Affirmed and Majority and Dissenting Opinions filed June 6, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01048-CR

LANCE MITCHELL LUCKENBACH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause No. 1935781

D I S S E N T I N G O P I N I O N

The majority holds that the affidavit establishes probable cause for a search warrant to draw blood from appellant. I disagree with this conclusion. I would reverse the trial court's ruling. Accordingly, I dissent.

The affidavit at issue fails even when interpreted in a non-hyper-technical, common-sense fashion and drawing reasonable inferences from the facts contained within the affidavit's four corners. The affidavit reads:

I have reason to believe that on or about November 1, 2013 at 12:08 AM, in Harris County, Texas, the Defendant did then and there unlawfully operate a motor vehicle in a public place while intoxicated. My belief is based on the following:
In this case, [o]n or about November 1, 2013 at approximately 12:08 AM Officer K.V. Mitchell, a peace officer employed by the Houston Police Department, observed a 2009 Black Audi A5, a motor vehicle, license plate BNK-[####], in the 1700 block of Gray Street a public place in Harris County, Texas, driving the wrong way eastbound on a oneway street that goes westbound only. Officer Mitchell a reliable and credible witness then initiated a traffic stop by "activating his emegency [sic] equipment in his marked police car and the defendant's vehicle stopped in the 2100 block of Hamilton a public roadway in Houston, Harris County, Tx. Officer Mitchell made contact with the defendant and he observed him with a strong odor of an alcoholic beverage on and about his breath. Officer Mitchell then asked for a DWI Task force unit and I came by the scene to assist with the investigation.

I came into contact with Defendant and noticed glassey [sic] eyes and a strong odor of an alcohol beverage on and about the Defendant's breath and person.

I asked Defendant to perform some field sobriety tests to determine the Defendant's level of intoxication, including the HGN, OLS, and WAT. 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 do all field sobriety test [sic] at the scene.

At the scene, I offered the Defendant an opportunity to provide a sample of the Defendant's breath and Defendant declined to provide a sample. This is a violation of the Texas Implied Consent law and is also an indication to me that Defendant is attempting to hide evidence of the Defendant's level of intoxication.

Based on the totality of the 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. I am aware that blood can be drawn and used to scientifically determine a person's level of intoxication and I have therefore done so on many occasions. I am aware through my training and my experience that blood can be drawn through minimally invasive and medically accepted techniques. It is my belief that based upon all my observations, that a chemical sample will provide evidence of this Defendant's state of intoxication as well as evidence of the type of substance that has been consumed.
>
> It is my belief that based upon all my observations, that a chemical sample will provide evidence of this defendant's state of intoxication as well as evidence of the type of substance that has been consumed.

We are tasked with determining whether the affidavit for the search warrant sets forth probable cause. We normally review a trial court's decision on a motion to suppress under a bifurcated standard, giving almost total deference to the trial court's findings of historical facts but reviewing *de novo* its application of the law to the facts. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). However, when the trial court is determining probable cause to support issuance of a search warrant, there are no credibility determinations; rather, the trial court is constrained to the four corners of the affidavit. *Id.* Accordingly, when reviewing the magistrate's decision to issue a warrant, we apply a highly deferential standard because of the constitutional preference for searches to be conducted pursuant to a warrant. *Id.* As long as the magistrate had a substantial basis for concluding probable cause existed, we will uphold the magistrate's decision. *Id.* We may not analyze the affidavit in a "hyper-technical manner" and instead should interpret it in "a commonsensical and realistic manner," deferring to all reasonable inferences that the magistrate could have made. *Id.* (quoting *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007). "Probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found at the specified location." *Id.* at

272. This analytical framework is straightforward. It is not a blank check.

A search warrant is generally required to draw blood from a suspect. *Missouri v. McNeely*, 569 U.S. 1552, 1558 (2013). Under article 18.02(a)(10) of the Texas Code of Criminal Procedure, a search warrant may be issued to search for and seize property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense. Tex. Code Crim. Proc. Ann. art. 18.02(a)(10) (West 2015). A search warrant may not be issued under article 18.02(a)(10) unless the sworn affidavit required by article 18.01(b) sets forth sufficient facts to establish probable cause (1) that a specific offense has been committed, (2) that the specifically described property or items to be searched for or seized constitutes evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. *Id.* art. 18.01(c) (West 2015). A warrant issued under this provision is often called an "evidentiary warrant." *Porath v. State*, 148 S.W.3d 402, 408 (Tex. App—Houston [14th Dist.] 2004, no pet.). The forgoing provision applies to search warrants to draw blood from a suspect. *Clay v. State*, 391 S.W.3d 94, 97 (Tex. Crim. App. 2013).

