IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,024

ALBERT LESLIE LOVE, Jr., Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM CAUSE NO. 2011-1511-C1 IN THE 19TH DISTRICT COURT
McLENNAN COUNTY

KELLER, P.J., filed a dissenting opinion in which HERVEY, J., joined.

The Court grants relief on the ground that obtaining text messages from appellant's cell phone records without a warrant violated the Fourth Amendment. The Court's opinion points to three places in the record where appellant lodged a complaint that had something to do with the Fourth Amendment: (1) a general pretrial motion to suppress, (2) a motion to suppress evidence that was obtained through appellant's cell phone records ("cell phone" motion to suppress), and (3) an objection in a hearing outside the presence of the jury. As we shall see, none of these complaints sufficiently preserved error with respect to the issue on which the Court grants relief.

A. A Complaint Must Be Sufficiently Specific

It is not necessary to employ "specific words or technical considerations" to preserve error.[1] But Rule 33.1 does require that the party's complaint at trial "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context."[2] This means that the party must "let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him."[3] A "general or imprecise objection" will not preserve error "unless the legal basis for the objection is *obvious* to the court and to opposing counsel."[4] Moreover, when part of the proffered evidence is admissible and part of it is inadmissible, the complaining party must point to the specific portions that he thinks should be excluded.[5]

B. None of the Complaints at Trial Were Sufficiently Specific

1. *The General Motion to Suppress*

Appellant's general motion to suppress requested the suppression of "all evidence obtained by any officer or other person in violation of any provisions of the Constitution or laws of the State of Texas or the Constitution of the laws of the United States of America, specifically, but not limited to, the following . . . ." What followed this general statement were three categories: (1) oral or

---

[1] *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016).

[2] TEX. R. APP. P. 33.1(a)(1)(A).

[3] *Vasquez*, 483 S.W.3d at 554.

[4] *Id.* (emphasis in original).

[5] *Whitaker v. State*, 286 S.W.3d 355, 369 (Tex. Crim. App. 2009).

written statements obtained from appellant in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments, counterpart provisions of the Texas Constitution, and Article 38.22 of the Code of Criminal Procedure; (2) property or other items of physical evidence obtained from appellant's "person, residence, automobile, or place of business" in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments, counterpart provisions of the Texas Constitution, and Article 18.01 of the Texas Code of Criminal Procedure; and (3) "[a]ny and all other materials or physical items obtained in violation of the Constitution or laws of the State of Texas or of the United States of America."

The general request for suppression and the third category did not place the trial court on notice of anything; no particular evidence was specified nor was any specific constitutional provision cited. The first category recited the Fifth and Sixth Amendments but did not recite the Fourth Amendment and seems to be aimed at confessions made by the defendant to law enforcement officers rather than to text messages made to friends and acquaintances. The second category appears to cover only tangible evidence. The general motion to suppress was not specific enough to raise a Fourth Amendment claim with respect to electronic data associated with cell phones.

2. *The Motion to Suppress Evidence Obtained Through Cell Phone Records*

At the beginning of his Motion to Suppress Evidence Obtained Through Cell Phone Records and Memorandum in Support, appellant requested the suppression of "any and all evidence the State obtained through use of the Defendant's cell phone records because such evidence was wrongfully derived from an unreasonable search and seizure." In the body of his motion, appellant discussed the Supreme Court case of *United States v. Jones*,[6] which, in appellant's words, "held that

[6] 565 U.S. 400 (2012).

attachment of a GPS device to a vehicle, and its use of the device to monitor the vehicle constituted a search under the Fourth Amendment." After quoting from the Court's opinion and the concurring opinions in *Jones*, appellant concluded his motion with the following statement:

> Simply put, based upon the United States Supreme Court's recent holding in *Jones*, it is evident that the State's use of the defendant's cell phone records to obtain information regarding his location or lack of location constitutes an unreasonable search and seizure. As such, any and all evidence derived from said search must be suppressed.

Appellant's "cell phone" motion to suppress sufficiently preserved a Fourth Amendment claim regarding the use of cell phone records containing location data. The motion specifically cited *Jones*, a GPS case, as authority for holding that the use of cell phone records to obtain location data constituted a search. But the motion did not suggest that it was intended to encompass the use of cell phone records for purposes other than obtaining location data. Having explicitly summed up by saying that obtaining location information was an unreasonable search, the motion simply failed to convey the idea that text messages should also be suppressed.

