In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00350-CR

ROELIO MADRIGAL, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 67,505-E, Honorable Douglas Woodburn, Presiding

July 13, 2016

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and HANCOCK, JJ.

Appellant Roelio Madrigal appeals his conviction for possession of methamphetamine, greater than one gram but less than four grams.[1] A jury set punishment at confinement in prison for ten years. The trial court imposed sentence accordingly. We will overrule appellant's three issues and affirm the judgment of the trial court.

[1] TEX. HEALTH & SAFETY CODE ANN. § 481.115(a),(c) (West 2010).

Background

Timothy Parks made a 911 call in Amarillo at about 10:40 p.m., telling the operator that an intruder had entered his house with a weapon. Two police officers were dispatched to the location. On their arrival they encountered Parks standing "directly" in front of the house. In testimony, one officer described Parks as "frantic." The other officer testified that after speaking with Parks, they were "under the assumption that someone was in the house with a weapon." He said the "threat level . . . of the call went up" at that point.

An officer looked through a window and saw appellant inside the house. He did not see a weapon. Parks gave the officers permission to enter the house. Believing appellant was armed, the officers drew their weapons, entered the house, and ordered appellant to the floor. They patted appellant down for weapons, asking appellant if he possessed "anything illegal." Appellant responded he had a "meth pipe" in his pocket. No weapon was found.

The officers arrested appellant for possession of drug paraphernalia. A search of his person revealed five individually-wrapped bags containing a substance that proved to be methamphetamine. Appellant told officers he smoked methamphetamine about thirty minutes before the encounter.

After appellant's arrest, Parks gave officers an affidavit in which he identified the house as his residence. He stated the homeowner, Veronica Salazar, told him if appellant came to the house to call the police.

Appellant called Salazar as a witness at trial. Taken on voir dire by the State, she testified she was out of town at the time of appellant's arrest. In brief testimony, she stated appellant is her uncle who lives in Dumas, Texas. On occasion when she is out of town she has given appellant a house key and permission to stay at her residence. Testifying then in an offer of proof by appellant, Salazar said she had met Parks only one time, he never lived at her residence, he had no authority to enter the residence or allow the police to enter it, and he lied if he told police he was authorized to do so.

Analysis

First Issue

Appellant's three issues all relate to his challenge of the lawfulness of the officers' warrantless entry of the residence. By his first issue, appellant contends the officers' entry was not justified because Parks lacked apparent authority[2] to give them consent. By his briefing, appellant as much as concedes that the issue is not preserved for our review, but he presents two arguments for our consideration of its merits. We disagree with both arguments.

[2] Appellant does not present an issue challenging the availability of the apparent authority doctrine in Texas, and the issues presented do not require our consideration of the question. *See Noble v. State*, No. 07-06-0304-CR, 2007 Tex. App. LEXIS 8282, at *10 (Tex. App.—Amarillo October 18, 2007, no pet.) (mem. op., not designated for publication) (noting Texas Court of Criminal Appeals has not expressly adopted apparent authority doctrine, citing *McNairy v. State*, 835 S.W.2d 101, 105 (Tex. Crim. App. 1991)). *See also Hubert v. State,* 312 S.W.3d 554, 564 (Tex. Crim. App. 2010) ("We leave the apparent-authority doctrine to be further developed in a case in which its application is, unlike here, determinative of the outcome").

First, appellant argues that, under *Limon v. State*, 340 S.W.3d 753 (Tex. Crim. App. 2011), the issue is one of sufficiency of evidence, and therefore not subject to procedural default. He points to the opinion's statement, "The State must prove actual or apparent authority by a preponderance of the evidence." *Id*. at 757 (citation omitted). The *Limon* opinion makes clear the issues under discussion arose in the context of the trial court's denial of a pretrial motion to suppress evidence. *Id*. at 755. Texas law is equally clear that a defendant's efforts to exclude the State's evidence offered at trial are subject to preservation of error rules. TEX. R. EVID. 103; *Garza v. State*, 126 S.W.3d 79, 81 (Tex. Crim. App. 2004); *Strehl v. State*, 486 S.W.3d 110, No. 06-15-00117-CR, 2016 Tex. App. LEXIS 1221, at *2-4 (Tex. App.—Texarkana Feb. 5, 2016, no pet. h.). That the *Limon* opinion does not discuss preservation of error is no indication preservation is not required.

Second, appellant argues the holding of *Thomas v. State*, 408 S.W.3d 877 (Tex. Crim. App. 2013), permits our review of his claim's merits.

During the week preceding trial appellant filed a motion to suppress, and filed an amended motion on the morning of trial. Through these motions, appellant sought suppression of all tangible evidence police seized in connection with his arrest. Shortly before the jury panel was brought into the courtroom on the morning trial began, the following exchange occurred:

> The Court: All right. Are you -- are you desirous to pursue this Motion to Suppress at this time?
>
> [Defense Counsel]: Your Honor, the witness that we had who was the tenant of the premises in question, I had visited with her on Friday, again yesterday, and she was supposed to be here at 9:00 a.m.; it's Veronica Salazar. She is not here and I cannot proceed without her.

