APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4213

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BENITEZ AUGUARIUS MOODY,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk. Henry Coke Morgan, Jr., Senior District Judge. (2:16-cr-00124-HCM-DEM-1)

Argued: December 13, 2018 Decided: July 29, 2019

Before MOTZ, AGEE, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Motz and Judge Agee concurred.

ARGUED: James R. Theuer, JAMES R. THEUER, PLLC, Norfolk, Virginia, for Appellant. Daniel Taylor Young, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** G. Zachary Terwilliger, United States Attorney, Alexandria, Virginia, Sherrie S. Capotosto, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Norfolk, Virginia, for Appellee.

RICHARDSON, Circuit Judge:

After a jury convicted Benitez Auguarius Moody of federal drug and firearm offenses, he sought an evidentiary hearing to challenge a facially sufficient search warrant affidavit. Such hearings are called "*Franks* hearings," named for the Supreme Court's decision permitting them in *Franks v. Delaware*, 438 U.S. 154 (1978). In his request, Moody argued that a police officer's trial testimony contradicted her search warrant affidavit that had led to evidence used at his trial. The district court, however, refused to hold a *Franks* hearing, finding that Moody had failed to make the necessary threshold showing. We affirm.

I.

On March 24, 2016, as part of a larger investigation into narcotics trafficking, police used a confidential informant to buy heroin from Moody, a suspected drug dealer. Later that evening, Portsmouth Police Detective Beth Shelkey applied for warrants to search Moody's home (1212 Lindsay Avenue) and vehicle (a black BMW). Shelkey's supporting affidavit described the investigation, including the controlled heroin purchase on March 24 as well as other drug transactions:

> During the past 6 months, this affiant and other members of the Portsmouth Police Department [Special Investigations Unit] have utilized Confidential Informants who have been up to and inside of 1212 Lindsay Ave Portsmouth, VA and purchased quantities of heroin and cocaine from MOODY. During the investigation controlled purchases have been conducted directly from 1212 Lindsay Ave Portsmouth VA and from a 2004 black in color BMW convertible displaying Virginia tags VLD-9617 reregistered to MOODY.
>
> . . . .

> Within the past 24hrs this affiant and other members of the Portsmouth Police Department utilized a Confidential Informant who placed a telephone call to MOODY asking to purchase heroin from MOODY. MOODY arranged to meet the Confidential Informant in a pre arranged location. During this controlled purchase, MOODY and other co-conspirators (two unidentified black females) were observed leaving from 1212 Lindsay Ave Portsmouth, VA and surveilled traveling to the pre arranged location and selling the Informant heroin. The heroin was recovered by members of the Portsmouth Police Department Special investigations Unit, field tested and resulted positive for heroin.

J.A. 446. A state magistrate issued the warrants that same day. The resulting searches uncovered four firearms, drugs, drug paraphernalia, and thousands of dollars in cash. Moody was ultimately indicted by a federal grand jury on multiple counts of drug possession with intent to distribute, drug distribution, and firearm offenses.

Moody chose to go to trial. The Government called one of the informants identified in the affidavit, who testified about her practice of buying drugs from Moody and recounted her controlled heroin purchase on March 24. The informant explained that she had arranged the drug purchase with Moody on the telephone and that two of his associates handled the physical transfer of drugs and money at the meeting location. In doing so, she acknowledged that Moody was not physically present for the drug delivery.

This informant's testimony was echoed by Detective Shelkey, who also testified that Moody was not physically present for the exchange. Shelkey explained that the informant told her that two unidentified women delivered the drugs. And she testified that the surveillance team told her that these women came from Moody's house. Shelkey also confirmed the informant's testimony that Moody "directed" the transaction remotely,

a fact that Shelkey herself knew from listening to the informant's phone call with Moody. J.A. 246–47.

After three days of testimony, the jury convicted Moody on three drug counts and two firearm counts but acquitted him on ten other drug charges. Only then did Moody seek a *Franks* hearing. In support of this request, he claimed that Shelkey's affidavit falsely stated that he was physically present for the drug exchange on March 24. The district court, without deciding whether the post-verdict motion was timely, denied Moody's request on the merits, concluding that he had failed to satisfy the preliminary showing needed to justify a *Franks* hearing.

After sentencing, Moody timely appealed the *Franks* ruling. We have jurisdiction under 28 U.S.C. § 1291. And as always, we review the district court's legal determinations de novo and its factual findings for clear error. *United States v. White*, 850 F.3d 667, 672 (4th Cir. 2017).

II.

