In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-08-00533-CR

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JARED CHEYENNE TALLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 07-08-08366 CR

MEMORANDUM OPINION

Jared Cheyenne Talley was charged with possession of methamphetamine. After the trial court denied Talley's motion to suppress, he pled guilty. The trial court sentenced him to two years in prison.

The motion to suppress challenged the deputies' entry into the apartment and seizure of evidence. In this appeal, Talley attacks the denial of the motion, as the law permits him to do, despite his guilty plea. *See* TEX. R. APP. P. 25.2(a)(2)(A).

THE HEARING

At the hearing on the motion, Officer Degner testified Talley was on Montgomery County's most-wanted list. Degner had felony and misdemeanor warrants for Talley. Degner learned Talley might be in the county. A woman reported that a gun had been pointed at her brother. She identified two men with whom Degner "was familiar," and she described the suspects' pickup truck as a late 1990s white and gray pickup. Degner knew the two men were "possibly staying" with some friends or relatives on old Highway 105. Degner located the truck, but the two men "took off on [him]."

Degner put out a bulletin over the police radio. He received a phone call from an officer who told him Talley's girlfriend, Amy Dupree, was in jail. Another officer gave Degner information that led him to an apartment. Degner testified he had information that Talley had stayed at the apartment before and was dating whoever lived there.

Degner saw the truck in the parking space near the apartment. Several deputies were already there watching for Talley. Degner explained he and another officer noticed the apartment door was "already ajar." The time was 4 a.m., and there were no lights on in the apartment.

Peering through windows, the officers could see two people lying down with their heads away from the window. Degner testified the men "were the same general description of the guys [he] had been looking for." Degner testified the deputies decided to execute on

the felony arrest warrant for Talley.

As they entered the apartment, Degner saw a yellow duffel bag on the side of the sofa. "[O]n top of the duffel bag was a revolver pistol." Degner recovered the weapon for safety reasons and stuck it in his belt. A backpack was on the sofa; the backpack was open, and on top of it were items of "drug paraphernalia."

The officers located the two men asleep in the bedroom. A pistol lay between their heads. After arresting the suspects, the officers took the duffel bag and the backpack to the Conroe office and searched them. The duffel bag contained ammunition. The backpack contained drugs and Talley's birth certificate.

Talley testified at the suppression hearing. He explained he had been dropped off at the apartment, which had no electricity. Later, a man named Rammage entered the apartment. Talley testified he closed the door and the blinds in the bedroom and told Rammage that he was going to sleep.

When the prosecutor stated to the trial judge that Talley's girlfriend lived at the apartment and "that's where he stays," Talley interjected, " I had my own house." He did not testify he lived at the apartment or was a guest there, and he did not explain how he got into the apartment.

STANDARD OF REVIEW

An appellate court reviews a ruling on a motion to suppress under an abuse of

discretion standard and views the facts in the light most favorable to the trial court's decision. *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). Almost total deference is given to a trial court's express or implied determination of historical facts, but the court's application of the law of search and seizure to those facts is reviewed *de novo*. *Id*. The trial court's ruling will be affirmed if the ruling is reasonably supported by the record and is correct under any theory of law applicable to the case. *Young v. State*, 283 S.W.3d 854, 873 (Tex. Crim. App. 2009), *cert. denied*, *Young v. Texas*, No. 09-6406, 2009 WL 2920880 (2009) (not yet released for publication).

MOTION TO SUPPRESS

Talley asserted in his motion to suppress that the warrantless search of his residence violated his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and his rights under article I, sections 9, 10, and 19 of the Texas Constitution. Talley contends that any tangible evidence was seized without warrant, probable cause, or other lawful authority.

ANALYSIS

Talley argues on appeal that officers may not search for the subject of an arrest warrant in the home of a third party unless the officers have a search warrant. He relies on *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981).

Talley's motion in the trial court stated, however, that the residence was his. He did

not raise the issue of the warrantless search of a third person's residence in the trial court. The general statements in the motion to suppress would not have alerted the trial court to the specific complaint under *Steagald* regarding the search of a third party's residence without a search warrant. *See generally Mbugua v. State*, No. 01-07-00690-CR, 2009 WL 2634596, at *7 (Tex. App.--Houston [1st Dist.] Aug. 21, 2009, pet. filed) (not yet released for publication). Because Talley's complaint on appeal in issue one does not comport with what he presented to the trial court, he failed to preserve this complaint. *See* TEX. R. APP. P. 33.1(a); *Resendez v. State*, No. PD-0917-08, 2009 WL 3365656, at *4 (Tex. Crim. App. Oct. 21, 2009) (not yet released for publication).

Even if the motion is considered sufficient to preserve this argument, Talley's reliance on *Steagald* is misplaced. *Steagald* involved a situation in which police, searching for the person named in an arrest warrant, entered the home of a third party and discovered evidence that incriminated the homeowner. *Steagald,* 451 U.S. at 205-07. The person named in the arrest warrant was not at the residence. *Id.* at 206. Indicted on federal drug charges, the homeowner raised a Fourth Amendment challenge to the search. *Id.* at 211-12. The Supreme Court limited its holding in addressing the issue to the homeowner's challenge: "the narrow issue before us is whether an arrest warrant -- as opposed to a search warrant -- is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances."

Steagald, 451 U.S. at 212. The Court explained that "[t]he issue here, however, is not whether the subject of an arrest warrant can object to the absence of a search warrant when he is apprehended in another person's home, but rather whether the residents of that home can complain of the search." *Id.* at 219. The Court concluded that the homeowner's Fourth Amendment rights were violated. *Steagald*, 451 U.S. at 216. In this case, Talley was the person named in the arrest warrant.

