Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00692-CR

Gabriel **RAMOS**,
Appellant
v.
The **STATE** of Texas,
Appellee

From the 175th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CR1778
Honorable Catherine Torres-Stahl, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: November 4, 2020

AFFIRMED

After the trial court denied his motion to suppress, Gabriel Ramos pled nolo contendere to the criminal offense of failure to stop and render aid resulting in death. *See* TEX. TRANSP. CODE ANN. § 550.021. The trial court sentenced Ramos to ten years in prison in addition to a $2,000 fine. On appeal, Ramos asserts the trial court erred by denying his motion to suppress. We overrule Ramos's sole issue and affirm the trial court's judgment.

BACKGROUND

On February 22, 2015, a traffic accident occurred that left one driver dead. The other driver abandoned a black and white Chevrolet Tahoe and fled the scene before police arrived. Inside the

Tahoe, police found a promissory note and a pay stub, both of which listed the name Gabriel Ramos and his address. Later that day, Detective Steven Castillo of the San Antonio Police Department went along with another detective to the address listed on the paperwork. There, they met and spoke with Vanessa Burns.

Detective Castillo recorded the entirety of his conversation with Burns with an audio recorder. In the recording, Burns states she was Ramos's girlfriend and that Ramos drove a black and white Chevrolet Tahoe. She stated that Ramos purchased the vehicle and stated "That's his car, not mine." Burns also told Detective Castillo that sometimes Ramos stayed at her residence but that she did not know his whereabouts and could not contact him.

On May 10, 2017, Detective Castillo used the information he had gathered to prepare an affidavit in support of a search warrant. In the affidavit, Detective Castillo described the accident that occurred on February 22, 2015, and concluded that based on his investigation, Ramos committed the offense of failure to stop and render aid resulting in death. Detective Castillo drew his conclusion from several items of paperwork found in the abandoned Tahoe listing Ramos's full name and address and from his discussion with Ramos's girlfriend, Burns, who stated that Ramos owned the black and white Tahoe and that he was the only known driver of the vehicle. Detective Castillo sought a search warrant to collect a DNA sample from Ramos for comparison to the DNA profile obtained from the Tahoe's airbags at the scene of the accident.

Based on Detective Castillo's affidavit, the magistrate signed a search warrant for a DNA sample from Ramos. Analysis of these samples could not exclude Ramos as the source of DNA collected from the Tahoe. Before trial, Ramos filed a motion to suppress the DNA test results. Ramos argues the search was without probable cause since Detective Castillo's affidavit contained statements made deliberately or with reckless disregard for the truth.

At the hearing on the motion to suppress, Detective Castillo testified that he interviewed Burns on the night of the accident and was informed that she and Ramos were the only people who drove the Tahoe but that the Tahoe was not her vehicle. He also testified that Burns did not indicate that anyone else owned the Tahoe. Detective Castillo testified that he executed the search warrant approximately ten months after his interview with Burns, and that he did not review the audio recording of the interview but relied on his memory when he prepared the affidavit. He further testified that, although the words in the affidavit may not have been word-for-word what Burns stated, the words contained the same substance as what Burns actually told him and contained the inferences he made based on her actual words. Although he did not review the recording itself, he reviewed a transcript of the audio recording with Ramos's attorney before drafting his affidavit.

At the conclusion of the hearing, the trial court denied Ramos's motion. Thereafter, Ramos pled nolo contendere to the offense of failure to stop and render aid resulting in death and was sentenced to ten years in prison. *See* TEX. TRANSP. CODE ANN. § 550.021. Ramos appeals.

MOTION TO SUPPRESS

In his only point of error, Ramos contends the trial court erred when it denied his motion to suppress. We disagree.

A. Standard of Review

In reviewing a trial court's ruling on a motion to suppress, we apply a bifurcated standard. *Hines v. State*, 383 S.W.3d 615, 621 (Tex. App.—San Antonio 2012, pet. ref'd) (citing *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007)); *Hodson v. State*, 350 S.W.3d 169, 173 (Tex. App.—San Antonio 2011, pet. ref'd). Although we "review the trial court's application of the law de novo," we must "defer to the trial court's determination of facts." *Hodson*, 350 S.W.3d at 173. Because the trial court is "uniquely situated to observe first hand the demeanor and appearance of a witness," the trial judge serves as "the sole trier of fact and judge of the credibility

of the witnesses and the weight to be given their testimony." *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007) (citation omitted). The reviewing court views all evidence in a trial court's motion to suppress ruling "in the light most favorable to the trial court's ruling." *State v. Iduarte*, 268 S.W.3d 544, 548 (Tex. Crim. App. 2008). We affirm the trial court's holding "if there is any valid theory of law applicable to the case, even if the trial court did not base its decision on that theory." *Hines*, 383 S.W.3d at 621 (citing *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002)). We will overturn the ruling only if it is outside the zone of reasonable disagreement. *See Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011).

