

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. <u>11-cr-20137 M1/P</u>
)	
MARCUS BROOKS,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION

Before the court are defendant Marcus Brooks's Request for a Hearing Pursuant to Franks v. Delaware (ECF No. 29) and Supplemental Request for a Hearing Pursuant to Franks v. Delaware (ECF No. 40) (collectively, "Motion for Franks Hearing"), and Motion to Disclose Identity and Background of Confidential Informant ("Motion to Disclose CI") (ECF No. 30). On October 27, 2011, the United States ("government") filed responses in opposition to the motions. The motions were referred to the magistrate judge for a report and recommendation. On November 21, 2011, the court held a hearing on the motions. At the hearing, the court heard testimony from Detective Jonathan Overly of the Memphis Police Department ("MPD"). The court admitted as evidence four exhibits, including Detective Overly's search warrant affidavit, two photographs of Brooks's residence, and utility records for Brooks's residence. The court also considered Brooks's affidavit

attached to his Motion for Franks Hearing.

Based on the briefs filed in support of and in opposition to the motions, the evidence presented at the hearing, and the entire record, the court submits the following proposed findings of fact and conclusions of law, and recommends that the Motion for Franks Hearing and the Motion to Disclose CI be denied.

I. PROPOSED FINDINGS OF FACT

The court has carefully considered the testimony of Detective Overly and finds him to be credible. Therefore, the court adopts Detective Overly's version of events as its Proposed Findings of Fact.

On December 20, 2010, Detective Overly received a tip from a confidential informant ("CI") that Marcus Brooks was selling marijuana out of his residence at 157 West Person Avenue in Memphis, Tennessee. The CI informed Detective Overly that on December 19, 2010, the CI had been inside the West Person residence and had witnessed Brooks storing and selling marijuana in his living room. The CI also stated that Brooks was confined to a wheelchair. Detective Overly had received tips from this CI on several prior occasions and found the CI to be reliable. Specifically, as stated in Detective Overly's December 22, 2010 affidavit submitted in support of his application for a search warrant, the CI had previously provided information leading to nine convictions of defendants in Shelby County Criminal Court and the

seizure of 149.37 grams of crack cocaine, 8.94 grams of powder cocaine, 939.45 grams of marijuana, and \$17,591 in cash. The MPD has worked with this CI since 2007, and Detective Overly currently uses this CI in pending drug investigations.

After receiving the CI's tip, Detective Overly took steps to confirm that Brooks resided at the West Person residence. On December 21, he reviewed utility records for the residence and learned that Brooks was the account holder. Detective Overly also drove by the residence on December 21 and saw a red Corvette parked in the driveway. He checked the tags on the vehicle and found that it was registered to Brooks. Detective Overly viewed booking photographs of Brooks, which matched the CI's description of Brooks and confirmed the CI's statement that Brooks was confined to a wheelchair. Detective Overly then showed these photographs to the CI, who confirmed that the photographs were of Brooks.

After confirming Brooks's identity, Detective Overly conducted surveillance of the residence. During a thirty-minute period during the daytime hours of December 21, Detective Overly witnessed three different individuals arrive at the residence on foot, enter the residence, and then leave within one to two minutes. While Detective Overly was not able to see who allowed the individuals into the residence, he did observe Brooks's vehicle in the driveway at the time of these visits. Based on his training and experience, Detective Overly believed these visits were consistent with illegal

drug activity. In addition, in the evening of December 21, Detective Overly witnessed Brooks participate in what appeared to be a hand-to-hand transaction directly across the street from the residence. Detective Overly witnessed Brooks's red Corvette facing southbound on Pennsylvania Street across from the residence, while another man, whose black car was positioned next to the Corvette, stood outside Brooks's car window. As Detective Overly drove by the two vehicles, his headlights illuminated both cars. He observed Brooks in the driver's seat of the Corvette participating in a hand-to-hand exchange with the other man. Detective Overly could not see exactly what was exchanged between the two men, but believed their actions were consistent with a drug transaction. On December 22, Detective Overly conducted another drive-by surveillance of the West Person residence and witnessed Brooks coming out of the doorway of the house.

