IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1549-15

THE STATE OF TEXAS

v.

SHIRLEY COPELAND, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS VICTORIA COUNTY

KELLER, P.J., filed a dissenting opinion in which YEARY, J., joined.

The trial court granted appellee's motion to suppress evidence and made findings of fact. These findings of fact related to whether the police had effective consent to search a car in which appellee was a passenger.[1] During the course of the appellate process, it was determined that these findings were not sufficient to justify granting the suppression motion.[2] At the trial level, however, appellee litigated a separate legal theory that is not addressed by the trial court's findings—whether

[1] *See State v. Copeland*, 380 S.W.3d 214, 216-17 (Tex. App.–Corpus Christi 2012), *rev'd*, 399 S.W.3d 159 (Tex. Crim. App. 2013).

[2] *See Copeland*, 399 S.W.3d at 166-67.

the length of detention was reasonable.[3] The Court now holds that the State procedurally defaulted any complaint regarding the length-of-detention theory because the State did not initially argue against it in the court of appeals. I believe that the Court is mistaken in so holding because error preservation is not the controlling legal principle in this case. The controlling legal principles are the *Calloway* rule that a trial court's ruling be upheld under any legal theory applicable to the case[4] and the holding in *Elias* that incomplete findings of fact require a remand for further proceedings.[5]

Under the *Calloway* rule, an appellate court must uphold a trial court's ruling if that ruling can be upheld under any legal theory applicable to the case—even if the legal theory was not articulated by the trial court.[6] The length-of-detention issue is a possible unarticulated alternative basis, under the *Calloway* rule, for upholding the trial court's granting of the motion to suppress. Under *Calloway* (before *Elias*), the court of appeals should have determined whether the trial court's ruling could be upheld under the length-of-detention basis. We have not held under the *Calloway* rule that the losing party has the burden on appeal to preemptively articulate and challenge possible alternative bases for upholding the trial court's ruling.

There are three circumstances in this case that negate any conclusion that the State procedurally defaulted the length-of-detention issue: (1) the issue was litigated at the trial level, (2) the issue was advanced by appellee as a basis for obtaining relief, not by the State as a basis for

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[3] *See id.* at 160.

[4] *Calloway v. State*, 743 S.W.2d 645, 651-52 (Tex. Crim. App. 1988).

[5] *State v. Elias*, 339 S.W.3d 667, 676 (Tex. Crim. App. 2011).

[6] *Calloway*, 743 S.W.2d at 651-52. *See also State v. Esparza*, 413 S.W.3d 81, 85-86 (Tex. Crim. App. 2013).

denying relief, and (3) the trial court made findings, but not on this issue. First, because the issue was litigated at trial, we are not faced with a failure by the State to preserve a claim in the trial court.[7] The Court implicitly acknowledges this and contends, instead, that the State's procedural default occurred when it failed to argue the length-of-detention issue to the court of appeals. But that brings me to the second point.

The length-of-detention issue was argued by *appellee* in the trial court as one of two alternative bases for granting the motion to suppress. This stands in contrast with the issues at stake in *Mercado*—the inventory-search and search-incident-to-arrest exceptions to the warrant requirement—which were being relied upon by the *State* (as appellant) as independent defenses to the motion to suppress.[8] The State in *Mercado* failed to raise the search-incident-to-arrest defense at the trial level, but if it had, it would then have been reasonable for an appellate court to expect the State to raise the defense on appeal in order to obtain review of it. But the State is not always responsible for raising an appellate complaint about an appellee's alternative grounds for granting a motion to suppress. Which brings me to the third point.

There are two circumstances in which the State, as the appealing party, would be responsible for raising an appellate complaint about an appellee's alternative ground for granting a motion to suppress: (1) when the trial court makes no findings at all, and (2) when the trial court makes findings on the appellee's ground in the appellee's favor. When there are no findings of fact explaining the basis for the trial judge's decision, an appellate court must imply findings that support

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[7] *Cf. State v. Mercado*, 972 S.W.2d 75 (Tex. Crim. App. 1998) (State raised "inventory search" exception to the warrant requirement in the trial court but did not raise "search-incident-to-arrest exception.).

[8] *See id.*

the ruling as long as the evidence supports the implied findings.[9] Because the State-appellant does not know, in the absence of findings, which of an appellee's alternative grounds for suppression were accepted by the trial court, it makes sense to require the State to challenge all of them on appeal. That situation is avoided if the trial court issues findings, and if the trial court does not do so on its own accord, it can be required to do so by the losing party.[10] The whole point of findings is to determine what the trial court actually thought,[11] and in doing so, the findings help to narrow the issues to be litigated on appeal.

If the trial court issues findings, and those findings resolve a basis for relief in appellee's favor, it likewise makes sense to require the State to make a complaint regarding that basis for relief on appeal. But if the trial court issues findings, and the findings do not address a particular basis for relief litigated by the appellee, *Elias* dictates that we accord no presumption that the trial court resolved the unaddressed basis in the prevailing party's favor.[12] Nor does *Elias* require the appealing party to complain that the findings are inadequate; remand for further factfinding is required whenever the appellate court, after rejecting a basis for relief that was addressed in the trial court's findings, determines that the findings made by the trial court are not adequate to dispose of the

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[9] *Meekins v. State*, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011).

[10] *State v. Cullen*, 195 S.W.3d 696, 698-99 (Tex. Crim. App. 2006).

[11] *Id.*

[12] 339 S.W.3d at 676 ("[T]he trial court, once having taken it upon itself to enter specific findings and conclusions . . . assumed an obligation to make findings and conclusions that were adequate and complete, covering every potentially dispositive issue that might reasonably be said to have arisen in the course of the suppression proceedings.").

case.[13] Once that determination is made, the case should be remanded for further findings of fact.[14]

Of course, an appellee has no burden to preserve error, as long as the issue is one that turns upon predicate facts that the opposing party was "fairly called upon to adduce during the course of the proceedings below."[15] Before reversing the trial court's decision, the court of appeals would be obligated to address such an issue, and if it reversed without doing so, an appellee could complain for the first time in a petition for discretionary review.[16] So, when this Court rejected appellee's lack-of-consent claim, the court of appeals was obligated on remand to resolve the length-of-detention claim, even though the latter claim is not addressed by the trial court's findings.

But the State was never obligated to raise the length-of-detention claim in the appellate courts. The State did raise a complaint about the consent claim—the basis for relief that was articulated in the trial court's findings. Once that complaint was sustained, it became clear that the findings were incomplete, either as a factual or legal matter. The court of appeals would not need to remand for further findings if it were to determine that the length-of-detention issue can be resolved as a matter of law—that is, if the appellate court could determine that one of the parties is entitled to prevail under the evidence regardless of what findings the trial court might issue. But if the court of appeals were to determine that a resolution of disputed facts were necessary, then, under

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[13] *See id.* at 675-76 (concluding that the trial court's findings erroneously applied a subjective standard in determining the existence of reasonable suspicion and rejecting the appellee's claim that this Court should nevertheless presume, absent findings one way or the other, that the trial court disbelieved the police officer's testimony).

[14] *Id.* at 676.

[15] *Esparza*, 413 S.W.3d at 90.

[16] *Volosen v. State*, 227 S.W.3d 77, 80 (Tex. Crim. App. 2007).

Elias, a remand for further findings would be required.

Because the Court has applied the law of procedural default when it should have applied the holdings in *Calloway* and *Elias*, its conclusion that the State has committed a procedural default is incorrect. I respectfully dissent.

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