3. *Trial Objection*

The discussion at trial regarding the admissibility of cell phone records begins on page 11 of volume 36 of the court reporter's record and continues for ten pages. On pages 11 and 12, defense counsel objected generally to evidence obtained from the cell phone records of appellant, Rickey Cummings, D'Arvis Cummings, Sheronica Patterson, Shelia Bowers, Shacira Love, and Brittany Snell. Defense counsel objected that text messages within these records were inadmissible on the basis of relevance, hearsay, and character. On pages 12 through 19, the prosecutor summarized the contents of the cell phone records of each person and explained their relevance. When asked for a response, defense counsel stated:

> [T]hose records include text messages to people other than Albert Love [appellant]. That constitutes hearsay. If there were any messages between that particular phone and those phones and Mr. Love, they would certainly be contained within Mr. Love's records, so I think those are somewhat redundant and aren't necessary, and certainly anything above and beyond those records would be hearsay.[7]

After a response from the prosecutor, the trial court then said, "All right. Anything else Mr. Evans [defense counsel]?" Defense counsel responded that the cell phone records for Sheronica Patterson were not needed if she could testify. Defense counsel then objected to "these records" under Texas Rule of Evidence 403. After that, defense counsel stated, on page 21:

> Further, Your Honor, with regard to these matters and in light of the current state of affairs in our nation, we would argue that these records, without a search warrant, should not have been accessible, and since they were not [sic] produced without a search warrant, Judge, we would argue they should be inadmissible as well.[8]

After that objection, defense counsel stated that some messages in appellant's records (Exhibit 185) that were made by Sheronica Patterson were redundant and would constitute hearsay, but the prosecutor explained that there were no text messages of that sort and defense counsel said, "Never mind."

The trial court then overruled the objections. Then the prosecutor said:

> Could I also have the record reflect that these records were not obtained with a search warrant, but they were obtained by Court orders, I believe, in many instances signed by this particular Court for the records in question. I would like the record to reflect that, Your Honor.

The trial court then stated, "So noted. The objections are overruled on all grounds."

I think it is probably correct to construe defense counsel's statement about the absence of a

---

[7] These statements might have been a tacit admission that text messages from appellant contained in his own records would not be hearsay under the party opponent rule. *See* TEX. R. EVID. 801(e)(2).

[8] The "[sic]" notation appears in court reporter's record.

search warrant "in light of the current state of affairs in our nation" as a Fourth Amendment complaint. Nevertheless, I think the objection was insufficiently specific for two reasons.

First, the objection appeared as a perfunctory afterthought, with no explanation as to why there was a Fourth Amendment violation; so, the trial court could have thought that the objection was simply a reference to the "cell phone" motion to suppress, which contested only the use of location data. The entire pages-long discussion that preceded the complaint never once mentioned "search warrant," and the claim was not made until the trial court indicated, by asking whether there was anything else, that it was ready to wrap up the hearing. If appellant intended to make a new claim, I do not believe that he put the court on notice that he was doing so. And as far as I can tell, the prosecutor may also have thought the Fourth Amendment objection still referred to the subject of the "cell phone" motion. Appellant's Fourth Amendment objection at trial was not sufficiently specific to place the trial court on notice that he was contesting the admissibility of the text messages contained in his cell phone records.[9]

Second, even if this vaguely-worded Fourth Amendment objection were construed to be a new claim, separate from the "cell phone" motion, and to embrace all data contained in the cell phone records that were being discussed, most of that data was admissible. As the Court explains, the cell phone location data was not the result of a search, and appellant had no standing to challenge the cell phone records of other people. But defense counsel's Fourth Amendment challenge was to

---

[9] The Court contends that it would have been readily apparent to the trial court after appellant's ten pages of objections having nothing to do with the Fourth Amendment that references to text messages within those objections meant that his Fourth Amendment objection had been expanded to include text messages. But, the brevity and vagueness of appellant's Fourth Amendment objection, the existence of a prior motion to suppress that was limited to location data, and the brevity with which the parties and the trial court treated the objection suggests otherwise.

all of these records as a unit. He made no attempt to segregate the records that were subject to his Fourth Amendment challenge from those that were not. Nor did he attempt to obtain a more specific ruling with respect to the different types of cell-phone-record evidence. Whether the entries in the records involved location data or text messages, or whether the records were appellant's records or the records of another, defense counsel made (at best) but a single global objection to them all. Under these circumstances, defense counsel's single global objection failed to preserve the claim upon which the Court grants relief.[10]

With these comments, I respectfully dissent.

Filed: December 7, 2016
Publish

[10] This was the State's argument for why error was not preserved. The Court's answer is essentially that, because *Ford v. State*, 477 S.W.3d 321 (Tex. Crim. App. 2015), had not yet been decided, defense counsel had no reason to know that location data would ultimately be found to be admissible, and so, we should excuse his failure to distinguish between location data and text messages. But that argument, even if accepted, would not excuse the failure of the objection to distinguish between appellant's cell phone records and the cell phone records of other people. The proposition that a defendant cannot, under the Fourth Amendment, contest the violation of someone else's expectation of privacy is well established. *Rakas v. Illinois*, 439 U.S. 128, 134 (1978).