In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00241-CR

MARCUS ALLEN JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 15-04-03355-CR

MEMORANDUM OPINION

Appellant Marcus Allen Johnson appeals his conviction for the offense of online solicitation of a minor. In issue one, Johnson argues that the trial court erred during his punishment hearing by admitting evidence that the police retrieved from his cellular phone and which exceeded the scope of his consent. In issue two, Johnson contends that the complained-of evidence included photographic evidence that had not been authenticated. We affirm the trial court's judgment.

BACKGROUND

A grand jury indicted Johnson for the offense of online solicitation of a minor. Johnson's trial counsel filed a pre-trial motion to suppress evidence, alleging, among other things, that any tangible evidence seized in his case was seized without a warrant, probable cause, or other lawful authority. During the jury trial, the parties agreed that the trial court would only hear Johnson's motion to suppress if Johnson were convicted. The jury found Johnson guilty of online solicitation of a minor, and Johnson elected to have the jury determine his punishment.

Prior to the punishment hearing, the trial court heard Johnson's motion to suppress. The State represented that it intended to offer five exhibits containing photographs taken by Jerry Serratt, an Investigator with the Internet Crimes Against Children Task Force, the day after Johnson's arrest. According to the State, the photographs are of conversations taken from Johnson's cellular phone. During the suppression hearing, Serratt testified that he recovered three cellular phones in Johnson's vehicle and that he took photographs of the primary phone, the black Nexus, the following day. Serratt testified that Johnson gave him consent to search the phone and also gave him the "swipe pass code" so that he could search the phone. Serratt testified that Johnson's consent was recorded on video.

The record shows that the State offered a video recording of Serratt's interview of Johnson, in which Johnson gave his consent to have the police search his phone, and the trial court viewed the video and admitted it only for the appellate record. In the interview, Johnson told Serratt that he met a girl on the KIK website, and she told him that she was fourteen years old, but that he was unsure of her age. Johnson admitted that he used his phone to access KIK and that the conversations he had with the girl were sexual in nature. The video recording shows that when Serratt asked if Johnson would mind if he searched Johnson's phone to match up text messages, Johnson told Serratt that he did not mind and showed him how to access his phone by using his swipe pass code. Johnson told Serratt that he could go through his KIK account and search his dropbox. Johnson also gave Serratt consent to search another phone found in his vehicle, and Johnson provided the passcode.

Serratt explained that the day after Johnson gave consent to have his phone searched, Serratt went back into Johnson's phone using Johnson's pass code, pulled up Johnson's KIK account, and took photographs. Serratt also explained that when he asked Johnson for consent, he did not tell Johnson that he was asking for an unlimited consent or that he was going to search the phone on other occasions. According to Serratt, instead of getting a warrant when he accessed Johnson's phone the second time, he relied on the consent that Johnson gave during the prior

interview. Serratt testified that Johnson did not limit or revoke his consent at any time.

Johnson testified during the suppression hearing that it was his understanding that when Serratt asked if he could search his phone, he was asking if he could look at it right then and not days later. According to Johnson, he did not believe that he was giving consent for a general unlimited search of his phone at a future date. Johnson explained that he did not understand that he was giving consent for the police to take photographs of his phone or his KIK account and that he assumed that his consent was for the limited time when he was with Serratt. Johnson also admitted that he did not revoke his consent and that Serratt did not tell him that his consent was limited.

At the end of the suppression hearing, Johnson's counsel argued that Serratt asked for consent for a specific time and not for a general unlimited search in the future. Johnson's counsel further argued that a reasonable person would not have believed that the consent given in this case included future searches of the same material. The State argued that no specific time was given and that it was reasonable for Serratt to search the phone the next day and take pictures of the conversations that he viewed the previous day during his interview with Johnson. According to the State, a reasonable person would expect that consent, which is not revoked at any

time, would extend to the next day. After hearing the parties' arguments, the trial court denied Johnson's motion to suppress.