Based on this information, Detective Overly obtained a search warrant for the residence on December 22. In support of this warrant, Detective Overly signed an affidavit in which he described the information received from the CI, the CI's past reliability, and the detective's observations during his surveillance of the residence. On December 23, MPD officers executed the search warrant. Inside, the officers found Brooks with another individual, later identified as Julius Dodson. The search resulted in the discovery of a loaded Smith & Wesson .40 caliber semi-

automatic pistol, as well as small quantities of crack cocaine, \$411.00 in cash, marijuana, and a digital scale. Brooks was indicted on one count of being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).

On September 20, 2011, Brooks filed the motions presently before the court. Brooks asserts that he is entitled to a Franks evidentiary hearing because, as set forth in his affidavit, he was not at the residence at any time from December 17 through December 22, 2010. Thus, according to Brooks, it was impossible for either the CI to have witnessed him selling marijuana in the residence or for Detective Overly to have witnessed him engaged in any suspicious activity during that time. Brooks contends that his affidavit satisfies the "substantial preliminary showing" required for a Franks hearing. In his Motion to Disclose CI, Brooks argues that the CI's identity should be disclosed so that Brooks may interview the CI and attempt to obtain evidence in support of his claim that false and misleading information was included in the search warrant affidavit.

II. PROPOSED CONCLUSIONS OF LAW

A. Motion for Franks Hearing

In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held that, in certain circumstances, a criminal defendant is entitled to a hearing regarding the veracity of a sworn statement used by the police to procure a search warrant. "To obtain a

Franks hearing, 'the defendant must make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit.'" United States v. Hudson, 325 F. App'x 423, 425-26 (6th Cir. 2009) (quoting United States v. Stewart, 306 F.3d 295, 304 (6th Cir. 2002)). "The purpose of a Franks hearing is to allow the defendant to challenge the truthfulness of statements in an affidavit in order to challenge the legality of a search warrant issued on the basis of the affidavit." United States v. Sharp, No. 1:09-cr-98, 2010 WL 1427292, at *3 (E.D. Tenn. Mar. 18, 2010). As explained by the Sixth Circuit:

A defendant who challenges the veracity of statements made in an affidavit that formed the basis for a warrant has a heavy burden. His allegations must be more than conclusory. He must point to specific false statements that he claims were made intentionally or with reckless disregard for the truth. He must accompany his allegations with an offer of proof. Moreover, he also should provide supporting affidavits or explain their absence. If he meets these requirements, then the question becomes whether, absent the challenged statements, there remains sufficient content in the affidavit to support a finding of probable cause.

United States v. Bennett, 905 F.2d 931, 934 (6th Cir. 1990) (citations omitted); see also Sharp, 2010 WL 1427292, at *4 (quoting Bennett).

"A Franks hearing requires that the defendant make a substantial preliminary showing that the *affiant*, rather than the *informant*, deliberately or recklessly included false information in the affidavit." Sharp, 2010 WL 1427292, at *4 (emphasis in

original) (citing Franks, 438 U.S. at 155; United States v. Stuart, 507 F.3d 391, 396 (6th Cir. 2007); United States v. Trujillo, 376 F.3d 593, 603-04 (6th Cir. 2004); United States v. Pritchett, 40 F. App'x 901, 905 (6th Cir. 2002); United States v. Fields, No. 98-5798, 2000 WL 1140557, at *4 (6th Cir. Aug. 4, 2000); United States v. Giacalone, 853 F.2d 470, 474-76 (6th Cir. 1988); United States v. Kelley, 596 F. Supp. 2d 1132, 1149-50 (E.D. Tenn. 2009)).

