

Opinion issued April 26, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-14-00993-CR

DEMETRUS TREMAINE HORTON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1387050

MEMORANDUM OPINION ON REHEARING*

A jury convicted Demetrus Tremaine Horton of possession of a controlled substance in an amount more than one gram and less than four grams. *See* TEX.

* We grant appellant's motion for rehearing, withdraw our opinion dated December 22, 2015, and replace it with this opinion. The disposition remains the same. We dismiss appellant's motion for rehearing en banc as moot.

HEALTH & SAFETY CODE § 481.115(c). He pleaded “true” to two prior felony convictions, resulting in an enhanced punishment. The jury assessed punishment at 25 years’ imprisonment. Horton appealed, and he asserts two issues: (1) the trial court erred by denying his motion to suppress evidence from a warrantless search and (2) he received ineffective assistance of counsel.

Finding no reversible error, we affirm.

Background

Officer G. Meola was patrolling with his partner when he observed a vehicle merge from the exit ramp to the third moving lane of traffic without using a signal, which is a traffic violation. Officer Meola initiated a stop and pulled the vehicle over. When he approached the driver’s side window, he smelled what he recognized from experience to be a strong odor of phencyclidine (PCP).

Officer Meola asked Horton, the vehicle’s driver and sole occupant, to exit the car. He patted down Horton’s upper body and waist but did not find any contraband. Both police officers searched the vehicle and were still unable to find the source of the odor. Officer Meola observed that Horton’s behavior was consistent with someone who had smoked PCP, and handcuffed him because he had heard of PCP users becoming violent. He concluded based on the odor of the PCP and Horton’s behavior that he had probable cause to search his person. He noticed a bulge in Horton’s left sock, and he pulled out three cigarettes in a plastic

bag that were still wet from being coated in PCP. Officer Meola then placed Horton in custody.

Horton asked to make a phone call to his girlfriend. Officer Meola dialed for him and held the phone to his ear. The officer overheard Horton tell his girlfriend, “They have my sherm.” “Sherm” is a slang term for a cigarette dipped in PCP.

Horton filed a pretrial motion to suppress the evidence from Officer Meola’s search. The motion argued that the cigarettes should be suppressed because “Defendant was not under arrest and the officer was not conducting a legal pat-down of Defendant.” The trial court denied that motion by a written pretrial order. At trial, when the cigarettes were offered as evidence before the jury, Horton’s counsel stated, “no objection.” The trial court nonetheless removed the jury and stated that Horton’s counsel had previously asked to take up the motion to suppress outside the jury’s presence.

Horton’s trial counsel examined Officer Meola on the search procedures he conducted. In closing his argument on the motion to suppress, Horton’s counsel stated:

I would like to point out that the officer did perform a warrantless arrest on Mr. Horton. He failed to follow proper procedures. He really had absolutely no reason to search my client’s socks. There was a — he said a small — I mean, we know what was contained in the sock according to the officer was three cigarettes, which do not create a bulge, not even if they’re in a sandwich bag. I think that his proper procedure would have been to perform a pat-down search of this suspect to see if they were able to locate any type

of contraband that would allow them to further search, and that wasn't done.

The State responded that there was probable cause based on the odor of PCP, which allowed Officer Meola to search the socks despite the lack of a warrant. The trial court denied the motion to suppress without issuing findings of fact or conclusions of law.

Horton subsequently testified that he bought the drugs but had intended to purchase less than a gram of PCP. He admitted that he intended to get high because he had an addiction. He testified that he placed the cigarettes in his sock to avoid placing it on the seat or in the car, due to the smell.

At Horton's request, the jury charge included an instruction on the lesser-included offense of possession of a controlled substance in an amount less than one gram. The jury found Horton guilty of possession of a controlled substance in an amount of one to four grams and assessed punishment at 25 years' imprisonment. Horton appealed.

Analysis

Horton asserts two issues on appeal. He argues that the trial court erred by denying his motion to suppress the evidence taken from his sock, claiming that the warrantless search of his person was illegal and the resulting evidence should have been excluded. Based in part upon this alleged error, Horton also claims that his trial counsel's failure to successfully argue the motion to suppress indicated a lack

of understanding of the law, and that this constituted ineffective assistance of counsel.

I. Motion to suppress

Horton asserts that the trial court erred by denying his motion to suppress. He claims that the traffic stop should have been classified as a detention, that any arrest was unlawful because Officer Meola did not have probable cause based on the smell of PCP in the vehicle alone, and that any search pursuant to this unlawful arrest or detention was illegal. *See, e.g., Estrada v. State*, 154 S.W.3d 604, 608–09 (Tex. Crim. App. 2005). The State responds that the odor of PCP in a vehicle with a single occupant, as opposed to a house, can provide probable cause for the search of the occupant’s person. *See Rocha v. State*, 464 S.W.3d 410, 418 (Tex. App.—Houston [1st Dist.] 2015, pet. ref’d); *Jordan v. State*, 394 S.W.3d 58, 64 (Tex. App.—Houston [1st Dist.] 2012, pet. ref’d). The State further argues that the exigent-circumstances exception to the warrant requirement applied because there was a need to prevent the loss or destruction of the evidence. *See Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007).

