TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00293-CR

Silas Graham Parker, Appellant

v.

The State of Texas, Appellee

FROM THE 274TH DISTRICT COURT OF HAYS COUNTY
NO. CR-18-0250, THE HONORABLE WILLIAM R. HENRY, JUDGE PRESIDING

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

Silas Graham Parker was charged with possession with intent to deliver four hundred grams or more of a controlled substance, psilocin. *See* Tex. Health & Safety Code § 481.113(a), (e). Pursuant to a plea-bargain agreement, appellant pled guilty to the lesser-included offense of possession of one gram or more but less than four grams. *See id.* § 481.113(c). The district court placed him on deferred-adjudication community supervision for ten years. On appeal, appellant challenges the denial of his two pretrial motions to suppress. We affirm.

BACKGROUND[1]

On June 1, 2017, Detective Lee Harris of the San Marcos Police Department received information about the seizure of two packages by the Oregon State Police. Detective Jered McLain of the Oregon State Police explained to Detective Harris that a security supervisor at a UPS store in Eugene, Oregon, opened a package, one of two that he thought smelled of marijuana, prior to shipment. Detective McLain, a member of the Lane County Interagency Narcotics Enforcement Team, recognized the contents as psilocybin mushrooms. He seized both packages and opened the second package. Each package contained twenty, one-pound bags of mushrooms, which tested positive for psilocybin.[2] The shipping labels and paperwork listed Silas Parker as both the shipper and the recipient, with a delivery address of 2070 Lime Kiln Road, San Marcos, Texas. At Detective Harris's request, Detective McLain returned one bag to each package, added rocks for weight, and returned them to the UPS store for shipment. The UPS supervisor provided Detective Harris with the packages' tracking information, which reflected a delivery scheduled for June 9, 2017. Detective Harris searched a law enforcement database and discovered that the address on appellant's driver's license is 2070 Lime Kiln Road. He also discovered that appellant is listed on the website of Thigh High Gardens, a business at the same address, as its "manager."

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[1] The trial court conducted evidentiary hearings on the motions. Although no witnesses testified, the State offered two exhibits, which contained the warrants, supporting affidavits, and returns. In addition, at the first hearing, the parties stipulated to the admission of portions of the offense report, which were read aloud to the court. At the second hearing, the parties stipulated to the fact that the second search warrant was executed. We take the facts in the background section from two supporting affidavits and the stipulations.

[2] The parties treat psilocybin as interchangeable with psilocin. We note that both compounds are listed separately as controlled substances. *See* Tex. Health & Safety Code § 481.103(a)(5)(B)(ii).

Detective Harris submitted an affidavit requesting a warrant to arrest appellant and seize the packages on the expected delivery date after confirming that the packages had been delivered. The affidavit describes the land at 2070 Lime Kiln Road and its improvements, which are not visible from the front gate. A magistrate judge issued the warrant. On the morning of June 9, 2017, Detective Harris and other officers watched the delivery truck drive through the property's front gate and out of sight. After Detective Harris confirmed on the UPS website that the driver had marked the packages as "delivered," the officers executed the warrant and seized the bags of mushrooms, among other things.

Detective Harris subsequently applied for a second warrant to obtain Parker's electronic customer data from his cellular provider. The affidavit supporting the request describes the previous events in the case and explains that the customer data could confirm that appellant was in Oregon when the packages were shipped. A different magistrate granted the second warrant, which was executed on the cellular provider.

Appellant filed a motion to suppress all evidence from the search of 2070 Lime Kiln Road and a separate motion to suppress his electronic customer data. The district court heard arguments, admitted copies of the warrants and Detective Harris's affidavits, and overruled both motions. Appellant pleaded guilty, and the district court placed him on deferred-adjudication community supervision for ten years. This appeal followed.

DISCUSSION

Appellant argues on appeal that the first warrant is an invalid "anticipatory" warrant and, in the alternative, that Detective Harris failed to comply with its terms. He also contends that there was no probable cause to support either warrant.

