In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00089-CR

DARRICK LYNDELL BRADLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 08-07-06812-CR

MEMORANDUM OPINION

Darrick Lyndell Bradley appeals his conviction for possession with intent to deliver or manufacture a controlled substance.[1] Before trial, Bradley filed a motion to suppress evidence, claiming that the evidence was illegally obtained. The trial court denied Bradley's motion to suppress the evidence. After the State presented one of its

[1]Bradley was also convicted of possession of a controlled substance and possession of marihuana. Before trial, Bradley pled guilty to these offenses. Although these offenses were charged as Counts II and III of the same indictment that charged Bradley with possession with intent to deliver or manufacture a controlled substance, he limited his appeal to his conviction for possession with intent to deliver or manufacture a controlled substance, found in Count I of the indictment.

witnesses, Bradley waived his right to a jury trial. The "Waiver of Trial by Jury," executed by Bradley, the State's prosecutor, and the trial judge, states that in addition to Bradley's waiver of his right to trial by jury, he "further waives any right to appeal the jury's verdict as well as the sentence imposed in this case." Under an open plea, Bradley entered a plea of guilty to the offense, stipulated to the evidence supporting his conviction, and the trial court found Bradley guilty. The trial court then sentenced Bradley to twenty-five years in prison.

Waiver of Right to Appeal

On appeal, Bradley challenges the trial court's denial of his motion to suppress. The trial court's certification reflects that the defendant could appeal matters that "were raised by written motion filed and ruled on before trial and not withdrawn or waived, and the defendant has the right of appeal as to punishment only." The State argues that because it agreed to waive the completion of the ongoing jury trial in exchange for Bradley's guilty plea, Bradley waived his right to appeal the issue on which he seeks appellate review.

A defendant in any criminal action has the right of appeal. Tex. Code Crim. Proc. Ann. art. 44.02 (West 2006). However, a defendant may waive this right if the defendant executes a waiver of appeal voluntarily, knowingly, and intelligently. *Ex parte Broadway*, 301 S.W.3d 694, 697 (Tex. Crim. App. 2009) (citing *Monreal v. State*, 99 S.W.3d 615, 617 (Tex. Crim. App. 2003)); *see also* Tex. Code Crim. Proc. Ann. art. 1.14

(West 2005). When the record reflects that the State gave consideration–its consent to the waiver of a jury trial in exchange for the defendant's waiver of appeal–the waiver can be valid.[2] *Broadway*, 301 S.W.3d at 697-98.

Here, however, while the State consented to Bradley's waiver of a jury trial after the trial started, the record, including the trial court's certification, is unclear whether Bradley voluntarily, knowingly, and intelligently waived his right to appeal the trial court's ruling on his pre-trial motion to suppress. *See Broadway*, 301 S.W.3d at 697-98, 699. The existence of confusion regarding whether Bradley would retain his right to appeal the trial court's ruling on his motion to suppress exists because the record of the proceedings reflects that after Bradley changed his plea of not guilty to guilty, the trial court stated that Bradley could appeal matters raised by written motion filed and ruled on before trial, as to punishment only. When the State's attorney indicated that Bradley was making an open plea, the trial court then stated that it did not "know if the State can hold any–hold their feet to the fire on that because it's not like you're giving–okay. That's where we are on that." The trial court's certification regarding Bradley's right to appeal does not state that Bradley had no right to appeal; instead, the trial court certified that Bradley could appeal "matters [] raised by written motion filed and ruled on before trial and not withdrawn or waived, and the defendant has the right of appeal as to punishment

[2]"Under the Code of Criminal Procedure, a defendant may not unilaterally waive the right to a jury trial–the court and the State must consent to the waiver." *Ex parte Broadway*, 301 S.W.3d 694, 698 (Tex. Crim. App. 2009) (citing Tex. Code Crim. Proc. Ann. art. 1.13 (West 2005)).

only." Given the confusion evidenced in the record on the waiver issue, we are unable to use Bradley's "Waiver of Right to Trial by Jury" to conclude that Bradley voluntarily, knowingly, and intelligently waived his right to appeal the trial court's decision to deny his motion to suppress. Faced with the ambiguity concerning Bradley's waiver of his right to appeal the trial court's suppression ruling, we will review Bradley's issues on appeal.

