No. 17-3505

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEMONTAE BELL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of Illinois, No. 15-cr-10029
The Honorable Colin S. Bruce

BRIEF FOR THE UNITED STATES

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JURISDICTIONAL STATEMENT

The jurisdictional summary in the defendant Demontae Bell's brief is complete and correct.

ISSUES PRESENTED FOR REVIEW[1]

I. Introduction: The defendant moved to dismiss the indictment under the Speedy Trial Act, arguing only that the period between July 27 and September 28, 2015, was not excludable. The district court denied the motion.

Did the defendant waive his ability to challenge on appeal any other period?

II. Did the district court correctly deny the defendant's motion to dismiss under the Speedy Trial Act?

III. Has the defendant failed to show that the district court plainly erred by not dismissing the indictment on constitutional, speedy trial grounds?

IV. Did the district court correctly deny the defendant's motions to suppress and for a *Franks* hearing that were aimed at suppressing the photograph of the AK-47 firearm found on his cellular telephone following his arrest? Alternatively, does the good-faith exception to the exclusionary rule apply?

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[1] Our citations to the record use the following abbreviations: "d/e" means "docket entry"; "R." followed by a number refers to the document bearing that number on the district court's docket; "Tr." refers to the transcript of the trial; and "Def.Br.," "Def.App.A," and "Def.App.B" refer to the defendant's brief and appendices.

STATEMENT OF THE CASE

This is a direct appeal in which the defendant, Demontae Bell, challenges the district court's denial of his motion to quash arrest and suppress evidence (R.68); second motion to suppress and for a *Franks* hearing (R.72); motion to dismiss under the Speedy Trial Act (R.81); and amended motion for new trial (R.143), in which he argued that the district court erred in denying the motion to dismiss under the Speedy Trial Act. *See* Def.App.A at 9-10, 25-31, 32-49 (orders denying (1) motion for new trial, (2) speedy trial motion, (3) motion to quash and second motion to suppress).

I. Background

A. The Offense Conduct

On November 6, 2014, Mark Turner burgled two AR-15 rifles, a Glock handgun, an AK-47 rifle (without magazine), and a pellet gun from the Pekin, Illinois, residence of a coworker. Later that same day, Turner contacted Bell, who was Turner's girlfriend's drug dealer and known to Turner and his girlfriend as "Jay," to see if Bell could broker a deal for the stolen firearms. Tr. 136, 317. Bell agreed to locate a buyer. *Id.* at 319-21, 328-32.

Turner, with his girlfriend and his brother, then met Bell in Peoria, Illinois, to complete a deal with the third party. Tr. 274-75, 277. Turner agreed to give Bell either a cut of the cash proceeds from the firearms sale or a firearm for a "really

cheap price" in exchange for Bell brokering the transaction. *Id.* at 337-39. Bell directed Turner to a home in Peoria to introduce him to a potential buyer. *Id.* at 214. Bell and Turner carried the stolen firearms into the home, and, with Bell's assistance, Turner traded the two AR-15 rifles and the Glock pistol for cocaine, marijuana, and cash. *Id.* at 215, 219-20.

Bell and Turner then left the residence and traveled to another home in Peoria, still in possession of the AK-47 rifle and pellet gun. Tr. 345-46. After they arrived, Bell provided Turner with additional money and crack cocaine in exchange for the AK-47 rifle, the pellet gun, and some additional stolen items. *Id.*

In late November 2014, Turner was arrested on methamphetamine charges and began cooperating with law enforcement. Tr. 30, 351-52. During a proffer interview, Turner confessed to stealing the five guns from his coworker's home and said that he had exchanged them for drugs and money with "Jay's" assistance. *Id.* at 352. Turner agreed to assist law enforcement with locating those firearms. *Id.* at 105, 357-58.

On February 13 and 25, 2015, law enforcement agents used Turner to conduct controlled purchases of cocaine from Bell in an effort to obtain information that would aid in locating and recovering the stolen AK-47 that Turner had provided to Bell on November 6. Tr. 30, 38, 115. During the first buy, Turner asked Bell whether he still had one of "those things," referring to the AK-47, and noted that

it needed "clips" (i.e., a magazine). R.72, Ex. N; Tr. 319-20, 328-29, 367, 386-87. He offered to arrange a trade of drugs for magazines if Bell could tell him the model number of the AK-47. *Id.* Bell indicated that he had sold the AK-47, but suggested the buyer might be interested in the magazines. *Ibid.*; *see also* Tr. 369-72.

Following the first buy, a law enforcement agent showed photographs of Bell taken during the transaction to an inmate at the local jail, who identified Bell as "Demontae Bell" or "Tay." R.72, Ex. O. The agent later printed a photograph of Bell without identifiers from a law enforcement database, and showed it to Turner, who confirmed it was "Jay." Def.App.B at 4.

After the second buy, while both Bell and Turner were still sitting in the car, Bell said that he had sold the AK-47 and the pellet gun (originally believed to be a sniper-style rifle) together. Def.App.B at 24, 29, 33; Tr. 344-46, 382-83. Bell showed Turner a photograph that he had taken of the AK-47 on his cell phone on November 7, 2014. Tr. 65-66, 77, 387-88; Def.App.B at 26, 30. Turner provided Bell with his cell phone number and asked Bell to text the photograph to him so that he could help Bell find magazines to sell to the person who bought the AK-47. Tr. 389; Def.App.B at 26. Bell told Turner it was "[s]ome type of Russian A-K" and said he would attempt to get the model number from the buyer. Tr. 64; Def.App.B at 30-31.

Turner showed the photograph to a law enforcement officer right after the buy, and the officer took a photograph of Turner's phone with the AK-47 photograph displayed. Tr. 66-67. Turner's coworker, the rightful owner of the AK-47, later viewed that picture and positively identified the firearm, recognizing its upgraded grip, shoulder strap, and the fact that it had no magazine. Tr. 95-96, 182-83, 192-94.

B. The Arrest Warrant and Arrest

On April 8, 2015, a federal magistrate judge issued an arrest warrant for Bell based on an affidavit submitted by Special Agent Jason Nixon, FBI. R.5. The affidavit described the theft of the firearms and pellet gun by Turner from his coworker's home and his identification as a potential suspect. R.72-1, Ex.A. The affidavit also disclosed that Turner was later arrested on methamphetamine-related charges and during a proffer interview had confessed to the burglary. *Id.* The affidavit provided that Turner confessed that, after stealing the firearms, he took them to Peoria and sold them to a drug dealer who went by the street name "Jay" for money and cocaine. *Id.*

The affidavit (1) explained that Turner had agreed to assist law enforcement in locating the stolen firearms; (2) described the February 13 and 25 controlled buys from "Jay"; (3) stated that a Peoria County Jail inmate had identified Bell from photographs that law enforcement had taken during the February 13 buy; and (4)

further stated that Turner had identified Bell as the person he knew as "Jay" from a separate photograph printed from a law enforcement database (without identifiers). R.72-1, Ex.A. The affidavit also noted that Bell's criminal history included a felony delivery of controlled substance conviction, set forth the AK-47's make and model, and stated that the firearm had previously moved in interstate commerce. *Id.*

On April 9, 2015, law enforcement agents arrested Bell and secured his black LG flip phone incident to arrest. At that time, Officer Justin Sinks, Peoria Police Department, flipped open the phone to access the power button and turn it off. R.76 at 19-21, 25-26. Upon opening it, he saw that the phone's background photograph was a picture of an AK-47 rifle. R.76 at 26, 35.

C. The Issuance and Execution of Two Cell Phone Search Warrants

1. The first search warrant

On April 17, 2015, a federal magistrate judge issued a search warrant for the forensic examination of Bell's phone for evidence related to the stolen firearms and violations of 18 U.S.C. § 922(g). Def.App.B at 2-10. The factual basis for the supporting affidavit was similar to Agent Nixon's arrest warrant affidavit, but it also included facts concerning Officer Sinks's observation of the AK-47 photograph on the phone's home screen following Bell's arrest.[2] *Id.*

[2] Additionally, the search warrant affidavit noted the AK-47 was "Polish" but did not

Nixon executed the warrant on April 30, 2015. Tr. 74. He completed a manual review of the phone and took photographs of its content. *Id.* Among other items, Nixon documented a photograph of an AK-47 that, per its file name, appeared to have been taken on November 7, 2014. Tr. 77.

2. The second search warrant

In October 2015, a federal magistrate judge issued a second search warrant for the flip phone to permit the FBI to search for photograph metadata. Def.App.B 11-21. The supporting affidavit for the second warrant was similar to the arrest and first search warrant affidavits. *Id.* This affidavit, however, did not include facts concerning Sinks's viewing of the AK-47 photograph on the phone's home screen. *Id.* But it did note the April 30, 2015, execution of the prior federal search warrant, and the related discovery of an AK-47 photograph. *Id.* That photograph was printed and shown to the burglary victim, who positively identified it as his based on its aftermarket pistol grip. *Id.*

An FBI forensic examiner assisted in the execution of the second search warrant. Tr. 79. Metadata from the photograph of the AK-47 on the phone showed that it was taken on November 7, 2014, and that the same photograph was texted to Turner's phone number on February 25, 2015. Tr. 79, 431, 439-41.

