IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1299-16

THE STATE OF TEXAS

v.

KIMBERLY FORD, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS NUECES COUNTY

KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, RICHARDSON, YEARY, and KEEL, JJ., joined. WALKER, J., filed a dissenting opinion in which ALCALA, J., joined. NEWELL, J., concurred.

We consider whether a police officer had probable cause to arrest a customer for theft from a store (for concealing items in her purse) when she had not yet exited the store and when she claimed, after being confronted by the officer, that she was going to pay for the items she had taken. We conclude that the officer had probable cause to arrest.

I. BACKGROUND

A. Trial

Appellee was indicted for possession of methamphetamine. The drugs were seized from her

purse at a Dollar General store during a theft investigation. Appellee filed a motion to suppress the drugs, and the police report of the incident was admitted at the suppression hearing.[1]

According to the police report, a Dollar General store employee reported that a customer in the store was concealing store merchandise in her purse and jacket. Upon arriving at the store, the responding police officer met with the employee who made the report. The employee told the officer that the customer in question was in the northeast corner of the store, and she described the customer as a "white female with blond hair" wearing "blue jeans and a light blue shirt." The officer went to that part of the store and encountered appellee, who met the employee's description exactly.

The officer informed appellee that she had been seen concealing items in her purse. Appellee responded that she had put items in her purse, but she was not done shopping, and she was going to pay for the items before she left. The officer noticed that appellee had a shopping cart and that there were items from the store in the cart that were not in her purse.[2] The purse was in the child seat of the shopping cart and was covered by a blue jacket.

The officer picked up the blue jacket and discovered that the purse was zipped up and full of merchandise. Upon removing the store items from the purse, the officer discovered six small baggies of methamphetamine and two pills later identified as hydrocodone/ibuprophen. The store employee printed a receipt for the store items in the purse, and the total price was $75.10. Appellee was placed under arrest for theft over $50. She was later booked into jail on charges of theft and

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[1] This report was the only evidence because the arresting officer was unavailable to testify due to an injury, and the trial court was unwilling to grant a continuance. The trial court admitted the report over appellee's objection.

[2] The officer's report stated, "Kimberly had other items in the shopping cart proving she does know the proper way to carry items around the store. It also showed that she was intending on paying for some items while concealing others."

possession of controlled substances.

At the suppression hearing, the trial court observed that appellee "never actually tried to leave the store with the property." The trial court acknowledged that "theft may be complete without the actual removal of property" but then concluded that a theft had not occurred here because appellee "was still shopping." The trial court further stated that it was left "with a narrative that is hearsay upon hearsay. There's no one here to vouch for the credibility of the information." The trial court acknowledged that appellee "had some items in the basket [shopping cart] and some items in a purse that was zipped up and concealed." But the trial court determined that there was insufficient evidence that appellee intended to steal the items because she never tried to leave the store with the items, she did not flee when approached, she did not try to hide anything, and she indicated that she was going to pay for the items. Consequently, the trial court concluded that "the officer acted prematurely in contacting her in the middle of the store and asking about items that she placed in a purse, whether zipped or unzipped" and that inferring an intent to steal was "just too big a leap at this point, considering her cooperation." The trial court also stated that it "question[ed] the reliability of the information contained within the report provided by [the store employee] to the officer" and "there not being anyone to substantiate the information [the store employee] gave." The trial court granted appellee's motion to suppress.

The trial court's written findings of fact and conclusions of law were as follows:

I. FINDINGS OF FACT

> 1. On January 9, 2013, a store employee of the Dollar General Store at Waldron and Glenoak in Corpus Christi, Nueces County, Texas called Corpus Christi Police Department after becoming suspicious that Defendant was shoplifting.
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> 2. When the police officer arrived, he found Defendant inside the store shopping.

3. When stopped by the officer, Defendant had not left the store.

4. When stopped by the officer, Defendant had not passed the checkout area of the store.

II. CONCLUSIONS OF LAW

1. The officer did not have reasonable suspicion to believe that Defendant had committed a crime at the time he stopped the Defendant and searched her purse.

