Circuit Court for Baltimore City
Case No. 119176004

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1563

September Term, 2022

LAWRENCE BANKS

v.

STATE OF MARYLAND

Arthur,
Albright,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: November 30, 2023

A Baltimore City jury convicted Lawrence Banks (a/k/a Malik Samartaney) of possession of a regulated firearm after having been convicted of a disqualifying crime and possession of ammunition after having been convicted of a disqualifying crime. The court sentenced Banks to 15 years of incarceration for illegal possession of a firearm and one year of incarceration, to be served concurrently, for illegal possession of ammunition.

On appeal, Banks asks whether the court erred by restricting his counsel's closing argument. Banks also asks whether the circuit court erred in denying his request for a "*Franks* hearing"—i.e., a hearing, under *Franks v. Delaware*, 438 U.S. 154 (1978), at which "a defendant is permitted to go beyond the four corners of [a search] warrant and cross-examine the affiant to prove [that the affiant] made a materially misleading statement or omission." *Thompson v. State*, 245 Md. App. 450, 468 (2020). In an earlier appeal from a related conviction, this Court affirmed the circuit court's decision to deny Banks's request for a *Franks* hearing. *Banks v. State*, No. 135, Sept. Term 2022, 2023 WL 3017818 (Md. App. Apr. 20, 2023) ("*Banks I*").

For the reasons to follow, we shall affirm the judgments of the circuit court once again.

BACKGROUND

The Motion for a *Franks* Hearing

At the end of May of 2019, the Baltimore City Police Department executed a search warrant at Banks's apartment.

In the affidavit for the warrant, the affiant stated that on May 12, 2019, the police had responded to a call about "a suspicious bag in a shopping cart." The shopping cart

was "next to the trash dumpster in the parking lot" "at the rear of [the] 3900 blk. of Clarks Lane[.]" The bag contained the torso of a female body. "The body consisted of the shoulders and arms, but was missing both hands, both feet, both lower legs, and the head." There were three "distinctive tattoos" on the victim's body. The affiant disseminated a photograph of one of the tattoos in an attempt to get information about the victim's identity.

The affidavit went on to state in relevant part:

> On 5/29/19 this detective received a phone call from a female who resides in North Carolina. The caller stated that the pictures of the tattoo and the body found at the dumpster was [sic] her mother [D.F.] . . . . The caller has not talked [to D.F.] since the early part of May 2019. The caller also told this detective that the person responsible for [D.F.'s] death was Lawrence Banks also known as Marty Banks . . . . The caller said that he [Banks] was also responsible for killing her grandmother and other relatives. It should be noted that this case was confirmed under compalint [sic] #916K40661. I then spoke with another relative who stated that the tattoos shown on the body were identical to that [sic] of [D.F.]. Pictures were shown to this detective of [D.F.'s] tattoo located on her abdomen. It is identical to the tattoo on the recovered torso. Information from the family also revealed that the Mr. Banks resides at 4001 Clarks Manor Road Apt. 214, which is around the corner from where the body was discovered (approximately 30 yards). This location is listed in the name of Lawrence Banks. Further investigation determined that the victim, [D.F.] was staying at the location and was in a sexual relationship with her father, Lawrence Banks.

Banks requested a *Franks* hearing at which he could attack the veracity of the affiant's statements. Banks was entitled to a *Franks* hearing only if he could make "a substantial preliminary showing that the affiant intentionally or recklessly included false statements in the supporting affidavit for a search warrant, and that the affidavit without the false statement is insufficient to support a finding of probable cause[.]" *McDonald v. State*, 347 Md. 452, 471 n.11 (1997); *accord Thompson v. State*, 245 Md. App. at 465.

At Banks's request, the court convened a hearing to determine whether he had made the requisite preliminary showing that would entitle him to a *Franks* hearing.