On appeal, Moody argues that a *Franks* hearing was required because Shelkey intentionally or recklessly made the false statement that Moody was physically present during the March 24 controlled purchase. He also raises several other arguments about the affidavit for the first time on appeal. After describing the legal framework, we address each in turn.

A.

"An accused is generally not entitled to challenge the veracity of a facially valid search warrant affidavit." *United States v. Allen*, 631 F.3d 164, 171 (4th Cir. 2011). A

Franks hearing provides a criminal defendant with a narrow way to attack the validity of an affidavit. But to obtain the hearing, a defendant must make a "substantial preliminary showing" that (1) law enforcement made "a false statement"; (2) the false statement was made "knowingly and intentionally, or with reckless disregard for the truth"; and (3) the false statement was "necessary to the finding of probable cause." *White*, 850 F.3d at 673 (quoting *Franks*, 438 U.S. at 155–56). Given the "presumption of validity with respect to the affidavit supporting the search warrant," *Franks*, 438 U.S. at 171, a defendant must satisfy this "heavy" burden before a hearing takes place. *United States v. Tate*, 524 F.3d 449, 454 (4th Cir. 2008).

The first required showing, of falsity, cannot be conclusory and must rest on affidavits or other evidence. *See Franks*, 438 U.S. at 171; *United States v. Clenney*, 631 F.3d 658, 663 (4th Cir. 2011). As a result, the defendant cannot rely on a purely subjective disagreement with how the affidavit characterizes the facts. Rather, there must be evidence showing that the statements at issue are objectively false.

The second showing, requiring intentional falsity or reckless disregard for the truth, is just as demanding. An innocent or even negligent mistake by the officer will not suffice. *Franks*, 438 U.S. at 170; *United States v. Lull*, 824 F.3d 109, 115–16 (4th Cir. 2016). And here too, the defendant must provide facts—not mere conclusory allegations—indicating that the officer subjectively acted with intent to mislead, or with reckless disregard for whether the statements would mislead, the magistrate. *See United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990).

Finally, the defendant must show materiality—that is, that the false statements were "necessary to the finding of probable cause." *Franks*, 438 U.S. at 156; *United States v. Wharton*, 840 F.3d 163, 168 (4th Cir. 2016). A district court may not hold a *Franks* hearing where, after stripping away the allegedly false statements, the truthful portions of the warrant application would still support probable cause. This limitation reflects the ultimate purpose of *Franks*: "to prevent the admission of evidence obtained pursuant to warrants that were issued only because the issuing magistrate was misled into believing that there existed probable cause." *United States v. Friedemann*, 210 F.3d 227, 229 (4th Cir. 2000).

We note that the Federal Rules require certain motions, including a motion for a *Franks* hearing, to be made before trial "if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(C); *see White*, 850 F.3d at 673. On appeal, the Government argues that the basis for making this preliminary showing was reasonably available to Moody before trial. Like the district court, however, we decline to decide whether the motion was timely and instead affirm on the merits.

B.

As in his motion below, Moody argues on appeal that Shelkey's affidavit falsely suggested that he was physically present for the controlled purchase on March 24. Because the informant and Shelkey both testified at trial that Moody arranged the transaction but was not physically present at the point of sale, Moody argues that the affidavit was false, and intentionally (or at least recklessly) so.

According to Moody, the following sentence from Shelkey's affidavit should be read to say that he was present for "selling" the heroin: "During this controlled purchase, MOODY and other co-conspirators (two unidentified black females) were observed leaving from 1212 Lindsay Ave Portsmouth, VA and surveilled traveling to the pre arranged location and selling the Informant heroin." J.A. 446. As the district court recognized, there is ambiguity here. The language says that three people (Moody and his two conspirators) did three things: left the house, traveled to the buy location, and sold heroin.

The affidavit lacks precision regarding whether all three people did all three things, or whether the activities were somehow divided up—a lack of precision that is perhaps understandable, as conspirators commonly split tasks among themselves. As a result, Shelkey could have intended at least three different meanings: (1) all three subjects were seen "leaving" the house, "traveling" to the transaction site, and "selling" the informant heroin, (2) all three subjects were seen "leaving" and "traveling," but only a subset (the two women) were seen "selling" the informant heroin; or (3) only the two women were seen "traveling" and "selling" the informant heroin, while Moody was only seen "leaving" with them. Only the first interpretation of the affidavit would clearly be false.[1] And, to be fair, the most natural reading of the affidavit does seem to say that Moody was at the scene of the transaction with the informant.