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specifically discuss movement in interstate commerce.

II. The District Court Proceedings

A. The Defense's First Motion to Continue

On April 21, 2015, the grand jury returned a single-count indictment charging Bell with possession of a firearm by a felon in connection with the AK-47. R.8; *see* 18 U.S.C. § 922(g). At the May 7, 2015, arraignment, a jury trial date of June 29, 2015, was set. d/e 7/15/2015.

During the first pretrial conference held on June 18, 2015, defense counsel, Michelle Schneiderheinze, moved to continue the June 29, 2015, trial date. d/e 6/18/2015. The court granted the motion and reset the trial date for July 27, 2018. *Id.*; R.171 at 3. In granting the motion, the district court made an "interest of justice" finding that the time was excludable under the Speedy Trial Act. R.171 at 3; *see also* 18 U.S.C. § 3161(h)(7)(A).

B. First Superseding Indictment, First Government Motion for a Continuance and the July 22, 2015, Status Conference

On July 21, 2015, the grand jury returned a superseding indictment that included the felon-in-possession count from the original indictment (now Count Three) and four additional charges: use, carrying and possession of a firearm during, in relation to, and in furtherance of a drug trafficking crime, *see* 18 U.S.C. § 924(c) (Counts One and Two), and distribution of cocaine, *see* 21 U.S.C. 841(a)(1), (b)(1)(c) (Counts Four and Five). R.12.

At the July 22, 2015, status conference, the court permitted defense counsel's request for a brief recess to allow her to discuss the new charges with Bell. Def.App.A at 53. The court then read the indictment aloud, and Bell initially expressed confusion as to its meaning. *Id.* at 60. After Bell confirmed he understood the charges and penalties, he entered a plea of not guilty to all five counts. *Id.*; d/e 7/22/2015.

The government informed the court that just prior to the hearing, it provided about one thousand pages of additional discovery, along with about eight hours of recorded discovery, to the defense. Def.App.A at 60-61. Defense counsel told the court that she had not had an opportunity to review that discovery with Bell but had told him about it. *Id.* She had offered to attempt to schedule a visit with him at the jail that afternoon to review it but noted that was "not always easy to facilitate." *Id.* She explained to the court that it was her "client's position that he does not want a continuance" of the July 27, 2015, trial date as to the felon-in-possession charge. *Id.* at 61-62.

The court then asked counsel if she could "possibly be prepared" to represent Bell as to all five counts by July 27. Def.App.A at 62. The attorney told the court that she believed all of the counts arose from the same three transactions, and said she would be prepared to proceed with the caveat that she didn't know what was contained in the discovery and would reserve "the ability to seek a continuance"

if there was new information. *Id.* The court nonetheless expressed concerns regarding whether counsel could "realistically" be prepared to try the case on July 27 and whether she could be considered ineffective if additional information arose at trial for which she was not prepared. *Id.* at 62-63. Counsel responded that she would "review the materials and dedicate as much time as" she could "to get the case to trial" on July 27, per her client's request. *Id.*

The court confirmed that Bell understood his attorney's response and further realized that he was asking his lawyer to prepare a case in five days where he faced a sentence of as much as 30 years in prison. Def.App.A at 63-64. The court then asked him a series of questions regarding his competency. *Id.* at 64. The court asked Bell if he still wished to proceed to trial by July 27 even though it would be very difficult for him to later allege ineffective assistance of counsel because the record reflected that Bell was "well aware" that his attorney could not "be properly prepared for trial." *Id.* at 64-65.

At that point, the government renewed its motion for a continuance in light of the "state of the record" and the fact that Bell had just been arraigned that afternoon. Def.App.A at 65. The government said it needed a reasonable amount of time to prepare for trial on the new charges and also referenced witnesses. *Id.*

The court inquired whether the superseding indictment restarted the speedy trial clock, giving the government an additional 70 days to retry the case,

particularly with regard to the felon-in-possession charge (now Count Three) that was included in the original indictment. Def.App.A at 65-66. The government responded that it believed (incorrectly) that the superseding indictment gave the government an additional 70 days both on the new charges and as to Count Three, citing 18 U.S.C. § 3161(h)(1)(B), which states that "delay resulting from trial with respect to other charges against the defendant" is excludable time under the Speedy Trial Act. *Id.* at 66. Bell disputed the government's position. *Id.* at 66-67.

The court then discussed potential start dates for the trial, offering various options, but expressing that it did not want to sever and try a case twice. Def.App.A at 67. The court stated that if the government was "comfortable enough to believe in" its Speedy Trial Act position, "knowing that it could result in a motion filed from the defense that we would address, it could set the matter on all five counts for September 28th." *Id.* Government counsel requested the September 28 date. *Id.* The court granted the government's request over the defense's objection, stating that it believed that it was in "Bell's best interest as well [because] it will give his attorney time to prepare his case adequately" and further noting that the government's motion "well taken." *Id.* at 67-68. The court then reset the pretrial conference for September 10, 2015, and the trial for September 28, 2015. *Id.* at 68.

The court asked whether the government believed "an interest of justice finding [was] also required." Def.App.A at 68. Government counsel said he did, and noted that the continuance was "in the interest of Bell and the public." *Id.* The court responded that it believed it was "in the interest of justice as well" and made that finding. *Id.*

C. Pretrial Motions, Second Defense Motion for a Continuance, and Second Superseding Indictment

On September 9, 2015, Bell filed three pretrial motions. R.22, 23, 26. At the September 10, 2015, pretrial conference, the defense again moved for a continuance without objection. d/e 9/10/2015; R.167 at 2. Ms. Schneiderheinze noted the pending motions, stated that the defense might file more, and requested a November hearing date. R.167 at 3. The district court granted Bell's motion for a continuance and made an interest of justice finding excluding the time between September 10, 2015, and the new trial date of January 19, 2016. R.167 at 2, 5. The court set the motion hearing for October 28, 2015. *Id.* at 4, 6-7.

On September 22, 2015, the grand jury returned a second superseding indictment. R.28. Like the first superseding indictment, it contained two § 924(c) counts (Counts One and Two), one felon-in-possession count (Count Three), and two drug trafficking counts (Counts Four and Five). *Id.* The material differences between the first and second superseding indictments were that Counts One and

Two relied solely upon the "possession in furtherance" prong of 18 U.S.C. § 924(c) and set forth narrower offense dates of "in or about November 2014." *Compare R.*12 *with R.*28.

D. Attorney Withdrawal and Third Defense Motion for a Continuance

On September 30, 2015, Ms. Schneiderheinze withdrew as defense counsel, and the court reset the pending motions hearing from October 28 to December 2, 2015. R.35; d/e 9/30/2015. Charles Schierer was appointed to represent Bell that same day. 9/30/2015.

At the December 2 hearing, newly appointed counsel moved to vacate the trial setting of January 19, 2016, in order to file additional pretrial motions. d/e 12/2/2015; R.174 at 2-3. Counsel requested an additional six weeks to file the motions and announced that he also planned, at his client's request, to file a motion to suppress regarding the cellular phone search. R.174 at 2-3. Bell, however, told the court he would like the trial to go in January. *Id.* at 7. The court and Bell discussed Bell's request that his attorney file a motion to suppress the phone search, and the delay caused by granting his previous attorney's withdrawal. *Id.* at 8, 10. Bell then agreed with the court that it did not appear to be in his best interest to go forward without the new pretrial motions. *Id.* at 9. The district court granted the defense motion to continue and made an interest of justice finding excluding the time between December 2, 2015, and the newly scheduled trial date

of March 7, 2016. d/e 12/2/2015; R.174 at 11. The defense withdrew the pending pretrial motions with leave to refile. d/e 12/2/2015; R.174 at 4.

E. Defense Motions to Suppress, Dismiss and Sever

On January 4, 2016, the defense filed a motion to suppress and for a *Franks* hearing, which the court set for a March 1, 2016, hearing. R.37, 38; d/e 1/20/2016; *see Franks v. Delaware*, 438 U.S. 154 (1978). Bell, however, moved to withdraw that motion on January 27, 2016, and the court granted his motion the following day. On the same day that he filed the motion to withdraw, he filed a motion to dismiss Counts One and Two and an alternative motion to sever those counts from the drug-trafficking counts (Counts Four and Five). R.51, 52.

While those motions were still pending, Bell filed an amended motion to suppress on February 1, 2016. R.53. In the amended motion, he argued that Officer Sinks's opening of the flip phone following his arrest was an illegal search. *Id.* at 1-2. Bell also challenged both search warrants authorizing the search of the cell phone. Concerning the first warrant (issued in April 2015), he argued in part that the supporting affidavit included information regarding the photograph of the AK-47 without describing how Officer Sinks had opened the phone. *Id.* at 2; Def.App.A at 33-34. Concerning the second search warrant (issued in October 2015), he noted that although the information regarding Officer Sinks's viewing of the AK-47 on the phone's home screen had been removed from the supporting

affidavit, the inclusion of evidence in the affidavit that was learned from the execution of the April 2015 warrant was problematic. R.53 at 5-6.