At the hearing, defense counsel argued that the affidavit contained several pieces of false information. First, the affidavit stated that Banks's address was "4001 Clarks Manor Road Apt. 214[,]" but his address was actually 4001 Clarks Lane, Apartment 214. Second, the affidavit specified that the apartment "is listed in the name of Lawrence Banks[,]" but the apartment was actually listed under the name that Banks legally adopted some 30 years ago, Malik Samartaney. Third, the affidavit estimated that the distance between Banks's apartment and the location where the body was found was "approximately 30 yards," but defense counsel asserted that the distance was actually "over 100 yards." Fourth, the affidavit stated that, according to the caller, Banks "was also responsible for killing [the caller's] grandmother and other relatives" and that "this case was confirmed under [complaint] #916K40661." According to defense counsel, however, complaint #916K40661 "stems from an incident in 1991 in which Mr. Banks had pled guilty to the homicide of his son." Defense counsel offered to submit an affidavit from Banks or have him testify "for the limited purpose of this motion," but adduced no evidence other than a copy of a burglary charge that he had filed against D.F.

The State responded that D.F.'s daughter called the Baltimore Police Department from North Carolina and stated that "she recognized the photograph of the tattoos as those of her mother." D.F.'s daughter, the State asserted, told the detectives that her mother was in Baltimore and was staying with Banks. According to the State, D.F.'s daughter also told the detectives that Banks lived on Clarks Manor Road.

Regarding the detective's review of complaint #916K40661, the State asserted that in 1991 Banks pleaded guilty to murdering his son. The case file indicated that Banks's son had reported him to Child Protective Services for sexually and physically abusing D.F. Banks allegedly murdered his son to prevent him from testifying about the allegation of sexual abuse. The State asserted that the affidavit referred to a sexual relationship between Banks and D.F. because of those prior allegations of sexual abuse.

The State proceeded to recount how the detectives "looked further back" into Banks's history, because the caller had said that he "was responsible for the killing of her grandmother." The State explained:

> Detectives found a 1976 unsolved murder of [D.F.'s] mother . . . . Mr. Banks had been convicted in 1975 or '76 of an assault with intent to murder [D.F.'s mother]. Our victim in this case, [D.F.], . . . was nine months old. He had been accused of and convicted of throwing [D.F.] through a plate glass window and causing about 22 stitches to her at the time.
>
> Shortly after that assault occurred, [D.F.'s] mother, went missing.

Although Banks had "never been charged" in the death of D.F.'s mother, the State asserted that "[h]e has always been a suspect in that case." According to the State, the reference to the death of the caller's grandmother was part of "the detective's attempt to corroborate what this caller was telling him."

Lastly, the State responded to defense counsel's argument about the distance from Banks's apartment to the location where D.F.'s body was found. According to the State: "If you were to cut through the wooded path where the video shows that the individual comes from, it's significantly less than [100 yards], because it's a more direct route."

The court concluded that Banks had not met his burden. The court explained that it found no specific mistruths or falsehoods in the affidavit. Even if there were specific mistruths or falsehoods, the court found that they would not have made a difference in whether the affiant could have obtained a search warrant. Accordingly, the court denied the request for a *Franks* hearing.[1]

Banks renewed his request for a *Franks* hearing twice. The circuit court denied both requests.

The Trial and Banks's Attorney's Closing Argument

Because Banks does not challenge the sufficiency of the evidence, we shall provide only a brief recitation of the evidence adduced at trial for context. *See Washington v. State*, 190 Md. App. 168, 171 (2010).

At trial, the State presented evidence that the police executed a search warrant at Banks's apartment. Inside a trashcan in the bedroom, the detectives found a box of ammunition and a Beretta Model 1934 semi-automatic pistol.

The State also presented evidence of two recorded jail calls. In the first call, Banks stated: "Something told me a long time ago, get rid of that pistol, told me a long time ago, get rid of that pistol[.]" In the second call, Banks stated: "Something told me get rid of that pistol. My intuition told me get rid of that pistol a long time ago and I didn't get to it."

[1] The preceding factual recitation comes directly from *Banks I*, 2023 WL 3017818, at *1-3.

The parties stipulated that Banks was prohibited from possessing a regulated firearm.

