Opinion issued July 21, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00942-CR

WOLFGANG FISHER, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Case No. 159340801010

MEMORANDUM OPINION

Appellant Wolfgang Fisher pled guilty to the misdemeanor offense of cruelty to animals. The trial court deferred adjudication for one year and fined him $300.00. Fisher now contests the trial court's denial of his pre-trial motion to

suppress evidence. In two issues, the appellant argues (1) that the evidence was seized pursuant to a facially invalid warrant and (2) that the trial court erred in not suppressing the evidence pursuant to Article 38.32(a) of the Texas Code of Criminal Procedure.

We affirm.

BACKGROUND

In November, 2008, Christine Kendrick, a Harris County Deputy Constable assigned to the Precinct 1 Animal Cruelty Unit, learned from an anonymous tip received by the Houston SPCA that a very ill chimpanzee was housed in a garage in Crosby, Texas. Accompanied by two SPCA employees, Deputy Kendrick went to investigate and upon arrival at the address, could hear the chimpanzee screaming as soon as she stepped from her car.

No one answered the front door of the house, but from an open doorway of the garage could be seen a caged chimpanzee sitting on a small shelf with his knees pulled up, making hacking noises, vomiting and emitting screams that sounded like cries of human distress. The animal was emaciated and filthy, with discharge running from his eyes and nose. Deputy Kendrick testified that she believed the chimp to be *in extremis* necessitating emergency care, but her lack of familiarity with handling primates and concern about communicable diseases dissuaded her from her desire to immediately remove the animal herself. Instead, she called the

Harris County Sheriff's Department and, while a unit remained at the scene, went to get a warrant. A zoo veterinarian was summoned to handle the animal.

In the course of filling in the blanks of a form affidavit and warrant[1] Deputy Kendrick made some errors and tore it up, realizing too late that it was her last form. The deputy then "borrowed" one of the SPCA investigator's forms, completed it and proceeded to court. The presiding judge signed the warrant and, once Deputy Kendrick made copies, she returned with them to the house in Crosby, provided copies to the zoo veterinarian and the SPCA personnel and posted a copy on the front door of the residence. The chimp was then sedated and removed.

Unknown to the deputy at the time, the pre-printed affidavit and warrant forms that Deputy Kendrick had filled out were identical to those forms she used in the course of her duties with one important exception: they repeatedly recited Montgomery County, not Harris County. Deputy Kendrick testified that she paid no attention to the pre-printed portions of the forms as she was setting forth her hand-written descriptive information in the blanks provided on the affidavit and warrant forms. Where the county, precinct number and court number were to be provided on a blank line at the top right-hand corner of the warrant, she wrote in "Harris," as was her custom as a Harris County officer. Deputy Kendrick testified

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[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 821.022 (West 2010) (authorizing officer to apply for warrant to seize "cruelly treated" animal).

that the judge, too, must have failed to note the several printed "Montgomery County" references, as he made no mention of it as he signed off on the warrant. She further acknowledged that she only handles Harris County cases and that the use of those forms reciting Montgomery County was a mistake. In her findings of fact, the trial judge found Deputy Kendrick's testimony truthful and credible.

ANALYSIS

In both of his issues appellant complains of the admission of evidence he asserts was seized in violation of his constitutional rights.

A. STANDARD OF REVIEW

We review a trial court's decision in denying a motion to suppress for an abuse of discretion under a bifurcated standard of review, giving almost total deference to the trial court's determination of historical facts that depend on credibility. *See Balentine v. State*, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). This is especially true when the trial court's findings turn on evaluating a witness's credibility and demeanor. *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000) (en banc). We give the same amount of deference to the trial court's ruling on mixed questions of law and fact when the question is resolved by evaluating credibility and demeanor. *Id.* Only pure questions of law are considered de novo. *Id.*

When, as here, a trial court makes explicit findings of fact, we determine whether the evidence, viewed in the light most favorable to the trial court's ruling, supports the findings. *See State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). If the trial court's ruling is reasonably supported by the record and is correct on any theory of law applicable to the case, the reviewing court will sustain it upon review. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996) (en banc).

B. THE VALIDITY OF THE SEARCH WARRANT

In his first and second issues, appellant contends that the trial court erred in denying his motion to suppress evidence seized pursuant to a facially invalid warrant. The warrant, signed by a Harris County justice of the peace, directed Montgomery County peace officers to seize an animal located at a Harris County address mistakenly labeled as a Montgomery County address. While a Harris County officer both presented the affidavit underlying the warrant and executed the warrant at the correct Harris County address, appellant contends that Deputy Kendrick entered the premises absent lawful authority and all evidence seized was the fruit of that unlawful entry. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005) ("No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the

Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.").