During the punishment hearing, the State offered five exhibits containing the photographs of the KIK chats that Serratt took from Johnson's phone. Johnson re-urged the objections that he made in his motion to suppress, and the trial court overruled Johnson's objections and admitted the exhibits. The record shows that the KIK chats contained in the exhibits had been redacted so that they only included what Johnson said from his phone. No responses to Johnson were included. The record also shows that Serratt testified that Johnson gave him consent to look at his KIK account and that all of the photographs that he took of Johnson's phone were from Johnson's KIK account.

After hearing the evidence at punishment, the jury assessed Johnson's punishment at ten years of imprisonment, but recommended that Johnson's sentence be suspended. Based on the jury's recommendation, the trial court suspended the imposition of Johnson's sentence, placed Johnson on community supervision for a period of ten years, and, as conditions of his community supervision, ordered Johnson to serve 180 days in jail and to comply with the sex offender treatment requirements. Johnson appealed.

ANALYSIS

In issue one, Johnson argues that the trial court erred in admitting evidence retrieved from his phone, because the evidence, which included photographs of electronic conversations from third parties, exceeded the scope of his consent. Johnson maintains that his consent was limited to evidence concerning the KIK account because Serratt specifically asked to look through his phone to compare texts and to look at his KIK account. According to Johnson, the photographs and electronic conversations from third parties which were admitted clearly exceeded the scope of his consent. Johnson maintains that evidence other than the KIK texts alone should have been excluded.

Johnson's argument that the trial court erred by admitting electronic conversations from third parties is without merit. The record shows that the trial court admitted exhibits that had been redacted to exclude the responses of the third parties with whom Johnson was conversing on KIK. While Johnson maintains that evidence other than the KIK text alone should have been excluded, the record shows that the exhibits only included photographs taken from Johnson's KIK account. Because the record shows that Johnson gave Serratt consent to search his KIK account on his phone and because the exhibits only included photographs taken from

Johnson's KIK account, we conclude that the trial court properly limited the admission of evidence to Johnson's KIK account.

Johnson also complains that the trial court erred by admitting the exhibits because Serratt exceeded the scope of his consent by searching and photographing his KIK account on his phone the day after Johnson gave consent. During the suppression hearing, Johnson testified that he assumed that his consent to search his phone was for the limited time when he was with Serratt, and that he did not believe that he was giving consent for a general unlimited search of his phone at a future date. Johnson also admitted that he did not revoke his consent and that Serratt did not tell him that his consent was limited in any way.

"We review a trial court's ruling on a motion to suppress under a bifurcated standard of review." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). "First, we afford almost total deference to a trial judge's determination of historical facts." *Id.* Second, we review a trial judge's application of the law to the facts *de novo*. *Id.* We uphold the trial court's ruling if it is reasonably supported by the record and is correct on any applicable legal theory. *Id.* at 447-48. At the suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). When the trial court makes no findings of fact,

"we view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record." *Id.*

Consent to search is an established exception to the constitutional requirements of both a warrant and probable cause. *Carmouche v. State*, 10 S.W.3d 323, 331 (Tex. Crim. App. 2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 219 (1973)). To be valid, a consent to search must be positive and unequivocal and must not be the product of duress or coercion. *Allridge v. State*, 850 S.W.2d 471, 493 (Tex. Crim. App. 1991). However, even when an individual voluntarily consents to a search, an officer's authority to perform the search is not without limit. *See Mantzke v. State*, 93 S.W.3d 536, 540 (Tex. App.—Texarkana 2002, no pet.). "The extent of the search is limited to the scope of the consent given." *Lemons v. State*, 298 S.W.3d 658, 661 (Tex. App.—Tyler 2009, pet. ref'd). Thus, it is important to consider any express or implied limitations or qualifications attending that consent which establish the permissible scope of the search as to such matters as time, duration, area, or intensity. *State v. Weaver*, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011). It is the State's burden to show that the search was conducted within the scope of the consent received. *Lemons*, 298 S.W.3d at 661.

