**Affirmed and Memorandum Opinion filed July 15, 2010.**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-09-00104-CR**

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**LARRY WAYNE PARKER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 208th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1081010**

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## MEMORANDUM OPINION

Appellant, Larry Wayne Parker, was convicted of aggravated sexual assault of a child. Appellant contends the trial court erred in denying his motion to suppress and in admitting DNA test results. Because all dispositive issues are settled in law, we issue this memorandum opinion and affirm. *See* Tex. R. App. P. 47.4.

## I. BACKGROUND

In August 2006, appellant was involved in a relationship with Maria Velles, the mother of M.E., a thirteen-year-old female. According to M.E., on August 15, appellant retrieved her from school and brought her to a hotel where they engaged in sexual intercourse. Later that night, appellant and M.E. returned to Velles's house. After appellant and Velles had a heated argument, appellant left with M.E. Velles contacted the authorities, and an Amber Alert was issued for M.E. Appellant and M.E. spent the following day at a hotel where they engaged in sexual intercourse several times. The next day, officers with the Houston Police Department ("HPD") located appellant and M.E. in downtown Houston. Appellant was taken into custody and consented to providing saliva and hair samples. Officers interviewed M.E. at a police facility. M.E. initially denied that appellant sexually assaulted her. However, after being told her clothes would be confiscated and analyzed, M.E. conceded that she had engaged in sexual intercourse with appellant. M.E. was brought to Texas Children's Hospital where she was examined and evidence was taken for a sexual-assault kit. Test results indicated that M.E. was HIV positive.

In January 2007, a search warrant was issued to obtain a blood sample from appellant. Tests performed on appellant's blood revealed he was HIV positive. Additionally, HPD sent items to an out-of-state testing company. DNA tests were performed to compare the DNA from appellant's saliva with DNA extracted from underwear M.E. was wearing at the time of the offense. The test results indicated that there was a high probability the DNA found on M.E.'s underwear came from appellant.

Appellant was indicted for aggravated sexual assault. The trial court denied appellant's motion to suppress the blood-test results and overruled his objection to the DNA evidence. A jury convicted appellant, and the trial court assessed punishment at life imprisonment.

## II. MOTION TO SUPPRESS

In his first issue, appellant contends the trial court erred by denying his motion to suppress the results of his blood test because the search warrant used to obtain his blood was not supported by probable cause.

### A. Standard of Review and Applicable Law

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Champion v. State*, 919 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). The trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented. *Id.* We give almost total deference to the trial court's determination of historical facts that depend on credibility and demeanor, but review *de novo* the trial court's application of the law to the facts if resolution of those ultimate questions does not turn on the evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). When the trial court does not file any findings of fact, as in this case, the appellate court will review the evidence in the light most favorable to the trial court's ruling. *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005).

A magistrate shall not issue a search warrant without first finding probable cause exists that a particular item will be found in a particular location or on a particular person. *See* U.S. Const. amend. IV; Tex. Const. art. I § 9; *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007). The Texas Code of Criminal Procedure requires a sworn affidavit setting out substantial facts establishing probable cause be filed in each instance a search warrant is requested. *See* Tex. Code Crim. Proc. Ann. art. 18.01(b) (Vernon Supp. 2009). A court must look to the totality of the circumstances to determine whether the facts set forth in the affidavit are adequate to establish probable cause. *Ramos v. State*, 934 S.W.2d 358, 362–63 (Tex. Crim. App. 1996). In determining whether probable cause

exists, we examine only the four corners of the affidavit and must read the affidavit in a commonsense and realistic manner. *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). Reasonable inferences may be drawn from the facts and circumstances contained within the four corners of the affidavit. *Id.*

The facts necessary to establish probable cause in an affidavit are "(1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched." Tex. Code Crim. Proc. Ann. art. 18.01(c). "Probable cause 'exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found[.]'" *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

A judgment regarding probable cause cannot be based on a mere conclusory statement made within an affidavit. *Illinois v. Gates*, 462 U.S. 213, 239 (1983); *Johnson v. State*, 803 S.W.2d 272, 288 (Tex. Crim. App. 1990), *overruled on other grounds by Heitman v. State*, 815 S.W.2d 681, 685 n.6, 690 (Tex. Crim. App. 1991). A magistrate may presume the reliability of information conveyed to the affiant by other officers or citizens to determine probable cause for issuance of a search warrant. *See Marquez v. State*, 725 S.W.2d 217, 233 (Tex. Crim. App. 1987). When in doubt, we defer to all reasonable inferences the magistrate could have made. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007).