2. The officer did not have probable cause to arrest Defendant and to search her purse.

3. The State did not meet its burden to show that a crime had occurred.[3]

B. Appeal

The State's appeal addressed two interactions between appellee and the police officer: (1) the conversation between the officer and appellee, and (2) the search of appellee's purse. The State contended that the conversation was part of a consensual encounter. In the alternative, the State contended that the officer had reasonable suspicion to stop appellee to question her about a possible theft. Regarding the search, the State contended that the totality of the circumstances, including the employee's report and the officer's conversation with appellee, gave rise to probable cause to arrest. The State further argued that, because the officer had probable cause to arrest, the search was a valid search incident to arrest. The State also claimed that the trial court's findings on the motion to suppress were incomplete and needed supplementation.

The court of appeals rejected the State's claim that the conversation was part of a consensual encounter but agreed with the State that the police officer had reasonable suspicion to stop appellee

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[3] *See also State v. Ford*, No. 13-15-00031-CR, 2016 Tex. App. LEXIS 10139, *5 (Tex. App.—Corpus Christi Sept. 15, 2016) (not designated for publication).

to ask her questions.[4] Consequently, the court of appeals held that the trial court erred in concluding that the officer lacked reasonable suspicion to conduct a stop.[5]

Next, the court of appeals addressed whether the trial court erred in concluding that the officer lacked probable cause to arrest.[6] The court of appeals recognized that the carrying away of property is not an element of theft in Texas.[7] Nevertheless, the court noted appellee's statement that she was going to pay for the items in her purse before she left the store, and the court said, "Nothing else in the record indicates any actions or statements by Ford indicating that she was attempting to appropriate the items with an intent to deprive Dollar General of the merchandise, as she had not left the store and also had other items in a shopping cart that she intended to purchase."[8] The court of appeals also stated, "The only evidence introduced by the State to support its arguments was [the officer's] police report and narrative, which the trial court referenced in its ruling by expressly finding that the reliability and accuracy of the information given by [store employee] to [the officer] regarding the 'items and information' contained within [the officer's] report was questionable."[9] Based on these remarks, the court of appeals held that the trial court was within its discretion to conclude that the State failed to meet its burden of establishing probable cause to arrest.[10]

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[4] *Id.* at *8-10.

[5] *Id.* at *10.

[6] *Id.*

[7] *Id.* at 11.

[8] *Id.* at *12.

[9] *Id.*

[10] *Id.* at *3

The court of appeals also rejected that the State's claim that the trial court's findings needed supplementation: "Here, we conclude that the oral and written findings of fact and conclusions of law made and adopted by the trial [court] are adequate for this Court to review the trial court's application of law to facts."[11]

II. ANALYSIS

Under the appellate standard of review on Fourth Amendment claims, an appellate court is to afford almost total deference to the trial court's determination of historical facts, and of application-of-law-to-fact issues that turn on credibility and demeanor, while reviewing *de novo* other application-of-law-to-fact issues.[12] As the prevailing party at the trial level, appellee gains the benefit of deference on factual findings made in her favor.[13] However, whether the facts, as determined by the trial court, add up to reasonable suspicion or probable cause is a question to be reviewed *de novo*.[14]

For an arrest to be justified under the Fourth Amendment, a police officer must have "probable cause to believe that the suspect has committed or is committing an offense."[15] Probable cause is a fluid concept that cannot be readily reduced to a neat set of legal rules.[16] Although the concept evades precise definition, it involves "a reasonable ground for belief of guilt" that is

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[11] *Id.* at *5 n.3.

[12] *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[13] *State v. Krizan-Wilson*, 354 S.W.3d 808, 815-16 (Tex. Crim. App. 2011).

[14] *Byram v. State*, 510 S.W.3d 918, 923 (Tex. Crim. App. 2017).

[15] *Virginian v. Moore*, 553 U.S. 164, 173 (2008).

[16] *Baldwin v. State*, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009).

"particularized with respect to the person to be searched or seized."[17] It is a greater level of suspicion than "reasonable suspicion" but falls far short of a preponderance of the evidence standard.[18] If an officer has probable cause to arrest, a search incident to arrest is valid if conducted immediately before or after a formal arrest.[19]

Appellee was suspected of committing the offense of theft. Theft occurs when a person "unlawfully appropriates property with intent to deprive the owner of the property."[20] "Appropriate" means, among other things, "to acquire or otherwise exercise control over property other than real property."[21] In *Hill v. State*, we recognized that a customer of a store can exercise control over property with an intent to deprive, even if the customer has not yet left the store with the property.[22] In that case, the defendant did so by concealing the property (a handgun) underneath his shirt.[23] In *Groomes v. United States*, the District of Columbia Court of Appeals addressed a fact situation very much like the one confronting us today, where the defendant had some items in a shopping cart and other items concealed in her purse.[24] The DC court found the facts sufficient to establish larceny (an equivalent of modern theft) even though the defendant had not yet left the store:

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[17] *Id.*

[18] *Id.*

[19] *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980); *State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999).