[1] Moody cites the testimony of Officer Roesch, a member of the SWAT team that executed the search, to suggest that Moody never even left the house. But Roesch's testimony says no such thing. He merely summarized the contents of an affidavit (Continued)

Yet warrant affidavits are "normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (noting also that "[t]echnical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area"). They must be interpreted in a commonsense manner, neither held to the standard of what judges or lawyers feel they would have written if given the opportunity nor "judged as an entry in an essay contest." *United States v. Harris*, 403 U.S. 573, 579 (1971) (quoting *Spinelli v. United States*, 393 U.S. 410, 438 (1969) (Fortas, J., dissenting)). Mere imprecision does not, by itself, show falsity.

Even assuming that the affidavit was false, Moody has failed to show intentional falsity or a reckless disregard for the truth by Shelkey. Given the lack of precision in the statement at issue, we cannot reasonably infer that Shelkey acted with intent to mislead or with reckless disregard of whether the statements would mislead. *See United States v. Chavez*, 902 F.2d 259, 265 (4th Cir. 1990); *cf. United States v. Lyon*, 567 F.2d 777, 782 (8th Cir. 1977) (explaining that "ambiguity does not in every case constitute recklessness or intent to deceive"). Rather, it appears Shelkey honestly believed that Moody had left the house with the two women, who then delivered the drugs at his direction, and her

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supporting the criminal complaint against Moody. *See* J.A. 423–28. There was no foundation showing that Roesch was involved in the surveillance of Moody's house at all. Thus, this evidence could not show, one way or the other, whether Moody was seen leaving with the two women. And for her part, Shelkey testified that the surveillance team told her Moody had left the house. J.A. 292.

failure to specify that Moody was not present at the transaction reflected, at most, a lack of care.

Moreover, Moody's presence at the exchange was unnecessary to establishing probable cause. *See Wharton*, 840 F.3d at 168. The affidavit explained that Moody had organized the sale of heroin over the phone and that the runners delivering the heroin had left from his house. This established probable cause that instrumentalities or evidence of crime would be found in Moody's house, making Moody's presence for the delivery simply irrelevant. That shows any falsity was immaterial, while also suggesting that Shelkey had no motive to lie.

C.

While Moody's *Franks* motion below only raised his lack of physical presence, he makes five additional arguments for the first time on appeal. These unpreserved claims of error are subject to the rigorous plain-error standard. *United States v. Olano,* 507 U.S. 725, 732 (1993) (noting that reversal under this standard requires an error that is plain and that both affects "substantial rights" and "seriously" affects "the fairness, integrity or public reputation of judicial proceedings" (citation omitted)). Moody's additional claims fail this rigorous test, and in fact would fail even without subjecting them to more stringent review.

First, Moody contends that Shelkey's affidavit falsely alleged that he dealt narcotics "directly" from his home at 1212 Lindsay Ave.[2] Shelkey stated in her affidavit: "During the investigation controlled purchases have been conducted directly from 1212 Lindsay Ave Portsmouth VA . . . ." J.A. 446. Moody maintains that this statement conflicts with Shelkey's trial testimony that Moody "would not meet people at the house but [] would go to different locations." J.A. 250.

Moody's claim of falsity turns on the whether a purchase "conducted directly" from the house necessarily means that the transfer of the drugs to the informant happened inside the house.[3] Moody did conduct the March 24 controlled purchase from the house in part: he arranged the transaction from his house by phone and sent his runners from there to deliver the drugs. But Moody might say that the adverb "directly" implies that the transfer to the informant (as opposed to the transfer from Moody to his co-conspirators) occurred inside the house.

Even if we strictly interpreted Shelkey's statement and found this statement to be false, there is still no evidence of her mental state or of materiality. This nuanced, after-the-fact reading does nothing to show Shelkey acted with intent to mislead or with

[2] The briefs suggest that Moody raised this contention before the district court, but without providing any citation. Our independent review of the record uncovered no instance of this claim being raised below. But again, Moody's prior failure to raise this issue makes no difference to the outcome of this case.

[3] It is unclear from the record whether other informants obtained drugs from Moody inside his house. It is clear that Moody did not keep all of his customers away from his home: another police informant was found inside Moody's house during the execution of the search warrant.

reckless disregard of whether the statement would mislead. And again, the precise location of the drug transfers was not important to a finding of probable cause necessary to search the house, because the simple fact is that Moody directed transfers and dispatched runners from there. This is enough to establish probable cause that evidence of the criminal conduct would be found in the house. *See United States v. Grossman*, 400 F.3d 212, 217–18 (4th Cir. 2005) (holding that there is probable cause to search the part-time residence of a defendant known to deal drugs, despite the lack of direct evidence that drugs are kept there). Contrary to Moody's conclusory contention that Shelkey's statement had the purpose "to mislead the magistrate into believing 1212 Lindsay Avenue was used for drug distribution," Appellant's Brief at 11, it is immaterial whether the informant received the heroin inside the house or at a nearby parking lot. We therefore reject Moody's claim that Shelkey's statement about conducting a controlled purchase from his house required a *Franks* hearing.