An appellate court reviews a trial court’s denial of a motion to suppress under a bifurcated standard, affording almost total deference to the trial court’s determination of historical facts but reviewing the trial court’s application of the law of search and seizure to the facts de novo. *Valtierra v. State*, 310 S.W.3d 442,

447 (Tex. Crim. App. 2010). When there are no explicit findings of historical fact, the appellate court views the evidence in the light most favorable to the trial court's ruling. *Estrada*, 154 S.W.3d at 607. This court "must uphold the trial court's judgment as long as it is reasonably supported by the record and is correct under any applicable theory of law." *Hereford v. State*, 339 S.W.3d 111, 117–18 (Tex. Crim. App. 2011).

The United States and Texas Constitutions protect against unreasonable searches. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9. Warrantless searches of a person are presumed unreasonable unless they are subject to a recognized exception. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013). No evidence obtained in violation of the United States and Texas constitutions shall be admitted in evidence at trial. TEX. CODE CRIM. PROC. art. 38.23.

The recognized exceptions to the warrant requirement include voluntary consent to search, search under exigent circumstances, and search incident to arrest. *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). The State carries the burden to prove that an exception to the warrant requirement has been met. *Id.* at 613; *Gore v. State*, 451 S.W.3d 182, 186 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). A warrantless search under exigent circumstances is only reasonable if the officer has both (1) probable cause and (2) an exigency that requires an immediate search. *Gutierrez*, 221 S.W.3d at 685.

A. Probable cause

“Probable cause to search exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality of a crime or evidence of a crime will be found.” *Estrada*, 154 S.W.3d at 609 (quoting *McNairy v. State*, 835 S.W.2d 101, 106 (Tex. Crim. App. 1991)). This includes the “sum total of layers of information” that the officer acts upon, not merely individual considerations. *Id.*

In *State v. Steelman*, 93 S.W.3d 102 (Tex. Crim. App. 2002), the Court of Criminal Appeals held that “the mere odor of burning marijuana” in a home was insufficient to give officers probable cause that a particular suspect had committed the offense of possession of marijuana in their presence. *Steeleman*, 93 S.W.3d at 108. The Court clarified in *Estrada v. State*, 154 S.W.3d 604 (Tex. Crim. App. 2005), that the odor of marijuana emanating from a home could be an element in determining whether there was probable cause, so long as the odor was not the sole justification for the search. *See Estrada*, 154 S.W.3d at 608–09.

This court has noted that when the odor of a narcotic has been detected in a small, enclosed area, such as a car, particularized suspicion is not required, unlike the requirements articulated in *Steeleman*. *See Jordan*, 394 S.W.3d at 64 (citing *Parker v. State*, 206 S.W.3d 593, 597 n.11 (Tex. Crim. App. 2006)). When the

recognizable odor of a narcotic emanates from a vehicle, there is probable cause to search both the vehicle and its occupants. *Id.* at 65.

Horton argues that *Estrada* and *Steelman* establish that there was no probable cause for the search of his person, and only the initial pat-down was a legal search. This argument ignores the distinction recognized in *Jordan*, which held that the strong, recognizable odor of a narcotic in a small, concealed space provided a basis for probable cause to search a person. *See id.* Furthermore, Officer Meola testified that he observed Horton behaving in a manner consistent with users of PCP, and Horton was the sole occupant of the vehicle, which were additional factors that could lead to a showing of probable cause. *See Estrada*, 154 S.W.3d at 608–09.

We conclude that the facts adduced in the record support the trial court’s implied ruling that the State met its burden to establish probable cause for the search. *See Estrada*, 154 S.W.3d at 609; *Jordan*, 394 S.W.3d at 64–65.

B. Exigent circumstances

The Court of Criminal Appeals has identified three categories of exigent circumstances that justify a warrantless intrusion by police officers: providing aid or assistance to persons reasonably believed to be in need of assistance; protecting police officers from persons reasonably believed to be present, armed, and

dangerous; and preventing the destruction of evidence or contraband. *Gutierrez*, 221 S.W.3d at 685.

For the destruction of evidence to qualify as an exigent circumstance, there must be proof that “the officer reasonably believed that the removal or destruction of evidence was imminent.” *Turrubiate v. State*, 399 S.W.3d 147, 153 (Tex. Crim. App. 2013). Evidence of mere possession of narcotics or suspicion that the evidence will be imminently destroyed is not enough to fulfill this requirement; there must be an objective indication that those in possession are preparing to destroy or dispose of the evidence. *See id.*; *Davila v. State*, 441 S.W.3d 751, 758 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d).