During his closing argument, Banks's attorney asserted:

> So there's levels of convincing in the judicial system and I just want to go over them so you understand how important reasonable doubt is and why we use it in these type of proceedings. . . . The charge standard is probable cause, right, it's a fluid type of concept but it's basically it may or may not have happened so we are charging him.
>
> Okay, so, the next standard that we use in the legal system is called preponderance of evidence.

At that point, the court, on its own motion, interrupted the attorney and asked that he approach the bench. At the bench, the following exchange occurred:

> THE COURT: They've not had legal instruction. They've received no instruction from me as to what those standards are. They're not applicable of [sic] relevant in a criminal case so move on from trying to provide comparative analysis of different forms of proof because it is not of any consequence of this trial.
>
> [DEFENSE COUNSEL]: Yes, Your Honor, I was only merely trying to show—
>
> THE COURT: I'm not questioning your motive, I'm just telling you that's not a subject you can address in a courtroom that I preside over where those issues are not for the jury there has been no law given to them for you to explain further or elaborate on.
>
> [DEFENSE COUNSEL]: Am I allowed to say this is the highest standard?
>
> THE COURT: Absolutely.

After counsel returned to the trial table and the court apologized for the interruption, defense counsel resumed his argument, stating: "As I was saying reasonable doubt in its essence is the highest standard, this is the highest standard we have

throughout the process." As noted, the jury found Banks guilty of both counts: possession of a regulated firearm after having been convicted of a disqualifying crime and possession of ammunition after having been convicted of a disqualifying crime. This timely appeal followed.

ANALYSIS

I.

According to Banks, the court erred by prohibiting his attorney from contrasting the standard of proof by a preponderance of the evidence with the standard of proof beyond a reasonable doubt. The State responds that "[t]he trial court properly exercised its broad discretion to regulate closing arguments by limiting this line of argument[.]"

"'[A]ttorneys are afforded great leeway in presenting closing arguments to the jury.'" *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Degren v. State*, 352 Md. 400, 429 (1999)). "At the same time, a trial judge has broad discretion to control the scope and duration of counsel's closing argument in order to ensure fairness." *Ingram v. State*, 427 Md. 717, 727 (2012).

"A trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case." *Id*. at 726. Accordingly, the regulation of closing argument is within the sound discretion of the trial court. *See, e.g.*, *Degren v. State*, 352 Md. at 431. An appellate court should not disturb the trial court's judgment "unless there is a clear abuse of discretion that likely injured a party." *Ingram v. State*, 427 Md. at 726. In this context, a trial court abuses its discretion "'where no reasonable person would take the view adopted by the [trial] court, or when the court acts without

reference to any guiding rules or principles.'" *Cagle v. State*, 462 Md. 67, 75 (2018) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)).

In *Ingram v. State*, 427 Md. at 720, the trial court barred the defense attorney "from including in his anticipated argument an explanation of the significance of the legal thresholds of suspicion, reasonable articulable suspicion, probable cause, and a 'tie,' by way of contrasting these thresholds" with proof beyond a reasonable doubt. "The trial court allowed, however, Ingram's counsel to explain to the jury, for the same purpose, the thresholds of preponderance of the evidence and clear and convincing evidence, as well as to render a lengthy dissertation on the significance of the burden of beyond a reasonable doubt." *Id*. On appeal, the Court held that the trial court did not abuse its "broad discretion to control the scope of closing argument" when it acted "to reduce the potential for juror confusion" by barring Ingram's counsel from discussing these other "extraneous, extrinsic, and largely irrelevant legal standards." *Id*. at 726.

In reaching its decision, the Court relied on this Court's decision in *Drake v. State*, 186 Md. App. 570 (2009), *rev'd on other grounds*, 414 Md. 726 (2010).[2] In that case, the