Essential in an affidavit for an evidentiary search warrant are facts to establish that a particular person committed an offense. *Carmen v. State*, 358 S.W.3d 285, 297 (Tex. App—Houston [1st Dist.] 2011, no pet.). The offense for which evidence was sought in this case was Driving While Intoxicated. A person commits this offense if the person is intoxicated while operating a motor vehicle in a public place. Tex. Penal Code Ann. § 49.04(a) (West 2015). Simply put, the affidavit must set forth probable cause that appellant operated a motor vehicle in a

public place while intoxicated. Operate is not defined in the Texas Penal Code, and is therefore given its common meaning. *See Denton v. State*, 911 S.W.2d 388, 389 (Tex. Crim. App. 1995) (approving of lower court's reliance on the common meaning of the statutorily undefined term "operate" in assessing the sufficiency of the evidence).

In the second paragraph of the probable cause affidavit, Ciers states what Officer K. V. Mitchell observed appellant do. Nowhere in the affidavit does Ciers state that *Mitchell* observed appellant operating a vehicle. Operating a vehicle is an element of the offense for which Ciers sought to obtain evidence. The affidavit is devoid of that element. In fact, there is *no direct mention* in the affidavit that appellant was in the vehicle, much less operating it. Yet, the majority holds that the magistrate must have inferred that Mitchell observed appellant driving a car. This is more than an inference. It is speculation.

Next, the probable cause affidavit details what Ciers personally observed. Nowhere in the affidavit does Ciers state that he came to know that appellant was operating a vehicle on the night in question. Further, the affidavit in no way details how Ciers came to know what Mitchell observed. No doubt the majority believes the magistrate inferred that Mitchell told Ciers what Mitchell observed in addition to inferring appellant was in the vehicle and operating it. While it may be reasonable to infer that Mitchell told Ciers what Mitchell observed, again, since there is no mention of appellant operating a vehicle, it is not reasonable, based on this affidavit, to infer that Mitchell told Ciers that appellant was operating a vehicle.

The majority cites *Hogan v. State*, 329 S.W.3d 90 (Tex. App—Fort Worth 2010, no pet.), to support the inference that appellant was driving the vehicle. *Hogan* is distinguishable. The affidavit in *Hogan* indicates that the affiant was

present when Hogan was stopped. Further, the affidavit details what the affiant observed when the stop took place. The affidavit in this case does not indicate that Ciers ever saw the car being driven by anyone. Nor does the affidavit in this case state that anyone told Ciers that appellant drove the vehicle. The court in *Hogan* remarked that the affidavit could have been clearer. *Id.* at 95. That would be an understatement in this case.

The majority alternatively holds the complaint that appellant was not driving was not preserved. The cases cited for this proposition do not deal with written motions to suppress evidence from a search based on a defective search warrant affidavit and are distinguishable. *See Swain v. State*, 181 S.W.3d 359, 365 (Tex. Crim. App. 2005) (holding as unpreserved the general complaint that statements obtained in violation of right to counsel should have been suppressed); *Rothstein v. State*, 267 S.W.3d 366, 373 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (holding as unpreserved the "generic" complaint that evidence obtained pursuant to illegal search should have been suppressed). Additionally, the Motion to Suppress states "the affidavit failed to provide the magistrate with all requisite probable cause to believe that Mr. Luckenbach had committed the offense of DWI." Appellant specifically pointed out that Ciers's affidavit was lacking "all requisite probable cause." Certainly, a vital aspect of probable cause for the commission of the offense of DWI is whether the particular individual to be subjected to the blood draw search had been operating the vehicle. Therefore, even applying the cases cited by the majority, I would find that appellant preserved the issue.

Applying the deferential standard, as we are bound to do, this affidavit fails. Article 18.02(a) requires evidence that a particular person committed an offense. That requirement has not been met. Failing to comply with the statutory requirements of article 18.02(a) is not a hyper-technical error. Reading this

affidavit in a commonsensical manner reveals a total absence of an essential element of an offense for which evidence is sought. The speculative inferences the majority makes in this matter ignore statutory requirements and take our jurisprudence further away from the requirement of probable cause so clearly established in the Fourth Amendment of the United States Constitution and Article I, Section 9, of the Texas Constitution. As reviewing courts, we must ask ourselves at what point do these "reasonable inferences" become a rubber stamp and abolish the necessity of probable cause entirely? This is especially true if we infer compliance with statutory requirements. The ever-growing catalog of "reasonable inferences" found in our jurisprudence continues to diminish the requirement of probable cause. Indeed, perhaps someday we will find that a magistrate could infer everything needed to establish probable cause in search warrant affidavits. If we continue to dilute the requirements of the Fourth Amendment, then we risk what would essentially be a return to the use of writs of assistance.[1] The Fourth Amendment requires more than *possible* cause, which is what the affidavit in this case has at best.

I respectfully dissent.

/s/ Marc W. Brown
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Brown. (Frost, C.J., majority).
Publish — Tex. R. App. P. 47.2(b).

[1] Writs of assistance allowed customs officers in the early colonies to rummage through homes and warehouses, without any showing of probable cause linked to a particular place or item sought. *See generally United States v. Wurie*, 728 F.3d 1, 3 (1st Cir. 2013), *aff'd sub nom., Riley v. California*, 134 S. Ct. 2473 (2014).