

COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Latharian Devante Merritt v. State

No. 01-18-00607-CR (Tex. App.—Houston [1st Dist.] Apr. 14, 2020) (mem. op.) · No. 01-18-00607-CR ·

Decided April 14, 2020

SUMMARY

The Court of Appeals for the First District of Texas affirmed Latharian Devante Merritt’s capital-murder conviction and life-without-parole sentence. The court held that Merritt failed to preserve his challenge to the probable-cause affidavit and, alternatively, that the affidavit did not contain material omissions under a Franks analysis. The court also held that the jury instruction distinguishing reasonable doubt from all possible doubt was not erroneous.

CASE DETAILS

COURT	Court of Appeals for the First District of Texas
WRITING FOR THE COURT	Peter Kelly; Chief Justice Radack; Justice Lloyd; Justice Kelly
JURISDICTION	Texas
DECIDED	April 14, 2020
DOCKET	01-18-00607-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Merritt appealed his capital-murder conviction and life-without-parole sentence, challenging the denial of his motion to suppress post-arrest statements and the reasonable-doubt instruction in the jury charge.
STANDARD OF REVIEW	Motions to suppress are generally reviewed under a bifurcated standard, with almost total deference to the trial court's factual findings and de novo review of the application of law to those facts. When probable cause is challenged based on a warrant affidavit, the reviewing court considers the four corners of the affidavit, interprets it in a common-sense and reasonable manner, and determines whether it provides a substantial basis for the magistrate's probable-cause finding.
PRECEDENTIAL VALUE	Unpublished memorandum opinion; not designated for publication and of limited precedential value.
PARTIES	Latharian Devante Merritt v. The State of Texas

TOPICS

suppression of evidence

probable cause

preservation of error

jury instructions

reasonable doubt

PRACTICE AREAS

criminal procedure

appellate procedure

constitutional law

QUESTIONS PRESENTED

1. Whether Merritt preserved a challenge under *Franks v. Delaware* that the arrest-warrant affidavit omitted material information about M.S.'s untruthfulness.
2. Whether, even if considered on the merits, the alleged omissions from the arrest-warrant affidavit were material and made intentionally, knowingly, or with reckless disregard for the truth so as to invalidate the warrant.
3. Whether the trial court erred by instructing the jury that the State was not required to prove guilt beyond all possible doubt but was required to exclude all reasonable doubt.

HOLDINGS

1. Merritt did not preserve his appellate argument that the arrest-warrant affidavit was invalid because it omitted information about M.S.'s repeated lies. His trial objection challenged the sufficiency of the facts within the affidavit, whereas his appellate argument relied on Detective Knotts's outside-the-affidavit testimony and a *Franks* omission theory.
2. Even if Merritt's omission argument were considered under *Franks*, he did not establish that the affidavit contained material omissions made intentionally, knowingly, or with reckless disregard for the truth. The disclosed lie about how M.S. got home did not undermine probable cause because that fact was immaterial to her ability to observe and identify the participants.
3. The trial court did not err by instructing the jury that the prosecution need not prove guilt beyond all possible doubt and must exclude all reasonable doubt.

KEY QUOTATIONS

“To preserve error for appellate review, the complaining party must make a specific objection and obtain a ruling on the objection.” (at 6)

“Because this argument was not raised in the trial court, it does not comport with the trial objection, and it is not preserved for our review.” (at 7)

“When a governmental affiant knowingly, intentionally, or with reckless disregard for the truth includes a false statement in the warrant affidavit, and the remainder of the affidavit’s content is insufficient to establish probable cause, the warrant is invalid under the Fourth Amendment, and evidence obtained as a consequence of the warrant should be excluded.” (at 8)

“The affidavit itself shows that M.S. planned and participated in the robbery and that she had personal knowledge that Merritt also participated.” (at 10)

FACTUAL BACKGROUND

Merritt participated in a planned robbery at a house in Tarrant County during which Ethan Walker was shot and later died. Information from a participant, M.S., and corroboration from Holt connected Merritt, who was identified by the nickname "Larry," to the robbery and shooting. A magistrate issued an arrest warrant based on Detective Knotts's affidavit, and Merritt gave two post-arrest statements admitting that he shot Walker. The affidavit disclosed that M.S. had lied about how she got home but did not recount every instance in which she had lied during police interviews.

