

Opinion issued January 6, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00090-CR

THE STATE OF TEXAS, Appellant

V.

ROBERT WADE HART, Appellee

**On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1204267**

MEMORANDUM OPINION

A grand jury indicted Robert Wade Hart for the felony offense of possession with intent to deliver a controlled substance, namely cocaine,

weighing more than four grams and less than 200 grams. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D), 481.112(d) (Vernon 2010). The trial court granted Hart’s motion to suppress evidence seized pursuant to a search warrant on the ground that the affidavit supporting the warrant did not establish probable cause. On appeal, the State contends that the trial court erred in granting the motion. We hold that the trial court erred because the affidavit supporting the warrant established probable cause. We therefore reverse and remand for further proceedings.

Background

In February 2009, Houston Police Department Officer J. Dunn submitted an affidavit to obtain a search warrant for an apartment on Lockwood Drive in Harris County, Texas. In the affidavit, he stated that he had probable cause to believe that two men were selling illegal narcotics—specifically, crack cocaine—from the apartment. He provided the following probable cause statement for this belief:

I received information that [an unknown black male and another male known as “Shakey” were] selling illegal narcotics from [the Lockwood Drive apartment]. The information was received through a citizen complaint. I also received information regarding the location from a confidential informant.

Within the last 48 hours, I personally met with a credible and reliable informant, who for reasons of personal safety and security shall remain unnamed throughout this affidavit. This

confidential informant has seen crack cocaine by sight and smell. The informant has provided Officer M. Sinegal with the Houston Police Department Narcotics Division with narcotics information on many occasions that was proven to be true and correct. Officer M. Sinegal and the [i]nformant have worked together for several years and as a result of the informant's information, Officer Sinegal has recovered large quantities of illegal narcotics.

Officer Sinegal and I met with the confidential informant in a secluded area and searched the confidential informant. We did not find any money, contraband, or weapons on the confidential informant. I provided the informant with a quantity of U.S. currency to be used in the investigation. Officer Sinegal and I followed the informant to the suspected place. We watched as the informant walked directly to the door of said suspected place. Officer Sinegal watched as the suspected person unlocked the burglar bars on the door and walked inside the apartment unit. Officer Sinegal observed the informant enter suspected place. The informant left said suspected place and returned to Officer Sinegal and [me].

The confidential informant relayed the facts described below to me: The confidential informant met with suspected party "Shakey". The informant stated the male "Shakey" opened the deadbolt on the burglar bar with a key and then walked inside [the Lockwood Drive apartment]. The suspected party asked the informant how much he wanted. The informant walked into [the] apartment . . . and asked the suspected party for a quantity of crack cocaine. The suspected party removed the quantity of crack cocaine from a clear bag and gave the quantity to the informant. The informant observed what was described as a "cookie like object" left inside the clear bag. The informant stated that [he/she] has seen the cookie objects before and knows them to be crack cocaine.

The informant observed an unknown black male inside apartment . . . who was sitting near a semi-[automatic] pistol which was in arm[']s reach of the unknown male. The informant stated that the suspected party and others that

frequent the suspected place are known to carry weapons. The informant has seen pistols inside the suspected place on numerous prior occasions. The informant stated that the suspected party always has crack cocaine and other illegal narcotics inside the suspected place. The informant stated that the suspected party told the informant if he/she needed more to come by again.

The informant returned to Officer Sinegal and [me] and handed me the quantity of crack cocaine. I field tested the quantity and determined it tested positive. Officer Sinegal again searched the informant and found no weapons, money, and[/]or contraband.

Based on the affidavit, a magistrate judge issued a search warrant for the apartment. Officer Dunn executed the warrant and seized 31 grams of crack cocaine, 28 grams of powder cocaine, 50 grams of marijuana, 1.8 grams of ecstasy, a 22-caliber pistol and a digital scale. Upon execution of the warrant and recovery of the contraband, officers arrested Hart. A grand jury indicted Hart for the felony offense of possession with intent to deliver between four and 200 grams of cocaine.

Hart moved in the trial court to suppress all evidence seized as a result of the search of the Lockwood Drive apartment. After a hearing, the trial court granted Hart's motion, concluding that Officer Dunn's affidavit failed to establish probable cause to issue a search warrant for the apartment. *See Massey v. State*, 933 S.W.2d 141, 148 (Tex. Crim. App. 1996).

Discussion

On appeal, the State contends that the trial court erred in granting Hart's motion to suppress. According to the State, the trial court did not properly defer to the magistrate's finding of probable cause, or accord reasonable inferences that the magistrate could have made in finding the affidavit sufficient. We agree.

