

**PABLO ALIK, a/k/a PABLO MAX,
Appellant,**

v.

**REPUBLIC OF PALAU,
Appellee.**

CRIMINAL APPEAL NO. 10-002
Criminal Case No. 09-086

Supreme Court, Appellate Division
Republic of Palau

Decided: February 22, 2011¹

[1] **Criminal Law:** Search Warrants

Franks requires a trial court to determine whether the defendant has made a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit. If a satisfactory preliminary showing is made, the trial court then examines the warrant for probable cause without the disputed material. If the remaining content is insufficient to support a finding of probable cause, the defendant is then entitled to a hearing.

[2] **Criminal Law:** Search Warrants

The question facing a judge reviewing a search warrant application is whether the affidavit demonstrates in some trustworthy fashion the likelihood that an offense has been committed and that there is sound reason to believe that a particular search will turn up

¹ The panel finds this case appropriate for submission without oral argument, pursuant to ROP R. App. P. 34(a).

evidence.

[3] **Criminal Law:** Possession

Constructive possession exists when a person has the power and intention to exercise dominion or control over an object. In making this determination, a court will examine whether the defendant has exercised dominion and control over the premises in which the object is located.

[4] **Appeal and Review:** Clear Error

Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

[5] **Criminal Law:** Sufficiency of the Evidence

In extraordinary circumstances, a credibility issue may warrant the reversal of a criminal conviction on appeal.

[6] **Criminal Law:** Assistance of Counsel

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficiency prejudiced the defense. These two elements of proof need not be addressed in any particular order, and a court considering the issue need not address one element where the defendant has failed to make the necessary showing with respect to the other.

Counsel for Appellant: Jason Shaw, Office of the Public Defender

Counsel for Appellee: Jason Loughman, Office of the Attorney General

BEFORE: KATHLEEN M. SALII, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellant Pablo Alik, aka, Pablo Max, appeals the trial court's denial of his pre-trial motions, and a guilty verdict entered on September 23, 2010. Because we find that the trial court properly denied Alik a *Franks*² hearing, the evidence presented at trial was sufficient to support Alik's convictions, and Alik was not deprived effective assistance of counsel, we **AFFIRM** the trial court's order denying Appellant's pre-trial motions, as well as Appellant's convictions.

I. BACKGROUND

A. *Factual Background*

Some time in late June 2009, Officer Norman Bintorio of the Bureau of Public Safety contacted a confidential informant (who was later revealed to be Terteruich Remengesau) regarding a matter unrelated to this case. During their conversation, the informant stated that some time in February 2009, he had seen a gun at the residence of Pablo Max (Alik). The informant disclosed that while inside Alik's home, he discovered and held a black and silver rifle. Officer Bintorio typed a statement of the February incident for the informant to sign.

² *Franks v. Delaware*, 98 S. Ct. 2674 (1978).

On July 13, 2009, Officer Bintorio again contacted Remengesau to have him confirm that there was a rifle at Alik's house. The officer drove the informant to Alik's neighborhood, then Remengesau approached Alik's house on foot. Looking in the window, Remengesau viewed a brownish-red gun. He did not hold the gun on this occasion. He also could not say that it was the same gun he had seen previously and concluded that there must have been two guns in Alik's house. The informant returned to the vehicle, at which time Officer Bintorio debriefed the informant and hand-wrote a statement for him to sign. In an affidavit dated September 22, 2010, Remengesau stated that he could not say the gun he viewed in Alik's house on July 13, 2009, was a rifle, and that instead, the gun may have been a BB gun or an air gun.

Later on July 13, 2009, Officer Bintorio and additional members of law enforcement executed a search warrant at Alik's house, located in Ochelochel, Airai. Officer Bintorio testified at trial that when the officers arrived at the residence, Alik was found at or near the house. The officers served the warrant on Alik and asked him to come inside with them. At the time they entered the house, nobody besides the police officers and Alik was present. It did not appear to the officers that anybody else other than Alik lived in the house. The officers found a rifle leaning against a wall inside the house and a single round of ammunition located inside a woven basket on a countertop in the kitchen area. Officer Bintorio testified that Alik told the officers that it was his rifle and that it had been with him a long time. The officers seized the rifle and ammunition, which were admitted as Exhibits 1 and 3, respectively, at trial. Officer Bintorio later

test-fired the .30-.30 caliber rifle and confirmed that it was functional.

