

Affirmed and Opinion Filed April 19, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-00602-CR

**CHRISTOPHER LEN BARBER, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1335500-V**

MEMORANDUM OPINION

**Before Chief Justice Wright and Justices Lang and Brown
Opinion by Chief Justice Wright**

Appellant Christopher Len Barber was charged with burglary of a habitation. He filed a motion to suppress, which the trial court denied. Subsequently, appellant pleaded guilty, and the trial court assessed appellant's punishment at five years' imprisonment pursuant to a negotiated plea agreement. In this Court, appellant challenges the trial court's denial of the motion to suppress.

Background

On December 6, 2013, Irving police received a call from a tenant at the Waterford Apartments complex. The caller reported he had watched through his peephole as two men broke into the apartment across from his and carried a television set away. The caller described the two men for the dispatcher, and he also described a red car he had seen the same men in

earlier that day. Irving Police Officers Chi Nguyen and Shawn Vissinger responded to the call. They found the red car and ran its license plates; the car was registered to a person living in apartment 2005 of the Waterford complex. When the officers examined the area around the burgled apartment, they discovered footprints in the snow and ice that had fallen the day before; the footprints led to apartment 2005. The officers approached that apartment, knocked, and the door was opened by Kamalah Brown, who leased the apartment. The officers found two men in the apartment and arrested both for the burglary. Appellant was one of the men arrested.

Before trial, appellant filed a motion to suppress “[a]ll statements or evidence gathered from the search” of apartment 2005 on December 6, 2013. As grounds for suppression, the motion recited:

II.

Defendant would show the Court that said evidence was seized pursuant to a search, and such search was in violation of the Fourth and Fourteenth Amendments of the United States Constitution; Article 1, Section 9, of the Texas Constitution; Article 1.06 of the Texas Code of Criminal Procedure and Article 15.02 of the Texas Code of Criminal Procedure.

III.

Defendant would further show that the seizure by police officers was without probable cause and exigent circumstances, and without the consent of the owner’s [sic] of the property and that in the absence of a warrant or an exception to the warrant requirement, any evidence seized is inadmissible.

Nguyen testified at the hearing on the motion, as did Brown. The trial court—based on appellant’s relevance arguments—limited the evidence to the issue of whether the officers had authority to enter the apartment. Nguyen testified Brown consented to their entry and search of the premises; Brown testified the officers pushed their way in the apartment with guns drawn, and she denied giving the officers permission to enter. Following Brown’s testimony, the attorneys argued the issue of consent and whether the State had met its burden on that issue. The trial court denied the motion at the close of the hearing.

Appellant ultimately pleaded guilty to the charge and was sentenced to five years' imprisonment, in accordance with a negotiated plea bargain. This appeal followed.

The Motion to Suppress

In a single issue, appellant argues Nguyen did not provide the description of the suspect on which he relied to search apartment 2005 and arrest appellant. In the absence of that description, appellant contends, the State could not satisfy its burden to prove Nguyen had probable cause to believe appellant was one of the burglars, discovered under circumstances that reasonably showed he was guilty of a felony. We review the trial court's denial of a motion to suppress giving almost total deference to the trial court's determination of the historical facts that the record supports, especially if those findings are based on an evaluation of credibility and demeanor. *Montanez v. State*, 195 S.W.3d 101, 106 (Tex. Crim. App. 2006). "[I]f police have probable cause coupled with an exigent circumstance, or they have obtained voluntary consent, or they conduct a search incident to a lawful arrest, the Fourth Amendment will tolerate a warrantless search." *Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007) (citing *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003)). It is the State's burden to prove that an exception to the warrant requirement applies in this case. *See Gutierrez*, 221 S.W.3d at 685.

The State contends that the issue appellant argues on appeal was never raised before the trial court and, thus, has been waived. The State urges further that if there were any error in failing to offer evidence of the suspect's description, that error was invited by appellant when he objected to any evidence beyond the issue of consent—or lack thereof—to enter the apartment. We agree with the State on both points.

Appellant's motion to suppress generally challenged the warrantless search of apartment 2005 and put the State to its burden to prove an exception to the requirement of a warrant. The

State offered Nguyen's testimony explaining how the officers arrived at apartment 2005, knocked on the door, and told Brown the reason they were there. Nguyen testified Brown told him she leased the premises and he asked her permission to enter and search for the burglary suspects. He testified further that he and Vissinger entered the apartment only after Brown gave them permission to do so. When the State attempted to question Nguyen concerning appellant's clothing, appellant's counsel objected and argued that any evidence beyond the validity of the officers' entry into the apartment was irrelevant to appellant's motion. The prosecutor specifically pointed out to the court that his question for Nguyen was intended to discover "information that [gave] him pertinent reason to believe that this particular suspect, Mr. Barber, was a suspect to be arrested." But appellant's counsel argued against "[a]ny testimony past the point that the officer entered into the apartment without a warrant and without sufficient justification." The trial court sustained appellant's objection, allowing appellant to narrow the scope of his motion to the single issue of consent. Thus, when Brown testified that she did not give Nguyen permission to enter the apartment, the issue became solely one of credibility. The trial court resolved that issue in favor of the State.

Even constitutional arguments can be waived if they do not comport with the objection made at trial. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). Appellant's argument on appeal concerning the State's failure to address the description of the burglary suspect does not comport with his objection at trial concerning consent to enter the apartment. Thus, appellant has not preserved the description argument for our review. *See id.* And as to the consent argument that *was* raised at trial, we defer to the trial court on its implicit finding based on credibility of the witnesses before it. *See Montanez*, 195 S.W.3d at 106.

Conclusion

We decide appellant's single issue against him, and we affirm the trial court's judgment.

/Carolyn Wright/

CAROLYN WRIGHT
CHIEF JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

CHRISTOPHER LEN BARBER, Appellant

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THE STATE OF TEXAS, Appellee

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Opinion delivered by Chief Justice Wright,
Justices Lang and Brown participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered April 19, 2016.