The court finds that Brooks has not made a substantial preliminary showing that Detective Overly deliberately or recklessly included false information in his search warrant affidavit. The only evidence presented by Brooks in support of his request for a Franks hearing is his own affidavit, in which he states that he was not at the residence during the time period described in Detective Overly's affidavit. However, Brooks provides no other support for his claim, such as affidavits by other individuals who could verify his whereabouts during this time period or documentation that might support his contention that he was somewhere else. Notably, although Brooks claims in his affidavit that he was not at his residence during this time period, he makes no attempt to explain where he was residing at the time. Brooks's affidavit, standing alone, does not meet the substantial preliminary showing requirement. In any event, Detective Overly testified credibly at the hearing about the information contained in his affidavit, including information he obtained from the CI,

the reliability of the CI, and the detective's observation of what appeared to be drug transactions at the residence. The record demonstrates that Detective Overly did not provide any false or misleading information in his search warrant affidavit. Therefore, the court concludes that Brooks is not entitled to a Franks evidentiary hearing.

B. Motion for Disclosure of CI

Brooks argues in his Motion for Disclosure of CI that he needs to know the identity and background of the CI in order to develop his claim that false and misleading information was included in the search warrant affidavit. As stated above, it is well-established that a Franks hearing requires that the defendant make a substantial preliminary showing that the affiant, rather than the informant, deliberately or recklessly included false information in the affidavit. In United States v. Giacalone, the defendants argued that they had evidence that either the informants or the affiant lied, and that they needed to interview the informants (or at minimum have the district court interview the informants *in camera*) to determine whether information contained in the affidavit was false. Giacalone, 853 F.2d at 476. The court rejected this argument:

We hold that the district court did not abuse its discretion by choosing to examine only the affiant and the other FBI agents *in camera* and not the informants. We decline defendants' invitation to extend the reasoning of the Franks decision to mandate a preliminary *in camera* examination of both the affiant and the informants in

cases where the defendants allege that the affidavit contains false information. In Franks, the Court was primarily concerned with the credibility of the *affiant*, not the informants. The Franks Court observed that the fourth amendment does *not* require "that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information within the affiant's own knowledge that sometimes may be garnered hastily." Rather, the Franks Court simply held that the government affiant must reasonably believe the allegations to be true.

Id. at 476 (internal citations omitted) (emphasis in original).

Like in Giacalone, this court has heard testimony from the affiant regarding the information contained in his search warrant affidavit, including the reliability of the CI, and the court has found that the affiant did not provide false information in his affidavit.¹ Because Brooks has not made a substantial preliminary showing that Detective Overly's statements were false - and thus is not entitled to a Franks hearing - disclosure of the CI's identity for the purpose of a Franks hearing is not warranted. Id. at 477 ("In the instant case, the affidavits submitted by defendants do not amount to a 'substantial preliminary showing' that Agent Rossi's statements were false; therefore, there is no need to consider whether the informants' identities should be revealed to

¹The district court in Giacalone examined the affiant and other agents *in camera*, without defendants or their counsel present. Detective Overly, however, was examined in open court by the government and defendant's counsel, with the defendant present. The Sixth Circuit in Giacalone noted that there are no clearly defined parameters for conducting a hearing to determine whether a Franks evidentiary hearing is warranted, and that the trial court "should retain the discretion to determine what type of hearing is necessary." Giacalone, 853 F.2d at 477 n.1.

defendants for purposes of a Franks evidentiary hearing.").

Nor has Brooks demonstrated that he is entitled to learn the identity of the CI in order to prepare his defense in this case. In general, the government is not required to disclose the names of its witnesses before trial. United States v. Baylis, No 3:08-CR-147, 2009 WL 454332, at *1 (E.D. Tenn. Feb. 10, 2009) (citing United States v. Perkins, 994 F.2d 1184, 1190 (6th Cir. 1993); United States v. McCullah, 745 F.2d 350, 353 (6th Cir. 1984); United States v. Dark, 597 F.2d 1097, 1099 (6th Cir. 1979)). As for government informants, the Supreme Court has recognized a qualified privilege that protects their identities:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving that anonymity, encourages them to perform that obligation.

