APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4119

UNITED STATES OF AMERICA

v.

PETER WOODLEY,
a/k/a Darren Brown

Peter Woodley,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:13-cr-113)
District Judge: Honorable Gustave Diamond

Submitted Under Third Circuit LAR 34.1(a)
on Thursday, September 19, 2019

Before: KRAUSE and MATEY, *Circuit Judges*, and QUIÑONES,[*] *District Judge*

(Opinion filed: September 26, 2019)

OPINION[*]

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[*] Honorable Nitza I. Quiñones Alejandro, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

KRAUSE, *Circuit Judge*.

Appellant Peter Woodley appeals the District Court's denial of his motion to suppress in which he challenged the admission of evidence obtained in two incidents. Regarding a September 2012 encounter with a Pennsylvania state trooper, he contends that the search of a rental car was unsupported by either probable cause or valid consent. Regarding a March 2013 DEA investigation, he contends that the District Court should have held a so-called "*Franks* hearing" to determine whether the warrant to track Woodley's real-time cell-site location information (CSLI) was founded upon false information. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978). He also argues that the seizure of his person and bag was unreasonably prolonged, rendering the drugs seized the fruit of an unconstitutional *Terry* stop. We perceive no error in the District Court's rulings.

A. September 2012 Rental Car Search

Woodley contends that the September 2012 search of the rental car violated the Fourth Amendment's prohibition on unreasonable searches and seizures and that the District Court erred in holding he lacked a reasonable expectation of privacy in the car because he was not listed on the rental car agreement as lessee. This claim derives from *Byrd v. United States*, issued by the Supreme Court after the District Court's ruling, in which the Court held as a general matter that an unlisted lessee does have a reasonable expectation of privacy in a rental car. *See* 138 S. Ct. 1518, 1531 (2018). Given that intervening precedent, we might need to consider in other circumstances whether the expiration of the rental car agreement or Woodley's provision of a false name would

except him from *Byrd*'s general rule. But on the facts here, we agree with the Government that we "need not plumb the depths of Fourth Amendment jurisprudence in order to affirm." Appellee's Br. 41. That is because, even assuming both that Woodley had a reasonable expectation of privacy in the car and that the troopers did not have probable cause to search it, the search of Woodley's bag was nonetheless authorized by the voluntary consent of the rental agent who appeared on the scene.

It is axiomatic that a search based on the voluntary consent of a person whom an officer reasonably believes is authorized to give it is constitutional. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973). Such consent grants officers the right to search any place over which they reasonably believe the consenting person exercises authority, *Georgia v. Randolph*, 547 U.S. 103, 109 (2006), and the scope of such consent is dictated by "[c]ommon sense," *United States v. Kim*, 27 F.3d 947, 956 (3d Cir. 1994).

Here, the rental agent had the authority to give consent to the search of the car and voluntarily did so. The rental agreement had expired at the time of the search, such that the officers could reasonably believe that possession of the car had reverted to the rental company. *See United States v. Lumpkins*, 687 F.3d 1011, 1013–14 (8th Cir. 2012). Given this belief, it was likewise reasonable for the officers to conclude that the rental agent had authority over the car and could therefore consent to a search of it. *See United States v. Morales*, 861 F.2d 396, 399–400 (3d Cir. 1988).

But even if the initial search of the car was constitutional, Woodley contends that the search of his bag found in the trunk of the car was not. While the rental agent's

consent to the search of the bag presents a closer question, the Government again has the better argument. True, the trooper who initiated the stop conceded at the suppression hearing that he did not think that the bag belonged to the rental agent. But he also testified that he did think that the rental agent's consent authorized his search of the bag, and we agree that this belief was reasonable under the circumstances. The trooper asked Woodley and his friend "if there was anything in th[e] vehicle that was theirs," and the friend said no while Woodley claimed ownership only of some "CDs." App. 331–32; *see Morales*, 861 F.2d at 399–400. In short, because the rental agent had authority over the car, the bag was found inside the car, and no other party claimed the bag, the trooper reasonably concluded that the rental agent's authority extended to the bag and the search was not constitutionally defective. *See Kim*, 27 F.3d at 956.

B. The March 2013 Investigation

Woodley also challenges both the District Court's refusal to hold a *Franks* hearing regarding the warrant to track his CSLI and its rejection of his claim that his bag was unreasonably seized for three hours after arriving in Pittsburgh. We find no error in either holding.

1. The Franks Hearing

Woodley contends that he was entitled to a *Franks* hearing regarding the government's truthfulness in obtaining authorization to track his real-time CSLI. Under *Franks*, a court must hold an evidentiary hearing to determine whether a search warrant is invalid when a defendant makes a "substantial preliminary showing" that the affidavit contained knowingly or recklessly false statements. 438 U.S. at 170. When assessing the

sufficiency of the showing as to scienter, we consider that "the short useful life of an informant's drug-related tips require[s] that the officer produce the search affidavit in great haste." *United States v. Brown*, 3 F.3d 673, 678 (3d Cir. 1993). And as to materiality, we consider whether the officer's alleged misrepresentation concerned facts that a "reasonable person" would think salient to a judge. *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000) (citation omitted).

As relevant here, the District Court refused to hold a *Franks* hearing because it concluded that Woodley had not made the "requisite substantial preliminary showing . . . that the affidavit contained a false statement . . . necessary to the finding of probable cause." *United States v. Woodley*, No. 2:13-cr-113, 2015 WL 5136173, at *10 (W.D. Pa. Sept. 1, 2015).[1] We discern no error.

Woodley's central allegation of falsity is premised on the poor quality of the DEA's recording of a conversation between Woodley and the informant that was summarized in the affidavit. Woodley reasons that the government's failure to mention the poor quality of the recording suggests impropriety. But as the agents' affidavits explained, and Woodley does not dispute, they also conducted physical surveillance of

[1] As we conclude that Woodley did not make the requisite showing to hold a *Franks* hearing, we need not address his argument that the District Court erred in holding he lacked standing to challenge the warrant. *See Woodley*, 2015 WL 5136173, at *9; *see also Byrd*, 138 S. Ct. at 1530–31 (noting that Fourth Amendment standing is "not a jurisdictional question" and court can review probable cause before standing "in its discretion"). And as the District Court's carefully separated alternative holdings on standing and the sufficiency of the *Franks* showing demonstrate, *see Woodley*, 2015 WL 5136173, at *9–11, there is no merit to Woodley's argument that the two issues are inextricably intertwined.

that meeting and then debriefed the informant to ascertain Woodley's statements. The affidavits do not represent otherwise and, given that independent basis for the officers' account of the encounter, their failure to explain or discuss the inaudible recording was not a material omission. *See Wilson*, 212 F.3d at 789. Rather, the officers' course of action was eminently reasonable, as they took care to capitalize on the "short useful life of [the] informant's drug-related tips," *Brown*, 3 F.3d at 678, without misrepresenting his words in their affidavits. Absent additional proof that the agents lied about the informant's statements—and Woodley offers none—Woodley's contention that he made a sufficient threshold showing to justify a *Franks* hearing is untenable. *See United States v. Aviles*, --- F.3d ---, No. 18-2967, slip op. at 11–12 (3d Cir. Sept. 12, 2019).

2. Seizure of Woodley's Bag

Woodley's final argument—that the DEA agents unreasonably seized his person and bag when he arrived at the Pittsburgh bus terminal—fares no better. Woodley's argument turns on the distinction between a detention based on reasonable suspicion and a seizure based on probable cause. The Fourth Amendment requires that seizures of both persons and their effects be reasonable, *see United States v. Place*, 462 U.S. 696, 703 (1983), and the reasonableness of a given seizure depends upon the quantum of evidence justifying it—either reasonable suspicion or probable cause, *see Alabama v. White*, 496 U.S. 325, 329–31 (1990). Relying on *Place*, where the Court held a 90-minute detention of a bag unreasonable because mere reasonable suspicion allows officers only "minimally intrusive" detentions of personal effects, 462 U.S. at 709, Woodley contends that the three-hour detention of his person and bag was unconstitutional.

