In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00434-CR
NO. 09-10-00435-CR
NO. 09-10-00436-CR
NO. 09-10-00437-CR

CHARLES RAY WALKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause Nos. 10-08334, 10-08469, 10-08470, and 08-04182

MEMORANDUM OPINION

Appellant Charles Ray Walker appeals his convictions for the offense of felony possession of marijuana, unlawful possession of a firearm by a felon, and two separate offenses for possession of a controlled substance. On appeal, Walker argues that the trial court erred in failing to suppress evidence obtained during an allegedly unlawful execution of his arrest warrant. We affirm the trial court's judgments.

Background

On July 24, 2008, the grand jury, in trial cause number 08-04182, indicted Walker for the offense of possession of a controlled substance, namely MDMA (ecstasy). Walker entered a guilty plea and the trial court sentenced him to five years confinement, but the court probated the imposition of his sentence and placed Walker on community supervision for three years. On December 16, 2009, the trial court issued a warrant for Walker's arrest after an administrative hearing for alleged violations of the conditions of probation. The administrative hearing report provided Walker's current address and ordered Walker arrested at the address reflected in the report. In the late morning hours of January 8, 2010, Officers Dennis Collins and Eric Heilman attempted to execute the felony arrest warrant for Walker at his residence as designated on the warrant. The two officers were in tactical uniforms, with "POLICE" written in big white letters across the front and back. Heilman testified that when they arrived at the residence, Collins went to the side of the residence, while Heilman went to the front door and knocked. After seeing a female look out of the window, Heilman announced his presence, specifically identified himself as a police officer, and knocked again. Heilman then indicated to Collins that someone had looked out the window and motioned for Collins to join him at the front door, which is when Cheri Riley opened the door. Heilman could not recall if he asked Riley if Walker was home or whether Riley invited him into the residence.

When Riley opened the door, the officers recognized a strong odor of marijuana coming from within. Heilman also identified a second female, Ebony Hunter in the house. Heilman testified that when Hunter saw him at the front door, she "made a quick move for the kitchen." Heilman was uncertain what she was doing, but believed she may have been attempting to destroy evidence or warn Walker of their presence. Because of the strong odor of marijuana and the almost simultaneous encounter with an individual moving unusually quick to the back of the house, Officer Heilman immediately stepped in the front door. Officer Collins followed. Once Collins and Heilman had both entered the house, they began to secure the house and look for Walker anywhere he could hide. The officers had not received permission prior to conducting their search. While searching for Walker, Heilman saw in open view a "misdemeanor amount" of marijuana in the kitchen area and found a loaded shotgun in a bedroom closet. After securing the small amount of marijuana found in the kitchen, the officers noted a lingering overpowering smell of marijuana throughout the house, which caused them to believe additional marijuana was in the residence. At this point, the officers stopped their search and requested a search warrant for the residence. In the meantime, the officers detained Riley and Hunter, and stood in the front of the residence to wait for the search warrant. After obtaining the search warrant, the officers resumed the search and found additional illegal narcotics and other drug paraphernalia hidden in the house. While the officers did not find Walker in the residence, they did find mail addressed to him. Later, while

officers were searching the house pursuant to the search warrant, Walker returned to the home and officers arrested him in accordance with the original arrest warrant.

Appellant disputed the officers' testimony regarding the execution of the arrest warrant. Riley, Walker's girlfriend, testified that when she heard the knock at the door she asked who was there and when no one answered, she looked out the window and saw three police officers. She testified that when she opened the door, an officer asked her if Walker was home, to which she responded that he was not. She eventually told the officers that Walker was attending his "drug class." She recalled that one of the officers told her to go inside and sit down. She testified that an officer asked her if he could search the house and she told him that she did not live there and could not give permission. At the time, Riley's cousin, Hunter, was in the kitchen on the phone, when an officer told her to get off the phone and sit down. Riley testified that the officer told them that he smelled marijuana, and asked where it was as he proceeded to walk around the house and into the kitchen where he located marijuana. Riley testified she told the officer that the marijuana was for Walker. Riley testified that the officer asked her where the rest of the marijuana was located, and told her that if she did not tell him, he would arrest her for possession if Walker failed to return.

Following the events on January 8, 2010, in February 2010, the State filed three indictments against Walker for (1) unlawful possession of a firearm by a felon in trial cause number 10-08334; (2) felony possession of marijuana in trial cause number 10-

08469; and (3) possession of a controlled substance, namely cocaine, in trial cause number 10-08470. Because of these additional charges, on February 11, 2010, the State filed a motion to revoke Walker's community supervision. Walker pled "untrue" to the State's allegations that he failed to meet the terms of his community supervision.

Walker filed a motion to suppress evidence police seized from Walker's home on January 8, 2010, on the grounds that the search and seizure was unlawful because the police did not have a lawful search warrant or other lawful authority to enter Walker's residence.

