In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00220-CR

ROBERT KENNETH STRATTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 08-240432

MEMORANDUM OPINION

Robert Kenneth Stratton was charged with driving while intoxicated. Stratton filed a motion to suppress the results of a blood test obtained through a search warrant.[1] In a single issue, Stratton argues that the trial court erred in denying his motion to suppress. We conclude the probable cause affidavit was sufficient, and the trial court did not err in denying the motion.

[1]After the trial court denied the motion, Stratton pleaded no contest to the charge.

STANDARD OF REVIEW

We review a trial court's ruling on a suppression motion under a bifurcated standard, giving almost total deference to a trial court's determination of historical facts and reviewing *de novo* the court's application of law. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *see also St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). The involuntary taking of a blood sample by law enforcement officers is a search and seizure within the meaning of the Fourth Amendment to the United States Constitution and article one, section nine of the Texas Constitution. *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (United States Constitution); *Smith v. State*, 557 S.W.2d 299, 301 (Tex. Crim. App. 1977) (Texas Constitution). Generally, a search warrant is required. *See Schmerber*, 384 U.S. at 770; *Smith*, 557 S.W.2d at 301-302. Article 18.02 of the Texas Code of Criminal Procedure authorizes the issuance of a warrant to seize blood. *See* TEX. CODE CRIM. PROC. ANN. art. 18.02(10) (Vernon 2005) ("search warrant may be issued to search for and seize . . . items"); *Gentry v. State*, 640 S.W.2d 899, 902 (Tex. Crim. App. 1982) (blood is "item" under article 18.02). Before a warrant may issue, however, a sworn affidavit "setting forth substantial facts establishing probable cause" must be filed. TEX. CODE CRIM. PROC. ANN. art. 18.01(b) (Vernon Supp. 2009). The affidavit "memorialize[s] the affiant's recitation of the facts, conclusions, and legal basis for the issuance of the search warrant." *Smith v. State*, 207 S.W.3d 787, 790 (Tex. Crim. App. 2006).

Under the Fourth Amendment, an affidavit is sufficient if, from the totality of the circumstances reflected in the affidavit, the magistrate was provided with a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317; 76 L.Ed.2d 527 (1983); *see* U.S. CONST. amend. IV; *Ramos v. State*, 934 S.W.2d 358, 362-63 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1198, 117 S.Ct. 1556, 137 L.Ed.2d 704 (1997). No credibility determinations are made by the trial court in examining the sufficiency of an affidavit to determine probable cause; probable cause is determined from the four corners of the affidavit alone. *Hankins v. State*, 132 S.W.3d 380, 388 (Tex. Crim. App. 2004), *cert. denied*, 543 U.S. 944, 125 S.Ct. 358, 160 L.Ed.2d 256 (2004); *Jones v. State*, 833 S.W.2d 118, 123 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 921, 113 S.Ct. 1285, 122 L.Ed.2d 678 (1993); *Tolentino v. State*, 638 S.W.2d 499, 501 (Tex. Crim. App. 1982).

Probable cause will be found to exist if the affidavit shows facts and circumstances within the affiant's knowledge and of which the affiant has reasonably trustworthy information sufficient to warrant a person of reasonable caution to believe that the criteria set forth in article 18.01(c) have been met. *Tolentino*, 638 S.W.2d at 501; *see* TEX. CODE CRIM. PROC. ANN. art. 18.01(c) (Vernon Supp. 2009). Article 18.01(c) states that a search warrant may not be issued under Article 18.02(10) unless the affidavit sets forth facts which establish that (1) a specific offense has been committed, (2) the property or items to be searched or seized constitute evidence of the offense or evidence

that a particular person committed the offense, and (3) the property or items are located at or on the person, place, or thing to be searched. TEX. CODE CRIM. PROC. ANN. art. 18.01(c); *Tolentino*, 638 S.W.2d at 501. Although a search warrant affidavit may not be based solely on hearsay or conclusory statements, a search warrant affidavit is not to be deemed insufficient on that score so long as a substantial basis for crediting the hearsay exists or corroborating facts within the officer's knowledge exist. *See Gates*, 462 U.S. at 241-43.

A reviewing court "should not invalidate a warrant by interpreting the affidavit in a hypertechnical . . . manner." *Rodriguez v. State*, 232 S.W.3d 55, 59 (Tex. 2007). Instead, when a court reviews an issuing magistrate's determination, the court should interpret the affidavit in a common sense and realistic manner, recognizing that the magistrate may draw reasonable inferences. *See id.* at 61; *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006).

