not so lacking in indications of probable cause, or so facially deficient to particularize the place to be search[ed], the things to be seized, or that the executing deputies could not reasonably presume its validity."

The trial court found that, even without the objectionable information, there existed probable cause. If the information of defendant's gang membership were excised, there remained the information of the .45-caliber handguns, the assault weapons, descriptors of two vehicles, location of the property, recent observations of weapons and thousands of rounds of ammunition, and defendant's status of convicted felon with weapons-related charges and an assault with a deadly weapon charge. The court found it was not wholly unreasonable for the deputy to have relied on this statement of probable cause. The trial court noted the warrant's assertion that the CRI had given the deputy and his partner information in the past on different individuals resulting in recovery of firearms and narcotics based on that information and the deputy's opinion that the CRI was credible. The court concluded that, even if the objectionable information were

omitted, it could not make a finding that there lacked sufficient probable cause on the face of the warrant on which the affiant could rely. The court found that the magistrate could rely upon the presentation of the affiant, and it denied the motion to quash.

The trial court then heard defendant's testimony regarding the motion to traverse. Defendant stated that he had no stolen firearms in his possession in the year prior to the search, nor did he have any assault weapons, including an M-16. He had never sold weapons from his residence or to any member of the Vagos motorcycle criminal street gang. He was not an active member of that gang and had not associated with them. He had never told anyone he was a member. He admitted that he had firearms on his property in the year preceding the search, and he had ammunition and weapons in his possession and control a month before the search.

The prosecutor argued that defendant's self-serving testimony was not a sufficient showing that there was false information in the affidavit as required by *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*). Therefore, there was no need to move on to an evidentiary hearing. The trial court agreed and did not allow defendant to call Deputy Huff, but the court permitted counsel to argue. Counsel contended that defendant's testimony should be believed rather than the statements of an absent informant. The prosecutor countered that, even if the information that defendant was not convicted of weapons-related charges and assaults with a deadly weapon were excised, there remained a warrant for a convicted felon in possession of firearms and ammunition, and that was sufficient.

The trial court ruled that it could not make a finding by a preponderance of the evidence that a false statement was intentionally or recklessly included in the affidavit and that the false statement was material to the finding of probable cause. Therefore, the defense had not met its burden of a substantial preliminary showing. The affiant described the CRI as reliable in the affidavit, and many of the facts in the affidavit were true and accurate. Even if the court disregarded items not borne out by the return and omissions, police nevertheless found several weapons, an S.K.S. instruction manual, and thousands of rounds of various types on the property. The trial court stated, "[m]ere

conclusionary contradictions of the affiant's and the affidavit statements are insufficient to show the affiant is presenting false or misleading information or to support defendant's burden to make a substantial preliminary showing. Also, allegations of negligence or innocent mistakes are insufficient as a basis as well." The trial court found no reckless disregard and no deliberate falsity.

III. Analysis

A. Motion to Quash

A search warrant may only be issued on a showing of probable cause. (§§ 1525, 1527.) Probable cause exists when, based on the totality of circumstances described in the affidavit, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238; *People v. Kraft* (2000) 23 Cal.4th 978, 1040-1041.)

A defendant seeking to quash a search warrant bears the burden of establishing its invalidity. (*People v. Amador* (2000) 24 Cal.4th 387, 393.) A magistrate's determination as to the existence of probable cause is given "'great deference'" and will not be overturned unless the affidavit fails as matter of law to establish probable cause. (*Illinois v. Gates*, *supra*, 462 U.S. 213 at p. 236; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1041.) Because of the law's preference for warrants, doubtful or marginal cases should be resolved in favor of upholding the warrant. (*People v. Superior Court (Corona)* (1981) 30 Cal.3d 193, 203; *People v. Garcia* (2003) 111 Cal.App.4th 715, 720.) An affidavit need not be based on personal knowledge of the affiant; information from an informant may justify issuance of a warrant if that informant has previously been reliable or his information is corroborated. (*Illinois v. Gates*, at pp. 242, 244-245; *Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 573-574.)