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exact exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). The question is not to be determined on the basis of the subjective interpretation of the searching officer or the subjective intentions of the consenting party. *Lemons*, 298 S.W.3d at 661 (citing *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667 (5th Cir. 2003)). When the consent to search is entirely open ended, a reasonable person would have no cause to believe that the search will be limited in some manner. *Id.* While the United States Supreme Court has recognized that the scope of consent may be limited by any limitations the suspect expresses when consenting, the Court has also emphasized that limitations imposed by the defendant in assenting to a request must be explicit. *Jimeno*, 500 U.S. at 251. We note that Johnson's response to Serratt's request to search his KIK account on his phone contained no explicit limitations concerning the duration of the search. *See id.*; *Flowers v. State*, 438 S.W.3d 96, 109 (Tex. App.—Texarkana 2014, pet. ref'd).

This case does not involve an unlimited consent to search Johnson's entire cell phone, as the record shows that Johnson's consent was limited to his KIK account and his dropbox. *See Flowers*, 483 S.W.3d at 108 (noting that "it is well

established that limited consent for a specific purpose does not operate as consent for a full-scale investigatory search"). When the scope of consent is limited to an object, the search is limited to those areas in which the object would be reasonably found. *Id.* Police officers may seize items under the plain-view doctrine when conducting a consensual search. *Id.* at 109. Because the scope of Johnson's consent gave Serratt a legal right to access his KIK account, Serratt could, under the plain-view doctrine, seize any additional evidence he discovered. *See id.*

Additionally, confirmation of prior knowledge does not constitute exceeding the scope of a prior search. *See U.S. v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001). Police do not exceed the scope of a prior search when they examine the same materials more thoroughly than they did before. *See id.* at 464. Thus, police do not engage in a "new search" for Fourth Amendment purposes each time they examine a particular item. *See id.* at 465. When an officer has lawfully observed an object in plain view, the owner's remaining interests in the object are merely those of possession and ownership. *See Johnson v. Stat*e, 161 S.W.3d 176, 184 (Tex. App.—Texarkana 2005), *aff'd*, 226 S.W.3d 439 (Tex. Crim. App. 2007). In focusing on the rights sought to be protected by the Fourth Amendment, and by clearly separating what constitutes a search from what constitutes a seizure, it becomes clear that a

subsequent seizure of evidence already discovered during a prior search does not further invade privacy rights and is therefore constitutionally permissible. *Id.*

The record shows that during the suppression hearing, Serratt explained that the day after Johnson gave him consent to search his KIK account, Serratt went back into Johnson's phone to take photographs of that account. Johnson's counsel argued that there was no reason why Serratt could not have taken the photographs when he first viewed Johnson's KIK account. The State argued that Johnson was arrested at night, and Serratt was not going to take numerous screen shots of Johnson's phone while interviewing Johnson in the car. The State maintained that Serratt took Johnson's phone back to the office, and the next day, Serratt took pictures of the conversations he viewed while in the car. The State argued that a reasonable person could expect that consent, which is not revoked, would extend to Serratt looking at the phone within the same twenty-four hour period to take photographs of the conversations that he had already viewed and discussed with Johnson in the car.

Based on our review of the record, a reasonable person could not have concluded that Johnson intended to limit the scope of his consent to the duration of the interview. *See Jimeno*, 500 U.S. at 251. Instead, it is reasonable to conclude that Johnson's surrender of his phone to Serratt in response to Serratt's open-ended request to search his KIK account implied Johnson's grant of equally unbridled

consent for Serratt to examine the information contained in his KIK account. *See id.*; *Lemons*, 298 S.W.3d at 662. Additionally, Johnson's failure to revoke his consent was an indication that Serratt's search was within the scope of Johnson's consent. *See Lemons*, 298 S.W.3d at 662. We conclude that the State carried its burden of proving by clear and convincing evidence that Serratt's search was conducted within the scope of Johnson's consent. *See id.* at 661-62. The record, viewed in the light most favorable to the trial court's ruling, supports an implicit finding that Serratt did not exceed the scope of Johnson's consent. *See Ross*, 32 S.W.3d at 855. Because the trial court did not err in denying Johnson's motion to suppress, we overrule issue one. *See Valtierra*, 310 S.W.3d at 447-48.