Legal Standards

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion, applying a bifurcated standard of review. *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018). We afford almost total deference to the trial court's findings of historical fact and determinations of mixed questions of law and fact that turn on credibility and demeanor if they are reasonably supported by the record. *State v. Arellano*, 600 S.W.3d 53, 57 (Tex. Crim. App. 2020). We review de novo a trial court's determination of legal questions and its application of the law to facts that do not turn upon a determination of witness credibility and demeanor. *Id.*

The issues raised here include statutory construction, which is a question of law that we review de novo. *Lopez v. State*, 600 S.W.3d 43, 45 (Tex. Crim. App. 2020). In analyzing a statute, we apply the "the plain meaning of its language, unless the statute is ambiguous, or the plain meaning would lead to absurd results that the legislature could not have possibly intended." *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015).

Analysis

"The cornerstone of the Fourth Amendment and its Texas equivalent is that a magistrate shall not issue a search warrant without first finding probable cause that a particular item will be found in a particular location." *Foreman v. State*, 613 S.W.3d 160, 163 (Tex. Crim. App. 2020) (citing *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007)). Under article 18.01 of the Code of Criminal Procedure, a search warrant may issue only after submission of an affidavit "setting forth substantial facts establishing probable cause." Tex. Code Crim. Proc. art. 18.01(b). "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." *State v. Elrod*, 538 S.W.3d 551, 558 (Tex. Crim. App. 2017) (citing *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012)). This is a "flexible and nondemanding" standard. *Foreman*, 613 S.W.3d at 164.

Appellant first argues that the warrant authorizing the search of 2070 Lime Kiln Road is an "anticipatory warrant" that is not supported by probable cause. An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." *United States v. Grubbs*, 547 U.S. 90, 94 (2006) (citing 2 W. LaFave, Search and Seizure § 3.7(c), 398 (4th ed. 2004)). Most anticipatory warrants "subject their execution to some condition precedent other than the mere passage of time—a so-called 'triggering condition.'" *Id.* The affidavit here, for example, explained that the search would take place "on or around the expected delivery date of June 9, 2017, after [Harris] has been able to confirm parcel delivery to said suspected place and premises." Appellant argues that article 18.01(b) prohibits magistrates from issuing anticipatory search warrants. We disagree.

Article 18.01(b) provides:

> No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that *probable cause does in fact exist for its issuance.* A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

Tex. Code Crim. Proc. art. 18.01(b) (emphasis added). Appellant argues that article 18.01(b) prohibits anticipatory warrants because probable cause does not "exist" at the time of issuance. The Court of Criminal Appeals has not addressed this issue under article 18.01, but the United

States Supreme Court has rejected this argument under the Fourth Amendment.[3] *See* U.S. Const. amend IV (providing that "no warrants shall issue, but upon probable cause"). The Court explained:

> Because the probable-cause requirement looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, "anticipatory." In the typical case where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed. . . . . Thus, when an anticipatory warrant is issued, the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed.
>
> Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will* be on the described premises (3) when the warrant is executed.

Grubbs, 547 U.S. at 95–96 (internal citations and footnote omitted). For probable cause to exist at the time the warrant issues, "[i]t must be true not only that if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, but also that there is probable cause to believe the triggering condition will occur." *Id.* at 96–97 (internal citation omitted). Appellant argues that article 18.01(b) prohibits magistrates from issuing warrants based on such conditional facts, but when the Legislature intends to prohibit magistrates from issuing warrants unless the affidavit includes a certain type of facts, it does so expressly. *See, e.g.*, Tex. Code Crim. Proc. arts. 18.01(c) (providing that search warrants

[3] We disagree with appellant that the Court of Criminal Appeals adopted his interpretation of article 18.01(b) in *State v. Toone*, 872 S.W.2d 750 (Tex. Crim. App. 1994). The Court declined to reach that issue and decided the case on other grounds. *See id.* at 752 ("We emphasize that our holding in this case does not reflect upon the validity of an anticipatory search warrant under the Texas Constitution, nor does it reflect upon the validity of an anticipatory search warrant which is otherwise governed by article 18.01.").

for evidence of crimes may not issue unless affidavit includes certain facts), .0215 (prohibiting magistrates from issuing warrants to search cellular telephones unless affidavit includes certain facts). Article 18.01(b) says only that the affidavit must include "sufficient facts" to satisfy the issuing magistrate that "probable cause does in fact exist" to issue a warrant. *See id.* art. 18.01(b). We conclude that a magistrate does not violate this requirement by issuing a warrant based on facts showing a "fair probability" that (1) certain items will be found at the designated location and (2) the triggering condition will occur. *See Grubbs*, 547 U.S. at 96–97.