The magistrate's duty "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information," there is probable cause to search. (*Illinois v. Gates*, *supra*, 462 U.S. at p. 238.) Our duty "is

simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." (*Id*. at pp. 238-239.)

With respect to the motion to quash, defendant first contends that the reliability of the CRI was not sufficiently established, and he argues several points on this issue, i.e., the date the CRI supposedly saw defendant with the illegal firearms was not disclosed; there was no time specified as to when the CRI had provided information in the past; the affidavit was vague as to what type of individuals had the drugs and weapons; the affidavit was not specific as to the sort of information the CRI had provided, such as the number of times and the number of people involved; the affidavit did not state whether the CRI had pending criminal charges or probation violations; and the affidavit lacked evidence the CRI had any experience or knowledge of firearms, such as those he or she described. With respect to the last point, defendant notes that the affidavit changes the description of the firearms from M-16-type assault weapons to assault-style weapons, which are different. Defendant asserts that the affidavit does not state that the allegations are based on the CRI's personal observations, which is a fatal flaw.

In addition, defendant contends the allegation that he sold assault weapons was conclusory and vague. The statement merely says he was "selling weapons," which is not sufficient. Defendant points out that, during the surveillance conducted by the affiant, the officers observed only the two vehicles the CRI had described at the address he gave. The affiant and his partner did not observe enough to verify the CRI's claims, such as an exchange of money for stolen assault weapons.

As for the credibility of the informant, we agree with the trial court that, although there were few details about the incidents in which the CRI aided police, there were enough. Given that search warrant affidavits are written by nonlawyers who are in the midst of an investigation, we cannot demand elaborate specificity. (*People v. Varghese* (2008) 162 Cal.App.4th 1084, 1103.) The affiant stated that information had previously been obtained about more than one individual, and narcotics and firearms had been recovered in those instances. The affiant stated that, in his opinion and based on his experience with the CRI, the CRI's claims were credible.

We agree with the trial court that, although there is not a wealth of detail in the affidavit, there was sufficient information within the four corners of the document to establish probable cause. Even if the information that defendant was a member of the Vagos gang were excised, there was information that .45-caliber handguns and assault-type weapons, as well as thousands of rounds of ammunition, were possessed by defendant, who was a convicted felon. Contrary to defendant's assertion, the CRI in this case described recent *personal* observations. Therefore, unlike the informants in *People v. French* (2011) 201 Cal.App.4th 1307, relied upon by defendant, the information the CRI provided was not mere hearsay provided by untested informants. (*Id*. at pp 1317-1318.) "[E]ven 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." (*Illinois v. Gates*, *supra*, 462 U.S. at p. 234.) The affiant asserted that the CRI described "seeing" thousands of live rounds. The CRI "recently observed" the weapons and ammunition at defendant's residence. The affiant also personally observed the two vehicles at the address the CRI named. Although the latter constitutes "'pedestrian facts,'" this is not a case in which the affiant relied upon an untested informant, where such facts are regarded as insufficient corroboration. (*French*, at pp. 1319-1320.) The CRI also stated that defendant was a convicted felon, and although the specific nature of defendant's conviction was later shown to be incorrect, the fact of the felony conviction added to the totality of the circumstances that supported the affidavit.

Finally, Deputy Huff attested to his 13 and 1/2 years of experience as a deputy and, inter alia, his in-service training in the areas of gangs and weapons possession and sales. "A magistrate may reasonably rely on the special experience and expertise of the affiant officer in considering whether probable cause exists." (*People v. Varghese*, *supra*, 162 Cal.App.4th at p. 1103; see also *People v. Kershaw* (1983) 147 Cal.App.3d 750, 760.) Although the deputy's training and experience could not substitute for a lack of evidentiary nexus between the location to be searched and probable cause to believe the

search would produce evidence of the suspected criminal activity, the information on the deputy's background was an important component of the totality of the circumstances.