At trial, Alik admitted to living at the house for two years, although he denied that it was his "residence." He testified that he had never before seen the rifle that was admitted into evidence as Exhibit 1. However, he conceded that the gun could have been in his house, but only in a particular room that he claimed never to have entered. He claimed to have had no knowledge of either the firearm found leaning against a wall inside the house or of the round of ammunition found on his kitchen counter.

B. Procedural History

On July 16, 2009, the Republic filed an Information charging Alik with one count each of Possession of a Firearm and Possession of Ammunition. An Amended Information, correcting a typographical error, was filed on January 28, 2010. A first appearance hearing was held on October 30, 2009. Alik filed a Notice of Insanity Defense on December 15, 2009. The trial court heard argument on the insanity defense on April 9, 2010 and the parties subsequently filed briefing. The trial court characterized the notice as a motion to dismiss on grounds of insanity and denied the motion in a written order dated June 25, 2010.

On July 16, 2010, the court set the matter for trial on September 23, 2010. The deadline for filing pre-trial motions—30 days before trial—ran on August 24, 2010. On August 25, 2010, Alik filed a motion for the disclosure of the identity of the Republic's confidential informant. After a response in opposition and a reply, the trial court ordered

an *in camera* hearing for September 21, 2010. On September 20, three days before trial and one day before the *in camera* hearing, Alik filed a motion to suppress evidence, alleging deliberate falsehood on the part of Officer Bintorio, whose affidavit was the basis for the search warrant.

On September 21, 2010, the court granted a hearing, scheduled for September 22, 2010, on Alik's motion to suppress. However, after reviewing the Republic's written response to the motion, filed on the morning of September 22, the court, through its order of the same day, agreed that Alik had not made the required "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the warrant affidavit," and that the allegedly false statement was necessary to the finding of probable cause. On that basis, the trial court vacated the suppression hearing.

On the same day the court also denied the motion to suppress, Alik filed a motion to reconsider ruling and a request for hearing to make a record. On the morning of trial, September 23, 2010, over the objection of the prosecution, the trial court granted the motion to reconsider ruling and heard argument on the merits of Alik's request for a *Franks* evidentiary hearing. The request was again denied, and the case proceeded to trial. The court found Alik guilty of both counts, and Alik was sentenced on November 2, 2010, to 15 years of incarceration on the firearm charge and one day incarceration on the ammunition charge, to run concurrent.

II. DISCUSSION

Appellant sets forth three arguments as the basis for his appeal. First, he argues that the trial court erred in denying his request for a *Franks* evidentiary hearing because Appellant made a substantial preliminary showing that inaccuracies in the search warrant were the product of deliberate or reckless falsehood, and that such inaccuracies were necessary for the warrant to issue. Second, Appellant contends that the evidence presented at trial was insufficient for the trial court to have found, beyond a reasonable doubt, the essential elements of the crime. Third, he argues that trial counsel was ineffective for failing to file the motion to suppress in a timely manner.

A. Trial Court's Denial of *Franks*'s Evidentiary Hearing

1. Standard of Review

Appellant appeals the trial court's denial of his request for a *Franks* evidentiary hearing to challenge the veracity of Officer Bintorio's search warrant affidavit, which led to the discovery of evidence used against Appellant at trial. The applicable standard of review for denial of a *Franks* hearing is a matter of first impression in the Republic.³ As both Appellant and Appellee have indicated in their briefs, the United States Courts of Appeal are widely split as to the standard for reviewing a trial court's denial of a *Franks* hearing, and the Supreme Court of the United States has yet to address the question. Although Appellant urges this Court to adopt

³ In the absence of applicable law in the Republic, this Court may adopt the relevant common law of the United States. 1 PNC § 303.

de novo review, Appellant does not provide any explanation or support for his recommendation. On the other hand, Appellee recommends that the Court adopt a clear error standard of review, and provides an extensive discussion in support of its stance.