F. Third Superseding Indictment and Arraignment

While the motion to dismiss (R.51), motion to sever (R.52), and amended motion to suppress (R.53) were still pending, the grand jury returned a third superseding indictment on February 17, 2016. R.55. The third superseding indictment merged the prior two § 924(c) counts into one count by charging all four weapons – the Glock pistol, AR-15 rifles, and AK-47 rifle – in Count One. *Compare* R.28 *with* 55.

At the March 1, 2016, arraignment, the district court learned that Bell planned to supplement his motion to dismiss Counts One and Two (R.51) in light of the third superseding indictment. R.168 at 4-5. The court continued the hearing date for the pending suppression motion (R.53) to April 13, 2016, and the trial date to May 9, 2016. d/e 3/1/2016. The court made an interest of justice finding excluding the time between March 1 and May 9, 2016. R.168 at 9; Def.App.A at 26.

G. Defense Motion to Quash, Suppression Hearing, and Denial of the Amended Motion to Suppress

On April 6, 2016, Bell filed what he titled as a "motion to quash arrest warrant and to suppress evidence." R.68. Therein he argued, among other things, that because the affidavit in support of the criminal complaint was insufficient

(allegedly), the evidence collected from Bell's cellphone must be suppressed as fruit of the arrest. R.68, ¶ 12. Included in the motion to quash were allegations concerning Turner's reliability. *Id.* ¶¶ 7, 10.

On April 13, 2016, the district court held a suppression hearing on the amended motion to suppress (R.53) and motion to quash (R.68). However, when defense counsel appeared to make a *Franks*-type argument, the government objected. R.76 at 53-71. Counsel then indicated that he would be filing a *Franks* motion. *Id.* at 97-99. The court therefore vacated the trial date of May 9, 2016, and made an interest of justice finding excluding the time between April 13 and the new pretrial conference date of May 5, 2016. Def.App.A at 26.

At the conclusion of the hearing, the district court took the amended motion to suppress (R.53) and the motion to quash arrest (R.68) under advisement. d/e 4/13/2016. On April 20, 2016, the court denied Bell's amended motion to suppress in a written order but did not rule on the motion to quash. *See* R.71. In the order, the court held that Officer Sinks violated the Fourth Amendment when he viewed the home screen of Bell's phone after the arrest and further held that no exigent circumstances permitted the viewing. *Id.* at 4-11. Nonetheless, the court upheld the April 2015 and October 2015 search warrants. With respect to the April 2015 affidavit, the court held that even when the offending paragraph about Sinks was disregarded, the affidavit supported the magistrate judge's probable cause

finding. *Id.* at 14-15. Concerning the October 2015 affidavit, the court noted that it was substantially the same as the April 2015 affidavit, except that the offending paragraph had been omitted and replaced with the averment that the photograph had been found during the April 2015 search. *Id.* at 15. Thus, the court held, the October 2015 warrant established probable cause. The court did not reach the government's good-faith argument. *See* R.60 at 10; R.69 at 7-8.

H. Motion to Suppress and for *Franks* Hearing and Continuance

On May 4, 2016, Bell filed a second motion to suppress and for a *Franks* hearing. R.72. That same day he filed a motion to suppress his post-arrest statement (R.73). At the May 5, 2016, pretrial hearing, the district court set a June 8, 2016, hearing on all pending motions (R.68, 72, 73) and made an interest of justice finding excluding the time through that date. d/e 5/5/2016.

I. Fourth and Fifth Defense Request for a Continuance

On May 19, 2016, Bell filed a motion to hold pending motions in abeyance pending plea negotiations. R.77. Shortly thereafter, on May 24, 2016, Bell filed an unopposed motion to continue, again noting plea negotiations. R.78. On June 1, 2016, the district court denied the motion to hold pending motions in abeyance as moot, and granted Bell's request for a continuance. d/e 6/1/2018. The court vacated the June 8 motions hearing and set the case for a June 15, 2016, status conference. *Id.*

At the June 15, 2016, status conference, defense counsel made an oral motion for a continuance due to plea negotiations, to which the government did not object. d/e 6/15/2016. The court granted Bell's motion and set a pretrial conference for July 21, 2016. d/e 6/15/2016; Def.App.A at 27. The court made an interest of justice finding excluding the time through that date. *Ibid.*

J. Attorney Withdrawal, Appointment of New Attorney, and Adoption of Pending Motions

At the status conference on July 21, 2016, Bell requested that his attorney be removed and that another attorney be appointed. d/e 7/21/2016; Def.App.A at 27. The court appointed Hugh Toner to represent Bell and made an interest of justice finding excluding the time between July 21 and the newly scheduled status conference on August 26, 2016. *Ibid.* That status conference was later reset to August 31, 2016, and, at that hearing, Bell's new attorney adopted the pending motions to suppress (R.72, 73). d/e 8/23/2016; d/e 8/31/2016; Def.App.A at 27. The court scheduled a pretrial conference for November 3, 2016; set the trial for December 19, 2016; and made an interest of justice finding excluding the time through the trial date. d/e 8/31/2016.

K. Sixth Defense Motion for a Continuance

On September 19, 2019, Mr. Toner filed a motion to continue based on a potential conflict of interest, which was later resolved at an October 12, 2016, hearing. R.79; d/e 10/12/2016. At that same hearing, counsel also adopted the pending motion to quash and to suppress (R.68). d/e 10/12/2016.

L. Second Motion to Suppress Hearing

On October 20, 2016, the district court held a hearing on Bell's motion to quash arrest (R.68), second motion to suppress and for a *Franks* hearing (R.72), and motion to suppress Bell's post-arrest statement (R.73). d/e 10/20/2016. The government conceded the motion to suppress Bell's statement (R.73), and the court heard argument on the remaining motions, which it took under advisement. R.127; d/e 10/20/2016.

M. Motion to Dismiss Indictment on Speedy Trial Grounds

On October 20, 2016, Bell filed a motion to dismiss the indictment (R.81), arguing that his speedy trial rights had been violated when the court continued his trial date from July 27 to September 28, 2015. R.81. The government opposed the motion. R.84.

The district court denied the motion on November 4, 2016. While Bell had only alleged a speedy trial violation stemming from the July 2015 continuance, the court nonetheless addressed all delays following Bell's indictment. The court first noted

that the 56 days[3] that elapsed between Bell's indictment and the June 18, 2015, pretrial conference counted against the speedy trial clock. Def.App.A at 29. The court noted that it made interest of justice findings excluding all but the following remaining dates from the speedy trial clock: June 8 through June 15, 2016, (six days) and August 26 through August 31, 2016 (four days). *Id.* at 30. The court properly noted that even if these days were not excluded, Bell still would not have accumulated enough time to exceed the 70-day limit set by the speedy trial clock. *Id.* In any case, however, each of these time periods was automatically excluded under 18 U.S.C. § 3161(h)(1)(D) because pretrial motions were still pending. *Id.*

Regarding the July 22, 2015, continuance, the district court noted that a judge is permitted to "grant the continuance and exclude it from the Speedy Trial Act computation on his own motion, provided that he places in the record his reasons for doing so." Def.App.A at 30 (citing 18 U.S.C. § 3161(h)(7)(A); *United States v. Asubonteng*, 895 F.2d 424, 427 (7th Cir. 1990)). The court stated that it had made an interest of justice finding in light of "permissible considerations," including: (1) the time necessary to try additional counts that were not included in the original indictment; (2) the interest in trying all counts against Bell in a single trial; and (3) the fact that the continuance was in the best interest of Bell and was necessary to

[3] The government calculates this number as 57. See pp. 35-36.

give his attorney time to prepare his case. *Id.* at 6 (citing *Asubonteng*, 895 F.2d at 427)).

N. Denials of Motion to Quash and Motion for *Franks* Hearing

Also on November 4, 2016, the district court denied Bell's motion to quash his arrest warrant and suppress evidence (R.68) and related motion for a *Franks* hearing (R.72). *See* Def.App.A at 32-49. The court found the motion to quash largely rehashed arguments that had already been argued in Bell's motion to suppress the search warrants (R.53). *Id.* at 48. Furthermore, the court stated that any alleged omissions from the affidavit were not knowing and reckless and were not material to the issuing judge's probable cause determination. *Id.* at 39-47.

O. Seventh Defense Motion for Continuance

At a December 16, 2016, status conference, defense counsel made an oral motion to continue Bell's trial due to counsel's parents' health concerns. R.130 at 2-3. Bell personally objected and suggested he was not agreeing to waive speedy trial. *Id*. Counsel explained that Bell deserved his full attention, and he apologized for the situation that was beyond his control. *Id.* at 3. Bell maintained his objection. *Id.* The court granted the motion, and made an interest of justice finding, noting counsel's difficulty in providing services to Bell. *Id.* at 4. The court excluded all time through the new trial date of January 30, 2017. d/e 12/16/2016. Bell again

stated he felt like his speedy trial rights had been violated, but he did not request a new attorney or request to represent himself. R.130 at 6-7.