Nevertheless, Talley argues that, absent an exception, a warrant is required to search persons, houses, papers, and effects. The State stipulated there was no search warrant. Therefore, Talley asserts, the burden shifted to the State to prove the reasonableness of the warrantless search.

A defendant who seeks to suppress evidence obtained in violation of the Fourth Amendment must first show that he personally had a reasonable expectation of privacy in the place the government invaded. *Luna v. State*, 268 S.W.3d 594, 603 (Tex. Crim. App. 2008), *cert. denied*, *Luna v. Texas*, 130 S.Ct. 72, 175 L.Ed.2d 51 (2009); *Granados v. State*, 85 S.W.3d 217, 222-23 (Tex. Crim. App. 2002). The burden to prove a legitimate expectation of privacy rests with the defendant. *Villareal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996 (citing *Calloway v. State,* 743 S.W.2d 645, 650 (Tex. Crim. App. 1988)). Whether a defendant has a legitimate expectation of privacy to contest a search and seizure is a question of law reviewed *de novo*. *Parker v. State*, 182 S.W.3d 923, 925 (Tex. Crim. App. 2006). A

defendant must show two things: (a) he had an actual, subjective expectation of privacy, exhibited by measures taken to protect the privacy of the property in question; and (b) the subjective expectation of privacy is one that society is prepared to recognize as reasonable. *See Granados*, 85 S.W.3d at 223; *Davis v. State,* 119 S.W.3d 359, 366-68 (Tex. App.--Waco 2003, pet. ref'd) (genuine intention to preserve something as private).

Talley was in the apartment that night and had stayed there before. He did not testify he lived there or was a co-resident; instead, he stated he had his own house. Tally's motion, however, asserted the apartment was his. The person whose name was on the lease was his girlfriend, Amy Dupree, and she was in jail. Under the circumstances, the trial court could reasonably conclude that, even though Talley may have had another residence, the apartment was the place he lived at that time. "[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Furthermore, the circumstances confronting the officers support the trial court's ruling. Degner was in pursuit of Talley, a fugitive believed to be armed and dangerous, who had fled from the deputy in a truck found parked in front of the apartment. The apartment door was ajar, and Degner identified the suspect through the window. The exigent circumstances doctrine justifies the entry into the apartment without a search warrant under the circumstances. *See United States*

v. Santana, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976).

Once in the apartment, the deputies saw the open backpack in plain view on the couch. The drug paraphernalia on top of the open backpack consisted of items the deputies could have concluded were associated with contraband and criminal activity. The search and seizure satisfied the plain view doctrine, which requires (1) that law enforcement officials have a right to be where they are, and (2) that it is immediately apparent that the item seized constitutes evidence. *Walter v. State*, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000); *Bouyer v. State*, 264 S.W.3d 265, 269 (Tex. App.--San Antonio 2008, no pet.). "If an item is in plain view, neither its observation nor its seizure involves any invasion of privacy. The rationale of the plain view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment." *Bouyer* at 269 (citations omitted); *see also Bower v. State*, 769 S.W.2d 887, 897 (Tex. Crim. App. 1989), *overruled on other grounds*, *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991)) (holding that what person knowingly exposes to public even in his own home is not search subject to Fourth Amendment). In addition, Talley did not establish he had any expectation of privacy in the open backpack, and the police could seize and search it. *See Oles v. State*, 993 S.W.2d 103, 110 (Tex. Crim. App. 1999) (Once it is determined that police lawfully seized an arrestee's personal effects, his expectation of privacy is diminished in

those effects until "he *can* and *does* exhibit subjective expectations through his conduct, presumably at the time of release from detainment or incarceration.").

Talley contends further that the trial judge erred in denying the motion to suppress because the record reflects that no arrest warrant was exhibited to the trial judge. He relies on *Gant v. State*, 649 S.W.2d 30, 32-33 (Tex. Crim. App. 1983). The Court stated in *Gant* that "when an accused objects to admission of evidence on the ground that it is tainted by a warrantless arrest and the State relies on an arrest warrant, in the absence of waiver, reviewable error will result unless the record reflects that the arrest warrant was exhibited to the trial judge for a ruling." *Id*. at 33. Here, Talley did not object at the suppression hearing to the deputy's testimony that he had an arrest warrant for Talley. Further, later cases have held that if the defendant seeks to suppress evidence on the basis of an illegal arrest, the defendant has the initial burden of proof to rebut the presumption of proper police conduct. *Young*, 283 S.W.3d at 872. "The defendant may satisfy this burden by establishing that he was arrested without a warrant." *Id.; see also Blondett v. State*, 921 S.W.2d 469, 472 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd) (citing *Russell v. State*,[1] 717 S.W.2d 7, 9 (Tex. Crim. App.1986)) ("A movant in a motion to suppress alleging a lack of probable cause must initially produce evidence that a warrantless arrest occurred."). Once the defendant meets this

[1]*Russell* was disavowed on other grounds by *Handy v. State*, 189 S.W.3d 296, 299 n.2 (Tex. Crim. App. 2006).

burden, the burden shifts to the State to either produce evidence of a warrant or prove the reasonableness of the arrest. *Young*, 283 S.W.3d at 872. Talley did not meet his burden of showing the arrest was without a warrant. The officer testified he had a felony arrest warrant for Talley. *See id*. Because Talley did not meet this initial burden, the State was not required to physically display the arrest warrant to the trial court. *See Blondett*, 921 S.W.2d at 472-73.

We overrule issues one, two, and three. The judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on January 21, 2010
Opinion Delivered February 17, 2010
Do Not Publish

Before McKeithen, C.J., Gaultney and Kreger, JJ.