There are generally four standards for reviewing a denial of a *Franks* hearing. First, the Eighth Circuit reviews the denial of a *Franks* hearing for abuse of discretion. See *United States v. Scott*, 610 F.3d 1009, 1013 (8th Cir. 2010). Second, the Ninth and Fifth Circuits review such a denial de novo. See *United States v. Homick*, 964 F.2d 899, 904 (9th Cir. 1992); *United States v. Mueller*, 902 F.2d 336, 341 (5th Cir. 1990) (citing *United States v. DiCesare*, 765 F.2d 890, 895 (9th Cir. 1985)). Third, the First, Second, and Seventh Circuits review denial of a *Franks* hearing for clear error. See *United States v. Hadfield*, 918 F.2d 987, 992 (1st Cir. 1990); *United States v. One Parcel of Property*, 897 F.2d 97, 100 (2d Cir. 1990); *United States v. Pace*, 898 F.2d 1218, 1226-27 (7th Cir. 1990). Fourth, the Sixth Circuit reviews the trial court's legal conclusions de novo and conclusions of fact for clear error. See *United States v. Graham*, 275 F.3d 490, 505 (6th Cir. 2001).

The Ninth Circuit has adopted Appellant's requested de novo standard. In *United States v. Ritter*, 752 F.2d 435 (9th Cir. 1985), it explained that de novo is the proper standard of review for denials of *Franks* hearings because "[t]he decision to hold a *Franks* hearing is a determination about the legal sufficiency of a set of allegations, much like the district court's ruling on a Fed. R. Civ. P. 12(b)(6) or summary judgment motion." *Ritter*, 752 F.2d at 439.

In support of Appellee's clear error recommended standard, Appellee focuses on the *Pace* court's discussion, which rejected the Ninth Circuit's de novo review in favor of the more deferential standard for clear error. The *Pace* court explained that:

deferential review does not depend merely on the district court's ability to view witnesses and judge their credibility. Determining the proper standard of appellate review also requires us to examine the different roles of the district and appellate courts, and the efficient use of judicial resources, which includes the rational division of labor between the district and appellate courts.

Pace, 898 F.2d at 1227. The *Pace* court then articulated three reasons why de novo review is the improper standard to apply to denials of *Franks* hearings. First, trial courts have more expertise in fact-finding and thus, de novo review would not lead to more "correct" decisions. *Id.* Second, even if de novo review is likely to catch more mistakes by trial courts, those mistakes do not go to a defendant's actual guilt or innocence because the illegality of a search does not make the evidence gathered any less probative or reliable. *Id.* Third, the adequacy of a *Franks* proffer may depend on the circumstances of each case, and such case-specific determinations are unlikely to have precedential value. *Id.* Overall, de novo review imposes too great a cost for the benefits it might obtain. *Id.* The *Pace* court concluded by stating that "where the district court has reasonably and conscientiously

reviewed the defendant's *Franks* proffer, and has properly applied the law, its decision should stand even if we, as an original matter, would have ordered the hearing." *Id.*

Notwithstanding these arguments, the Court need not decide which standard to apply because under any standard, the trial court properly denied the *Franks* hearing. The discussion below explains our reasoning for affirming the trial court.

2. *Franks* Hearing

[1] *Franks* requires a trial court to determine whether the defendant has made "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." 98 S. Ct. at 2676. If a satisfactory preliminary showing is made, the trial court then examines the warrant for probable cause without the disputed material. If the remaining content is insufficient to support a finding of probable cause, the defendant is then entitled to a hearing. *Id.* at 2684. The *Franks* court further explained that:

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the

warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Id.

Appellant requested a *Franks* hearing, arguing that the affiant to the search warrant, Officer Bintorio, had included false or misleading statements, or statements made in reckless disregard of the truth, in the affidavit of probable cause attached to the search warrant application. Appellant contended that the statements were necessary to form the basis for probable cause. In support of his request for a *Franks* hearing, Appellant directed the trial court's attention to three statements: 1) the July 13, 2009 statement made by the informant, Remengesau, and hand-written by Officer Bintorio; 2) the affidavit sworn to by Remengesau on September 22, 2010; and 3) the July 13, 2009 affidavit of probable cause sworn to by Officer Bintorio.

