In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-18-00011-CR

WALTER TODD MILLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 4th District Court
Rusk County, Texas
Trial Court No. CR16-106

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

A Rusk County jury found that Walter Todd Miller was intoxicated when he slammed his motor vehicle into one driven by Roman Rangel, killing him. After the jury found Miller guilty of intoxication manslaughter, he pled true to the State's habitual offender enhancement allegations and was sentenced to ninety-nine years' imprisonment. On appeal, Miller argues that the trial court erred in failing to suppress the results of a warrantless blood draw, which demonstrated that Miller's blood alcohol level was .215 grams of alcohol per 100 milliliters of blood almost three hours after the accident. Miller also argues that the State committed a *Brady*[1] violation by failing to disclose that an eighteen-wheeler tractor trailer drove through the accident scene without stopping.

We affirm the trial court's judgment, because (1) the trial court did not abuse its discretion in denying Miller's suppression motion and (2) Miller failed to preserve any *Brady* complaint.

(1) The Trial Court Did Not Abuse Its Discretion in Denying Miller's Suppression Motion

"We review a trial court's denial of a motion to suppress for an abuse of discretion." *Elrod v. State*, 533 S.W.3d 52, 55 (Tex. App.—Texarkana 2017, no pet.). "A trial court abuses its discretion when it acts unreasonably or arbitrarily, if it acts outside the zone of reasonable disagreement, or if its decision is made without reference to guiding rules and principles." *Duncan v. State*, 182 S.W.3d 409, 415 (Tex. App.—Texarkana 2005, no pet.) (citing *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)).

[1]*Brady v. Maryland*, 373 U.S. 83 (1963).

In determining whether a trial court abused its discretion in denying a motion to suppress, we use a bifurcated standard of review, giving almost total deference to the trial court's determination of historical facts that turn on credibility and demeanor while reviewing de novo other application-of-law-to-fact issues. *See Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We also afford nearly total deference to trial court rulings on application-of-law-to-fact questions, also known as mixed questions of law and fact, if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

Miller sustained considerable injuries in the accident and was airlifted to a hospital for emergency treatment. A specimen of Miller's blood was taken at the hospital. Miller filed a motion to suppress the results of that blood test on the basis that his consent for the blood draw was acquired after the administration of opioid-based narcotics. The trial court set the suppression motion for an evidentiary hearing.

"In a hearing on a motion to suppress evidence, a defendant bears the initial burden of proof to demonstrate that the search and seizure occurred without a warrant." *Hitchcock v. State*, 118 S.W.3d 844, 848 (Tex. App.—Texarkana 2003, pet. ref'd) (citing *Bishop v. State*, 85 S.W.3d 819, 821 (Tex. Crim. App. 2002)). Once it is shown that no warrant was issued for the blood draw, as was done here, the burden shifts to the State to prove that an exception justified the warrantless search, given the totality of the circumstances. *Id.*; *see State v. Steelman*, 93 S.W.3d 102, 106 n.5 (Tex. Crim. App. 2002); *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002). The grant

of consent is a well-established exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Carmouche v. State*, 10 S.W.3d 323, 331 (Tex. Crim. App. 2000).

Consent must be voluntary based on a consideration of all circumstances. *Ohio v. Robinette*, 519 U.S. 33, 40 (1996). The State must prove, by clear and convincing evidence, that consent was voluntary. *State v. Weaver*, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011). A decision is voluntary if it is made freely and deliberately, not if it is made because of intimidation, coercion, or deception. *Joseph v. State*, 309 S.W.3d 20, 25 (Tex. Crim. App. 2010); *see Moran v. Burbine*, 475 U.S. 412, 421 (1986).

The record in this case contains no findings of fact. When the trial court does not file findings of fact, we should assume that it made implicit findings that support its ruling, so long as those implied findings are supported by the record. *Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). The trial court's evidentiary ruling "will be upheld on appeal if it is correct on any theory of law that finds support in the record." *Gonzalez v. State*, 195 S.W.3d 114, 126 (Tex. Crim. App. 2006); *see Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002).

Evidence at the suppression hearing established that Zachary Mills and David Haney, both state troopers with the Texas Department of Public Safety, met Miller at the hospital. Mills testified that he and Haney held a written copy of "the DIC-24 statutory warning form" to Miller's face so that he could read the form and that he also read the form out loud to Miller before obtaining his oral consent to the blood draw. Mills testified that state troopers normally fill out DIC-24 paperwork and that suspects "don't sign it unless they refuse." Here, Mills candidly testified that

he did not fill out the associated paperwork because he believed Haney would fill it out.[2] Mills further testified that there was no written consent to the blood draw signed by Miller. Mills testified, however, that Miller gave his express oral consent after the statutory warnings were read to him. Mills added that, in his belief, Miller's consent to the blood draw was free and voluntary.

