Affirmed and Plurality, Concurring, and Dissenting Opinions filed August 10, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01005-CR
NO. 14-15-01006-CR

NATHAN RAY FOREMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause Nos. 1374837 & 1374838

P L U R A L I T Y O P I N I O N

In one issue, appellant Nathan Ray Foreman challenges the denial of his motions to suppress surveillance video evidence found on a computer hard drive.[1] A

[1] Appellant filed a motion to suppress evidence obtained from three hard drives seized from his business. Before trial, a visiting judge granted appellant's pretrial motion to suppress evidence found on two of the hard drives because they were not part of the surveillance system. Appellant then filed a motion for rehearing seeking again to suppress the evidence on the third hard drive, which was heard and denied by the sitting trial judge. Appellant reurged the motion during trial

jury found appellant guilty of aggravated robbery and aggravated kidnapping, and the trial court assessed 50 year sentences to run concurrently.

The offenses occurred in part in a custom auto shop. A video surveillance system captured a portion of the offenses on video. At trial, the trial judge admitted the surveillance video, which was obtained from a computer tower seized from the shop. Appellant argues that the police officer's affidavit in support of the issuance of the search warrant "failed to set forth facts sufficient to establish probable cause that surveillance video or surveillance equipment would be located at the place to be searched" in violation of the Fourth Amendment of the United States Constitution, article I, section 9 of the Texas Constitution, and chapter 18 of the Texas Code of Criminal Procedure.

The cornerstone of the Fourth Amendment and article I, section 9 is that a magistrate shall not issue a search warrant without first finding "probable cause" that particular evidence of a particular crime will be found in a particular location. *Rodriguez v. State*, 232 S.W.3d 55, 60 & n.15 (Tex. Crim. App. 2007) (citing U.S. Const. amend. IV and Tex. Const. art. I, § 9); *see also Bonds v. State*, 403 S.W.3d 867, 872-73 (Tex. Crim. App. 2013). The Code of Criminal Procedure allows the issuance of a search warrant to seize property or items that constitute evidence of an offense. *State v. Dugas*, 296 S.W.3d 112, 115-16 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing Tex. Code Crim. Proc. art. 18.02(a)(10)). Before a search warrant may issue, a sworn affidavit must be filed setting forth sufficient facts to show 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 or evidence that a particular person committed that offense;

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before a third trial judge. She noted that the matter already had been heard by two judges and admitted the surveillance video over appellant's objections.

and (3) the property or items constituting such evidence are located at or on the particular person, place, or thing to be searched. *Id*. (citing Tex. Code Crim. Proc. art. 18.01(c)).

Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at a specified location. *Bonds*, 403 S.W.3d at 873; *Rodriguez*, 232 S.W.3d at 60. This standard is "flexible and nondemanding." *Bonds*, 403 S.W.3d at 873; *Rodriguez*, 232 S.W.3d at 60. Because of the flexibility in this standard, neither federal nor Texas law defines *precisely* what degree of probability suffices to establish probable cause, but that probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez*, 232 S.W.3d at 61.

An affiant must present an affidavit that allows the magistrate to determine probable cause independently: the magistrate's actions cannot be a mere ratification of the bare conclusions of others. *Id*. However, when reviewing a magistrate's decision to issue a warrant, trial and appellate courts apply a highly deferential standard in keeping with the constitutional preference for a warrant.[2] *Id*. Thus, when reviewing an issuing magistrate's determination, we interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences. *Id*. We defer to all reasonable inferences that the magistrate could have made. *Id*.

The issue is not whether there are other facts that could have, or even should have, been included in the affidavit: we focus on the combined logical force of facts that are in the affidavit, not those that are omitted from the affidavit. *Rodriguez*, 232

[2] We typically review a trial judge's motion to suppress ruling under a bifurcated standard, but when reviewing a magistrate's decision to issue a warrant, both appellate courts and trial courts instead apply this standard of review. *Walker v. State*, 494 S.W.3d 905, 907 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

S.W.3d at 62. Concomitantly, our review is restricted solely to the four corners of the affidavit. *Bonds*, 403 S.W.3d at 873; *Walker v. State*, 494 S.W.3d 905, 907 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). We are not to invalidate a warrant by interpreting the affidavit in a hyper-technical rather than a commonsense manner. *Bonds*, 403 S.W.3d at 873; *Walker*, 494 S.W.3d at 907.

With these general principles in mind, we turn to the affidavit in this case. Applying a commonsense reading, we conclude that the affidavit contained sufficient facts from which the trial court could find probable cause based on a fair probability that surveillance equipment would be found at the auto shop containing evidence of the offenses.

The affiant stated that he "ha[d] reason to believe and [did] believe" that evidence of the offenses would be found at the auto shop, including, among other things, audio/video surveillance equipment.[3] The affidavit described a number of facts about the auto shop. The windows and front door of the business were dark tinted glass, and the back of the business had an aluminum bay door opening into the business. The affidavit also describes a number of facts regarding the specific offenses. Two men had agreed to meet someone named "Jerry" at the specifically-described custom auto shop, Dreams Auto Customs, to conduct business. When the two men arrived, several suspects grabbed them, tied them up, beat them, poured gasoline on them, and threatened to set them on fire. The suspects stole cash and other items from the men. The suspects then forced the men into the back of a van at gunpoint, only then leaving the auto shop. The men jumped out of the moving van

[3] Appellant argues that this statement, standing alone, is conclusory and does not support an inference that the auto shop would have surveillance equipment. We, however, review the affidavit in its entirety, deferring to all reasonable inferences, to determine whether probable cause existed. *See Bonds*, 403 S.W.3d at 873 (noting probable cause is reviewed "under the totality of the circumstances"); *see also Rodriguez*, 232 S.W.3d at 60 (same).

because they believed they were going to be killed. As the men jumped, they were shot by the suspects.

