

10 May 2021

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,) MOTION TO
<i>Appellant</i>) CORRECT ERRORS IN
) GOVERNMENT BRIEFING
)
v.)
) USCA Dkt. No. 21-0137/AF
Airman Basic (E-1)) Crim. App. No. 39606
ROBERT J. HERNANDEZ, USAF,)
USAF,)
<i>Appellee</i>)

**TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED
FORCES**

Pursuant to Rule 30 of this Court's Rules of Practice and Procedure, the United States hereby moves to correct errors in its Brief and Reply Brief, filed with this Court on 1 March 2021 and 12 April 2021, respectively. In preparing for oral argument, the United States identified some incorrect factual assertions in its briefing before this Court, which the United States now seeks to correct. These incorrect factual assertions relate to the timing of certain arguments made by trial defense counsel during the oral argument on the motion to suppress Appellee's urinalysis, but do not change the United States' overall position with respect to waiver, as argued in Issue I of its briefs.

As a preliminary matter, it is accurate that trial defense counsel failed to

allege that Investigator AM made any false statements or intentional reckless omissions in her written motion to suppress Appellee's urinalysis. (JA at 31-36.) It is also accurate that during testimony on the motion, trial defense counsel never questioned Investigator AM about any alleged false statements or omissions in the affidavit. (JA at 88-95.)

However, the United States mistakenly misstated the timing of some of trial defense counsel's arguments during oral argument on the motion to suppress. (Govt. Br. at 42; Govt. Reply Br. at 11.) Trial defense counsel did mention the discrepancy between Investigator AM and SSgt PO's testimonies about Jager alerting to Appellee's door when arguing that Investigator AM's affidavit lacked probable cause. (JA at 182.) In arguing for a lack of probable cause, trial defense counsel also mentioned that Investigator AM left out of the affidavit the 2 May date that a resident had supposedly smelled marijuana in the dorms. (JA at 187.) To the extent the United States' briefs suggest that trial defense counsel only discussed the existence of alleged misstatements or omissions in the affidavit in conjunction with the good faith exception, that is incorrect.

Nonetheless, the United States maintains its contention that trial defense counsel's oral argument was insufficient to preserve an objection to an intentionally false or reckless affidavit under M.R.E 311(d)(4)(b) and Franks v. Delaware, 438 U.S. 154 (1978). In her oral motion argument, trial defense

counsel never characterized any alleged misstatements as deliberately false or reckless and never characterized any alleged omissions as deliberately misleading or reckless. With respect to whether Jager actually alerted to Appellee's door, trial defense counsel merely contended that "deference" should be given to SSgt PO's memory on the issue, since he was the dog's handler. (JA at 182.) As to the alleged 2 March date being left out of the affidavit, trial defense counsel suggested that Investigator AM "maybe got overly excited about this," without any elaboration as to what that meant. (JA at 187.) And while trial defense counsel called what was included in the affidavit regarding the dates marijuana was smelled "extremely misleading," she still did not allege that Investigator AM *deliberately* mislead the magistrate or that he omitted information *with reckless disregard* for whether it would mislead the magistrate. (Id.)

In discussing the alleged lack of probable cause, trial defense counsel did not invoke M.R.E. 311(d)(4)(B) or ask for a hearing under that rule. Thus, trial defense counsel still fell short of preserving an objection on the basis of intentionally false or reckless statements or omissions in the affidavit. As the Supreme Court held Franks, in order to challenge the veracity of a search affidavit, "[t]here must be *allegations of deliberate falsehood or of reckless disregard for the truth*, and those allegations must be accompanied by an offer of proof." (emphasis added.) Alleging conflicting memories and an agent getting "overly

excited” does not meet this standard. Nor does alleging that an affidavit was “extremely misleading” meet this standard. An accused must allege the requisite mens rea to mislead – specific intent or recklessness. *See United States v. Mason*, 59 M.J. 416, 422 (C.A.A.F. 2004) (quoting *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990)) (“Franks protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead the magistrate.”) “The mere fact that information was omitted from an affidavit cannot alone show recklessness or intentionality.” *United States v. Haas*, 986 F.3d 467, 475 (4th Cir. 2021). And not only did trial defense counsel fail to allege that Investigator AM had the required mens rea under Franks and M.R.E. 311 to mislead the magistrate, later in the same argument she expressly declined to allege “any improper conduct” by Investigator AM. (JA at 189.) This affirmatively waived the argument.

Further, another point in the United States’ briefs merits clarification. In its earlier briefing, the United States argued, in part, that an argument about a false or reckless affidavit was waived with respect to the good faith exception, because trial defense counsel stated she was only attacking the second and third prongs of *United States v. Leon*, 468 U.S. 897 (1984). (Govt. Br. at 29-30; Govt. Reply Br. at 15, n.3.) After rereading the record, the United States acknowledges that trial defense counsel may have been referring to the second and third prongs of the

good faith exception under M.R.E. 311(c)(3), rather than Leon. (*See* JA at 189.)

But even if trial defense counsel was referring to M.R.E. 311(c)(3), that would not change the United States' argument on waiver. Trial defense counsel never stated she was attacking the good faith exception under the first prong of Leon, which holds that the exception does not apply where "the officers were dishonest or reckless in preparing their affidavit." Leon, 468 U.S. at 926. Trial defense counsel never alleged that Investigator AM was dishonest or reckless. Indeed, she disavowed any "improper conduct" by Investigator AM. (JA at 189.) This affirmatively waived any argument under the first prong of Leon.

Wherefore, the United States respectfully requests this Court grant its motion.

Respectfully submitted,

A handwritten signature in black ink that reads "Mary Ellen Payne". The signature is written in a cursive, flowing style.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 10 May 2021.

A handwritten signature in black ink that reads "Mary Ellen Payne". The signature is written in a cursive, flowing style.

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