Second, Moody argues that Shelkey's affidavit deceptively described the state of the investigation by misrepresenting the number of controlled purchases and confidential informants as well as by falsely stating that an informant had been inside his home and observed drug paraphernalia. His primary evidence for this is that Shelkey's trial testimony only detailed the controlled purchase on March 24, which took place away from his house. *See id*.

This claim largely fails to show falsity. Shelkey testified about conducting other purchases from Moody, *see* J.A. 245,[4] and Officers Adams and Monteith testified about another informant who had been involved in the investigation, including by helping create a diagram of the interior of the house, but then stopped cooperating fully. While Moody makes the conclusory claim that there were no confidential informants who observed drugs, guns, or paraphernalia in the house, Appellant's Brief at 14, this second informant was in Moody's house during the search *that uncovered all three*. Moody has therefore failed to provide evidence beyond conclusory allegations to cast doubt on Shelkey's statements. *See United States v. McKenzie-Gude*, 671 F.3d 452, 462 (4th Cir. 2011) (noting that a mere contradiction of a warrant application does not require a *Franks* hearing); *United States v. Pace*, 898 F.2d 1218, 1227 (7th Cir. 1990) ("[The defendant's] self-serving statement in his affidavit that he never accepted bets on the number listed in the warrant affidavit is not sufficient to require a *Franks* hearing . . . ."). We thus reject Moody's claim here as well.

Finally, Moody argues that there were three "material omissions" from Shelkey's affidavit: (1) "the confidential informant had not been to the address and had never purchased narcotics at the address," (2) "Shelkey knew from the confidential informant

[4] The record might be read to suggest that the purchase on March 24 was the only *controlled* purchase from Moody. Even so, the probable cause determination does not turn on whether the other purchases of drugs by informants from Moody were controlled. *See generally* Appellee's Brief at 46 (noting that the affidavit showed that the "defendant made similar sales of cocaine and heroin to other informants at the Lindsay Avenue residence within the preceding six months").

that Mr. Moody was not present at a drug transaction on the same day as the execution of the affidavit," and (3) "the lack of reliability of the confidential informant." Appellant's Brief at 6–7. A defendant requesting a *Franks* hearing based on claims of omissions faces an even higher evidentiary burden than when he bases his claims on false statements. *Tate*, 524 F.3d at 454–55.

Moody's claims of material omissions, largely a repackaging of his claims of false statements that we have already rejected, do not satisfy this standard. As to the first alleged omission, it was irrelevant whether the testifying informant had been inside Moody's home or bought narcotics there since both the affidavit and trial testimony point to the participation of other informants (one of whom was in his house during the raid). As to the second, we have already explained that Moody's lack of physical presence at the exchange on March 24 was unnecessary to the probable cause determination. And as for the last alleged omission, Moody has provided no basis for his claim that Shelkey's affidavit omitted anything about the testifying informant's reliability.

* * *

A defendant must meet a high bar before he may challenge the veracity of a facially valid search warrant affidavit. Each of Moody's arguments fails to clear that bar. We therefore conclude that the district court properly rejected his motion for a *Franks* hearing. Accordingly, the judgment of the district court is

AFFIRMED.

FILED: July 29, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4213
(2:16-cr-00124-HCM-DEM-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BENITEZ AUGUARIUS MOODY

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES of AMERICA,

v. **Criminal No. 2:16cr124**

BENITEZ A. MOODY,

Defendant.

OPINION & ORDER

This matter is before the Court on Defendant Benitez Auguarius Moody's ("Defendant's") Consolidated Motions for Post-Trial Franks Hearing and for Rule 29 Judgments of Acquittal or for Rule 33 New Trial ("Post-Trial Motion"). Doc. 62. For the reasons set forth below, the Court **DENIES** the Post-Trial Motion.

I. BACKGROUND

A. Procedural History

On February 22, 2017, a federal grand jury returned a fifteen-count Superseding Indictment charging Defendant with (1) Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii); (2) Possession with Intent to Distribute Heroin, Cocaine and Fentanyl, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); (3) Possession with Intent to Distribute Heroin and Fentanyl, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); (4) Possession of Firearm in Furtherance of Drug Trafficking, in violation of 18 U.S.C. § 924(c)(1)(A); (5) Felon in Possession of Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); (6)–(13) Distribution of Heroin, in violation of 21 U.S.C. §§ 841(a)(1) and

(b)(1)(C); (14) Possession with Intent to Distribute Heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); and (15) Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Doc. 31.

