**Affirmed and Memorandum Opinion filed March 10, 2016.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-14-00312-CR**

**ALLEN EDWARD LOPEZ, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 185th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1394962**

## M E M O R A N D U M   O P I N I O N

Appellant Allen Edward Lopez pleaded guilty without an agreed recommendation to felony driving while intoxicated (DWI) after unsuccessfully moving to suppress his blood test results. On appeal, he challenges the denial of his motion to suppress. In his first two issues, he asserts that the trial court erred in finding that the affidavit in support of the blood draw warrant was supported by sufficient facts to establish probable cause. In his third issue, he contends that his

trial counsel was ineffective by failing to offer the results of his blood test at the hearing on his motion to suppress. We affirm.

## I. Background

A grand jury indicted appellant with DWI, elevated to a third degree felony by two previous convictions for DWI. Texas Department of Public Safety Corporal Thomas Radford, who arrested appellant for DWI and prepared the affidavit in support of the search warrant, stated as follows in his affidavit after describing his relevant background and experience in the field of alcohol detection:

> In this case, I observed the defendant driving a 2000 Porsche 911 with a license plate number of TX224YBY at approximately 10:00 pm going eastbound on highway 10 and Campbell Road in Harris County Texas. I observed the suspect fail to signal his lane change and failed to maintain a single marked lane.
>
> I came into contact with Defendant and noticed the Defendant was unsteady on his feet, had a strong odor of alcohol emitting from his breath and person, with droopy eyes.
>
> The defendant denied drinking any alcohol.
>
> I asked Defendant to perform some field sobriety tests to determine the Defendant's level of intoxication, including the Horizontal Gaze Nystagmus, Walk and Turn, and the One Leg Stand. I use these tests frequently and find them to be accurate and reliable indicators of intoxication or lack thereof and have arrested many people based on their poor performances on these tests (as well as having released many people based upon their satisfactory performance on these tests).
>
> The defendant refused to perform any field sobriety test.
>
> Based on the totality of circumstances including Defendant's actions and performance prior to the testing, I formed the opinion that Defendant was intoxicated due to the introduction of alcohol into the Defendant's system and had lost the normal use of the Defendant's mental and physical faculties. Therefore, I placed the Defendant under arrest and transported the Defendant to the police station. At the scene, Trooper T. Radford offered Defendant an opportunity to

> provide a sample of the Defendant's breath and blood and Defendant declined to provide a sample.

A magistrate signed a search warrant authorizing seizure of appellant's blood based on Corporal Radford's affidavit.

Appellant filed a motion to suppress, in which he alleged as follows:

> The arrest and search (i.e., blood draw) of defendant was performed without a valid search or arrest warrant based on sufficient reasonable suspicion or probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Texas Constitution, and Article 38.23 and Chapter 14 of the Texas Code of Criminal Procedure.

Appellant later filed an amended motion to suppress, in which he repeated these grounds and urged more specifically that Corporal Radford's affidavit contained false statements made knowingly and intentionally or with reckless disregard for the truth. He attached Radford's affidavit, the search warrant, and Radford's offense report to the motion. Specifically, he challenged the trooper's statements that appellant (1) failed to maintain a single marked lane and (2) was unsteady on his feet because neither of these statements were supported by the video taken by the trooper's in-dash camera. He requested a *Franks*[1] hearing and suppression of his blood test results.