"[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." (*Illinois v. Gates*, *supra*, 462 U.S. at p. 232.) "It is less than proof beyond a reasonable doubt [citation]; less than a preponderance of the evidence [citation]; and less than a prima facie showing [citation]." (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1783.) It requires only a "substantial chance" of criminal activity rather than an actual showing of such activity. (*Illinois v. Gates*, at pp. 243-244, fn. 13; *Tuadles*, at p. 1783.) Even if the instant case were a doubtful one, it has been held that doubtful cases of probable cause should be determined by the preference accorded to warrants. (*United States v. Ventresca* (1965) 380 U.S. 102, 109.) Under the totality of the circumstances, we conclude the trial court properly denied the motion to quash, and the affiant's information obtained from the CRI, together with the affiant's personal corroboration of some of the details, was adequate to establish a fair probability that evidence of a crime or contraband would be found at defendant's residence. (*Illinois v. Gates*, at p. 238.)

B. Motion to Traverse

As summarized in *People v. Bradford* (1997) 15 Cal.4th 1229, 1297 *(Bradford)*, the court "must conduct an evidentiary hearing if a defendant makes a substantial showing that: (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to justify a finding of probable cause. At the evidentiary hearing, if the statements are proved by a preponderance of the evidence to be false or reckless, they must be considered excised. If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that warrant must be suppressed. [Citation.]" (*Bradford*, at p. 1297, citing *Franks, supra*, 438 U.S. at pp. 155-156.) Defendant bears the burden of showing material misstatements in the affidavit. (*Bradford*, at p. 1297.) Probable cause for a search warrant cannot be supported by the results of the search, but the results of the

search can support the veracity of the statements in the warrant affidavit by an affiant whose credibility is being challenged. (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 275.)

With respect to the motion to traverse, defendant asserts that the following false information was included in the affidavit: (1) defendant had prior convictions for weapon-related crimes and assaults with deadly weapons; (2) the confidential informant saw defendant with two assault weapons of the M-16 type, which are military type weapons used in combat, and two stolen .45-caliber handguns; (3) defendant was selling weapons from his home; and (4) defendant was an active member of the Vagos gang—a criminal motorcycle street gang. Defendant contends that the traverse motion should have been granted because he made a substantial showing that: (1) the statements in the affidavit were deliberately false or made in reckless disregard of the truth; and (2) the false statements were necessary to the finding of probable cause.

Of the four items defendant asserts were false, only the nature of defendant's prior conviction was shown to be false by evidence other than defendant's testimony. Defendant did not have prior convictions for weapons-related crimes and assaults with deadly weapons, but rather a conviction for possession of marijuana for sale. As in *People v. Duval* (1990) 221 Cal.App.3d 1105, 1113, with respect to the other items, defendant's "self-serving conclusory statements constitute a general denial and fall far short of meeting the *Franks* requirement set forth above." (See also *People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1318.) Defendant continually asserts that Deputy Huff either knowingly presented this false information to the magistrate or was reckless in failing to confirm the reliability of the confidential informant's information because the return to search warrant stated on page 11 of 13 that, "Based on the CRIs information, we conducted an investigation regarding the validity of the allegations. A check via CCHRS confirmed S/Butts was convicted of possession of marijuana for sales on 06-22-1981." The trial court acknowledged the incorrect information but found it to be a mistake or negligence rather than reckless disregard and thus insufficient to form the basis for defendant's required preliminary showing.

The page of the return to the search warrant cited by defendant clearly shows that, at some point, Deputy Huff and presumably his partner verified the nature of defendant's prior conviction. If the narrative on this page is considered to be chronological, this verification occurred before the deputies conducted their surveillance of defendant's residence. Thus, the deputies believed this type of conviction, being a felony conviction, was sufficient to pursue the tip. We agree with the trial court that the failure to correct the affidavit as to the nature of the conviction appears to be negligence or mistake rather than purposeful misrepresentation or reckless disregard of the truth. (*Franks*, *supra*, 438 U.S. 154, 171 [innocent or negligent misrepresentations do not support a motion to traverse]; see also *People v. Scott* (2011) 52 Cal.4th 452, 484; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 988–989.)