**B. Analysis**

The affidavit, sworn to on January 11, 2007, by the affiant Robert Dennard, an investigator with the Harris County District Attorney's Office, includes the following relevant statements:

> After reviewing the offense report of the City of Houston Police Department, . . . it is my belief that the investigator of the report is M.J. Parrie[,] . . . an investigator employed by the City of Houston Police Department, Juvenile Sex Crimes Division. I have reason to believe and I do believe that [appellant] . . . committed the offense of Aggravated Sexual Assault of a Child against [M.E.] . . . on or about August 16, 2006 in Harris County, Texas.
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> . . . .
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> M.J. Parrie conducted the investigation of the Aggravated Sexual Assault of a Child of [M.E.], which occurred on August 16, 2006 at 405 W. Tidwell, a location in Harris County, Texas. [M.E.], a credible and reliable person, told M.J. Parrie that [appellant] . . . put his penis in her vagina on August 16, 2006, at the Victoria Inn . . . . [M.E.] gave a videotaped statement indicating the following: on August 16, 2006, [appellant] took her to the Victoria Inn, room #109, took her clothes off and put his penis in her vagina on two separate occasions. . . . [M.E.] also stated in the interview that [appellant] put his penis in her vagina approximately 15 times during the time she has known him.
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> [M.E.] was transported to the Texas Children's Hospital and evidence for a rape kit was collected. The rape kit was submitted to the Houston Police Department crime lab for further analysis.
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> Affiant states that the medical records from Texas Children's Hospital stated that [M.E.] was diagnosed with a sexually transmitted disease. Because this condition is transmitted by sexual conduct, Affiant believes that analyzing [appellant's] blood for the same sexually transmitted disease would constitute highly probative evidence that [appellant] committed the above-described offense of Aggravated Sexual Assault of a Child.

Appellant contends the affidavit "fails to meet the second requirement of article 18.01(c) because it does not state facts that show how or why an analysis of [his] blood would yield evidence of the alleged offense or evidence that [he] committed the offense." Appellant relies on *Mulder v. State*, 707 S.W.2d 908 (Tex. Crim. App. 1986), to support his contention that the affidavit includes conclusory statements that do not support a finding of probable cause.

In *Mulder*, the Court of Criminal Appeals held that a search-warrant affidavit to recover blood and saliva from the defendant was insufficient to show probable cause. *Id.* at 916. The affiant expressed that the defendant had been indicted for aggravated robbery and attempted capital murder and that blood and saliva samples from the defendant were needed for comparison with blood found at the crime scene. *Id.* However, no facts were given supporting a link between the defendant and the blood found at the crime scene, such as that the defendant had been injured during the offense. *Id.* Accordingly, the court held that the affidavit failed to meet the second requirement of article 18.01(c). *Id.*

Unlike the affidavit in *Mulder*, the present affidavit contains sufficient facts supporting probable cause to believe appellant's blood would yield evidence of the underlying offense. The affiant stated he reviewed Officer Parrie's offense report. According to the affiant, M.E. told Officer Parrie that she and appellant had engaged in sexual intercourse and that M.E. was transported to Texas Children's Hospital where a rape kit was collected and later submitted to the HPD crime lab. Reading the affidavit as a whole, it is reasonable to infer that the affiant learned these facts from Officer Parrie's offense report. The affiant then stated that medical records from Texas Children's Hospital indicated M.E. had a sexually-transmitted disease ("STD"). It is reasonable to infer that these records resulted from evidence procured for the rape kit and that the affiant reviewed the records. We determine these facts support a reasonable inference that attaining and testing appellant's blood for the same STD contracted by M.E. would produce some evidence appellant engaged in sexual intercourse with M.E. *See* Tex. Code Crim. Proc. Ann. art. 18.01(c).

