IN THE
TENTH COURT OF APPEALS

No. 10-14-00263-CR

SHAWNA PHALENE JOHNSON,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the County Court at Law No. 1
McLennan County, Texas
Trial Court No. 2013-2341-CR1

MEMORANDUM OPINION

A jury found Appellant Shawna Phalene Johnson guilty of possession of marijuana in an amount of four ounces or less but more than two ounces and assessed her punishment at 365 days' confinement in the county jail and a $1,000 fine. This appeal ensued.

Relevant Background

McGregor Police Department Special Investigator Jose Coy sought a warrant to search a residence for items that constituted evidence of the illegal distribution of

marijuana and to arrest those who were in charge of and controlled the residence. Coy submitted the following affidavit in support of the warrant:

> The undersigned Affiant, being a Peace Officer under the laws of Texas and being duly sworn, on oath makes the following statements and accusations:
>
> 1. THERE IS IN MCLENNAN COUNTY, TEXAS, A SUSPECTED PLACE AND PREMISES DESCRIBED AND LOCATED AS FOLLOWS: a single family, single story, wood framed home, yellow in color with blue colored porch poles located at 107 Johnson Street in McGregor, McLennan County, Texas. Entrance to the residence faces east towards Johnson Street. Said residence has the numbers 107 displayed in black on the front porch near the front steps to the residence. To include all places, structures, buildings and all other vehicles on the property under the control of the suspected parties. Hereinafter called "Suspected Premises".
>
> 2. THERE IS IN SUSPECTED PLACE AND PREMISES PROPERTY CONCEALED AND KEPT IN VIOLATION OF THE LAWS OF TEXAS AND DESCRIBED AS FOLLOWS: Affiant request[s] to search for the items that constitute evidence of illegal distribution of controlled substances to wit: marijuana, in violation of various sections of the TEXAS HEALTH AND SAFETY CODE.
>
> 3. SAID SUSPECTED PLACE AND PREMISES ARE IN CHARGE OF AND CONTROLLED BY EACH OF THE FOLLOWING PERSONS: Shawn L Johnson, white male, date of birth 8/20/1971, Joseph Johnson, white male, Shawna Johnson, white female, date of birth 2-12-1974, and person or persons whose identities are unknown to Affiant who may be residing or making their escape therefrom. Hereinafter called "Suspected Parties".
>
> 4. AFFIANT HAS PROBABLE CAUSE FOR SAID BELIEF BY REASON OF THE FOLLOWING FACTS: Affiant is Jose L. Coy. Affiant, a certified peace officer of the State of Texas, is currently employed as a Special Investigator with the McGregor Police Department and was formally employed with the Narcotics Service of the Texas Department of Public Safety, and had been employed by the Texas Department of Public Safety Criminal Investigation Division for approximately twenty eight years. Affiant's primary responsibility is for the enforcement of laws and to ensure public safety which includes the investigation of drug related offenses. As such, Affiant has undergone extensive training and has years of experience in various aspects of illegal drug related activities and methods used by drug offenders to maintain their activities. In addition, Affiant has

participated and assisted in joint investigations with law enforcement agents of the Federal Drug Enforcement Administration, Federal Bureau of Investigation, various State and Federal Drug Task Forces and other law enforcement agencies in their investigations of individuals who traffic in illegal controlled substance.

a. Your Affiant has talked with other experienced local, state and federal law enforcement officers as well as prosecuting attorneys representing both state and federal systems concerning narcotics and dangerous drug trafficking activities and criminal violations.

Your Affiant has performed narcotics and dangerous drug law enforcement activities and functions throughout the United States and your Affiant has participated in numerous investigations of individuals who have ultimately been convicted of both state and federal laws pertaining to narcotics and dangerous drugs.

1. During my tenure as a law enforcement officer, Affiant has conducted hundreds of hours of surveillance of narcotics traffickers and money launderers and has personally seen currency and illegal drugs delivered to businesses, residences and public places by courier. Your Affiant has participated in the execution of court ordered search warrants of businesses, residences and vehicles where large amounts of illegal drugs, currency and records were discovered and seized. During the course of these investigations, I have worked in the company of other experienced law enforcement officers and have discussed their investigative techniques and experiences with them. During the course of the investigations which I have been party to, I have become familiar with the clandestine business practices of drug traffickers and money launderers.