Woodley is mistaken in his premise: Here, the officers were acting on an informant's tip that was corroborated and therefore gave rise to probable cause. *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984). The informant told the agents that Woodley would travel to Pittsburgh by bus to sell him heroin, and Woodley then arrived precisely where the informant had said he would at precisely the time the informant had said to expect him. Thus, "[t]he informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole," creating probable cause. *Id.* And when officers have probable cause to believe that personal effects may contain evidence, the Fourth Amendment is permissive: They may—as they did here—"seize[] and secure[]" the item "to prevent destruction of evidence while seeking a warrant." *Riley v. California*, 573 U.S. 373, 388 (2014).

* * *

For the foregoing reasons, we affirm the District Court's judgment of conviction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 13-113
	)	
PETER WOODLEY	)	

OPINION

DIAMOND, D.J.

Presently before the court is defendant Peter Woodley's most recent pretrial motions: (1) Motion to Suppress All Evidence Discovered During Vehicle Search Occurring September 17, 2012 (Document No. 111); (2) Motion for Severance of Counts for Trial (Document No. 113); (3) Motion to Suppress All Evidence Seized from Defendant's Person on March 20, 2013 (Document No. 114); and (4) Motion for a Hearing Pursuant to Franks v. Delaware (Document No. 115). The government responded to defendant's pretrial motions. See Document Nos. 91, 92 and 123. For reasons explained below, defendant's suppression motions and motion for a Franks hearing will be denied, and his severance motion will be denied to the extent he seeks to sever Count Two of the superseding indictment (the firearm count) from the two drug counts for trial, although a bifurcated trial will be ordered.

I. Procedural History

On March 22, 2013, a criminal complaint was filed against defendant alleging that he violated various provisions of the Controlled Substances Act relating to the distribution of heroin. On April 16, 2013, a grand jury returned a two-count indictment against defendant charging him with conspiracy to distribute and possess with intent to distribute heroin from in and around December 2011, until in and around August 2012, in violation of 21 U.S.C. §846 and possession with intent to distribute heroin on or about March 20, 2013, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(i).

Defendant's first appointed CJA counsel, Melvin Vatz, filed the following pretrial motions: (1) Motion to Suppress; (2) Motion for Discovery; (3) Motion for Disclosure of Promises of Leniency and/or Existence of Plea Bargain Agreements; (4) Motion to Dismiss; and (5) Motion for Ordering of Government's Proof or for a Separate Hearing to Determine the Existence of a Conspiracy.

Defendant became dissatisfied with Attorney Vatz's representation, and requested the appointment of new counsel. Following a hearing, the court granted defendant's request and Attorney James Brink was appointed to represent him.

After a hearing, the court denied defendant's Motion to Suppress[1] and granted in part and denied in part his other pretrial motions. See Opinion and Order of Court dated December 30, 2013 (Document Nos. 47 and 48) (hereinafter, the "December 2013 Opinion"). The court also

[1]Defendant's suppression motion challenged his detention and the detention of his duffle bag on March 20, 2013, when he arrived at the Greyhound bus station in Pittsburgh. The court ruled that even if defendant was correct that his detention was so prolonged that it constituted a *de facto* arrest, that arrest was supported by ample probable cause. The court also ruled that the detention of defendant's duffle bag was reasonable under the circumstances.

scheduled trial to begin on January 27, 2014.

At a pretrial status conference held on January 23, 2014, defendant asserted that he was dissatisfied with Attorney Brink, who moved to withdraw as his counsel. The court granted Attorney Brink's motion, and rescheduled trial to begin on April 21, 2014.

On January 29, 2014, Attorney James Robinson was appointed to represent defendant. At a status conference held on April 8, 2014, Attorney Robinson indicated his intent to file a motion to continue the April 21, 2014, trial date. Defendant indicated his agreement with the request for a trial continuance, as well as his understanding that the resulting delay was caused by his request and by his desire to file additional pretrial motions that he claims were not filed by his prior counsel.

On April 14, 2014, the court granted defendant's motion to continue the trial until August 25, 2014, to give Attorney Robinson ample time to prepare defendant's case. Despite the fact that the time for filing pretrial motions had long since passed, the court permitted defendant to file any additional pretrial motions he wished to file, and he subsequently filed a Motion for a Franks Hearing.

On July 21, 2014, the court denied defendant's Franks motion, finding that he did not have standing to challenge the agent's application and affidavit regarding data location information transmitted by the cellular telephone associated with him. Even assuming defendant had standing, the court found that he failed to make the substantial preliminary showing required by Franks to obtain a hearing. See Opinion and Order of Court dated July 21, 2014 (Document Nos. 74 and 75) (hereinafter, the "July 2014 Opinion").

Prior to the court's July 2014 Opinion, the grand jury returned a three-count superseding

indictment against defendant on July 15, 2014, charging him with conspiracy to distribute and possess with intent to distribute heroin from in and around December 2011, until in and around August 2012, in violation of 21 U.S.C. §846 (Count One), possession of a firearm by a convicted felon on or about September 17, 2012, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count Two), and possession with intent to distribute heroin on or about March 20, 2013, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(C) (Count Three).

Following the superseding indictment, the court granted Attorney Robinson's motion to continue the previously scheduled August 2014, trial date to allow defendant to file pretrial motions related to the new charges. On March 30, 2015, Attorney Robinson filed a motion to suppress evidence related to the firearm charge and a motion for severance of counts for trial. The government responded to these motions and a suppression hearing was scheduled on March 17, 2015.

However, on February 24, 2015, defendant filed a pro se motion for appointment of new counsel. After a hearing, the court entered an order on March 12, 2015, denying defendant's request because he had not established good cause for replacing court-appointed counsel. Defendant was directed to set forth in writing and provide the specific requests he had of Attorney Robinson with respect to the handling of his case by April 13, 2015. As a result of this development, the court granted Attorney Robinson's motion to continue the suppression hearing until May 20, 2015.

Despite defendant's claim of indigence which entitled him to three court-appointed counsel, Attorney William Norman entered his appearance on April 13, 2015, as retained counsel for defendant, and Attorney Robinson was granted leave to withdraw from the case.

Attorney Norman then moved to continue the suppression hearing scheduled on May 20, 2015. The court granted defendant's motion and rescheduled the suppression hearing on July 15, 2015. Defendant also was ordered to file all pretrial motions he wished to file by June 8, 2015. Defendant then filed the pending pretrial motions, and the government responded. After reviewing the parties' respective submissions, the court determined that a hearing was necessary only with respect to defendant's motion to suppress evidence related to the vehicle search, which was held on July 15, 2015.

II. Motion to Suppress All Evidence Discovered During Vehicle Search Occurring September 17, 2012 (Document No. 111)

Defendant argues that the evidence discovered during a vehicle search which occurred on September 17, 2012, should be suppressed because it was obtained in violation of the Fourth Amendment. Defendant argues that *prior* to obtaining the rental company representative's consent to search the vehicle, the police violated the Fourth Amendment. According to defendant, Pennsylvania State Trooper Eric Maurer approached him in the role of a "community caretaker," but acted beyond the permissible scope of that role by ordering defendant to produce identification without reasonable suspicion that he had committed any offense or without any public safety concern. Defendant claims that Trooper Maurer unlawfully seized him when he asked for his identification, which ultimately led to discovery of the firearm charged in the superseding indictment. Defendant contends the firearm should be suppressed as fruit of the poisonous tree.

A. Background Regarding Events of September 17, 2012

Trooper Maurer testified at the suppression hearing concerning the events of September 17, 2012, and he also completed an incident report relating to that matter, a copy of which is attached

AO 72
(Rev. 8/82)

as Exhibit C to the government's Omnibus Response to Defendant's Pretrial Motions (Document No. 123) (hereinafter, the "government's Omnibus Response"). On that date, while on patrol in a marked vehicle on State Route 28, Trooper Maurer observed a vehicle parked on the berm of the highway with its hazard signals activated. Trooper Maurer stopped behind the vehicle to check on the safety of the occupant, who eventually was identified as defendant. Defendant, who was seated in the driver's seat, informed Trooper Maurer that he had run out of gas and that he was on the phone with his girlfriend who was in the area. Consistent with his practice in such situations, Trooper Maurer asked defendant for his identification, as well as identification for the vehicle. Defendant stated that he had no identification on him, but provided his name as Darren Brown and said that he was from New Jersey. Defendant also provided an expired rental agreement, which did not list him as a driver, and an insurance card for a vehicle belonging to Nicole Eakin.

