IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1337-15

THE STATE OF TEXAS

v.

ROGER ANTHONY MARTINEZ, Appellee

ON COURT'S OWN MOTION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS VICTORIA COUNTY

NEWELL, J., filed a concurring opinion in which JOHNSON, HERVEY, and ALCALA, JJ., joined.

O P I N I O N

I agree with the ultimate conclusion that we should remand the case for "essential findings" before we can evaluate the propriety of the trial court's ruling on the defendant's motion to suppress the evidence. Many of the trial court's findings simply recount the trial court's recollection of the hearing without evaluating the evidence for accuracy or credibility, or

declaring what the trial court found to have happened. We simply have no idea what happened because we do not know if the trial court regarded some, all, or none of the testimony of the police officers as credible. This was the same flaw in the factual findings in *State v. Mendoza*, 365 S.W.3d 666, 671 (Tex. Crim. App. 2012). We remanded for new findings in that case, and we properly do so in this one.

But I do not understand why the plurality ever sets out on the journey to evaluate the legal claims themselves (and adversely to the trial court, I might add) without knowing "what happened" according to the trial court. For example, the plurality notes that the testimony at the hearing permitted the reasonable inference that one officer perceived the same signs of public intoxication as the other two officers. But this assumes the very thing we are sending the case back for, a credibility determination. A trial court cannot draw reasonable inferences from incredible testimony. In this way, the plurality seems to be telegraphing to the trial court what factual determinations to make and how to resolve the legal issues.[1]

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[1] The plurality candidly admits as much in its opinion. According to the Court, we must first determine whether the trial court *could* infer probable cause assuming all the evidence was credible and properly considered. But that question is a legal one. The trial court held that such inferences are impermissible under existing law. The plurality purports to "correct" the trial court's legal determination by holding that "a finding of probable cause

In *State v. Elias*, we held that the more prudent course in these situations is to remand the case to the trial court so it has the opportunity to address the potentially "dispositive" historical facts necessary to evaluate the legal claims. 339 S.W.3d 667, 679 (Tex. Crim. App. 2011). We relied upon *Elias* when we remanded for essential findings in *Mendoza*. 365 S.W.3d at 670-71. I agree with the holdings in both *Elias* and *Mendoza*. They have not yet proven to be unworkable or wrongly decided. *See Grey v. State*, 298 S.W.3d 644, 646 (Tex. Crim. App. 2009) (setting out different factors that support the overruling of precedent). But if we keep issuing opinions like the one in this case, we may have to revisit whether remanding for essential findings is truly an act of prudence rather than micro-management.

With these thoughts I concur.

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does not necessarily have to be supported by testimony from the arresting officer himself, or even by testimony from other officers who were at the scene concerning what they told the arresting officer." This is not simply adding up all the evidence presented and determining if it would be possible to draw inferences; it is actually deciding the legal issue before all the facts are actually in. Without knowing what the trial court believed happened, any legal conclusion we would draw would be merely advisory. *See Armstrong v. State*, 805 S.W.2d 791, 794 (Tex. Crim. App. 1991) ("This Court and the Court of Appeals are without authority to render advisory opinions."). Without a credibility determination, the Court cannot reach the legal question because a finding on remand that the officers lacked credibility renders the entire legal discussion completely moot.