Franks v. Delaware
438 U.S. 154 (1978)

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U.S. Supreme Court

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No. 77-5176

Argued February 27, 1978

Decided June 26, 1978

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CERTIORARI TO THE SUPREME COURT OF DELAWARE

Syllabus

Prior to petitioner's Delaware state trial on rape and related charges and in connection with his motion to suppress on Fourth Amendment grounds items of clothing and a knife found in a search of his apartment, he challenged the truthfulness of certain factual statements made in the police affidavit supporting the warrant to search the apartment, and sought to call witnesses to prove the misstatements. The trial court sustained the State's objection to such proposed testimony and denied the motion to suppress, and the clothing and knife were admitted as evidence at the ensuing trial, at which petitioner was convicted. The

Delaware Supreme Court affirmed, holding that a defendant under no circumstances may challenge the veracity of a sworn statement used by police to procure a search warrant.

Held: Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request. The trial court here therefore erred in refusing to examine the adequacy of petitioner's proffer of misrepresentation in the warrant affidavit. Pp. 438 U. S. 155-156; 438 U. S. 164-172.

(a) To mandate an evidentiary hearing, the challenger's attack must be more than conclusory, and must be supported by more than a mere desire to cross-examine. The allegation of deliberate falsehood or of reckless disregard must point out specifically with supporting reasons the portion of the warrant affidavit that is claimed to be false. It also must be accompanied by an offer of proof, including affidavits or sworn or otherwise reliable statements of witnesses, or a satisfactory explanation of their absence. P. 438 U. S. 171.

(b) If these requirements as to allegations and offer of proof 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, but if the remaining content is insufficient, the defendant is entitled under the Fourth and Fourteenth Amendments to a hearing. Pp. 438 U. S. 171-172.

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(c) If, after a hearing, a defendant establishes by a preponderance of the evidence that the false statement was included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause, then the search warrant must be voided, and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit. Pp. 155-156.

373 A.2d 578, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined, REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, *post,* p. 438 U. S. 180.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents an important and longstanding issue of Fourth Amendment law. Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?

In the present case the Supreme Court of Delaware held, as a matter of first impression for it, that a defendant under no circumstances may so challenge the veracity of a sworn statement used by police to procure a search warrant. We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was

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included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that, at that hearing, the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided, and the fruits of the search excluded, to the same extent as if probable cause was lacking on the face of the affidavit.

I

The controversy over the veracity of the search warrant affidavit in this case arose

in connection with petitioner Jerome Franks' state conviction for rape, kidnaping, and burglary. On Friday, March 5, 1976, Mrs. Cynthia Bailey told police in Dover, Del., that she had been confronted in her home earlier that morning by a man with a knife, and that he had sexually assaulted her. She described her assailant's age, race, height, build, and facial hair, and gave a detailed description of his clothing as consisting of a white thermal undershirt, black pants with a silver or gold buckle, a brown leather three-quarter-length coat, and a dark knit cap that he wore pulled down around his eyes.

That same day, petitioner Franks coincidentally was taken into custody for an assault involving a 15-year-old girl, Brenda B. ____, six days earlier. After his formal arrest, and while awaiting a bail hearing in Family Court, petitioner allegedly stated to Robert McClements, the youth officer accompanying him, that he was surprised the bail hearing was "about Brenda B. I know her. I thought you said Bailey. I don't know her." Tr. 175, 186. At the time of this statement, the police allegedly had not yet recited to petitioner his rights under *Miranda v. Arizona,* 384 U. S. 436 (1966).

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On the following Monday, March 8, Officer McClements happened to mention the courthouse incident to a detective, Ronald R. Brooks, who was working on the Bailey case. Tr. 186, 190-191. On March 9, Detective Brooks and Detective Larry D. Gray submitted a sworn affidavit to a Justice of the Peace in Dover, in support of a warrant to search petitioner's apartment. [Footnote 1] In paragraph 8 of the affidavit's "probable cause page," mention was made of petitioner's statement to McClements. In paragraph 10, it was noted that the description of the assailant given to the police by Mrs. Bailey included the above-mentioned clothing. Finally, the affidavit also described the attempt made by police to confirm that petitioner's typical outfit matched that of the assailant. Paragraph 15 recited:

"On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people."