After a jury was selected, but before it had been sworn, the trial court conducted a hearing on appellant's motion. Corporal Radford testified at the hearing. He explained that on the evening of the offense, he was parked on Interstate 10 on the right-hand shoulder in Harris County, watching for traffic violations. He saw a yellow Porsche sports car cross over the white fog line on the interstate and pass by his vehicle; the Porsche changed lanes to the left, and Radford decided to follow the vehicle to observe more driving behavior. Shortly

[1] *See Franks v. Delaware*, 438 U.S. 154, 157 (1978).

after Radford caught up with the Porsche, his in-dash camera activated and started filming the Porsche. The Porsche was weaving within its lane, which can be seen on the video from Corporal Radford's in-dash camera. Appellant, later identified as the driver of the Porsche, changed lanes to the right without signaling—also visible on the video. Radford activated his patrol car's lights and siren. Corporal Radford testified that appellant had an opportunity to safely exit the freeway, but instead pulled over onto the shoulder of the busy roadway. Radford pulled over onto the shoulder behind appellant's car. Radford got out of his patrol car, approached the passenger's side of appellant's car, and introduced himself to appellant, who was the sole occupant of the car. Corporal Radford testified he could tell "right away" that appellant had been drinking based on appellant's "behavior" and "the way he was talking." Radford asked appellant to step out of the vehicle, and appellant complied.

Radford described appellant as "unsteady on his feet" in the affidavit he prepared for the search warrant; he explained that he observed appellant to be unsteady "throughout the whole time" he had contact with him. He described appellant getting out of the car:

> I could see him use the door support and I could see him kind of put his weight on one foot and . . . he kind of leaned over and kind of held it for just a second and in my opinion, if the door wasn't there, he probably would have continued on.

On the video, after appellant got out of his car, Corporal Radford can be heard over the traffic noise saying what sounds like, "Don't topple over," and instructing appellant to stand next to the concrete barricade on the side of the interstate furthest away from the passing traffic. Appellant leaned against the barricade throughout their conversation. Radford also can be heard saying, "When you got out of the car you kind of" stumbled or fumbled.

Radford further stated in his search warrant affidavit that appellant "failed to maintain a single marked lane." He testified at the hearing about the difference between weaving within the lane, which is apparent on the video, and failure to maintain a single marked lane, which is not: "Fail to signal — I mean, fail to maintain a signal [sic] lane would be when the vehicle drives out of its lane onto the lane markings there. Weaving within the lane, they never go outside the lane or drive onto the lane." According to Radford, appellant's failure to maintain a lane arose from his "initial observation" of appellant before the recording of appellant on his in-dash camera began. Radford testified that he did not put appellant's failure to maintain a single marked lane in his offense report because "that wasn't the reason" for the traffic stop;[2] instead, the reason for the stop was appellant's failure to signal his lane change.

After reviewing the video, hearing the testimony from Corporal Radford, and considering the affidavit and warrant, the trial court stated:

> All right. Having watched the vehicle — excuse me — watched the video, I have heard arguments of counsel. Well, No. 16, I feel — this is not there, observing — losing his balance and whatever, so if you take that out, you're still left with — what I'm looking at is that he observed the suspect fail to signal his lane change, failed to maintain a single marked lane, my — I'm not too sure about that. However, the remaining factors, if you read the cases, and I know that you all have, droopy eyes, strong odor of alcohol on breath, all of that, taken with the totality of the circumstances, I'm going to deny your Franks motion. However, I would make a statement that I don't believe there was any false or misleading statement whatsoever with regard to the unsteady on his feet. I just don't see it. So where does that leave us?

In response, appellant's trial counsel stated, "That leaves us with going to trial."

[2] Radford did note in his offense report both "weaving from left to right within [the] lane" and "fail[ure] to signal as the vehicle changed lanes to the right."

After a brief recess, the parties returned before the judge and announced that they had reached an agreement; appellant entered a plea of "guilty" to the offense without an agreed recommendation. The trial court admonished appellant, and after a hearing during which appellant testified, sentenced appellant to six years confinement. The trial court suspended appellant's sentence and placed him on community supervision for six years and imposed a $1,500 fine. This appeal timely followed.

