IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KEITH O. MATTHEWS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11479 Trial Court No. 3KO-11-470 CR MEMORANDUM OPINION On Rehearing No. 6628 — May 2, 2018

Appeal from the Superior Court, Third Judicial District, Kodiak, Steve W. Cole, Judge.

Appearances: Brooke Berens, Assistant Public Advocate, Appeals and Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, and Keith O. Matthews, *in propria persona*, Seward, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

PER CURIAM.
Judge MANNHEIMER, concurring.

Keith O. Matthews seeks rehearing of our decision in his case, *Matthews v. State*, unpublished, 2017 WL 6209591 (Alaska App. 2017).

On rehearing, Matthews raises an issue concerning the proper interpretation of the Alaska Supreme Court's decision in *State v. Malkin*, 722 P.2d 943 (Alaska 1986). In *Malkin*, the supreme court recognized a defendant's right to attack a search warrant if the officer who applied for the warrant made misstatements of fact in the search warrant application. In his petition for rehearing, Matthews contends that this Court applied the wrong remedy for cases where a search warrant application contains reckless misstatements of fact.

In our initial decision, we declared that the remedy for reckless misstatements in a search warrant application was to re-evaluate the application after correcting the misstatements — *i.e.*, after substituting accurate information for the recklessly misstated information. Matthews contends that the remedy is to completely excise the sentences or paragraphs containing the reckless misstatements, so that the search warrant application no longer contains *any* information on the subjects covered by those sentences or paragraphs.

For the reasons explained in this opinion, we conclude that this issue is moot under the facts of Matthews's case. Even if the reckless misstatements are completely excised from the search warrant application, the application still established probable cause to issue warrants for the search of Matthews's person and his vehicle.

To fully explain Matthews's argument in this petition for rehearing, we must revisit the facts of his case, and we must revisit a portion of our initial decision.

The litigation in the superior court, and this Court's initial decision

Much of the evidence against Matthews was obtained when the police executed search warrants for Matthews's person and for his vehicle. One of the primary

questions raised in Matthews's appeal was whether those search warrants were tainted by misstatements in the search warrant application.

As we explained in our initial decision, Matthews's claim of misstatements in the search warrant application arose from the fact that the officer who prepared the search warrant application, Detective William Pyles, wrote a supporting affidavit that detailed the Kodiak Police Department's years of investigation into Matthews's activities.

When Detective Pyles wrote this supporting affidavit, he cut and pasted passages of text from the Kodiak Police Department's "running affidavit" pertaining to its past investigations of Matthews. This "running affidavit" consisted of the written notes kept by officers in the drug investigation unit over a number of years. These notes described the information these officers had received about Matthews, and the prior investigative efforts they had pursued.

When Detective Pyles wrote his affidavit in support of the search warrant, he relied in part on this "running affidavit", by copying and pasting various notes that had been written by other officers.

As the superior court later ruled, Pyles did not try to hide his reliance on the investigative efforts of his fellow officers. Rather, at the beginning of his affidavit, in the "preliminary matters" section, Pyles informed the magistrate that "the information contained in this affidavit comes from my investigation *and the written and oral reports of other law enforcement officers from the Kodiak Police Department*." (Emphasis added.)

For the most part, when Detective Pyles inserted paragraphs of text from the drug investigation unit's "running affidavit" into his search warrant application, those paragraphs identified the officers who received the information or who conducted the earlier investigations. But in Paragraphs 1 and 3 of his affidavit, Detective Pyles

neglected to substitute "Detective Olson" (the other officer's name) for the pronouns "I" and "me" in the pasted text — thus making it appear as if Pyles himself had personally received the information or had performed the investigation:

> 1) On 8/23/2006, I received drug information from the Anchorage Police Department's Drug Enforcement Unit. They reported receiving a call from an anonymous person who stated [that] Keith Omar Matthews flew to Kodiak with drugs on Monday or Tuesday. Matthews will be staying in Kodiak [for] a couple of weeks or until the supply is gone.
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> . . .
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> 3) On 8/23/2006, I sent a copy of Matthew's [*sic*] Alaska Identification card to Officers of the Kodiak Police Department. On 8/24/2006, Sgt. Bradbury informed me [that] he believes he saw Matthews in the downtown area with another male.