Your Affiant states the facts which establish probable cause necessary for the issuance of a search warrant for the suspected premises and persons are as follows:

1. On or about December 13th, 2012, Affiant received information from a cooperating individual, herein referred to as CI-1 that a Shawn Johnson, Joseph Johnson and Shawna Johnson were all involved in the illegal distribution of marijuana. CI-1 advised that within the last 48 hours, CI-1 has been to the said suspected premises and has observed the parties named above in possession of high grade marijuana which was being stored at the said suspected premises.

2. Affiant believes that information provided by CI-1 is credible and reliable, because information provided by CI-1 has been corroborated through surveillance, independent investigation and from other investigative sources. Affiant has found no reason that false or inaccurate information would be provided by CI-1. CI-1 has successfully demonstrated to Affiant that CI-1 is familiar with marijuana by the method that marijuana is consumed, by the appearance of marijuana and by the method that marijuana is distributed and packaged. Affiant wishes to keep the identity of CI-1 for fear of retaliation and harm. Affiant is aware that if the identity of the cooperating individual is known that fewer individuals would be willing to come forward to assist law enforcement.

3. On or about December 1st, 2012, Affiant received information from a cooperating individual, herein referred to as CI-2. CI-2 forwarded information to Affiant that Joseph was involved in the illegal distribution of marijuana which was being conducted at the Johnson's residence located at 107 Johnson Street in McGregor, Texas….

4. Affiant believes that information provided by CI-2 is credible and reliable, because CI-2 is gainfully employed and considered an upstanding member of the community. CI-2 has a reputation for truth and credibility. Information provided by CI-2 has been corroborated through surveillance, independent investigation and from other investigative sources. Affiant has found no reason that false or inaccurate information would be provided by CI-2. CI-2 has successfully demonstrated to Affiant that CI-2 is familiar with marijuana by the method that marijuana is consumed, by the appearance of marijuana and by the method that marijuana is distributed and packaged. Affiant wishes to keep the identity of CI-2 for fear of retaliation and harm. Affiant is aware that if the identity of the cooperating individual is known that fewer individuals would be willing to come forward to assist law enforcement.

Based on all the foregoing facts, Affiant believes that there exists probable cause to believe that the suspected parties are knowingly and intentionally in possession of the items described above that constitute evidence of violations of the TEXAS HEALTH AND SAFETY CODE and the TEXAS PENAL CODE; there further exists probable cause to believe that the items described above are being concealed at the suspected premises and on the property and on the persons of the suspected parties.

> WHEREFORE, Affiant asks for issuance of a warrant that will authorize him to search said place and premises for said property and seize the same and to arrest each said described and accused person.

The warrant was issued, and when it was executed, Coy found Shawna Johnson in the master bedroom of the residence with marijuana.

Before trial, Johnson filed a "Motion to Suppress Evidence," arguing that the search warrant affidavit was insufficient to establish probable cause for the issuance of the search warrant. Johnson also filed a "Motion to Require Disclosure of All Informers Relied Upon and for Production of Said Informers in Open Court." After a hearing, the trial court signed an order, which states as follows:

> The Court finds that the State has the privilege to refuse to disclose an informant's identity.
>
> The Court finds that the Defendant is required to make a plausible showing of how the informant's information may be important to the disposition of the case at hand and that the State has presented evidence that indicates that the informants were not present on the date of the offense and that they will not be material witnesses in said case.
>
> The Court hereby denies the motion to compel the State to provide information disclosing the names of the informants. Therefore the entirety of the Motion to Suppress is hereby DENIED.