To preserve an issue for appeal, a timely objection must be made that states the grounds for the ruling sought “with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context.” TEX. R. APP. P. 33.1(a)(1)(A). “The purpose for requiring a timely, specific objection is twofold: (1) it informs the judge of the basis of the objection and affords him an opportunity to rule on it, and (2) it affords opposing counsel an opportunity to respond to the complaint.” *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015). Rather than a highly technical requirement, all that is required of a party is “to let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a

time when the trial court is in a proper position to do something about it.” *Layton v. State*, 280 S.W.3d 235, 239 (Tex. Crim. App. 2009) (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)).

On appeal, Horton argues, for the first time, that “[t]here is no exception to the warrant requirement applicable to the instant case authorizing the officers to search Appellant for contraband.” Appellant’s Brief at 17. In response, the State argues that the exigency in this case stemmed from the potential loss or destruction of the contraband that Horton was carrying. Horton replies there was no evidence of imminent destruction adduced at trial, and therefore the State’s argument must fail.

Horton is correct that the State did not elicit any testimony regarding exigency. However, we cannot know what evidence might have been adduced on that subject because trial counsel entirely failed to raise the issue of whether there was a valid exception to the warrant requirement when arguing the motion to suppress. Instead of arguing that there was no exception to the warrant requirement for the search and that the warrantless search was invalid on that basis, trial counsel’s argument was that there was no probable cause to search Horton’s sock without a prior pat-down search. Accordingly, the State’s response at trial was solely on the basis of probable cause, and the trial court’s ruling was based on these arguments. Opposing counsel was not given an opportunity to present

argument (or adduce additional evidence, if necessary), to respond to the potential issue of an exception to the warrant requirement, and the trial court was not asked to consider it.

In his motion for rehearing, Horton suggests that by applying the error-preservation rules, we effectively have relieved the State of its burden to prove an exception to the warrant requirement. Not so. Horton is correct to observe this was the State's burden to prove at trial in order to justify admission of the evidence, but that only establishes that he may have had a valid objection to such evidence at trial, had he made a contemporaneous objection. In order to preserve the objection for appeal, that objection first had to be made at trial.

Because the trial court was not apprised of any issues regarding possible exceptions to the warrant requirement and the argument at trial was focused on probable cause, we conclude that Horton has failed to preserve the issue of whether there was a valid exception to the warrant requirement as a ground for complaint on appeal. *See Douds*, 472 S.W.3d, at 676–77 (holding that trial court was not placed on notice for potential complaint about constitutionality when argument at trial was limited to statutory requirements, thus appellant failed to preserve error); TEX. R. APP. P. 33.1(a)(1)(A).

We conclude that the trial court correctly found probable cause for Officer Meola's search and that Horton failed to preserve the issue of exigent circumstances for review. We overrule Horton's first issue.

II. Ineffective assistance of counsel

Horton claims that his trial counsel did not understand the applicable law and that his deficient performance constituted ineffective assistance of counsel. Among several factors, Horton relies upon his trial counsel's supposed lack of knowledge of the procedure to preserve error and his failure to rely upon recent Fourth Amendment caselaw.

To show that trial counsel was ineffective, an appellant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and a probability sufficient to undermine confidence in the outcome existed that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Rylander v. State*, 101 S.W.3d 107, 109–10 (Tex. Crim. App. 2003); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984).

A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and the defendant bears the burden to overcome the presumption that, under the circumstances, the challenged action was a result of sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. An accused is not entitled to

perfect representation, and a reviewing court must look to the totality of the representation when gauging trial counsel's performance. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013). The reviewing court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

A claim of ineffective assistance of counsel must be "firmly founded in the record and the record must affirmatively demonstrate the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting *Goodspeed*, 187 S.W.3d at 392). "It is a rare case in which the trial record will by itself be sufficient to demonstrate an ineffective-assistance claim." *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013). The record's limitations often render a direct appeal inadequate to raise a claim of ineffective assistance of counsel, as trial counsel is unable to respond to any articulated concerns. *See Goodspeed*, 187 S.W.3d at 392; *Rylander*, 101 S.W.3d at 111 (noting that "trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective").

Based upon the totality of the record, we cannot conclude that Horton has established that his trial counsel's performance fell below an objective standard of

reasonableness. Counsel may have been aware of *Jordan* and chosen to avoid a more specific, nonmeritorious argument against probable cause. He may have had knowledge of unfavorable facts outside the record regarding exigent circumstances. Without a response from trial counsel, this court cannot do anything but speculate as to the reasons for his actions. Accordingly, we find that Horton has failed to satisfy the first prong of *Strickland* on this direct appeal, and we overrule Horton's second issue. *See Goodspeed*, 187 S.W.3d at 392–93.

Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

Michael Massengale
Justice

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

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