Paragraphs 16 and 17 respectively stated:

"Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket,"

and

"Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat."

The warrant was issued on the basis of this affidavit. App. 9. Pursuant to the warrant, police searched petitioner's apartment and found a white thermal undershirt, a knit hat, dark pants, and a leather jacket, and, on petitioner's kitchen table, a single-blade knife. All these ultimately were introduced in evidence at trial.

Prior to the trial, however, petitioner's counsel filed a written motion to suppress the clothing and the knife found in the search; this motion alleged that the warrant, on its face, did not show probable cause, and that the search and seizure were

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in violation af the Fourth and Fourteenth Amendments. *Id.* at 11-12. At the hearing on the motion to suppress, defense counsel orally amended the challenge to include an attack on the veracity of the warrant affidavit; he also specifically requested the right to call as witnesses Detective Brooks, Wesley Lucas of the Youth Center, and James D. Morrison, formerly of the Youth Center. [Footnote 2] *Id.* at 14-17. Counsel asserted that Lucas and Morrison would testify that neither had been personally interviewed by the warrant affiants, and that, although they might have talked to another police officer, any information given by them to that officer was "somewhat different" from what was recited in the affidavit. *Id.* at 16. Defense counsel charged that the misstatements were included in the affidavit not inadvertently, but in "bad faith." *Id.* at 25. Counsel also sought permission to call Officer McClements and petitioner as witnesses, to seek to establish that petitioner's courthouse statement to police had been obtained in violation of petitioner's Miranda rights, and that the search warrant was thereby tainted as the fruit of an illegally obtained confession. *Id.* at 17, 27.

In rebuttal, the State's attorney argued in detail, App. 124, (a) that Del. Code Ann., Tit. 11, §§ 2306, 2307 (1974), contemplated that any challenge to a search warrant was to be limited to questions of sufficiency based on the face of the affidavit; (b) that, purportedly, a majority of the States whose

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practice was not dictated by statute observed such a rule; [Footnote 3] and (c) that federal cases on the issue were to be distinguished because of Fed.Rule Crim.Proc. 41(e). [Footnote 4] He also noted that

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this Court had reserved the general issue of subfacial challenge to veracity in *Rendorf v. United States,* 376 U. S. 528, 376 U. S. 531-532 (1964), when it disposed of that case on the ground that, even if a veracity challenge were permitted, the alleged factual inaccuracies in that case's affidavit

"were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."

Id. at 376 U. S. 532. The State objected to petitioner's "going behind [the warrant affidavit] in any way," and argued that the court must decide petitioner's motion "on the four corners" of the affidavit. App. 21.

The trial court sustained the State's objection to petitioner's proposed evidence. *Id.* at 25, 27. The motion to suppress was denied, and the clothing and knife were admitted as evidence at the ensuing trial. Tr.192-196. Petitioner was convicted. In a written motion for judgment of acquittal and/or new trial, Record Doc. No. 23, petitioner repeated his objection to the admission of the evidence, stating that he

"should have been allowed to impeach the Affidavit used in the Search Warrant to show purposeful misrepresentation of information contained therein."

Id. at 2. The motion was denied, and petitioner was sentenced to two consecutive terms of 25 years each and an additional consecutive life sentence.

On appeal, the Supreme Court of Delaware affirmed. 373 A.2d 578 (1977). It agreed with what it deemed to be the "majority rule" that no attack upon the veracity of a warrant affidavit could be made:

"We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are

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more properly considered in a trial on the merits."

Id. at 580. Because of this resolution, the Delaware Supreme Court noted that there was no need to consider petitioner's "other contentions, relating to the evidence that would have been introduced for impeachment purposes." *Ibid.*

Franks' petition for certiorari presented only the issue whether the trial court had erred in refusing to consider his allegation of misrepresentation in the warrant affidavit. [Footnote 5] Because of the importance of the question, and because of the conflict among both state and federal courts, we granted certiorari. 434 U.S. 889 (1977).

II

It may be well first to note how we are compelled to reach the Fourth Amendment issue proffered in this case. In particular, the State's proposals of an independent and adequate state ground and of harmless error do not dispose of the controversy.