Motion to Suppress

In four issues, Bradley contends that the trial court erred or abused its discretion in denying his motion to suppress. Bradley's brief does not separately argue each issue, but in support of his issues Bradley argues: (1) the affidavit upon which the search warrant was issued contains material misstatements and omissions that make it inadequate to support the magistrate's finding of probable cause, and (2) the person who issued the search warrant was not authorized by the Texas Code of Criminal Procedure to do so.

The evidence from a hearing the trial court conducted on Bradley's motion to suppress includes the testimony of a detective with the Conroe Police Department. The detective testified that a confidential informant (CI) informed him that the CI could buy crack cocaine from an individual known as "D", who the CI indentified as Bradley. According to the detective, twice in January 2008, the CI bought crack from Bradley with money that had been provided by the police. The detective explained that he had not actually seen the CI purchase the drugs because he did not want to be recognized as being

in the area; however, the detective stated that he did see the CI go onto Bradley's property, and after the purchase, the CI showed the detective drugs that the CI had purchased. Based on these events, the detective completed a probable-cause affidavit in the presence of a justice of the peace who was not licensed to practice law. The detective's affidavit requested that a warrant issue to allow the police to search, among other items, for "drugs kept, prepared, or manufactured in violation of the laws of this state, to-wit: [c]rack cocaine." The detective acknowledged at the suppression hearing that his affidavit did not explain that the CI was driving a car when he went onto the property or that the CI did not leave his car when purchasing the drugs.

The suppression hearing also includes audio recordings obtained by the CI during the buys. In one of the audio recordings, the CI reports that he saw Bradley exiting the residence and he described what Bradley wore. The recording also captured fragments of a conversation that allowed the trial court to infer that the CI purchased something from the person the CI claimed had exited the residence.

Before reaching the sufficiency of the probable-cause affidavit, we first address whether the warrant was issued by a person authorized to sign it. Bradley argues that the warrant in his case was issued pursuant to article 18.02(10) of the Texas Code of Criminal Procedure. According to the Code of Criminal Procedure, a justice of the peace, who does not have a license to practice law, cannot authorize search warrants seeking "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. 18.01(c) (West Supp. 2010), art. 18.02(10) (West 2005). In response, the State argues that the warrant was issued pursuant to article 18.02(7), which allows a justice of the peace, even though not licensed to practice law, to sign a warrant to search for drugs. *See* Tex. Code Crim. Proc. Ann. art 18.02(7) (West 2005); *see also* Tex. Code Crim. Proc. Ann. art. 18.01(a) (West Supp. 2010). With respect to the warrant issued in Bradley's case, the body of the search warrant, as well as the detective's accompanying affidavit, authorized the police to search and seize "drugs kept, prepared or manufactured in violation of the laws of this state, to-wit: [c]rack cocaine." As the warrant that was issued in Bradley's case authorized the police to search for drugs, we conclude that it issued pursuant to article 18.02(7), and not article 18.02(10) of the Texas Code of Criminal Procedure.

Article 18.01(a) allows a justice of the peace who is not a lawyer to issue a search warrant for illegal drugs. Tex. Code Crim. Proc. Ann. art. 18.01(a); *Chavez v. State*, 769 S.W.2d 284, 286 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); *see Wall v. State*, 878 S.W.2d 686, 688-89 (Tex. App.—Corpus Christi 1994, pet. ref'd), *superseded on other grounds by statute, as recognized in Hines v. State*, 976 S.W.2d 912, 912-13 (Tex. App.—Beaumont 1998, no pet). Because the warrant issued in Bradley's case was not an article 18.02(10) "evidentiary" search warrant, but instead was a warrant authorizing a search for drugs, the justice of the peace was one of the persons who could authorize the

issuance of the warrant to search for drugs. *See Mason v. State*, 838 S.W.2d 657, 660 (Tex. App.—Corpus Christi 1992, pet. ref'd) (holding that a warrant for drugs was not a warrant for property and that a magistrate not licensed to practice law properly issued the search warrant).

Bradley also argues that the existence of misstatements and omissions in the affidavit supporting the search warrant required the trial court to grant his motion to suppress. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). According to Bradley, the affidavit used to obtain the search warrant (1) falsely implied that the CI entered Bradley's residence, (2) failed to explain that the detective did not see Bradley hand the CI drugs in exchange for money, and (3) failed to explain that the audio recordings of the transactions were inconclusive about whether a drug transaction had occurred. The State contends that the affidavit supporting the warrant contains no material misstatements or omissions.