## II. Motion to Suppress

### A. Standard of Review and Applicable Law

We generally review a trial court's decision to grant or deny a motion to suppress using an abuse-of-discretion standard. *Swain v. State*, 181 S.W.3d 359, 365 (Tex. Crim. App. 2005). During the suppression hearing, the trial court is the exclusive trier of fact and judge of the witnesses' credibility. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000); *Mason v. State*, 116 S.W.3d 248, 256 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). An appellate court affords almost total deference to the trial court's determination of historical facts supported by the record. *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). We afford the same amount of deference to a trial court's ruling on mixed questions of law and fact if the resolution turns on evaluating credibility and demeanor. *Id.* at 652; *Guzman*, 955 S.W.2d at 89. We review de novo, however, those mixed questions of law and fact not turning on credibility or demeanor. *Johnson*, 68 S.W.3d at 653 (citing *Guzman*, 955 S.W.2d at 89).

Peace officers may obtain a defendant's blood for a DWI investigation through a search warrant issued by a magistrate. *See* Tex. Code Crim. Proc. art. 18.01(a), (j); *Beeman v. State*, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002). A

search warrant may not legally issue unless it is based on probable cause. U.S. Const. amend. IV; Tex. Const. art. I, § 9; Tex. Code Crim. Proc. art. 1.06. "Both appellate courts and trial courts alike must give great deference to a magistrate's implicit finding of probable cause." *State v. McLain*, 337 S.W.3d 268, 271–72 (Tex. Crim. App. 2011). The issuing magistrate's determination of probable cause will be sustained if the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing. *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

When reviewing a magistrate's determination, we "'should interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences. When in doubt, we defer to all reasonable inferences that the magistrate could have made.'" *McLain*, 337 S.W.3d at 271 (quoting *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007)). A "grudging or negative attitude" by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant. *Gates*, 462 U.S. at 236. Whether the facts alleged in a probable-cause affidavit sufficiently support a search warrant is determined by examining the totality of the circumstances. *Id.* at 230–31. A search warrant is supported by probable cause when the facts set out within the "four corners" of the affidavit 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).

However, when a defendant challenges a search warrant affidavit on the ground that it contains falsehoods, a reviewing court is not limited to what appears on its face. *See Cates v. State*, 120 S.W.3d 352, 355 (Tex. Crim. App. 2003) (citing *Franks*, 438 U.S. at 154). Limiting a falsity challenge to an affidavit as

written would negate the underlying challenge and raise serious due process concerns. *See id.* at 355 n.3. In conducting a *Franks* suppression hearing review, we use the same bifurcated standard as we do in reviewing a trial court's ruling on a traditional motion to suppress, described above. *See Emack v. State*, 354 S.W.3d 828, 838 (Tex. App.—Austin 2011, no pet.); *Jones v. State*, 338 S.W.3d 725, 739 (Tex. App.—Houston [1st Dist.] 2011), *aff'd on other grounds*, 364 S.W.3d 854 (Tex. Crim. App.). That is, we give almost total deference to the trial court's rulings on questions of historical fact and application of law-to-fact questions that turn on an evaluation of credibility and demeanor, but we review de novo application of law-to-fact questions that do not turn on credibility or demeanor. *See Emack*, 354 S.W.3d at 838; *Arnold v. State*, 47 S.W.3d 757, 759 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Further, an affidavit supporting a search warrant begins with the presumption of validity. *Franks*, 438 U.S. at 171; *Cates*, 120 S.W.3d at 355. The defendant bears the burden of rebutting that presumption by proving by a preponderance of the evidence that the affiant made false statements deliberately or with reckless disregard for the truth. *Franks*, 438 U.S. at 156, 171; *see also Arnold*, 47 S.W.3d at 760.

With this framework in mind, we turn to appellant's first two issues: whether the trial court abused its discretion (1) in determining that the affidavit as written contained sufficient facts to establish probable cause for the search warrant, and (2) in failing to disregard the "false statements" not shown on the video that appellant failed to maintain a single lane, was unsteady on his feet, and smelled strongly of alcohol and determining that the affidavit contained sufficient facts to establish probable cause.