Trooper Maurer returned to his patrol car to check the information defendant provided and discovered the vehicle was a rental owned by Leeway Rental. In addition, Trooper Maurer ran a check for Darren Brown, but found no information for any such individual in Pennsylvania or New Jersey.

Trooper Maurer then returned to the rental vehicle, informed defendant that no information existed for Darren Brown and asked him to exit the vehicle because Trooper Maurer could not confirm his identity and he was not authorized to operate the rental vehicle. Defendant complied and consented to a search of his person, which revealed $700 in cash. While speaking with defendant, two females arrived, and one identified herself as Nicole Eakin. Eakin indicated she knew the rental vehicle was overdue, but she let defendant drive it.

Subsequently, a representative from Leeway Rental arrived on the scene to retrieve the

vehicle and gave consent to search it. Eakin stated that she did not have any personal property in the vehicle and defendant claimed only to have compact discs in it. A search of the vehicle revealed a duffle bag in the trunk which contained a loaded pistol with a partially obliterated serial number, $1000 in cash, clothing and personal items.

Defendant was informed that he was under arrest and he was transported to the State Police Barracks. While entering evidence, the police found a piece of paper in the duffle bag with a receipt from the Plainfield, New Jersey Police issued to Peter Woodley for currency seized during an investigation. Trooper Maurer searched the name "Woodley," contacted the Plainfield Police and ultimately identified defendant as Woodley, not Darren Brown.

B. Defendant Lacks Standing to Challenge the Vehicle Search

Defendant, apparently recognizing the insurmountable hurdle he faces because (1) he was not authorized to drive the rental vehicle and thus lacks standing to challenge the vehicle search and (2) the rental company representative consented to a search of it, argues that a Fourth Amendment violation occurred *before* it was discovered he was an unauthorized driver and *before* consent was obtained. Defendant's position is without merit.

As an initial matter, the Fourth Amendment right to be free from unreasonable searches and seizures is a personal right and a defendant must establish standing in order to assert that right. See United States v. Padilla, 508 U.S. 77, 81-82 (1993). It is the defendant's burden to establish standing to raise a Fourth Amendment challenge. See Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978). In order to establish standing, an individual claiming Fourth Amendment protection must "demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." Minnesota v. Carter, 525 U.S. 83, 88 (1998).

The Third Circuit has held that "the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy." United States v. Kennedy, 638 F.3d 159, 165 (3d Cir. 2011). Although the defendant in Kennedy had the renter's permission to operate the vehicle, he did not have the permission of the owner rental company, thus he lacked standing to contest the search of the rental vehicle. Id. at 168. Further, no extraordinary circumstances suggesting a legitimate expectation of privacy were present in Kennedy because the defendant "was simply granted permission by the renter of the vehicle." Id. (citation omitted).

Like the defendant in Kennedy, defendant in this case only had been given permission by Eakin as renter, not Leeway Rental as owner, to operate the vehicle, thus no extraordinary circumstances are present, and he lacks standing to challenge the search of the rental vehicle. Defendant concedes that Kennedy is binding precedent, but he believes the decision is erroneous and raises the issue to preserve it for future appellate review.

Although defendant lacks standing to contest the search of the rental vehicle, and despite the fact that a representative of Leeway Rental consented to a search, defendant maintains that he may challenge the search of the duffle bag found in the trunk. Defendant is incorrect.

The Supreme Court has held that "the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle." California v. Acevedo, 500 U.S. 565, 576 (1991). Rather, "closed containers in cars [can] be searched without a warrant because of their presence within the automobile . . . [and] the privacy interest in those closed containers yield[s] to the broad scope of an automobile search." Id. at 572 (citing United

States v. Ross, 456 U.S. 798 (1982)); see also United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994) (holding that "[o]ne who can assert no legitimate claim to the car he was driving cannot reasonably assert an expectation of privacy in a bag found in that automobile"). Additionally, a defendant who fails to alert the police to his ownership interest in a bag within the vehicle that is searched ultimately does not retain an expectation of privacy. See United States v. Anderson, 859 F.2d 1171, 1177 (3d Cir. 1988); United States v. Valle-Irizarry, 2014 WL 3673139, *6 (D.N.J. July 22, 2014) (finding that the defendant did not maintain an expectation of privacy in a camera bag located during the search of a vehicle where the defendant failed to furnish any evidence that expressed his ownership of the bag either before or during the vehicle search).[2]

Based on this authority, defendant did not maintain an expectation of privacy in the duffle bag found in the trunk of the rental car. As an unauthorized driver of the rental vehicle, defendant had no reasonable expectation of privacy in the vehicle or its contents. Furthermore, after the Leeway Rental representative consented to a search of the vehicle, defendant claimed that he only had compact discs in the car, not a duffle bag, thus he failed to assert any expectation of privacy in the bag. For these reasons, the search of the duffle bag did not violate the Fourth Amendment.

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[2]Defendant contends that he has standing to challenge the search of the duffle bag under state law principles because the search was conducted by a Pennsylvania state trooper and Pennsylvania law confers automaticstanding in this instance. Defendant's argument is without merit. Defendant is charged in federal court with violation of a federal firearms statute, thus federal law applies. See Elkins v. United States, 364 U.S. 206, 223-34 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."); see also United States v. Bedford, 519 F.2d 650, 654 (3d Cir. 1975). This binding precedent makes clear that federal law controls our analysis, despite defendant's position to the contrary, which he attempted to support by citation to United States v. Rickus, 566 F. Supp. 96 (E.D. Pa. 1983), see Document No. 118 at 12, yet failed to indicate that case subsequently was reversed. See United States v. Rickus, 737 F.2d 360, 363 (3d Cir. 1984) (observing "[i]t is a general rule that federal district courts will decide evidence questions in federal criminal cases on the basis of federal, rather than state, law" and finding no authority for the district court's holding that an exception to this general rule exists where state agents have violated state constitutional, as opposed to state statutory, law).

C. Defendant Was Not Unlawfully Seized

To circumvent the lack of standing because he was not authorized to drive the rental vehicle, as well as the Leeway Rental representative's consent to search the car, defendant argues that Trooper Maurer's *prior* actions were unlawful, thus the evidence seized should be suppressed in any event. Once again, defendant is incorrect.

Defendant claims that Trooper Maurer initially approached him in the role as a "community caretaker"[3] to check on defendant's safety when he observed the vehicle on the berm of the highway with its hazard signals activated. According to defendant, when he indicated he did not need assistance, Trooper Maurer should have ceased the interaction, but instead asked for identification, which constituted an unlawful seizure. Defendant argues that any evidence subsequently discovered should be suppressed as fruit of the poisonous tree.

Contrary to defendant's position, the Supreme Court has held that even when the police have no basis for suspecting an individual, they may generally ask him questions and ask to examine his identification, as long as the police do not convey a message that compliance is required. See Florida v. Bostick, 501 U.S. 429, 435 (1991). This type of interaction does not constitute a seizure. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id. at 434.

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[3] "In performing [the] community caretaking role, police are expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety." United States v. Smith, 522 F.3d 305, 313 (3d Cir. 2008) (quoting United States v. Coccia, 446 F.3d 233, 238 (1st Cir. 2006)). The community caretaking function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

The Supreme Court has held that a seizure occurs when the police apply physical force to restrain a person or, absent force, the person seized submits to police authority. California v. Hodari D., 499 U.S. 621, 626-28 (1991); see also, United States v. Mendenhall, 446 U.S. 544, 553 (1980) (stating that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained"). Whether the police make a show of authority is an objective test: "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." Hodari, 499 U.S. at 628. Examples of situations that might indicate a seizure include the threatening presence of several officers, the fact that an officer displayed a weapon, some physical touching of the individual or the use of a tone of voice or language to signify that compliance with the officer's request is required. Mendenhall, 446 U.S. at 554.

On the facts present here, defendant was not unlawfully seized. Trooper Maurer initially approached defendant by himself, he did not display a weapon or touch defendant and there is no evidence to indicate that the trooper used a threatening tone of voice or language. Trooper Maurer credibly testified (and his police report also indicates) that he *asked* defendant for identification. There is no indication that Trooper Maurer restrained defendant by means of physical force or a show of authority, thus defendant was not unlawfully seized and suppression of the subsequently discovered evidence is not warranted. See United States v. Carpenter, 462 F.3d 981, 985 (8th Cir. 2006) (finding that an officer's request for identification, and brief retention of those documents, did not constitute a seizure where there was no message of compulsion present in the record).

