In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00144-CR

JAMES WILLIAM UTZMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 124th District Court
Gregg County, Texas
Trial Court No. 46,051-B

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

James William Utzman pled guilty to and was convicted of possession of 400 grams or more of testosterone, a penalty group 3 controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.104(a)(9) (West Supp. 2017), § 481.117(e) (West 2017). Pursuant to a plea-bargain agreement with the State, Utzman was sentenced to ten years' imprisonment.[1] On appeal, Utzman argues that the trial court erred in overruling his motion to suppress evidence obtained after a search of his motel room. Because we disagree, we affirm the trial court's judgment.

I. Standard of Review

The Longview Police Department (LPD) obtained a warrant to search Utzman's motel room and seize controlled substances and related paraphernalia. We "normally review[] a trial court's ruling on a motion to suppress by using a bifurcated standard of review, where we give almost total deference to the historical facts found by the trial court and review de novo the trial court's application of the law." *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). "However, when the trial court is determining probable cause to support the issuance of a search warrant, there are no credibility determinations[;] rather[,] the trial court is constrained to the four corners of the affidavit." *Id.* "Accordingly, when we review the magistrate[]'s decision to issue a warrant, we apply a highly deferential standard because of the constitutional preference for searches to be conducted pursuant to a warrant as opposed to a warrantless search." *Id.*

[1]The Texas Legislature has granted a very limited right of appeal in plea-bargain cases. In a plea-bargain case, a defendant may only appeal those matters (1) that were raised by written motion filed and ruled on before trial or (2) after obtaining the trial court's permission to appeal. TEX. R. APP. P. 25.2(a)(2). In this case, the trial court granted Utzman permission to appeal its ruling on his motion to suppress.

"To justify the issuance of a search warrant, the supporting affidavit must set forth facts sufficient to establish probable cause." *Taunton v. State*, 465 S.W.3d 816, 822 (Tex. App.—Texarkana 2015, pet. ref'd). Specifically, these facts include:

> (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) (West 2015); *Taunton*, 465 S.W.3d at 822.

"We are instructed not to analyze the affidavit in a hyper-technical manner." *McLain*, 337 S.W.3d at 271 (citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). Rather, we "interpret[] affidavits for search warrants . . . in a common sense and realistic manner." *Lopez v. State*, 535 S.W.2d 643, 647 (Tex. Crim. App. 1976). "[A] magistrate, in assessing probable cause, may draw inferences from the facts." *Id.* Therefore, although the magistrate's determination of probable cause must be based on the facts contained within the four corners of the affidavit, the magistrate may use logic and common sense to make inferences based on those facts.

"The test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a 'substantial basis' for issuing the warrant." *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012) (quoting *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984)). "Probable cause exists when, under the totality of the circumstances, there is a 'fair probability' that contraband or evidence of a crime will be found at the specified location." *Id.* (quoting *Gates*, 462 U.S. 238). "This is a flexible, nondemanding standard." *Id.*

II. The Affidavit's Four Corners Provided a Substantial Basis for Issuing the Warrant

The warrant permitting the search of Utzman's Motel 6 room was based on a probable cause affidavit authored by Alejandro Castillo, a police officer with the LPD. Castillo's affidavit established that Utzman had previously been arrested for possession of controlled substances, was currently on community supervision for another offense, and was living in a motel that Castillo knew from his experience as a member of the LPD was a "high crime area, particularly [for] narcotics trafficking." The affidavit stated that community supervision officers had arrived at Utzman's motel room to conduct a random drug test, that "Utzman performed the urinalysis test and ended up failing the test," and that the community supervision officer, Barbara Crowe, reported to Sergeant Chad Lemaire of the LPD that she had seen items commonly associated with illegal narcotics in plain view, including "glass ware, chemical ware, gloves, [a] pressure cooker, and other paraphernalia."[2] The affidavit further established that on Crowe's report, Lemaire travelled to Utzman's motel room and saw the same items in plain view. Castillo wrote that Lemaire called him to report the findings on May 4, 2016, which was the same day the warrant was ultimately signed by the magistrate.

Here, the magistrate was presented with evidence that Utzman was on community supervision, had been administered (and failed) a drug test conducted in his motel room, and had items in the room, in plain view to the community supervision officers, that were commonly associated with illegal narcotics. We find that a commonsense interpretation of Castillo's affidavit

[2]"It is evident from this affidavit that the magistrate based his finding of probable cause partially on information involving multiple hearsay. Hearsay-upon-hearsay may be utilized to show probable cause as long as the underlying circumstances indicate that there is a substantial basis for crediting the hearsay at each level." *Hennessy v. State*, 660 S.W.2d 87, 91 (Tex. Crim. App. [Panel Op.] 1983).

could lead a reasonable magistrate to conclude that it provided a fair probability that contraband or evidence of a crime would be found in Utzman's motel room. Thus, the four corners of the affidavit provide a substantial basis for issuing the warrant. We overrule Utzman's point or error.

III. Additional Matters

In a further attempt to attack the trial court's ruling on the suppression issue, Utzman makes several arguments which he did not present to the trial court by written motion.[3] Utzman's right to appeal is specifically to "those matters that were raised by written motion filed and ruled on before trial." *See* TEX. R. APP. P. 25.2(a)(2).

Utzman's written motion to suppress was a generalized one. On appeal, he argues that the trial court erred in finding that refusal to consent to a search cannot be used as evidence of guilt and in failing to excise portions of the affidavit under *Franks v. Delaware*, 438 U.S. 154 (1978).[4]

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[3]Some of Utzman's arguments were made as a result of the trial court's explanations for its ruling at the end of the suppression hearing.

[4]"Under *Franks*, a defendant who makes a substantial preliminary showing that a false statement was made in a warrant affidavit knowingly and intentionally, or with reckless disregard for the truth, may be entitled by the Fourth Amendment to a hearing, on the defendant's request." *Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim. App. 2007) (citing *Franks*, 438 U.S. at 155–56).

Because there is a presumption of validity with respect to an affidavit supporting the search warrant, "[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory." *Franks*, 438 U.S. at 171. The United States Supreme Court has explained what is required to obtain an evidentiary hearing:

> There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. . . . Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Utzman also asserts that Lemaire must have conducted a warrantless search. None of these issues were raised in Utzman's written motion. Additionally, they were not properly raised during his argument at the suppression hearing. Thus, we will not consider them.

IV. Conclusion

We affirm the trial court's judgment.

Bailey C. Moseley
Justice

Date Submitted: November 22, 2017
Date Decided: December 1, 2017

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Id. at 171–72 (footnote omitted). Utzman's suppression motion did not raise a *Franks* issue, and he made no allegation of deliberate falsehood at trial.