After hearing testimony and receiving evidence, the trial court denied Walker's motion to suppress, revoked his community supervision, and sentenced him to five years for the 2008 offense of possession of a controlled substance, namely MDMA (ecstasy), in trial cause number 08-04182. *See* Tex. Health & Safety Code Ann. §§ 481.116(d), 481.103(a)(1) (West 2010).[1] After the trial court denied Walker's motion to suppress, Walker pled guilty to each new indictment. The trial court sentenced Walker to seven years confinement for the unlawful possession of a firearm by a felon; seven years confinement for the unlawful possession of a controlled substance, cocaine; and twelve months for felony possession of marijuana. *See* Tex. Penal Code Ann. § 46.04(a)(1) (West 2011) (unlawful possession of a firearm); *see also* Tex. Health & Safety Code Ann. §§ 481.115(d), 481.101(3)(D) (West 2010) (possession of a controlled substance-

[1] As there have been no material intervening substantive changes, we cite to the current versions of this statutes.

cocaine), § 481.121 (West 2010) (possession of marijuana). The court ordered Walker's sentences to run concurrently. The trial court certified Walker's right to appeal in each case.

Standard of Review

We review the denial of a motion to suppress by giving almost total deference to a trial court's determination of historical facts and reviewing *de novo* the court's application of the law. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). When the trial court does not make explicit findings of historical facts, we review the evidence in the light most favorable to the trial court's ruling. *Id.* at 327-28. In determining suppression issues, the trial court is the "'sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony.'" *York v. State*, 342 S.W.3d 528, 544 (Tex. Crim. App. 2011) (quoting *Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex. Crim. App. 2007)). Thus, we draw all reasonable inferences supported by the record that are necessary to support the trial court's ruling. *State v. Kelly*, 204 S.W.3d 808, 819 (Tex. Crim. App. 2006). "The prevailing party is afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence." *State v. Weaver*, No. PD-1635-10, 2011 Tex. Crim. App. LEXIS 1320, at *6 (Tex. Crim. App. Sept. 28, 2011). We then review "the trial court's legal ruling *de novo* unless the supported-by-the-record implied fact findings are also dispositive of the legal ruling." *Id*. If the trial court's ruling is reasonably supported by the record, we will

sustain it if the court's ruling is correct on any theory of law applicable to the case. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

The Fourth Amendment

Walker argues that officers unlawfully entered his residence to serve the arrest warrant. Walker does not contest the validity of the arrest warrant, or the validity of his arrest, but only the admissibility of evidence discovered while executing the arrest warrant. The Fourth Amendment provides individuals "[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. *Gutierrez v. State*, 221 S.W.3d 680, 684-85 (Tex. Crim. App. 2007); *see also Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The United States Supreme Court held in *Payton*:

> If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Payton, 445 U.S. at 602-03. An officer's reasonable belief that a residence is the defendant's and that the defendant is inside authorizes the officer to enter the residence to arrest the defendant under an arrest warrant. *See id*.

The Supreme Court has not clarified the "reasonable belief" standard announced in *Payton*. However, the Fifth Circuit adopted the reasonable belief standard of the

Second, Third, Eight, and Eleventh Circuits. *United States v. Route*, 104 F.3d 59, 62 (5th Cir. 1997) (citing *e.g.*, *United States v. Risse*, 83 F.3d 212, 216 (8th Cir. 1996)) (holding an officer's assessment that the suspect is present need not be correct to demonstrate the officer's reasonable belief); *United States v. Lauter*, 57 F.3d 212, 215 (2nd Cir. 1995) (holding proper inquiry is whether officers had a reasonable belief that the suspect resided at the residence and whether the officers had a "reason to believe" that the suspect was present); *United States v. Edmonds*, 52 F.3d 1236, 1248 (3d Cir. 1995) (holding that officers had reasonable grounds that suspect was present even though the information available to the officers did not exclude the possibility that he was not present), *vacated in part on other grounds*, 80 F.3d 810 (3rd Cir. 1996); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995) (holding that "the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry"). In *Magluta*, the court explained that "courts must be sensitive to common sense factors indicating a resident's presence." *Magluta*, 44 F.3d at 1535. The court reasoned that "officers may take into consideration the possibility that the resident may be aware that police are attempting to ascertain whether or not the resident is at home[.]" *Id.* Further, the presence of visitors at the residence also supports the reasonable conclusion that the resident is home. *Id.* at 1538.

Walker argues that the State failed to comply with the *Payton* test and specifically challenges the officers' reliance on the arrest warrant alone to establish the basis for their belief that they were at Walker's residence. Walker was on community supervision with Jefferson County when officers attempted to execute the arrest warrant. Walker's community supervision order required him to report any change in address to his community supervision officer. Walker's arrest warrant was issued as the result of an administrative hearing conducted by the Jefferson County Community Supervision and Corrections Department. The administrative hearing report lists Walker's current address. The trial court approved the administrative hearing recommendation and ordered Walker arrested at the address reflected in the report.