Because Detective Pyles mistakenly included the pronouns "I" and "me" in these paragraphs, Matthews's attorney asked the superior court to invalidate the resulting search warrants under *State v. Malkin*. The defense attorney contended that the detective's misuse of the pronouns "I" and "me" was either an intentional or at least a reckless misstatement of the facts.

(The difference between "intentional" and "reckless" misstatements is explained in *Lewis v. State*, 862 P.2d 181, 186-87 (Alaska App. 1993), and in *Gustafson v. State*, 854 P.2d 751, 756 (Alaska App. 1993) — where we held that, for purposes of applying the suppression rule announced in *Malkin*, a misstatement is "intentional" only if it was consciously made in a "deliberate attempt to mislead" the magistrate into issuing the warrant.)

At the evidentiary hearing on Matthews's suppression motion, Detective Pyles conceded that, by using a copy-and-paste technique to assemble the search warrant affidavit, he mistakenly included the pronouns "I" and "me" when he described some of the Kodiak Police Department's prior investigative efforts.

However, the erroneous pronouns appear in only two paragraphs of a factual recitation that contained a total of 29 paragraphs. [1] And as we have already noted, Detective Pyles plainly stated at the beginning of his affidavit that "the information contained in this affidavit comes from my investigation and the written and oral reports of other law enforcement officers from the Kodiak Police Department."

Based on the detective's testimony and the search warrant application itself, the superior court concluded that Detective Pyles's misstatements were "inadvertent", and that, in any event, the detective's mistakes were harmless. The superior court therefore denied Matthews's suppression motion. We upheld the superior court's ruling in our initial decision.

With respect to Matthews's contention that the detective had "recklessly" misstated the facts, the superior court labeled the detective's misstatements "inadvertent" in its written decision, but the superior court did not expressly address the question of whether the detective had acted "recklessly".

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[1] Although the paragraph numbers in the search warrant affidavit only go up to "24", the actual total of paragraphs is 29. The introductory paragraph of the affidavit, detailing "Crime Stoppers" tips, is not numbered. Neither are the concluding two paragraphs of the affidavit, which describe investigations performed on the day before, and the day of, the search warrant application. Finally, there are two paragraphs near the end of the affidavit where Detective Pyles mistakenly re-used paragraph numbers "14" and "15", when those two paragraphs should have been numbered "25" and "26".

We did not remand Matthews's case to the superior court for more express findings on the issue of Detective Pyles's mental state because we concluded that the issue was moot — since, under the true facts as revealed at the evidentiary hearing, the search warrant application still established probable cause for the issuance of the warrants.

Here is our discussion of this issue in our initial decision. We have italicized the language that Matthews challenges in his petition for rehearing:

> This leaves the question of whether the detective acted recklessly when he included the paragraphs that contained first-person pronouns — because, under *Malkin*, if a search warrant application contains misstatements of fact and the trial judge concludes that those misstatements were made recklessly, the judge must assess whether the search warrant application still establishes probable cause for issuing the warrant *after those misstatements are corrected*. *Malkin*, 722 P.2d at 946; *Lewis*, 862 P.2d at 186.
>
> We conclude that this issue of recklessness is moot because we agree with the superior court that, *when the misuses of personal pronouns in the search warrant affidavit are corrected*, the affidavit still establishes probable cause to issue the warrants.

Matthews, 2017 WL 6209591 at *4.

Matthews's claim on rehearing

In his petition for rehearing, Matthews contends that this Court employed the wrong test when we concluded that the detective's misuse of the personal pronouns made no difference to the content of the search warrant application.

