



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-19-00128-CR

KENDRICK JAMAR BYRD AKA KENDRICK JAMAL BYRD, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 42nd District Court
Taylor County, Texas¹
Trial Court No. 27,867-A, Honorable James Eidson, Presiding

May 27, 2020

MEMORANDUM OPINION

Before PIRTLE and PARKER and DOSS, JJ.

In this appeal from his convictions on three felony drug offenses, appellant Kendrick Jamar Byrd, a/k/a Kendrick Jamal Byrd, asserts that the trial court erred by denying his motion to suppress and his motion to disclose the identity of the State's confidential informant. We affirm the judgment of the trial court.

¹ Originally appealed to the Eleventh Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. See TEX. GOV'T CODE ANN. § 73.001 (West 2013).

Background

After receiving a tip from a confidential informant, Officer Alfred Cox of the Abilene Police Department executed an affidavit in which he averred that appellant possessed cocaine at a specified residence in Abilene. The warrant was signed and executed on the same day. In their search of the residence, police officers found methamphetamine, heroin, and cocaine. Appellant and two other individuals at the residence were arrested.

Appellant filed a pretrial motion to suppress the evidence obtained as a result of the search and a motion to disclose the identity of the confidential informant. The trial court denied both motions.

A jury found appellant guilty of possession of methamphetamine with intent to deliver, possession of heroin, and possession of cocaine. See TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(a), (d); .115(c) (West 2017). He pleaded “true” to two enhancement paragraphs alleging two prior felony convictions, and the trial court assessed punishment at confinement for forty years, twenty-five years, and fifteen years on the three charges, respectively, with sentences to run concurrently.

Appellant filed this appeal, challenging the trial court’s denial of his motion to suppress and motion to disclose the identity of the confidential informant.

Analysis

Motion to Suppress

By his first issue, appellant contends that the trial court abused its discretion when it denied his motion to suppress. Appellant asserts that the affidavit in support of the

warrant did not contain sufficient facts to provide a substantial basis to determine that probable cause existed. Specifically, appellant maintains that the warrant contained insufficient evidence that the confidential informant was “credible, reliable, and trustworthy” as alleged.

We review a trial court’s decision to deny a motion to suppress under a bifurcated standard of review, giving almost total deference to the trial court’s determination of historical facts that depend on credibility, and reviewing de novo the trial court’s application of the law to those facts. *Hubert v. State*, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010). When, as in this case, an appellant raises a complaint that a search should have been suppressed because the magistrate had no probable cause to issue a search warrant, we apply a “great deference” standard of review. *Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004).

Both the United States and Texas constitutions require a search warrant to be based on probable cause supported by an oath or affirmation. See U.S. CONST. amend. IV; TEX. CONST. art. I, § 9. A search warrant may be obtained from a magistrate only after submission of an affidavit setting forth facts establishing probable cause. *State v. Jordan*, 342 S.W.3d 565, 568 (Tex. Crim. App. 2011); see TEX. CODE CRIM. PROC. ANN. art. 18.01(b) (West 2018). Probable cause exists if, under the totality of the circumstances in the affidavit, there is a “fair probability” that contraband or evidence of a crime will be found in a particular place at the time the warrant is issued. *Jordan*, 342 S.W.3d at 568-69. A reviewing court will generally apply a presumption of validity regarding a magistrate’s determination that a search warrant affidavit supports a finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

In his affidavit in support of a warrant, Officer Cox stated, in part:

That just prior to making this application for this search warrant your affiant had received information from a confidential informant whose identity must remain a secret for security reasons. Your affiant knows this same confidential informant to be credible, reliable, and trustworthy and this belief is based on the following set of facts:

Your affiant is a certified peace officer of the State of Texas and is employed by the Abilene Police Department, and has been so employed for the past 9 years. Your affiant is currently assigned to the Special Operations Division and has been for the past three years.

That this same confidential informant has provided information to your affiant in the past in reference to criminal activities in the Abilene area that has always proven to be true and correct.

That this same confidential informant is supplying information to your affiant on a voluntary basis, and no deals or promises of any kind have been made to the informant by your affiant.

That this same confidential informant has provided information to your affiant in the past that has led to the arrest of at least four drug offenders.

That within the past forty-eight hours this same confidential informant was at the above described place and observed the suspected party, [appellant], in possession of a white powdery substance that the suspected party purported to be Cocaine.

That this same confidential informant believes the same white powdery substance to be Cocaine.

The affidavit also included information from a records check showing that appellant had previously been arrested and had two outstanding warrants from Tarrant County for failure to register as a sex offender and for manufacture and delivery of a controlled substance.

Appellant's complaint is that Officer Cox's affidavit was based upon statements made to him by a confidential informant whose credibility and reliability were not established. Where, as here, an officer's search warrant affidavit is based on information received from a confidential informant, the informant's veracity or reliability and his basis

of knowledge are highly relevant factors in determining, by the totality of the circumstances, whether probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Hennessy v. State*, 660 S.W.2d 87, 89 (Tex. Crim. App. 1983). These factors “should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical questions whether there is ‘probable cause’ to believe that contraband or evidence is located in a particular place.” *Gates*, 462 U.S. at 230. The magistrate’s task is to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of the person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* at 238.