Probable cause to support the issuance of a search warrant exists when the facts submitted to the magistrate sufficiently justify a conclusion that the object of the search is probably on the premises to be searched. *Cassias v. State*, 719 S.W.2d 585, 587 (Tex. Crim. App. 1986). Whether the facts mentioned in the affidavit are adequate to establish probable cause depends on the totality of the circumstances. *Ramos v. State*, 934 S.W.2d 358, 362-63 (Tex. Crim. App. 1996). When reviewing an issuing magistrate's determination, the affidavit is interpreted "in a commonsensical and realistic manner,

recognizing that the magistrate may draw reasonable inferences." *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007); *see also Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006).

Because Bradley relies on *Franks*, we review his issue under the same standard under which we review claims asserting other alleged probable-cause deficiencies, applying a mixed standard of review. *Fenoglio v. State*, 252 S.W.3d 468, 473 (Tex. App.—Fort Worth 2008, pet ref'd). "We give almost total deference to a 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 while we review *de novo* application-of-law-to-fact questions that do not turn upon credibility and demeanor." *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)); *see also Janecka v. State*, 937 S.W.2d 456, 462 (Tex. Crim. App. 1996). When deciding an issue alleging that the probable-cause affidavit contained material misstatements, trial courts may consider not only the probable-cause affidavit but also the evidence offered during the hearing on the motion to suppress. The review of the trial court's decision involving a claim of an alleged misrepresentation is not limited to the four corners of the affidavit because the complaint about the sufficiency of the affidavit arises from the claim that it contains false statements. *See Franks*, 438 U.S. at 155-56; *Cates v. State*, 120 S.W.3d 352, 355-57 (Tex. Crim. App. 2003).

Bradley claims that the detective misrepresented the facts of the drug transactions in his affidavit by falsely implying that the drug purchases occurred inside Bradley's residence. The affidavit, with respect to both transactions, states that the CI was "followed to the suspected residence and was observed entering the property." The term "the property" is not defined in the affidavit as having been intended to mean Bradley's residence, and the affiant, when conveying information about the residence, states in his affidavit: that the CI "advised that he/she had observed Bradley exit the residence located at the listed address." We conclude that the affidavit's reference to "the property" does not constitute a false or intentional misrepresentation that the CI entered Bradley's residence.

Bradley also complains that the affidavit supporting the search warrant was insufficient based on omissions of facts. The State contends that the affidavit supports the decision by the justice of the peace to issue the warrant even if the affidavit had included the information that Bradley complains was omitted. The omitted information about which Bradley complains concerns facts about the transactions having occurred outside Bradley's residence; the detective's inability to observe or hear the details of the transactions; and the failure of the recordings to capture conversations sufficient to demonstrate that with the recordings alone, drug sales had occurred.

While the United States Supreme Court and the Court of Criminal Appeals have not decided that *Franks* extends to complaints about omissions from search warrant

affidavits, several federal and Texas courts of appeals have applied the *Franks* analysis to omissions. *See United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980); *McKissick v. State*, 209 S.W.3d 205, 212-14 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *Darby v. State*, 145 S.W.3d 714, 722 (Tex. App.—Fort Worth 2004, pet. ref'd) (collecting cases); *see also Massey v. State*, 933 S.W.2d 141, 146 n.3 (Tex. Crim. App. 1996) ("This Court has indicated that we might not recognize application of *Franks* to omissions of fact.").

Even if we are required to consider Bradley's argument concerning allegedly omitted facts, having reviewed the affidavit, we conclude that it supports a finding of probable cause. The affidavit established that the CI was searched for contraband before entering Bradley's property and none was found. After the CI claimed to have purchased drugs from Bradley, and after exiting Bradley's property, the CI informed the police that Bradley had sold him drugs. After leaving the property, the CI gave the police several off-white colored rocks which were tested and found to be positive for cocaine. We hold that the alleged omissions about which Bradley complains would not have made the affidavit accompanying the search warrant incapable of supporting a finding of probable cause. *See, e.g., Sadler v. State*, 905 S.W.2d 21, 22 (Tex. App.—Houston [1st Dist.] 1995, no pet.) ("The circumstances of a 'controlled buy,' standing alone, may be sufficient to reasonably confirm an informant's information and give probable cause to issue a search warrant.").

In conclusion, we hold that the trial court did not err or abuse its discretion by denying Bradley's motion to suppress evidence. We overrule each of Bradley's issues and affirm the trial court's judgment.

AFFIRMED.

_____

HOLLIS HORTON
Justice

Submitted on May 27, 2011
Opinion Delivered July 27, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.