As can be seen from the above-quoted portion of our decision, we assessed the sufficiency of the search warrant application by (1) correcting the detective's misstatements and then (2) re-evaluating whether, under the true facts, the application established probable cause for the issuance of the search warrants. Matthews asserts that this approach is inconsistent with the supreme court's decision in *Malkin*.

Matthews argues that when a search warrant application contains material misstatements, the remedy is to *completely eliminate* the sentences or paragraphs containing the false statements from the search warrant application, and then to re-evaluate whether the application still establishes probable cause.

As we have explained, the misuse of "I" and "me" occurs in Paragraphs 1 and 3 of the search warrant application. But Matthews asserts that he is entitled to much more than simply the deletion of Paragraphs 1 and 3.

In Matthews's opening brief to this Court (see footnote 58 on page 21 of the brief, and footnote 63 on page 23 of the brief), and again in his petition for rehearing, Matthews contends that, because Detective Pyles mistakenly used "I" and "me" in these paragraphs, "all information predating March 2011 should be redacted" from the search warrant application. In other words, Matthews claims that he is entitled to deletion of any and all information that was obtained by officers of the Kodiak Police Department before Detective Pyles joined the narcotics unit in March 2011 and began to personally participate in the investigation of Matthews.

But Matthews does not explain why he believes that he is entitled to this wholesale deletion, and his request is seemingly at odds with established law.

When police officers apply for a search warrant, they are not limited to the information personally known to them. Rather, search warrant applications can be based

on hearsay. Indeed, that is the whole point of the *Aguilar-Spinelli* rule:[2] this rule sets the legal standard for evaluating hearsay assertions in search warrant applications.[3]

Under *Aguilar-Spinelli*, fellow law enforcement officers are presumed to be credible.[4] Thus, when Detective Pyles prepared his search warrant application, he could properly include information obtained from, or recorded by, other police officers in the Kodiak Police Department's narcotics unit — even if that information was obtained before Pyles began working in the unit.

We are thus unable to ascertain the legal basis for Matthews's claim that he is entitled to deletion of all information obtained before March 2011. We therefore deny that claim.

This leaves Matthews's claim that he is entitled to *deletion* — not just correction — of Paragraphs 1 and 3 of the search warrant affidavit. These are the two paragraphs where Detective Pyles failed to correct the misuse of the pronouns "I" and "me".

Matthews bases this argument on the text of *Malkin*, 722 P.2d at 946. In this portion of the *Malkin* opinion, the supreme court explained that if a search warrant affidavit contains reckless material misstatements or omissions,"the misstatements must be excised and the remainder of the affidavit tested for probable cause". *Ibid.*

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[2] *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *See State v. Jones*, 706 P.2d 317, 324-25 (Alaska 1985) (holding that, as a matter of state law, the *Aguilar-Spinelli* test continues to govern the evaluation of hearsay information offered to support a search or seizure).

[3] *See Lewis v. State*, 862 P.2d 181, 185 (Alaska App. 1993).

[4] *See Landon v. State*, 941 P.2d 186, 190 (Alaska App. 1997); *Stam v. State*, 925 P.2d 668, 670 (Alaska App. 1996).

Based on this passage from *Malkin*, and particularly on the supreme court's use of the word "excised" when describing the appropriate remedy, Matthews argues that this Court was wrong when we re-evaluated the sufficiency of the search warrant application by *correcting* Detective Pyles's misstatements about the *source* of the information described in Paragraphs 1 and 3. Matthews contends that he is entitled to have the search warrant application re-evaluated after *completely excising all the information* contained in these paragraphs.

For the reasons explained in Judge Mannheimer's concurrence, *Malkin* may not necessarily call for complete excision in these circumstances. But in any event, this issue is moot. Even if we completely excised Paragraphs 1 and 3 from the search warrant application in this case, the application still establishes probable cause for the issuance of the search warrants.