Appellant argues the "affiant fails to disclose the basis for his asserted knowledge or aver any facts to show any personal expertise in the transmission of sexual diseases." However, it is common knowledge that when an STD-positive person engages in sexual intercourse with another person, the latter may contract the disease. Appellant further contends the affiant did not state that appellant is the only person with whom M.E. had

sexual contact or that the STD can be transmitted only through sexual intercourse. However, these considerations pertain more to the evidentiary weight of appellant's blood-test results than whether the results constitute evidence corroborating M.E.'s statement that appellant had sexually assaulted her. Finally, appellant contends that the affiant failed to specify the type of STD involved or that testing appellant's blood in January 2007 would yield probative evidence that he committed a crime five months earlier. Admittedly, if M.E. had contracted an STD that disappears within a few weeks, testing appellant's blood for the same STD five months later would not be probative of his participation in the offense. However, it is common knowledge that a characteristic of many STDs is their incurable or recurring nature. Thus, although the better practice would have been to specify the particular type of STD and its duration (and facts supporting the affiant's knowledge of such things), because of the commonly-understood nature of STDs, the affiant's failure to so specify did not prevent the magistrate from concluding there was probable cause to believe appellant's blood constituted evidence of the offense. *See Davis*, 202 S.W.3d at 154 (instructing that courts must read the affidavit in a commonsense and realistic manner); *Rodriguez*, 232 S.W.3d at 62 ("The issue is not whether there are other facts that could have, or even should have, been included in the affidavit; we focus on the combined logical force of facts that *are* in the affidavit, not those that are omitted from the affidavit.").

We conclude the affidavit provided sufficient facts to support the magistrate's conclusion there was probable cause to believe appellant's blood would yield evidence of the underlying offense. Accordingly, the trial court did not err in denying appellant's motion to suppress. We overrule appellant's first issue.

## III. ADMISSION OF DNA TEST RESULTS

In his second issue, appellant contends that the trial court erred in admitting the DNA test results because the State failed to show the evidence was reliable pursuant to Texas Rule of Evidence 702 and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

## A. Standard of Review and Applicable Law

We review a trial court's evidentiary ruling for an abuse of discretion. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). Abuse of discretion occurs when the trial court's decision is outside the zone of reasonable disagreement or if it acts without reference to guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380, 391 (Tex. Crim. App. 1991) (opinion on reh'g). If the ruling was correct under any theory of law applicable to the case, we must uphold the trial court's judgment. *Sauceda*, 129 S.W.3d at 120.

Rule 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence . . . a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise." Tex. R. Evid. 702. Expert testimony is admissible if (1) the expert is qualified, and (2) the testimony is relevant and based on a reliable foundation. *See Hartman v. State*, 946 S.W.2d 60, 62 (Tex. Crim. App. 1997). To establish the reliability of scientific evidence, the State must satisfy three criteria by clear and convincing evidence: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. Factors the trial court may consider in determining reliability include, but are not limited to, the following: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the experts testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. *Id*.

**B. Analysis**

At trial, Sara Walker, a DNA analyst with Orchid Cellmark, testified that HPD sent her certain items to be tested. After testifying about her background and experience, Walker explained there are four basic parts to DNA testing: extraction, amplification, detection, and interpretation. According to Walker, the DNA sample is procured during the extraction phase. During the amplification phase, millions of photocopies of the sample are produced in a widely-accepted process known as polymerase chain reaction ("PCR"). During the detection phase, the DNA copies are loaded into a "3100" instrument:

> We have an instrument called "3100." It's got little capillaries on it that are kind of like little spaghetti noodles. They're little thin strips. And we denature the DNA so it separates out, and we load it onto this instrument. And the DNA will migrate through these capillaries.
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> During amplification, the DNA has had a fluorescent tag attached to it. And on this instrument, it's going to migrate past a laser. The laser kind of excites the DNA and then causes that tag to fluoresce. And it takes a picture of that fluorescence. . . . [B]ased on how fast it moves through the equipment, that gives us a result.

In the final interpretation phase, information taken by the camera is translated into a graph for analysis.

Before Walker testified regarding the specific results from this case, appellant requested a *Kelly* hearing outside the jury's presence. During the hearing, the State elicited testimony that Walker did not detract from standard procedure in conducting her testing and the PCR process and testing she performed are widely accepted in the scientific community. Appellant cross-examined Walker regarding the PCR amplification phase. Walker explained that the amplification process involves twenty-eight cycles of heating and cooling. She further explained that the amplification machine did not output an error message during any of the cycles and even if an error occurred, it would only make the

DNA less detectable and not affect her confidence in the results. Walker admitted she did not personally observe all twenty-eight cycles.

Following the hearing, appellant specified that he was objecting to Walker's testimony under the third prong of *Kelly*. *See Kelly*, 824 S.W.2d at 573 (describing third prong as "the technique must have been properly applied on the occasion in question"). The trial court overruled the objection, and Walker proceeded to testify about the results of her testing.