P. January 2017 Continuance

At the January 26, 2017, pretrial conference, the government indicated that one of its key witnesses, Turner, was unavailable to testify in person due to a quarantine at the prison where he was housed. Def.App.A at 13. The government noted that it was possible for Turner to appear via video. *Id.* at 14.

Mr. Toner told the court that strategically he preferred to have Turner appear in person. Def.App.A at 14. Counsel explained that the "bulk" of the defense was going to involve the lengthy cross-examination of Turner and it would be a "grave disadvantage" if Turner testified by video. *Id.* at 19. Moreover, it would be a "logistical nightmare" to conduct a cross-examination involving exhibits, such as transcripts and videos, via teleconference. *Id.* at 14-15.

Bell, however, said that he wanted to go to trial on January 30, maintaining that position even when the court discussed the disadvantages. Def.App.A at 15-17. Bell stated he did not understand how Turner's appearance by video had anything to do with his trial, and stated that he believed the continuance would violate his speedy trial rights. *Id.* at 17. The court replied that if it could not have a conversation with Bell where he understood that problem, he would rely on Bell's attorney's representation and make his decision based on that. *Id.*

The court found that the time was excludable through the new trial date of March 7, 2017, because the witness was unavailable in light of the importance of the in-person cross-examination of Turner. Def.App.A at 22.

Q. Trial, Post-Trial Motions, and Sentencing

On March 7, 2017, Bell proceeded to a three-day bench trial and was convicted on all counts. d/e 3/7/2017; d/e 3/8/17; d/e 3/9/17.

Shortly after the trial, Mr. Toner filed a motion for a new trial, asserting in part that Bell's speedy trial rights had been violated, while failing to identify during what time period(s). R.122. The motion also made no mention of the constitutional right to speedy trial and did not cite to related case authority. *Id.* Mr. Toner withdrew shortly after filing that motion, and William Holman was appointed to represent Bell. d/e 3/23/2017. Mr. Holman later filed an amended motion for new trial on behalf of Bell and asserted a speedy trial rights violation. R.143. In that motion, like the one previously filed, there was no mention of the Sixth Amendment right to a speedy trial and no related case citation. *Id.*

The district court denied the amended motion at the November 29, 2017, sentencing hearing. Def.App.A at 9-10. At that same hearing, the court sentenced Bell to an aggregate sentence of 160 months in prison, comprising terms of 60 months on Count One, to run consecutively to the concurrent terms of 100 months

on Counts Two through Four. d/e 11/29/2017; Def.App.A at 3. The court also imposed concurrent three-year terms of supervised release on all counts. *Id.*

The court entered final judgment on November 30, 2017, and this appeal follows Bell's December 11, 2017, timely notice of appeal. Def.App.A 1-7.

SUMMARY OF THE ARGUMENT

The "failure to raise a particular period of non-excludable time in a motion to dismiss" before the district court bars a defendant from challenging those periods on appeal. *United States v. Taplet*, 776 F.3d 875 (D.C. Cir. 2015). Here, Bell waived any argument under the Speedy Trial Act that is not premised on the *only* period of excludable time that he challenged below: July 22 through September 28, 2015.

Further, Bell's Speedy Trial Act claim is without merit even if this Court considers each of the four periods he now raises on appeal. At most, at the time he filed his motion to dismiss, only 57 non-excludable days had passed with regard to the felon-in-possession count alleged in the original indictment. R.8. The district court properly made an interest of justice finding excluding the July 22 to September 28, 2015, time period. The periods of June 8 to 15, 2016, and August 26 to 31, 2015, were automatically excluded because pretrial motions were pending. 18 U.S.C. § 3161(h)(1)(D). And the period of January 26 to March 7, 2017, was properly excluded due to the in-person unavailability of the government witness. 18 U.S.C. § 3161(h)(1), (3)(A). Furthermore, the district court did not plainly err by not dismissing Bell's indictment on constitutional, speedy trial grounds.

Finally, the district court correctly held that the affidavits in support of the April 2015 search warrant and the October 2015 search warrant established probable cause and that Bell failed to make the required showing for a *Franks*

hearing. Regarding the affidavits, they fully supported the probable cause determinations with detailed averments regarding Bell's brokerage of Mark Turner's sale of stolen firearms for cash and drugs; recorded details of a controlled drug transaction between Turner and Bell, in which Bell's sale of the AK-47 was noted, and Bell sent a photograph of the AK-47 to Turner; and a second confidential source's identification of Bell, among other factors. The district court also did not clearly err in declining to hold a *Franks* hearing. The court correctly determined that the alleged omissions in the search warrant affidavits regarding Turner's criminal history, law enforcement's independent sourcing of the AK-47 photograph, and information regarding the post-arrest search of Bell's phone were neither knowing nor reckless and were not material to the magistrate judge's probable cause determination.

In the alternative, the good faith exception established by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984), applied because Agent Nixon's affidavits were not so plainly deficient that they would have put a reasonable officer on notice that they failed to establish probable cause.

ARGUMENT

I. The Defendant Waived Speedy Trial Act Arguments That He Did Not Assert In A Motion To Dismiss

On appeal, Bell challenges four periods of time that he claims were not excludable time under the Speedy Trial Act, 18 U.S.C. § 3161: (1) July 22 through September 28, 2015; (2) June 8 through 15, 2015; (3) August 26 through 31, 2016; and (4) January 26 through March 7, 2016. *See* Def.Br. 17-28. He has waived any argument with respect to any period other than July 22 through September 28, 2015.

The Act provides that if "a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." *Id.* This Court has consequently recognized that the Act "characterizes a defendant's failure to move for dismissal as 'a waiver – not a forfeiture – of his rights under the Act.'" *United States v. White*, 443 F.3d 582, 589 (7th Cir. 2006) (citation omitted). In such circumstance, this Court has determined it may not address the defendant's claims under the Act on appeal. *Id.* Moreover, even where a motion to dismiss the indictment is filed, a "failure to raise a

particular period of non-excludable time in a motion to dismiss" amounts to a waiver, not merely a forfeiture, that those days are non-excludable. *United States v. Taplet*, 776 F.3d 875, 879 (D.C. Cir. 2015); *United States v. O'Connor*, 656 F.3d 630, 638 (7th Cir. 2011) (dictum) stating that if "the defendant bears the burden of 'spotting' Speedy Trial Act violations, it follows that any specific violation not raised in a motion to dismiss is waived.").

Here, Bell's motion to dismiss the indictment raised only one speedy trial issue: the propriety of the district court's July 22 to September 28, 2015, continuance. R.81. Consequently, Bell has waived any claims regarding the other periods he raises for the first time on appeal: June 8 through 15, 2016; August 26 through 31, 2016; and January 26 through March 7, 2017. *See* 18 U.S.C. § 3162(a)(2); *White*, 443 F.3d at 589.[4]

II. The Defendant's Rights Under The Speedy Trial Act Were Not Violated

A. Standard of Review

This Court "reviews legal questions regarding the application of the Speedy Trial Act de novo," but reviews the district court's factual findings for clear error. *United States v. King*, 338 F.3d 794, 797 (7th Cir. 2003) (citation omitted).

[4] Even if Bell's motion for a new trial could cure his waiver, which it cannot, the perfunctory speedy trial claim in that motion (R.143) challenges no specific period of time.

B. Legal Framework

The Speedy Trial Act generally requires criminal trials to begin with 70 days "from the filing date (and making public) of the indictment . . . or from the date the defendant has appeared before a judicial officer of the court" in which the charges at issue are pending, whichever occurs later. 18 U.S.C. § 3161(c)(1). If the defendant is not brought to trial within that 70-day timeframe, the charging document shall be dismissed on the motion of the defendant. 18 U.S.C. § 3162(a)(2). However, certain continuances and delays of trial may be excluded from the 70-day time period. *See* 18 U.S.C. § 3161(h).

Relevant here, permitted exclusions of time include delays resulting from any pretrial motion from the filing of such a motion through the conclusion of the hearing on, or other prompt disposition of, such a motion. 18 U.S.C. § 3161(h)(1)(D). Such pretrial motions include motions to continue by defense counsel, even where a defendant did not consent to the motion. *Blake v. United States*, 723 F.3d 870, 886 (7th Cir. 2013). Furthermore, this Court has held that oral motions for a continuance toll the speedy trial clock "the same as written motions for purposes of Speedy Trial Act calculations." *Id.* at 886. Consequently, the day on which defense counsel makes an oral motion for a continuance is "automatically excludable" under 18 U.S.C. § 3161(h)(1)(D). *United States v. Richmond*, 735 F.2d 208, 212 (6th Cir. 1984).

The Act also permits delays where the court is considering a proposed plea agreement. 18 U.S.C. § 3161(h)(1)(G). Additional permissible delays include those reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court. 18 U.S.C. § 3161(h)(1)(H). And delays resulting from the absence or unavailability of an essential witness are likewise excluded. 18 U.S.C. § 3161(h)(1), (3)(A).

