In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00452-CR

THE STATE OF TEXAS, Appellant

V.

JANINE SUZANNE STETLER, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 21,039

MEMORANDUM OPINION

A grand jury indicted appellee Janine Suzanne Stetler for engaging in organized criminal activity. The State brings this appeal from the trial court's order granting Stetler's motion to suppress. *See* Tex. Code Crim. Proc. Ann. § 44.01(a)(5) (West Supp. 2010). We reverse the trial court's order and remand the cause for further proceedings consistent with this opinion.

THE MOTION TO SUPPRESS

In her motion to suppress, Stetler contended that the search of her residence violated her rights pursuant to "the Fourth, Fifth, Sixth, and Fourteenth Amendments to

the United States Constitution, [and] Article I, Sections 9, 10[,] and 19 of the Constitution of the State of Texas[,] and under Article 38.23 of the Texas Code of Criminal Procedure[.]" Specifically, Stetler argued that (1) the affidavit upon which the search warrant was based was improperly and illegally executed, (2) the warrant was illegally issued because the supporting affidavit "does not reflect sufficient probable cause[,]" (3) the magistrate did not have a substantial basis for concluding that the alleged contraband would be found in a particular place, (4) the search and seizure was "facially deficient because the search warrant failed to specify the place to be searched[,]" (5) the search warrant failed to particularize the things to be seized, (6) the magistrate failed to manifest neutrality and detachment, (7) the magistrate's probable cause determination was not objectively reasonable, (8) "the issuing magistrate was misled by information in the affidavit that the affiant officer knew was false or would have known was false except for his reckless disregard for the truth[,]" and (9) Stetler did not receive appropriate *Miranda* warnings before giving statements.

HEARING AND RULING

While Deputy Darrin Crow of the Polk County Sheriff's Office was patrolling on July 30, 2009, he saw a vehicle pull up to a stop sign and turn without a signal, so he initiated a traffic stop. The sheriff's office had been alerted through a Crime Stoppers tip that the vehicle might be transporting illegal drugs, and in response, Lieutenant Anthony Lowrie instructed officers to "set up to see if [they] could catch them on the way back" to

determine whether they were transporting marijuana. When the car pulled over, Deputy Crow got out of his vehicle, approached the vehicle and made contact with the female driver, S.B. When Deputy Crow made contact with S.B., he noted a strong odor of marijuana coming from inside the vehicle.

Shortly after Deputy Crow stopped the vehicle, Lieutenant Lowrie arrived at the scene, and the officers asked for consent to search the car. S.B.'s passenger, M.B., told Deputy Crow that he had marijuana in his shoe and consented to be searched, and when Deputy Crow searched M.B., he found marijuana in M.B.'s shoe. The officers eventually arrested M.B. for possession of marijuana and S.B. for driving without a license. When S.B. was in the back of the patrol car, she told Lieutenant Lowrie that she and M.B. had gone to get a pound of marijuana, that they had taken the marijuana to the residence of Stetler and her husband, who were "their boss[,]" and that they received an ounce of marijuana as their payment for doing so.

After speaking with S.B., Lieutenant Lowrie and Detective Randy Turner went to the Stetlers' residence. When the officers arrived, they pulled up the driveway, but did not have to open a gate to proceed through the opening in the fence. The Stetlers' neighbor testified that the Stetlers "always" keep their gate locked, and that the gate was locked on the date in question, but he also explained that he was not present when the officers arrived. As the officers got out of their vehicles, Lieutenant Lowrie heard someone talking on the back porch, so Lowrie said, "How are you all doing?" A male

voice, later identified as belonging to Stetler's husband, asked the officers who they were, and Lieutenant Lowrie said "Sheriff's department" and shined his flashlight on them as he and Detective Turner walked up to the back porch. Lieutenant Lowrie testified that the officers went to the back porch instead of the front door because they heard voices there, as well as because S.B. had told her the Stetlers typically entered the home via the back porch. Lieutenant Lowrie explained that the officers did not have a search warrant when they entered the Stetlers' back yard.