**B. Analysis**

First, we consider whether the trial court abused its discretion in denying appellant's motion to suppress based on its implicit determination that the affidavit, as written, contained sufficient facts to establish probable cause for the search warrant. As detailed above, the affidavit reflects the following facts: (1) appellant failed to signal a lane change; (2) appellant failed to maintain a single marked lane; (3) appellant was unsteady on his feet; (4) appellant had a strong odor of alcohol on both his breath and body; (5) appellant had "droopy" eyes; (6) appellant denied drinking any alcohol; (7) appellant refused to perform any field sobriety tests when requested that he do so; and (8) appellant refused to provide the requested breath or blood samples. Based on the totality of these facts and the reasonable inferences derived from them, the magistrate was justified in concluding that there was a fair probability that appellant was driving while intoxicated when Radford stopped him and that evidence of that offense would be found through a sample of appellant's blood. *See, e.g.*, *Hogan v. State*, 329 S.W.3d 90, 94–96 (Tex. App.—Fort Worth 2010, no pet.) (affidavit was sufficient to establish probable cause where it described defendant as smelling strongly of alcohol, having bloodshot, watery, and heavy eyes, unsteady balance, and staggered walk); *Foley v. State*, 327 S.W.3d 907, 912 (Tex. App.—Corpus Christi 2010, no pet.) (affidavit was sufficient to establish probable cause where it reported the suspect smelled strongly of alcohol, had red and glassy eyes, slurred speech, poor balance, and refused to provide a breath or blood sample); *Maxwell v. State*, 253 S.W.3d 309, 314 (Tex. App.—Fort Worth 2008, pet. ref'd) (citing refusal to perform field sobriety tests as a factor that can support probable cause to arrest suspect for DWI).

Appellant cites *Farhat v. State* in support of his contention that Corporal Radford's affidavit does not contain sufficient facts to establish probable cause. 337 S.W.3d 302, 306–08 (Tex. App.—Fort Worth 2011, pet. ref'd) (reversing trial court's determination of probable cause based on insufficient facts in affidavit). But significantly fewer facts describing the officer's personal observations of the appellant in *Farhat* are contained in that affidavit than are present here. The officer stated in his affidavit that (1) Farhat was driving 10 mph below the speed limit at around 12:50 a.m.; (2) Farhat was weaving from side to side; (3) Farhat continued in the left lane for about a half mile; (4) the officer, after stopping Farhat, saw two pill bottles in the center console of Farhat's vehicle; (6) Farhat refused field sobriety testing; and (7) the officer believed Farhat had committed the offense of DWI. *Id.* at 306–07. Appellant asserts that "[t]he presence of an odor of alcohol on Appellant is akin to the presence of a pill bottle in Farhat's car in that, in both cases, there was no evidence that Appellant or Farhat consumed the intoxicant as suspected by the officers." We disagree.

Had Corporal Radford stated only that he observed a bottle of alcohol in appellant's vehicle, rather than that Radford smelled a strong odor of alcohol on appellant's breath and body, appellant's analogy might hold. But numerous courts, including the Court of Criminal Appeals and this court, have held that evidence of intoxication includes the odor of alcohol on one's breath or body. *See, e.g.*, *Cotton v. State*, 686 S.W.3d 140, 142 n.3 (Tex. Crim. App. 1985) (evidence of intoxication may include odor of alcohol on breath or body, bloodshot eyes, slurred speech, unsteady balance, and a staggered gait); *Campos v. State*, 623 S.W.2d 657, 660 (Tex. Crim. App. 1981) (smell of beer on defendant and defendant's "thick-tongued" speech and unsteadiness on his feet were evidence of intoxication); *State v. Dugas*, 296 S.W.3d 112, 117 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd)

(probable cause established by affidavit that described defendant as having moderate smell of alcohol, slurred speech, being unsteady on his feet, admitting to consuming alcohol, showing signs of intoxication in field sobriety testing, and having refused to provide breath or blood tests). In short, unlike the affidavit in *Farhat*, which contained no specifically described "personal observations" of Farhat to support the officer's statement that he believed that Farhat was driving while intoxicated, here, Corporal Radford included several personal observations of appellant—strong smell of alcohol on his breath and body, unsteadiness on his feet, "droopy" eyes, refusal to perform field sobriety tests or provide a breath or blood sample—that support his reasonable belief that appellant was driving while intoxicated. *Farhat* is thus readily distinguishable from the case at bar.