[2] In *Drake*, the Court reversed this Court on the issue of whether the trial court erred in propounding a voir dire question asking whether the jurors would be unable to convict the defendant in the absence of "scientific" evidence. *Drake v. State*, 414 Md. at 729. In view of the disposition of that issue, the Court declined to consider whether the trial court had unduly restricted defense counsel's closing argument. *Id.* at 729 n.3. In *Ingram*, however, the Court set out to decide the issue that it had refrained from deciding in *Drake*: "Did the lower court err by relying on *Drake v. State,* 186 Md. App. 570, 975 A.2d 204 (2009), and limiting trial counsel's attempt in closing argument to compare the State's burden of proof beyond a reasonable doubt to other legally recognized standards of proof?" *Ingram v. State*, 427 Md. at 726. In affirming the judgments against Ingram, the Court indirectly affirmed this Court's conclusion in *Drake* about the restriction on closing argument.

circuit court had allowed counsel "to argue from the pattern jury instruction on the reasonable doubt standard; to point out that it is the highest measure of proof recognized in the law; to compare the reasonable doubt standard with the preponderance of the evidence standard; and to exhort the jurors not to convict based on rumor or suspicion." *Id*. at 594. The court, however, had prohibited defense counsel from arguing about other standards of proof, such as probable cause, reasonable articulable suspicion, and clear and convincing evidence. *Id*. at 597-98. This Court affirmed the trial court's regulation of closing argument because the "[o]ther evidentiary standards counsel wished to discuss . . . were not generated by the evidence and were not relevant to the case[,]" and the "court reasonably sought to minimize the possibility of juror confusion." *Id*.

In addition to this Court's decision in *Drake*, the *Ingram* Court relied on *Grillot v. State*, 107 S.W.3d 136 (Ark. 2003). In that case, the prosecutor had objected to Grillot's "use of a chart illustrating and comparing the various burden-of-proof standards used in the law." *Id*. at 149. The trial court "allowed Grillot to use the chart but ruled that 'he may not refer to any burden of proof other than "beyond a reasonable doubt" that is the standard in this case.'" *Id*. The Supreme Court of Arkansas upheld that decision on the ground that the trial court "properly guarded against the jury becoming confused by other burden-of-proof standards that are inapplicable in criminal cases." *Id*. at 149-50. The *Ingram* Court stated that *Grillot* provided "sound guidance for the proper exercise of discretion in similar contexts." *Ingram v. State*, 427 Md. at 730.

According to the *Ingram* Court, "*Drake* and *Grillot* demonstrate that extraneous legal standards may be deemed outside the latitude afforded counsel in argument and that

such may be excluded by the trial court if deemed inappropriate or likely to lead to jury confusion." *Ingram v. State*, 427 Md. at 730. "By allowing a discussion of preponderance of the evidence and clear and convincing evidence that compares them to beyond reasonable doubt," the *Ingram* Court stated, the trial judge in that case "exercised his discretion in a less restrictive fashion than allowed in *Grillot* and *Drake.*" *Id.* at 731.

Banks attempts to limit *Ingram* by arguing that "*Ingram* was based in part on the wide latitude given to defense counsel to contrast the reasonable doubt standard with preponderance of the evidence and clear and convincing evidence standards." He complains that, unlike the defense attorney in *Ingram*, his attorney was not permitted to discuss the preponderance of the evidence standard. *Ingram* is not as narrow as Banks implies.

Ingram stands for the proposition that a trial court does not abuse its "broad discretion" to control closing argument when it prevents an attorney from potentially confusing a jury with a discussion of legal standards that are "extraneous" to the case at hand. *Id*. at 726. The decision in *Ingram* does not rise or fall on the specific standards that the trial court prohibited the attorney from discussing. To the contrary, the *Ingram* Court wrote approvingly of *Drake* and *Grillot* even though it recognized that in those cases the courts exercised their discretion to prohibit defense counsel from discussing certain topics that the trial court in *Ingram* had allowed counsel to discuss. *Id*. at 731. The *Ingram* Court reasoned that, because the courts had not abused their discretion in *Drake* and *Grillot* by imposing the greater restrictions that they had imposed, the trial

court in *Ingram* could not possibly have abused its discretion by imposing a lesser restriction. *Id*.

