TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00691-CR

Dean Edward Calhoun, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF CALDWELL COUNTY, 421ST JUDICIAL DISTRICT
NO. 14-222, HONORABLE TODD A. BLOMERTH, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Dean Edward Calhoun appeals from his conviction for the offense of possession of a controlled substance, methamphetamine, in an amount less than one gram. *See* Tex. Health & Safety Code § 481.115. In three issues, Calhoun asserts that (1) the trial court erred by denying his motion to suppress evidence obtained during the search of a metal canister attached to Calhoun's key chain, (2) the trial court erred by refusing his request for an article 38.23 jury instruction, *see* Tex. Code Crim. Proc. art. 38.23, and (3) the judgment should be reformed to properly reflect that Calhoun was convicted of a state jail felony rather than a second degree felony. On the basis of Calhoun's first argument, we will reverse the judgment of conviction and remand the cause to the trial court.

BACKGROUND

In March 2014, four officers arrived at Calhoun's residence, a recreational vehicle located in rural Caldwell County, to execute an outstanding arrest warrant. After executing the warrant, the officers detained Calhoun at his residence prior to transporting him to jail. At Calhoun's request, one of the officers retrieved Calhoun's keys from inside the recreational vehicle and locked the door. Attached to the keychain was a small green metal canister. After locking the door, Officer Brian Wahlert, the officer who retrieved the keys, approached Calhoun and asked him if the keys belonged to him. When Calhoun stated that they were his keys, Officer Wahlert opened the screw top of the canister and observed inside it a plastic bag that contained what appeared to him to be methamphetamine. Officer Wahlert performed a field test on the substance in the plastic bag and then took it with him to the Sheriff's office. Chemical analysis performed by the Department of Public Safety in Austin confirmed that the substance found in the plastic bag was .54 gram of methamphetamine, including adulterants and dilutants. Calhoun was then indicted for possession of a controlled substance.

Calhoun moved to suppress the methamphetamine and other evidence taken from his trailer and requested a pre-trial hearing to address the motion. The trial court carried the motion until trial. During trial, the court overruled Calhoun's objections to the admission of evidence related to the contents of the metal canister. After trial, a jury returned a verdict of guilty, Calhoun was convicted of the offense charged, and punishment was assessed at 14 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). We give "almost total deference to a trial court's determinations of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We afford the same level of deference to a trial court's rulings on mixed questions of law and fact if the resolution of those questions turns on an evaluation of credibility and demeanor. *Montanez v. State*, 195 S.W.3d 101, 107 (Tex. Crim. App. 2006). We review de novo mixed questions of law and fact that do not depend on credibility and demeanor. *Amador*, 221 S.W.3d at 673. If the trial court's ruling regarding a motion to suppress is reasonably supported by the record and is correct under any theory of law applicable to the case, the reviewing court must affirm. *Young v. State*, 283 S.W.3d 854, 873 (Tex. Crim. App. 2009) (citing *Romero v. State*, 800 S.W.2d 539, 543-44 (Tex. Crim. App. 1990)).

DISCUSSION

In his first issue, Calhoun argues that the trial court erred by denying his motion to suppress and admitting evidence obtained during the search of the metal canister attached to his key chain because that evidence was seized in violation of Calhoun's rights under the Fourth Amendment to the United States Constitution and article I, section 9 of the Texas Constitution. The State responded at trial that the methamphetamine was discovered during a valid "inventory search." *See Colorado v. Bertine*, 479 U.S. 367 (1987) (inventory searches are well-defined exception to warrant requirement of Fourth Amendment).

