

Reversed and Remand and Memorandum Opinion filed March 2, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00121-CR

CARL EDWARD RUBIT, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1180754**

MEMORANDUM OPINION

Appellant, Carl Edward Rubit, appeals the denial of his motion to suppress. Following the denial of his motion, appellant entered a plea of guilty to one count of possession of cocaine. Pursuant to a plea agreement, appellant was sentenced to two years' confinement in the Texas Department of Criminal Justice, Institutional Division. We reverse the trial court's denial of appellant's motion to suppress and remand for a new trial consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Harris County Deputy Sheriff Gary Worley testified that on August 27, 2008, he

received a call from fellow Deputy B. J. Taylor informing him of the whereabouts of a female named Wanda White. Deputy Taylor had apprehended a male named Joseph Ellis who relayed to Deputy Taylor that White had been involved in robberies at the local truck-stop. Ellis informed Deputy Taylor that White was staying at an apartment complex in the McNair area. Deputy Worley ran White's name through the "NCIC/TCIC"¹ system and discovered there was a warrant out for her arrest because of a parole violation. Deputy Worley also decided to run appellant's name because he knew that White and appellant "ran together." After running appellant's name through the JIMS² system, Deputy Worley learned there was an open J.P. warrant³ for appellant on a ticket Deputy Worley had written him. Before going to White's alleged location, Deputy Worley called the Board of Pardons and Paroles to verify White's warrant and called the Constable's office to verify appellant's warrant. Deputy Worley testified that both were valid.

Deputy Worley, his partner Deputy Garza, and Deputy Taylor, went to the apartment complex where White was allegedly staying. Deputy Worley testified that the apartment complex had been abandoned for years, it had no electricity or water, and that it was "trashed." Deputy Worley said there was no door to the unit where White was staying; there was only a piece of particle board covering the doorway. Deputy Worley testified that he pushed on the board, it fell down, and he walked inside. Once inside, Deputy Worley observed buckets of human waste, disassembled bicycles, car parts, and candles that had been burned all the way down. He also testified that there was no electricity in the unit at this time. Deputy Worley found appellant and White asleep in the bedroom. Deputy Worley observed a crack pipe at appellant's bedside, which field tested positive for cocaine. Deputy Worley also found a piece of plastic cellophane containing a substance, which tested positive for cocaine, in appellant's pants. Deputy Worley testified appellant voluntarily admitted both the crack pipe and the cocaine were his.

¹ The record does not indicate what these acronyms mean.

² The record does not indicate what these acronyms mean.

³ Deputy Worley indicated that a J.P. warrant is a warrant issued on an unpaid misdemeanor ticket.

Deputy Worley arrested appellant; however, the record is unclear as to whether Deputy Worley arrested appellant for possession of cocaine/contraband or the open warrant. During cross-examination, Deputy Worley confirmed that his only legal basis for entering the apartment was the warrant out for White's parole violation and the tip that White would be inside that apartment. Deputy Worley also confirmed that he was not using appellant's J.P. warrant for probable cause to enter the apartment. The State did not enter either of the warrants into evidence at trial.

After Deputy Worley finished testifying, the defense called appellant to the stand. Appellant testified he had been living at the apartment since 2004 and that he uses the front room to work on projects, such as small engines, air conditioners, stoves, and other various appliances. Appellant told the court he has a 13-inch color television that was on when Deputy Worley arrested him. Appellant said that the landlord of the building, Mr. Kevin Lawson, allowed him to stay at the apartment in exchange for odd jobs and work on the property. Appellant testified that White was his common law wife and had been staying with him at the apartment since 2004. Appellant explained that when Deputy Worley came to his apartment to arrest him, the crack pipe was not at his bedside, but was in the closet. Appellant also denied having admitted to owning the crack pipe or cocaine. Appellant testified that he was not shown a warrant on the morning Deputy Worley entered his apartment.

During cross-examination, appellant testified that he had electricity in his apartment. However, he told the court that his name was not on the electricity account. Appellant explained the account was under his ex-girlfriend's name and that he gave her money to pay the bill. Appellant testified there was a door on the apartment with a lock and that Deputy Worley was lying when he said there was not a door.

