Opinion issued August 11, 2011

In The
Court of Appeals
For The
First District of Texas

NOS. 01-10-00788-CR, 01-10-00789-CR

HOMER CLARK STEELE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 338th District Court
Harris County, Texas
Trial Court Cause Nos. 1200859, 1200952

MAJORITY OPINION

Appellant, Homer Clark Steele, appeals judgments convicting him for indecency with a child and possession of child pornography. *See* TEX. PENAL CODE ANN. §§ 21.11(a)(1), (2)(B) (West Supp. 2010), 43.26(a) (West 2003). After the trial court denied his motion to suppress, appellant pleaded guilty to both

charges. The trial court assessed appellant's punishment at 20 years' imprisonment for indecency with a child and 10 years' imprisonment for possession of child pornography. On appeal, appellant contends that the trial court erred by denying his motion to suppress evidence obtained as a result of a search that he alleges was illegal on the ground that the affidavit supporting the search warrant was insufficient to establish probable cause. We conclude that the affidavit established probable cause and that the trial court properly denied appellant's motion. We affirm.

Background

On January 26, 2009, Officer Brinson swore to an affidavit supporting a warrant to search appellant's apartment for, among other things, "images of persons who appear to be under the age of 18, engaged in sexual acts or posed in a manner to elicit sexual response or otherwise engaging in sexual conduct." The affidavit establishes the following: Officer Brinson was assigned to investigate appellant after Anthony Thumann reported to the Pasadena Police Department that he had reason to believe that appellant had been sexually assaulting young boys over the course of the preceding 40 years. Thumann reported that appellant was currently living with a young male named "C.S." and that C.S. had lived with appellant since C.S. was 10 years old. After filing his initial report, Thumann mentioned to Officer Brinson that while inside appellant's residence several years

before, he had seen nude photographs depicting C.S. at 11 years old. Thumann reported that appellant was currently living with an 18-year-old male named "K.A."

The affidavit also recounts that after speaking with Thumann, Officer Brinson met with Grattan Broderick, who represented that appellant had been a friend of his family for the preceding 40 years. Broderick informed Officer Brinson that appellant had confided in him how he would pursue and sexually assault young boys. Appellant told Broderick that he preferred boys who were around 10 years old and living with a single mother. Appellant would offer to take the young boys into his care and then provide everything for them. Broderick reported to Officer Brinson that C.S. was currently living with appellant and that C.S. had lived with appellant since C.S. was 10 years old. Broderick added that appellant had told him how he had sexually assaulted C.S. during that time. He also stated that he knew of at least 10 other young boys that appellant had had in his home and sexually assaulted. Broderick further stated that appellant was currently living with an 18-year-old, named "K.A." Additionally, Broderick reported to Officer Brinson that while cleaning appellant's apartment several years before, he found photographs depicting nude young boys. Broderick also reported that five months before, appellant had shown him a photograph, which he had removed from his wallet, depicting a nude 15-year-old boy. When Broderick

asked whom the photograph depicted, appellant told him it was K.A. Officer Brinson also stated in his affidavit that C.S. was born in June 1987 and K.A. was born in April 1990.

Officer Brinson further attested that he had been personally involved in the arrest of no fewer than 50 persons involved in child sexual exploitation and that, based on his own investigative experience as well as his conversations with more experienced investigators, he was aware that "people with a sexual interest in children, people who buy, produce, trade, or sell child pornography, and people who molest children . . . [tend to] collect sexually explicit . . . photographs . . . depicting children, which they . . . rarely, if ever, dispose of . . . and [which they] treat[] as prized possessions." Officer Brinson additionally attested,

> These people collect, and maintain photographs of children they have been involved with. These photographs may depict children . . . in various stages of undress, or totally nude . . . . These photographs are rarely, if ever, disposed of and are revered with such devotion that they are often kept upon the individual's person, in wallets and on diskettes. If a picture of a child is taken by such a person, depicting the child in the nude, there is a high probability the child was molested before, during, or after the photograph taking session . . . .

