IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. PD-1090-18, PD-1091-18

NATHAN RAY FOREMAN, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

KEASLER, J., delivered the opinion for a unanimous Court.

O P I N I O N

Acting on evidence that two men had been tortured and robbed at a business in Houston, the police obtained a warrant to search the business. The warrant authorized the police to seize "any and all . . . surveillance video and/or video equipment" from the business—and that is precisely what they did. The problem, Appellant Nathan Foreman says, is that the affidavit supporting the warrant said not one word about "surveillance video and/or video equipment" possibly being at the business. In this opinion, we must

decide whether the probable-cause magistrate was nevertheless justified in issuing a warrant authorizing the police to seize that equipment. We conclude that she was.

I. BACKGROUND

As far as con men go, Richard Merchant and Moses Glekiah are not what most people would call luminaries of their profession. They had concocted a plan to swindle Appellant Nathan Foreman into buying a batch of "black money,"[1] allegedly valued at $200,000, for $100,000 in cash. Of course, the "black money" was not money at all—it was construction paper. And at first, it seemed like the scam was working; Foreman appeared to be on board. Foreman agreed to conduct the transaction at Dreams Auto Customs, an auto-body shop owned by his wife. But somewhere along the way, the scam went awry.

Not long after Merchant and Glekiah arrived at the shop, they were ambushed. Foreman and some accomplices captured both men, tied them up, and tortured them. Eventually, Merchant and Glekiah were forced into a van at gunpoint. Foreman ordered his accomplices to take the pair to "the spot" and said that he would "be there" when they arrived. Unfortunately for Foreman, Merchant and Glekiah managed to escape in transit. Glekiah eventually told the police what had happened to them and where it had happened.

Based on the information that Glekiah gave, the police applied for a warrant to search Dreams Auto Customs. In addition to providing the known details of the alleged

---

[1] *See Foreman v. State*, 561 S.W.3d 218, 227 n.3 (Tex. App.—Houston [14th Dist.] 2018) (*en banc*) (explaining what a "black money" scam is).

offenses, the warrant affidavit had this to say about the shop, produced here without alteration:

> Said location of **2501-C #2 Central Parkway Houston, Harris County, Texas** is more particularly described as a single story building complex with a large sign facing Central Parkway that shows address 2501-C for all the businesses within the complex strip, this particular business is made of metal and brick with dark tinted glass windows and black painted aluminum; a sign attached to the front of the building over the door reads "Dreams Auto Customs"; the front door is dark tinted glass and faces parking lot; on the door is suite number C#2; the back of the business has an aluminum looking, gray in color bay door that opens into the business.

Later in the affidavit, this location is described as an "autoshop."

The hearing officer reviewing the affidavit, whom we shall hereinafter refer to as the "magistrate," found that it established probable cause. She issued a warrant for the police "to search for and seize any and all ITEMS CONSTITUTING EVIDENCE CONSTITUTING AGGRAVATED ASSAULT AND ROBBERY that may be found therein [at the listed location, Dreams Auto Customs] including," among other things, "audio/video surveillance video and/or video equipment." Pursuant to this warrant, the police seized three computer hard drives from Dreams Auto Customs. Upon analysis, one hard drive—the only hard drive at issue in this proceeding—was found to contain surveillance footage that depicted much of the incident at Dreams Auto Customs and Foreman's involvement in that incident. Foreman was charged with aggravated kidnapping and aggravated robbery.

Foreman filed a motion to suppress the fruits of the search, invoking the Fourth Amendment to the United States Constitution, Article I, Section 9 of the Texas Constitution, and Chapter 18 of the Texas Code of Criminal Procedure. Specifically,

Foreman argued that the warrant affidavit "fail[ed] to set forth sufficient facts to establish probable cause that audio and video surveillance equipment" could be found at Dreams Auto Customs. Through a winding procedural path that is not altogether relevant to this proceeding, the trial court denied Foreman's motion as to the hard drive at issue here and allowed the surveillance footage that it contained in evidence. Foreman was convicted of both offenses as charged and sentenced to fifty years' confinement.

On appeal, Foreman argued that the trial judge's ruling violated each of the constitutional and statutory provisions he had invoked in his motion to suppress. Once again, Foreman asserted that the warrant affidavit failed to establish probable cause that surveillance equipment could be found at Dreams Auto Customs. A divided panel affirmed the trial judge's ruling. Foreman then filed a motion for *en banc* reconsideration, which was granted.