THE AFFIDAVIT

Texas Department of Public Safety Officer Erik Burse averred in the search warrant affidavit that Stratton was arrested at 3:19 a.m. on May 26, 2008. According to the affidavit, Stratton was "operat[ing] a motor vehicle in a public place in Montgomery County, Texas, while intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, controlled substance, drug, or a dangerous drug into the suspect's body." According to Burse's affidavit, he observed

Stratton driving northbound on "I45/SH 242," a public place in Montgomery County. Burse's stationary radar indicated Stratton was driving eighty-three miles-per-hour in a sixty-five mile-per-hour zone. Burse made the following observations in the affidavit about Stratton:

Odor of alcohol:	Strong on Suspects Breath
Condition of eyes:	Red, glassy
Speech:	Thick Tongue
Demeanor:	Fine
Balance:	Heavy Footed

In paragraph 8 of the affidavit, Burse placed a "checkmark" next to the option that stated, "Field sobriety tests were administered to the suspect and the overall results of said testing confirm and indicate suspect's intoxication while operating a motor vehicle. (See below for specific details of each test administered.)" No checkmark was placed next to the option that stated "Suspect refused to perform field sobriety tests." In paragraph 9 of the affidavit, in response to the statement "Additional facts leading me to believe that the suspect was intoxicated while operating a motor vehicle in a public place are as follows[,]" Burse wrote, "NONE[.]" In paragraph 10, Burse averred that he "[has] seen intoxicated persons on many occasions in the past" and that based on his observation, experience, and training, he determined that Stratton was intoxicated and arrested him for driving while intoxicated. Burse then stated in the affidavit that he requested a sample of Stratton's blood, which Stratton refused to provide. Burse's affidavit requested a search warrant that would authorize him or his agent to obtain a blood sample from Stratton and

"seize the same as evidence." The affidavit was signed by Burse and notarized by a notary public. Based on a finding of probable cause, the magistrate issued the search warrant.

ANALYSIS

Stratton argues the affidavit fails to provide a substantial basis to support the magistrate's finding of probable cause that Stratton committed the offense of driving while intoxicated. Specifically, Stratton complains that Burse fails to establish his own credentials to detect intoxication. He also argues Burse's stated observations do not provide adequate specific facts to support a probable cause finding for driving while intoxicated. According to Stratton, substantive inferences to link intoxication to Burse's observations cannot reasonably be made because of Burse's "nominal credentials specific to detecting intoxication" and conclusory statements and observations "which are not self-evident of intoxication."

The affidavit is sufficient if, from the totality of the circumstances reflected in the affidavit, the magistrate was provided with a substantial basis for concluding that probable cause existed. *Gates*, 462 U.S. at 238-39. In the affidavit, Burse stated he has seen intoxicated people on many occasions and that the field sobriety tests he administered indicated Stratton was intoxicated. Burse averred that he concluded Stratton was intoxicated based on his experience and training. Burse "checked" the option stating that he administered the field sobriety tests and the tests indicated Stratton was

intoxicated, but did not provide details as to the tests administered or results from those tests. Nevertheless, the affidavit considered as a whole was sufficient. Burse's observations that Stratton's breath smelled of alcohol, his eyes were red and glassy, and he was "thick tongued" and "heavy footed," when considered together with the statement about the field sobriety tests, provided a substantial basis for concluding Stratton was intoxicated. *Gates*, 462 U.S. at 238-39; *see, e.g., Cotton v. State*, 686 S.W.2d 140, 142 n.3 (Tex. 1985) (evidence of intoxication may include the odor of alcohol on one's breath or body, bloodshot eyes, slurred speech, unsteady balance, and a staggered gait); *Campos v. State*, 623 S.W.2d 657, 660 (Tex. 1981) (smell of beer on defendant and defendant's "thick-tongued" speech and unsteadiness on his feet sufficient to prove intoxication); *Kennedy v. State*, 797 S.W.2d 695, 697 (Tex. App.--Houston [1st Dist.] 1990, no pet.) (red and glassy eyes, slurred speech and strong odor of alcohol on breath sufficient to prove intoxication). We are to view the affidavit in a common sense and realistic manner. *See Rodriguez*, 232 S.W.3d at 61; *Davis*, 202 S.W.3d at 154. The trial court could reasonably conclude that Burse was qualified to interpret the results of the field sobriety tests and detect intoxication. *Id*. From the totality of the circumstances reflected in the affidavit here, the magistrate was provided with a substantial basis for concluding that probable cause existed. *Gates*, 462 U.S. at 238-39. Issue one is overruled. The trial court's judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on June 18, 2010
Opinion Delivered July 7, 2010
Do Not Publish

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