On January 27, 2009, Officer Brinson executed the search warrant. Officer Brinson knocked on the front door of appellant's one-bedroom apartment. Appellant answered the door. Brinson asked if anyone else was inside the apartment, and appellant replied that 18-year-old K.A. was in the bed. Officer Brinson asked appellant if he had a billfold. Appellant handed Brinson the billfold.

Inside, Brinson found three nude photographs of K.A., at the ages of 14, 15, and 17 years old. After being read the statutory and *Miranda* warnings and transported to the police station, appellant admitted to having engaged in sexual relations with young boys for the past 30 years. Specifically, appellant admitted that he had engaged in sexual relations with K.A. since he had begun living with him at the age of 11 years. Appellant admitted having taken the photographs of K.A. during that time. Appellant also admitted to having sexual relations with C.S. while he lived with appellant from the age of 10 years until he finished high school.

Appellant was indicted for indecency with a child and possession of child pornography. Prior to trial, appellant filed a motion to suppress the evidence seized from his apartment or the evidence obtained as a result of the search, including appellant's own oral statements and the statements of the two complainants. Appellant based his motion on the contention that the search warrant was invalid because it was not supported by probable cause. The trial court denied appellant's motion to suppress.

Denial of Motion to Suppress

In his sole issue on appeal, appellant contends that the trial court erred by denying his motion to suppress because the affidavit supporting the search warrant was insufficient as to probable cause and thus violates the Fourth Amendment to the United States Constitution, section nine of article one of the Texas

Constitution, and articles 18.01 and 18.02 of the Texas Code of Criminal Procedure. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; TEX. CODE CRIM. PROC. ANN. arts. 18.01 (West Supp. 2010), 18.02 (West 2005). Specifically, appellant contends that the affidavit was not detailed enough to allow a magistrate to determine when the events occurred and whether the information was stale.[1]

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *McKissick v. State*, 209 S.W.3d 205, 211 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). We give almost total deference 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. *Id.* Thus, we review de novo the trial court's application of the law of search and seizure and probable cause. *Id.* However, our review of an affidavit in support of a search warrant is not de novo; rather, great deference is given to the magistrate's determination of probable cause. *Id.*

The duty of a reviewing court, including a reviewing trial court, is simply to ensure that the magistrate had a substantial basis for concluding that the probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 2332

[1] The dissenting opinion faults the search-warrant affidavit for being based on hearsay. However, appellant does not challenge the sufficiency of the affidavit on that ground.

(1983). The substantial-basis standard of review "does not mean the reviewing court should be a rubber stamp but does mean that the magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review." *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010) (quoting W. LaFave, S*earch and Seizure: A Treatise on the Fourth Amendment* § 11.7(c) at 452 (4th ed. 2004 & Supp. 2009–2010)).

B. Applicable Law

No search warrant may issue unless supported by an affidavit setting forth substantial facts establishing probable cause for its issuance. TEX. CODE CRIM. PROC. ANN. arts. 1.06, 18.01(b) (West 2005 & Supp. 2009). "Probable cause to support the issuance of a search warrant exists where 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." *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). In reviewing the affidavit supporting the warrant, an appellate court is limited to the "four corners" of the affidavit. *Id.*; *Jones v. State*, 833 S.W.2d 118, 123 (Tex. Crim. App. 1992). The supporting affidavit is interpreted in a commonsensical and realistic manner, drawing all reasonable interferences. *Davis*, 202 S.W.3d at 154; *Jones*, 833 S.W.2d at 123–24. Probable cause ceases to exist if at the time the search warrant is issued, it would be unreasonable to presume the items remain at the suspected

place. *Rowell v. State*, 14 S.W.3d 806, 809 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 66 S.W.3d 279 (Tex. Crim. App. 2001) (citing *Guerra v. State*, 860 S.W.2d 609, 611 (Tex. App.—Corpus Christi 1993, pet. ref'd)). "The proper method to determine whether the facts supporting a search warrant have become stale is to examine, in 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." *Id.* (citing *Hafford v. State*, 989 S.W.2d 439, 440 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd); *Guerra*, 860 S.W.2d at 611). "When the affidavit recites facts indicating activity of a protracted and continuous nature, i.e., a course of conduct, the passage of time becomes less significant." *Id.* (*Lockett v. State*, 879 S.W.2d 184, 189 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd)). The lack of a specific date in a search-warrant affidavit is not necessarily fatal to the validity of a search warrant. *Jones v. State*, 338 S.W.3d 725, 735–38 (Tex. App.—Houston [1st Dist.] 2011, pet. filed).