Next, Appellant argues the warrant is invalid as an anticipatory search warrant because it does not comply with the heightened requirements applicable to warrants for a certain type of item. *See* Tex. Code Crim. Proc. art. 18.01(c). Under article 18.02(a)(10), a search warrant may be issued to search for and seize "property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense." *Id.* art. 18.02(a)(10). A warrant for items described by subsection (a)(10), known as an "evidentiary search warrant" or a "mere evidentiary search warrant," is subject to heightened requirements:

> A search warrant may not be issued under Article 18.02(a)(10) unless the sworn affidavit required by Subsection (b) sets forth sufficient facts to establish probable cause: (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Id. art. 18.01(c). Appellant argues that the warrants here must be justified under article 18.02(a)(10) because the State agreed to strike from the first affidavit allegations satisfying article 18.02(a)(7). We disagree.

Under article 18.02(a)(7), a search warrant may be issued to search for and seize "a drug, controlled substance . . . or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state." *Id.* art. 18.02(a)(7). The State agreed to strike the allegation that there was already a quantity of psilocybin on the property, but the allegations regarding the pending delivery of the packages remained. Those allegations are sufficient to justify issuing the warrant under article 18.02(a)(7). A warrant that authorizes a search for items described by article 18.02(a)(10) and items listed under another ground is not subject to article 18.01(c). *See Jennings v. State*, 531 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (concluding that warrant that authorizes search for both "mere evidence" and items listed under another ground for search and seizure, "is not a mere evidentiary search warrant and is not subject to the heightened requirements of 18.01(c)"); *Carmen v. State*, 358 S.W.3d 285, 298 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (same).

Next, appellant argues that the warrant is invalid because the triggering condition did not occur. He contends the State essentially admitted that this did not occur at the suppression hearing. Specifically, the prosecutor told the court that "it was Zachary Alfin that approached the UPS delivery truck and took custody of the two packages." He contends that this is insufficient to show the package was in fact delivered to the premises because there is no information regarding Zachary Alfin's connection with Thigh High Gardens. The only reference to Alfin in the record is from the statement of the prosecutor at the suppression hearing. The arguments of the parties "are not evidence." *See Cary v. State*, 507 S.W.3d 750, 755 (Tex. Crim. App. 2016). But even if we consider the prosecutor's statements, the record is sufficient to show that the packages were delivered to the property. The offense report reflected that

Detective Harris observed the UPS delivery truck enter the premises, saw an individual known from prior surveillance of the property approach the UPS delivery truck and take custody of the packages, and determined that the UPS tracking numbers of the two packages indicated that delivery had been made. Based on these facts, we conclude that the district court did not abuse its discretion in concluding the triggering condition occurred before the warrant was executed.

In his remaining issues, appellant argues that Detective Harris's affidavits fail to establish probable cause for either warrant. When we review a magistrate's decision to issue a warrant, we apply a highly deferential standard of review because of the constitutional preference for searches to be conducted pursuant to a warrant. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). "Ultimately, the test is whether the affidavit, read in a commonsensical and realistic manner and afforded all reasonable inferences from the facts contained within, provided the magistrate with a 'substantial basis' for the issuance of a warrant." *Foreman*, 613 S.W.3d at 164 (quoting *McLain*, 337 S.W.3d at 271). Appellant argues that the first affidavit fails to establish probable cause that he mailed the packages from Oregon because anyone could have written his name and address on the shipping labels. However, the affidavit contained additional information linking appellant to the packages: the address on appellant's driver's license is the same as on the shipping labels, and Thigh High Gardens' website lists him as an employee. Considering all these facts together, we conclude that the magistrate had a substantial basis to determine that probable cause existed to issue the warrant. *See State v. Jordan*, 342 S.W.3d 565, 569 (Tex. Crim. App. 2011) (explaining that courts determine probable cause from "totality of the circumstances contained within the four corners of the affidavit").

