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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1622**

State of Minnesota,
Respondent,

v.

Kenneth Davonte Smith,
Appellant.

**Filed August 7, 2017
Affirmed
Johnson, Judge**

Dakota County District Court
File No. 19HA-CR-15-4429

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, G. Paul Beaumaster, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and
Kalitowski, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Judge

The Dakota County District Court found Kenneth Davonte Smith guilty of being an ineligible person in possession of a firearm. Before trial, the district court denied Smith's motion to suppress evidence of a firearm that was found in a search of his home, which was conducted pursuant to a search warrant. Smith argues that the firearm should have been suppressed on the ground that the warrant application contained a material misstatement. We conclude that the warrant application does not contain a misstatement, that the officer who prepared the application did not act deliberately or recklessly, and that the alleged misstatement does not concern a material fact. Therefore, we affirm.

FACTS

In December 2015, Officer Werner of the Minneapolis Police Department received a tip from a confidential informant, who stated that he had been inside Smith's residence and had seen Smith with two handguns. Because Smith is not eligible to possess a firearm, Officer Werner applied to a Dakota County District Court judge for a warrant to search Smith's residence and his person. In the warrant application, Officer Werner stated:

I received information from a confidential reliable informant (CRI) regarding a party by the name of [Smith]. The CRI advised me that with in the past 72 hours they saw [Smith] with a large amount of marijuana inside his house . . . in West St. Paul. The CRI also stated that they saw [Smith] armed with a handgun. . . . The CRI also stated that [Smith] carries the gun with him to protect himself from being robbed of his drugs and money. The CRI also stated that [Smith] drives a silver Jaguar with MN license plate

Officer Werner also stated in his supporting affidavit that Smith is prohibited by law from possessing a firearm because of a prior felony conviction, that officers had seen a silver Jaguar with the same license-plate number parked in front of Smith's home, that officers had seen a person matching the informant's description of Smith leave the residence and drive away in the Jaguar, and that officers previously had had contact with Smith while he was driving the Jaguar. A judge approved the application and issued the warrant.

Police officers learned that Smith had a meeting with his probation officer that evening at 6:00 p.m. The officers decided to search his home in West St. Paul while he was at the meeting or on his way to the meeting. Officer Werner asked a West St. Paul police officer to detain Smith in a traffic stop "to assure Smith was accounted for since he is known to possess firearms" and "to assure the warrant could be executed safely."

Shortly before 5:00 p.m., police officers observed Smith walk out of his home and get inside an SUV that was parked in the driveway, which drove away with Smith in the front passenger's seat. A West St. Paul police officer stopped the SUV and removed Smith from the vehicle. A police officer searched the vehicle after smelling unburnt marijuana and observing a jar that contained marijuana on the floor on the passenger's side. The officer found a handgun under the driver's seat and more than \$1,000 in cash on Smith's person. The officer arrested Smith and transported him to the West St. Paul Police Department. Smith disclosed in an interrogation that he had a firearm on his person when arrested that was not detected during his arrest or during booking. An officer found that handgun in Smith's holding cell, inside his mattress.

Meanwhile, after Smith was detained in West St. Paul, Minneapolis police officers searched his home pursuant to the search warrant. Officers found a handgun in Smith's bedroom. While being questioned in West St. Paul, Smith admitted that the handgun found in his bedroom belonged to him.

The state charged Smith with one count of being an ineligible person in possession of a firearm, in violation of Minn. Stat. § 609.165, subd. 1b(a) (Supp. 2015). The complaint refers to both the firearm that was found in Smith's holding cell and the firearm that was found in his bedroom.

In March 2016, Smith moved to suppress evidence on the ground that the warrant application contained a misstatement of material fact. At an evidentiary hearing, the state called Officer Werner as a witness. The district court denied Smith's motion on the ground that the warrant application did not contain a misstatement.

In June 2016, Smith waived his right to a trial by jury and stipulated to the prosecution's case, and the parties agreed that the district court's pre-trial ruling would be dispositive. *See* Minn. R. Crim. P. 26.01, subd. 4. The district court found Smith guilty based on his possession of both the firearm that was found in his bedroom and the firearm that was found in his holding cell. The district court sentenced him to 60 months of imprisonment. Smith appeals.

D E C I S I O N

Smith argues that the district court erred by denying his motion to suppress evidence. He contends that the warrant application contains a misstatement that was material to the finding of probable cause.

The Fourth Amendment to the United States Constitution guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and states that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), the United States Supreme Court held that a criminal defendant may, after a warrant has been issued and executed, “challenge the truthfulness of factual statements made in an affidavit supporting the warrant.” *Id.* at 155-56, 98 S. Ct. at 2676. “A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause.” *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989). Accordingly, if a defendant seeks to invalidate a warrant under *Franks*, the defendant must show that “(1) the affiant ‘deliberately made a statement that was false or in reckless disregard of the truth,’ and (2) ‘the statement was material to the probable cause determination.’” *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (quoting *State v. McDonough*, 631 N.W.2d 373, 390 (Minn. 2001)). This court applies a clear-error standard of review to a district court’s finding on the first requirement and a *de novo* standard of review to a district court’s determination of the second requirement. *Id.*

Smith contends that Officer Werner made a misstatement of fact in the warrant application concerning Smith’s possession of a handgun.¹ In a police report, Officer

¹The district court found Smith guilty based on his possession of two firearms: the handgun found in his bedroom and the handgun found in his holding cell. Smith’s