Several months later, the trial court held a *Franks* hearing. *See Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). At the hearing, Johnson alleged that the affidavit contained the following "blatant misstatement": "CI-1 advised that within the last 48 hours, CI-1 has been to the said suspected premises and has observed the parties named above [Shawn Johnson, Joseph Johnson and Shawna Johnson] in possession of high grade marijuana which was being stored at the said suspected premises." The

affidavit was sworn to on December 13, 2012. As evidence to support this allegation, Johnson offered a document from the McLennan County Sheriff's Department that showed that a "Shawn Lee Johnson" living at the address of the suspected premises was in jail from November 14, 2012 to June 12, 2013. The trial court stated that Johnson's counsel had "met the burden" and "should be allowed to go forward with this hearing." Johnson and the State then argued whether, excluding the statement, the affidavit was sufficient to establish probable cause. The trial court ruled as follows:

> I find that there was sufficient hearing (sic), excluding the one sentence that I've talked about, from the [four] corners of the affidavit. I do not believe the information contained in the warrant is a lie, but it is really poorly worded. In regard to that sentence, I've excluded that sentence.
>
> And excluding that sentence, I find the affidavit is sufficient; and I'm not going to go forward with this hearing. We're adjourned.

Warrant Affidavit

In her first issue, Johnson contends that the affidavit was insufficient to justify a finding of probable cause for the issuance of the search and arrest warrant. Johnson argues that the affidavit did not show that the informants were reliable. Johnson asserts that the affidavit instead contained nothing but conclusory, subjective statements and that CI-1, in fact, gave false information to the affiant, false information that Johnson claims was critical and should have been dispositive. Johnson also points out that CI-2's statements in the affidavit contained information that was twelve days old.

In assessing the sufficiency of a search and arrest warrant, the reviewing court is limited to the four corners of the affidavit. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011); *Glaze v. State*, 230 S.W.3d 258, 260 (Tex. App.—Waco 2007, pet. ref'd).

Accordingly, and because of the constitutional preference for warrants, we apply a highly deferential standard in reviewing a magistrate's decision to issue a warrant. *Illinois v. Gates*, 462 U.S. 213, 234-37, 103 S.Ct. 2317, 2330-31, 76 L.Ed.2d 527 (1983); *McLain*, 337 S.W.3d at 271. As long as the magistrate had a substantial basis for concluding that probable cause existed, the magistrate's probable-cause determination will be upheld. *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331; *McLain*, 337 S.W.3d at 271. The affidavit is not to be analyzed hypertechnically. *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331; *McLain*, 337 S.W.3d at 271. Rather, the reviewing court should interpret the affidavit in a common-sense and realistic manner, recognizing that the magistrate was permitted to draw reasonable inferences. *McLain*, 337 S.W.3d at 271; *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007).

Probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found at the specified location. *McLain*, 337 S.W.3d at 272. It is a flexible and non-demanding standard. *Id.* The focus is not on what other facts could or should have been included in the affidavit; the focus is on the combined logical force of facts that are in the affidavit. *State v. Duarte*, 389 S.W.3d 349, 354-55 (Tex. Crim. App. 2012).

With regard to an informant's tip, we take into account the informant's veracity or reliability and his basis of knowledge to determine the value of his assertions. *Gates*, 462 U.S. at 233, 103 S.Ct. at 2329; *Rivas v. State*, 446 S.W.3d 575, 579 (Tex. App.—Fort Worth 2014, no pet.). But "a deficiency in one may be compensated … by a strong showing as to the other, or by some other indicia of reliability," all of which are relevant

considerations under the totality of the circumstances. *Gates*, 462 U.S. at 233, 103 S.Ct. at 2329. The unnamed informant's credibility may be established by allegations that the informant has proven reliable on previous occasions. *Blake v. State*, 125 S.W.3d 717, 726 (Tex. App.—Houston [1st Dist.] 2003, no pet.). This reliability may be established by the general assertions of the affiant, as stated in the affidavit, concerning the informant's prior reliability. *Id.* The informant's tip combined with independent police investigation may also provide a substantial basis for the probable-cause finding. *Lowery v. State*, 843 S.W.2d 136, 141 (Tex. App.—Dallas 1992, pet. ref'd) (citing *Janecka v. State*, 739 S.W.2d 813, 825 (Tex. Crim. App. 1987)).

The affidavit in this case shows that the affiant received tips from two unnamed informants. The affidavit does not indicate whether CI-1 had been credible or reliable in the past, but it provides that CI-2 had "a reputation for truth and credibility." The affiant further stated that he believed that the information provided by CI-2 was credible and reliable because CI-2 was gainfully employed and considered an upstanding member of the community.