A four-day jury trial in the instant matter commenced on April 25, 2017. On April 28, 2017, at the conclusion of the jury trial, the jury rendered a verdict finding Defendant Guilty on Counts 1–5 and Not Guilty on Counts 6–15. Doc. 57. On May 12, 2017, Defendant filed the instant Post-Trial Motion. Doc. 62. On May 16, 2017, the Government responded in opposition to the Post-Trial Motion. Doc. 64. On May 22, 2017, Defendant filed a Motion for Extension of Time to File Reply Brief ("Motion for Extension"). Doc. 65. On May 24, 2017, the Court GRANTED the Motion for Extension. Doc. 67. On May 30, 2017, Defendant filed a Motion for an Additional Extension of Time to File Reply Brief ("Second Motion for Extension"). Doc. 68. On June 1, 2017, the Court GRANTED the Second Motion for Extension. Doc. 70. On June 2, 2017, Defendant replied in further support of the instant Post-Trial Motion. Doc. 71.

B. Factual Background

"On March 24, 2016, Portsmouth Police Officers executed a search warrant on 1212 Lindsay Avenue, Portsmouth (alleged to be defendant's residence) and upon a 2004 BMW (alleged to be a vehicle of defendant's)." Doc. 63 at 2. "At trial, the search warrant and affidavit that provided the basis for searching Defendant's residence in the 1200 block of Lindsay Avenue were admitted into evidence." Doc. 64 at 3. On March 24, 2016, Detective Shelkey submitted an affidavit to the magistrate in support of the search warrants and included the following facts:

> In and around the month of October 2015 Portsmouth Police Department[']s Special Investigation Unit (SIU) Detectives and this affiant gained information from a Confidential Informant (CI) that Benitez Aguarius MOODY, a.k.a. "Lil T", described in section two of this affidavit was distributing [h]eroin and [c]ocaine from 12** Lindsay Ave Portsmouth, VA. SIU Detectives began conducting surveillance from October 2015 and have been doing so since March

24, 2016. During the past 6 months, this affiant and other members of the Portsmouth Police Department SIU have utilized Confidential Informants who have been up to and inside of 12** Lindsay Ave Portsmouth, VA and purchased quantities of heroin and cocaine from MOODY. During the investigation, controlled purchases have been conducted directly from 12** Lindsay Ave Portsmouth[,] VA and from a 2004 black in color BMW convertible displaying Virginia tags VLD-9617 re[-]registered to MOODY.

During these controlled purchases, these Confidential Informants have observed MOODY in possession [of] heroin, cocaine, and multiple firearms on and around his person. These Confidential Informants have observed Moody with cutting agents and digital scales that MOODY is utilizing to weigh different amounts of cocaine and heroin.

Within the past 24hrs this affiant and other members of the Portsmouth Police Department utilized a Confidential Informant who placed a telephone call to MOODY asking to purchase heroin from MOODY. MOODY arranged to meet the Confidential Informant in a pre[-]arranged location. During this controlled purchase, MOODY and other co-conspirators (two unidentified black females) were observed leaving from 12** Lindsay Ave Portsmouth, VA and surveilled traveling to the pre[-]arranged location and selling the Informant heroin. The heroin was recovered by members of the Portsmouth Police Department Special [I]nvestigations Unit, field tested and resulted positive for heroin.

A review of MOODY's criminal history reveals that MOODY has been charged with Possession of Marijuana, PWID Marijuana (felony), and Manufacture Possession of a controlled substance x2. MOODY's criminal history reveals that he is a 3 time convicted felon making it illegal for MOODY to possess a firearm.

Section 7:

These Confidential [I]nformant(s) have made controlled purchases of illegal narcotics as directed by this affiant and other members of the Portsmouth Police Department Special Investigations Unit. These informant(s) have provided information in the past that has been able to be proven true and accurate through this affiant or other members of the Portsmouth Police Department Special [I]nvestigations Unit. These [I]nformant(s) have provided information that has been proven truthful for other ongoing investigations. These [I]nformant(s) were shown photographs one of which was Benitez Aguarius MOODY who is described in section two of this affidavit. These Informant(s) positively identified MOODY as being the individual who distributes heroin and cocaine from inside of 12** Lindsay Ave Portsmouth, VA.

This affiant has been a Portsmouth Police Officer for over 14 years and has been assigned as a Detective to the Special Investigations Unit for over 3 years. This affiant has participated in the execution of drug-related search warrants and has

> been involved in arrests of several drug dealers and users. This affiant has completed training in the use, packaging and distribution of illegal drugs conducted by the Portsmouth Police Department, the DEA, and other local and state agencies.

