

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

UNITED STATES OF AMERICA,)
)
 Plaintiff,) **No. S1-4:06CR00337 CEJ/MLM**
 v.)
)
 BETONSPORTS PLC, et al.,)
)
 Defendants.)
 _____)

**GOVERNMENT’S RESPONSE TO DEFENDANT PENELOPE A. TUCKER’S
MOTION TO COMPEL SPECIFIC MATERIAL
PURSUANT TO *FRANKS V. DELAWARE***

The United States, through counsel undersigned, hereby responds to defendant Penelope A. Tucker’s Motion to Compel Specific Material Pursuant to Franks v. Delaware, (Doc. #504).

Defendant Penelope A. Tucker has moved this Court to compel the government to provide information relating to the credibility of the confidential sources who were referred to in the Applications and Affidavits for Search Warrants for the searches of the premises located at 18305 and 18325 SW 150th Court, Miami, Florida. The basis of Tucker’s argument is that language in the affidavit of FBI Special Agent David O. Rizi relating to two Confidential Sources asserted that each of these informants had “provided reliable information in the past and had never been proven to be knowingly wrong in the information provided to law enforcement.” Tucker suggests that the use of this language “leaves the impression” that these informants have provided false information in the past. Tucker is seeking discovery of information relating to these informants to provide the basis for contending that the affidavits used to obtain these warrants were based on false statements, pursuant to Franks v. Delaware, 438 U.S. 154 (1978).

Tucker does not state any authority for this request other than general references to Rule 16 of the Federal Rules of Criminal Procedure; Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); and Franks v. Delaware, 438 U.S. 154 (1978). The government previously has informally advised counsel for Tucker that there are no materials subject to disclosure under Rule 16 that indicate that the Confidential Sources ever knowingly gave law enforcement agents false information.

On September 12, 2007, counsel for Tucker sent a letter to counsel for the government requesting the information regarding the Confidential Sources that is sought in Tucker's Motion to Compel Specific Information Material Pursuant to Franks v. Delaware. A copy of this letter is attached hereto as Exhibit 1. Counsel for the government responded to this letter on September 12, 2007, saying that it was the position of the United States that the requested information was not exculpatory as to Tucker, and was therefore not covered by Brady. In addition, because it was unlikely that either Confidential Source would be called as a witness at trial, Giglio did not apply. A copy of this response is attached hereto as Exhibit 2.

Counsel for Tucker replied to the government's response on September 19, 2007. In this reply, counsel for Tucker informed the government that it was seeking the requested information in order to raise issues under Franks as well as for trial purposes. A copy of this reply is attached hereto as Exhibit 3. Counsel for the government responded to this reply on September 19, 2007, and reiterated the government's position that it had no materials that indicate that the Confidential Sources ever gave law enforcement agents false information, and that the government is not aware of any materials that would support a Franks hearing regarding Special Agent Rizi's Affidavit. A copy of this response is attached hereto as Exhibit 4.

The government has found three cases in which similar requests for information relating to informants whose statements provided the basis for search warrants were rejected by the courts. In United States v. Morris, 2006 WL 2092373 (N.D. Ill. 2006), the defendant in a drug case moved to compel the identity of the confidential informant described in an affidavit used to obtain a search warrant. According to the defendant, the information provided by the informant was false, and he was entitled to obtain discovery in order to make a preliminary showing under Franks.

The court rejected this request and first noted that it was the government's position that evidence that a third party lied to the affiant of a search warrant application does not constitute a Franks violation. The government pointed out the Seventh Circuit's decision in United States v. Jones, 208 F.3d 603, 607 (7th Cir. 2000), where the court said:

[T]he fact that a third party lied to the affiant, who in turn included the lies in a warrant affidavit, does not constitute a Franks violation. A Franks violation occurs only if the affiant knew the third party was lying, or if the affiant proceeded in reckless disregard of the truth.

Id. at 607.

The Eighth Circuit has also held that there is no Franks violation if the confidential informant who provided allegedly false information was not a government agent. United States v. Hollis, 245 F.3d 671, 673-74 (8th Cir. 2001); United States v. Baker, 907 F.2d 53, 54 (8th Cir. 1990). This holding finds support in the Supreme Court's opinion in Franks, where the Court said, "The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." Id. at 171.

The court in Morris ultimately rejected the defendant's request for disclosure of the identity of the informant on the grounds that there was no showing that the allegedly false

statement was necessary for the finding of probable cause, and the balancing test established by the Supreme Court in Roviaro v. United States, 353 U.S. 53, 62-63 (1957), for disclosure of information relating to informants was weighted in favor of confidentiality. Morris at *4.

In United States v. Ross, 2006 WL 938535 (E.D. Pa. 2006), a defendant in a drug case sought the identity of and information concerning an informant who told a detective that the defendant was dealing drugs. The court in Ross also found that the warrant could be sustained without the allegedly false information from the informant, and that under Roviaro there was no basis for providing the requested information to the defendant. Ross at *7 and *14.