Next, appellant argues that Detective Harris's second affidavit, concerning appellant's phone records, is improperly conclusory. Neither Texas nor federal law defines precisely what degree of probability suffices to establish probable cause, "but that probability cannot be based on mere conclusory statements of an affiant's belief." *Rodriguez*, 232 S.W.3d at 61. The affidavit must contain enough facts for the magistrate "to independently determine probable cause." *Id.*; *see also Elrod*, 538 S.W.3d at 558 ("A magistrate should not be a rubber stamp.").

The second affidavit consists of seven statements explaining Detective Harris' justification for seeking appellant's phone records for the relevant time:

1. On Friday, June 9, 2017, Affiant executed a court ordered search and arrest warrant at 2070 Lime Kiln Road in San Marcos, Hays County, Texas, after having conducted a controlled delivery of a distributable amount of psilocybin, a controlled substance listed under penalty group 2 of the Texas Health & Safety Code.

2. The parcels were shipped from Eugene, Oregon via UPS to the above mentioned address with the name "Silas Parker" as both the sender and the recipient, "care of" Scott Cove. The package was initially intercepted by Oregon State Police and determined to contain approximately 40 pounds of psilocybin.

3. Silas Parker (DOB: 08/04/83) was determined to have a TXDL with an address of 2070 Lime Kiln Road, San Marcos, Texas. Silas Parker was not on scene at the time of the search warrant; an associate of Parker stated he was out of town.

4. The above mentioned location is a business/farm known as Thigh High Gardens. The website for Thigh High Gardens (thighhighgardens.org) lists Silas Parker as the manager.

5. During execution of the search and arrest warrant, it was determined that Silas Parker resides at 2070 Lime Kiln Road, San Marcos, Texas, which is the same address listed on the two parcel[s]' shipping labels that contained the psilocybin; this [was] determined not only by Parker's TXDL but by the affirmative link(s) located within the residence.

6. The electronic customer data sought from Silas Parker's mobile cellular carrier would provide evidence that Silas Parker was in Oregon at the time of shipment of the approximately forty (40) pounds of psilocybin, which listed Silas Parker as the shipper and the receiver on the two parcel's shipping labels.

7. Affiant knows via training and experience that the data sought is held in electronic storage by the mobile cellular carrier.

Appellant argues that the affidavit is conclusory because Detective Harris failed to explain the source of his knowledge for these statements. For example, the affidavit is silent on how Detective Harris knew the Oregon State Police intercepted the packages and that the packages contained psilocybin, or how he knew the cellular provider would possess appellant's data.

However, the magistrate could reasonably infer this information from the facts presented. *See Foreman*, 613 S.W.3d at 164. Harris's statement that he executed a search warrant on 2070 Lime Kiln Road after conducting a controlled delivery of packages that had been seized by the Oregon State Police permits an inference that the police informed him about the content of the packages and their destination. The statement that the address on appellant's license was the same as the shipping packages permits a reasonable inference that Detective Harris viewed appellant's driver's license in the course of the investigation. And it was reasonable to infer that the cellular provider would possess appellant's electronic customer data. Electronic customer data consists of "data or records" in the "possession, care, custody, or control of a provider of an electronic communications service" and which contain, among other things, "information about a customer's use of the applicable service," "the content of a wire or electronic communication sent to or by a customer," and "any data stored with the applicable service provider by or on behalf of a customer." *See* Tex. Code Crim. Proc. art. 18B.001(7); *id*. art. 18.02(b)(2) (providing that "electronic customer data" has meaning assigned by article 18B.001). There being no dispute that Detective Harris sought information from the company that was appellant's cell phone provider at the relevant time, it was reasonable for the court to

infer that the company would possess this data. We conclude the second affidavit established probable cause.

We overrule appellant's issues on appeal.

CONCLUSION

We affirm the district court's judgment.

Edward Smith, Justice

Before Chief Justice Byrne and Justices Triana and Smith

Affirmed

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