III. Motion for a Hearing Pursuant to Franks v. Delaware (Document No. 115)

At issue in defendant's Motion for a Franks Hearing is an Application and Affidavit dated March 11, 2013, for Disclosure of Location Data Relating to a Wireless Telephone, which was completed by Narcotics Sergeant Christopher Bouye of the New Castle City Police Department and Task Force Officer with the Drug Enforcement Administration ("DEA"), a copy of which is attached as Exhibit A to the government's Omnibus Response (hereinafter, the "Bouye Affidavit"). Information contained in the Bouye Affidavit was incorporated into the Affidavit in Support of Application for Search Warrant prepared by DEA Special Agent Melissa Cobb (hereinafter, the "Cobb Affidavit"), which is attached as Exhibit B to the government's Omnibus Response.

Defendant argues that he is entitled to a Franks hearing because both the Bouye Affidavit and the Cobb Affidavit contained material misrepresentations or omissions. See defendant's Memorandum of Points and Authorities in Support of Application for Order of Suppression (Document No. 120), at 6-7, 12-13. According to defendant, law enforcement unlawfully obtained data location information for the cellular telephone associated with him, which enabled them to track his location and ultimately locate, seize and detain him and his duffle bag that contained heroin.

Contrary to defendant's position, no Franks hearing is required. This court previously ruled that defendant lacks standing to challenge the Bouye Affidavit regarding data location information transmitted from the cellular telephone in question, but even if he had standing, he failed to make the substantial preliminary showing required by Franks to obtain a hearing. See generally, July 2014 Opinion. Although repetitive, we will repeat our discussion and ruling on the matter, as well as address defendant's argument based on the affidavit he submitted.

A. Background Regarding Events of March 20, 2013

The Bouye Affidavit and the Cobb Affidavit set forth the following information. The DEA, along with local law enforcement agencies, conducted an investigation of a heroin trafficking organization involving an individual known as "P", who was later identified as defendant. In connection with the investigation, the DEA utilized a confidential source ("CS") who had been involved in the organization. The CS is federally charged with participating in the heroin distribution conspiracy, and is cooperating with the government with the hope of reducing his or her sentence.

On March 5, 2013, the CS received an e-mail message from a female who advised that "P" wanted to contact the CS. The female provided the CS with P's telephone number, and the CS spoke with "P" to arrange a meeting to discuss future heroin transactions.

On March 6, 2013, the CS placed a consensually recorded phone call to "P" and arranged to meet him in Pittsburgh. On that day, while under constant surveillance by law enforcement agents, the CS met with "P" and discussed future heroin transactions. The CS told the agents that "P" is from New Jersey and travels to Pittsburgh by Greyhound bus to transport hundreds of bricks of heroin.[4] According to the CS, he/she had purchased heroin from "P" in the past and "P's" mode of travel had been consistent.

During the controlled meeting that occurred, "P" advised the CS that he would return to Pittsburgh with several hundred bricks of heroin at the end of the next week. "P" agreed to provide the CS with approximately 100 bricks of heroin when he returned to Pittsburgh. The CS

[4] According to the government, the meeting was recorded, but the recording is of poor quality because of the way the CS handled the recording device. See government's Omnibus Response at 10.

understood that "P" would travel to Pittsburgh by Greyhound bus as he had done in the past.

Based on the foregoing information, on March 11, 2013, Sergeant Bouye applied for and obtained court authorization directing Verizon Wireless to provide physical data location information for the cellular telephone associated with "P," so that the agents could track the location of that telephone.

On March 19, 2013, "P" contacted the CS and indicated that he would travel to Pittsburgh the next day on the Greyhound bus to provide the CS with heroin. The data location information confirmed that the cellular telephone associated with "P" traveled from New Jersey to Pittsburgh and arrived at approximately 6:00 a.m. on March 20, 2013.

Agent Cobb observed the individual known as "P"exit a Greyhound bus carrying a duffle bag. "P", who was identified as defendant, and the duffle bag were detained while Agent Cobb applied for a warrant to search the duffle bag, which was authorized by a magistrate judge. The agents' search of the bag uncovered heroin, and defendant was arrested.

B. Legal Standard

The rule governing situations involving allegedly misleading search warrant affidavits was articulated by the Supreme Court in Franks v. Delaware, 438 U.S. 154 (1978). Pursuant to Franks, upon an appropriate showing, a defendant has the right to an evidentiary hearing to challenge the truthfulness of statements made in a search warrant affidavit establishing probable cause. Id. at 155-56.

To establish that a hearing is warranted, Franks requires the defendant to make a substantial preliminary showing that the affidavit contained a false statement, which was made knowingly and intentionally or with reckless disregard for the truth, and which is necessary to the finding of

probable cause. Franks, 438 U.S. at 155-56, 171. In order to make the substantial preliminary showing, the defendant cannot rest on mere conclusory allegations or a "mere desire to cross-examine," but rather must specifically identify the alleged false statements or omissions in the affidavit and present an offer of proof contradicting the affidavit, including materials such as sworn affidavits or otherwise reliable statements from witnesses. Id. at 171; see also United States v. Yusef, 461 F.3d 374, 383 n.8 (3d Cir. 2006).

Statements or assertions contained in an affidavit of probable cause are "made with reckless disregard when 'viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.'" Wilson v. Russo, 212 F.3d 781, 788 (3d Cir. 2000) (quoting, United States v. Clapp, 46 F.3d 795, 801 n.6 (8th Cir. 1995)). Omissions from an affidavit are made with reckless disregard for the truth if an officer withholds facts that any reasonable person would know that a judge would want to know. Wilson, 212 F.3d at 788. A district court "may properly infer that an affiant acted with reckless disregard for the truth where his affidavit contains an averment that was without sufficient basis at the time he drafted it." United States v. Brown, 631 F.3d 638, 649 (3d Cir. 2011). However, when attempting to demonstrate that the affiant included a false statement in a warrant affidavit or omitted material from it, it is insufficient to prove that he acted with negligence or made an innocent mistake. Franks, 438 U.S. at 171; Yusef, 461 F.3d at 383.

Finally, if the requirements of the substantial preliminary showing "are met, and 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. However, if the remaining content is insufficient, the

defendant is entitled to a hearing.[5] Id. at 172. In consideration of these principles, defendant is not entitled to a Franks hearing in this case for the reasons which we explain below.

C. Defendant has not established he is entitled to a *Franks* hearing

Defendant is not entitled to a Franks hearing. First, defendant has not established that he has standing to challenge the Bouye Affidavit regarding the acquisition of data location information transmitted from the cellular telephone associated with him. Furthermore, defendant has failed to make the substantial preliminary showing required by Franks to obtain a hearing regarding information contained in the Bouye Affidavit or the Cobb Affidavit.

1. Defendant lacks standing to challenge the acquisition of data location information transmitted from the cell phone associated with him

As the court previously ruled in the July 2014 Opinion, defendant has not established that he has standing to challenge the data location information associated with the cellular telephone in question. Defendant has not proffered any evidence that connects him to the cell phone as the owner, subscriber or authorized user, thus he has not shown that he had a reasonable expectation of privacy in the records associated with the cell phone, including data location information transmitted from it.[6] Even if defendant could do so, numerous federal courts have held that one

[5] If a Franks hearing is held, and the defendant proves by a preponderance of the evidence that the false statements or omissions were made knowingly and intentionally or with a reckless disregard for the truth, and with the affidavit's false material set aside, the remaining content is insufficient to establish probable cause, then the warrant must be voided and the fruits of the search must be excluded from the trial. Franks, 438 U.S. at 156; see also United States v. Frost, 999 F.2d 737, 743 (3d Cir. 1993).