After the hearing on the motion to suppress the trial court denied appellant's motion and filed findings of fact and conclusions of law. The court found appellant had an expectation of privacy in the apartment because it was his residence, but Deputy Worley entered lawfully pursuant to a subjective belief that there was a valid warrant for White's

arrest and, per an informant, Deputy Worley had reason to believe White would be inside the apartment. Appellant pleaded guilty to possession of cocaine, but retained the right to appeal the motion to suppress.

DISCUSSION

Appellant contends the trial court erred in denying his motion to suppress. Specifically, appellant argues police deputies unlawfully entered his residence thereby tainting any evidence they obtained. The State argues appellant has no standing to bring a motion to suppress because he lacked an expectation of privacy in the residence.

I. Standard of Review

We review the trial court's ruling on a motion to suppress under an abuse of discretion standard. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). If supported by the record, a trial court's ruling on a motion to suppress will not be overturned. *Id.* At a suppression hearing, the trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented. *Brooks v. State*, 76 S.W.3d 426, 430 (Tex. App.—Houston [14th Dist.] 2002, no pet.). We afford almost total deference to the trial court's determination of the historical facts that the record supports, especially when the trial court's findings turn on evaluating a witness's credibility and demeanor. *Paulea v. State*, 278 S.W.3d 861, 863 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). We review de novo the trial court's application of the law to the facts if resolution of those ultimate questions does not turn on the evaluation of credibility and demeanor. *Id.* The reviewing court may not disturb supported findings of fact absent an abuse of discretion. *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999).

II. Analysis

A. Did appellant have an expectation of privacy in the residence?

We must first address the State's contention that appellant has no standing to contest the search of the residence. In its factual findings the trial court found “[t]hat the residence in question served as the Defendant’s residence and that the Defendant had standing to challenge the search.”

An accused has standing to contest a search under the Fourth Amendment only if he had a legitimate expectation of privacy in the place to be searched. *Granados v. State*, 85 S.W.3d 217, 222–23 (Tex. Crim. App. 2002) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). A defendant, who bears the burden of demonstrating a legitimate expectation of privacy, can do so by establishing that he had a subjective expectation of privacy in the place invaded that society is prepared to recognize as reasonable. *Id.* at 223 (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1978)). Several factors are relevant to determining whether a given claim of privacy is objectively reasonable: (1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, prior to the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy. *Id.* This list of factors is not exhaustive, however, and none is dispositive of a particular assertion of privacy; rather, we examine the circumstances surrounding the search in their totality. *Id.*

In this case, Deputy Worley testified the apartment complex had been abandoned for years, had no electricity, and no water. He said the doorway of appellant’s unit had a particle board nailed over it and that the inside was “trashed.” On the other hand, appellant testified he had been living in the apartment on and off since 2004. He testified the landlord allowed him to stay there in exchange for appellant’s doing odd jobs on the property. Appellant told the trial court he paid an electric bill for the property to his ex-girlfriend because her name was on the account. Appellant claimed the apartment had a door with a lock. Appellant testified there was a television playing in the bedroom when Deputy Worley entered. Deputy Worley did not recall seeing an operating television when he entered the property.

The question here is one of credibility. Because the trial court is the sole judge of witness credibility and demeanor in a motion to suppress hearing, we must give deference to his findings. *Paulea*, 278 S.W.3d at 863. The trial court found the apartment was

appellant's residence based on the above testimony. Therefore, taking appellant's testimony as historical fact and applying the above legal factors, we hold the trial court did not abuse its discretion in finding that appellant had an expectation of privacy in the apartment.

