

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>Criminal No. 05-81-P-H</b>
	)	
<b>JUAN CASTILLO,</b>	)	
	)	
<b>Defendant</b>	)	

**MEMORANDUM DECISION ON MOTION FOR RECONSIDERATION**

The defendant, Juan Castillo, moves for reconsideration of my denial, Docket No. 34, of the motion for a *Franks*<sup>1</sup> hearing that was embedded in his motion to suppress, Motion to Suppress Evidence (“First Motion”) (Docket No. 27) at 5-7. Motion to Reconsider *Franks* Motion (“Reconsideration Motion”) (Docket No. 40) at 1. I deny this motion as well.

It is readily apparent that the motion to reconsider raises arguments not asserted in the first motion.

That motion asserted the following grounds for a *Franks* hearing:

In his affidavit [submitted in support of an application for a search warrant], Officer Stanton tells the issuing judge that (1) according to neighbors, there was a large amount of foot traffic in and out of the residence generally, and (2) there were several people who visited the residence for short periods of time on July 14, 2004. . . . According to the affidavit of Luemily Melendez, and the defendant, there was only one visitor to 187 Pine Street on July 14, 2004.

Paragraph 10 of the affidavit tells that the residence at 187 Pine Street was “secured.” The affidavit fails to inform the magistrate that the house was forcibly entered, without the consent of the inhabitants. Paragraph 10 goes on to say that Arroyo was advised of his Miranda rights and agreed to waive those rights. The

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<sup>1</sup> *Franks v. Delaware*, 438 U.S. 154 (1978).

affidavit of Juan Castillo specifies that he was not read Miranda and did not, at any time, waive his Miranda rights. Paragraph 10 states that Castillo admitted that he was in possession of cocaine and directed Agent MacVane to a closet, where Agent MacVane found some cocaine. . . . The affidavit of Castillo indicates that he did not admit that he was in possession of cocaine and did not direct Agent MacVane to the closet and consent to a search of the closet.

First Motion at 6-7 (footnote omitted). The current motion asserts the following grounds for a *Franks*

hearing:

In paragraph 6 of the affidavit for search warrant, the affiant claims that Phillip Tarmey, when he exited 187 Pine Street, was carrying “what appeared to be a plastic baggie.” Mr. Tarmey refutes this in his own affidavit, in paragraph 9, when he states that “I did not have a plastic bag in my hand when I exited 187 Pine Street.” He also states, in paragraph 8, that he did not obtain cocaine at 187 Pine Street and, in paragraph 7, that he had his keys in his hand when he exited 187 Pine Street. . . .

Barbara Tatu corroborates Mr. Tarmey’s story in her affidavit . . . where she states that she was asked to give Mr. Tarmey a ride to 187 Pine Street to get his keys . . . .

\* \* \*

In paragraph 9 of the affidavit for search warrant, the affiant claims that Phillip Tarmey told the police that he bought the cocaine that was in his pocket from 187 Pine Street during his “recent brief visit there.” Phillip Tarmey flatly denies this in his affidavit.

Reconsideration Motion at 2-3.

As the First Circuit has noted,

[i]t is generally accepted that a party may not, on a motion for reconsideration, advance a new argument that could (and should) have been presented prior to the district court’s original ruling. This principle has deep prudential roots. Litigants normally must frame the issues in a case before the trial court rules. After that point, a litigant should not be allowed to switch from theory to theory like a bee in search of honey.

*Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir. 2003) (citations omitted). Perhaps anticipating

this problem, the defendant asserts that “[a]t the time that the initial pleadings were filed by the defense,

Phillip Tarmey, despite the efforts of the defense private investigator, had not been located and interviewed.” Reconsideration Motion at 1-2. The interview of Tarmey, the motion goes on to assert, “lead [sic] to the interview of Barbara Tatu.” *Id.* at 2.

The docket of this case shows that the current attorney for the defendant was appointed on October 3, 2005. Docket No. 7. A motion for funds for a private investigator was filed on October 14, 2005. Docket No. 25 (sealed). The first motion for a *Franks* hearing was filed the next day. Docket No. 27. The motion for funds was granted in part on November 8, 2005. Docket No. 29 (sealed). The motion for a *Franks* hearing was denied on December 14, 2005. Docket No. 34. The instant motion for reconsideration was filed on January 18, 2006. Docket No. 40. This motion offers no reason why it was necessary to file the first motion for a *Franks* hearing before the investigator could possibly have begun his or her work; it does not offer the date on which either Tarmey or Tatu was located or interviewed. This motion was filed over two months after the funds for the investigator were approved. No explanation of this lapse of time has been provided.

Were I not inclined to deny the motion for reconsideration under *Cochran*, I would nonetheless deny the motion on its merits. As the First Circuit teaches,

[a] *Franks* hearing is required only if the defendant makes a substantial preliminary showing (1) that a false statement in the affidavit has been made knowingly and intentionally,<sup>2</sup> and (2) that the false statement is necessary for the finding of probable cause. The defendant’s offer of proof must be more than conclusory . . . .