PROCEDURAL HISTORY

A jury convicted Merritt of capital murder, and the Criminal District Court No. 2 of Tarrant County sentenced him to life imprisonment without the possibility of parole because the State did not seek the death penalty. The trial court denied Merritt's pretrial motion to suppress statements made after his arrest and included the challenged reasonable-doubt language in the jury charge. Merritt appealed, and the Supreme Court of Texas transferred the appeal to the First Court of Appeals under its docket-equalization authority.

DISPOSITION

affirmed

CASES CITED

- State v. Elrod, 538 S.W.3d 551, 556-57 (Tex. Crim. App. 2017)
- Wilson v. State, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002)
- Rodriguez v. State, 232 S.W.3d 55, 62, 64 (Tex. Crim. App. 2007)
- Montgomery v. State, No. 02-03-425-CR, 2005 WL 1048707, at *2 (Tex. App.—Fort Worth May 5, 2005, pet. ref'd) (mem. op.; not designated for publication)
- Amador v. State, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007)
- Lagrone v. State, 742 S.W.2d 659, 661 (Tex. Crim. App. 1987)
- Whitemon v. State, 460 S.W.3d 170, 174 (Tex. App.—Fort Worth 2015, pet. ref'd)
- Franks v. Delaware, 438 U.S. 154, 155-56 (1978)
- Darby v. State, 145 S.W.3d 714, 721-22 (Tex. App.—Fort Worth 2004, pet. ref'd)
- Massey v. State, 933 S.W.2d 141, 146 (Tex. Crim. App. 1996)
- Blake v. State, 125 S.W.3d 717, 724 (Tex. App.—Houston [1st Dist.] 2003, no pet.)
- Mays v. State, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010)
- Woods v. State, 152 S.W.3d 105, 115 (Tex. Crim. App. 2004)
- Burrows v. State, 492 S.W.3d 398, 408 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd)
- Frank v. State, 183 S.W.3d 63, 79 (Tex. App.—Fort Worth 2005, pet. ref'd)

OPINION

PER CURIAM.

Opinion issued April 14, 2020 In The Court of Appeals For The First District of Texas NO. 01-18-00607-CR LATHARIAN DEVANTE MERRITT, Appellant V. THE STATE OF TEXAS, Appellee On Appeal from the Criminal District Court No. 2 Tarrant County, Texas1 Trial Court Case No. 1465902D 1 Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal from the Court of Appeals for the Second District of Texas to this Court.

See Misc. Docket No. 18-9083 (Tex. June 19, 2018); see also TEX. GOV'T CODE § 73.001 (authorizing transfer of cases). We are unaware of any conflict between the precedent of the Court of Appeals for the Second District and that of this Court on any relevant issue. See TEX. R. APP. P. 41.3. MEMORANDUM OPINION A jury convicted appellant Latharian Devante Merritt of capital murder, and the trial court sentenced him to life in prison without the possibility of parole.

See TEX. PENAL CODE § 19.03 (capital murder); id. § 12.31(a)(2) (mandating punishment of imprisonment for life without parole when State does not seek death penalty and offense committed when defendant was 18 years of age or older). He raises two issues on appeal.

First, he challenges the trial court's denial of his motion to suppress statements made after his arrest because he contends that his arrest warrant was not supported by probable cause. Second, he contends that a statement in the jury charge was an erroneous definition of reasonable doubt.

We affirm. Background Zachary Beloate shared a house with Ethan Walker and another roommate. Beloate was dating a teenage girl, M.S., who believed that Beloate and Walker had been selling small amounts of drugs and marijuana. M.S. and several friends decided to rob them. M.S. told one friend, Megan Holt, that a gun would be needed for the robbery. Holt recruited T.M., a teenage boy, to commit the robbery, and he, in turn, recruited three other young men: Merritt, Shawn Robinson, and J.B.

On the night of the robbery, M.S., Holt, and Ariana Bharrat went to Beloate's house at 1500 Aspen Court under the pretense of spending time together. The women 2 unlocked exterior doors, and the four men let themselves in. When one of the men pointed a gun at Beloate, M.S., Holt, and the other young woman left the room unimpeded. Shortly after, they heard gunshots and fled the house, leaving together in a white vehicle.