The *en banc* court of appeals agreed with Foreman that the search warrant was issued in error because the supporting affidavit failed to establish probable cause that Dreams Auto Customs was equipped with a surveillance system.[2] It rejected the State's argument that it was "common knowledge" that most businesses nowadays have surveillance systems.[3] In so holding, it adopted the standard that "common knowledge" consists only of matters "so well known to the community as to be beyond dispute."[4]

---

[2] *Id.* at 238.

[3] *Id.* at 239.

[4] *Id.* (citing *Cardona v. State*, 134 S.W.3d 854, 859 (Tex. App.—Amarillo 2004, pet. ref'd)).

Applying that standard, the court of appeals regarded the "presence of surveillance video or equipment in an auto shop" to be insufficiently "well known to the community as to be beyond dispute."[5] It also rejected the State's argument that the police's seizure and subsequent analysis of the hard drive was justified under the "plain view" doctrine.[6] The court of appeals ultimately found that the trial judge's error in admitting the surveillance footage was harmful and so reversed Foreman's conviction.[7]

In this discretionary-review proceeding, the State advances three arguments. First, the State argues that the court of appeals erred when it held "that a magistrate could not infer from the warrant affidavit that an auto body shop would have a surveillance system." Second, the State argues that the court of appeals erred to hold that the seizure of the surveillance system was not justified by the plain-view doctrine. Third, the State argues that the court of appeals erred to find the trial judge's putative error in admitting the surveillance footage in evidence harmful. Based on our resolution of the first point, we need not reach the second or third points.

II. LAW

There are three distinct legal provisions at issue in this proceeding: The Fourth Amendment to the United States Constitution; Article I, Section 9 of the Texas Constitution; and Chapter 18 of the Texas Code of Criminal Procedure.

---

[5] *Id.*

[6] *Id.* at 244.

[7] *Id.* at 245.

"The cornerstone of the Fourth Amendment and its Texas equivalent is that a magistrate shall not issue a search warrant without first finding probable cause that a particular item will be found in a particular location."[8] Under the Fourth Amendment, probable cause to support the issuance of a search warrant exists "where the facts submitted to the magistrate are sufficient to justify a conclusion that the object of the search is probably on the premises to be searched at the time the warrant is issued."[9] The test is not whether the warrant affidavit proves beyond a reasonable doubt, or even by a preponderance of the evidence, that a search of the listed location would yield a particular item of evidence; a "fair probability" will suffice.[10] Neither does the test demand that the affidavit be read with hyper-technical exactitude.[11] While a magistrate may not baselessly presume facts that the affidavit does not support, the magistrate is permitted to make reasonable inferences from the facts contained within the affidavit's "four corners."[12] Ultimately, the test is whether the affidavit, read in a commonsensical and realistic manner and afforded all reasonable inferences from the facts contained within, provided the

---

[8] *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007) (internal quotation marks omitted) (citing U.S. CONST. amend. IV; TEX. CONST. art. I, § 9).

[9] *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006) (citations omitted).

[10] *See Rodriguez*, 232 S.W.3d at 60 (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)).

[11] *See, e.g.*, *State v. Cuong Phu Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015) (citing *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013)).

[12] *E.g.*, *State v. McLain*, 337 S.W.3d 268, 271–72 (Tex. Crim. App. 2011) (footnotes and citations omitted).

magistrate with a "substantial basis" for the issuance of a warrant.[13] This is a "flexible and nondemanding" standard.[14] "Thus, even in close cases we give great deference to a magistrate's determination of probable cause," in part because we seek to "encourage police officers to use the warrant process[.]"[15]

By contrast, we have held that Article I, Section 9 of the Texas Constitution "contains no requirement that a seizure or search be authorized by a warrant."[16] The inquiry is holistic and singular: Whether, under the totality of the circumstances and in light of the "public and private interests that are at stake," the search or seizure was "reasonable."[17] But on appeal, the only aspect of the instant search that Foreman has characterized as unreasonable happens to be the same aspect that he finds objectionable under the Fourth Amendment: The mismatch between what the search warrant expressly authorized (*i.e.*, the seizure of "surveillance video and/or video equipment") and what the underlying affidavit described. Therefore, our analysis under Article I, Section 9 will mirror our Fourth-Amendment analysis. We will decide whether the warrant affidavit established probable cause for the search and seizure of surveillance equipment.

---

[13] *See id.*

[14] *Id.* at 272 (citations omitted).

[15] *Rodriguez*, 232 S.W.3d at 59.