1. REQUIREMENTS OF A SEARCH WARRANT

The Texas Code of Criminal Procedure provides:

> A search warrant issued under this chapter shall be sufficient if it contains the following requisites:
>
> (1) that it run in the name of the "State of Texas";
>
> (2) that it identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;
>
> (3) that it command any peace officer of the proper county to search forthwith the person, place, or thing named; and
>
> (4) that it be dated and signed by the magistrate.

See TEX. CODE CRIM. PROC. ANN. art. 18.04 (West 2005).

2. THE WARRANT

Here, the fundamental dilemma stems from a pre-printed form that resulted in a warrant authorized by a magistrate of one county (erroneously described in the warrant as being from another county) directing officers from one county to make a search and seizure at a location described to be in that county, but actually in another county, and executed by officers of that other county.

The face of the search warrant commanded officers of Montgomery County to seize property at an address described to be in Montgomery County, but actually located in Harris County. The warrant was subscribed by a Harris County justice

of the peace above a signature line identifying himself as "Justice of the Peace Montgomery County, Texas." Additionally, although directed to Montgomery County law enforcement, the warrant was actually executed by Harris County officers. These being the facts as they have come to us, that the warrant is facially invalid is a given.

The State presents ample authority for the proposition that inconsistencies in the warrant that are typographical in nature do not operate to invalidate the warrant. *See, e.g.*, *Rougeau v. State*, 738 S.W.2d 651, 663 (Tex. Crim. App. 1987), *overruled on other grounds*, 784 S.W.2d 5 (Tex. Crim. App. 1989) (typographical error indicating that arrest warrant was issued one year before offense did not vitiate arrest warrant); *Lyons v. State*, 503 S.W.2d 254, 255–56 (Tex. Crim. App. 1973) (evidence seized pursuant to search warrant containing typographical date error was admissible); *Rios v. State*, 901 S.W.2d 704, 707 (Tex. App.—San Antonio 1995, no pet.) (inaccurate use of word "vehicle" in search warrant, rather than "premises," did not vitiate warrant where person who typed warrant testified that discrepancy was due to clerical error). However, these cases speak to true typographical errors by the maker of the warrant who entered an incorrect word or date.

Vance v. State, 759 S.W.2d 498, 501 (Tex. App.—San Antonio 1988, pet. ref'd), provides a closer measure of guidance to the issues before us. There, a

warrant on a pre-printed form for use in Bexar County, Texas, was altered by the preparing officer for use in Guadalupe County by typing X's through printed references to Bexar County and the City of San Antonio and typing, as interlineations, "Guadalupe County." *Id*. He made three such changes, but failed to alter the line near the top of that warrant that directed it "TO THE SHERIFF OR ANY PEACE OFFICER OF BEXAR COUNTY." The appellant in that case contested the validity because it was directed to officers of a different county.

The San Antonio court, noting the warrant was executed by two members of the Guadalupe County Sheriff's Office and three San Antonio police officers, and that a proper return was made on the warrant, held that, "[c]onsidering the entire warrant and the accompanying affidavit incorporated by reference therein," the failure to substitute Guadalupe County for Bexar County at the top of the warrant "was not such a fatal defect that it contributed to either the conviction or the punishment of the appellant." *Id.*

Here, Deputy Kendrick conceded that she never noticed the words on the pre-printed form that directed the warrant to a Montgomery County officer, and made no attempt to change "Montgomery County" to "Harris County." Indeed, the lone mention of "Harris County" is hand-written immediately above a blank line intended for insertion of the County's name. Deputy Kendrick made clear that she did not write "Harris County" in an attempt to alter the affidavit, but simply

because, as a Harris County Deputy Constable, it was her common practice in filling out the pre-printed affidavit forms to insert "Harris" on that blank line of the affidavit. She failed to notice that the remainder of the form she had obtained from the SPCA representative had "Montgomery" pre-printed in all the places her usual forms recited "Harris."

Vance is further instructive in that here the record reflects that only Harris County officers participated in the chimpanzee's seizure. *See also, Dickey v. State*, 816 S.W.2d 832, 834 (Tex. App.—Eastland 1991, no pet.) (warrant addressed to peace officer of Galveston County for search of location in Galveston County upheld, despite fact that affidavit was signed by Houston police officer, where at least one of officers who participated in search was deputy in Galveston County Sheriff's Department).