The Fourth Amendment to the United States Constitution and article I, section 9 of the Texas Constitution provide protection from unreasonable searches and seizures. *See Hankston v. State*, No. PD-0887-15, 2017 WL 1337659, at *6-7 (Tex. Crim. App. Apr. 12, 2017.)[1] A warrantless search is presumptively unreasonable. *Horton v. California*, 496 U.S. 128, 133 & n.4 (1990); *Katz v. United States*, 389 U.S. 347, 357 (1967). However, an inventory search has long been recognized as a valid exception to the warrant requirement of the Fourth Amendment. *See Illinois v. Lafayette*, 462 U.S. 640 (1983). "Consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station incident to booking and jailing the suspect." *Id.* at 640. Inventory searches serve three purposes: (1) to protect the owner's property while it is in police custody; (2) to protect the police against claims or disputes over lost or stolen property; and (3) to protect the police or public from potential danger. *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976); *Garza v. State*, 137 S.W.3d 878, 882 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd). Because "[j]ustification for such searches does not rest on probable cause, [] the absence of a warrant is immaterial to the reasonableness of the search." *Lafayette*, 462 U.S. at 640. Thus, if an inventory search is part of a bona fide "routine administrative caretaking function" of the police, there is no requirement that an officer obtain a search warrant to conduct that inventory. *United States v. Skillern*, 947 F.2d 1268, 1275 (5th Cir. 1991).

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[1] Because we conclude that the search in the present case violated the protections afforded by the Fourth Amendment, we need not address whether in this instance article I, section 9 of the Texas Constitution provides greater protections in the context of an inventory search than does the Fourth Amendment.

The Fourth Amendment requires that an inventory not be a "ruse for a general rummaging in order to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990). "The policy or practice governing inventory searches should be designed to produce an inventory." *Id.* To prevent inventories from becoming a general rummaging, the Supreme Court encourages "'[a] single familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Lafayette*, 462 U.S. at 648 (quoting *New York v. Belton*, 453 U.S 454, 458 (1981)). "The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering crime.'" *Wells*, 495 U.S. at 4 (quoting *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring)). Thus, an inventory search must be conducted in good faith and pursuant to reasonable standardized police procedure designed to accomplish the "caretaking" function. *Bertine*, 479 U.S. at 374; *Rothenberg v. State*, 176 S.W.3d 53, 57 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd).

The State bears the burden of establishing that the police conducted a lawful inventory search. *See Gauldin v. State*, 683 S.W.2d 411, 415 (Tex. Crim. App. 1984), *overruled on other grounds by Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991); *Evers v. State*, 576 S.W.2d 46, 50 & n.5 (Tex. Crim. App. 1978). The State satisfies this burden by demonstrating that (1) an inventory policy exists and (2) the officer followed that policy. *Moberg v. State*, 810 SW.2d 190, 195 (Tex. Crim. App. 1991) (citing *Evers*, 576 S.W.2d at 50 & n.5).

Having reviewed the testimony adduced at trial, we must conclude that the State failed to satisfy its burden of demonstrating that Officer Wahlert's search of the metal canister was

pursuant to and in accordance with an inventory policy rather than a search based on probable cause conducted without a warrant. Regarding his search of the sealed, metal canister, Officer Wahlert testified as follows:

> Q: Okay. Now, he requested the keys. You retrieved them. You open the container. Why did you open the container?
>
> A: Through my years of law enforcement experience, I know that this [is] a common place to where people hide narcotics [and] also prescription drugs. Then it is going to be going into a correctional facility. Everything must be checked before it goes into a correctional facility if—to make sure no contraband makes it in. If contraband goes into the correctional facility that person is charged with a higher degree of offense than the original offense.

Officer Wahlert's testimony does not establish that his search was for the purpose of creating an inventory of the items in Calhoun's possession. Nor does his testimony indicate or tend to show that the search was conducted pursuant to a policy designed to advance the "routine administrative caretaking function" of protecting Calhoun's property while it was in police custody, protecting the police from a claim of lost or stolen property, or protecting the police or public from potential danger. Officer Wahlert did not testify that he asked or sought to determine whether Calhoun had any additional items in his possession that should be included in an inventory either before or after opening the metal canister. There was no mention of making a list. Instead, Officer Wahlert plainly stated that he opened the canister because, in his experience, it was a "common place" to "hide narcotics."

Officer Wahlert's testimony that "everything must be checked before it goes into a correctional facility" indicates that his department has a policy of collecting, and presumably making

an inventory of, the items in possession of a person who will be detained. The testimony does not, however, establish that Officer Wahlert's search was pursuant to that policy and done for the purpose of creating an inventory of Calhoun's possessions. In fact, his own testimony contradicts that notion. We further note that Officer Wahlert testified that the purpose of searching items going into the correctional facility was "to make sure no contraband makes it in" so that Calhoun would not be "charged with a higher degree of offense than the original offense." This justification does not except Officer Wahlert's search from the warrant requirement.