Finally, the Act permits delays to be excluded from the 70-day window when those delays result from a continuance granted by a judge on his own motion, at the request of the defendant or his counsel, or at the request of an attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. 18 U.S.C. § 3161(h)(7)(A). Such delays are only excludable if the court sets forth, orally or in writing, its reasons for finding that the ends of justice served by the granting the motion outweigh the best interests of the public and the defendant in a speedy trial. *Id.*

In determining whether to grant a continuance based on the ends of justice, the judge weighs factors, including (1) whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible or result in a miscarriage of justice; and (2) whether the failure to grant a continuance would deny the defendant reasonable time to obtain counsel, would

unreasonably deny the defendant or the government continuity of counsel, or would deny counsel for the defendant or the attorney for the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence. 18 U.S.C. § 3161(h)(7)(B).

Federal Rule of Criminal Procedure 45 governs the calculation of time under the Act to the extent it is not already covered by statutory provisions. *See United States v. Garrett*, 45 F.3d 1135, 1140, n.6 (7th Cir. 1995). Rule 45 requires that a period of time be calculated from the day after the event that triggers the period through the last day of the period, to include weekends and holidays. Fed. R. Crim. P. 45(a)(1).

C. Analysis

Even assuming for argument's sake that Bell did not waive three of his Speedy Trial Act claims, he still cannot show that his rights under the Act were violated.

1. The district court properly excluded the period of July 22 to September 28, 2015, in the interest of justice

Turning first to the only time period that Bell contested below, the district court was within its broad discretion in granting the government's July 22, 2015, motion and determining that it was in the interest of justice to do so. This Court has held that whether "to grant a continuance along with the related decision(s) of whether to exclude periods of delay under the Act are matters entrusted to the sound

discretion of the district court." *Blake*, 723 F.3d at 884. Thus, "any decision made does not constitute reversible error absent a showing of abuse of discretion by the court *and* of actual prejudice." *Id.* (emphasis added). Neither exists here.

The court's interest of justice finding was well-reasoned. The court considered factors, including the amount of discovery that Bell had just received five days before the scheduled trial. Def.App.A at 60-61. The court also weighed the time necessary for defense counsel to adequately prepare for the trial of her client, who was facing significant time in prison. *Id.* at 62-64. Bell attempts to make much of the fact that his attorney said she was ready for trial. Def.Br. 23, 25. It is true that the attorney said that *Bell* "did not want a continuance of the trial date." Def.App.A at 61-62. But she indicated that she might end up needing a continuance and reserved the right to seek it, saying she would be "prepared to proceed with the caveat" that she didn't know what was in the 1,000 pages and eight hours of recording. *Id.* at 62. Bell's attorney also expressed other concerns with the trial date, including the potential difficulty in meeting with her client at the jail to go over the discovery. *Id.* Additionally, at the time of the July 22 hearing, she had yet to file any pretrial motions.

Though Bell suggests the discovery provided by the government would have been inapplicable to his felon-in-possession count from the original indictment (Def.Br. 24), that goes directly against what his own attorney said at the hearing.

Bell's attorney said that she believed all of the new counts in the superseding indictment arose from the same "three discrete occurrences" about which she already had knowledge (presumably the trade of firearms for drugs and two cocaine sales to Turner). Def.App.A at 62. Bell's suggestion that the new discovery would not be relevant to his trial on the felon-in-possession charge is therefore implausible. Regardless, his argument on appeal has no support in the record.

Bell also argues that the district court adopted an incorrect position proffered by the government regarding the application of the speedy trial clock to superseding and original indictments. Def.Br. 20-26. Not only did the district court not accept the government's position at the July 22 status hearing, the court also warned the government that its position on the Speedy Trial Act might be incorrect. Def.App.A at 68. Nonetheless, the court said if the government was "comfortable enough to believe in" its position, "knowing that it could result in a motion filed from the defense that [the court] would address," the court could set all five counts for a later date. *Id.*

In the end, the court did not grant the government's motion for a continuance based on the Speedy Trial Act position the court had suggested it might later overturn. Def.App.A at 68. The government had proffered a number of reasons to continue the trial outside that application of the Act, citing the "state of the record," the fact that Bell had "just been arraigned" that afternoon, and the fact

that the government needed to prepare witnesses. *Id*. at 65. It is not clear which of these reasons caused the court to describe the government's motion as "well taken." *Id*. The Act permits the issuing judge to grant a continuance "without the consent of the defendant or his counsel." *United States v. Asubonteng*, 895 F.2d 424, 427 (7th Cir. 1990). Considerations including the "efficient and effective use of judicial time" and the ability of a defendant's attorney to prepare for trial are all permissible factors for the court to take into account, as it did at the July 22 hearing.

When it later denied Bell's motion to dismiss under the Speedy Trial Act (Def.App.A at 25-31), the district court affirmed its reasoning for granting the July 22, 2015, motion to continue. The court stated that it agreed with the government's rationale regarding the efficiency of trying all of the counts against Bell together in a single trial as justifying the continuance. Def.App.A at 30. The court also discussed how the continuance was in the best interest of Bell himself because it was "necessary to give his attorney adequate time to prepare his case." *Id*. The court's careful consideration of Bell's best interest in granting this continuance constitutes neither an abuse of discretion nor actual prejudice. *Blake*, 723 F.3d at 884.

2. The district court correctly held that the periods of June 8 to 15, 2016, and August 26 to 31, 2016, were automatically excluded due to pending motions

The next two time periods that Bell categorizes as non-excludable – June 8 through 15, 2016, and August 26 through 31, 2016 – are excluded under 18 U.S.C. § 3161(h)(1)(D) because pretrial motions were pending during those windows. 18 U.S.C. § 3161(h)(1)(D). First, between June 8 and 15, 2016, Bell's motions to suppress and quash (R.68, R.72, R.73) remained pending with the district court and that time was therefore excludable. 18 U.S.C. § 3161(h)(1)(D). The same motions were pending between August 26 and August 31, 2016, making that time excludable as well. *Id.; see also* d/e 8/23/2016; d/e 8/31/2016; Def.App.A at 27.

Relatedly, Bell claims that, when the June 2016 and August 2016 dates are considered in conjunction with the time between his indictment and first pretrial conference, exactly 70 days of non-excludable time passed before his trial. Not only does his argument fail because the June 2016 and August 2016 periods are excludable, his calculations are incorrect as well. April 21, 2015, the day of Bell's public indictment, triggered the first and only non-excludable period. R.8. Per Rule 45, however, the initial day, April 21, is not counted. Fed. R. Crim. P. 45(a). The scheduled pretrial conference on June 18, 2015, was the final day of the non-excludable period. d/e 5/7/2015. Under Rule 45, June 18 would normally be counted toward the non-excludable period. Fed. R. Crim. P. 45(a). But Bell moved

for a continuance on June 18 which makes that day excludable as well. *See Blake*, 723 F.3d at 886. Therefore, 57 days of non-excludable time elapsed between the public filing of the indictment and the June 18 motion for continuance, rather than 58 days as Bell claims. Def.Br. 18. That alone is enough to sink Bell's argument that exactly 70 non-excludable days passed between his indictment and trial. Def.Br. 17-20. His calculation of the June time period is similarly inaccurate due to his motion for a continuance on June 15, 2016. Def.Br. 18; *see also Blake*, 723 F.3d at 886. The June time period at issue was therefore six days, and not seven.

Consequently, only 57 days of non-excluded time counted against Bell's speedy trial clock. *See* Fed. R. Crim. P. 45(a); *Blake*, 723 F.3d at 886. Moreover, that 57 days only accumulated against the felon-in-possession count in the original indictment (R.8), which was the only count charged during that time period. *See United States v. Kennedy*, 33 F.3d 56 (7th Cir. 1994) (holding that where a superseding indictment adds new charges, the speedy trial clock resets with respect to those charges, with limited exceptions).

Bell mistakenly argues (Def.Br. 19-20) that judicial estoppel prevents the government from arguing that the speedy trial clock could not have run on the new counts until after the first superseding indictment was filed. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Zedner*

v. United States, 547 U.S. 489, 504 (2006) (citations omitted). Simply put, the government did not prevail on a contrary position in district court. Certainly, the government made legally erroneous statements regarding the application of the speedy trial clock to charges in original and superseding indictments. *See* R.84 at 5; Def.App.A at 66. But the government did not prevail because of those misstatements, and should not be "bound to a position it unsuccessfully maintained." *See Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990). As described above, the district court did not adopt the government's previous position on the application of the Speedy Trial Act to the original and superseding indictments.[5]

3. The district court did not clearly err in concluding that Turner was unavailable under the terms of the Act

The district court also did not clearly err in determining that Turner was unavailable as a witness and, therefore, granting the defense's motion to continue for that reason. *King*, 338 F.3d at 797. The Act excludes from the speedy trial clock any "period of delay resulting from the absence or unavailability of . . . an essential witness." 18 U.S.C. § 3161(h)(3)(A). A witness is unavailable when his

[5] Bell also incorrectly states that the district court's order denying his motion to dismiss shows that the court believed there was one speedy trial clock for *all* counts of the indictment. Def.Br. 19. In fact, the district court's order is not clear on that point. Def.App.A at 30. The court does say, however, that it made an interest of justice finding in granting the continuance, which again suggests its decision to grant the motion to continue was not based an adoption of the government's Speedy Trial Act position. *Id.* at 29-31.

whereabouts are "known but his presence for trial cannot be obtained with due diligence." § 3161(h)(3)(A). At the January 26, 2017, pretrial conference, the government told the court and defense counsel that a material witness, Turner, would be unavailable to testify in person on the scheduled trial date of January 30, 2017, due to a quarantine at Turner's prison. Def.App.A at 13. While the government did offer to have Turner appear via video, Bell's attorney said that could greatly hamper Bell's defense. *Id.* at 14. Defense counsel explained that the "bulk" of his defense for Bell was going to involve the lengthy cross-examination of Turner, and video testimony would be a "grave disadvantage." *Id.* at 19. He also suggested, understandably, that it would be a "logistical nightmare" to conduct a cross-examination involving transcript and video exhibits via teleconference. *Id.* at 14-15.