The trial court denied the motion to suppress, implicitly finding the officers' testimony credible. The record reveals that the officers went to Walker's residence to execute the arrest warrant. They believed that Walker resided at the home because the arrest warrant listed the address as Walker's residence. Walker does not challenge the validity of the arrest warrant issued. We conclude that the officers' reliance on the accuracy of the arrest warrant to determine Walker's current address was reasonable.

Walker also argues that the State failed to show any evidence supporting the officers' belief that Walker was in the house when they attempted to execute the arrest warrant. In support of this contention, Walker relies on the holding in *Green v. State*, 78 S.W.3d 604 (Tex. App.—Fort Worth 2002, no pet.). In *Green*, the Fort Worth Court of

Appeals held that the State failed to meet the second prong of the *Payton* test when the officer failed to articulate any facts supporting his belief that the suspect was inside the residence other than the visitor's demeanor when answering the door. *Id.* at 614-15. A maintenance man had found a hypodermic syringe near an apartment. *Id*. at 607. The apartment manager called the police and informed them that Green leased the apartment and that similar needles had previously been found. *Id*. In response, officers ran a computer search on Green and learned that he had two outstanding arrest warrants for a traffic violation and for failing to appear in court. *Id*. The officers went to the apartment to execute the warrants. *Id*. The officers had the maintenance man knock on the door and a woman answered. *Id.* In response to the officer inquiring whether Green was home, the woman indicated he was not. *Id*. The officer eventually forcibly entered the apartment. *Id*. at 608. In analyzing the second prong of the *Payton* test, the court reasoned that the officer knew nothing of Green's employment status or habits and knew nothing about the make or model of Green's car to determine whether he was present in the apartment. *Id.* at 614. Additionally, the officer's testimony was devoid of any suggestion that he saw lights on inside the apartment or that he had detected any kind of movement within. *Id*. The court explained "that nervous behavior by the person answering the door [must] be coupled with some other indicia, however minor, that the suspect is present in order to generate a reasonable belief the suspect is home." *Id.* at 615.

Green is distinguishable from the present case. In *Green*, a single individual answered the door and the officers had no indication that other persons were within the residence. Here, officers identified at least two persons in Walker's residence when after announcing their presence, the one who looked out of the window and another person who answered the door. The officers approached a residence with an arrest warrant for a person known to be on community supervision and found at least two visitors present in the house, together with the distinct odor of an illegal drug indicting the possibility of illegal activity in the home. When one visitor made a sudden move toward the rear of the home upon seeing the police officer at the door, Officer Heilman believed that Walker was present and that the lady may be attempting to warn him of the officers' presence. *See Magluta*, 44 F.3d at 1538. Further, the record does not indicate that the officers had any information to suggest conclusively that Walker was not at home. Given the totality of the facts and circumstances, and viewing the record and all reasonable inferences in the light most favorable to the trial court's ruling, we hold that the trial court could reasonably conclude that the officer had formed a reasonable belief that Walker was within the residence. *See Magluta*, 44 F.3d at 1535, 1538.

After entering the residence, the officers began looking for Walker, which necessarily included looking in places where he might have been hiding. In the process of looking for Walker, the officers inadvertently came across marijuana and a gun. The arrest warrant placed the officers in a lawful position to view these incriminating objects.

Though Walker does not specifically address the plain-view doctrine on appeal, he argues that the officers discovered the shotgun and marijuana during an improper warrantless search of the residence. The plain-view doctrine provides that when an officer has a right to be in the location where an item is in plain view, and the item in plain view leads police to have an immediate apparent belief that the item is evidence of a crime, contraband, or otherwise subject to seizure, then the officer's seizure of the item does not involve an invasion of privacy under the Fourth Amendment. *Walter v. State*, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000); *see Horton v. California*, 496 U.S. 128, 133, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) ("If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy."). We determine whether an officer had a right to be in a location by whether the officer violated the Fourth Amendment in arriving at the location from which the officer could plainly view the evidence. *Horton*, 496 U.S. at 136. Having concluded that the officers' entry into Walker's residence was justified since the officers were executing an arrest warrant for Walker, we also conclude that both the shotgun and the misdemeanor amount of marijuana were found in plain view. After discovering the misdemeanor amount of marijuana in plain view and securing it in a sealed baggy, the officers continued to smell a strong odor of marijuana in the house. The officers stopped their search and obtained a search warrant for the remainder of the house. After the search warrant was obtained, the officers discovered the other illegal drugs for which Walker was charged. During the

execution of that search warrant, Walker arrived at the residence and was taken into custody.

Considering the totality of the circumstances and viewing all of the evidence in the light most favorable to the trial court's ruling, we hold that the trial court did not err in denying Walker's motion to suppress the evidence discovered at his residence while officers were executing the warrant for his arrest. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on May 27, 2011
Opinion Delivered October 12, 2011
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Before Gaultney, Kreger, and Horton, JJ.