The affiant also stated that both informants' tips had been corroborated through surveillance, independent investigation, and other investigative sources and that he found no reason that the informants would provide false or inaccurate information. The affiant did not detail the specific investigative techniques that he used to corroborate the informants' tips; however, he described some of the training and investigations that he had participated in during his approximately twenty-eight-year law-enforcement career. One could reasonably infer that the affiant used his extensive experience in conducting

the investigation in this case. Furthermore, as stated above, the focus is not on what other facts could or should have been included in the affidavit; the focus is on the combined logical force of facts that are in the affidavit. *Duarte*, 389 S.W.3d at 354-55.

Citing *Davis v. State*, 144 S.W.3d 192 (Tex. App.—Fort Worth 2004, pet. ref'd), and *Lowery*, 843 S.W.2d 136, Johnson argues that, given the fact that the affiant had not previously tested the informants' reliability, the affiant should have more clearly detailed what efforts he took to independently verify the informants' information. While the affidavit in this case does not state that CI-2 had been an informant before, it states that CI-2 had "a reputation for truth and credibility." By contrast, the affidavits in *Davis* and *Lowery* either stated that the informant had never before given information to a law enforcement agency or did not indicate that any of the informants had been credible or reliable in the past. *Davis*, 144 S.W.3d at 198; *Lowery*, 843 S.W.2d at 141. *Davis* and *Lowery* are therefore distinguishable.

Johnson also notes that CI-2's statements in the affidavit contained information that was twelve days old. The facts stated in a search warrant affidavit "must be so closely related to the time of the issuance of the warrant that a finding of probable cause is justified." *McLain*, 337 S.W.3d at 272. But with regard to staleness, time is a less important consideration when, as here, an affidavit recites observations that are consistent with ongoing drug activity at a defendant's residence. *Jones v. State*, 364 S.W.3d 854, 860-61 (Tex. Crim. App. 2012).

Finally, Johnson argues that CI-1 gave false information to the affiant that was critical and should have been dispositive. In *Franks*, the United States Supreme Court

held as follows:

> [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.

Franks, 438 U.S. at 155-56, 98 S.Ct. at 2676. This exclusionary rule does not extend to instances in which the police are merely negligent in collecting the facts alleged in the affidavit. *Id.* at 170-71, 98 S.Ct. at 2683-84; *Thom v. State*, 437 S.W.3d 556, 563-64 (Tex. App.—Houston [14th Dist.] 2014, no pet.). A misstatement in an affidavit that is the result of simple negligence or inadvertence, as opposed to reckless disregard for the truth, will not make the warrant invalid. *Dancy v. State*, 728 S.W.2d 772, 783 (Tex. Crim. App. 1987); *Thom*, 437 S.W.3d at 564.

The affidavit in this case provides, "CI-1 advised that within the last 48 hours, CI-1 has been to the said suspected premises and has observed the parties named above [Shawn Johnson, Joseph Johnson and Shawna Johnson] in possession of high grade marijuana which was being stored at the said suspected premises." The affidavit was sworn to on December 13, 2012. During the *Franks* hearing, Johnson offered a document from the McLennan County Sheriff's Department that showed that a "Shawn Lee Johnson" living at the address of the suspected premises was in jail from November 14, 2012 to June 12, 2013. Johnson argues that Shawn Johnson could not, therefore, have been

at the suspected premises "within the last 48 hours" from December 13, 2012 for CI-1 to have observed him in possession of marihuana. Johnson argues that the affiant thus acted with reckless disregard for the truth in including the statement in the affidavit. Johnson asks in her brief, "How much false information has to exist before it is imputed to the affiant[?]… If jail records are readily available to the affiant, a police officer, how much effort does he have to put forth to verify an informant[']s information?" Based on this record, however, we conclude that the trial court could have reasonably concluded that the affiant's inclusion of the statement in the warrant affidavit was a mistake or simple negligence in the wording of the statement. Furthermore, other than the above arguments, which we have considered and rejected, Johnson makes no other argument that, with the false information set to one side, the affidavit's remaining content is insufficient to establish probable cause. The warrant, therefore, need not be voided because of the false information. *See Franks*, 438 U.S. at 155-56, 98 S.Ct. at 2676.

Based on the foregoing, we conclude that the affidavit was sufficient under the totality of the circumstances to justify a finding of probable cause for the issuance of the warrant. We overrule Johnson's first issue.