> The Court: Okay. Then you're waiving the Motion to Suppress. Is that correct?
>
> [Defense Counsel]: At this time, yes, Your Honor.

Appellant thereafter did not obtain a hearing on his motion to suppress. However, during the State's case, appellant thoroughly cross-examined the police officers concerning their reasons for accepting the information Parks gave them when they responded to his 911 call and relied on his consent to enter the residence. Then, during the testimony of the State's forensic scientist, the State offered the 1.2 grams of methamphetamine and the scientist's report into evidence, whereupon appellant voiced "no objection."

Thomas holds that a defendant's statement of "no objection" to the State's proffer of evidence does not necessarily forfeit the defendant's earlier-preserved claim of error from admission of the evidence. *Thomas*, 408 S.W.3d at 885. Here, however, because appellant never obtained a hearing, or a ruling, on his motion to suppress, *Thomas* has no application. Appellant's contention the methamphetamine should have been excluded from evidence is not preserved for our review, but his "no objection" statement is not the primary reason the issue is not preserved. Primarily, it is not preserved because the trial court never heard, or ruled on, the motion to suppress. TEX. R. APP. P. 33.1(a).

Moreover, as the court noted in *Thomas*, even when the issue has been preserved, the trial record as a whole may leave an appellate court uncertain of a defendant's intention when he voices "no objection" to the State's proffer. *Id*. at 885. Here, appellant's thorough examination of the officers on facts pertinent to the State's

assertion of Parks' apparent authority allowed appellant to evaluate the strength of the assertion. After the officers' testimony, appellant's efforts appear focused on his attempt to have the opportunity to argue the issue to the jury pursuant to article 38.23.

Appellant's first issue is overruled.

Second Issue

Appellant next argues the trial court erred by refusing his request for a jury instruction under article 38.23.[3] He asserts the testimony presented an issue of fact whether the officers used "reasonable caution" in entering the house without more extensively questioning Parks.

A defendant is entitled to an article 38.23(a) instruction if he shows that: "(1) an issue of historical fact was raised in front of the jury; (2) the fact was contested by affirmative evidence at trial; and (3) the fact is material to the constitutional or statutory violation that the defendant has identified as rendering the particular evidence inadmissible." *Robinson v. State,* 377 S.W.3d 712, 719 (Tex. Crim. App. 2012) (citing *Madden v. State,* 242 S.W.3d 504, 510 (Tex. Crim. App. 2007)).

[3] TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005). The statute reads:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

From our review of the record, we conclude the historical facts regarding the officers' warrantless entry of the house were not disputed. There was no factual dispute over what Parks told the officers. The issue was application of the law to those facts. *See Robinson,* 377 S.W.3d at 719 & n.22 ("Where the issue raised by the evidence at trial does *not* involve controverted historical facts, but only the proper application of the law to undisputed facts, that issue is properly left to the determination of the trial court") (emphasis in original)); *id.* at n.22 (citing *Garcia v. State,* 43 S.W.3d 527, 531 (Tex. Crim. App. 2001) and explaining parenthetically, "[i]n addressing the sufficiency of the facts to justify the stop in *Garcia,* we explained that the issue was an application of the law to the facts: 'The question, then, is whether the child looking back several times is enough to establish reasonable suspicion for a seat belt violation'").

Appellant cites our opinion in *Uballe v. State,* 439 S.W.3d 380 (Tex. App.—Amarillo 2014, pet. refused), in which we held the defendant was entitled to an article 38.23(a) instruction because of an issue of fact regarding an officer's good faith in the conduct of an inventory of an impounded vehicle. *Id. at* 386-87 (citing *Colorado v. Bertine*, 479 U.S. 367, 374, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987)). *Uballe* is inapposite here. No issue of the officers' good faith or other subjective intent is raised in review of their reliance on Parks' consent. The reasonableness of the officers' actions is "judged against an objective standard" that asks whether "the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) (quoting *Terry v. Ohio,* 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (internal quotation marks and punctuation

omitted)); *cf. Corbin v. State*, 85 S.W.3d 272, 280-81 & n.8 (Tex. Crim. App. 2002) (Cochran, J., concurring).

Appellant's second issue is overruled.

Third Issue

The trial court did not allow the jury to hear Salazar's testimony challenging the credibility of Parks' claim he resided at the residence. By his third issue appellant contends the trial court abused its discretion by excluding her testimony.

We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Martinez v. State,* 327 S.W.3d 727, 736 (Tex. Crim. App. 2010) (citing *Green v. State,* 934 S.W.2d 92, 104 (Tex. Crim. App. 1996)). The trial court does not abuse its discretion unless its determination lies outside the zone of reasonable disagreement. *Martinez,* 327 S.W.3d at 736. '"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401.

On the night of appellant's arrest, Salazar was out of town and thus had no personal knowledge of the information available to the officers at the time they decided to make a warrantless entry of the residence. *See Rodriguez*, 497 U.S. at 188 (search valid if "facts available to the officer at the moment" warrant reasonable belief consenting party had authority). The court did not err by excluding her testimony. Appellant's third issue is overruled.

Conclusion

Having overruled appellant's three issues, we affirm the judgment of the trial court.

James T. Campbell
Justice

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