In summary, *Ingram* recognized that a discussion of "extraneous legal standards may be deemed outside the latitude afforded counsel in argument" and that such a discussion "may be excluded by the trial court if deemed inappropriate or likely to lead to jury confusion." *Id*. at 730. Here, the court determined that the extraneous legal standards fell outside the latitude afforded to Banks's counsel because the jury "received no instruction from [the trial court] as to what those standards are[,]" and those standards were "not applicable." Under *Ingram*, the court did not abuse its discretion in regulating defense counsel's closing argument as it did.

II.

Banks claims that the circuit court erred in denying his motion for a *Franks* hearing. That motion stemmed from the same search warrant that Banks challenged in *Banks I*, i.e., the search warrant that authorized the police to search Banks's apartment.

In reviewing the decision to deny a *Franks* hearing, this Court defers to the circuit court's factual findings unless they are clearly erroneous (*Thompson v. State*, 245 Md. App. at 469), but reviews the court's legal determinations without deference. *See Carter v. State*, 236 Md. App. 456, 467 (2018).

The Fourth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"Reasonableness" within the meaning of the Fourth Amendment generally requires that law enforcement officers obtain a judicial warrant before effectuating a search. *See, e.g.*, *State v. Johnson*, 458 Md. 519, 533 (2018). A warrant must be supported by probable cause, which is "a 'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent [individuals], not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). "The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. at 371. However, "'[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized[.]" *Id*. (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

"A judicially issued search warrant is presumptively valid, and the burden is allocated to the defendant to rebut that presumed validity." *Wood v. State*, 196 Md. App. 146, 164 (2010). "A mere assertion is not an effective rebuttal." *Id*.

"When reviewing the basis of the issuing judge's probable cause finding, we ordinarily confine our consideration of probable cause solely to the information provided in the warrant and its accompanying application documents." *Greenstreet v. State*, 392 Md. 652, 669 (2006); *accord Whittington v. State*, 474 Md. 1, 33 n.25 (2021); *Patterson*

v. State, 401 Md. 76, 90 (2007). "We do not consider evidence that seeks to supplement or controvert the truth of the grounds advanced in the affidavit." *Greenstreet v. State*, 396 Md. at 669; *accord Whittington v. State*, 474 Md. at 33 n.25; *Patterson v. State*, 401 Md. at 90. The "four corners" doctrine is firmly established and rigorously applied. *Fitzgerald v. State*, 153 Md. App. 601, 639-40 (2003).

Franks, however, creates an exception to the "four corners" doctrine:

> [W]here 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 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.

Franks v. Delaware, 438 U.S. at 155-56.

This Court has described that threshold as "daunting." *Fitzgerald v. State*, 153 Md. App. at 643. "[T]he challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Franks v. Delaware*, 438 U.S. at 171. "There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id*. "Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Id*. "Allegations of negligence or innocent mistake are insufficient." *Id*. Moreover, "[t]he deliberate falsity or reckless disregard whose

impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant." *Id*.

"The burden on the defendant in requesting a *Franks* hearing is 'a substantial preliminary showing[.]'" *Thompson v. State*, 245 Md. App. at 468. But even if the movant makes that showing, a hearing is not necessarily required: "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." *Franks v. Delaware*, 438 U.S. at 171-72.

In *Banks I*, we held that "Banks failed to make the 'substantial preliminary showing of falsity' that is a prerequisite for a *Franks* hearing." *Banks I*, 2023 WL 3017818, at *6. As a threshold issue, the State argues that the *Franks* claim in this appeal is barred by collateral estoppel because of the decision in *Banks I*.

Collateral estoppel applies "'[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment . . . and the determination is essential to the judgment.'" *Weatherly v. Great Coastal Exp. Co.*, 164 Md. App. 354, 369 (2005) (quoting *Colandrea v. Wilde Lake Cmty. Ass'n, Inc.*, 361 Md. 371, 387 (2000)). For the doctrine of collateral estoppel to apply, this four-part test must be satisfied:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

2. Was there a final judgment on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Colandrea v. Wilde Lake Cmty. Ass'n, Inc., 361 Md. at 391 (citation omitted); *accord Bank of New York Mellon v. Georg*, 456 Md. 616, 625-26 (2017).

Our focus is on the first question: whether the issue raised in this appeal is identical with the issue raised in *Banks I*.