B. Did the trial court err in finding the deputies lawfully entered appellant's residence?⁴

Deputy Worley based his entry into appellant's residence on a warrant for Wanda White's arrest. The record is unclear as to whether appellant was arrested pursuant to an open J.P. warrant or pursuant to the "plain view" exception to the warrant requirement. On appeal, appellant contends the warrant for White's arrest was not sufficient to provide the deputies with probable cause to enter his residence. The arrest warrant for White was not entered into evidence at trial. The trial court determined Deputy Worley lawfully entered appellant's apartment because he had a subjective belief that a warrant existed for White's arrest and that Deputy Worley had reliable information White was in appellant's residence.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. Amend. IV. If the State intends to justify a search or arrest on the basis of a warrant, it is incumbent on the State to produce the warrant and its supporting affidavit for inspection by the trial court. *Etheridge v. State*, 903 S.W.2d 1, 19 (Tex. Crim. App. 1994); *Moreno v. State*, 858 S.W.2d 453, 461 (Tex. Crim. App. 1993). This procedure allows the trial court to review the documents and determine whether probable cause exists and whether the accused's rights have been protected. *Etheridge*, 903 S.W.2d at 19;

⁴ The State failed to respond to this issue in its brief.

Garrett v. State, 791 S.W.2d 137, 140 (Tex. Crim. App. 1990). Courts have excused the State from compliance with this production requirement if the State introduces testimony from the magistrate who issued the warrant, the deputy who presented the probable cause affidavit for the warrant, or another witness familiar with the factual basis for the warrant. See *Dorsey v. State*, 964 S.W.2d 701, 704 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Presentation of such other evidence suffices if the accused has the opportunity to cross-examine the witness concerning the validity of the warrant and the trial court has an adequate opportunity to determine whether probable cause existed. *De La O v. State*, 127 S.W.3d 799, 801 (Tex. App.—San Antonio 2003, pet. ref'd).

In *Garrett v. State*, the Court of Criminal Appeals explained the application of this requirement to parolees, who, in some instances, have diminished rights as necessitated by the parole system. *Garrett*, 791 S.W.2d at 140. The *Garrett* Court stated while a supporting affidavit of probable cause may not be required for parolees; a trial court must have a sufficient opportunity to determine whether there was a reason to believe the parolee violated his parole conditions. *Id.* at 140–41. In *Garrett*, the State failed to produce the warrant and supporting affidavit during the suppression hearing. *Id.* at 138. However, the court held the warrant was valid because a parole case worker testified regarding the defendant's failure to comply with a parole condition, providing the trial court the opportunity to determine whether the warrant was supported by reasonable belief. *Id.* at 141.

In the instant case, the arrest warrant for White was not entered into evidence. The only evidence the State provided regarding the warrant was Deputy Worley's testimony that he ran White's "NCIC/TCIC" and "got the hit on the parole violation." Deputy Worley testified he verified White's warrant by calling the Board of Pardons and Parole. On cross-examination, Deputy Worley admitted he did not know (1) why White was on parole, (2) the issuing date of the warrant, or (3) how White had violated the terms of her probation. Because there was no evidence introduced explaining the basis for the warrant, the trial court was not given an opportunity to determine whether a warrant existed and that

White violated her probation. Accordingly, we hold the trial court abused its discretion in finding Deputy Worley lawfully entered appellant's apartment. Consequently, the trial court erred in denying appellant's motion to suppress based on Deputy Worley's unlawful entry into appellant's residence. Accordingly, we sustain appellant's sole issue.

Having determined the trial court erred in denying appellant's motion to suppress, we now consider whether this error is reversible. *See* Tex. R. App. P. 44.2. The error violated appellant's federal constitutional rights. *See Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005). The Court of Criminal Appeals has stated appellate courts are not to speculate as to an appellant's reasons for entering a "guilty" plea or as to whether appellant would have done so if the motion to suppress had been granted. *See McKenna v. State*, 780 S.W.2d 797, 799–800 (Tex. Crim. App. 1989); *Kraft v. State*, 762 S.W.2d 612, 613–15 (Tex. Crim. App. 1988). As long as the evidence that should have been suppressed "would in *any* measure inculcate the accused," this court must presume the trial court's denial of appellant's motion to suppress influenced appellant's decision to plead "guilty" and is reversible error. *See McKenna*, 780 S.W.2d at 799–800; *Kraft*, 762 S.W.2d at 613–15. Because the evidence seized from appellant's residence, namely the cocaine, was inculpatory, we presume the trial court's erroneous denial of appellant's motion to suppress influenced appellant's decision to plead "guilty." Therefore, the error is reversible.

CONCLUSION

Having sustained appellant's sole issue, we reverse and remand for a new trial consistent with this opinion.

/s/ John S. Anderson
 Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

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