Beloate and Walker were both shot during the robbery, and Walker later died from his injuries. The first call for emergency services was made at 10:42 p.m., and a witness informed responding law enforcement officers that she saw three young women run from 1500 Aspen Court and drive away in a white sports-utility vehicle. Detectives P. Knotts and S. Peacock investigated the homicide.

Based on an affidavit from Det. Knotts, a magistrate issued a warrant for Merritt's arrest. The affidavit stated facts learned during an initial investigation. While still in the hospital, Beloate told Det. Peacock that M.S. had been at the house but left after the shooting. Beloate gave Det. Peacock M.S.'s address. Detectives Knotts and Peacock went to M.S.'s house.

While there, they spoke to M.S.'s brother, V.S., who said that M.S. came home in a white vehicle between 11:00 and 11:30 p.m. V.S. informed them that M.S. had been with Holt and Bharrat, and when she came home, she was nervous, and she told him that she had "hit a lick" and it "went bad." V.S. also said that M.S.'s friend had been shot. M.S.'s mother allowed her to be interviewed at police headquarters.

Detectives Knotts and Peacock drove M.S., and on the way, she directed them to 3 1500 Aspen Court. At police headquarters, M.S. said that she, Holt, and Bharrat were in Beloate's room at 1500 Aspen Court just before the shooting. While there, M.S. saw a text message on Bharrat's phone that said "hit a lick" and "is it a go." In the affidavit, Knotts averred that "hit a lick" means to commit a crime such as theft, burglary, or robbery.

Although M.S. initially told the detectives that she left the house during the robbery, went to a nearby fast-food restaurant, and used a rideshare service to get home, she "later said she had lied about how she got home." M.S. later said that she went home with Holt and Bharrat.

After Detective Knotts told M.S. that Walker had died, she agreed to help identify the other suspects. M.S. sent several emails and photographs identifying three of the four male suspects by their nicknames or street names.

The following day, M.S. was arrested for capital murder. Later, she gave another statement to police, and she provided a physical description of Merritt, whom she knew as "Larry." Sgt. T. Hewitt interviewed Holt in connection with the murder. Holt knew "Larry" socially, and she identified him as the man in the photograph provided by M.S. Based on the affidavit, Tarrant County District Court Judge Gallagher signed the warrant authorizing Merritt's arrest.

At that time, Merritt had been identified only as "Larry" and by his photograph and physical description, both of which were included in the arrest warrant. 4 Merritt was arrested on capital murder charges. He gave two statements to police, admitting that he had shot Walker.

Before trial, Merritt moved to suppress statements he made after his arrest on the grounds that they were tainted by the illegality of his arrest. In particular, he maintained that the affidavit in support of the arrest warrant did not establish probable cause.

The trial court held an evidentiary hearing and denied the motion to suppress. The court's charge to the jury included the following statement about the State's burden of proof: "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." At the charge conference, Merritt asked the court to remove that statement from the court's charge, acknowledging, however, that the Fort Worth Court of Appeals had previously ruled that the language was not erroneous.

The trial court denied the request to remove the language. The trial court found Merritt guilty of capital murder, and because the State had not sought the death penalty, the trial court sentenced Merritt to life in prison without the possibility of parole. Merritt appealed. 5 Analysis On appeal, Merritt challenges the trial court's ruling on the motion to suppress his statements due to an allegedly illegal arrest warrant and the trial court's instruction to the jury that reasonable doubt is not the same as all doubt.

I. Motion to suppress defendant's statements In the trial court, Merritt moved to suppress statements that he made after his arrest on the grounds that the arrest was illegally "conducted pursuant to an arrest warrant and supporting affidavit that did not state sufficient facts that established probable cause for its issuance." In the pretrial hearing on the motion to suppress, Merritt argued that the "arrest warrant affidavit" "does not establish probable cause for his arrest." He argued that M.S. was the only source of information connecting him to the crime, and because she had lied to the investigating officers, she was "not a credible person." The State argued that the four-corners rule² required the court to consider only information found within the four corners of the affidavit and urged the court not to consider the pretrial testimony of Detective Knotts.