Id. at 3–4 (quoting Doc. 63, Ex. 1 at 5–6). At trial, Defense counsel cross-examined Portsmouth Detective Beth Shelkey "about the affidavit, as well as witness Alexandra Hogan, who made the final controlled purchase of heroin referenced in the affidavit, 24 hours prior to Detective Shelkey's submission of the affidavit to the state magistrate." Id. Detective Shelkey explained that after the confidential informant, Ms. Hogan, called Defendant "to order up heroin and he agreed to meet her at a particular location, surveillance units who were watching the defendant's house told Detective Shelkey that the defendant and two black females departed the house and traveled to the pre-arranged meeting spot." Id. at 4 (citing Doc. 63, Ex. 3 at 4–5). Additionally, Detective Shelkey explained that

> it was her understanding based on what Ms. Hogan later relayed to her and the information received from her surveillance units, that "two black females . . . came to that location, directed by Mr. Moody where she was supposed to have met him, but the two black females showed up and delivered the narcotics there."

Id. at 5 (citing Doc. 63, Ex. 3 at 6). On cross examination, "Ms. Hogan testified that when she made the purchase, the defendant wasn't present, but rather, that he sent 'two girls' to deliver the drugs." Id. (citing Doc. 63, Ex. 4 at 3). Specifically, Ms. Hogan testified to the following:

> THE COURT: All right. How was it set up? What happened?
>
> A. HOGAN: I called him on the phone. When I got to the place – when I got to the place –
>
> THE COURT: Okay. You called him on the phone. You talked to him?
>
> A. HOGAN: I talked to him. He told me where to go.
>
> THE COURT: Do you know his voice?
>
> A. HOGAN: Yes. I have gotten up with him before. He told me where to go, and

he said, I'm sending somebody to you, and two girls pulled up in a vehicle.

Id. (quoting Doc. 63, Ex. 4 at 18; Doc. 64, Ex. 1 at 1.).

II. LEGAL STANDARDS

To be entitled to a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 155–56 (1978), commonly referred to as a Franks hearing, a defendant must make a "dual showing . . . which incorporates both a subjective and an objective threshold component." United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990). First, the defendant must "make[ ] a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Franks, 438 U.S. at 155–56 (quotations omitted); United States v. Jeffus, 22 F.3d 554, 558 (4th Cir. 1994) ("The defendant's burden [to establish cause for a Franks hearing] is a heavy one, since ample mechanisms already exist in pretrial stages of the criminal process to protect innocent citizens' rights."); United States v. Chavez, 902 F.2d 259, 265 (4th Cir. 1990) (holding that ambiguity or lack of clarity is insufficient to justify a Franks hearing).

Secondly, "the false information must be essential to the probable cause determination." Colkley, 899 F.2d at 300. If, "when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." Franks, 438 U.S. at 171–72. "Franks, thus serves to prevent the admission of evidence obtained pursuant to warrants that were issued only because the issuing magistrate was misled into believing that there existed probable cause." United States v. Friedemann, 210 F.3d 227, 229 (4th Cir. 2000), cert. denied, 531 U.S. 875 (2000). United States v. Akinkoye, 185 F.3d 192, 199 (4th Cir. 1999) (Franks hearing not required where probable cause existed apart from the alleged inconsistencies in affidavit), cert.

denied, 528 U.S. 1177 (2000).

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Franks, 438 U.S. at 171.

III. ANALYSIS

Defendant argues he "has made a prima facie showing in the trial testimony of a deliberate falsehood or a reckless disregard for the truth in the search warrant affidavits justifying a post[-]trial Franks hearing." Doc. 63 at 3. Specifically, Defendant "respectfully submits that witness Hogan's testimony establishes a prima facie case of deliberate falsehood or reckless disregard for the truth by Detective Shelkey in her affidavit on a point essential to probable cause for the searches, in the absence of which deliberate or reckless falsehoods probable cause would be insufficient." Id. Further, Defendant claims that the "fruits of the searches of the residence and the vehicle of March[ ] 24, 2016 (and particularly of the residence) are essential to the sufficiency of the evidence supporting the convictions on Counts 1–5. Without this seized evidence, the convictions on these Counts would" not be supported by sufficient evidence and Defendant would be entitled to judgments of acquittal. Id. at 5. "In the alternative, at a minimum, post-trial suppression of such evidence would entitle the defendant to a new trial." Id.