The difficulties that counsel identified made Turner unavailable for the then-scheduled trial date. The courts have long recognized the importance of cross-examination. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 61 (2004). Although Bell personally said he did not want any more continuances and noted his speedy trial rights, the necessity of having the government's material witness in the courtroom for in-person cross-examination by the defense was a strategic decision properly left to his attorney. *See Gearhart,* 576 F.3d 459, 463 n. 3 (7th Cir. 2009) (no Speedy Trial Act requirement that counsel obtain defendant's consent "prior to making

purely tactical decisions such as the decision to seek a continuance."). The court therefore properly found that the time through the new trial date of March 7, 2017, was excludable.[6]

III. There Was No Constitutional, Speedy Trial Error, Plain Or Otherwise

A. Standard of Review

In neither the motion to dismiss (R.81) nor the perfunctory amended motion for new trial (R.143) in which he claimed the district court erred in denying the motion to dismiss did Bell even refer to the Sixth Amendment right to a speedy trial. Additionally, his filings were devoid of relevant case authority and discussion of the four-factors relevant to a Sixth Amendment claim. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972). Further, the district court clearly understood Bell's motion to dismiss as raising a claim only under the Speedy Trial Act, *see* Def.App.A at 25-31, and Bell never took any step to correct the court's understanding. In short, Bell forfeited the constitutional claim that he now raises on appeal.

[6] Should this Court disagree with the government's position and hold that the indictment or any count of the indictment must be dismissed, the government requests that this Court leave to the district court to determine whether the dismissal would be with or without prejudice. *See United States v. Janik*, 723 F.2d 537, (7th Cir. 1983) (stating the district court should make such determination, subject to appellate review, "unless the answer is so clear that no purpose would be served by a remand to the district court.").

When, as here, a defendant has failed to preserve a constitutional speedy trial claim, review is for plain error. *United States v. O'Connor*, 656 F.3d 630, 643 (7th Cir. 2011); *but see United States v. Oriedo*, 498 F.3d 593, 597, n.2 (7th Cir. 2007) (stating constitutional speedy trial claims are unsuited to the strict rules of forfeiture and reviewing the defendant's claim de novo). Under the plain-error standard, this Court examines whether (1) the district court committed an error, (2) that is "clear" or "obvious," and (3) that affected the defendant's "substantial rights." *United States v. Olano*, 507 U.S. 725, 732-35 (1993) (citations omitted). The defendant "shoulders the burden of demonstrating that the error resulted in prejudice to him," and there is "no reason why this rule should not apply when the issue is whether a district court relied on a clearly erroneous fact at sentencing." *United States v. Corona-Gonzalez*, 628 F.3d 336, 341 (7th Cir. 2010). To demonstrate prejudice, a defendant must show that there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Burns*, 843 F.3d 679, 688 (7th Cir. 2016) (citation omitted). Even if a defendant meets the first three parts of the plain-error test, an appellate court has discretion to correct the error, and it should exercise that discretion only "if the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted). The Supreme Court has made clear that this fourth part of the plain-error standard imposes an

independent barrier to relief that must be applied on "a case-specific and fact-intensive basis," *Puckett v. United States*, 556 U.S. 129, 142 (2009), to correct only "egregious errors," *United States v. Young*, 470 U.S. 1, 15 (1985) (citation omitted).

Irrespective of the standard this Court applies to review Bell's forfeited claim, it is without merit.

B. Legal Framework

The Sixth Amendment guarantees a defendant "the right to a speedy and public trial." U.S. Const. am. VI. That right is triggered by an indictment. *United States v. Arceo*, 535 F.3d 679, 684 (7th Cir. 2008). The Supreme Court has identified four factors for courts to consider in determining whether a defendant's constitutional speedy trial rights have been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. *Doggett v. United States*, 505 U.S. 647, 651 (1992) (citation omitted).

C. Analysis

Balancing these factors, it is evident that Bell's constitutional right to a speedy trial was not violated.

Although Bell correctly notes that this Court considers delays that approach one year to be presumptively unreasonable, Bell bore the lion's share of the responsibility for the delay due to his multiple changes in attorneys and multiple

(and at times, repetitive) pretrial motions. *Doggett*, 505 U.S. at 651. Bell also requested at least seven continuances during the trial, and was "responsible for the resulting delay," while the government only requested two. *United States v. Gearhart*, 576 F.3d 459, 463 (7th Cir. 2009).

Bell nonetheless argues that the delays were due to the government's filing of new indictments. Def.Br. 33. But the record reflects that following the first superseding indictment, the changes to the second and third superseding indictments (narrowed date ranges and a merging of counts) did not delay proceedings. *Compare* R.12 *with* R.28 *with* R.55.

Bell further argues that the government delayed proceedings by being unprepared for set trial dates, but again mischaracterizes the July 22, 2015, hearing, as well as the March 1, 2016, arraignment. Def.Br. 33. At the arraignment, government and defense counsel compared available dates to determine the best date for a future suppression hearing on *Bell's pending motions*, the government said it was available in March, defense counsel requested mid-April, and the court set a date of April 13, 2016. R.168 at 6-9. For Bell to suggest the government caused that delay is disingenuous. With respect to the July 22, 2015, hearing, defense counsel gave, at best, a tepid representation that she would be ready for the then-set trial. And a review of the record reveals the case was not ready, as she soon thereafter filed various motions and subsequent counsel filed multiple

suppression motions. Had the trial occurred at that time, Bell would undoubtedly be claiming that his attorney was not prepared (and ineffective) since she had failed to file any procedural or substantive motions.

Furthermore, while Bell did file a motion to dismiss his indictment based on alleged Speedy Trial Act violation, he only challenged one narrow window of the pretrial period (July 22 through September 28, 2015) and did not raise a constitutional claim. That motion was denied because, as discussed *supra*, the district court correctly determined that it was in the interest of justice (and in Bell's best interest) not to proceed to trial on July 27, 2015. Def.App.A at 25-31. Bell also filed a post-trial motion for a new trial that suggested a speedy trial violation, although it did not specify time frame, which was similarly denied. R.143. These unsuccessful assertions, combined with Bell's complaints about delays at several hearings, do not show that his speedy trial rights were violated, particularly in light of his attorneys' valid reasons for requesting continuances, including but not limited to the filing of pretrial motions and plea negotiations. These strategic decisions were within the purview of Bell's attorneys and in fact frequently resulted in pretrial motions being filed on his behalf. *See Gearhart,* 576 F.3d at 463 n. 3.

Finally, Bell did not suffer prejudice due to the delay. *See Doggett*, 505 U.S. at 651. While it is true that certain witnesses at trial said they did not remember every

detail of the case due to the two-year gap (Def.Br. 30, 33), all of these witnesses were interviewed and wrote reports contemporaneous with the events that occurred. Bell had access to all of those documents and was free to refresh the witnesses' memories at any point necessary. Gaps in government witnesses' memories could even have been helpful to Bell, as he could "have highlighted [those gaps] as a reason to discount their testimony." *O'Connor*, 656 F.3d at 643. Bell has not shown that the delay before trial caused his defense to be *impaired* by "dimming memories" or "loss of exculpatory evidence" or that it weakened his ability to raise specific defenses. *Doggett*, 505 U.S. at 654.

In sum, in light of Bell's responsibility for the delay before trial and his inability to show that he suffered prejudice, the district court did not clearly err in not dismissing Bell's case on constitutional, speedy trial grounds.

IV. The District Court Correctly Denied The Defendant's Motions Aimed At Suppressing The Evidence From His Cellphone

A. Standard of Review

In reviewing the issuing judge's finding of probable cause, a district court does not decide the issue of probable cause de novo. Instead, it "gives 'great deference' to the issuing judge's determination so long as the judge had a 'substantial basis' for the finding." *United States v. Miller*, 673 F.3d 688, 692-93 (7th Cir. 2012) (citation omitted).

This Court, in turn, reviews de novo the district court's determination that the issuing judge had a substantial basis for the probable cause finding. *United States v. Searcy*, 664 F.3d 1119, 1122 (7th Cir. 2011). This Court, however, also gives "'great deference' to the conclusion of the judge who initially issued the warrant." *Id.* (citation omitted).