The officers heard Stetler's husband say, "Go hide the weed." Stetler started toward the house, and to preserve evidence, Lieutenant Lowrie instructed her not to enter the house. The officers separated Stetler from her husband, and her husband "denied any knowledge of anything." The officers placed Stetler's husband in hand restraints for officer safety reasons because he was belligerent and made furtive movements, and they advised Stetler of her rights. Stetler told the officers that she had an ounce of marijuana in the house for personal use. When the officers asked Stetler for consent to search the home, Stetler told them that it was her husband's decision, and her husband denied consent.

Lieutenant Lowrie called for additional units to the scene, and Detective Turner left to obtain a search warrant. Detective Turner prepared the warrant and affidavit and obtained the judge's signature. Detective Turner testified that he only served the search warrant itself upon one of the Stetlers; he did not serve the affidavit in support of the

search warrant. Detective Turner did not recall whether he served the warrant on Stetler or her husband. The search warrant did not contain information about where the search was to take place or for what the officers were authorized to search. However, the search warrant referred to the affidavit and stated that the affidavit "is by this reference incorporated herein for all purposes[.]" The affidavit that was incorporated by reference in the search warrant contained detailed information concerning the location to be searched, what was to be searched for, and the individuals who were in charge of the location.

The trial court granted the motion to suppress. At the State's request, the trial court signed findings of fact and conclusions of law. In its findings of fact, the trial court found that only the page marked "search warrant" was served; that said page "did not identify that which is to be seized, nor did it name or describe the person, place[,] or thing to be searched[;]" and that neither the affidavit for the warrant nor the exhibit attached to the affidavit "contain a month[,] date[,] or year as to when the alleged activity was supposed to have happened." In its conclusions of law, the trial court found that the search warrant "did not conform to Article 18.04(2) of the Code of Criminal Procedure" and granted the motion to suppress. The State then filed this appeal, in which its sole contention is that the trial court erred by granting the motion to suppress.

ANALYSIS

We review the trial court's ruling on a motion to suppress for abuse of discretion. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006); *Long v. State*, 823 S.W.2d 259, 277 (Tex. Crim. App. 1991). At a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of witnesses and the weight to be given to their testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000); *Wood v. State*, 18 S.W.3d 642, 646 (Tex. Crim. App. 2000). "Accordingly, the judge may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted." *Ross*, 32 S.W.3d at 855 (footnotes omitted). We afford almost total deference to the trial court's determination of the historical facts that depend on an evaluation of credibility and demeanor, but we review *de novo* the trial court's application of the law to the facts if resolution of those ultimate questions does not turn on evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

When, as here, the trial court makes explicit fact findings, we determine whether the evidence viewed in the light most favorable to the trial court's ruling supports the trial court's findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). We review the trial court's legal ruling *de novo* unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id.* We will uphold the trial court's ruling if it is reasonably supported by the record and is correct under any

theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

Article 18.04(2) of the Texas Code of Criminal Procedure requires that to be sufficient, a search warrant must "identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched[.]" Tex. Code Crim. Proc. Ann. art. 18.04(2) (West 2005). However, a search warrant that does not contain the information required by article 18.04(2) can still be valid if it incorporates the affidavit by reference, and the affidavit contains the required information. *See Turner v. State*, 886 S.W.2d 859, 864-65 (Tex. App.—Beaumont 1994, pet. ref'd); *see also Gonzales v. State*, 743 S.W.2d 718, 720 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd). "[I]n the absence of a showing of some prejudice or harm, the failure of the officers . . . to provide appellant with a copy of the affidavit for the search warrant [does] not render the search invalid." *Gonzales*, 743 S.W.2d at 720.

Even viewing the evidence in the light most favorable to the trial court's ruling, the trial court's factual findings do not support its legal conclusion, and the trial court's legal conclusion is erroneous. *See Kelly*, 204 S.W.3d at 818; *Turner*, 886 S.W.2d at 864-65. Stetler has not demonstrated that she was prejudiced or harmed by the failure to serve the affidavit. *See Gonzales*, 743 S.W.2d at 720. In addition, there is no evidence that the officers were not in possession of a copy of the affidavit. *See id.* We sustain the State's sole issue. Accordingly, we reverse the trial court's order granting the motion to

suppress and remand the cause to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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STEVE McKEITHEN
Chief Justice

Submitted on February 3, 2011
Opinion Delivered March 23, 2011
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Before McKeithen, C.J., Kreger and Horton, JJ.