Standard of Review

In reviewing the trial court's ruling on a motion to suppress, we apply a bifurcated standard of review. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *McKissick v. State*, 209 S.W.3d 205, 211 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). We defer to the trial court's determination of historical facts that depend on credibility, while we review de novo the trial court's application of the law to those facts. *Carmouche*, 10 S.W.3d at 327. Appellate review of an affidavit in support of a search warrant, however, is not de novo; rather, a trial court and subsequent courts should greatly defer to the magistrate's determination of probable cause. *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331 (1983); *Uresti v. State*, 98 S.W.3d 321, 334 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Probable cause to support the issuance of a search warrant exists when 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. *Cassias v. State*, 719 S.W.2d 585, 587 (Tex. Crim. App. 1986); *McKissick*, 209 S.W.3d at 211.

An affidavit submitted in support of a search warrant must set forth facts sufficient to establish probable cause that (1) a specific offense has been committed; (2) the specifically described property or items to be searched for or seized constitute evidence of that offense; and (3) the property or items constituting such evidence are located at the particular place to be searched. TEX. CODE CRIM. PROC. ANN. art. 18.01(c) (Vernon Supp. 2010). Whether the facts mentioned in the affidavit are adequate to establish probable cause depends on the totality of the circumstances. *Ramos v. State*, 934 S.W.2d 358, 362-63 (Tex. Crim. App. 1996). We examine only the four corners of the affidavit to determine whether probable cause exists. *Massey*, 933 S.W.2d at 148; *Wilson*, 98 S.W.3d at 270-71. Statements made during the hearing on a motion to suppress thus do not factor into the probable cause determination. A magistrate may draw reasonable inferences may from the affidavit, and we interpret it in a common-sense and realistic manner. *Wilson*, 98 S.W.3d at 271.

Did the Trial Court Err in Granting Hart's Motion to Suppress?

a. Observation of the Controlled Buy

The State maintains that Officer Dunn's affidavit contained probable cause to issue the search warrant because the affidavit described a controlled buy by the informant at the apartment to be searched. We previously have held that the circumstances of a single controlled buy, standing alone, can be sufficient to confirm an informant's story, and support probable cause to issue a search warrant. *See Sadler v. State*, 905 S.W.2d 21, 22 (Tex. App.—Houston [1st Dist.] 1995, no pet.); *see also Ford v. State*, 179 S.W.3d 203, 212-213 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). In *Sadler*, the officer stated in the affidavit that the officers had searched the informant before sending him to purchase the drugs and the officers kept him in view as he walked to and from the suspected premises. 905 S.W.2d at 22. In addition, the informant reported seeing contraband on the premises. *Id.*

Similarly, Officer Dunn's affidavit in this case detailed a controlled buy of crack cocaine from the Lockwood Drive apartment. The affidavit states that Officers Dunn and Sinegal searched the informant for contraband before the buy and gave him money to purchase drugs from a suspect inside the apartment. The officers watched the informant walk directly to the door of the apartment. The informant told the officers that he then entered the

apartment and handed Hart money in exchange for a quantity of crack cocaine. Hart then told the informant that he should return to the apartment if he needed more crack cocaine, and the informant observed that crack cocaine in the form of a cookie-like object remained at the apartment after he left. The officers later identified the substance the informant purchased as crack cocaine.

These facts support a reasonable inference that cocaine was available for sale within the place named in the warrant. Thus, facts existed within the four corners of the affidavit from which the issuing magistrate could reasonably infer that the informant had purchased crack cocaine inside the place named in the search warrant. *See Sadler*, 905 S.W.2d at 22; *see also Ford*, 179 S.W.3d at 212-213 (concluding that affidavit supported finding of probable cause to search apartment because it detailed controlled buy in which officers searched informant for contraband before purchase of drugs, and informant entered suspect's apartment and received drugs in exchange for money).

In response, Hart maintains that the circumstances of the controlled buy were insufficient to confirm the informant's story, contending that Officer Dunn's affidavit refers to circumstances during the buy that Officer Sinegal, not Officer Dunn, observed. The pertinent part of the affidavit

states:

Officer Sinegal and I followed the informant to the suspected place. We watched as the informant walked directly to the door of said suspected place. Officer Sinegal watched as the suspected person unlocked the burglar bars on the door and walked inside the apartment unit. Officer Sinegal observed the informant enter suspected place. The informant left said suspected place and returned to Officer Sinegal and [me].