[16] *Hulit v. State*, 982 S.W.3d 431, 436 (Tex. Crim. App. 1998).

[17] *Holder v. State*, 595 S.W.3d 691, 704 (Tex. Crim. App. 2020) (citing *Hulit*, 982 S.W.2d at 436).

Finally, Article 18.01(b) of the Texas Code of Criminal Procedure says that "no search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance."[18] Article 18.01(c) elaborates:

> A search warrant may not be issued under Article 18.02(a)(10) unless the sworn affidavit required by Subsection (b) sets forth sufficient facts to establish probable cause: (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.[19]

In turn, Article 18.02(a)(10) says that a search warrant may be issued "to search for and seize . . . property or items . . . constituting evidence of an offense."[20] Other provisions of Article 18.02(a) authorize the issuance of warrants to search for and seize, for example, stolen property, arms and munitions, weapons, drugs, and instrumentalities of crime.[21]

Evidently believing that Article 18.01(c) demands greater specificity in probable-cause affidavits for search warrants issued pursuant to Article 18.02(a)(10), the court of appeals deemed it necessary to decide whether the only provision authorizing the instant

---

[18] TEX. CODE CRIM. PROC. art. 18.01(b) (some capitalization altered).

[19] *Id.* art. 18.01(c).

[20] *Id.* art. 18.02(a)(10).

[21] *Id.* arts. 18.02(a)(1), (3), (4), (7), (9).

search warrant was Article 18.02(a)(10).[22] It found that Article 18.02(a)(10) was not the only statute authorizing the issuance of the instant search warrant, and so concluded that "additional findings [were] not required under" Article 18.02(c).[23] The only "findings" necessary to justify the issuance of the instant search warrant were those required by the Fourth Amendment.[24]

Foreman has not complained about this holding in a cross-petition. The court of appeals' decision in this regard going unchallenged, we decline to review it. So here again, our analysis under Chapter 18 of the Code of Criminal Procedure will mirror our Fourth Amendment analysis. We need only decide whether the affidavit in this case contained enough facts for a magistrate to reasonably conclude that, to the degree of certainty associated with probable cause, a search of the listed location would yield evidentiary video equipment.

III. ANALYSIS

Before the court of appeals, the State argued that the probable-cause magistrate could infer that Dreams Auto Customs was equipped with a surveillance system because "magistrates are allowed to make inferences and presumptions based upon common knowledge." The court of appeals, while acknowledging that magistrates are "permitted

---

[22] *See Foreman*, 561 S.W.3d at 234–35 (citing *Jennings v. State*, 531 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd)).

[23] *Id.* at 235.

[24] *See id.* ("Nonetheless, the Fourth Amendment requires that a warrant affidavit establish probable cause to believe that a particular item is at a particular location.").

to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit,"[25] nevertheless rejected the State's invocation of "common knowledge." It held that only those matters that are "so well known to the community as to be beyond dispute" may be regarded as within the realm of "common knowledge."[26]

Like the court of appeals, we look upon the State's "common knowledge" rubric with some skepticism. Our research has revealed scant support for the idea that a magistrate, contemplating a probable-cause affidavit articulating a limited set of facts to justify the issuance of a search warrant, may supplement the articulated facts with unarticulated facts that the magistrate deems so obvious or widespread as to constitute "common knowledge."[27] That is not to say that probable-cause magistrates lack any authority to take cognizance of "common knowledge" whenever they perceive it. It means only that it is not how established Fourth Amendment jurisprudence would generally frame the inquiry. Established Fourth Amendment jurisprudence would instead observe that a magistrate, contemplating a probable-cause affidavit articulating a discrete set of facts to justify the issuance of a warrant, is allowed to draw all reasonable inferences from the

---

[25] *Id.*

[26] *Id.* at 239 (internal quotation marks and citations omitted).

[27] *See, e.g.*, *Spinelli v. United States*, 393 U.S. 410, 418 (1969) (characterizing as "common knowledge" the fact that "bookmaking is often carried on over the telephone and from premises ostensibly used by others for perfectly normal purposes"); *Brinegar v. United States*, 338 U.S. 160, 167 (1949) (characterizing as "common knowledge" the facts that "Joplin, Missouri was a ready source of supply for liquor and Oklahoma a place of likely illegal market"); *cf. also Cassias v. State*, 719 S.W.2d 585, 589 (Tex. Crim. App. 1986) (characterizing as outside the realm of "common knowledge" the fact that the "sale or ingestion of marihuana or cocaine calls for the use of" plastic tubs and tubing).

articulated facts.[28] And that, we conclude, is the optimal way to address the probable-cause issue before us. So, rather than imposing upon the State's scantly supported probable-cause rubric an even-less-well supported limiting principle, we will sidestep those inquiries altogether and focus instead on what we perceive to be the proper Fourth Amendment inquiry. We will simply decide whether it was reasonable for the magistrate to infer from the facts actually articulated in the probable-cause affidavit that the business described in that affidavit was equipped with surveillance cameras.