*United States v. Scalia*, 993 F.2d 984, 986-87 (1st Cir. 1993) (citations and internal quotation marks omitted). With respect to the first statement in Stanton’s affidavit now challenged by the defendant, neither

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<sup>2</sup> The *Franks* opinion allows impeachment of “a deliberately or recklessly false statement” in an affidavit submitted in (continued on next page)

Tarmey's nor Tatu's affidavits demonstrates that Stanton's statement was false. Affidavit of Phillip Tarmey ("Tarmey Aff.") (Exh. 4 to Reconsideration Motion) ¶ 9 ("I did not have a plastic bag in my hand when I exited 187 Pine Street"); Affidavit of Barbara Tatu (Exh. 5 to Reconsideration Motion) ¶¶ 12-13 ("I did not notice that Phillip Tarmey had anything in his hands when he got into my car;" "I did not see a plastic bag in Phillip Tarmey's hand" at that time). Stanton stated that "MacVane observed the white male [Tarmey] carrying what seemed to be a plastic baggie." Application and Affidavit for Search Warrant ("Stanton Aff.") (Exh. 1 to Government's Objection to Defendant's Motion to Suppress, etc. ("Objection") (Docket No. 32)) ¶ 6. The alleged fact that what Tarmey was actually carrying was a set of keys does not make the statement of MacVane's observation, as phrased, false. Even if that were the case, the defendant has made no attempt to show that Stanton's statement was made "knowingly and intentionally."

With respect to the second statement challenged by the defendant, Stanton's affidavit states that "Tarmey told agents that he purchased the cocaine, which was recovered from his pocket[,] from 187 Pine Street during his recent brief visit." Stanton Aff. ¶ 9. Tarmey's affidavit certainly denies that he made any such statement. Tarmey Aff. ¶ 14 ("I did not, at any time, tell the police that I bought the cocaine that was in my pocket during my recent visit to 187 Pine Street.").<sup>3</sup> Again, the reconsideration motion makes no reference to the requirement that the defendant make a showing that the challenged statement was "knowingly and intentionally" false.

The defendant must offer direct evidence of the affiant's state of mind or inferential evidence that the affiant had obvious reasons for omitting facts in order to prove deliberate falsehood or reckless disregard.

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support of a search warrant. 438 U.S. at 165.

<sup>3</sup> The defendant also asserts that a statement given to Stanton by Tarmey, which was included "in the affidavit for search warrant," states "that the reason that [Tarmey] went to 187 Pine Street that day was to get his keys." Reconsideration Motion at 2. This information accordingly cannot be said to have been kept from the state judge or justice of the peace who granted the search warrant.

*United States v. Skinner*, 972 F.2d 171, 177 (7th Cir. 1992) (citation and internal quotation marks omitted). Here, the defendant offers no direct evidence of Stanton's state of mind. He presumably expects the court to infer the existence of knowledge that the statement was false when made from Tarmey's denial. Assuming *arguendo* that this dubious inference is sufficient under applicable case law, the defendant's submission still fails to meet the final requirement of *Scalia*, that the allegedly false statement was necessary to the finding of probable cause.

In this case, Stanton's affidavit is sufficient to support a finding of probable cause without the assertion that Tarmey said, in connection with MacVane's discovery of cocaine in his pocket, that he had purchased the cocaine "during his recent brief visit" to 187 Pine Street. Without that statement, the affidavit provides the following information: (i) a confidential source advised that two males of Dominican descent were selling large amounts of cocaine from 187 Pine Street; (ii) neighbors of 187 Pine Street said that an unusual amount of vehicular and pedestrian traffic, involving short visits at all hours of the day and night, was taking place at that address; (iii) Tarmey visited 187 Pine Street for approximately 3 minutes and left carrying something in his hand and was shortly thereafter found to have cocaine in a plastic bag in his pocket; (iv) when officers stopped the car which Tarmey had entered after leaving 187 Pine Street, Tarmey moved about the interior in a furtive manner; (v) when asked to "turn over your cocaine," Tarmey stated, "It's in my pocket," from which MacVane recovered approximately one gram of cocaine; (vi) another agent advised that Tarmey was known by the Maine Drug Enforcement Agency to be involved with the distribution of cocaine in the Lewiston-Auburn area; and (vii) an anonymous source stated that a Dominican male at 187 Pine Street was trafficking in drugs and was in possession of a firearm. Stanton Aff. ¶¶ 2-3, 5-9, 11-12. This is sufficient information to provide probable cause to believe that cocaine, records relating to drug

trafficking, money obtained from the sale of scheduled drugs and drug paraphernalia, *id.* at [6], would be found at 187 Pine Street.

For the foregoing reasons, the motion for reconsideration is **DENIED**.

Dated this 26th day of January, 2006.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Defendant**

**JUAN CASTILLO (1)**  
*also known as*  
**LUIS ARROYO, JR (1)**

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