In June 2009, Remengesau informed Officer Bintorio that in February 2009, he viewed and held a black and silver rifle in Alik's house. On July 13, 2009, Remengesau viewed through a window to Alik's house a brownish-red gun, but he did not hold the gun. He stated that it was not the same gun he had seen at the residence in February. He

concluded that there must have been two guns in Alik's house.

Officer Bintorio's affidavit stated that:

On July 13, 2009, this Officer received information that there was a brown and silver rifle in Pablo Max's house located in Airai. The house is located across the street from Ivan Rudimch's house and said house is white and burgundy in color. This information was obtained from a CI who personally held and viewed the rifle on July 13, 2009.

Appellant argues that Officer Bintorio's affidavit included false statements made knowingly, or at least with reckless disregard for the truth. First, the color of the gun seen by Remengesau on July 13, 2009, was not brown and silver but brownish-red. Second, Remengesau never stated that the gun he saw was a rifle. Rather, he described it as a gun and concluded that there must be two guns in the house. Third, Remengesau never held the gun on July 13, 2009, but merely observed it through a window.

Appellee argued at the hearing on September 23, 2010, that Appellant failed to make a substantial showing that Officer Bintorio knowingly and intentionally made the false statements that appeared in the search warrant affidavit. However, Appellee did not address whether the false statements were made with reckless disregard for the truth. Appellant argued that, at a minimum, Officer Bintorio acted with reckless disregard for the truth because just hours before writing the

search warrant affidavit, he had taken Remengesau to Alik's house, had heard Remengesau's account of what he saw in Alik's house, and even hand-wrote Remengesau's statement for him to sign. This Court agrees with Appellant that Officer Bintorio was aware of the facts on July 13, 2009: that Remengesau had seen a brownish-red gun inside Alik's house, that he did not describe the gun as a rifle, and that he did not handle the gun on July 13. The false statements made by Officer Bintorio in the search warrant affidavit show at least a reckless disregard for the truth when the officer had very recently heard Remengesau's account of what he saw in Alik's house and the officer had hand-written a statement for Remengesau to sign. If, while writing the search warrant affidavit, Officer Bintorio had any doubt as to his recollection of the facts, he could have very easily consulted the statement that he wrote for Remengesau. As to Appellee's argument that Officer Bintorio's mistakes in the affidavit are attributable to his lack of mastery of the English language, this Court is not convinced. Having read the affidavit, in addition to Remengesau's statement translated by Officer Bintorio, the Court finds that Officer Bintorio has a sufficient command of the English language to properly portray the basic facts of Remengesau's July 13, 2009, account without making errors like the ones in this case.

Although Appellant clears the first hurdle of the test to obtain a *Franks* hearing, he fails to meet the second prong because the false statements included in the search warrant affidavit were not necessary to the finding of probable cause. Removing the offending language, the relevant portions of the affidavit read: "On July 13, 2009, this Officer received

information that there was a [] [gun] in Pablo Max's house This information was obtained from a CI who personally [] viewed the [gun] on July 13, 2009." The handwritten note, upon which Officer Bintorio could have relied for this affidavit, provides no indication that the informant suspected the gun was an air rifle or a BB gun. Instead, the note states that Remengesau suspects that there are two guns in the house. Only in his affidavit dated September 22, 2010, does Remengesau speculate that the gun he saw on July 13 could have been an air gun. Even in his September 22 affidavit however, Remengesau does not state that he informed Officer Bintorio of his suspicion at the time.

[2] Appellant argues that when the false information is removed, the affidavit does not necessarily describe illegal activity.⁴ However, the question facing a judge reviewing a search warrant application is whether the affidavit "demonstrates in some trustworthy fashion the likelihood that an offense has been committed and that there is sound reason to believe that a particular search will turn up evidence of it." *ROP v. Gibbons*, 1 ROP Intrm. 547A, 547H (1988) (citing *United States v. Aquirre*, 839 F.2d 854, 857-58 (1st Cir. 1988)). Here, a reasonable judge could have found that Officer Bintorio's edited affidavit contained probable cause that Alik had possession of a prohibited firearm to justify the issuance of the search warrant for Alik's house. Because we affirm the trial court using de novo review, the trial court would also certainly clear the more deferential

⁴ It is not illegal to possess a gun in the Republic, such as an air gun or BB gun, so long as it is not a firearm. See 17 PNC §§ 3303(c) (the definition of "firearm" does not include air guns), 3404(d) (definition of "firearm").

standards of review for clear error and abuse of discretion. Thus, Appellant was properly denied a *Franks* hearing because he failed to show that the false statements included in Officer Bintorio's affidavit were necessary to the finding of probable cause.