Considering the totality of circumstances presented to the magistrate, we conclude that such an inference was reasonable. To support this conclusion, we will discuss each specific, articulated fact that we believe reasonably contributed to the magistrate's determination of probable cause. Though we will discuss each fact sequentially, we will analyze them in their totality.

- The affidavit described the target location as one "business" amongst other businesses within a "single story building complex." From the fact that the target location was a "business," the magistrate could reasonably infer that the activities being conducted there involved money. From the fact that this business was located within a "single story building complex," the magistrate could infer that this business dealt in (or at least contained) tangible goods, and possibly even cash. These facts would reasonably

[28] *See, e.g.*, *Gates*, 462 U.S. at 240 (reaffirming "the authority of the magistrate to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant").

contribute to the conclusion, at least to the degree of certainty associated with probable cause, that the target location had a heightened need to keep its premises secure.

- The affidavit said that the target location was "made of metal and brick," with "dark tinted glass windows and black painted aluminum." From this, the magistrate could reasonably conclude that, not only did this business have a heightened need for security measures, it had already adopted at least one security measure: tinted windows. From there, it would not offend reason for a magistrate to infer that there was a fair probability of other security measures being employed there, as well.

- The affidavit explained that this business was called "Dreams Auto Customs" and was in fact an "autoshop." From this, the magistrate could reasonably infer that the target business involved the customization of automobiles. Automobiles, the magistrate might reasonably conclude, are uniquely mobile and highly valuable tangible goods. And because the automobiles being worked upon at this business were customized items, the magistrate could reasonably infer that they warranted extra security. These things also contributed to a reasonable inference that, at least to the degree of certainty associated with probable cause, the target location was likelier to employ some means of keeping tabs on the comings and goings of the vehicles in its care.

- The affidavit said that there was a bay door in the back of the business that opened into the interior of the business. From this fact, the magistrate could infer that the automobiles upon which Dreams Auto Customs worked were brought directly into the business; they were not handled off-site. Consequently, either for security or liability purposes, the magistrate could reasonably infer that the business needed to be able to keep an eye on the interior of the business.

From these concrete indications that the target business had a unique need for security on its premises and had in fact deployed some security measures, it was logical for the magistrate to infer that to the degree of certainty associated with probable cause, the business was equipped with a video surveillance system. This does not mean that based on the articulated facts, we consider it more-than-fifty-percent probable that the target business was using surveillance equipment. That is not what probable cause demands.[29] It means only that based on the totality of the articulated facts, it was not unreasonable for the magistrate to discern a "fair probability" of such equipment being found.[30]

IV. CONCLUSION

We acknowledge that this is a close case. But even in close cases we must afford the magistrate's determination of probable cause great deference, if for no other reason than that such deference is likelier to foster the constitutionally preferred warrant-

---

[29] *See Rodriguez*, 232 S.W.3d at 60 (citations omitted).

[30] *See id.* (citations omitted).

application process.[31] In our estimation, invalidating this warrant would serve only to discourage the police from undertaking the warrant process in the future. Why go to all the effort if a reviewing court would likely invalidate the warrant anyway, for want of the right talismanic set of words? Reading the affidavit realistically and affording it all reasonable inferences consistent with the magistrate's ruling, and with the understanding that the warrant process is to be fostered rather than discouraged, we find that the affidavit in this case was just detailed enough for the warrant to authorize what it did.

Because we find that the warrant affidavit articulated sufficient facts for the magistrate to reasonably conclude that a search of the target business would turn up evidentiary surveillance equipment, we hold that this warrant satisfied the Fourth Amendment. Furthermore, because of the way in which this warrant was challenged at trial and on appeal, this conclusion also suffices to dispose of the Article I, Section 9 and Chapter 18 claims that Foreman raised. That being the case, the trial judge did not err to admit the surveillance footage in evidence.

We reverse the court of appeals' contrary judgments and affirm Appellant's convictions and sentences.

Delivered: November 25, 2020

Publish

[31] *See id.* at 59–60.