Identity of Informant

In her second issue, Johnson contends that the trial court abused its discretion in denying her motion to disclose the identity of CI-1 under Rule of Evidence 508(c)(3).

The State generally has the privilege to refuse to disclose its confidential informants' identity. TEX. R. EVID. 508(a). But Rule of Evidence 508(c)(3) provides as follows:

(3) ***Legality of Obtaining Evidence.***

(A) ***Court May Order Disclosure.*** The court may order the public entity to disclose an informer's identity if:

(i) information from an informer is relied on to establish the legality of the means by which evidence was obtained; and

(ii) the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible.

(B) ***Procedures.***

(i) On the public entity's request, the court must order the disclosure be made in camera.

(ii) No counsel or party may attend the in camera disclosure.

(iii) If the informer's identity is disclosed in camera, the court must seal and preserve for appeal the record of the in camera proceeding. The record of the in camera proceeding must not otherwise be revealed without the public entity's consent.

TEX. R. EVID. 508(c)(3).

Johnson argues that the trial court abused its discretion under Rule 508(c)(3) because it did not order the identity of the informer to be disclosed in light of CI-1's misrepresentation, but the record contains no evidence indicating that Coy, when he prepared his affidavit, did not believe CI-1 to be reliable and credible. *See Shedden v. State*, 268 S.W.3d 717, 734 (Tex. App.—Corpus Christi 2008, pet. ref'd); *Blake*, 125 S.W.3d at 728; *Thompson v. State*, 741 S.W.2d 229, 231 (Tex. App.—Fort Worth 1987), *pet. ref'd*, 763 S.W.2d 430 (Tex. Crim. App. 1989). While Johnson raised doubt as to whether CI-1 told the truth, she merely speculates that Coy recklessly included false statements in his affidavit. In contrast, Coy stated in his affidavit, "Affiant believes that information provided by CI-1

is credible and reliable, because information provided by CI-1 has been corroborated through surveillance, independent investigation and from other investigative sources. Affiant has found no reason that false or inaccurate information would be provided by CI-1." Therefore, an in camera hearing was not required, and the trial court did not abuse its discretion in denying Johnson's motion to disclose the identity of CI-1. *See also Sanchez Selph v. State*, No. 14-03-01112-CR, 2005 WL 851184, at *5 (Tex. App.—Houston [14th Dist.] Apr. 14, 2005, no pet.) (mem. op., not designated for publication) ("The plain wording of Texas Rule of Evidence 508(c)(3) requires an in camera hearing only if the trial court requires the disclosure of an informant's identity."). We overrule Johnson's second issue.

Jury Charge

The jury charge in this case included the following instruction:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or an Information filed, or otherwise charged with the offense, gives rise to no inference of guilt at this trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the Defendant, unless the jurors are satisfied beyond a reasonable doubt of the Defendant's guilt after careful and impartial consideration of all the evidence in the case.
>
> The prosecution has the burden of proving the Defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt, and if it fails to do so, you must acquit the Defendant.
>
> It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the Defendant's guilt.
>
> In the event you have a reasonable doubt as to the Defendant's guilt after considering all the evidence before you, and these instructions, you

will acquit him and say by your verdict not guilty.

Johnson's counsel objected in the trial court, arguing that the sentence, "It is not required that the prosecution prove guilt beyond all possible doubt," should be deleted. The trial court overruled the objection. In her third issue, Johnson contends that the trial court erred in overruling her objection to the language in the charge. More specifically, Johnson argues, "The complained of language is an attempt to limit the legal requirement of proof beyond a reasonable doubt. To instruct the jury what reasonable doubt is not is the equivalent of defining it, using the language in this case, the equivalent of limiting its weight."

The Court of Criminal Appeals has addressed this contention in a similar case and held that the trial court did not abuse its discretion in submitting the complained-of instruction. *See Woods v. State*, 152 S.W.3d 105, 114-15 (Tex. Crim. App. 2004). We therefore conclude that inclusion of the complain-of instruction was not improper and overrule Johnson's third issue.

Having overruled all of Johnson's issues, we affirm the trial court's judgment.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed March 17, 2016
Do not publish
[CR25]


COURT OF APPEALS
STATE OF TEXAS