"Clear error is the proper standard of review if a party is challenging a district court's denial of a defendant's request for a *Franks* hearing." *United States v. Wilburn*, 581 F.3d 618, 622 (7th Cir. 2009).

B. Legal Framework

The "task of the issuing magistrate is simply to make a practical commonsense decision whether," given the totality of circumstances set forth in the affidavit, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Curry*, 538 F.3d 718, 729 (7th Cir. 2008) (internal alterations omitted). When an affidavit is the only evidence presented to a judge in support of a search warrant, the validity of the warrant rests solely on the strength of the affidavit. *United States v. Peck*, 317 F.3d 754, 755 (7th Cir. 2003).

C. Analysis

Bell appears to contest both the district court's denial of his amended motion to suppress (R.71) and the district court's denial of his motion to quash arrest warrant and suppress evidence and motion for a *Franks* hearing (Def.App. A at 32-

49), though he never explicitly states in his brief that he is challenging the former ruling nor does he attach the court's order with his appendix as required. *See* Fed. R. App. P. 30(a)(1)(C); Cir. R. 30(a). Bell first argues the district court erred in finding that the photograph of the AK-47 obtained from Bell's phone was admissible as evidence in light of the independent source doctrine. Def.Br. 34-42. Bell next argues that the inclusion of information about the illegal search of his phone and subsequent discovery of the AK-47 photograph irredeemably tainted the April 2015 search warrant when considered with other omissions. *Id.* at 38-42. Finally, Bell claimed that the district court clearly erred in declining to grant him a *Franks* hearing because he had made a substantial preliminary showing that the signing officer for the April 2015 and October 2015 search warrants omitted or distorted certain details. *Id.* at 42-46. His claims are meritless.

1. The district court correctly determined that the AK-47 photograph should not be suppressed

The district court properly determined that the photograph of an AK-47 Bell had on his cellular phone should not be suppressed. R.71. In making that determination, the district court judge concluded that Officer Sinks's opening of Bell's flip phone without a warrant constituted an illegal search. *Id.* at 11. The court nevertheless correctly found that the photograph Officer Sinks discovered should not be suppressed under the independent source doctrine. *Id.* at 15. "The

independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix v. Williams*, 467 U.S. 431, 443 (1984). Here, Agent Nixon had already learned, in separate circumstances, that Bell had a photograph of the AK-47 on his phone, and, in fact, had a copy of the photograph in question. Specifically, during the February 25, 2015, controlled substance transaction, Bell, from his own phone, had shown and texted Turner a photograph of the AK-47. Tr. 65-66, 77, 387-88; Def.App.B at 26, 30. Nixon was able to confirm these events because (1) audio and video of the controlled buy showed the two men discussing the AK-47, Turner telling Bell his number, and Bell showing the Turner his phone, and (2) directly after the buy, Turner showed the AK-47 photograph to Nixon, who then took a picture of Turner's phone displaying the AK-47 photograph. Tr. 65-67; Def.App.B at 26. Because law enforcement had prior knowledge of the AK-47 photograph on Bell's phone and in fact had taken a picture of the image, under the independent source doctrine, the AK-47 photograph was admissible.

Moreover, law enforcement clearly would have obtained a warrant for Bell's phone based on the above information and discovered the photograph. This Court has held in numerous cases that even an illegally seized item need not be suppressed if the government can prove by a preponderance that officers would have inevitably discovered it through lawful means. *United States v. Stotler*, 591

F.3d 935, 940 (7th Cir.2010). In order to show that the seized item would have been inevitably discovered, the government need only demonstrate that it "would be unreasonable to conclude that, after discovering all of [the] information, the officers would have failed to seek a warrant." *United States v. Pelletier*, 700 F.3d 1109, 117 (7th Cir. 2012) (citation omitted). Because law enforcement agents knew Bell previously had an image of the AK-47 on his phone, they would have sought (and received) a warrant regardless of whether Officer Sinks viewed the phone in advance.

2. The April 2015 affidavit presented to the magistrate judge contained sufficient probable cause even without details of Officer Sinks's search

The district court correctly found that the April 2015 search warrant affidavit contained sufficient probable cause supporting the search of Bell's cell phone, even without the information regarding Officer Sinks's search. R.71 at 12-14. That was the correct analysis. "A search warrant obtained, in part, with evidence which is tainted can still support a search if the 'untainted information, considered by itself, establishes probable cause for the warrant to issue." *United States v. Oakley*, 944 F.2d 384, 386 (7th Cir. 1991). In assessing whether the results of the subsequent search must be suppressed, courts ordinarily consider, first, whether the illegally obtained evidence affected the magistrate's decision to issue the warrant and, second, whether the officer's decision to obtain a warrant was prompted by the

information unlawfully obtained. *United States v. Gray*, 410 F.3d 338, 344 (7th Cir. 2005). Thus, the central question for this Court is whether the "affidavit police submitted to obtain the search warrant contained sufficient facts to establish probable cause" for the search. *United States v. Scott*, 731 F.3d 659, 664 (7th Cir. 2013).

Here, the affidavit contained sufficient facts to establish probable cause justifying the search warrant even without the details of Officer Sinks' viewing of Bell's phone. The affidavit describes Officer Sinks's discovery in one sentence: "Upon Bell's arrest, Peoria Police Officer Justin Sinks observed the 'home' and/or 'lock screen' photo on the Device to be a photograph of an AK-47." Def.App.B at 2-10.

The rest of the affidavit standing on its own provides sufficient probable cause for the search of Bell's phone. The affidavit describes the theft of the Glock pistol, two AR-15 rifles, one AK-47 rifle and an air rifle from a confidential source's coworker's home. Def.App.B at 3. The affidavit also noted that the confidential source was identified by his coworker as a potential suspect. *Id.* The affidavit revealed that the confidential source was later arrested on charges relating to the manufacture of methamphetamine and during a proffer interview confessed to the burglary of his coworker's residence. *Id.* He further confessed that after stealing

the firearms, he brought them to Peoria and sold them to a drug dealer who went by the street name "Jay" for money and cocaine. *Id.*

The affidavit stated that the confidential source later agreed to assist law enforcement in locating the stolen firearms. Def.App.B at 4. On February 13, 2015, law enforcement agents conducted a controlled buy of a small amount of cocaine from "Jay" by the confidential source, which was audio- and video-recorded. *Id.* Following that transaction, law enforcement interviewed an inmate at the local jail and showed him images from the buy. *Id.* The inmate positively identified the seller as "Demontae Bell." *Id.* The confidential source was later shown a photograph of Bell that was obtained from a law enforcement database, and he confirmed that the individual in the photograph was "Jay." *Id.*

The affidavit described another controlled buy between the confidential source and Bell on February 25, 2015, which was again audio- and video-recorded. Def.App.B at 5. The confidential source told law enforcement that during the buy Bell advised him that he no longer had the AK-47 rifle. *Id.* The confidential source's statement was confirmed following a review of the audio- and video-recording. *Id.* Bell stated that he had a photograph of the AK-47 and offered to send it to the confidential source via text message. *Id.* The confidential source received the photograph, and showed it to law enforcement. *Id.*

The affidavit also noted that Mr. Bell's criminal history included a felony delivery of controlled substance conviction. Def.App.B at 4.

The affidavit, even without the sentence regarding Sinks, therefore provides ample probable cause. "Probable cause is established when, based on the totality of the circumstances, the affidavit [to the judge] sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime." *Peck*, 317 F.3d at 756. This is a "practical, nontechnical conception." *Illinois v. Gates*, 462 U.S. 213, 231 (1983). A practical reading of the affidavit establishes probable cause to believe Bell illegally possessed the AK-47 and that there was a fair probability that a photograph of that AK-47 existed on his cell phone. As a result, the AK-47 photograph was discovered pursuant to a valid search warrant and was admissible at trial

Bell attempts to further discredit the probable cause finding by asserting that "the magistrate judge knew *nothing* about Turner when he issued the warrant." Def.Br. 39 (emphasis in original). These allegations, along with indicators of Turner's reliability, are addressed further below in the context of Bell's motion for a *Franks* hearing.

3. Even absent probable cause, the good faith exception applies

Should this Court determine that, without the Sinks information, the April 2015 warrant lacks probable cause, the *Leon* good faith exception should still apply. "[T]he suppression of evidence seized pursuant to a search warrant that is later declared invalid is inappropriate if the officers who executed the warrant relied on good faith on the issuing judge's finding of probable cause." *United States v. Searcy*, 664 F.3d 1119, 1124 (7th Cir. 2011) (citing *United States v. Leon*, 468 U.S. 897, 920-24 (1984)). "An officer's decision to obtain a search warrant is *prima facie* evidence that he or she was acting in good faith." *Id*. A defendant can rebut the presumption of good faith by demonstrating one of the following: "(1) that the issuing judge abandoned his or her detached and neutral role, (2) the officers were dishonest and reckless in preparing the affidavit, or (3) the warrant was so lacking in probable cause as to render the officer's belief in its existence entirely unreasonable." *Id*.