Roviaro v. United States, 353 U.S. 53, 59 (1957). This privilege is not absolute; whether disclosure is appropriate in a given case is determined by balancing "the public interest in protecting the flow of information against the individual's right to prepare his defense." Id. at 62. "[T]he informer's privilege must yield when the informant's identity is 'relevant and helpful to the defense of an accused' or 'essential to a fair determination of a cause.'"

Baylis, 2009 WL 454332, at *1 (quoting Roviaro, 353 U.S. at 60-61). Factors to be considered in this determination include, among others, the charges against the defendant, the potential defenses, and the possible significance of the informer's testimony. Id. (citing Roviaro, 353 U.S. at 59); United States v. Jordan, No. 3:06-CR-102, 2007 WL 1849985, at *31 (E.D. Tenn. June 25, 2007) (same).

The burden is on the defendant to show how disclosure of the informant would substantively assist his or her defense. United States v. Moore, 954 F.2d 379, 381 (6th Cir. 1992). A defendant must do more than speculate that revealing the identity would be helpful to the defense. Jordan, 2007 WL 1849985, at *31 (citing United States v. Trejo-Zambrano, 582 F.2d 460, 466 (9th Cir. 1978); United States v. Moore, 954 F.2d 379, 381 (6th Cir. 1992)); see also United States v. Sharp, 778 F.2d 1182, 1186 (6th Cir. 1985). "A court may require disclosure if it finds that the informant's provision of relevant testimony, which is material to the defense, is 'reasonably probable.'" United States v. Thompson-Bey, No. 3:09-CR-64, 2010 WL 276122, at *2 (E.D. Tenn. Jan. 15, 2010) (quoting United States v. McManus, 560 F.2d 747, 751 (6th Cir. 1978)). Once the defendant makes this initial showing, if the evidence reveals that "it is reasonably probable that the informer can give relevant testimony, the burden should be on the Government to overcome this inference with evidence that the informer cannot

supply information material to the defense." Id. (quoting United States v. Eddings, 478 F.2d 67, 71 (6th Cir. 1973)).

Further, the Sixth Circuit has stated that "[a]lthough there is no fixed rule, disclosure has usually been required when . . . the informer was an active participant in the events underlying the defendant's potential criminal liability. On the other hand, disclosure has usually been denied when the informer was not a participant, but was a mere tipster or introducer." Sharp, 778 F.2d at 1186 n.2 (internal citations omitted); see also Thompson-Bey, 2010 WL 276122, at *4 (stating that an informant's role as an active participant, as opposed to a mere tipster, is a relevant factor to the Roviaro analysis); United States v. Bennett, No. 3:07-CR-81, 2008 WL 701644, at *5 (E.D. Tenn. Mar. 13, 2008) (same).

In the present case, the CI's role was that of a tipster as opposed to an active participant. The CI was not involved with the surveillance of the West Person residence conducted by Detective Overly, nor was the CI involved with the execution of the search warrant. Brooks was charged only with the illegal possession of the firearm found inside his residence, and because the government will only offer proof at trial of evidence obtained personally by police officers, the CI will not testify at trial. Moreover, according to Detective Overly, the CI continues to assist him in drug investigations and that disclosing the CI's identity would

jeopardize the safety of the CI. Accordingly, Brooks is not entitled to disclosure of the CI's identity or background.

III. RECOMMENDATION

For the reasons above, it is recommended that the Motion for Franks Hearing and the Motion to Disclose CI be denied.

Respectfully submitted,

s/ Tu M. Pham _____
TU M. PHAM
United States Magistrate Judge

December 8, 2011
Date

NOTICE

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 THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.