Opinion issued August 13, 2009

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00424-CR

ALBERTO CONTRERAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 1109955

CONCURRING OPINION

I respectfully concur in the judgment.

Appellant contends the trial court erred in denying his motion to suppress his

videotaped statement because it was the fruit of an illegal warrantless arrest. The majority sustains the trial court's ruling on the ground that article 14.03(a)(1) clearly allows the warrantless arrest. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (Vernon 2005) (authorizing warrantless arrest of "persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony"). Because justification of the warrantless arrest was neither argued nor briefed under article 14.03(a)(1), however, I would address the issue under article 14.04, which was argued and briefed by both sides. *See* TEX. R. APP. P. 38.1(h); *see also Tesoro Petroleum Corp. v. Nabors Drilling USA*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (stating that Rule 38 requires appellant to provide reviewing court "with such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue"); *but see Neal v. State*, 256 S.W.3d 264, 281 (Tex. Crim. App. 2008) (noting that appellate courts sustain trial court's ruling on motion to suppress if correct under any theory of law). Like the majority, I would affirm.

Facts

Reynaldo Canales worked with the complainant, Julio Jimenez, at the apartment complex where Jimenez lived and worked. On March 27, 2007, the morning after the night on which Jimenez was robbed and murdered, Canales went

with the apartment manager, Dora Lucio, to console Jimenez's widow at the complex. After he left the apartment and was waiting for Lucio in the parking lot, Canales saw a car pull into the parking lot and two young men, one black and one Hispanic, get out. These young men were later identified as Joshua Nogess and appellant. Canales saw them looking underneath cars, between bushes, and around the air-conditioning unit. He knew that the men who had assaulted Jimenez had lost their gun, and he believed appellant and Nogess were those men and were looking for it. Canales called Lucio on his cell phone. When appellant and Nogess noticed that Canales and Lucio were watching them, they left on foot. Canales stayed in contact with Lucio and followed appellant and Nogess in his vehicle because they were leaving the area.

Lucio called Sergeant M. Vana, who was working at a Houston Police Department storefront at the complex, and Lucio told Vana that she had Canales on another line and that he was following two suspicious people who had been at the scene where the crime had been committed the night before and who had been going through the bushes and looking underneath cars. Sergeant Vana knew that one black male and one Hispanic had been involved in the aggravated robbery and killing and had lost a gun. Sergeant Vana believed that appellant and Nogess met that description and were looking for the murder weapon and were thus tampering with evidence. In response to the information she received from Lucio, Vana got into her

car and went to a nearby subdivision looking for the suspects. Canales pointed them out, and Vana informed other officers of the suspects' descriptions and route of travel.

HPD Officer T. Stearns, who was on patrol, heard Sergeant Vana's request for help in locating the suspects. A dispatcher relayed the description of the two suspects over the radio. Officer Stearns spoke with Sergeant Vana in person and learned the location of the suspects. He saw two people walking across a grassy area and followed them from behind, undetected. They attempted to turn away from the road when they saw patrol cars coming from the opposite direction. As they approached a gate, they turned, and Officer Stearns ordered them to "freeze." He arrested appellant and Nogess and transported them back to the HPD storefront at the apartment complex. Sergeant Vana called the Homicide Division.

Analysis

Article 14.04 of the Texas Code of Criminal Procedure provides, "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused." TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 2005). To lawfully arrest someone under this article, "there must be some

evidence amounting to satisfactory proof, either related by a credible person to an officer or observed by the officer him/herself, indicating that a felony has been committed, that the person arrested is the offender, and that the person was about to escape so that there was no time to procure a warrant." *Hughes v. State*, 24 S.W.3d 833, 838 (Tex. Crim. App. 2000); *Kelley v. State*, 676 S.W.2d 646, 650 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd).

"Satisfactory proof" is the legal equivalent of constitutional probable cause. *Hughes*, 24 S.W.3d at 838. Whether probable cause exists at the time of the arrest or search can only be decided in terms of the concrete factual situation presented by the case. *Lerma v. State*, 491 S.W.2d 152, 154 (Tex. Crim. App. 1973); *Brown v. State*, 481 S.W.2d 106, 109 (Tex. Crim. App. 1972). Probable cause requires that the officer have a reasonable belief, based on facts and circumstances within his personal knowledge, or of which the officer has reasonably trustworthy information, that an offense has been committed by the person searched or arrested. *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005); *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). Probable cause requires more evidence than mere suspicion but far less than that needed to support a conviction or even to support a finding by a preponderance of the evidence. *Guzman*, 955 S.W.2d at 87; *Hughes*, 24 S.W.3d at 838.

The test of probable cause for a warrantless arrest made by an officer on the strength of a request by other law enforcement authorities is the information known to the requesting authorities. *Farmah v. State*, 883 S.W.2d 674, 683 (Tex. Crim. App. 1994). A "credible person" for purposes of this article includes ordinary citizens relating information of which they have direct knowledge. *Esco v. State*, 668 S.W.2d 358, 360–61 (Tex. Crim. App. 1982); *Salazar v. State*, 688 S.W.2d 660, 663 (Tex. App.—Amarillo 1985, no pet.). Information from a credible person that is placed into a police broadcast after a report of a crime by a victim or witness is inherently reliable and therefore satisfactory proof that a felony has been committed. *Carter v. State*, 713 S.W.2d 442, 447 (Tex. App.—Fort Worth 1986, pet. ref'd). Police broadcasts that are based on probable cause and that report a felony and a description of the perpetrator satisfy the requirements for a warrantless arrest. *Farmah*, 883 S.W.2d at 683; *Law v. State*, 574 S.W.2d 82, 84 (Tex. Crim. App. 1978); *Goldberg v. State*, 95 S.W.3d 345, 362 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). The place where a suspect is found and the direction in which he was traveling, taken in combination with strongly founded previous suspicion, can also lead to probable cause to arrest and search him. *Woodward v. State*, 668 S.W.2d 337, 344–45 (Tex. Crim App. 1982), cert. denied, 469 U.S. 1181 (1985). When there has been some cooperation between law enforcement agencies or officers, the

sum of the information known to the cooperating agencies or officers at the time of a search or arrest by any of the officers involved is considered in determining whether there was probable cause for the search or arrest. *Woodward*, 668 S.W.2d at 344; *see also Tarpley v. State*, 565 S.W.2d 525, 529–30 (Tex. Crim. App. 1978).

In support of its argument that article 14.04 allowed appellant's warrantless arrest, the State contends that police officers had credible reports that appellant and Nogess were seen committing the felony of "attempted tampering with evidence." A person commits this offense if "knowing an investigation or official proceeding is pending or in progress, he . . . alters, destroys, or conceals any record, document, or thing with intent to impair its . . . availability as evidence in the . . . official proceeding," or if he, "knowing that an offense has been committed, alters, destroys, or conceals any . . . thing with intent to impair its . . . availability as evidence in any subsequent investigation of or official proceeding related to the offense." TEX. PENAL CODE ANN. § 37.09 (Vernon Supp. 2008). An investigation is "pending" within the meaning of the statute if a person knows the an investigation is "impending or about to take place." *Lumpkin v. State*, 129 S.W.3d 659, 663 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd); *see also Williams v. State*, 270 S.W.3d 140, 143–45 (Tex. Crim. App. 2008); *Barrow v. State*, 241 S.W.3d 919, 923 (Tex. App.—Eastland 2007, pet. ref'd). A person commits a criminal attempt "if, with

specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." TEX. PENAL CODE ANN. § 15.01 (Vernon 2003). Here, the State admits that there was nothing in the area in which appellant was looking that constituted evidence of the offense with which appellant could have tampered. Therefore, appellant could only have committed the offense of attempted tampering with evidence by searching among the bushes and cars in the apartment complex parking lot.

Based on the facts of the case, I would hold that there was satisfactory proof to support the warrantless arrest of appellant based upon the representations of credible witnesses that appellant and Nogess, who met the description of the persons involved in the robbery and killing of the complainant at the apartment complex the night before, had knowledge of the crime, knew that the gun used in the crimes had been lost, and had returned to the scene, where they looked for the gun in the bushes and among the cars to conceal or destroy it, knowing that an investigation of the robbery and murder was pending. There was also satisfactory proof that when appellant and Nogess saw that they had been spotted by Canales and Lucio while attempting to commit the additional crime of tampering with the evidence, they attempted to escape by abandoning their car and leaving the parking lot at the complex on foot. However, they were tracked from the scene by Canales and their

route was described to Sergeant Vana in the HPD storefront at the apartment complex by Lucio and Canales. Sergeant Vana, who knew about the crime, the loss of the gun, and the description of the suspects in the robbery and murder, got in her car on the basis of this additional credible information and joined the search, spotting appellant and Nogess when they were pointed out to her by Canales. She conveyed the information she knew and was continuing to receive to Officer Stearns, who followed appellant and Nogess from behind and saw them turn and attempt to leave the road when the police cars approached them. Officer Stearns stopped appellant and Nogess, arrested them, and conveyed them back to Sergeant Vana at the police storefront at the apartment complex.

I would hold on the basis of the foregoing evidence that there was satisfactory proof upon the representation of credible persons that a felony had been committed by appellant and Nogess, that the offenders were about to escape, and there was no time for the police to get a warrant without losing them. *See* TEX. CODE CRIM. PROC. ANN. art. 14.04 (authorizing warrantless arrest "upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant"). Accordingly, I would hold that a warrantless arrest was justified under article 14.04 of the Criminal Code.

I concur in the majority's holding that the trial court did not err in denying

appellant's motion to suppress his videotaped statement as the product of an illegal, warrantless arrest, and I concur in the judgment.

Evelyn Keyes
Justice

Panel consists of Justices Jennings, Keyes, and Higley.

Justice Keyes, concurring.

Do not publish. TEX. R. APP. P. 47.2(b).