[20] TEX. PENAL CODE § 31.03(a).

[21] *Id.* § 31.01(4).

[22] 633 S.W.2d 520, 521 (Tex. Crim. App. 1981).

[23] *Id.*

[24] 155 A.2d 73, 75 (D.C. App. 1959).

> It was established that the items once removed from the shelf were immediately secreted in her purse. At the time, the cart used by appellant was about half full of groceries. By concealing the articles in her purse separate and apart from the other goods in the cart, appellant acquired complete and exclusive control over the property. It is well settled that the elements of a taking and asportation are satisfied where the evidence shows that the property was taken from the owner and was concealed or put in a convenient place for removal. The fact that the possession was brief or that the person was detected before the goods could be removed from the owner's premises is immaterial.[25]

The trial court and the court of appeals in the present case both seemed to recognize that it was not necessary for appellee to take the items out of the store for her to commit a theft. In fact, appellee's own admission that she placed items inside her purse was sufficient to show an exercise of control over those items so as to constitute "appropriation."

Appropriation by itself does not establish theft—there must also be an intent to deprive the owner of the property, and both courts below concluded that the officer did not have probable cause to believe that she had the requisite intent. Nevertheless, the officer had knowledge of at least four undisputed facts that supported a conclusion that appellee exercised control over the items in her purse with the requisite intent to deprive:

1. A store employee reported that appellee was concealing store items in her purse.

2. Appellee admitted to the officer that she placed some store items in her purse.

3. The store cart appellee was using contained other items from the store that were not in her purse.

4. Appellee's purse was covered by a jacket.

The fact that some items were visible in the cart while others were concealed in appellee's purse caused the arresting officer to infer that appellee intended to pay for some items while concealing

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[25] *Id.*

others. The DC court in *Groomes* seems to have reached a similar conclusion, and we agree with the inference. Also, the police officer could have reasonably believed that the jacket covering the purse was designed to further conceal the items.

The court of appeals indicated that the trial court could doubt or disbelieve the reliability of the information given by the employee.[26] But as the court of appeals itself held, the employee's report was sufficiently reliable to establish reasonable suspicion.[27] The employee's report was then

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[26] The court of appeals did not hold that the trial court disbelieved the police officer. *See State v. Ross*, 32 S.W.3d 853, 857 (Tex. Crim. App. 2000) ("The trial court, however, was free to disbelieve all of the agent's testimony. As the sole trier of fact and judge of credibility, the trial court was not compelled to believe the agent's testimony, even if uncontroverted, based on credibility and demeanor. Because the evidence, if believed, would compel a denial of the motion to suppress, the record supports the second theory that the trial court did not find the agent's testimony to be credible based on demeanor, appearance, and tone."). Such a holding would not have been consistent with the court of appeals's determination that the officer had reasonable suspicion to conduct a stop. It also would not have been consistent with the court of appeals's refusal to allow a supplementation of the written findings of fact. Although the court of appeals's opinion is less than clear on this point, it appears that the court inferred from the trial court's statements during the hearing, which it referred to as oral findings, that the trial court credited the police report with accurately reciting what information the officer received during his investigation. We think that the court of appeals's implicit inference on this point is a fair reading of the record.

Judge Walker's dissent concedes that the officer had probable cause to arrest but contends that the trial court's suppression ruling can be upheld on the basis that the officer lacked reasonable suspicion to stop appellee. We note that appellee did not file a cross-petition complaining about the court of appeals's reasonable suspicion holding. *See* TEX. R. APP. P. 68.2(b) ("Even if the time specified in (a) has expired, a party who otherwise may file a petition may do so within 10 days after the timely filing of another party's petition."). Moreover, the dissent's contention with respect to reasonable suspicion is that the trial court was free to disbelieve the credibility of the store employee's hearsay statement. But the existence of reasonable suspicion does not turn on whether the store employee's hearsay statement should ultimately be believed by the trial court but on whether the officer had sufficient articulable facts to reasonably conclude that a crime was being committed. *See Furr v. State*, 499 S.W.3d 872, 878 (Tex. Crim. App. 2016). The store employee's statement to the officer that appellee was concealing items in her purse gave the officer sufficient articulable facts to conduct an investigation.