Banks's *Franks* claim encompasses several sub-issues. Most of the sub-issues are identical to issues that we decided in *Banks I*.

In this appeal, Banks argues again about four alleged falsehoods in the affidavit in support of the warrant application: Banks's address, the name on his lease, the distance between his apartment and the location where D.F.'s body was found, and the representation that the 1991 case involved the murder of D.F.'s mother (and the caller's grandmother). *Banks I*, 2023 WL 3017818, at *5. Reviewing these alleged falsehoods, we determined in *Banks I* that he "failed to make the 'substantial preliminary showing of falsity' that is a prerequisite for a *Franks* hearing." *Id*. at *6. We also determined that, "[e]ven if any of the statements were false, . . . Banks's request for a *Franks* hearing would fail, because he made no attempt to show that the affiant intentionally or recklessly made a false statement." *Id*. Banks raises identical sub-issues in this appeal, our mandate affirmed the final judgments of the circuit court, and Banks had a fair opportunity to be

heard. Thus, the doctrine of collateral estoppel bars him from relitigating those four sub-issues.[3]

Banks, however, raises three sub-issues that he did not raise in *Banks I*. He challenges "the assertion that the female caller told [a police detective] that Lawrence Banks was responsible for [D.F.'s] death[.]" He also challenges "the assertion that further investigation determined that [D.F.] was 'staying at the location and was in a sexual relationship with her father, Lawrence Banks.'" Lastly, he argues that "the hearing judge applied the wrong standard in denying the request for a *Franks* hearing[.]" We shall address each of these new claims in turn.

Banks argues that there was "nothing in the affidavit to verify the identity of the caller or 'where the caller got the information from.'" He argues that the police detective "'took the information and put it directly into the [affidavit], as if it were true.'" The affidavit, however, did not state that the caller's allegation was true. Instead, the affidavit described the information received and the source of that information. In addition, the affidavit stated that the police had disseminated a photograph of a tattoo in order to get information about the identity of the person whose body they had found. According to the affidavit, the detective received a call from a source who stated that the tattoo belonged to her mother and that she believed that "the person responsible for [D.F.'s] death was Lawrence Banks[.]" Banks failed to establish any falsity in the detective's description of the information received about the caller's allegation.

[3] Even if these contentions were not barred by the doctrine of collateral estoppel, we would decide them exactly as we did in *Banks I*.

Banks also challenges the assertion in the affidavit concerning his alleged cohabitation and sexual relationship with D.F. Yet, at the hearing on his request for a *Franks* hearing, Banks had submitted a charging document that he filed against D.F. "for breaking into his apartment[.]" The State observed that, "[w]ithin those charges," Banks "alleged that [D.F.] had been staying with him," that "he kicked her out," and that "she broke back in to get her belongings." Moreover, "the State responded to one of [Banks's] motions in limine by presenting text messages proving, by clear and convincing evidence, that Banks was in a sexual relationship with D.F." *Banks I*, 2023 WL 3017818, at *2 n.1. Hence, Banks failed to establish any falsity in "the assertion that further investigation determined that [D.F.] was 'staying at the location and was in a sexual relationship with her father, Lawrence Banks.'"

In any event, the affidavit established a substantial basis to find probable cause even without the two statements that Banks did not previously challenge.[4] If the court disregarded those statements, the affidavit still contained the following assertions:

- On May 12, 2019, the police found the dismembered body of a woman in a shopping cart next to a dumpster at 3900 Clarks Lane in Baltimore.
- The body had three distinctive tattoos on its torso.
- The police disseminated photographs of the tattoos to the public.

[4] A reviewing court determines not whether there was probable cause (that is, whether the court itself would find probable cause), but "whether *the issuing judge had a substantial basis* for concluding that the warrant was supported by probable cause." *Patterson v. State*, 401 Md. 76, 89 (2007) (emphasis added).

- On May 29, 2019, a detective received information from a person who identified herself as D.F.'s relative. That person stated that the tattoos depicted in the photographs were identical to D.F.'s tattoos.