On appeal, appellant argues that "the State failed to show that the machine used to analyze the evidence, the '3100,' meets the requirements of scientific validity and reliability" and "failed to meet its burden to show by clear and convincing evidence that the technique applied in testing the evidence in this case has scientific validity and reliability." This argument appears to fall under the second *Kelly* prong. *See Kelly*, 824 S.W.2d at 573 (describing second prong as "the technique applying the theory must be valid"). Appellant further argues that the State failed to establish that (1) the scientific community has accepted the validity of the 3100 instrument, (2) Walker has "the requisite expertise on the underlying science of the DNA testing machine," (3) scientific literature supports, and other experts are available to discuss, the validity of the machine, and (4) Walker had personal knowledge of whether the DNA sample was properly heated and cooled twenty-eight times during the PCR amplification phase. In support of his argument, appellant relies on *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. 2003) (per curiam).

In *Hernandez*, the defendant objected to the reliability of an "ADx analyzer" used to test his urine for the presence marijuana. *Id.* at 30. In affirming the court of appeals's reversal of the defendant's conviction, the Court of Criminal Appeals concluded,

> [T]he trial court abused its discretion in admitting the results of 'an ADX analyzer' without *any* showing of its scientific reliability or *any* reliance upon other scientific materials or judicial opinions which had found 'an ADx

> analyzer' a reliable methodology for determining whether a person does or does not have marijuana in his body.
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> . . . .
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> . . . Thus, the court of appeals was confronted with a trial record which did not support the scientific reliability of the ADx machine. It cannot be faulted for concluding that, based upon the record before it, the State had failed to show the machine's reliability.

*Id.* at 30, 31 (footnotes omitted).

Appellant contends *Hernandez* requires reversal because the State failed to show that the 3100 instrument was reliable. We begin, however, with the State's contention that appellant waived his argument regarding the 3100 instrument because his trial objection and the trial court's ruling did not pertain to the reliability of the 3100 instrument.[1]

Admittedly, Walker did not specifically testify about the reliability, acceptance in the scientific community, and rate of error of, or her expertise regarding, the 3100 instrument. However, during the *Kelly* hearing, appellant did not question Walker about, and did not object to the reliability of, the 3100 instrument. Instead, appellant questioned Walker regarding her final report and her personal observation of the twenty-eight heating and cooling cycles of the amplification process. If appellant intended to complain about the reliability of the 3100 instrument, it was not apparent from this context. *See* Tex. R. App. P. 33.1. Thus, unlike the defendant in *Hernandez*, appellant did not specifically object to the reliability of the testing machine. *See Hernandez*, 116 S.W.3d at 30. Under

[1] The State also suggests that description of the machine as a "3100" instrument may be the result of typographical error; the State points to several cases from Texas and non-Texas courts where DNA testing was performed using a "310" instrument. Having discovered a recent case recognizing the existence of both a 310 and 3100 instrument, we reject the State's suggestion. *See State v. Bander*, 208 P.3d 1242, 1244 (Wash. Ct. App. 2009) (recognizing that the 3100 is "a later-model genetic analyzer similar to the [310].").

these circumstances, we conclude appellant did not preserve error regarding reliability of the 3100 instrument.[2]

Furthermore, to the extent appellant argues the State failed to establish the reliability of the results achieved by the 3100 instrument because Walker did not personally observe all twenty-eight heating and cooling cycles of the amplification phase, we hold that the trial court did not abuse its discretion. Walker testified that the amplification machine displays when an error occurs and no error displays occurred in this case. Additionally, she explained that even if errors had occurred during the heating and cooling cycles, they would make the DNA less detectable but would not affect her confidence in the test results. Thus, despite Walker's failure to observe all twenty-eight cycles, the trial court did not err in admitting the results achieved by the 3100 instrument. Accordingly, we overrule appellant's second issue.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.
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[2] Several courts of appeals have determined that a specific objection to scientific evidence is necessary to preserve a corresponding appellate complaint. *See, e.g., Kennedy v. State*, 264 S.W.3d 372, 380 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (holding defendant did not preserve error regarding third *Kelly* prong because he failed to obtain an adverse ruling); *Brown v. State*, 163 S.W.3d 818, 826–29 (Tex. App.—Dallas 2005, pet. ref'd) (holding defendant failed to "point out [his] specific complaints about the predicate [for DNA testing statistics] to the trial court").