Werner wrote that the informant told him that Smith “keeps . . . guns at his house to protect himself from being robbed of his drugs and money.” In the warrant application, Officer Werner wrote that the informant stated that he “saw [Smith] armed with a handgun” inside his home and that Smith “carries the gun with him to protect himself from being robbed of his drugs and money.” At the suppression hearing, Smith made an argument based on a subtle difference between the police report and the warrant application. Specifically, Smith argued that, in the warrant application, Officer Werner falsely stated that Smith possessed guns when *away* from home, even though the informant had told Officer Werner only that Smith possessed guns when *at* home. On cross-examination, Officer Werner confirmed that the informant did not say that Smith carried guns when away from home. On re-direct examination, Officer Werner explained his statement in the warrant application as follows: “When I say ‘carries the gun’ or ‘has the gun,’ . . . I’m referring to that he keeps it at the house, maybe carries it on him at the house, but I’m not referring to that he was carrying the gun outside the house, no.” Officer Werner explained further that, based on the informant’s tip, he believed that Smith probably possessed a firearm at his home and that the search was intended to find a firearm in Smith’s home.

The district court resolved Smith’s motion in a ruling from the bench, as follows:

There is no misstatement in Exhibit C [*i.e.*, the warrant application]. The officer has every right to determine what is the safest route to stop people, especially when there is a gun

argument on appeal goes directly to the validity of the search of his home. Smith does not explain why the district court should have suppressed the evidence of the handgun found in his holding cell. We nonetheless assume that, but for the search warrant, police officers would not have stopped the SUV in which Smith was a passenger, would not have arrested him, and would not have found the handgun in his holding cell.

involved. Even if the statement by the [informant] was that he only carries the guns in the house, in buildings, he never has it on his person, no police officer should ever rely on that when it comes to their safety or the safety of the public safety. Once a gun is heard by a police officer or by the courts and it's dealing with drugs, I would assume that every police officer will assume that at this point in time, this person is carrying a gun, because if I guess wrong, it's a bad scenario. So that will not carry the day.

In essence, the district court reasoned that if an officer knows that a suspect possesses a firearm while at home, the officer is entitled to infer that the suspect also possesses a firearm while away from home. But Officer Werner testified that he did *not* intend to say that Smith carried a firearm while away from home.

On appeal, Smith makes a slightly different argument. He argues that Officer Werner's warrant application "implied that Smith carried a gun and did not suggest that he only kept them at his house." It appears that Smith now is focusing on the distinction between, on the one hand, possessing a firearm at home by *carrying* it and, on the other hand, possessing a firearm at home by *keeping* it someplace inside the home. Smith contends that Officer Werner falsely made the former statement even though the informant had made only the latter statement.

As stated above, Smith first must show that Officer Werner "deliberately made a statement that was false or in reckless disregard of the truth." *See Andersen*, 784 N.W.2d at 327 (quotation omitted). Smith has not shown that Officer Werner made any misstatement in the warrant application by stating that Smith "carries the gun." Officer Werner's statement in the warrant application is not inconsistent with the informant's statement that Smith "keeps . . . guns at his house." It would be difficult to keep a gun at

one's home without ever carrying it. There is no evidence that Smith never carried a handgun, and there is no suggestion that some other person carried the guns into Smith's home. Given the informant's statement that Smith "keeps" guns at home, it reasonably may be inferred that Smith occasionally "carries" the guns inside the home. Thus, we agree with the district court's finding that there is no misstatement of fact in the warrant application. This conclusion is sufficient to affirm the district court's ruling on the motion to suppress evidence.

There are additional reasons why Smith is not entitled to suppression. If he could establish that Officer Werner made a misstatement, he also would need to show that the officer did so deliberately or with reckless disregard for the truth. *See id.* Mere "innocent or negligent misrepresentations will not invalidate a warrant." *Moore*, 438 N.W.2d at 105. Officer Werner testified that he did not intend to cause the judge reviewing the warrant application to believe that Smith carries guns both while at home and while away from home. Smith's attorney did not impeach that testimony during the suppression hearing. Officer Werner never was asked to explain why he used the word "carries" instead of "keeps" to describe Smith's conduct with respect to the guns in his home. The circumstances do not allow this court to infer that Officer Werner was either deliberate or reckless in making the statement about Smith's possession of guns when at home.

Furthermore, if Smith could establish the first requirement of the *Franks* test, he also would need to satisfy the second requirement by showing that "the [mis]statement was material to the probable cause determination." *See Andersen*, 784 N.W.2d at 327 (quotation omitted). "A misrepresentation or omission is material if, when the

misrepresentation is set aside or the omission supplied, probable cause to issue the search warrant no longer exists.” *Id.* If Officer Werner had used the word “keeps” instead of the word “carries,” the judge reviewing the warrant application would have had just as much reason to believe that evidence of unlawful possession of a firearm probably would be revealed by a search of Smith’s home. If anything, the judge reviewing the warrant application would have had *more* reason, not *less* reason, to approve the warrant application because the word “keeps” perhaps could be read to suggest that guns remained in the home even when Smith was away from home. In any event, Smith cannot show that, “when the misrepresentation is set aside . . . , probable cause to issue the search warrant no longer exists.” *See id.*

For all these reasons, the district court did not err by rejecting Smith’s *Franks* argument and by denying his motion to suppress evidence.

Affirmed.