Respondent argues that petitioner's trial counsel, who is not the attorney representing him in this Court, failed to include the challenge to the veracity of the warrant affidavit in the written motion to suppress filed before trial, contrary to the requirement of Del.Super.Ct.Rule Crim.Proc. 41(e) that a motion to suppress

"shall state the grounds upon which it is made." The Supreme Court of Delaware, however, disposed of petitioner's Fourth Amendment claim on the merits. A ruling on the merits of a federal question by the highest state court leaves the federal question open to review

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in this Court. *Manhattan Life Ins. Co. v. Cohen,* 234 U. S. 123, 234 U. S. 134 (1914); *Raley v. Ohio,* 360 U. S. 423, 360 U. S. 436-437 (1959); *Boykin v. Alabama,* 395 U. S. 238, 395 U. S. 241-242 (1969).

Respondent next suggests that any error here was harmless. Assuming, *arguendo,* respondent says, that petitioner's Fourth Amendment claim was valid, and that the warrant should have been tested for veracity and the evidence excluded, it is still clear beyond a reasonable doubt that the evidence complained of did not contribute to petitioner's conviction. *Chambers v. Maroney,* 399 U. S. 42, 399 U. S. 52-53 (1970). This contention falls of its own weight. The sole issue at trial was that of consent. Petitioner admitted, App. 37, that he had engaged in sexual relations with Mrs. Bailey on the day in question. She testified, Tr. 50-51, 69-70, that she had not consented to this, and that petitioner, upon first encountering her in the house, had threatened her with a knife to force her to submit. Petitioner claimed that she had given full consent, and that no knife had been present. *Id.* at 254, 271. To corroborate its contention that consent was lacking, the State introduced in evidence a stainless steel, wooden-handled kitchen knife found by the detectives on the kitchen table in petitioner's apartment four days after the alleged rape. *Id.* at 195-196; Magistrate's Return on the Search Warrant March 9, 1976, Record Doc. No. 23. Defense counsel objected to its admission, arguing that Mrs. Bailey had not given any detailed description of the knife alleged to be involved in the incident, and had claimed to have seen the knife only in "pitch blackness." Tr.195. The State obtained its admission, however, as a knife that matched the description contained in the search warrant, and Mrs. Bailey testified that the knife allegedly used was, like the knife in evidence, single-edged and not a pocket knife, and that the knife in evidence was the same length and thickness as the knife used in the crime. *Id.* at 69, 114-115. The State carefully elicited from Detective Brooks the fact that this was the only knife found in petitioner's

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apartment. *Id.* at 196. Although respondent argues that the knife was presented to the jury as "merely exemplary of the generic class of weapon testimonially described by the victim," Brief for Respondent 15-16, the State at trial clearly meant to suggest that this was the knife that had been used against Mrs. Bailey. Had the warrant been quashed, and the knife excluded from the trial as evidence, we cannot say with any assurance that the jury would have reached the same decision on the issue of consent, particularly since there was countervailing evidence on that issue.

We should note, in addition, why this case cannot be treated as was the situation in *Rugendorf v. United States.* There, the Court held that no Fourth Amendment question was presented when the claimed misstatements in the search warrant affidavit

"were of only peripheral relevancy to the showing of probable cause, *and,* not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."

376 U.S. at 532 (emphasis added). *Rugendorf* emphasized that the "erroneous statements . . . were not those of the affiant," and thus "fail[ed] to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." *Id.* at 376 U. S. 533. [Footnote 6] Here,

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whatever the judgment may be as to the relevancy of the alleged misstatements, the integrity of the affidavit was directly placed in issue by petitioner in his allegation that the affiants did not, as claimed, speak directly to Lucas and Morrison. Whether such conversations took place is surely a matter "within the personal knowledge of the affiant[s]." We also might note that, although respondent's brief puts forth that the alleged misrepresentations in the affidavit were of little importance in establishing probable cause, Brief for Respondent 16, respondent, at oral argument, appeared to disclaim any reliance on *Rugendorf.* Tr. of Oral Arg. 30.