The Government argues that Defendant is not entitled to a Franks hearing. Doc. 64 at 5–

10. The Government contends that "Defendant has not made a 'substantial preliminary showing' that Detective Shelkey made a knowing and intentional misstatement or recklessly disregarded the truth in her affidavit." Id. at 7. Further,

> [a]ssuming arguendo, that Detective Shelkey overstated the defendant's involvement in the March 24, 2016 controlled buy by failing to emphasize that he sent two women to deliver the heroin rather than delivering it personally, there was ample evidence in the four corners of the affidavit to support the magistrate's finding of probable cause to search he Lindsay Avenue residence.

Id. at 10. The Government lists the following additional support for the magistrate's finding of probable cause to search the Lindsay Avenue residence:

> (1) that the defendant made arrangements on the phone to sell the confidential informant heroin on that date and told her where to go to conduct the transaction;
> (2) that the defendant was seen leaving the Lindsay Avenue residence just prior to the controlled purchase in the company of two black females who ultimately delivered heroin to the confidential informant;
> (3) that the defendant made similar sales of cocaine and heroin to other informants at the Lindsay Avenue residence within the preceding six months;
> (4) that the defendant made similar sales of cocaine and heroin from his black 2004 BMW displaying Virginia tags VLD-9617 that is registered to him;
> (5) that the informants had seen the defendant in possession of multiple firearms at the Lindsay Avenue residence;
> (6) that the informants had seen the defendant in possession of cutting agents at the Lindsay Avenue residence;
> (7) that the informants had seen the defendant weighing out narcotics on a digital scale at the Lindsay Avenue residence; and
> (8) that the informants had positively identified a photograph of the defendant as the person selling heroin and cocaine out of the Lindsay Avenue residence.

Id. at 11. Finally, the Government argues that Defendant's Post-Trial Motion is untimely as "Federal rule of criminal procedure 12(b)(3) requires that motions to suppress evidence must be made before trial." Id. at 5 (quoting United States v. Wilson, 115 F.3d 1185, 1190 (4th Cir. 1997)).

Defendant's Post-Trial Motion is ineffectual. As noted above, to be entitled to a Franks hearing, a defendant must first "make[ ] a substantial preliminary showing that a false statement

knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Franks, 438 U.S. at 155–56 (quotations omitted). Second, "the false information must be essential to the probable cause determination." Colkley, 899 F.2d at 300. Defendant fails to satisfy either prong.

Defendant fails to satisfy the first prong required for a Franks hearing. Detective Shelkey stated in her affidavit to the state magistrate that "[d]uring this controlled purchase, MOODY and other co-conspirators (two unidentified black females) were observed leaving from 12** Lindsay Avenue Portsmouth VA and surveilled travelling to the pre[-]arranged location and selling the informant heroin." Doc. 63, Ex. 1 at 5. Meanwhile, Ms. Hogan testified that Defendant was not present or selling heroin to her at that same meeting. Doc. 63, Ex. 4 at 17–18. Further, when asked about this discrepancy on cross examination, in an effort to explain the wording and syntax of her affidavit, Detective Shelkey testified that Defendant "was a part of [the] transaction" and "that he was involved in it." Doc. 63, Ex. 3 at 7. Based on the language used in Detective Shelkey's affidavit, it is unclear exactly who was present for the transaction at issue and who was an active participant. What is clear, however, as the Government notes, is that Defendant "agreed to sell the information heroin, accompanied two women to a location at or near the agreed-upon meeting spot, and caused heroin to be delivered to the informant." Doc. 64 at 9. As such, it is evident that Detective Shelkey's affidavit was not designed to mislead the magistrate and cannot be characterized as intentionally false. Thus, Defendant has failed to satisfy the requisite "substantial preliminary showing" that Detective Shelkey intentionally deceived the magistrate, or recklessly disregarded the truth of facts contained in her affidavit. Franks, 438 U.S. at 155–56.

Defendant also fails to satisfy the second prong required for a Franks hearing. Despite

the ambiguities in Detective Shelkey's affidavit regarding Defendant's specific actions related to the controlled drug transaction, ample evidence exists within the affidavit to support the magistrate's finding of probable cause to search the Lindsay Avenue residence. Notably, the Portsmouth Police Department had conducted extensive surveillance of the Lindsay Avenue residence and directed confidential informants to participate in controlled purchases from said residence and from Defendant's 2004 BMW. Doc. 63, Ex. 1 at 5. Also, during the controlled purchases, the confidential informants observed Defendant in possession of heroin, cocaine, multiple firearms, cutting agents, and digital scales. Id. Further, the existence of such supporting evidence renders the "offending" information "not essential to magistrate's probable cause determination." Doc. 64 at 10. As such, Defendant has not satisfied the second prong required for a Franks hearing.