B. Applicable Law

When a defendant contends an affidavit in support of a search warrant contains false information or information conveyed in reckless disregard of the truth, we apply the standard announced in *Franks v. Delaware*, 438 U.S. 154 (1978):

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155–56; *see Harris v. State*, 227 S.W.3d 83, 85 (Tex. Crim. App. 2007) (applying the *Franks* standard). The Texas Court of Criminal Appeals has made clear that to be entitled to a *Franks* hearing a defendant must satisfy a three-prong test: "(1) Allege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false; (2) Accompany these allegations with an offer of proof stating the supporting reasons; and (3) Show that when the portion of the affidavit alleged to be false is excised from the affidavit,

the remaining content is insufficient to support the issuance of the warrant." *Harris*, 227 S.W.3d at 85.

After conducting a *Franks* hearing, the trial court must strike from the affidavit all information the defendant has proven, by a preponderance of the evidence, to be deliberately false or misleading. *See Franks*, 438 U.S. at 156; *id*. A "truthful" statement that should not be stricken requires only "that the information put forth [by the affiant] is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 164–65; *see Janecka v. State*, 937 S.W.2d 456, 462 (Tex. Crim. App. 1996). If the false statement that was stricken was necessary to the finding of probable cause, then the search warrant must be voided, and the fruits of the search excluded from the trial. *Harris*, 227 S.W.3d at 85.

An affidavit in support of a search warrant must provide the magistrate with sufficient information to support an independent judgment that probable cause exists for the issuance of the warrant. *Jones v. State*, 568 S.W.2d 847, 854 (Tex. Crim. App. 1978) (citing *Whiteley v. Warden of Wyo. Penitentiary*, 401 U.S. 560, 564 (1971)); *Burnett v. State*, 754 S.W.2d 437, 443 (Tex. App.—San Antonio 1988, pet. ref'd). The sufficiency of the affidavit is examined under a "totality of the circumstances" analysis. *Burnett*, 754 S.W.2d at 443; *cf. State v. Baldwin*, No. 14-19-00154-CR, 2020 WL 4530149, at *5 (Tex. App.—Houston [14th Dist.] Aug. 6, 2020—no pet. h.) ("[T]he process of determining probable cause deals with probabilities, not hard certainties.").

C. Analysis

Ramos argues the trial court erred in denying his motion to suppress because Detective Castillo's affidavit includes a false statement, omits material information, and includes a statement made in reckless disregard of the truth. Ramos alleges that the detective made a deliberate and reckless statement in his affidavit, and as an offer of proof, points to certain discrepancies between Burns's statement to him after the accident and the statement contained in the affidavit. Ramos

specifically challenges the statement regarding who had access to the Tahoe. Ramos generally asserts that these discrepancies amount to a deliberately false or reckless statement.

On this record, we need not decide whether the first two prongs of the test are met. *See Harris*, 227 S.W.3d at 85. Instead, we focus on the third prong, that the remaining content in the affidavit is insufficient to show probable cause. *Id.* An appellant must show that, when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support the issuance of the warrant. *Id.*

Here, Ramos fails to show the challenged statements were necessary to the finding of probable cause, thus voiding the search warrant and requiring suppression of the DNA search results. In his written motion to suppress, Ramos failed to argue or demonstrate how the affidavit would be insufficient if the court excised the challenged portion. *See id.* ("[S]pecific allegations and evidence must be apparent in the pleadings in order for a trial court to even entertain a *Franks* proceeding). In his appellate brief, Ramos provides an affidavit with the challenged statement omitted, but does not demonstrate how this affidavit lacks probable cause. *Cf. Cates v. State*, 120 S.W.3d 352, 355 (Tex. Crim. App. 2003) ("To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." (citing *Franks*, 438 U.S. at 171)). We hold that Ramos failed to meet the third prong of the requisite test. *See Harris*, 227 S.W.3d at 85 (holding that there was insufficient evidence to establish a *prima facie* violation under *Franks* because the appellant failed to meet the first two prongs of the *Franks* test).[1]

[1] In his brief, Ramos also argues that Detective Castillo omitted material information about Ramos's father being the actual owner of the Tahoe and that such omitted material facts would have negated the magistrate judge's probable cause determination. This argument, however, was not raised in the trial court and is therefore waived. *See* TEX. R. APP. P. 33.1(a)(1); *State v. Esparza*, 413 S.W.3d 81, 85 (Tex. Crim. App. 2013) (providing that an appellant may only raise theories of law on appeal that he first raised in his motion to suppress in the trial court); *Ortiz v. State*, No. 13-10-00118-CR, 2010 WL 2784034, at *2–3 (Tex. App.—Corpus Christi–Edinburg July 15, 2010, no pet.) (mem. op., not designated for publication) (holding that the appellant failed to preserve a *Franks* challenge for appellate review

CONCLUSION

We overrule Ramos's sole point of error and affirm the trial court's judgment.

Rebeca C. Martinez, Justice

DO NOT PUBLISH

because he did not allege that the affidavit contained a falsehood until his motion for reconsideration in the trial court and failed to make an offer of proof).