B. Whether Sufficient Evidence Was Presented at Trial to Support Appellant's Conviction

Appellant's second argument on appeal is that insufficient evidence was presented at trial to support his conviction of one count each of Possession of a Firearm and Possession of Ammunition. First, he contends that insufficient evidence was presented that he knowingly and unlawfully possessed, or had in his custody or control, a firearm and ammunition. Second, Appellant argues that Officer Bintorio's inconsistent statements amounted to an extraordinary circumstance warranting the reversal of his conviction. This Court's review for sufficiency of the evidence to support a conviction is very limited. We review for sufficiency only to determine "whether, viewing the evidence in the light most favorable to the prosecution, and giving due deference to the trial court's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt." *Aichi v. ROP*, 14 ROP 68, 69 (2007). The Appellate Division should not reweigh the evidence. *Id.* It should only determine whether there was any reasonable evidence to support the judgment. *Id.* (quotation marks omitted). Even if this Court would have decided the case differently as the trier of fact, the conviction must be upheld. *Id.*

[3] To prove the charges against Appellant, the Republic had to establish beyond a reasonable doubt that on or about July 13, 2009, Alik knowingly and unlawfully possessed or had in his custody or control: a) a firearm, and b) ammunition. See 17 PNC § 3306. A person acts “knowingly” when he is aware that he possessed or had custody or control over a firearm and ammunition. See 17 PNC § 3303(e). To “possess” means “to have in one’s actual or constructive custody or control.” 17 PNC § 3303(i). “Constructive possession exists when a person has the power and intention to exercise dominion and control over an object.” *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998). “In making this determination, courts examine, *inter alia*, whether the defendant exercised dominion and control ‘over the premises in which the firearms are located.’” *United States v. Dhinsa*, 243 F.3d 635, 676 (2d. Cir. 2001), *cert denied*, 120 S. Ct. 1443 (2000).

At trial, Officer Bintorio testified that on July 13, 2009, he and other officers executed a search warrant at Alik’s house located in Ochelochel, Airai. When the officers arrived, they encountered Alik on the front porch. The officers asked Alik to come inside with them, and they entered the house. Nobody besides the police officers and Alik was present inside the house, and it did not appear to Officer Bintorio that anybody else lived there. Officers located a gun leaning against a wall inside the house. Officer Bintorio testified that Alik told the officers that it was his gun and that it had been with him for a long time. Officer Bintorio later testified that he did not see Alik’s reaction when the gun was located because he was busy searching the house. On cross-examination, Officer Bintorio testified that he

never had a conversation with Alik while executing the search warrant. After the officers secured the gun, they continued searching the house. A single round of ammunition was found inside a woven basket on a counter in the kitchen area. Officer Bintorio later confirmed that the firearm, a .30-.30 caliber rifle, was functional by test-firing it.

Alik testified that on the date the search warrant was executed, he was outside the house when the officers arrived. He testified that he had lived in the house for two years, although he denied that it was his “residence.” He added that he was not the owner of the house. Alik testified that there were other people’s belongings in the house when he moved in, and that there were rooms in the house that he did not enter. He further testified that he had no knowledge that there was a gun or ammunition in the house and that he had never before seen Exhibit 1. Finally, Alik denied that he was present in the house while the search was being conducted and denied making a statement to Officer Bintorio that he recognized the rifle. No testimony was elicited that anyone other than Alik exercised dominion over the house.

After reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes of possession of a firearm and possession of ammunition beyond a reasonable doubt. The crux of Appellant’s argument is that he did not possess the firearm or ammunition; however, sufficient evidence was presented to prove, beyond a reasonable doubt, that Appellant exercised dominion and control over the premises in which the rifle and ammunition

were located, thereby putting him in constructive possession of those prohibited items.