Because Defendant has failed to satisfy either prong of the requisite "dual showing" to entitle Defendant to a Franks hearing, the Court **DENIES** Defendant's Post-Trial Motion. Additionally, because Defendant has failed to satisfy the Franks requirements and Court DENIES Defendant's requested relief, the Court need not reach whether Defendant's Post-Trial Motion is timely.

IV. CONCLUSION

For the reasons listed above, the Court **DENIES** Defendant's Post-Trial Motion. Doc. 62.

The Clerk is **DIRECTED** to deliver a copy of this Order to all counsel of record.

It is so **ORDERED**.

/s/
Henry Coke Morgan, Jr.
Senior United States District Judge

HENRY COKE MORGAN, JR.
SENIOR UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 23, 2017

FILED: August 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4213
(2:16-cr-00124-HCM-DEM-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BENITEZ AUGUARIUS MOODY

Defendant - Appellant

O R D E R

The court denies the petitions for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Agee, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

Section 2:

1212 Lindsay Ave, a single story house located in the Brighton neighborhood section of the City of Portsmouth, Virginia to include its curtilage. 1212 Lindsay Ave has green in color siding, maroon colored shutters, with a white in color front door on the front of the location. The number "1212" is clearly marked on the left hand side of the front door frame in black numbers. To include Benitez Auguarius Moody, a.k.a. "Lil T", described as a black male approximately 5'7" tall, 150 lbs, black shoulder length dreadlocks hair, with a DOB of 1/30/1983 and a S.S.# of 231-33-1467. To a 2004 black in color BMW convertible displaying Virginia tags VLD-9617.

Section 4:

In and around the month of October 2015 Portsmouth Police Departments Special Investigation Unit (SIU) Detectives and this affiant gained information from a Confidential Informant (CI) that Benitez Auguarius MOODY a.k.a. "Lil T", described in section two of this affidavit was distributing Heroin and Cocaine from 1212 Lindsay Ave Portsmouth, VA. SIU Detectives began conducting surveillance from October 2015 and have been doing so since March 24, 2016. During the past 6 months, this affiant and other members of the Portsmouth Police Department SIU have utilized Confidential Informants who have been up to and inside of 1212 Lindsay Ave Portsmouth, VA and purchased quantities of heroin and cocaine from MOODY. During the investigation controlled purchases have been conducted directly from 1212 Lindsay Ave Portsmouth VA and from a 2004 black in color BMW convertible displaying Virginia tags VLD-9617 reregistered to MOODY.

During these controlled purchases, these Confidential Informants have observed MOODY in possession heroin, cocaine, and multiple firearms on and around his person. These Confidential Informants have observed MOODY with cutting agents and digitals scales that MOODY is utilizing to weigh different amounts of cocaine and heroin.

Within the past 24hrs this affiant and other members of the Portsmouth Police Department utilized a Confidential Informant who placed a telephone call to MOODY asking to purchase heroin from MOODY. MOODY arranged to meet the Confidential Informant in a pre arranged location. During this controlled purchase, MOODY and other co-conspirators (two unidentified black females) were observed leaving from 1212 Lindsay Ave Portsmouth, VA and surveilled traveling to the pre arranged location and selling the Informant heroin. The heroin was recovered by members of the Portsmouth Police Department Special investigations Unit , field tested and resulted positive for heroin.

A review of MOODY's criminal history reveals that MOODY has been charged with Possession of Marijuana, PWID Marijuana (felony), and Manufacture Possession of a

controlled substance x2. MOODY's criminal history reveals that he is a 3 time convicted felon making it illegal for MOODY to posses a firearm.

Section 7:

These confidential informant(s) have made controlled purchases of illegal narcotics as directed by this affiant and other members of the Portsmouth Police Department Special Investigations Unit. These informant(s) have provided information in the past that has been able to be proven true and accurate through this affiant or other members of the Portsmouth Police Department Special investigations Unit. These informant(s) have provided information that has been proven truthful for other ongoing investigations. These informants(s) were shown photographs one of which was Benitez Auguarius Moody who is described in section two of this affidavit. These Informant(s) positively identified MOODY as being the individual who distributes heroin and cocaine from inside of 1212 Lindsay Ave Portsmouth, VA.

This affiant has been a Portsmouth Police Officer for over 14 years and has been assigned as a Detective to Special Investigations Unit for over 3 years. This affiant has participated in the execution of drug related search warrants and has been involved in arrests of several drug dealers and users. This affiant has completed training in the use, packaging and distribution of illegal drugs conducted by the Portsmouth Police Department, the DEA, and other local and state agencies.