Under these circumstances, we conclude that the search warrant was based on probable cause and did not violate the state or federal constitutions or state law. Because the trial court did not abuse its discretion in denying the motion to suppress based on the affidavit as written, we overrule appellant's first issue.

Next, we consider whether the trial court erred in failing to disregard the "false statements" in Corporal Radford's affidavit not shown in the scene video—i.e., that appellant failed to maintain a single lane, was unsteady on his feet, and smelled strongly of alcohol. First, as to appellant's allegation that Radford falsely stated that appellant smelled strongly of alcohol in the affidavit, appellant did not raise this issue in his *Franks* motion, nor did he question Radford about this statement during the hearing. Thus, appellant neither preserved this issue for our review, *see* Tex. R. App. P. 33.1(a), nor rebutted the presumption of validity as to this statement in the affidavit. *See Franks*, 438 U.S. at 171; *Cates*, 120 S.W.3d at 355. Therefore, this statement is presumptively valid.

Regarding Radford's allegedly false statement that appellant failed to maintain a single lane, appellant asserted in his amended motion to suppress as follows:

> The video of defendant's driving shows him moving and staying within his line while driving. Trooper Radford's offense report confirms the video and notes that the defendant weaved within his lane. Yet when Trooper Radford made out his affidavit in support of his probable cause for a search warrant, he stated, the defendant "*failed to maintain a single marked lane.*" The implication is the defendant was not staying in his lane as noted on the video and the offense report. A defendant's driving is a substantial and necessary factor in a magistrate's determination of whether or not probable cause exists to issue a search warrant.

On appeal, however, appellant's only argument is that Corporal Radford did not testify that appellant's driving was unsafe, which he asserts is a prerequisite to state an offense under the Texas Transportation Code.[3] Because appellant's argument on appeal was not raised before the trial court, he has failed to preserve this complaint for our review.[4] *See* Tex. R. App. P. 33.1(a); *Resendez v. State*, 306 S.W.3d 308, 315–18 (Tex. Crim. App. 2009).

Finally, regarding Corporal Radford's statement that appellant was "unsteady on his feet," the only evidence that appellant claims establishes the falsity of Radford's affidavit and testimony is the video of the stop. Although

[3] *See Fowler v. State*, 266 S.W.3d 498, 502–03 (Tex. App.—Fort Worth 2008, pet. ref'd) (explaining that to establish an offense under the Transportation Code for failure to maintain a single lane, there must be evidence that moving out of the marked lane was unsafe).

[4] Moreover, were we to consider appellant's claim that Corporal Radford's statement in his affidavit that appellant "failed to maintain a single lane" was false, we would conclude that appellant failed to carry his burden at the *Franks* hearing for the following reasons. Although the video from Radford's patrol unit did not capture appellant's failure to maintain a single marked lane, Radford testified at the hearing that he saw appellant cross over a marked lane *before* his camera was engaged. Appellant presented no contrary evidence; thus he did not establish that Corporal Radford's statement was made falsely or with reckless disregard for its truth. *See Arnold*, 47 S.W.3d at 758; *see also Emack*, 354 S.W.3d at 837–39.

appellant's unsteadiness may not be readily apparent on the video, such subtleties as swaying or slight staggering are not always amenable to being captured by a video camera installed in an officer's patrol vehicle parked several feet away, especially when the stop occurs when it is dark outside, as here.[5] *See Tucker v. State*, 369 S.W.3d 179, 187 n.1 (Tex. Crim. App. 2012) (Alcala, J., concurring) (noting that videotape evidence will rarely be "indisputable" and the evidentiary value of video evidence often depends on other factors because the "clarity of the video is often dependent on the lighting, angle or focus of the camera, or the camera's distance from the object recorded").