[27] *See Derichsweiler v. State*, 348 S.W.3d 906, 915 & n.34 (Tex. Crim. App. 2011) (Information from "a citizen-informant who identifies himself and may be held to account for the accuracy and veracity of his report may be regarded as reliable" for purpose of establishing

corroborated by appellee's admission that she had placed items in her purse, and other circumstances—other items visible in the cart and the jacket covering the purse—further reinforced the conclusion that appellee intended to deprive the store of the property that she had concealed. Moreover, the question is not whether the employee might subsequently be a credible witness in court for the purpose of proving beyond a reasonable doubt that appellee committed a crime. The question is whether the officer could rely upon the employee's report as one of several factors for determining probable cause. The answer to that question is "yes," because citizen informants who identify themselves "are considered inherently reliable."[28] Moreover, a court cannot simply discount the information given by an informant without looking at the circumstances that corroborate the information.[29]

The court of appeals also pointed to appellee's statement to the officer that she was not done shopping and was going to pay for the items. Although a suspect's innocent explanation is relevant information to be considered in a probable cause determination,[30] numerous courts have held that

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reasonable suspicion, even if the information did not supply probable cause.).

[28] *State v. Duarte*, 389 S.W.3d 349, 357 & n.35 (Tex. Crim. App. 2012).

[29] *See Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007) (A court must look at the totality of the circumstances in determining the existence of probable cause and not use a divide-and-conquer approach.). *See also Hennessy v. State*, 660 S.W.2d 87, 91 (Tex. Crim. App. 1983) ("Urquhart's credibility and reliability are established because he was a named informant, and because he gave detailed information about Barnes' activities which was substantially corroborated by independent police investigation."). *Cf. Dixon v. State*, 206 S.W.3d 613, 620 (Tex. Crim. App. 2006) ("Because the informant's veracity and basis of knowledge were sufficient, by themselves, to establish probable cause, Agent Gray's corroboration of details was, in the words of Professor LaFave, 'only the frosting on the probable cause cake.'").

[30] See *Miller v. Sanilac County*, 606 F.3d 240, 249 (6th Cir. 2010) ("A suspect's satisfactory explanation of suspicious behavior is certainly a factor in determining whether probable cause exists.") (brackets and internal quotation marks omitted).

a police officer is generally not required to credit an accused's innocent explanation when probable cause to arrest is otherwise apparent.[31]

We conclude that the courts below erred in concluding that the police officer lacked probable cause to arrest appellee. We reverse the judgments of the courts below and remand the case to the trial court.

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[31] *Stonecipher v. Valles*, 759 F.3d 1134, 1146 (10th Cir. 2014) ("Officers . . . are not required to credit a suspect's explanation if the officers reasonably believe they still have probable cause to make the arrest despite the explanation."); *Panetta v. Crowley*, 460 F.3d 388, 395-96 (2d Cir. 2006) ("The fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause and an officer's failure to investigate an arrestee's protestations of innocence generally does not vitiate probable cause.") (bracketed alteration removed, citations omitted); *Cox v. Hainey*, 391 F.3d 25, 32 n.2 (1st Cir. 2004) ("Hainey had no obligation to give credence to these self-serving statements. A reasonable police officer is not required to credit a suspect's story."); *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999) ("Once probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused. In fact, law enforcement is under no obligation to give any credence to a suspect's story or alibi nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause.") (citations, brackets, and internal quotation marks omitted); *Marx v. Gumbinner*, 905 F.2d 1503, 1507 (11th Cir. 1990) (Officers "were not required to forego arresting Marx based on initially discovered facts showing probable cause simply because Marx offered a different explanation."); *Michel v. Smith*, 188 Cal. 199, 208, 205 P. 113, 117 (1922) ("The guiltiest of felons have made the same protest. It is a safer rule, however, for courts to follow in such cases, to decide whether probable cause is, or is not, shown, than to rely upon the protestations of innocence of the persons arrested.").