Because we need not resolve this issue regarding the interpretation of *Malkin*, we will amend the challenged portion of our initial decision by substituting "excised" for "corrected". Thus, the affected paragraphs will now read:

> This leaves the question of whether the detective acted recklessly when he included the paragraphs that contained first-person pronouns — because, under *Malkin*, if a search warrant application contains misstatements of fact and the trial judge concludes that those misstatements were made recklessly, the judge must assess whether the search warrant application still establishes probable cause for issuing the warrant after those misstatements are excised. *Malkin*, 722 P.2d at 946; *Lewis*, 862 P.2d at 186.
>
> We conclude that this issue of recklessness is moot because we agree with the superior court that, when the paragraphs of the search warrant affidavit containing misuses

> of personal pronouns are excised, the affidavit still establishes probable cause to issue the warrants.

In all other respects, Matthews's petition for rehearing is DENIED.

Judge MANNHEIMER, concurring.

It is true, as Matthews points out, that in cases where a search warrant application contains reckless misstatements of fact, the *Malkin* decision declares that "the misstatements must be excised and the remainder of the affidavit tested for probable cause". *Malkin*, 722 P.2d at 946. But a moment's reflection will show that the quoted passage from *Malkin* is only a shorthand description of what should happen when a search warrant affidavit contains reckless material misstatements or omissions.

For instance, one cannot "excise" an omission. When an officer applying for a search warrant recklessly omits material information, the remedy is to correct the search warrant affidavit by *augmenting it* with the omitted information. *See State v. Anderson*, 73 P.3d 1242, 1246 (Alaska App. 2003); *Lewis v. State*, 9 P.3d 1028, 1033 (Alaska App. 2000).

There are likewise instances where an affirmative misstatement of fact cannot be remedied simply by deleting the misstatement from the search warrant application.

Take, for instance, a hypothetical case where the officer applying for a search warrant mistakenly declares, "The suspect offered no explanation for his presence in the warehouse" — when, in fact, the suspect *did* offer an explanation when he was interviewed earlier by another officer, and the officer who applied for the warrant recklessly failed to confer with the other officer and find out about the suspect's earlier statement.

In such a case, excising the reckless misstatement from the warrant application does not begin to remedy the situation. In all likelihood, simply deleting the mistaken sentence would have little effect on whether the search warrant application established probable cause for the warrant. To achieve the purposes of *Malkin*, it would

be necessary to *correct* the misstatement — *i.e.*, to augment the search warrant application with the information that the suspect *did* offer an explanation for his presence at the warehouse.

There are also times when it is unclear whether a misstatement in a warrant application should be viewed as an affirmative misstatement or, instead, an omission.

Take, for instance, a case in which the court finds that the officer applying for a search warrant recklessly misstated the facts when the officer asserted that a suspect "matched the description provided by an eyewitness" — when, in fact, the suspect matched only certain aspects of the witness's description.

Does the officer's assertion constitute an affirmative misstatement? Or is the problem that the officer omitted the clarifying phrase "certain aspects of"?

In my view, *Malkin* does not require courts to draw these kinds of linguistic and philosophical distinctions. Rather, *Malkin* requires courts to re-evaluate the sufficiency of the warrant application in light of the true facts.

Sometimes this will mean deleting false information from the warrant application. Sometimes this will mean augmenting the search warrant application with new information. And sometimes this will mean modifying the statements in the search warrant application so that they accurately reflect the facts.

This subject does not come up often in the reported cases. But there are a few courts — courts applying the corresponding rule of *Franks v. Delaware*[1] — who have recognized that correction of misstatements (by any appropriate means) is the proper approach to remedying reckless misstatements in a search warrant application.

The most cogent discussion of this point is found in *People v. Costello*, 251 Cal.Rptr. 325, 330-32; 204 Cal. App. 3d 431, 441-44 (Cal. App. 1988).

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[1] 438 U.S. 154, 155-56; 98 S.Ct. 2674, 2676; 57 L.Ed.2d 667 (1978).