Here, Officer Cox testified that he knew the confidential informant “to be credible, reliable, and trustworthy.” He referenced previous instances in which the informant provided information and stated that such information had “always proven to be true and correct.” Officer Cox stated that four drug offenders had been arrested as a result of information provided by the informant. Thus, the affidavit established that the informant had proven to be a credible source of information. *See Dixon v. State*, 206 S.W.3d 613, 616-17 (Tex. Crim. App. 2006) (evidence that information provided by informant had always been shown to be true and had led to the arrest of at least five drug offenders was important factor in establishing credibility of informant); *Brown v. State*, 243 S.W.3d 141, 146 (Tex. App.—Eastland 2007, pet. ref’d) (informant’s credibility was established where he had previously provided information that led to the arrest of at least five drug offenders,

had provided information voluntarily, had always provided true and correct information, and was lawfully employed).

Additionally, the informant personally saw the substance and was told by appellant that the substance was cocaine. These facts strongly indicate a solid basis for the informant's knowledge. *Dixon*, 206 S.W.3d at 617 ("An informant's first-hand observation of criminal activity provides a strong basis for the informant's knowledge of the facts he relays.").

Viewing the totality of the circumstances reflected in Officer Cox's affidavit, we conclude that the affidavit contained sufficient facts and circumstances to provide the magistrate with a substantial basis for concluding there was a fair probability that a search would uncover evidence of wrongdoing. See *Gates*, 462 U.S. at 238. Therefore, probable cause existed to issue the search warrant and the trial court did not err in denying appellant's motion to suppress. We overrule appellant's first issue.

Motion to Disclose

Before trial, the trial court conducted an open hearing and an in camera hearing on appellant's motion to disclose the identity of the confidential informant. Following those hearings, the court denied the motion. By his second issue, appellant contends that the trial court abused its discretion in denying his motion. According to appellant, the identity of the confidential informant was necessary to a fair determination of guilt or innocence and also because the informant was unreliable.

We apply the abuse of discretion standard in reviewing the trial court's denial of a motion to disclose the identity of a confidential informant. *Portillo v. State*, 117 S.W.3d

924, 928 (Tex. App.—Houston [14th Dist.] 2003, no pet.). We will only reverse if the trial court’s decision was so clearly wrong as to be outside the zone of reasonable disagreement. *Id.*

Generally, when a defendant files a motion to disclose an informant’s identity, the State has a privilege to withhold the identity of any person who provided information relating to, or assisting in, an investigation of a possible crime. TEX. R. EVID. 508(a). However, the privilege does not apply if the informant “can give testimony necessary to a fair determination of guilt or innocence.” TEX. R. EVID. 508(c)(2)(A). Additionally, the court may order disclosure of an informant’s identity when “the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible.” TEX. R. EVID. 508(c)(3)(A)(ii).

A defendant who seeks disclosure under Rule 508 has the threshold burden of demonstrating that the informant’s identity must be disclosed. *Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App. 1991) (en banc). The defendant must provide evidence, not mere conjecture or speculation, to compel disclosure of the informant’s identity. *Id.* However, since the defendant may not actually know the nature of the informant’s testimony, he is only required to make a plausible showing of how the informant’s information may be important. *Id.* Thus, we consider whether appellant presented sufficient information to show that the informant could give testimony necessary to a fair determination of guilt.

At the hearing on his motion to disclose, appellant testified that he believed the informant was a woman he knew as “Jackie.” He testified that he arrived in Abilene from

Fort Worth on May 15 and went to a girlfriend's house. Jackie, who he knew only through Facebook, later picked him up from the house and they spent the next several hours together. Jackie dropped him off at the house on the morning of May 16. The search warrant was executed a few hours later. According to appellant, during the twenty-four-hour period he was in Abilene, he spent around fourteen hours with Jackie.

Appellant testified that he did not sell any drugs to Jackie and that, in the time he was with her, he was not in possession of any drugs. He stated that the only people with whom he had contact while he was in Abilene were Jackie and the two occupants of the house where the search warrant was executed. Appellant made several references to allegations that he sold drugs to the confidential informant, such as, "If Jackie is the confidential informant, obviously I so-called allegedly sold Jackie drugs" and "[t]he offense is saying I sold her drugs." The prosecutor clarified that appellant was charged with possession of a controlled substance.

Appellant agreed that Jackie was not present when the officers executed the search warrant. He stated his belief that Jackie lied to the officer and that the officer should not have relied on the informant's information.

Following the open hearing, the trial court held an in camera hearing. The court questioned Officer Cox about his knowledge of the informant. After the in camera hearing, the court denied the motion for disclosure.

We have reviewed the record from the in camera hearing. Our review indicates that the informant was not a witness to the alleged offense and was not present when the search warrant was executed. The informant merely provided a tip to law enforcement.

“When the informant is not present when a search warrant is executed and the informant does not participate in the offense for which the defendant is charged, the identity of the informant does not need to be disclosed because the informant’s testimony is not essential to a fair determination of guilt.” *Washington v. State*, 902 S.W.2d 649, 657 (Tex. App.—Houston [14th Dist.] 1995, pet. ref’d). Under these circumstances, appellant has not demonstrated that the informant’s testimony was so necessary to a fair determination on the issues of guilt or innocence that the trial court’s denial of his motion to disclose was outside the zone of reasonable agreement.

We next consider appellant’s argument that disclosure was needed to assess the informant’s reliability and credibility. In our analysis of appellant’s first issue, we concluded that the trial court did not abuse its discretion in determining, for purposes of denying the motion to suppress, that the informant had been shown to be reliable and credible. For those same reasons, we find no abuse of discretion in the trial court’s ruling that the informant’s identity did not need to be disclosed by the State for an assessment of the informant’s credibility. Consequently, we overrule appellant’s second issue.

Conclusion

Having overruled both of appellant’s issues, we affirm the judgment of the trial court.

Judy C. Parker
Justice

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