Aside from Mills' testimony, no other evidence was submitted during the evidentiary hearing. Relying on attachments to his suppression motion, which were not introduced into evidence at the suppression hearing, Miller's counsel argued that Miller was unable to give voluntary consent and was in an altered state of consciousness because hospital staff had already administered 100 micrograms of fentanyl and hydromorphone to Miller. The trial court denied Miller's suppression motion.

On appeal, Miller relies on evidence at trial and the attachments to his suppression motion in arguing that the trial court's decision was an abuse of discretion. The State responds by arguing that Miller cannot rely on trial testimony or the attachments he failed to introduce at the suppression hearing.

When we are called on to review a ruling on suppression of evidence, we are ordinarily limited to the evidence at the suppression hearing, not evidence later admitted at trial. *Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996). We consider trial testimony only where "the parties consensually broach the suppression issue again before the fact-finder at trial." *Black v.*

[2]Section 724.015 of the Texas Transportation Code specifies the information that must be provided by an officer before requesting a specimen. TEX. TRANSP. CODE ANN. § 724.015 (West Supp. 2017). Nothing in that statute requires an officer to complete certain paperwork or obtain written consent prior to obtaining a blood sample based on verbal consent, and Miller has failed to point this Court to any other authority requiring such prerequisites. *See id.* Consent "may be given orally or by action, or it may be shown by circumstantial evidence." *State v. Weaver*, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011).

State, 362 S.W.3d 626, 635–36 (Tex. Crim. App. 2012); *see Rachal*, 917 S.W.2d at 809. In such a circumstance, we "also consider the evidence adduced before the fact-finder at trial in gauging the propriety of the trial court's ruling on the motion to suppress." *Id.* Here, because our review of the record demonstrates that the suppression issue was not re-litigated, we examine the record as it was at the time of the suppression hearing. *O'Hara v. State*, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000).

"When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or on opposing affidavits, or on oral testimony, subject to the discretion of the court." TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1(6) (West 2006). Although this statute sets out the different methods of resolving a suppression motion when a hearing is granted, "there is nothing to indicate that a trial court may not use more than one [method]." *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002). Here, the trial court set the suppression motion for an evidentiary hearing and had discretion to require live testimony at a pretrial suppression hearing. *See Ford v. State*, 305 S.W.3d 530, 540 n.28 (Tex. Crim. App. 2009). While the trial court could have also considered attachments to Miller's motion, nothing required it to do so. *See id.*; *see also Hahn v. State*, 852 S.W.2d 627, 629 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Nothing here suggests that the trial court actually considered any documentation or evidence not presented at the hearing, including the attachments to Miller's suppression motion.

In any case, "the validity of an alleged consent to search is a question of fact to be determined from the totality of the circumstances." *State v. Weaver*, 349 S.W.3d 521, 526 (Tex.

Crim. App. 2011). Mills testified that Miller gave his express oral consent to the blood draw after required statutory warnings were presented to him orally and in writing. Additionally, Mills testified that he believed Miller's consent was given freely and voluntarily. As the fact-finder at the pretrial suppression hearing, the trial court was entitled to believe Mills' testimony in concluding that the State had established consent as an exception to the warrant requirement. Since Mills' testimony supported the trial court's ruling, we cannot find that the court acted unreasonably or arbitrarily, outside the zone of reasonable disagreement, or without reference to guiding rules and principles. Thus, we conclude that the trial court did not abuse its discretion in denying Miller's motion to suppress evidence obtained from the blood draw.

We overrule this point of error.

(2) Miller Failed To Preserve Any Brady *Complaint*

At trial, an eyewitness to the fatal accident testified that an eighteen-wheeler drove right between Miller's and Rangel's vehicles immediately after the crash, but failed to stop. Because Miller was allegedly uninformed of this fact, he argues that the State committed a *Brady* violation by submitting "incomplete or falsified accident reports and analyses before trial, thus limiting [Miller's] opportunity to challenge the State's theory" that Miller's vehicle caused Rangel's death. The State contends that it also heard about the eighteen-wheeler for the first time at trial and argues that, in any event, Miller's *Brady* complaint is not preserved. Because we agree that Miller failed to preserve this complaint, we overrule it.

A *Brady* violation occurs when the State willfully or inadvertently suppresses material evidence favorable to a defendant. *See Brady*, 373 U.S. at 87; *Harm v. State*, 183 S.W.3d 403,

406 (Tex. Crim. App. 2006). A point of error on appeal alleging a *Brady* violation must be preserved for appellate review. *See Keeter v. State*, 175 S.W.3d 756, 760–61 (Tex. Crim. App. 2005). Thus, before raising an alleged *Brady* violation, "the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . ." TEX. R. APP. P. 33.1(a)(1).

Here, the appellate record demonstrates that Miller did not raise any complaint about an alleged *Brady* violation before the trial court, either during trial or by motion for new trial. We overrule Miller's last point of error because he failed to preserve it for our review.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: May 8, 2018
Date Decided: May 9, 2018

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