Further, even assuming that the video evidence did not corroborate Radford's affidavit and testimony, neither did it *disprove* his affidavit or testimony or expose a deliberate falsehood or reckless disregard for the truth. Without more evidence, appellant failed to rebut the affidavit's presumption of validity by a preponderance of the evidence showing that Corporal Radford made false statements deliberately or with a reckless disregard for the truth. *Franks*, 438 U.S. at 156; *Cates*, 120 S.W.3d at 355; *Arnold*, 47 S.W.3d at 758. And we must respect the trial court's explicit finding that Radford was credible at the hearing. *See Arnold*, 47 S.W.3d at 759 ("[T]he trial court, as the sole factfinder and judge of the witnesses' credibility and weight of the evidence, is owed great deference . . . .").

In short, appellant failed to establish that any of the challenged statements were false or made with reckless disregard for the truth. Thus, the trial court did not err by failing to disregard them. We have already determined that the trial court did not abuse its discretion in determining that the affidavit contained

[5] Indeed, the trial court seemed to recognize this issue by stating, after remarking that it did not believe that Corporal Radford had made any false or misleading statements about appellant's unsteadiness, "I just don't *see* it." (Emphasis added).

sufficient facts to establish probable cause for the search warrant. Thus, for the foregoing reasons, appellant's second issue lacks merit, and we overrule it.

## III. Ineffective Assistance of Counsel

In issue three, appellant contends his counsel was ineffective for failing to preserve error on his motion to suppress by not offering the blood test results into evidence at the hearing on his motion to suppress. To prevail on an ineffective assistance claim, an appellant must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) counsel's deficiency caused the appellant prejudice—there is a probability sufficient to undermine confidence in the outcome that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010). Here, appellant can only prevail on his ineffectiveness claim if, in fact, his trial counsel's failure to offer the blood test results into evidence resulted in forfeiture of his right to appeal the ruling on his motion to suppress. It did not, as we explain below.

"[A] defendant is not required to have the evidence he sought to suppress admitted in order for the court of appeals to address the merits of an appeal challenging denial of a pretrial motion to suppress." *Gonzales v. State*, 966 S.W.2d 521, 524 (Tex. Crim. App. 1998). As long as a court of appeals can determine the "fruits" the appellant sought to have suppressed and these fruits have "somehow been used" by the State, then the court must review the merits of the appellant's claim. *See id.*; *see also Badgett v. State*, 79 S.W.3d 581, 584 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Appellant explicitly sought to suppress the blood test results and attached the search warrant and affidavit authorizing the blood draw to his motion. Thus, it is clear from our record that

"the fruits" appellant sought to suppress were his blood test results. Further, the State contested appellant's motion to suppress and the motion was denied by the trial court. Thus, the State "preserved its option to 'use' his blood alcohol test results as evidence in the event of a trial," which we presume the State employed as leverage in obtaining appellant's guilty plea. *See Badgett*, 79 S.W.3d at 585 (citing *Gonzales*, 966 S.W.2d at 523).

In sum, because appellant did not need to have his blood test results admitted for this court to address the merits of his appeal from the denial of his motion to suppress, even if his trial counsel's failure to offer these results into evidence was deficient performance, appellant was not prejudiced by this alleged deficiency. *See Perez*, 310 S.W.3d at 893 ("[F]ailure to show either deficient performance or prejudice will defeat an ineffectiveness claim."). We overrule his third and final issue.

## IV. Conclusion

Having overruled each of appellant's three issues, we affirm the judgment of the trial court.

/s/ Sharon McCally
Justice

Panel consists of Justices Jamison, McCally, and Wise.
Do Not Publish — Tex. R. App. P. 47.2(b).