

**UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

MONTI L. BELOT
Judge

111 U.S. Courthouse
401 N. Market
Wichita, Kansas 67202
(316) 269-6519

May 5, 2005

ALL COUNSEL OF RECORD

Re: United States v. Morin
Case No. 05-10019-01

Dear Counsel:

Now that the government has filed its response to defendant's amended motion to suppress, I have turned my attention to this case which apparently is set for trial next week. I say "apparently" because the second superseding indictment was filed on May 3. However, the only amendment I can see is an increase in the amount of methamphetamine alleged in count two. I assume the government will have presented Mr. Henry with an updated report. In the absence of a motion to continue the trial, I'm going to assume that it will go forward.

I have reviewed defendant's motion to dismiss count three (Doc. 18). I realize this motion is filed simply for the purpose of preserving an argument and I'll probably simply deny it in a short order indicating as much. Let me know if this assumption is incorrect.

This leaves defendant's amended motion to suppress, the thrust of which is "the probable cause purportedly contained in the affidavit [of Ronnie Light] was based almost exclusively on the accusations of a recently-arrested drug addict, and other un-named confidential informants whose reliability was not established in any way in the affidavit." After reviewing the amended motion, I'm struggling with the decision whether to hold a Franks hearing. The amended motion alludes to this concern only once: "Finally, with respect to whether this court would hold a Franks hearing, defendant submits the material omissions made in this affidavit as to the surrounding circumstances, and the lack of any evidence of reliability of these individuals, would support the holding of a Franks hearing. The only evidence contained in the affidavit, apart from the hearsay accusations by arrested methamphetamine addicts, is the 'controlled buy.' Yet, that has no connection to defendant's residence that was searched." Defendant cites no Tenth Circuit authority that these sorts of claims are sufficient to require a Franks hearing.

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Defendant does cite United States v. McKissick, 204 F.3d 1282, 1297 (10th Cir. 2000) for its statement that "under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the district court is required to hold a hearing on the veracity of the affidavit supporting a warrant 'if the defendant makes a substantial showing that the affidavit contains intentional or reckless false statements and if the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause.'" Defendant's motion is not based on false statements. Moreover, both Franks and the Tenth Circuit require an additional specific showing before the district court will be required to conduct a Franks hearing. As recently as 2004, the Circuit stated in United States v. Artez, 389 F.3d 1106, 1116, as follows:

Under Franks v. Delaware, a defendant may request an evidentiary hearing regarding the veracity of a search warrant affidavit. 438 U.S. 154, 171-72, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Before the defendant will be entitled to such a hearing, however, the defendant must allege deliberate falsehood or reckless disregard for the truth, **and those allegations must be accompanied by an offer of proof. Id. at 171, 98 S. Ct. 2674. Affidavits of witnesses should be provided to the court or their absence satisfactorily explained. (My emphasis.)**

There is nothing new about this requirement. See United States v. Avery, 295 F.3d 1158, 1166-69 (10th Cir. 2002). Avery was my case and Mr. Henry represented the defendant.

Unless I have missed something in defendant's amended motion or unless I do not have all of the attachments, I find nothing in the motion which satisfies the requirements of an offer of proof. I don't want to waste my time, and counsels', on a hearing, nor spend government funds to bring in witnesses, unless defendant can meet the requirements of the Tenth Circuit cases. Absent Mr. Henry meeting those requirements, I'm prepared to cancel the hearing and proceed to trial.

Please let me hear from you tomorrow, May 6, before noon.

Very truly yours,



Monti L. Belot