In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-18-00430-CR

MICHAEL ALLEN LOLLIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 17-01-01233-CR

MEMORANDUM OPINION

Michael Allen Lollis appeals his conviction of continuous sexual abuse of a child. *See* Tex. Penal Code Ann. § 21.02(b). In one issue on appeal, Lollis challenges the trial court's admittance of digital information obtained from an electronic tablet owned by Lollis. For the reasons explained below, we affirm the judgment of the trial court.

Background

As Lollis does not challenge the sufficiency of the evidence, we only provide a brief recitation of the facts necessary for the resolution of his appeal. *See* Tex. R. App. P. 47.1. Lollis was charged with continuous sexual abuse of a child. More specifically, the indictment alleged that Lollis sexually abused his stepdaughter F.B.[1] In a motion to suppress hearing conducted during the course of the trial, Lollis argued that the State should not be allowed to introduce any data obtained from an electronic tablet Lollis owned. Specifically, he contended the State procured information in which he maintained an expectation of privacy through a warrantless search. During the hearing, the State argued that the tablet was a "family owned" device and therefore, Lollis's wife, C.L., lawfully provided consent for the tablet to be searched.[2] When Lollis left C.L.'s residence, he left the electronic tablet with C.L., who then gave the tablet to law enforcement and signed a written consent to a search of the tablet.

Montgomery County Investigator Tim Slusher testified that he is a digital forensic examiner and he examined the tablet Lollis owned. In the course of his

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[1] To protect the privacy of the victim, we identify her and her family members by their initials. *See* Tex. Const. art. I, § 30(a)(1) (granting victims of crime "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process").

[2] We note that Lollis told the trial court that the tablet contained privileged attorney client communication, but the State agreed to redact any information regarding communications between Lollis and his attorney.

forensic examination of the tablet, Slusher discovered searches for pornography, pornographic images of children, and other images he classified as questionable child pornography. He also found that the tablet had a website history showing a visit to a pornography site about stepfathers having sex with stepchildren. Slusher testified that the tablet had a linked email account that belonged to the wife, C.L. After hearing testimony outside the jury's presence, the trial court ruled that it would allow the State to introduce the information obtained from the tablet. The trial court provided the following explanation.

> All right. I am finding that there was consent given so that the warrantless search is still reasonable. And the consent, it appears, was freely and voluntarily given by [C.L.] I'm further finding that - - I've heard from the Investigator that some links can be made directly to this defendant and some perhaps can't. But when I look at that with Rule 403, I do find that the probative value is not substantially outweighed by the danger of unfair prejudice. And so, that testimony and those documents . . . will be admitted into evidence[.]

Lollis was convicted of continuous sexual abuse of a child and sentenced to 45 years confinement within the Texas Department of Criminal Justice Institutional Division. He timely appealed.

In his sole issue, Lollis argues that the trial court abused its discretion when it allowed the information from the tablet to be introduced because "the evidence obtained came from an unreasonable search and seizure of Appellant's electronic computer tablet . . . in violation of the Fourth Amendment to the United States

Constitution, Article 1, Section 9 of the Texas Constitution, and under Article 38.23 of the Texas Code of Criminal Procedure."

Standard of Review

A motion to suppress evidence is nothing more than a specialized objection. *Galitz v. State*, 617 S.W.2d 949, 952 n.10 (Tex. Crim. App. 1981); *Mayfield v. State*, 800 S.W.2d 932, 935 (Tex. App.—San Antonio 1990, no pet.). At trial, a trial court may reconsider, and even change, its order on an earlier suppression hearing. *See Montalvo v. State*, 846 S.W.2d 133, 137–38 (Tex. App.—Austin 1993, no pet.). Thus, upon review, an intermediate appellate court is not confined to the record of the suppression hearing but may consider the entirety of the record to determine the propriety of the trial court's order. *See Wallace v. State*, 932 S.W.2d 519, 521 (Tex. App.—Tyler 1995, pet. ref'd).

We use a bifurcated standard of review when examining a trial court's ruling on a motion to suppress. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) (citing *Ford v. State*, 158 S.W.3d 488, 493 (Tex. Crim. App. 2005)). Under that standard, we "must give 'almost total deference to a trial court's determination 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.'" *Id*. (quoting *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). Likewise, if the trial

court resolves a motion to suppress based on a resolution of mixed questions of law and fact, its evaluation of the credibility and demeanor of the witnesses is given almost total deference. *Id*. (citing *Montanez v. State*, 195 S.W.3d 101, 107 (Tex. Crim. App. 2006)). In contrast, if the trial court's findings do not depend on the trial court's evaluations of the credibility and demeanor of the witnesses or turned on resolving a pure question of law, we review its ruling using a *de novo* standard. *Id.* (citing *Montanez*, 195 S.W.3d at 107); *Guzman*, 955 S.W.2d at 89 (citation omitted).