- That same day, a caller who identified herself as D.F.'s daughter told the detective that she had not talked to D.F. "since the early part of May 2019."

- Banks was D.F.'s father, and he lived around the corner[5] from the dumpster where parts of the body were found.

- The investigation revealed that Banks was convicted of murdering his son and was suspected of murdering the mother of his son.

Viewing these unchallenged allegations, the warrant application, in our judgment, would have established a substantial basis to find probable cause if all of the allegedly false assertions had been deleted. *Banks I*, 2023 WL 3017818, at *6.

Lastly, Banks claims that "the hearing judge applied the wrong standard in denying the request for a *Franks* hearing." In denying the request, the court ruled:

> Now, as all parties are aware, before a defendant is entitled to a Franks hearing, that defendant must show by a preponderance of the evidence that the application for a search warrant—affidavit in support of the application for a search warrant contained deliberate falsehoods and specific mistruths showing a reckless disregard for the truth.

Banks contends that the court "improperly placed the burden on the defendant to 'show by a preponderance of the evidence,' rather than make a substantial preliminary

[5] As discussed in *Banks I*, the affidavit estimated that Banks's apartment was "approximately 30 yards" from the place where D.F.'s body was found, defense counsel asserted that the apartment was "over 100 yards" away. In *Banks I* this Court affirmed the circuit court's determination that "the allegedly inaccurate estimate was not 'a material falsehood or misrepresentation in an attempt to obtain a search warrant.'" *Banks I*, at *5.

showing, that the affidavit contains deliberate falsehoods or statements showing a reckless disregard for the truth."

"The burden on the defendant in requesting a *Franks* hearing is 'a substantial preliminary showing,' not a preponderance of evidence." *Thompson v. State*, 245 Md. App. at 468. The preponderance of the evidence standard "is the burden to be applied within the *Franks* hearing itself, where a defendant is permitted to go beyond the four corners of the warrant and cross-examine the affiant to prove he or she made a materially misleading statement or omission." *Id*. The circuit court misspoke when it said that Banks had to show by a preponderance of evidence that the affidavit contained deliberate falsehoods or false statements made with a reckless disregard for the truth.

Nevertheless, we review the court's findings of fact for clear error (*id*. at 469), and we review its legal conclusions de novo. *Carter v. State*, 236 Md. App. at 467. Thus, even though the court misstated the governing standard, we conduct our own assessment of whether the facts, as found by the circuit court, add up to "a substantial preliminary showing that the affiant intentionally or recklessly included false statements in the supporting affidavit for a search warrant, and that the affidavit without the false statement is insufficient to support a finding of probable cause[.]" *McDonald v. State*, 347 Md. at 471 n.11.

For the reasons outlined above (and in *Banks I*), we conclude that the circuit court was not clearly erroneous in finding a lack of "specific mistruths or falsehoods" in the affidavit. Under a *de novo* review of the court's legal conclusion, we hold that Banks failed to make the required substantial preliminary showing of falsity. *See Thompson v.*

State, 245 Md. App. at 476 (holding that a *Franks* hearing was properly denied because the appellant failed "to proffer evidence that contradicted" the challenged statements in the affidavit). As this Court wrote in *Banks I*:

> Even if any of the [challenged] statements were false, . . . Banks's request for a *Franks* hearing would fail, because he made no attempt to show that the affiant intentionally or recklessly made a false statement. In fact, he produced virtually no evidence at all.[6]

Banks I, 2023 WL 3017818, at *6.

That same reasoning applies with equal force here.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS ARE TO BE PAID BY APPELLANT.

[6] During the motion for a *Franks* hearing, defense counsel stated: "If the Court deems it necessary, we can definitely get an affidavit from Mr. Banks. Mr. Banks can take the stand for the limited purpose of this motion[.]" That representation does not satisfy the defendant's burden to obtain a *Franks* hearing. *Cf. Franks v. Delaware*, 438 U.S. at 171 (holding that "[a]ffidavits or sworn or otherwise reliable statements of witnesses should be *furnished*, or their absence satisfactorily explained") (emphasis added). The onus was on Banks to furnish proof without guidance from the court.