A witness reported she observed the men lying injured on the side of a road with their hands tied and mouths duct-taped. They had suffered multiple gunshot wounds. Another witness had seen the men exiting a van while it was moving down the road.

One of the injured men directed the affiant to the auto shop, which he determined was owned by appellant's wife. The affiant showed appellant's photograph to the man, who identified appellant as a suspect who punched the men, ordered other suspects around, poured gasoline on the men, and told other suspects to take the men away in the van.

Based upon this information, the affiant believed that DNA from the men and the suspects, as well as property belonging to the men and "instrumentalities of the crime such as the white van . . . , guns . . . , [and] zip ties" used to tie the men, would be found inside the auto shop. The affiant also believed surveillance equipment "may be found" there. The affidavit established a sufficient nexus between criminal activity, the things to be seized, and the place to be searched. *Bonds*, 403 S.W.3d at 873. From the face of the affidavit, it is a reasonable inference that surveillance equipment found in the auto shop, if any, would have recorded evidence of the criminal activity. *See Rodriguez*, 232 S.W.3d at 62. However, appellant argues that it is not a reasonable inference that surveillance video or surveillance equipment would be inside the shop.[4] The State argues, to the contrary, that there is a reasonable probability that "more or less every business" would have surveillance equipment

[4] Appellant complains that the affiant does not mention seeing cameras at the shop. The State counters that such specificity is not required and notes that the affidavit does not mention whether anyone left DNA or other items at the shop.

and thus the magistrate fairly could infer that surveillance equipment would be located on the premises.

We do not ask whether or not surveillance equipment was actually seen by the affiant. The proper inquiry is whether there are sufficient facts, coupled with inferences from those facts, to establish a fair probability or substantial chance that surveillance equipment containing evidence of the offenses would be found inside the auto shop. *See Bonds*, 403 S.W.3d at 873; *Rodriguez*, 232 S.W.3d at 62. We conclude that the facts in the affidavit and reasonable inferences drawn therefrom support a finding of a fair probability that surveillance equipment containing evidence of the offenses would be inside the auto shop.

A fair probability rests in the allegation that the offenses occurred in a building where the windows were blacked-out and a bay door opened directly into the premises and where valuable property (vehicles) belonging to customers, along with other expensive custom auto equipment, presumably was housed. Even the name of the business, "Dreams Auto Customs," supports the inference that expensive custom equipment would be there. From these facts, a magistrate reasonably could have inferred that a business owner interested in obscuring the view into his windows and providing secure access to the building within which such property is housed also would have a security system in place, including surveillance equipment, and such surveillance equipment probably recorded evidence of the criminal activity occurring there.[5] *See, e.g.*, *Walker*, 494 S.W.3d at 909 (holding magistrate reasonably could have inferred that evidence probably would be on the defendant's cell phone when the defendant had been communicating with the complainant and planning robberies around the time the complainant was robbed and killed); *Eubanks*

[5] Appellant further argued at trial that the State failed to secure a second warrant before searching the contents of the surveillance tapes. Appellant does not make that argument on appeal.

v. State, 326 S.W.3d 231, 248 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (holding magistrate reasonably could have inferred that defendant had pornographic photographs stored on a computer when he allegedly made the complainants pose for nude or partially nude photographs, even though the complainants did not mention the use of a digital camera or a computer).

The dissent agrees that the only element of article 18.02(c) at issue here is whether the affidavit sets forth sufficient facts to establish probable cause that the property is located at the place to be searched. *See* Tex. Code Crim. Proc. art. 18.01(c)(3). The dissent says that "[t]he affidavit did not mention any facts to support the conclusion that a video surveillance system existed at the body shop." Dissent at 2. This is simply incorrect. The affidavit includes multiple facts supporting that conclusion. *Supra* at 4-6. The dissent fails to credit all of the facts in the affidavit and cherry-picks only the fact that the offense occurred in a business to conclude that our holding would be applicable to any business. But our holding is not based solely on that one fact: it is based on all the relevant specific facts in the affidavit discussed above. We focus on the *combined* logical force of facts that are in the affidavit to determine whether the magistrate's inference was reasonable. *See Rodriguez*, 232 S.W.3d at 62.

The "computer/camera" and cellphone cases on which the dissent relies are distinguishable because they all address the second element of article 18.02(c), whether "the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense," not the third element involving whether evidence is located at the place to be searched: only the latter is at issue here.[6] *See* Tex. Code Crim. Proc.

[6] Neither appellant nor the dissent contests that the facts in this affidavit establish probable cause of the second element of article 18.02(c): the property constitutes evidence of a crime, which

art. 18.01(c)(2).

Considering the facts contained in the four corners of the affidavit and the reasonable inferences therefrom under the totality of the circumstances, we conclude that the facts submitted to the magistrate demonstrated a fair probability that surveillance equipment revealing evidence of the offenses would be inside the auto shop when the warrant was issued. *See Eubanks*, 326 S.W.3d at 249. Accordingly, the trial judges did not err in denying appellant's motions to suppress. We overrule appellant's sole issue on appeal.

We affirm the judgment of the trial court.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Christopher, Jamison, and Donovan (Christopher, dissenting) (Donovan, concurring).
Publish — TEX. R. APP. P. 47.2(b).

is a significant factor in this case. *See* Tex. Code Crim. Proc. art. 18.01(c)(2).