Using common sense and a realistic interpretation of this passage, the issuing magistrate reasonably could have inferred that Officer Dunn also was present at the controlled buy and witnessed the event in its entirety. They watched the events together and the informant stood with both officers before and after the buy. Although he did not include “and I” in each sentence, the magistrate could have inferred Officer Dunn’s presence during the whole transaction from the first and last sentences. *See Wilson*, 98 S.W.3d at 271; *see also Gates*, 462 U.S. at 235, 103 S. Ct. at 2330–31 (“Affidavits are normally drafted by nonlawyers in the midst and haste of criminal investigation. Technical requirements of elaborate specificity . . . have no proper place in this area.”) (citations omitted). Thus, the magistrate had a substantial basis to support the inference that the informant had purchased crack cocaine inside the apartment and that probable cause existed to issue the warrant. *See Gates*, 462 U.S. at 238, 103 S. Ct. at 2332.

b. Reliability of the Confidential Informant

Hart further contends that Officer Dunn's affidavit did not establish the reliability of the confidential informant and thus failed to establish probable cause. Specifically, he maintains the affidavit did not establish the reliability of the informant because: (1) it is unclear from the affidavit whether one or two confidential informants gave Officer Dunn information; (2) the affidavit provides no explanation how the informant identified the crack cocaine; and (3) it is unclear from whom Officer Dunn learned about the informant's reliability, knowledge of narcotics, and previous work with law enforcement.¹

An informant's veracity, reliability, and basis of knowledge are highly relevant in reviewing the sufficiency of an affidavit, but these elements are not each independent requirements. *Gates*, 462 U.S. at 230, 103 S. Ct. at 2328. Allegations that the informant has proven reliable on previous occasions may establish an informant's credibility. *Avery v. State*, 545 S.W.2d 803, 804 (Tex. Crim. App. 1977). The magistrate may also rely on the experience and pertinent expertise of an affiant in evaluating the informant's report. *Hackleman v. State*, 919 S.W. 2d 440, 447 (Tex. App.—Austin 1996, pet. ref'd).

¹ In the hearing on the motion to suppress, the trial court cited these same reasons for granting the motion.

An affidavit in support of a warrant to search for narcotics need not provide more specific details regarding the informant's reliability than to state the informant had given information in the past regarding narcotics trafficking which had proved correct. *Torres v. State*, 552 S.W.2d 821, 824 (Tex. Crim. App. 1977). Further, because such a statement indicates an informant's familiarity with controlled substances, reviewing courts require no further details to spell out an informant's qualifications in recognizing drugs. *Id.*

The affidavit here reveals the following about the reliability of the informant: (1) the informant provided Officer Sinegal with narcotics information over several years that was proven correct and resulted in the recovery of a large quantity of narcotics; (2) the informant participated in a controlled buy with Officers Dunn and Sinegal that resulted in the purchase of crack cocaine from the suspected place and party; and (3) the informant had seen crack cocaine before and could readily identify it. The magistrate judge properly concluded that this information sufficiently established the informant's reliability. *See Torres*, 552 S.W.2d at 824. *Compare Blake v. State*, 125 S.W.3d 717, 727 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (finding affidavit indicated confidential informant's reliability because informant had provided information used by police officers other than the

affiant to execute search warrants, arrest defendants, and seize drugs) *with State v. Davila*, 169 S.W.3d 735, 739 (Tex. App.—Austin 2005, no pet.) (finding affidavit did not establish confidential informant’s reliability because although affiant said that informant had previously given him narcotic trafficking information, he did not say whether that information had led to seizure of controlled substances).

Although Hart contends that the affidavit is unclear about from whom Officer Dunn learned about the informant’s knowledge of narcotics and previous work with law enforcement, the issuing magistrate reasonably could have inferred that Officer Sinegal had informed Dunn about the informant’s knowledge and previous work with him from the statement that the two officers had worked on the investigation together. *See Hackleman*, 919 S.W.2d at 447. Likewise, the issuing magistrate reasonably could infer from the affidavit that that only one informant was involved because nothing in the affidavit indicated that more than one informant provided information. *See Blake*, 125 S.W.3d at 727 (“[A]lthough appellant asserts that the affidavit was unclear regarding how many confidential informants provided information, the issuing magistrate, by interpreting in a common-sense and realistic manner, could have reasonably inferred . . . that only one informant was involved.”).

Having determined that there was only one informant, and that the informant was reliable, the issuing magistrate had a substantial basis to infer that the affidavit was sufficient to establish probable cause to issue a search warrant. *See Avery*, 545 S.W.2d at 804-805; *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332.

Conclusion

We conclude that the trial court erred in granting the motion to suppress because Officer Dunn's affidavit supported the magistrate judge's finding of probable cause to search the apartment. We therefore reverse the judgment and remand the case for further proceedings.

Jane Bland
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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