III

Whether the Fourth and Fourteenth Amendments, and the derivative exclusionary rule made applicable to the States under *Mapp v. Ohio,* 367 U. S. 643 (1961), ever mandate that a defendant be permitted to attack the veracity of a warrant affidavit after the warrant has been issued and executed, is a question that encounters conflicting values. The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search. In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N] o Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." Judge Frankel, in *United States v. Halsey,* 257 F.Supp. 1002, 1005 (SDNY 1966), *aff'd,* Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply:

"[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a

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'*truthful* showing' (emphasis in original). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law, *see Nathanson v. United States,* 290 U. S. 41, 290 U. S. 47 (1933); *Giordenello v. United States,* 357 U. S. 480, 357 U. S. 485-486 (1958); *Aguilar v. Texas,* 378 U. S. 108, 378 U. S. 114-115 (1964), that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite 'some of the underlying circumstances from which the informant concluded' that relevant evidence might be discovered, and"

"some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible,' or his information 'reliable.'"

Id. at 378 U. S. 114. Because it is the magistrate who must determine independently whether there is probable cause, *Johnson v. United States,* 333 U. S. 10, 333 U. S. 13-14 (1948); *Jones v. United States,* 362 U. S. 257, 362 U. S. 270-271 (1960), it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment.

In saying this, however, one must give cognizance to competing values that lead us to impose limitations. They perhaps can best be addressed by noting the arguments of respondent and others against allowing veracity challenges. The arguments are several:

First, respondent argues that the exclusionary rule, created in *Weeks v. United States,*

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personal constitutional right, but only a judicially created remedy extended where its benefit as a deterrent promises to outweigh the societal cost of its use; that the Court has declined to apply the exclusionary rule when illegally seized evidence is used to impeach the credibility of a defendant's testimony, *Walder v. United States,* 347 U. S. 62 (1954), is used in a grand jury proceeding, *United States v. Calandra,* 414 U. S. 338 (1974), or is used in a civil trial, *United States v. Janis,* 428 U. S. 433 (1976); and that the Court similarly has restricted application of the Fourth Amendment exclusionary rule in federal habeas corpus review of a state conviction. *See Stone v. Powell,* 428 U. S. 465 (1976). Respondent argues that applying the exclusionary rule to another situation -- the deterrence of deliberate or reckless untruthfulness in a warrant affidavit -- is not justified for many of the same reasons that led to the above restrictions; interfering with a criminal conviction in order to deter official misconduct is a burden too great to impose on society. Second, respondent argues that a citizen's privacy interests are adequately protected by a requirement that applicants for a warrant submit a sworn affidavit

and by the magistrate's independent determination of sufficiency based on the face of the affidavit. Applying the exclusionary rule to attacks upon veracity would weed out a minimal number of perjurious government statements, says respondent, but would overlap unnecessarily with existing penalties against perjury, including criminal prosecutions, departmental discipline for misconduct, contempt of court, and civil actions. Third, it is argued that the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit supporting a warrant application. He may question the affiant, or summon other persons to give testimony at the warrant proceeding. The incremental gain from a post-search adversary proceeding, it is said, would not be great.

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Fourth, it is argued that it would unwisely diminish the solemnity and moment of the magistrate's proceeding to make his inquiry into probable cause reviewable in regard to veracity. The less final, and less deference paid to, the magistrate's determination of veracity, the less initiative will he use in that task. Denigration of the magistrate's function would be imprudent insofar as his scrutiny is the last bulwark preventing any particular invasion of privacy before it happens.

Fifth, it is argued that permitting a post-search evidentiary hearing on issues of veracity would confuse the pressing issue of guilt or innocence with the collateral question as to whether there had been official misconduct in the drafting of the affidavit. The weight of criminal dockets, and the need to prevent diversion of attention from the main issue of guilt or innocence, militate against such an added burden on the trial courts. And if such hearings were conducted routinely, it is said, they would be misused by defendants as a convenient source of discovery. Defendants might even use the hearings in an attempt to force revelation of the identity of informants.

Sixth and finally, it is argued that a post-search veracity challenge is inappropriate because the accuracy of an affidavit, in large part, is beyond the control of the affiant. An affidavit may properly be based on hearsay, on fleeting observations, and on tips received from unnamed informants whose identity often will be properly protected from revelation under *McCray v. Illinois,* 386 U. S. 300 (1967).