IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0228-16

THE STATE OF TEXAS

v.

VICTORIA MARI VELASQUEZ, Appellee

ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS BEXAR COUNTY

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

DISSENTING OPINION

Because I agree with the interpretation given to Article 28.01 by the Fourth Court of Appeals, I would dismiss Velasquez's petition for discretionary review as improvidently granted. Respectfully, therefore, I dissent.

The majority concludes that Article 28.01 requires formal notice of a pre-trial hearing only when the trial court designates a separate setting for the pre-trial hearing occurring on a day before *the day* the case is set for trial. I disagree with this conclusion. The plain-language reading of the term "pre-trial" means before the trial is set to begin, not before *the day* the trial is set to begin. Article 28.01 requires notice to both the defendant and the State

of the "time and place" of the pre-trial hearing, not the *date* and place. In this case, the State was not given notice of the *time* that the trial court was going to conduct the pre-trial hearing on the motion to suppress. The State was only given notice that the trial was to begin on a certain date, presumably at the regular time in the morning that the judge appears on the bench and court is thereafter in session. A jury trial begins with jury selection. A trial court judge certainly has discretion to conduct a pre-trial hearing on the day of trial to resolve preliminary matters. However, I would interpret Article 28.01 as requiring the court to notify both sides of such pre-trial hearing.

As the majority points out, the judge acknowledged that it was his typical practice to run suppression motions with the trial. But in this case, when the trial (i.e., jury selection) was set to begin, the trial judge announced that he would instead at that time conduct a separate hearing on the motion to suppress. I would call that a pre-trial hearing of which both sides are entitled to notice.

According to the record, the State had contacted police officers to testify regarding the suppression issues, but the officers were not in the courtroom ready to testify at that time, because the State had no notice that a separate pre-trial hearing was going to be conducted. It is not surprising that the officers were not there waiting to testify, since jury selection and opening statements would have taken some time. Officers are paid overtime when they have to testify in a hearing or at trial. Prosecutors must arrange ahead of time for officers to be available through a police department liaison. Prosecutors do their best to limit the amount of time officers must be on standby waiting to testify. If the judge routinely carries the

suppression motion with the trial, and the prosecutor is not notified otherwise, the officers who have agreed to testify as witnesses would not be needed until after the jury is selected. Moreover, the State's failure to ask for a continuance was understandable since the trial court judge made it clear that he was not going to hear live testimony. The trial court judge told the prosecutor that he was not going to let the State call any witnesses— "I don't have to, and I'm not going to." A request for a continuance would clearly have been futile. Under these circumstances, the State's having notice of the trial setting *date* was not sufficient notice of "the time" of the pre-trial hearing on the motion to suppress that is required under Article 28.01.

This was a simple misdemeanor possession of marijuana case, but what if this had been a capital murder? The majority's decision today could have a ripple effect causing harsh ramifications for prosecutors, depending on the level of the offense and how complicated and involved a motion-to-suppress hearing might be.

I also add, as an aside, that this motion to suppress should not have been granted in the first place. Defense counsel conceded at the outset that Velasquez had consented to the search:

THE COURT:	Okay. So basically your client cooperated with whatever the Park Ranger wanted or the Park Police person wanted to do?
DEFENSE COUNSEL:	Correct, Your Honor
THE COURT:	Voluntarily gave him marijuana that was in her purse in the car; right?

DEFENSE COUNSEL: Yes.

At that point, the hearing should have been over and the motion to suppress denied. *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002) (citing *Rodriguez v. State*, 844 S.W.2d 744, 745 (Tex. Crim. App. 1992) (holding that, where no witnesses were called and no evidence was presented at a hearing on a motion to suppress, the trial court was permitted to determine the merits of the motion on the motion itself). Although this case involved a warrantless search, the search was conducted with Velasquez's consent. An exception to the warrant requirement is a search conducted with consent. *Meeks v. State*, 692 S.W.2d 504, 509 (Tex. Crim. App. 1985). A trial court's ruling should be reversed only if it is arbitrary, unreasonable, or "outside the zone of reasonable disagreement." *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006); *Montgomery v. State*, 810 S.W.2d 372, 391–92 (Tex. Crim. App. 1991)). This trial judge's ruling was arbitrary, unreasonable, and outside the zone of reasonable disagreement.

At any rate, because I agree with the Fourth Court of Appeals's interpretation of Article 28.01, I would have refused Velasquez's petition for discretionary review. Respectfully, therefore, I dissent.

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