[6] Defendant has submitted an affidavit in which he avers that he turned off the cell phone when he traveled from New Jersey to Pittsburgh by Greyhound bus on March 20, 2013. See Affidavit of Peter Woodley, ¶3 (attached as an Exhibit to Document No. 120) (hereinafter, "defendant's Affidavit"). Defendant's Affidavit does not allege that he was the owner or authorized subscriber/user of the phone, but he subsequently claimed in his reply brief that the phone was a prepaid cellular phone which did not require him to subscribe to it in his name, thus his possession of the phone is sufficient to establish standing. See defendant's Reply to Government's Omnibus Response to Pretrial Motions (Document No. 124) at 5. Regardless of whether the phone was a prepaid cellular phone, the weight of authority cited in this section indicates that one does not have a reasonable expectation of privacy in location data transmitted from a cell phone.

does not have a reasonable expectation of privacy in location data transmitted from a cell phone. See United States v. Skinner, 690 F.3d 772, 777 (6th Cir. 2012) (holding that the defendant did not have a reasonable expectation of privacy in location data broadcast from his cell phone); In re Application of the United States for an Order for Authorization to Obtain Location Data Concerning an AT&T Cellular Telephone, 2015 WL 1842761, at *6 (N.D. Miss. Mar. 30, 2015 (holding that suspects did not have a reasonable expectation of privacy in location data transmitted from their cell phones); United States v. Lang, 2015 WL 327338, at *4 (N.D. Ill. Jan. 23, 2015) (an individual does not have a legitimate expectation of privacy in historical cell site information and thus the protections of the Fourth Amendment do not apply); In re Smartphone Geolocation Data Application, 977 F.Supp.2d 129, 147 (E.D.N.Y. 2013) (holding that cell phone users who fail to turn off their devices do not have a reasonable expectation of privacy regarding prospective geolocation data and such expectation would not be reasonable in any event); United States v. Barrera-Barron, 2013 WL 3989182, at *4 (D. Kan. Aug. 1, 2013) (the defendant did not have a reasonable expectation of privacy in the GPS data from the cell phone that was used to track his whereabouts, thus he lacked standing to contest the use of that data).

Although defendant has not established that he has a reasonable expectation of privacy regarding the data location information transmitted from the cell phone in question, we nevertheless will address his claim that he is entitled to a Franks hearing.

2. Defendant has not made the substantial preliminary showing required by Franks to obtain a hearing regarding information contained in the Bouye Affidavit or the Cobb Affidavit

Even assuming defendant could challenge the acquisition of the data location information transmitted from the cell phone, he has not made the requisite substantial preliminary showing

necessary to obtain a Franks hearing regarding information contained in the Bouye Affidavit or the Cobb Affidavit. As previously discussed, in order to obtain a Franks hearing, the defendant must make a substantial preliminary showing that the affidavit contained a false statement, which was made knowingly and intentionally or with reckless disregard for the truth, and which is necessary to the finding of probable cause. Franks, 438 U.S. at 155-56, 171. To make the substantial preliminary showing, the defendant must specifically identify the alleged false statements or omissions in the affidavit and present an offer of proof contradicting the affidavit, including materials such as sworn affidavits or otherwise reliable statements from witnesses. Id. at 171.

The court notes that while defendant has identified certain statements in paragraphs 2,7, 8 and 9 of the Bouye Affidavit that he contends are false and claims that other information was omitted,[7] and further suggests that Special Agent Cobb lied by including in her Affidavit that data location information confirmed that the cell phone associated with him traveled from New Jersey to Pittsburgh on the morning of March 20, 2013, he has not submitted any material to contradict the Bouye or Cobb Affidavits. The only material defendant submitted is his own affidavit, which, as discussed below, does not contradict the Bouye or Cobb Affidavits. Defendant has not otherwise made an offer of proof or submitted any materials to establish that the Bouye Affidavit or the Cobb Affidavit contain false statements that were made knowingly and intentionally or with

[7]Defendant claims that the Bouye Affidavit contained the following false information: (1) that law enforcement was investigating a heroin distribution network as opposed to one possible heroin seller (¶2); (2) that law enforcement had recorded phone calls indicative of drug activity, but the calls did not contain any such language (¶2); (3) that defendant was involved in a heroin conspiracy, as opposed to a one-time, two-person transaction (¶7); and (4) that the CS received an electronic communication indicating defendant wanted to contact the CS about purchasing heroin, but the communication did not contain languagerelated to drug activity (¶8). Defendant also claims that ¶9 of the Bouye Affidavit omitted the following information: (1) that the audio/video recording of the meeting between the CS and defendant which occurred on March 6, 2013, was of poor quality; and (2) that the content of a recorded phone call does not include reference to drug activity.

reckless disregard for the truth.[8] See Franks, 438 U.S. at 171; Yusef, 461 F.3d at 383, n.8.

Defendant states in his Affidavit that he turned off his cell phone when he traveled by Greyhound bus from New Jersey to Pittsburgh on March 20, 2013, because he realized that it "was in need of charging and would likely be dead soon." See defendant's Affidavit, ¶¶2, 3. According to defendant, he never accessed his phone while on the bus and he never powered it back on. Id., ¶¶4, 5. Based on these assertions, defendant contends, without any explanation or supporting material, that law enforcement must have remotely powered on the cell phone in order to acquire the data location information necessary to track him.

Defendant's Affidavit relating to his cell phone, its dying battery and his claim that he turned it off does not contradict anything contained in the Bouye Affidavit that he claims is false concerning law enforcement's investigation of a heroin distribution network, the existence of recorded phone calls indicative of drug activity, defendant's involvement in a heroin conspiracy or the content of an electronic communication relating to drug activity. Further, the content of defendant's Affidavit does not bolster his contention that the Bouye Affidavit contained material omissions concerning the quality of the audio recording between the CS and defendant or the

[8] Equally unpersuasive is defendant's argument that the magistrate judge should not have relied on information from the CS that was contained in the Bouye Affidavit in making the probable cause determination because the CS was not established as reliable and the information was not independently corroborated. To the contrary, the Bouye Affidavit at ¶¶2 and 7 details steps law enforcement took in the investigation, including consensually recorded phone calls and undercover controlled meetings, which served to corroborate information provided bythe CS. See United States v. Stearn, 597 F.3d 540, 555 (3d Cir. 2010) (observing that "[a] magistrate may issue a warrant relying primarily or in part upon the statements of a confidential informant, so long as the totality of the circumstances gives rise to probable cause" and finding that the informant's tip regarding the defendant's involvement in cocaine distribution was sufficiently corroborated by independent police investigation to permit the magistrate to credit the tip when ruling on a search warrant application). The Bouye Affidavit also specifically references corroborating information in ¶¶8 and 9, which includes an email message on March 5, 2013, to the CS from a third party indicating that defendant wanted to contact the CS, a consensually recorded call on March 6, 2013, between the CS and defendant and a meeting between the CS and defendant on that same date, which was observed by agents and recorded. Although defendant now claims the information set forth in the Bouye Affidavit concerning the email message, the recordedcall and the meeting is false or incomplete, he has not submitted any material to contradict the information, thus he has failed to make the substantial preliminary showing necessary to obtain aFranks hearing.

content of a consensually recorded phone call. Finally defendant's Affidavit does not contradict the statement in the Cobb Affidavit that data location information confirmed the cell phone associated with him traveled from New Jersey to Pittsburgh on the morning of March 20, 2013. Although defendant claims he turned off the cell phone, he has not submitted any offer of proof or sworn statement indicating the government remotely powered on the phone in order to track his location, other than his own unsubstantiated assertion to that effect.

In sum, defendant's Affidavit is inadequate to establish that either Sergeant Bouye or Special Agent Cobb made false statements or omitted material in their respective Affidavit knowingly and intentionally or with reckless disregard for the truth. Accordingly, we find that defendant has failed to make the substantial preliminary showing required by Franks, thus he is not entitled to a hearing.

IV. Motion to Suppress All Evidence Seized from Defendant's Person on March 20, 2013 (Document No. 114)

Defendant argues that the government unlawfully obtained data location information transmitted from the cell phone associated with him, which allowed law enforcement to track his whereabouts and ultimately seize and detain him and his duffle bag in violation of the Fourth Amendment. According to defendant, he turned off the cell phone while traveling by bus from New Jersey to Pittsburgh, thus the government must have remotely powered on the cell phone to acquire the data location information necessary to track him, which was an illegal trespass. Without that information, defendant argues law enforcement did not have probable cause to arrest him, thus the heroin seized from his duffle bag after his arrest should be suppressed.