The likelihood that the methamphetamine would have been discovered had Calhoun arrived at the facility with the canister in his possession does not exempt it from the exclusionary rule. *See* Tex. Code Crim. Proc. art. 38.23 (no evidence obtained in violation of United States or Texas Constitution shall admitted in evidence). "[E]vidence actually 'obtained in violation of law' must be excluded whether or not it might have been 'obtained' lawfully." *State v. Daugherty*, 931 S.W.2d 268, 269 (Tex. Crim. App. 1996) (holding that language of article 38.23 "brooks no inevitable discovery doctrine"); *cf. Wehrenberg v.State*, 416 S.W.3d 458, 461 (Tex. Crim. App. 2013) (independent source doctrine excepts from exclusionary rule evidence "initially observed during an unlawful search but later obtained lawfully through independent means"). "[T]he plain language of Article 38.23 does not provide for an inquiry into the potential legal acquisition of evidence once it has been established that it was actually 'obtained in violation' of law." *Daugherty*, 931 S.W.2d at 271.

The record does not demonstrate that Officer Wahlert was operating under any set of standardized criteria designed to inventory Calhoun's possessions for their safekeeping or to

protect the police from claims of lost or stolen property. The State failed to meet its burden of establishing that opening the canister on Calhoun's keychain was within the scope of an inventory search of items in Calhoun's possession. The "inventory search" doctrine does not prevent this warrantless search from violating Calhoun's rights under the Fourth Amendment to the United States Constitution.

The State nevertheless argues that the search was valid despite being warrantless because it fell within the "arrest exception" to the warrant requirement. *See United States v. Robinson*, 414 U.S. 218, 226 (1973) ("[W]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. [] In addition, it is entirely reasonable for the arresting officer to search and seize any evidence of the arrestee's person in order to prevent its concealment or destruction."). A search incident to an arrest permits officers to search a defendant, or areas within the defendant's immediate control, in order to remove any weapons that the arrestee may seek to use to resist arrest or effect escape. *Chimel v. California*, 395 U.S. 752, 763 (1969); *see McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). Officer Wahlert did not testify that he opened the metal canister for the purpose of removing any weapons or items Calhoun might have used to resist arrest or effect an escape. An arresting officer may also search for and seize any evidence on the arrestee's person to prevent its concealment or destruction. *Chimel*, 395 U.S. at 763; *see McGee*, 105 S.W.3d at 615. But the keychain with the metal canister connected to it was not on Calhoun's person when Officer Wahlert opened the canister. According to Officer Wahlert's testimony, when he opened the canister Calhoun was "on the front porch sitting in handcuffs" and

therefore in no position to conceal or destroy either the metal canister or its contents. Officer Wahlert's opening of the metal canister did not constitute a search incident to arrest that could be conducted without a warrant. *See Robinson*, 414 U.S. at 218 (search incident to lawful arrest requires no warrant if it is restricted to search of person or objects immediately associated with person of arrestee); *Chimel*, 395 U.S. at 762-63 (search of objects in area within control of arrestee may constitute search incident to lawful arrest that requires no warrant).

The warrantless search of the metal canister was not reasonable under the Fourth Amendment either as an inventory search or a search incident to arrest. The trial court abused its discretion by denying Calhoun's motion to suppress the .54 gram of methamphetamine found in the canister.[2] We therefore sustain Calhoun's first issue.[3]

CONCLUSION

Having concluded that the trial court erred by denying Calhoun's motion to suppress evidence obtained during the search of the metal canister attached to his keychain, we sustain Calhoun's first issue, reverse the trial court's judgment of conviction, and remand the cause to the trial court for further proceedings consistent with this opinion.

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[2] Calhoun does not complain on appeal of the trial court's denial of his motion to suppress other items taken from his recreational vehicle by the arresting officers.

[3] Because of our disposition of this issue, we need not address Calhoun's second issue in which he complains of the trial court's refusal to instruct the jury to disregard any unlawfully seized evidence or his third issue in which he asserts, and the State agrees, that the judgment of conviction should be reformed to reflect that Calhoun was convicted of a state jail felony rather than a second degree felony.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Reversed and Remanded

Filed: May 26, 2017

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