Moreover, even if the deputies were guilty of a deliberate falsehood or reckless disregard of the truth in describing the nature of defendant's prior conviction, the remaining contents of the affidavit were sufficient to establish probable cause. The misstatement was not material in light of the totality of the circumstances. The trial court properly concluded that, even after redacting the information that defendant's prior conviction was for possession of marijuana for sales rather than for weapons offenses, sufficient information remained in the affidavit to support a finding of probable cause for the issuance of a search warrant for defendant's residence. (*Bradford*, *supra*, 15 Cal.4th at p. 1297; *People v. Thuss* (2003) 107 Cal.App.4th 221, 230.)

C. Good Faith Exception

Finally, although we believe probable cause was established, we observe that the good faith exception to the exclusion requirement would apply in this case. In *United States v. Leon* (1984) 468 U.S. 897 (*Leon*), the court established that the Fourth Amendment exclusionary rule does not "'bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.'" (*People v. Camarella* (1991) 54 Cal.3d 592, 596 (*Camarella*).)

"' [A] warrant issued by a magistrate normally suffices to establish'" an officer's good faith belief. (*Leon*, *supra*, 468 U.S. at p. 922.) In some circumstances, however, the officer will have no reasonable grounds for relying on the magistrate. (*Id*. at pp. 922-923.) Review is limited to an objective examination of whether a "'reasonably well trained officer would have *known* that the search was illegal despite the magistrate's authorization.'" (*Camarella*, *supra*, 54 Cal.3d at pp. 602-603.)

Leon noted four situations in which the good faith exception to the exclusionary rule would not apply: (1) where the affiant misled the magistrate with information the affiant knew was false or would have known but for the affiant's reckless disregard; (2) where the magistrate wholly abandoned his judicial role; (3) where the affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'"; or (4) where the warrant itself is facially deficient in particularizing the place and items to be searched. (*Leon*, *supra*, 468 U.S. at p. 923.)

In the instant case, defendant argues that the *Leon* exception does not apply because of the inaccurate information in the affidavit about defendant's conviction for a weapons offense. He contends that Deputy Huff "failed to do his part" to verify defendant's prior conviction. He also asserts that Deputy Huff knowingly or recklessly included the false information about defendant's prior conviction.

We believe the record does not support these assertions. As we have noted, Deputy Huff verified that defendant was a convicted felon at some point. It appears the deputy mistakenly or negligently failed to correct the nature of the prior convictions on the affidavit. There is no indication that the CRI did not tell the deputy that defendant had been convicted of the weapons offenses or that the CRI had no basis for believing that defendant had suffered these convictions. Defendant's criminal record shows a 1982 arrest for assault with a deadly weapon in violation of section 245, subdivision (a) with the result and disposition date "unknown." The record also shows that defendant was charged in 1981 with possession of a concealed weapon in violation of former section 12025, subdivision (b) and carrying a loaded firearm in violation of former section 12031, subdivision (a) at the same time he was charged with possession of marijuana for

sale. The two weapons charges were dismissed, and defendant was convicted only of the Health and Safety Code section 11359 offense. Defendant was also arrested for assault with a deadly weapon in 1992, but the case was rejected.

In *Camarella*, the court held that the relevant inquiry for the good faith exception is not whether further investigation would have been reasonable, but whether a reasonable officer would have known that the affidavit in support of the search warrant was legally insufficient, and that he should not have applied for the warrant. (*Camarella*, *supra*, 54 Cal.3d at p. 606.) Given that defendant had suffered a prior felony conviction and considering the rest of the information in the affidavit, under the totality of the circumstances, the affidavit here was not so deficient as to render the deputy's reliance on the magistrate's finding of probable cause objectively unreasonable.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

FERNS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.