Bell can prove none of these. The warrant, as described above, neither caused the issuing judge to abandon his detached and neutral role, nor was it so lacking in probable cause as to render Agent Nixon's belief in it non-existent. As will be addressed further below, Agent Nixon also was not dishonest or reckless in preparing the affidavit.

4. The district court did not clearly err in denying Bell's request for a *Franks* hearing

The district court did not clearly err when it denied Mr. Bell's motion for a *Franks* hearing challenging the veracity of the search warrants. R.72. *Wilburn*, 581 F.3d at 622. "In order to obtain a hearing, commonly called a *Franks* hearing, to explore the validity of a search warrant affidavit, a defendant must make a 'substantial preliminary showing' that: (1) the affidavit contained a material false statement; (2) the affiant made the false statement intentionally, or with reckless disregard for the truth; and (3) the false statement was necessary to support the finding of probable cause." *United States v. Maro*, 272 F.3d 817, 821 (7th Cir. 2001). These standards also apply to omissions from the affidavit. *United States v. Williams*, 718 F3d 644, 653-55 (7th Cir. 2013). With respect to omissions, a defendant must show that the alleged "material information was omitted deliberately or recklessly to *mislead* the issuing magistrate." *Id.* at 650 (emphasis in original).

These "elements are hard to prove, and thus *Franks* hearings are rarely held." *Maro*, 272 F.3d at 821 (citation omitted). A defendant requesting a *Franks* hearing "bears a substantial burden to demonstrate probable falsity." *Id.* (citation omitted). Additionally, "an unimportant allegation, even if viewed as intentionally misleading, does not trigger the need for a *Franks* hearing." *Id.* (citation omitted).

A careful review of the record here demonstrates that Bell failed to make a substantial preliminary showing that Nixon intentionally or recklessly included false statements or omitted certain information from his search warrant affidavits. On appeal, Bell addresses three alleged omissions in the warrant affidavits and argues that by allegedly knowingly and recklessly leaving out that information, Nixon substantially increased his chances of obtaining a warrant. Def.Br. 43. Specifically, Bell argues on appeal that the April 2015 and October 2015 search warrant affidavits contained omissions regarding (1) Turner's credibility, and (2) Nixon's knowledge of the origin of the AK-47 photograph on Turner's phone. Def.Br. 43-44. Bell further claims that Nixon omitted details from the April 2015 warrant that might have indicated Sinks illegally searched Bell's phone, and omitted Sinks's search altogether from the October 2015 warrant. Def.Br. 44.

As a preliminary matter, Bell's motion for a *Franks* hearing in district court did not raise questions about Agent Nixon's knowledge regarding the photograph's origin or challenge the omission of details regarding Sinks's viewing of Bell's phone. R.72. These arguments are therefore waived on appeal. *See United States v. Brodie*, 507 F.3d 527, 531 (7th Cir. 2007) (holding that "[a]lthough a forfeited argument usually warrants plain error review," a forfeited suppression argument is waived absent a showing of good cause). However, should this Court determine

the arguments are not waived, none of the alleged omissions was knowing or reckless or material to the probable cause determination.

First, Bell has not shown the district court clearly erred in concluding Bell had failed to make the required preliminary showing that the alleged omission by Nixon regarding Turner's credibility was knowing, reckless, or material to the probable cause determinations. Bell argues that Nixon's April 2015 and October 2015 affidavits failed to adequately outline Turner's criminal history, and also did not address the crimes he committed on April 21, 2015 after being signed up as an FBI informant. Def.Br. 44. As the district court correctly noted, however, the affidavits did not vouch for Turner's reliability and in fact "put the issuing judge on notice that [Turner] stole . . . weapons from his neighbor" and "had been arrested on charges related to manufacture of methamphetamine" at the time he became an informant. Def.App.A at 45. The magistrate judge was therefore well aware of Turner's criminality and that he faced pending charges, when considering his reliability and motivations.

Furthermore, a confidential source's motivation to lessen the consequences he would suffer for his own crimes does not make the information he provides inherently unreliable. *See United States v. Mitten*, 592 F. 3d 767, 774 (7th Cir. 2010). Finally, in evaluating Turner's credibility, this Court also considers independent police corroboration of the information, which was certainly present in each

affidavit. *Peck*, 317 F.3d at 756. The district court correctly found that Nixon's April 2015 and October 2015 affidavits included key corroborating information: an independent source's identification of Bell[7] and a discussion of the audio- and video-monitored February 25, 2015, controlled buy. Def.App.A at 45. The October 2015 affidavit also included averments concerning the burglary victim's identification of the AK-47 in the photograph recovered pursuant to the April 2015 warrant. *Id.* at 46.; *see also* Def.App.B at 14. Because the magistrate judge was on notice regarding Turner's criminality and the affidavits provided corroborating information for Turner's assertions, Bell failed to make the required preliminary showing for a *Franks* hearing concerning alleged omissions about Turner's past criminal conduct.

Addressing Turner's April 21, 2015 burglary, the district court correctly recognized that criminal conduct committed by Turner on that date could not have been included in the affidavit on April 17, 2015, when it was presented to the magistrate judge. Def.App.A at 44-45. The court also properly determined that Nixon was not required to report "unfavorable information" about a confidential source that came to light after the issuing of the warrant where it was not so significant as to alter the probable cause determination. *Id.* (citing *Guzman v. City*

[7] Bell also takes issue with the fact that the jail informant who identified him by his legal name said his nickname was "Tay Tay" rather than "Jay," the nickname by which Turner knew him. Def.Br. 42. An individual can have more than one nickname.

of Chicago, 565 F.3d 393, 396 (7th Cir. 2009) ("Information that emerges after the warrant is issued has no bearing on this analysis.")). Here, the fact that Turner, a known burglar, had committed another burglary and lied about it was not information so significant as to alter the probable cause analysis. The court also noted that information regarding Turner's April 21, 2015, criminal conduct was included in another government search warrant obtained later in April 2015, further suggesting that the omission here was not deliberate. *Id.* at 46.

Examining the October 2015 affidavit, the district court recognized that it also did not include the information regarding Turner's April 2015 arrest for burglary, despite being issued several months later. But as discussed previously, the affidavit had placed the magistrate judge on notice regarding Turner's criminality and contained significant corroborating information. Def.App.A at 46. The omission of Turner's April 2015 burglary was neither knowing nor reckless as it did not materially alter the probable cause analysis.

Bell similarly has not shown that Nixon, in either the April 2015 or October 2015 affidavit, recklessly or knowingly omitted information regarding his knowledge of the origin of the AK-47 photograph on Turner's photo. Bell specifically criticizes Nixon for failing to include an audio transcript with his application for the search warrant. Def.Br. 44-45. But Nixon provides an accurate, if brief, summary of the February 25, 2015, controlled buy conversation between

Bell and Turner and was not required to provide the audio transcript. Def.App.B 2-21. Although Bell alleges the transcripts show more ambiguity, it is clear in context that Bell told Turner during the controlled buys that he had sold the AK-47 and pellet gun. *See, e.g.,* Def.App.B at 24, 29-31, 33 ("I sold 'em both together," amid references to "[s]ome type of Russian AK" that was missing a magazine and a pellet gun). The audio and video recordings also depicted Bell showing Turner his phone, Turner reciting a telephone number, and Bell sending a text, providing corroboration for the image Turner provided to Nixon. Def.App.B at 26, 30. Importantly, an affidavit is not defective simply because it could have been better." *United States v. Shelton*, 418 F. App'x 514, 518 (7th Cir. 2011) (unpublished). While perhaps Nixon could have attached the transcripts to give the issuing judge an even more comprehensive view, he was not required to do so, and the warrant contained sufficient probable cause without them.

Bell further argues that Nixon omitted details that might have indicated Sinks had illegally searched his phone from the April 2015 warrant, and omitted Sinks's search altogether from the October 2015 warrant. Def.Br. 44. First, Nixon did not knowingly and recklessly leave information out regarding Sinks's viewing of Bell's phone – he in fact stated in the April 2015 affidavit that Sinks viewed the phone subsequent to Bell's arrest and did not remotely suggest that Sinks had a warrant to do so. Furthermore, as discussed above (pp. 48-51), even without the

details regarding Sinks's alleged search, the April 2015 warrant contained sufficient probable cause. Thus, the information regarding that search was immaterial to the probable cause determination. And it follows that the omission of information regarding Sinks's post-arrest search from the October 2015 warrant was likewise immaterial.

The district court therefore did not err, let alone clearly err, in denying Bell's request for a *Franks* hearing.

CONCLUSION

For the reasons presented above, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and (a)(6), as modified by Cir. R. 32(b), because I have prepared this brief in proportionally spaced typeface using Microsoft Word 2016 in 13-point (body) and 12-point (footnotes) Book Antiqua font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Cir. R. 32(c), in that it contains 13,804 words.

/s/KATHERINE V. BOYLE
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CERTIFICATE OF SERVICE

I certify that on February 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/KATHERINE V. BOYLE
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