Defendant provides no explanation or evidentiary support for the bald assertion that the

government somehow remotely powered on the cell phone associated with him to track his whereabouts. Even assuming the government could remotely power on the cell phone as defendant claims, he fails to explain how authorities could have obtained data location information from the cell phone if it "was in need of charging and would likely be dead soon" as he claims in his Affidavit. Defendant's argument on this point is illogical.

As the court explained in the December 2013 Opinion, law enforcement had ample probable cause to arrest defendant when he exited the Greyhound bus. To repeat, the agents had obtained information from the CS that defendant previously had traveled from New Jersey to Pittsburgh by Greyhound bus to transport heroin. While under surveillance by law enforcement agents, the CS met with defendant on March 6, 2013, to discuss future heroin transactions and defendant agreed to provide the CS with heroin when he returned to Pittsburgh. On March 19, 2013, defendant contacted the CS to advise that he would be traveling to Pittsburgh by Greyhound bus the next day with heroin. Data location information showed that the cell phone associated with defendant traveled from New Jersey to Pittsburgh on March 20, 2013, and arrived at the Greyhound bus station at 6:00 a.m. that day. The agents then observed defendant exit a Greyhound bus while carrying a duffle bag.

Under these circumstances, probable cause existed to arrest defendant. If the agents had immediately arrested defendant, they would have been permitted to conduct a search of his duffle bag incident to his arrest. See United States v. Shakir, 616 F.3d 315, 321 (3d Cir. 2010) (holding that a search incident to an arrest is permissible when "there remains a reasonable possibility" that the arrestee could destroy evidence or access a weapon in the container or area being searched). Instead of immediately placing defendant under arrest and searching the duffle bag, however, the

agents detained him while they obtained a search warrant for the bag. As the court previously ruled in the December 2013 Opinion, even if defendant was correct that his detention was so prolonged that it constituted a *de facto* arrest, that arrest was supported by ample probable cause, and the detention of his duffle bag while Agent Cobb obtained a search warrant was reasonable under the circumstances because law enforcement acted diligently to pursue their investigation.[9] Accordingly, there was no Fourth Amendment violation and defendant's motion to suppress will be denied.

V. Motion for Severance of Counts for Trial (Document No. 113)

Defendant has moved to sever Count Two of the superseding indictment, which charges him with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §922(g)(1), from the trial of Counts One and Three, which charge him with conspiracy to distribute and possession

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[9]As stated, the court ruled in the December 2013 Opinion that the detention of defendant's duffle bag while the agent obtained a search warrant was reasonable under the circumstances because law enforcement acted diligently to pursue their investigation. Despite that ruling, defendant now argues that law enforcement should have obtained an anticipatory search warrant because it would have minimized the amount of time defendant and his duffle bag were detained. Because an anticipatory search warrant was not obtained, defendant maintains that the detention was unnecessarily prolonged, thus the heroin should be suppressed. Defendant is incorrect.

An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." United States v. Grubbs, 547 U.S. 90, 94 (2006). Two prerequisites of probability must be satisfied for a conditioned anticipatory search warrant to comply with the Fourth Amendment's requirement of probable cause. See United States v. Golson, 743 F.3d 44, 54 (3d Cir. 2014) (citing Grubbs, 547 U.S. at 96-97). First, based on facts that exist when the warrant is issued, there must be probable cause to believe that contraband, which is not yet present at the place to be searched, willbe there when the warrant is executed. Grubbs, 547 U.S. at 96-97. For this requirement to be satisfied, "there must be a sufficient nexus between the contraband to be seized and the place to be searched . . . ." United States v. Loy, 191 F.3d 360, 365 (3d Cir. 1999). Second, there must be probable cause to believe that the triggering event will actually occur. Grubbs, 547 U.S. at 97.

In this case, it would have been impossible for the agent to apply for an anticipatory search warrant. While law enforcement had information from the CS that defendant would be traveling from New Jersey to Pittsburgh by Greyhound bus on March 20, 2013, carrying heroin, they had no information concerning the type of container defendant would use to transport the heroin, i.e, whether he would carry a suitcase, a duffle or tote bag or another type of container. Thus, the agent could not have applied for an anticipatory search warrant because she would have been unable to describe in the supporting affidavit the item or place to be searched when defendant arrived in Pittsburgh.

with intent to distribute heroin. According to defendant, separate trials are warranted on the drug counts and the firearm count under Federal Rule of Criminal Procedure 14(a) because joinder of the offenses is prejudicial to him. The government responds that all counts of the superseding indictment are properly joined and defendant will not be prejudiced if they are tried together, thus his severance motion should be denied. For the following reasons, the court will deny defendant's motion to the extent he seeks to sever Count Two of the superseding indictment from the other two counts for trial, but a bifurcated trial will be ordered.

Rule 8(a) provides that an indictment may charge a defendant in separate counts with two or more offenses if the offenses charged: (1) are of the same or similar character; or (2) are based on the same act or transaction; or (3) are connected with or constitute parts of a common scheme or plan. A defendant who claims improper joinder under Rule 8(a) must prove actual prejudice from the misjoinder. United States v. Gorecki, 813 F.2d 40, 42 (3d Cir. 1987).

Defendant does not contend that Counts One and Three of the superseding indictment, which relate to his alleged participation in a conspiracy to distribute heroin and possession with intent to distribute heroin, are improperly joined. However, without specifically referencing Rule 8(a), defendant maintains that the firearm charge is improperly joined with the drug charges, claiming that they "have no logical connection with one another . . . " and "[t]here is no conceivable nexus between the charged courses of conduct . . . ." See defendant's Brief in Support of Motion for Bifurcation of Counts for Trial[10] (Document No. 117) at 1, 2. To the extent that

[10]We note that defendant's motion is entitled as one for severance ofcounts, but his brief is entitled as one in support of bifurcation of counts. Compare Document No. 113 with Document No. 117. Defendant refers to both bifurcation and severance in his brief. See Document No. 117 at 2 (stating that the court should grant his request for bifurcation) and at 5 (stating that severance is due). To the extent defendant's request is for severance, his motion is denied as we explain herein, although we will order a bifurcated trial procedure.

defendant argues joinder is improper, he is incorrect. To the contrary, all counts of the superseding indictment are properly joined because they constitute parts of a common scheme.

Count One charges that defendant participated in a heroin distribution conspiracy from in and around December 2011 until in and around August 2012. According to the government, defendant dealt with the CS during that time, which was prior to the CS's cooperation with the government. Count Two charges that defendant, who is a convicted felon, illegally possessed a firearm on or about September 17, 2012. That charge stems from defendant's arrest in the Pittsburgh area following the incident where he was the unauthorized driver of a rental car in which a stolen firearm was located in a duffle bag. According to the government, defendant's presence in the Pittsburgh area at that time is evidence of his connection to the heroin conspiracy, and the CS will testify that the conspiracy ended because of defendant's incarceration on another charge. Count Three then charges defendant with possession with intent to deliver heroin on March 20, 2013, which is the day after he told the CS that he would travel to Pittsburgh the next day to deliver heroin. All counts of the superseding indictment relate to a common scheme involving defendant's alleged heroin trafficking in the Western District of Pennsylvania. Accordingly, it is not an appropriate use of judicial resources to sever Count Two from Counts One and Three.

Federal Rule of Criminal Procedure 14, which deals with relief from prejudicial joinder, only comes into play after it first has been determined that joinder was permissible under Rule 8(a). United States v. Graci, 504 F.2d 411, 413 (3d Cir. 1974). According to Rule 14(a), if the joinder of offenses in an indictment appears to prejudice a defendant, the court may order separate trials of counts. A motion for severance under Rule 14 rests in the sound discretion of the district court. United States v. Reicherter, 647 F.2d 397, 400 (3d Cir. 1981). One who claims improper joinder

under Rule 14 must demonstrate clear and substantial prejudice. Id. Mere allegations of prejudice are not enough, and it is insufficient to establish that severance would improve the defendant's chance of acquittal. Id.

Defendant generally claims that he will be prejudiced by joinder of the firearm count with the drug counts. See defendant's Motion for Severance of Counts for Trial (Document No. 113) (stating that "severance is needed to protect [defendant] from the prejudice that can result from trying a felon in possession charge with other unrelated felony charges"). However, defendant fails to allege, let alone pinpoint, clear and substantial prejudice sufficient to justify severance under Rule 14. Thus, defendant's motion will be denied to the extent he seeks to sever Count Two of the superseding indictment from the trial of Counts One and Three. However, the court finds that a bifurcated trial procedure is appropriate in this case.