[4, 5] Appellant's second argument on the issue of sufficiency is that Officer Bintorio's testimony was so incredible that the trial court could not have reasonably relied on it to convict Appellant. Ordinarily, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Omelau v. ROP*, 5 ROP Intrm. 23, 24 (1994). However, in extraordinary circumstances, a credibility issue may warrant the reversal of a criminal conviction on appeal. *Iyekar v. ROP*, 11 ROP 204, 206-07 (2004) (finding no extraordinary circumstances to overturn the conviction on the basis of credibility because "[t]o acknowledge that [the witness'] credibility was subject to legitimate attack . . . does not by itself make it so untrustworthy that no reasonable fact-finder could credit his testimony."); *Omelau v. ROP*, 5 ROP Intrm. 23, 24 (1994) (finding no extraordinary circumstances to override the deference usually given to a trial court's credibility determinations, even where witnesses testified inconsistently with prior statements given to the police and were arguably biased).

In *ROP v. Tmetuchl*, 1 ROP Intrm. 443 (1998), a credibility issue warranted the reversal of a conviction on appeal. In that case, the key witness linking the three defendants to the murder of President Remeliik had, prior to trial, told three different stories to the police, two of which did not inculcate the defendants at all; had told at least three different versions of the facts incriminating the defendants; and had failed three separate polygraph tests, twice recanting

her statements and admitting she had lied only to re-recant twice more and again incriminate the defendants. *Tmetuchl*, 1 ROP Intrm. at 447-456. Given this background, it was fair for the court to conclude, as one member of the panel put it, that "[b]y the time of trial [the government's key witness] had completely destroyed her own credibility." 1 ROP Intrm. at 496 (King, J., concurring and dissenting).

In the present case, however, Appellant does not meet the high standard set by *Tmetuchl*. Appellant is correct that Officer Bintorio first testified that he heard Appellant make the statement—"that's my gun, it's been with me for a long time"—but then later stated that he did not notice if Appellant had a reaction when the gun was located because he was busy searching the house. Officer Bintorio also testified on cross-examination that he never had a conversation with Appellant. Like the conflicting accounts of the questionable witnesses in *Omelau* and *Iyekar*, although Officer Bintorio's inconsistent statements are subject to legitimate attack, his testimony was not so untrustworthy that no reasonable fact-finder could credit his testimony. Indeed, his inconsistent statements about whether he spoke with Appellant during the execution of the search warrant did not come close to the level of the sweeping lies and retractions that were made by the key witness in *Tmetuchl*. The trial court, having observed Officer Bintorio's demeanor and having heard all the evidence, was in the best position to consider his potential bias, to assess the possible reasons for his inconsistent statements, and to decide whether he should be believed or not. Because it was reasonable for the trial court to credit Officer Bintorio's testimony, we are not in a position to overturn Appellant's

conviction.

C. Whether Appellant Had Effective Assistance of Counsel

[6] Appellant’s third argument is that he was denied effective assistance of counsel because his counsel filed the motion to suppress within 30 days of the trial date, in violation of Rule 12(c) of the ROP Rules of Criminal Procedure. To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney’s performance was deficient and that the deficiency prejudiced the defense. *Ngirailild v. ROP*, 11 ROP 173, 174 (2004). “These two elements of proof need not be addressed in any particular order, and a court considering the issue need not address one element where the defendant has failed to make the necessary showing with respect to the other.” 21A Am. Jur. 2d Criminal Law § 1137 (2008).

Contrary to Appellant’s argument, Appellant was not prejudiced by his counsel’s late filing of the motion to suppress. Although the motion to suppress was untimely filed, the trial court considered and denied the motion on its merits, finding that Appellant failed to make a substantial preliminary showing as required by *Franks*. When Appellant filed a motion to reconsider the denial of the motion to suppress, the trial court granted the motion and permitted argument to take place on the merits of whether to grant a *Franks* evidentiary hearing. The trial court denied the motion to suppress a second time, not because it was untimely filed, but again because Appellant had failed to satisfy the threshold requirement of making a substantial preliminary showing. Because there was no prejudice to Appellant as a result of the late

filing of his motion to suppress, the Court finds that Appellant was not denied effective assistance of counsel.

III. CONCLUSION

Accordingly, for the reasons set forth above, the trial court’s denial of Appellant’s pre-trial motions is **AFFIRMED** and Appellant’s convictions are **AFFIRMED**.