In issue two, Johnson argues that the exhibits containing the photographic evidence were unauthenticated and should have been excluded from evidence. According to Johnson, there was no testimony concerning the origin of the photographs, whether they were a true and accurate representation of the image thereon, or when they were taken. Johnson maintains that other than the fact that the photographs were found on his cell phone, there was "no evidence . . . that the pictures were what the proponent purported them to be, evidence of an additional conversation with a child." According to the State, most of the images in the exhibits depicted text conversations between Johnson and other individuals.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). An abuse of discretion occurs only if the trial court's decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016) (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)). We may not substitute our own decision for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). We will uphold an evidentiary ruling if it was correct on any theory of law applicable to the case. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

The trial court decides preliminary questions concerning the admissibility of evidence, including whether the evidence supports a finding of authenticity. Tex. R. Evid. 104(a); *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). To satisfy the requirement of authenticating an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it to be. Tex. R. Evid. 901(a). Testimony of a witness with knowledge that an item is what it is claimed to be satisfies the requirement of authenticating an item of evidence. Tex. R. Evid. 901(b)(1). In performing its Rule 104 gatekeeping function, the trial court need not be satisfied that the proffered evidence is authentic, as the ultimate question of whether an item is authentic is a question for the jury. *Tienda*,

358 S.W.3d at 638. Thus, the trial court need only decide whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the proffered evidence is authentic. *Id.*

During the suppression hearing, Johnson's counsel objected to the admission of the exhibits based on, among other grounds, hearsay and violation of the confrontation clause. Johnson's counsel argued that the State had the burden to authenticate the veracity of the messages before they could be admitted. According to Johnson's counsel, text messages emanating from the cell phone number assigned to the purported author are not sufficient to establish the necessary authenticity. Johnson's counsel also objected to the admission of photographs sent by other individuals, arguing a lack of foundation. The State argued that Johnson authenticated the messages at the scene when he admitted that it was his phone and his KIK account, and further argued that the statements are not testimonial and were being offered to show Johnson's intent to talk to minors.

In deciding the preliminary question of whether the State had provided sufficient evidence to support a reasonable jury determination that the exhibits it had proffered were authentic, the trial court considered the testimony of Serratt and the recorded interview of Johnson. *See id.* (stating that evidence may be authenticated by direct testimony from a person with knowledge or by circumstantial evidence).

The trial court heard Johnson admit in the recorded interview that the phone was his, the KIK account was his, he had been engaging in conversations with minors, and he had sent and received photographs using his KIK account. Serratt testified that the exhibits only contained photographs from Johnson's KIK account.

The trial court overruled Johnson's objections to the portions of the exhibits containing pictures that were found on Johnson's phone and statements made by Johnson. The trial court explained that it was allowing pictures found on Johnson's phone to be admitted because they are not testimonial, and that it was allowing Johnson's responses because they are admissions by a party opponent. Concerning Johnson's authentication argument, the trial court stated that the cell phone appears to be Johnson's and Johnson identified it as such during his recorded interview. However, the record shows that the trial court declined to admit the exhibits in the form offered by the State and instructed the State to redact the portions of the conversations attributable to individuals other than Johnson unless the State could present the individuals at trial. We overrule issue two. Having overruled both of Johnson's issues, we affirm the trial court's judgment.

AFFRIMED.

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STEVE McKEITHEN
Chief Justice

Submitted on April 25, 2017
Opinion Delivered August 30, 2017
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Before McKeithen, C.J., Kreger and Johnson, JJ.