We conclude that the warrant here, directed to Montgomery County law enforcement officers, to seize an animal from premises described in the warrant to be in Montgomery County was invalid to give Deputy Kendrick, a Harris County law enforcement officer, authority to search and/or seize property from a Harris County residence.

C. THE GOOD FAITH EXCEPTION

Evidence obtained under a defective warrant may still be valid, however, under the "good faith" exception to Article 38.23. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (West 2005).

1. STATUTE

Pursuant to Article 38.23(b), "[i]t is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." *Id.* Accordingly, evidence obtained by a police officer acting in good faith reliance upon a warrant based upon a magistrate's determination of probable cause is not rendered inadmissible because of a defect found in the warrant after its execution. *Dunn v. State*, 951 S.W.2d 478, 479 (Tex. Crim. App. 1997) (after warrant executed, officers realized warrant had not been signed by magistrate, even though magistrate meant to sign all 21 warrants); *Jones v. State*, 914 S.W.2d 675, 677 (Tex. App.—Amarillo 1996, no pet.) (after warrant executed, affiant-officer who executed warrant realized apartment number was wrong).

Under its unambiguous language, the good faith exception requires an initial finding of probable cause. *Curry v. State*, 815 S.W.2d 263, 265 (Tex. App.—Houston [14th Dist.] 1991, no pet.) Once this determination has been made, article

38.23(b) is only implicated if the warrant is in some way defective. *See Brochu v. State*, 927 S.W.2d 745, 748–49 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (warrant executed on misidentification); *Brent v. State*, 916 S.W.2d 34, 38 (Tex. App.—Houston [1st Dist.] 1995, writ ref'd) (warrant valid despite absence of affiant's signature); *Rios*, 901 S.W.2d at 706–07 (warrant inadvertently identified place to be searched as "vehicle" instead of "premises"). The statute requires that we assess the objective, and not the subjective, good faith of the officer executing the warrant. *Hunter v. State*, 92 S.W.3d 596, 603 (Tex. App.—Waco 2002, pet. ref'd), *overruled on other grounds*, 207 S.W.3d 787, 788 (Tex. Crim. App. 2006). Under Article 38.23(b), the affiant-officer who executed the warrant may explain defects in the affidavit at the hearing on the motion to suppress. *See Dunn*, 951 S.W.2d at 479; *Jones*, 914 S.W.2d at 677; *Rios*, 901 S.W.2d at 707; *cf. U.S. v. Gordon*, 901 F.2d 48, 50 (5th Cir.1990) (officer who executed affidavit and was present when warrant was executed testified at suppression hearing regarding mistake in street name). Under the unique, albeit harried, circumstances of this particular case, an error in the warrant description may be cured by facts known by the affiant-officer who is also the executing officer. 2 Wayne R. LaFave, *Search and Seizure* § 4.5(a) (3d ed. 1996); *see, e.g., Jones*, 914 S.W.2d at 677; *Rios*, 901 S.W.2d at 707; *Gordon*, 901 F.2d at 50); *Smith v. State*, 962 S.W.2d 178, 187 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (O'Connor, J., concurring).

2. APPLICATION OF LAW TO THE FACTS

At appellant's motion to suppress hearing, Deputy Kendrick acknowledged that the pre-printed sections of the warrant recited Montgomery rather than Harris County, thus establishing the warrant's defect. She testified as to having filled in blanks of the form affidavit and warrant without noticing the warrant's four recitations of Montgomery County. She further testified that the presiding judge signed the warrant immediately with no mention of the fact that it recited Montgomery rather than Harris County. Such testimony is sufficient to establish Deputy Kendrick's good faith in her reliance on the warrant.

Moreover, there is evidence to support that the warrant was issued on probable cause. The warrant was based on the affidavit that Deputy Kendrick executed. This affidavit listed her observations as follows:

> Deputy C. Kendrick, 82027, observed a chimpanzee in a metal enclosure inside a garage. No water was available. The enclosure was extremely dirty with the floor covered with feces, vomit and trash. The chimpanzee is extremely ill, with lesions in the mouth, vomiting continuously is thin and appears to be in respiratory distress. The county attorney's office will be notified.

Appellant has not challenged that this affidavit was inadequate to provide the magistrate with probable cause to issue the warrant. Nor is the neutrality of the magistrate challenged.

We are thus compelled to conclude that the evidence obtained by Deputy Kendrick herein falls squarely within the good faith exception to Article 38.23(b)

in that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(b). Accordingly, the trial court did not abuse its discretion by denying the motion to suppress the evidence and appellant's first and second issues are overruled.

CONCLUSION

We affirm.

Jim Sharp
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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