On appeal, Merritt makes a different argument. Rather than arguing that the facts recited in the affidavit were insufficient to establish probable cause, on appeal Merritt relies on *Franks v. Delaware*, 438 U.S. 154 (1978), to argue that the 2 See *State v. Elrod*, 538 S.W.3d 551, 556–57 (Tex. Crim. App. 2017) ("In determining whether a warrant sufficiently establishes probable cause, this Court is bound by the four corners of the affidavit.").

6 affidavit's omission of information about M.S.'s having lied rendered the search warrant invalid. "To preserve error for appellate review, the complaining party must make a specific objection and obtain a ruling on the objection." *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002) (on automatic appeal in capital murder case); see TEX. R. APP. P. 33.1 (preservation of error).

The objection must be timely, i.e., "made at the earliest possible opportunity." *Wilson*, 71 S.W.3d at 349. "Finally, the point of error on appeal must comport with the objection made at trial." *Id.* At the pretrial hearing, the State referred the trial court to two cases that originated from Tarrant County and held that the reviewing court is limited to the four corners of the affidavit to determine whether there was a substantial basis for concluding that probable cause exists.

Rodriguez v. State, 232 S.W.3d 55, 64 (Tex. Crim. App. 2007) ("We must defer to the magistrate's finding of probable cause if the affidavit demonstrates a substantial basis for his conclusion."); see *Montgomery v. State*, No. 02-03-425-CR, 2005 WL 1048707, at *2 (Tex. App.—Fort Worth May 5, 2005, pet. ref'd) (mem. op.; not designated for publication).

On appeal, Merritt relies on Detective Knotts's pretrial hearing testimony, which is outside the four corners of the affidavit, to argue that the arrest warrant was invalid. Because this argument

was not raised in the trial court, it does not comport with the trial objection, and it is not preserved for our review. See *Wilson*, 71 S.W.3d at 349.

Moreover, Merritt would not prevail on the merits of this issue. Ordinarily, we review a trial court's ruling on a motion to suppress under a bifurcated standard of review, giving almost total deference to the facts found by the court and reviewing de novo its application of the law. See *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). When a motion to suppress is based on a contention that a warrant was not supported by probable cause, the trial court is "bound by the four corners of the affidavit." *State v. Elrod*, 538 S.W.3d 551, 556–57 (Tex.

Crim. App. 2017). In that situation, we interpret the affidavit in a common-sense and reasonable manner, and we determine whether it states sufficient facts "to validate issuance of a proper warrant." *Lagrone v. State*, 742 S.W.2d 659, 661 (Tex. Crim. App. 1987); see *Rodriguez v. State*, 232 S.W.3d 55, 64 (Tex. Crim. App. 2007); *Whitemon v. State*, 460 S.W.3d 170, 174 (Tex.

App.—Fort Worth 2015, pet. ref'd). We "focus on the combined logical force of facts" that are in the affidavit. *Rodriguez*, 232 S.W.3d at 62. "It is not necessary to delve into all of the facts that were omitted by the affiant, facts that could have been included in the affidavit, or contrary inferences that could have been made by the magistrate." *Id.* at 64.

We will uphold a magistrate's finding of probable cause if the affidavit demonstrates a substantial basis for this conclusion. See *id.*; *Whitemon*, 460 S.W.3d at 174. 8 Relying on *Franks v. Delaware*, 438 U.S. 154 (1978), Merritt contends that the affidavit was misleading because it omitted the material fact that M.S. had been untruthful in her police interviews.

Merritt asserts that if the affidavit had stated that M.S. had been untruthful, then the magistrate would have concluded that she was not credible and disregarded the information she provided connecting Merritt to the crime.

In *Franks*, the United States Supreme Court held that when a governmental affiant knowingly, intentionally, or with reckless disregard for the truth includes a false statement in the warrant affidavit, and the remainder of the affidavit's content is insufficient to establish probable cause, the warrant is invalid under the Fourth Amendment, and evidence obtained as a consequence of the warrant should be excluded.

438 U.S. 155–56. "[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" *Id.* This is an exception to the four-corners rule.