The Third Circuit Court of Appeals has held that bifurcation may be appropriate to address the concern that introducing evidence of a defendant's criminal record in order to prove a felon in possession charge would prejudice him during the jury's deliberation on the other counts. See United States v. Joshua, 976 F.2d 844, 848 (3d Cir. 1992) (abrogated on other grounds by Stinson v. United States, 508 U.S. 36 (1993)); see also, United States v. Williams, 504 Fed. Appx. 207, 212-13 (3d Cir. 2012) (approving district court's use of bifurcated trial procedure for conspiracy to distribute narcotics and possession of a firearm by a convicted felon); United States v. McCode, 317 Fed. Appx. 207, 212 (3d Cir. 2009) (approving bifurcation of felon in possession counts from robbery related counts).

In Joshua, the defendant was charged with armed bank robbery, weapons charges in connection with the bank robbery and possession of a firearm by a convicted felon. The defendant

moved to sever the felon in possession count from the remaining counts for trial, fearing that the evidence of his prior criminal conviction might unfairly influence the jury's decision on the other counts. The district court denied the defendant's motion to sever, but ordered a bifurcated trial during which the jury first heard evidence and deliberated concerning the robbery-related counts, and then heard evidence of the defendant's criminal record and deliberated concerning the felon in possession count. The Third Circuit determined that this procedure employed by the district court "strikes an appropriate balance between the concern about prejudice to the defendant and considerations of judicial economy." Joshua, 976 F.2d at 848.

As in Joshua, bifurcation is appropriate here. Evidence of defendant's prior felony convictions, which is admissible at Count Two, may be prejudicial to defendant in the trial of Counts One and Three. In addition, the elements of Counts One and Three involving the drug charges are distinct from those that must be proved by the government in connection with the felon in possession charge at Count Two. For these reasons, we find it appropriate to bifurcate the trial such that the jury first will hear evidence related to Counts One and Three of the superseding indictment and, after reaching a verdict on those counts, will thereafter hear evidence concerning Count Two. This bifurcated trial procedure will balance the interest of judicial economy with any potential prejudice to defendant.

AO 72
(Rev. 8/82)

VI. Conclusion

For the foregoing reasons, defendant's suppression motions and motion for a Franks hearing will be denied, and his severance motion will be denied to the extent he seeks to sever Count Two of the superseding indictment (the firearm count) from the two drug counts for trial, although a bifurcated trial procedure will be ordered.

An appropriate order will follow.

Gustave Diamond
United States District Judge

Date: September 1, 2015

cc: Brendan T. Conway
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AO 72
(Rev. 8/82)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 13-113
	)	
PETER WOODLEY	)	

MEMORANDUM AND ORDER OF COURT

On September 1, 2015, the court entered and Opinion and Order on defendant's Motion to Suppress All Evidence Discovered During Vehicle Search Occurring September 17, 2012 (Document No. 111); (2) Motion for Severance of Counts for Trial (Document No. 113); (3) Motion to Suppress All Evidence Seized from Defendant's Person on March 20, 2013 (Document No. 114); and (4) Motion for a Hearing Pursuant to Franks v. Delaware (Document No. 115). For reasons fully explained in its 27-page opinion, the court denied defendant's suppression motions and motion for a Franks hearing, and denied defendant's severance motion to the extent he sought to sever Count Two of the superseding indictment (the firearm count) from the two drug counts for trial, although the court ordered a bifurcated trial procedure. See Opinion and Order dated September 1, 2015 (hereinafter, the "Opinion") (Document Nos. 133 and 134).

Presently before the court is defendant's Motion to Vacate Judgment Denying Suppression and/or Franks Hearing, or Alternatively, to Modify, Alter or Amend Opinion (defendant's "Motion") (Document No. 140) and the government's Response in opposition thereto (Document No. 148). For reasons explained below, defendant's Motion will be denied in all respects.

At the outset, the court reaffirms all of its rulings set forth in the Opinion and will not repeat in detail the rationale for its decision denying defendant's suppression motions and motion for a Franks hearing. Defendant's Motion makes clear that he disagrees with the court's rulings on these

matters, and defendant's objections are noted for the record. The court will only briefly address defendant's contentions that the Opinion should be vacated, modified, altered or amended. To the extent that defendant continues to believe the court's rulings are in error, he may pursue an appeal at the appropriate time.

Defendant first argues that he did not have to demonstrate that he would prevail at a Franks hearing to be entitled to such a hearing, and believes that he has done what is necessary to obtain a hearing.[1] Apparently, defendant misapprehends the holding of Franks v. Delaware, 438 U.S. 154 (1978), and/or the court's ruling on his motion for a Franks hearing.

To repeat what was stated in the Opinion, in order to establish that a hearing is warranted, Franks requires the defendant to make a substantial preliminary showing that the affidavit contained a false statement, which was made knowingly and intentionally or with reckless disregard for the truth, and which is necessary to the finding of probable cause. Franks, 438 U.S. at 155-56, 171. **In order to make the substantial preliminary showing, the defendant cannot rest on mere conclusory allegations or a "mere desire to cross-examine," but rather must specifically identify the alleged false statements or omissions in the affidavit and present an offer of proof contradicting the affidavit, including materials such as sworn affidavits or otherwise reliable statements from witnesses**. Id. at 171 (emphasis added); see also United States v. Yusef, 461 F.3d 374, 383 n.8 (3d Cir. 2006). If the requirements of the substantial preliminary showing "are met, and 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.

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1 Defendant argued that he was entitled to a Franks hearing because both the Bouye and Cobb Affidavits contained material misrepresentations or omissions. Defendant contended that law enforcement unlawfully obtained data location information for the cellular telephone associated with him, which enabled them to track his location and ultimately locate, seize and detain him and his duffle bag that contained heroin.

However, if the remaining content is insufficient, the defendant is entitled to a hearing.[2] Id. at 172.

Contrary to defendant's assertion, the court did not hold that defendant had to demonstrate he would ultimately prevail to obtain a Franks hearing. Rather, the court held that defendant was not entitled to a Franks hearing with respect to the Bouye Affidavit and the Cobb Affidavit because: (1) he lacks standing to challenge the acquisition of data location information transmitted from the cellular telephone associated with him; and (2) even if he had standing, he failed to make the substantial preliminary showing required by Franks to obtain a hearing regarding information contained in either Affidavit.

To reiterate, a Franks hearing is required only if the substantial preliminary showing is made and that requirement was not met here. While defendant identified certain statements in the Bouye and Cobb Affidavits that he contended were false and alleged that other information was omitted, defendant did not submit any material to contradict the Affidavits. The only material defendant submitted was his own affidavit, which the court explained did not contradict the Bouye or Cobb Affidavits. See Opinion at 19-20. Defendant obviously believes that his affidavit was a sufficient offer of proof, but for reasons explained in the Opinion, the court disagrees.

To repeat once again, the court held that defendant failed to make the substantial preliminary showing necessary to obtain a Franks hearing. The court did not hold, contrary to defendant's current claim, that he had to demonstrate he would prevail at a Franks hearing in order to get a hearing. Defendant further argues that the court deprived him of the opportunity to present his claims "in the fully developed manner he would be availed of the ability to do only after a

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2 If a Franks hearing is held, and the defendant proves by a preponderance of the evidence that the false statements or omissions were made knowingly and intentionally or with a reckless disregard for the truth, and with the affidavit's false material set aside, the remaining content is insufficient to establish probable cause, then the warrant must be voided and the fruits of the search must be excluded from the trial. Franks, 438 U.S. at 156; see also United States v. Frost, 999 F.2d 737, 743 (3d Cir. 1993).

hearing to solicit testimony and require the production of evidence." See defendant's Motion at 3. But, as we have stated numerous times, a defendant must make a substantial preliminary showing to obtain a Franks hearing. Defendant has not submitted any material which changes the court's determination that a Franks hearing is not warranted in this case.

Defendant next argues the Opinion failed to address his claim that suppression is warranted because law enforcement failed to obtain an anticipatory warrant.[3] According to defendant, the court merely "adverted" to the issue in a footnote. Contrary to defendant's view, the court found that it would have been impossible for the agent to apply for an anticipatory warrant. If defendant is unclear about the court's ruling, the court repeats and reaffirms it here: the court rejects defendant's argument that a Fourth Amendment violation occurred because the agent failed to obtain an anticipatory search warrant.