Costello involved an investigation into a large theft of business and computer equipment. One of the paragraphs of the search warrant application mistakenly asserted that an officer had seen "three males" loading equipment into a truck, when in fact only one man was loading the equipment into the truck. Here is the text of the paragraph at issue:

> At 18:45 hrs. your affiant was advised by Det. Smith that approx. three males were loading unk. type equipment into a grn w/wht camper shell pick-up lic #1H47873. This license shows in DMV to be a 1977 Toyota pick-up registered to Richard Lee Costello. The truck was seen backed into the driveway of 3148 Midway Dr. in front of the open garage. The garage light was out but the subjects were using a flashlight. [2]

The trial judge found that the misstatement about "three males" was reckless, and the appeals court upheld that trial judge's finding. [3]

The California appeals court then turned to the question of how to remedy the misstatement.

The trial judge in *Costello* had ruled that the entire quoted paragraph should be struck from the search warrant affidavit. The trial judge reasoned that the references to "three males" and to "the subjects" had to be excised — and that then, stripped of any reference to human actors, the paragraph no longer made any sense, and it should be deleted in its entirety.

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[2] *Costello*, 251 Cal.Rptr. at 329.

[3] *Id.* at 330-31.

The California appeals court criticized the trial judge for having "operated on the paragraph with an ax instead of a scalpel".[4] The court declared that the judge committed error by simply "striking out the inaccuracies" rather than correcting those inaccuracies.[5]

> The aim [of *Franks*] is not punitive but remedial — to make the affidavit read as it should have so that the reviewing court can then retest [it] for probable cause support. To that end, correction of the affidavit should not take one form (striking or adding) to the exclusion of the other. Where, as in this case, the defendant makes out a case for striking a misstatement, the proper remedy is to add back the true facts known to the affiant on that precise point ... rather than strike and jettison the passage altogether. That approach is especially critical where, as here, simply striking the misstatements leaves material unstricken facts standing out of context and ungrammatically stated.

Costello, 251 Cal.Rptr. at 332 (citations omitted).

The appeals court explained that the trial judge should have corrected the search warrant affidavit so that it referred to only "one male" loading the truck and using the flashlight — and that the law required nothing more. The court pointed out that if strict excision were the only permitted remedy, then grammatical form would soon take precedence over substance: the police would simply learn to phrase their search warrant applications so that every individual assertion of fact was contained in its own isolated sentence:

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[4] *Id.* at 331.

[5] *Ibid.*

> [N]othing in the rationale of *Franks* prevents a court from editing a partially stricken sentence so that its remaining contents can stand on their own. Otherwise, we put form over substance and encourage affiants to state each fact dryly, in separate sentences, avoiding all subordinate and dependent clauses, compound subjects and other rudiments of effective writing.

Ibid.

See also Frimmel v. Sanders, 338 P.3d 972, 981 (Ariz. App. 2014) ("In order to [re-assess probable cause in light of the misstatements], we first redraft the affidavits to remove the falsehoods and add in material omitted facts."); *United States v. Ippolito*, 774 F.2d 1482, 1486-87 n. 1 (9th Cir. 1985) ("A better approach ... would be to delete false or misleading statements and insert the omitted truths revealed at the suppression hearing.").

Returning to Matthews's case, the misstatement in Detective Pyles's affidavit had nothing to do with the substance of the information he presented to the magistrate in Paragraphs 1 and 3 of the search warrant application. Rather, the problem was that Detective Pyles, by failing to amend the references to "I" and "me" in Paragraphs 1 and 3, seemingly asserted that the information in these paragraphs was the result of his own personal investigative efforts, rather than the result of investigation performed earlier by another member of the narcotics team.

The record indicates that the trial judge believed that the misstated pronouns were the result of negligence rather than recklessness. But even if the misstatements were reckless, the remedy would not be to strike the two paragraphs from the search warrant application in their entirety. Instead, the remedy is to re-draft the paragraphs so that they present the correct information (as revealed by the testimony at the evidentiary hearing).