See *id.* Because Merritt relies on Franks, we construe his argument to be that there were material omissions from the affidavit that were made intentionally, knowingly, or with reckless disregard for the truth. See *Darby v. State*, 145 S.W.3d 714, 722 (Tex. App.—Fort Worth 2004, pet. ref’d) 9 (construing argument about omission from affidavit in light of defendant’s reliance on Franks).

Although the Court of Criminal Appeals has not extended Franks to allegations of material omissions, several Texas intermediate appellate courts— including Houston’s First Court of Appeals and Fort Worth’s Second Court of Appeals—have done so. See *Massey v. State*, 933 S.W.2d 141, 146 (Tex. Crim. App. 1996) (court has not applied Franks analysis to allegations of intentional and material omissions) (internal citations omitted); *Darby v. State*, 145 S.W.3d 714, 721–22 (Tex.

App.—Fort Worth 2004, pet. ref’d) (expressly agreeing with Fifth Circuit and intermediate Texas appellate courts’ application of Franks analysis to material omissions); *Blake v. State*, 125 S.W.3d 717, 724 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (same).

In this case the record does not reflect, by a preponderance of the evidence, that Detective Knotts intentionally or knowingly, with reckless disregard for the truth, made any misstatements or omissions in the affidavit that would affect the finding of probable cause.

The affidavit describes the robbery with some facts set forth in the affidavit corroborating others. For example, V.S. said M.S. arrived home in a white vehicle and neighbors reported that they saw the young women leaving 150 Aspen Court in a white vehicle. M.S. told Detective Knotts that she was part of the group that planned the robbery, that she participated and the role she played, and 10 that she knew some but not all the men who participated.

She also provided photographs, nicknames, and descriptions of three of the four men who participated, including Merritt. Holt corroborated M.S.’s statements about Merritt’s identity. The affidavit itself shows that M.S. planned and participated in the robbery and that she had personal knowledge that Merritt also participated.

The arrest warrant affidavit described one lie told by M.S.: “[M.S.] said that she ran out of the house during the robbery and went to a nearby McDonald’s where she met a friend who called her an Uber. [M.S.] later said she had lied about how she got home and told me she went home with [Holt] and [Bharrat].” M.S.’s untruthfulness about how she got home does not impact the probable cause analysis because how she got home that night is not material to whether she had seen and could identify the others who participated in the crime.

Merritt relies on testimony from Detective Knotts in the pretrial hearing in which he acknowledged that M.S. had lied to him: Q. And she [M.S.] had lied to you repeatedly, correct? A. She did lie, yes, sir. Q. Okay. You didn’t put in your affidavit that when you’d interviewed [M.S.] a

couple of times or—I don't know how many times, but however many times you did, that she lied to you those times, did you?

A. In the affidavit? Q. Right. 11 A. No, sir. The record does not indicate anything else that M.S. lied about or whether it was material to a determination of probable cause. Therefore, even if we were to review this issue under a Franks analysis, we would conclude that Merritt did not carry his burden to prove by a preponderance of the evidence that there were material omissions from the affidavit that were made intentionally, knowingly, or with reckless disregard for the truth.

We overrule Merritt's first issue. II. Motion to suppress defendant's statements In his second issue, Merritt argues that the trial court erred by providing a partial definition of reasonable doubt in the court's charge to the jury. Specifically, Merritt challenges the following instruction: 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." Merritt asserts that the courts of appeals are split on whether these instructions are erroneous, yet he concedes that both the First and the Second Courts of Appeals have held that it is not error to include that language in a jury charge.

See *Burrows v. State*, 492 S.W.3d 398, 408 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); 12 *Frank v. State*, 183 S.W.3d 63, 79 (Tex. App.—Fort Worth 2005, pet. ref'd). In addition, the Court of Criminal Appeals has held that inclusion of that language in a jury charge is proper. See *Mays v. State*, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010); *Woods v. State*, 152 S.W.3d 105, 115 (Tex.

Crim. App. 2004). We overrule Merritt's second issue. Conclusion We affirm the judgment of the trial court. Peter Kelly Justice Panel consists of Chief Justice Radack and Justices Lloyd and Kelly. Do not publish. TEX. R. APP. P. 47.2(b). 13