Finally, in United States v. Harding, 273 F.Supp. 2d 411 (S.D.N.Y 2003), a defendant in a child pornography case contended that the affiant for a search warrant deliberately omitted evidence that an informant was biased against the defendant, that the informant was motivated by a desire for public notoriety, that the informant provided unreliable computer printouts to the affiant, and that a photograph which the informant provided to the affiant was not a photograph of the defendant. The court concluded that none of these allegations were sufficient to create a need for a Franks hearing. Id. at 425-28.

The court then addressed the defendant's request for discovery of all documents from the informant which the government obtained before it sought the search warrant. The defendant requested these materials under Rule 16(a)(1)(E)(i) of the Federal Rules of Criminal Procedure on the theory that they were material to the preparation of the defense's pretrial motion to suppress the evidence seized during the search of his apartment. The court rejected this request, as follows:

As discussed earlier, Harding failed to sustain his burden under Franks v. Delaware to make a substantial preliminary showing that he is entitled to a

hearing concerning whether Castro [the affiant] knowingly or with reckless disregard for the truth made material false statements or omissions in his search warrant affidavit. Absent that showing, Harding is not entitled to wide-ranging discovery to canvass for evidence in support of his motion to suppress. Accordingly, the discovery request is denied.

Id. at 430.

In Franks, the Supreme Court recognized that a hearing to determine whether an affidavit for a search warrant contained statements which were deliberately false or made with reckless disregard for the truth had the potential to be abused by defendants. In order to prevent such abuse, the Supreme Court required an offer of proof as to which specific portion of the affidavit is false, and a statement of supporting reasons. According to the Supreme Court, “[t]he requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction.” Id. at 170.

Tucker has not made a specific showing that anything in the affidavit used to obtain the search warrant was knowingly false or made in reckless disregard for the truth. She should not be permitted to use the procedure established by the Supreme Court in Franks to obtain discovery in excess of that provided by the Federal Rules of Criminal Procedure, Brady, and Giglio. Information regarding the Confidential Sources is privileged, and Tucker has not made the requisite showing to break that privilege. United States v. Crenshaw, 359 F.3d 977, 1004-05 (8th Cir. 2004). This Court should overrule Tucker’s Motion to Compel Specific Material Pursuant to Franks v. Delaware.

Respectfully submitted,

MICHAEL W. REAP
Acting United States Attorney

/s/ Michael K. Fagan

MICHAEL K. FAGAN, #6617
Assistant United States Attorney

/s/ Steven A. Muchnick

STEVEN A. MUCHNICK, #3905
Assistant United States Attorney
111 South 10th Street, Room 20.333
St. Louis, Missouri 63102
(314) 539-2200

/s/ Marty Woelfle

MARTY WOELFLE, AZ #009363
Trial Attorney, U.S. Department of Justice
Organized Crime & Racketeering Section
(202) 353-2373

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2007, the foregoing was filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Paul D'Agrosa
Law Offices of Wolff & D'Agrosa
[DME Global Mktg. & Fulfillment;
Direct Marketing Expertise, Inc.;
Mobile Promotions, Inc.]

Tim Evans
Evans, Grady, Daniel & Moore
[David Carruthers]

N. Scott Rosenblum
Adam Fein
Gilbert Sison
Rosenblum, Schwartz, Rogers & Glass
[David Carruthers]

Brian Steel
The Steel Law Firm
[Neil Kaplan]

Susan S. Kister
Susan S. Kister, P.C.
[Neil Kaplan]

Steve LaCheen
Anne Dixon
LaCheen Dixon Wittels & Greenberg LLP
[Tim Brown]

Alan Ross
Robbins, Tunkey, Ross, Amsel, Raben,
Waxman & Eiglarsh, PA
[William Hernan Lenis]

Burton H. Shostak
Moline, Shostak & Mehan, LLC

[William Luis Lenis]

J. David Bogenschutz
Bogenschutz, Dutko & Kroll, P.A.
[Monica Lenis]

Rick Sindel
Sindel Sindel & Noble, PC
[Manny Gustavo Lenis]

Robert Katzberg
Kaplan & Katzberg
[Lori Kaplan Multz]

James F. Bennett, Esq.
Edward Dowd, Esq.
Robert F. Epperson, Jr.
Dowd, Bennett LLP
[Lori Kaplan Multz]

Jeffrey T. Demerath
Armstrong Teasdale LLP
[BETONSPORTS PLC]

Jonathan Bach
Cooley Godward Kronish, LLP
[BETONSPORTS PLC]

Chris Flood
Flood & Flood
[Gary Kaplan]

Dick DeGuerin
DeBuerin Dickson & Hennessy
[Gary Kaplan]

Barry A. Short
Evan Z. Reid
Steven D. Hall
Lewis, Rice & Fingersh, L.C.
[Gary Kaplan]

Samuel J. Buffone
Ryan M. Malone
Ropes & Gray LLP
[Gary Kaplan]

Michael J. Rosen
Michael J. Rosen, PA
[Penelope Tucker]

Larry D. Hale
the Hale Law Firm
[Penelope Tucker]

/s/ Steven A. Muchnick _____