



of probable cause to arrest the defendant for conspiracy to commit robbery.

Defendant argues, in essence, that information suggesting that other persons committed the robbery, as well as information about the defendant (i.e., his height, race, etc.) which was inconsistent with the robbery victim's initial descriptions of the perpetrators, should have been included in the warrant affidavit. But even had that material been included, the warrant affidavit still would have provided very strong reason to believe defendant committed the robbery.

The affidavit disclosed, among other things, that Kelly Moya attributed statements about defendant's complicity in this robbery to co-defendant Turcotte. Moya also reported that Turcotte accurately described both the mechanics of the robbery, as well as the dress of the robbers, information only the perpetrators and victim had (i.e., that information had not been released to the public). Moya's statement regarding pre-robbery planning comments made by both defendant and Turcotte, in her presence, further tied defendant to the crime. (Those comments

included inquiries by the conspirators about alarms at the targeted McDonald's restaurant, security cameras on site, the presence of employees, and whether Moya (a former employee) had keys to the restaurant). Turcotte also commented that the local newspaper reported, wrongly, that two white males had committed the robbery (defendant is not Caucasian), and that a car stolen from a local parking lot was used in the robbery (a car had indeed been recently stolen from that lot).

Given the totality of the circumstances presented, an issuing magistrate would, without question, have found probable cause to believe that defendant committed the McDonald's restaurant robbery with Turcotte, even had the magistrate been provided with the omitted information defendant says should have been included.

Because defendant has not made a "substantial preliminary showing" that the warrant affidavit suffered from material omissions that, if added to the affidavit, would undermine a finding of probable cause, a Franks hearing (Franks v. Delaware, supra) is not necessary, and the motion to dismiss (document no.

11) is denied. See United States v. Nelson-Rodriguez, 319 F.3d  
12 (1st Cir. 2003).

**SO ORDERED.**

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Steven J. McAuliffe  
United States District Judge

October 28, 2003

cc: Terry L. Ollila, Esq.  
Paul J. Garrity, Esq.  
U.S. Probation  
U.S. Marshal