

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

v.

07-CR-97-S

DAVID R. CARMEL,

Defendant.

On August 10, 2007, defendant David Carmel filed a motion to quash the state search warrant and to suppress all evidence derived from it. Carmel requested a *Franks* hearing¹ on his motion, alleging that the affiant intentionally or reckless omitted two material facts from the warrant affidavit. *See* dkt. 18. The government objected to the hearing request, so on August 14, 2007 I held a recorded telephonic hearing at which both sides presented their positions. Having carefully considered Carmel's arguments, I conclude that he has not crossed the high threshold that would entitle him to a *Franks* hearing.

It is Carmel's burden to make a substantial preliminary showing that: (1) the challenged search warrant affidavit contained false material statements or omitted material facts; (2) the affiant made the false statement(s) or omitted the material fact(s) intentionally or with reckless disregard for the truth; and (3) these false statements/omitted facts were necessary to support the court's finding of probable cause. *See Franks*, 438 U.S. at 155-56. "These elements are hard to prove and thus *Franks* hearings are rarely held." *United States v. Swanson*, 210 F.3d 788, 791 (7th Cir. 2000).

¹ *See Franks v. Delaware*, 438 U.S. 154 (1978).

In his affidavit in support of the challenged search warrant, Chippewa County Sheriff's Investigator Chad Holum stated that agents located in Carmel's car two "top handles" made for M16 machine guns, and reported, "based on his training in the Marine Corps and in law enforcement" that "without this part, the M16 would be unable to function" In the next paragraph, Investigator Holum reported that Carmel had reported possessing one machine gun, an MG M-119 and stated that he (Carmel) possessed a license for this weapon from the ATF. *See* Exh. 1 to dkt. 18.

Carmel now contends that these statements by Investigator Holum are compromised by material omissions: first, the M16 machine gun has a legal cousin, the semiautomatic AR15, which accepts top handles from an M16. Second, Carmel was telling the truth about the MG M-119: it *was* licensed by ATF. Had Investigator Holum reported these facts, they would have undermined the probable cause for the warrant.

I agree with Carmel that it would be material for the court to know that top handles for illegal M16s can be used on legal AR15s, but Carmel has not made a substantial preliminary showing that Investigator Holum actually knew this or that he intentionally or recklessly failed to include this information in his affidavit. Maybe he should have known this but didn't; maybe he did know that AR15s are cousins of M16s but didn't know the top handles are interchangeable, or maybe some other factor known to him but not contained in his affidavit corroborated his view that this handle only would fit an M16 and was not suitable for an AR15. We don't know which of these possibilities is true; we don't even know which is most likely,

notwithstanding Investigator Holum's claim of expertise regarding M16s. Although this is a close call, I conclude that Carmel is not entitled to take evidence on this point.

Carmel's second claimed omission is not as close a call. By reporting Carmel's claim that his M-119 was registered and legal, Investigator Holum placed material exculpatory information before the court. Investigator Holum did not state or imply that Carmel was lying. His failure to investigate whether Carmel's claim actually was true would be at most negligence; his failure to report a finding (if he made one) that Carmel's claim was true could not be material because it merely would be corroboration of a statement that stood uncontradicted in the affidavit. Therefore, Carmel is not entitled to take evidence on this point, either.

Entered this 14th day of August, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge