Dissenting opinion issued January 31, 2011

In The
Court of Appeals
For The
First District of Texas

NOS. 01-08-00828-CR
01-08-01015-CR
01-08-01016-CR

RIO SHAREESE JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Cause Nos. 07CR3567, 07CR3568, and 07CR3569

DISSENTING OPINION

While I join with the majority opinion's resolution of appellant's

legal-sufficiency issue, I dissent to the Court's judgments as I would grant appellant's first issue and reverse and remand for a new trial.

In its analysis of appellant's first issue, the majority confuses and conflates two related—but distinct—legal concepts: staleness and specificity. Specificity and staleness are interrelated concepts, but involve different questions, and are applicable to different points in a review of a search-warrant affidavit.

Specificity relates to the *adequacy of the affidavit*: whether the affidavit recites sufficiently specific information to determine probable cause. Under Texas law, "no search warrant shall issue for any purpose . . . unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance" and "a sworn affidavit setting forth *substantial facts* establishing probable cause shall be filed in every instance in which a search warrant is requested[.]" TEX. CODE CRIM. PROC. ANN. art. 18.01(b) (West Supp. 2010) (emphasis added); *see also Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 2332 (1983) (holding that magistrate must have substantial basis for concluding that probable cause exists). As to the question of timeliness, a magistrate need be able "to ascertain [from the affidavit] the closeness of time [of the event that is the basis for probable cause] sufficient to issue the warrant based on an independent judgment of probable cause." *See Schmidt v. State*, 659 S.W.2d

420, 421 (Tex. Crim. App. 1983) (holding affidavit insufficient to support issuance of search warrant that failed to recite *when* incident described took place). A search warrant affidavit *must have a sufficient* "*level of specificity . . . as to [the] time*" *of such event so that the magistrate would have* "*a reasonable basis* to infer that [the event] occurred at a time that would substantiate a reasonable belief that the object of the search [is] on the premises to be searched at the time the warrant . . . issue[s]." *Davis v. State*, 202 S.W.3d 149, 155, 157 n.23 (Tex. Crim. App. 2006) (emphasis added). The court in *Davis* then noted that when the information in an affidavit fails to "give[] a time frame which would corroborate the existence of [the item sought] on the premises when the warrant was requested," it is "insufficient to support the issuance of a warrant." *Id.* at 157; *see also Sherlock v. State*, 632 S.W.2d 604, 608 (Tex. Crim. App. 1982) (holding that affidavit is "inadequate if it fails to disclose facts that would enable the magistrate to ascertain from the affidavit that the event upon which the probable cause was founded was not so remote as to render it ineffective.") (citations omitted).

Staleness, on the other hand, relates to whether *the information contained in the affidavit shows probable cause.* In order for the information in an affidavit to show probable cause, "[t]he facts attested to must be so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at the time."

Peltier v. State, 626 S.W.2d 30, 32 (Tex. Crim. App. 1981) (quoting *Heredia v. State*, 468 S.W.2d 833, 835 (Tex. Crim. App. App. 1971)). "The proper method to determine whether the facts supporting a search warrant have become stale is to examine, in the light of the type of criminal activity involved, the time elapsing between the occurrence of the events set out in the affidavit and the time the search warrant was issued." *McKissick v. State*, 209 S.W.3d 205, 214 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

Thus, before a magistrate can determine probable cause, the magistrate must necessarily first have sufficiently specific information for an evaluation. In the case of a timeliness issue, in order to determine whether the information in the affidavit is stale—whether too much time has passed between the events in the affidavit and the time of the issuance of the warrant to make it reasonable to presume that the items remain at the suspected place—the magistrate must first be able to determine how much "time [has lapsed] between the occurrence of the events set out in the affidavit and the time the search warrant was issued." *See id.*

Specificity and staleness are therefore interrelated, but distinct. An affidavit that contains sufficiently specific information to satisfy constitutional and statutory specificity requirements may or may not establish probable cause. Whether the totality of the information in the affidavit justifies a finding of probable cause is

not the salient question. Rather, the question to be answered in a specificity review on appeal is: "Is there enough sufficiently specific information in this affidavit to provide a magistrate *a substantial basis for determining* whether there is probable cause?" Staleness, by contrast, deals with whether the information in the affidavit shows that the item sought is still likely to be found at the suspected place. Such a review asks, "Based on information in the affidavit, was the warrant timely? Was the magistrate justified in concluding that it was likely that the items would still be present, i.e., that the information that provided the basis for probable cause was not too remote in time ?"

The majority has mixed up these two legal concepts, relying largely on legal theories related to the question of staleness. The majority states that "the question before us . . . is whether the lack of a specific date or time is fatal in this case or whether the totality of the affidavit nonetheless *justified the magistrate's finding of probable cause*" and concludes that "we hold that *the affidavit provided* the magistrate with a substantial basis for concluding that a search would uncover evidence of wrongdoing." Majority op. at 19, 23.

In the appeals before us, appellant does not attack the information in the affidavit as being stale, nor does he ask for his convictions to be reversed on that basis. Indeed, the words "stale" or "staleness" never appear in appellant's

discussion of his contention regarding the defectiveness of the affidavit. Rather, appellant's complaint on appeal is to the statutory and constitutional defectiveness of the affidavit for failing to provide the magistrate with sufficiently specific information from which the magistrate could make a determination about the timeliness of the warrant.[1]

The majority relies on case law from other states regarding the determination of staleness and probable cause when a specific date is not provided in the affidavit.[2] *See State v. Walston*, 768 P.2d 1387, 1390 (Mont. 1989) (holding that

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[1] This complaint was preserved below in appellant's motion to suppress, in which appellant specifically asserted that the magistrate who issued the search warrant did not have a substantial basis for concluding that probable cause existed because the affidavit failed to recite when any of the events upon which probable cause was based took place. The trial court made one conclusion of law related to specificity, to-wit:

> 4. The Affidavit for Search Warrant contains sufficient information to show that the act or event upon which probable cause was based occurred within a reasonable time prior to making the affidavit[]

and one conclusion of law related to staleness:

> 5. The Affidavit for Search Warrant contains sufficient information to establish probable cause that the alleged contraband would be at the location at the time the search warrant was signed and executed.

[2] The majority also cites generally to 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(b) (4th ed. 2004) who himself concedes the problems attendant upon reliance upon the word "recently" and his cautious admonition that the use of the word "recently" "*might* be tolerated when the

evidence was "not stale" when informant stated in affidavit that he had "recently" heard defendant state he was growing marijuana, when elsewhere in affidavit informant stated that he had been in defendant's residence twice in last five months and had seen marijuana plants growing; concluding that "recently" must mean some different, more recent, time than the five months previously mentioned); *Commonwealth v. Jones*, 668 A.2d 114, 118 (Pa. 1995) (holding that affidavit was "not stale" and magistrate had substantial basis upon which to issue search warrant for apartment when affidavit evidenced on-going drug operation at apartment, police were told in last 24 hours by confidential informant that resident of apartment "had just" been selling drugs, and informant had personally observed drugs in apartment within past two months); and *Huff v. Commonwealth*, 194 S.E.2d 690, 695–96 (Va. 1993) (concluding that where there was evidence of an ongoing drug operation, affidavit's reference to drug activity "in recent weeks" was sufficient to permit magistrate to conclude that time period at issue was less

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reported facts establish so clearly a continuing course of conduct that the present probable cause could be found to exist even if these facts had been specifically identified as being several months old." (Emphasis added). LaFave cites no Texas cases regarding the required specificity of search warrant affidavits in this discussion. Moreover, the events underlying the affidavit at issue here—which consists of one "tip" and one "buy"—can hardly be characterized as fitting into the category of "so clearly a continuing course of conduct" that probable cause would exist even if these facts were identified as several months old.

than one month and time period for incriminating statement overheard "on a recent date" even less; holding that, under Virginia law, state had shown required "additional facts that would justify magistrate in finding probable cause to believe that the criminal conduct continued to the date of the warrant").

Unlike the cases at hand, all of the affidavits in the out-of-state cases relied upon by the majority included some other *more specific* temporal reference in the affidavit to which the term "recently" could be related (*Walston*—"past five months"; *Jones*—"past [2] two months"; *Huff*—"weeks").[3] These cases therefore

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[3] The majority also cites to a pre-*Gates*, pre-*Schmidt*, pre-*Sherlock*, pre-*Davis* Texas case which is factually distinguishable. In *Sutton v. State*, the court of criminal appeals held that the use of the term "recently," as used with other references to time in the affidavit, including the term "now," were sufficient to warrant the conclusion that the event relied upon as a basis for probable cause "occurred within a reasonable time before the making of the affidavit." 419 S.W.2d 857, 861 (Tex. Crim. App. 1967). In *Sutton*, the term "recently" was used twice. The first reference was to when the officers received information from the confidential informant. The second was in describing the information received from the confidential informant, who stated that he "ha[d] seen the marijuana recently." This *second* use of the term "recently" provided some temporal time frame for the event upon which probable cause was based. In the cases before us, we have only a time reference for the date that the first informant relayed information to Bjerke. The affidavit does not provide a time reference for the event upon which the probable cause was based—the controlled buy—other than that it occurred after the relay of information. Additionally, the *Sutton* court coupled "recently" with the term "that said narcotic drugs are now concealed by [appellant]" in making its evaluation. The term "now concealed" occurred immediately after a sworn statement by the affiant setting out a specific date that the offense of possession occurred and was a statement of

do **not** stand for the proposition that the use of the naked term "recently"—along with evidence of an ongoing drug operation, but without any other temporal reference in the affidavit—renders a search warrant "sufficiently specific" to meet constitutional and (Texas) statutory requirements.

I agree that where an affidavit recites facts indicating activity of a protracted and continuous nature, the passage of time is less significant for the purposes of determining staleness and, thus, probable cause. *See Lockett v. State*, 879 S.W.2d 184, 189 (Tex. App.—Houston [14th Dist.] 1994, no pet.). However, I disagree that such legal principle alters the statutory and constitutional requirement that an affidavit provide a sufficiently specific time frame so that a magistrate has a

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fact. By contrast, in the cases before us, Bjerke's statement that he "believes that [an offense] is currently taking place" is not a statement of fact, but merely a conclusory opinion upon which probable cause cannot be based. *See Gates*, 462 U.S. at 239, 103 S. Ct. at 2332. In *Sutton*, the combination of the statement of fact that "drugs are now concealed" coupled with the statement of fact that the informant "has seen the marijuana recently," provided the magistrate with a reasonable basis to believe that the event that was relied upon for probable cause—the possession of marijuana witnessed by the informant—occurred within a reasonable time before the making of the affidavit. In the instant case, Bjerke's conclusory "belief" that an offense was occurring at the time he made out his affidavit, even coupled with a statement that "recently" he had received information from a confidential informant, did not provide the trial court with a sufficient basis for determining that *the controlled buy* occurred at a time "so closely related to the time of the issuance of the warrant," *see Peltier*, 626 S.W.2d at 32, so as to "corroborate the existence of [the cocaine] on the premises" at the time that "the warrant was requested." *See Davis*, 202 S.W.3d at 157.

substantial basis from which it can determine that the sought item is on the premises at the time the warrant is issued. Rather, this "protracted and continuous nature" principle simply permits a greater period of time between the event forming the basis of probable cause and the issuance of the warrant before the basis for probable cause would be rendered stale.

But the question before us is not whether the information in the affidavit was stale and so the "protracted and continuance nature" principle is not applicable to the question at hand. The question before us is whether the information in the affidavit is sufficiently specific as to the time of the incident that provides the basis for probable cause—the controlled buy—to provide the magistrate with a substantial basis for determining probable cause. I would hold that it is not.

In the affidavit at issue, the only direct temporal reference is the word "recently," used in reference to Bjerke's contact with the first confidential informant. The only temporal reference to the date of the controlled buy forming the basis for probable cause is the term "after," placing the controlled buy at some period in time after Bjerke "recently" met with the first confidential informant. I disagree with the majority's assertion that Bjerke's statement that he "believes that [an offense] is currently taking place" supplies a temporal reference on which the

trial court could rely.[4] As discussed in footnote four of this dissent, this is not a statement of fact, but one of belief on which probable cause cannot be based. *See Gates*, 462 U.S. at 239, 103 S. Ct. at 2332 (holding that sworn statement that officer "has cause to suspect and does believe" that contraband is located at a certain location "will not do" and is a "mere conclusory statement").

Further, we may not consider any external sources of information that may have come to the magistrate's attention, such as the circumstances of the presentation of the affidavit, the time that the affidavit was presented to the magistrate, any haste or immediacy that may have been displayed by the officers, or any comments made by the officers at the time of the presentation. Just as we are not permitted to review these factors in determining whether the affidavit establishes probable cause, *see Massey v. State*, 933 S.W.2d 141, 148 (Tex. Crim. App. 1996), we similarly would not be permitted to use such external factors in determining whether the affidavit itself did or did not contain sufficiently specific

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[4] The majority emphasizes the use of the phrase "currently." LaFave criticizes reliance on the use of the present tense to establish that the facts are sufficiently timely, and sets out that the "better view" is that timely probable cause should not turn on the tenses used in the affidavit. He speaks with approval of courts that have rejected the use of the present tense to establish timeliness, and states that "fortunately" a growing number of courts are adopting such "sound reasoning" and not relying on the use of the present tense. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(b) (4th ed. 2004).

information be adequate under law.

Reviewing the four corners of this affidavit in light of the standards set out by *Davis*, *Schmidt* and *Peltier*, I conclude that the affidavit fails to recite with sufficient specificity the time of the controlled buy such that the magistrate was provided a reasonable basis to infer that the buy "occurred so close in time" to his issuance of the warrant to substantiate a belief that the cocaine was at the residence when the warrant issued. *See Davis*, 202 S.W.3d at 155; *Peltier*, 626 S.W.2d at 32. The term "recently," made in reference to time of the relay of information from the first confidential informant to the officer, does not provide the necessary specificity for the magistrate to determine the "closeness of time" of the controlled buy to the issuance of the warrant or provide a "time frame which would corroborate" the existence of cocaine at the residence "when the warrant was requested."[5] *See Schmidt*, 659 S.W.2d at 421; *Davis*, 202 S.W.3d at 157. Indeed, from the four corners of this affidavit, it would have been impossible to ascertain "the time elapsing between the [buy] and the time the search warrant was issued." *See McKissick*, 209 S.W.3d at 214.

Because the error involved implicates the right to be free of unreasonable

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[5] It is the date of the illegal event, the event forming the basis for the probable cause, which is significant, not the date that an informant spoke to the police. *See Schmidt v. State*, 659 S.W.2d 420, 421 (Tex. Crim. App. 1983).

searches and seizures and is constitutional in dimension under both the U.S. and Texas constitutions, we must conduct a constitutional-harm analysis. *See Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001) (holding that harm analysis for erroneous admission of evidence in violation of Fourth Amendment is to be conducted under Texas Rule of Appellate Procedure 44.2). We therefore must reverse unless we determine beyond a reasonable doubt that the error did not contribute to the convictions. *See* TEX. R. APP. P. 44.2(a) (providing that, when constitutional error involved, appellate court must reverse conviction or punishment unless court determines beyond reasonable doubt that error did not contribute to conviction or punishment). Absent evidence arising from the search conducted pursuant to the warrant, appellant would not have been convicted. Therefore, I conclude that appellant was clearly harmed by this error.

I recognize that the Texas Court of Criminal Appeals has recently granted petitions for discretionary review in three cases to address the question of the specificity required in search warrant affidavits as to the time factor, including one in a case involving the possession of a controlled substance, as we have here.[6] I

[6] *See State v. McLain*, 310 S.W.3d 180 (Tex. App.—Amarillo 2010, pet. granted) (holding that search warrant affidavit failed to give trial court "any idea of when any of the activity which allegedly supports the issuance of a warrant took place" when affidavit simply stated that in past 72 hours,

urge the Court of Criminal Appeals to grant the undoubtedly forthcoming petitions for discretionary review in these cases as well.

Accordingly, I join only in the portion of the majority opinion disposing of appellant's legal-sufficiency issue. As I believe that appellant's first issue should be sustained, the judgments reversed, and the cases remanded for a new trial, I dissent to the affirmance of appellant's convictions.[7]

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Sharp, dissenting.

Publish. TEX. R. APP. P. 47.2(b).

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confidential informant had told police that appellant was seen in possession of large amount of methamphetamine).

[7] I also do not join with the majority's resolution of the remainder of the issues as it is unnecessary dicta. Because appellant is entitled to have his convictions reversed and the cases remanded for a new trial based on his first issue, we need not reach any of any of his other issues apart from legal sufficiency.