C. Analysis

Appellant contends that a reader of the affidavit supporting the search warrant cannot discern when Thumann filed his initial report with the Pasadena Police Department, when Officer Brinson was assigned to the case, when Officer Brinson interviewed Thumann, or when Officer Brinson interviewed Broderick. Although the affidavit omits the specific dates of these events, it contains

references to time. Appellant contends, however, that the affidavit lacks a frame of reference that one would need to interpret these time references. We disagree.

The affidavit establishes that both Thumann and Broderick stated that appellant was currently living with an 18-year-old male, named K.A. Appellant contends that the word "currently" is meaningless because the affidavit fails to specify when Thumann and Broderick made these statements to Officer Brinson. The affidavit, however, also establishes that K.A. was born in April 1990. Thus, Thumann and Broderick must have made these statements during or after April 2008, when K.A. attained 18 years of age.[2]

The affidavit also provides:

> Mr. Broderick stated in his statement that approximately 5 months ago that [sic] that [appellant] pulled out a Polaroid picture out [sic] of his wallet and showed it to Mr. Broderick. Mr. Broderick stated that it was a picture of a young male approximately 15 years of age, that [sic] was naked.

Appellant contends the phrase "approximately 5 months ago" is meaningless because the affidavit fails to specify when Broderick made this statement. However, K.A.'s date of birth, which the affidavit reflects as April 1990, establishes that Broderick made this statement during or after April 2008. Moreover, Officer Brinson also stated in his affidavit, "Based on the forgoing information, I have reason to believe and do believe that [appellant] on or about

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[2] During the punishment phase of trial, Officer Brinson testified that Thumann filed his initial report on December 27, 2008.

August 1, 2008 did commit the felony offense, including Possession / Promotion of Child Pornography." August 1 was almost six months before the signing of the affidavit. The magistrate could have reasonably concluded that appellant showed Broderick the nude photograph of K.A. around August 1. Accordingly, Broderick must have made this statement during or after August 2008.

The affidavit also provides expert testimony that persons sexually attracted to children tend to collect sexually explicit photographs of children, treating the photographs as prized possessions, of which they rarely dispose. The affidavit further states that such persons specifically collect photographs of children whom they have been with and that they often keep such photographs in their wallets. Appellant, however, contends that the affidavit fails to link this information to him. We disagree. Both Thumann and Broderick stated that on separate occasions several years before, each had personally observed that appellant possessed, in his residence, nude photographs of young boys with whom he had had sexual relations. In addition, Broderick reported that he knew of at least 10 other young boys that appellant had sexually abused in his home. Moreover, as recently as five to six months prior to the execution of the search warrant, appellant had shown Broderick a photograph from his wallet of a nude 15-year-old boy. Because we read the affidavit, signed in early January 2009, in a commonsensical and realistic manner, drawing all reasonable inferences, we conclude that the magistrate could

have reasonably concluded that appellant continued to be in possession of child pornography. *See Flores*, 319 S.W.3d at 703 (holding anonymous tip regarding "narcotic activity" on unspecified date was sufficient when considering all circumstances); *McKissick*, 209 S.W.3d at 215 (magistrate could have reasonably inferred that illegal activity described in affidavit, possession of child pornography, was of continuous and protracted nature making the passage of time less relevant); *Morris v. State*, 62 S.W.3d 817, 823 (Tex. App.—Waco 2001, no pet.) (where affidavit indicates activity of continuous nature, magistrate could have reasonably inferred that appellant had pornography in his possession for substantial period of time, i.e., one-and-a-half years); *Burke v. State*, 27 S.W.3d 651, 655–56 (Tex. App.—Waco 2000, pet. ref'd) (evidence of child pornography one year prior to issuance was not stale).

We hold that the trial court did not err by denying appellant's motion to suppress because the affidavit supporting the search warrant contained evidence that appellant continued to be in possession of child pornography at the time the search warrant was issued and executed.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Bland.

Justice Keyes dissenting.

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