According to defendant, "[t]he analysis due Woodley on this issue has not been afforded him." See defendant's Motion at 6. The court believes it sufficiently has addressed defendant's argument, see Opinion at 22, n.9, but defendant may challenge the court's ruling on appeal if he disagrees.[4] In any event, we note that defendant's anticipatory warrant argument is undercut by the court's ruling that law enforcement had ample probable cause to arrest defendant when he exited the Greyhound bus in Pittsburgh, and if they had immediately done so, they would have been permitted to search his duffle bag incident to his arrest. Instead of immediately placing defendant

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3 Despite an earlier ruling in the court's December 2013 Opinion that the detention of defendant's duffle bag while the agent obtained a search warrant was reasonable under the circumstances, see Document No. 47, at 8-10, defendant argued that law enforcement should have obtained an anticipatory search warrant because it would have minimized the amount of time defendant and his bag were detained. Since the agent failed to obtain an anticipatory search warrant, defendant maintained that the detention was unnecessarily prolonged and the heroin should be suppressed.

4 Defendant argues that the anticipatory warrant issue is unreviewable because, in defendant's estimation, the court did not issue a ruling with findings of fact and conclusions of law. Defendant is incorrect. The court has rejected defendant's anticipatory warrant argument, finding that no Fourth Amendment violation occurred for the reasons explained in the Opinion. Although the court's ruling on this issue apparently is not in defendant's desired or preferred format, the issue is preserved for appellate review.

under arrest and searching his bag, the agents detained him while they obtained a search warrant. As this court has previously ruled, even if defendant is correct that his detention was so long that it constituted a *de facto* arrest, that arrest was supported by ample probable cause and the detention of his duffle bag was reasonable under the circumstances.

Defendant also argues that the court's conclusion that probable cause existed to arrest him when he exited the Greyhound bus is unreviewable because the court did not identify the offense for which he could have been arrested. The record in this case makes clear that the investigation of defendant involved conspiracy to distribute heroin and possession with intent to distribute heroin. See Opinion at 21 (describing why probable cause existed to arrest defendant when he exited the bus and referencing information from the confidential source regarding discussions with defendant concerning heroin and defendant's plan to transport it to Pittsburgh). To state the obvious, law enforcement had probable cause to arrest defendant for conspiracy to distribute heroin and/or possession with intent to distribute heroin.[5]

Defendant next revisits his argument concerning standing to challenge the acquisition of data location information transmitted from the cell phone associated with him. According to defendant, the court was obliged to afford him a hearing since he swore in an affidavit that he turned off his cell phone while traveling by bus from New Jersey to Pittsburgh, thus the only way law enforcement could have tracked his location was by remotely powering on his phone. The court explained in the Opinion that defendant's affidavit does not contradict the statement in the Cobb Affidavit that data location information confirmed the cell phone associated with him

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5 Defendant believes the court should make findings of fact and conclusions of law on this matter. The court previously explained its probable cause finding in its December 2013 Opinion, see Document No. 47, at 7, and repeated them in the September 2015 Opinion. See Document No. 133, at 21. Again, although the court's Opinion may not be in defendant's preferred format, the court believes it has sufficiently identified the factors which support the finding of probable cause to arrest defendant for the drug trafficking offenses with which he was charged in the superseding indictment.

traveled from New Jersey to Pittsburgh on the morning of March 20, 2013. As the court explained, although defendant claimed he turned off his cell phone, he did not submit any offer of proof or sworn statement indicating that the government remotely powered on the cell phone to track his whereabouts, other that his own unsubstantiated assertion. Defendant now submits an article suggesting that the NSA can remotely turn on a cell phone. Other than an article suggesting the government has this capability, defendant has not submitted any information to support his bald assertion that law enforcement actually powered his phone on to track his whereabouts. For reasons previously stated, the court reaffirms its conclusion that defendant does not have standing to challenge the acquisition of data location information transmitted from the cell phone associated with him, and he is not entitled to a hearing.

Defendant also claims that "[t]he law on abandonment does not support the court's factual conclusion that [he] abandoned the bag in the trunk." According to defendant, to the extent the court found that defendant abandoned his bag, the court "fails to appreciate the contemporary parlance by which urban youth communicate." See defendant's Motion at 10. Defendant asserts that his response indicating he only had compact discs in the vehicle was not meant to be an exhaustive list of his possessions in the vehicle, but rather that he was speaking in a "clipped" manner. Id. This argument relates to defendant's motion to suppress evidence from the search of a vehicle rented in another person's name, but the rental agreement had expired and the rental car company consented to a search of the vehicle.

Defendant appears to misapprehend the court's ruling on his motion to suppress evidence from the vehicle search. In accordance with United States v. Kennedy, 638 F.3d 159, 165 (3d Cir. 2011),[6] the court held that defendant lacked standing to challenge the search of the rental vehicle.

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6 In Kennedy, the Third Circuit held that the driver of a rental car who had been lent the car by the renter, but who was not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the

Nonetheless, and despite the fact that a representative of the car rental agency consented to a search of the vehicle, defendant argued that he could challenge the search of the duffle bag found in the trunk. As set forth in the court's Opinion, defendant's argument is inconsistent with Supreme Court and Third Circuit precedent. As stated in the Opinion, "closed containers in cars [can] be searched without a warrant because of their presence within the automobile . . . [and] the privacy interest in those closed containers yield[s] to the broad scope of an automobile search." California v. Acevedo, 500 U.S. 565, 572 (1991) (citing United States v. Ross, 456 U.S. 798 (1982)). Further, a defendant who fails to alert the police to his ownership interest in a bag within the vehicle that is searched ultimately does not retain an expectation of privacy. See United States v. Anderson, 859 F.2d 1171, 1177 (3d Cir. 1988).

Based on this authority, the court ruled in the Opinion that defendant lacked standing to challenge the search of the duffle bag for the following reasons: (1) as an unauthorized driver of the rental vehicle, defendant had no reasonable expectation of privacy in the vehicle or its contents; and (2) after the car rental agency representative consented to a search of the vehicle, defendant claimed that he only had compact discs in the car, not a duffle bag, thus he failed to assert any expectation of privacy in the bag.

Contrary to defendant's position, the court did not find that he abandoned the bag. Rather, as set forth in the Opinion and repeated here, the court held that defendant did not have standing to challenge the search of the rental vehicle or the bag located in the trunk. Furthermore, there was no Fourth Amendment violation because the vehicle was searched with the consent of the car rental agency representative, and that search properly extended to all containers within the vehicle.

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car unless extraordinary circumstances are present which suggest an expectation of privacy. Here, defendant was not listed on the rental agreement, he was only given permission by the renter, not the rental car company, to operate the vehicle, and no extraordinary circumstances were present, thus he lacked standing to challenge the search of the rental car.

Finally, defendant disagrees with the court's finding that the magistrate judge properly relied on information from the confidential source which was contained in the Bouye Affidavit in making the probable cause determination. According to defendant, information from the confidential source should not have been considered because it was not independently corroborated. As explained in the Opinion, the Bouye Affidavit explained the steps law enforcement took in the investigation, which served to corroborate information provided by the confidential source. See Opinion at 19, n.8. Although defendant believes that the information outlined in the Bouye Affidavit concerning the corroborating information is false or incomplete, which would entitle him to a Franks hearing, the court repeats its conclusion that defendant has not submitted any material to contradict the Bouye Affidavit, and he has not made the substantial preliminary showing required by Franks.

For the foregoing reasons, the court finds no basis to vacate its decision to deny defendant's suppression motions and his motion for a Franks hearing, nor does the court find any reason to modify, alter or amend its Opinion. Accordingly, defendant's Motion will be denied in all respects.

An appropriate order will follow.

ORDER

AND NOW, this 27th day of January, 2016, for the reasons stated in the Memorandum above, IT IS ORDERED that defendant's Motion to Vacate Judgment Denying Suppression and/or Franks Hearing, or Alternatively, to Modify, Alter or Amend Opinion (Document No. 140) be, and the same hereby is, denied.

Gustave Diamond
Gustave Diamond
United States District Judge

cc: Brendan T. Conway
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