The record before us reveals that Lollis did not ask the trial court to prepare written findings of fact and conclusions of law explaining its ruling on his motion to suppress. Because there are no written findings in the record, we "impl[y] the necessary fact findings that would support the trial court's ruling if the evidence (viewed in the light most favorable to the trial court's ruling) supports these implied fact findings." *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006); *accord State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000) (citing *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000)). The trial court's decision will be sustained if it is correct under any theory of law applicable to the facts of the case. *State v. Gray*, 158 S.W.3d 465, 467 (Tex. Crim. App. 2005); *Ros*s, 32 S.W.3d at 856.

Analysis

The Fourth Amendment protects citizens against unreasonable searches and seizures. *See* U.S. CONST. amend. IV; TEX. CONST. Art. 1 § 9. The Texas Court of Criminal Appeals has extended this protection to electronic devices, including tablets.

> The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." The term "papers and effects" obviously carried a different connotation in the late eighteenth century than it does today. No longer are they stored only in desks, cabinets, satchels, and folders. Our most private information is now frequently stored in electronic devices such as computers, laptops, iPads, and cell phones, or in "the cloud" and accessible by those electronic devices.

State v. Granville, 423 S.W.3d 399, 405 (Tex. Crim. App. 2014) (citations omitted). And while the tablet in this case is not a cell phone per se, the United States Supreme Court explained that these devices or "minicomputers" could easily be called "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Riley v. California*, 573 U.S. 373, 393 (2014). The Supreme Court explained that a search of an electronic device could conceivably expose to the State far more than a search of the suspect's residence. *Id*. at 396–97.

While the Fourth Amendment protects citizens from unreasonable searches and seizure, there are several exceptions to the general requirement that the police obtain a valid search warrant before conducting a search, including one authorized

by consent. *Schneckloth v. Bustamont*e, 412 U.S. 218, 222 (1973); s*ee also State v. Rodriguez*, 521 S.W.3d 1, 9–10 (Tex. Crim. App. 2017) (citing *O'Connor v. Ortega*, 480 U.S. 709 (1987); *California v. Carney*, 471 U.S. 386, (1985); *Mincey v. Arizona*, 437 U.S. 385 (1978); *United States v. Robinson*, 414 U.S. 218 (1973) (noting exceptions such as the exigency exception, the automobile exception, the search-incident-to-arrest exception, and the special-needs exception)). Consent need not be given solely by the accused to be valid.

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

United States v. Matlock, 415 U.S. 164, 171 (1974). To prove that the third party had proper authority to give consent, there must be "actual authority over the place or thing being searched." *Rodriguez*, 521 S.W.3d at 19 (citation omitted). In *Rodriguez*, the Court of Criminal Appeals explained that actual authority means "joint access or control." *Id.* (citation omitted).

> The third party may, in his own right, give valid consent when he and the absent, non-consenting person share "common authority" over the premises or property, or if the third party has some "other sufficient relationship" to the premises or property. Common authority is shown by mutual use of the property by persons generally having joint access or control for most purposes. With joint access and control, it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. (citations omitted); *see also Hubert v. State*, 312 S.W.3d 554, 560–61 (Tex. Crim. App. 2010). Moreover, a defendant's superior privacy interest in relation to the third party does not matter, as we review whether the third party had mutual access and control of the property. *Welch v. State*, 93 S.W.3d 50, 55 (Tex. Crim. App. 2002). In *Hubert*, the Texas Court of Criminal Appeals explained that a grandfather had "actual authority" to consent to the search of his grandson's bedroom under a "common authority test." 312 S.W.3d at 563–64. Therefore, our review of the third party's consent considers whether the third party had control over or authority to use the property being searched. *Balentine v. State*, 71 S.W.3d 763, 772 (Tex. Crim, App. 2002).

Testimony at trial showed that Lollis was listed as the owner of the tablet. The investigator testified that an email account bearing Lollis's wife's full name was listed as a "User Account" on the tablet, and C.L. had access to the tablet. Additionally, the investigator testified that emails were sent and received from the tablet linked to C.L.'s email address. Moreover, during the suppression hearing, Lollis's trial attorney argued that the tablet was a gift from C.L., that Lollis never used the tablet, and Lollis had no knowledge how the pornographic content got on the tablet. Lollis's argument during the suppression hearing underscores the State's position that although originally a gift from C.L. to Lollis, this tablet was communally used.

As stated above, we are not tasked with determining which person has superior control of the device, but whether the party granting consent has joint access and control of the property. *See Welch*, 93 S.W.3d at 53. Under *Hubert*, C.L. had common authority to consent to the tablet's search as she had some "control" over the device, evidenced by her email on the device and being listed as a user. *See* 312 S.W.3d at 564. The record did not demonstrate that Lollis was an exclusive user of the tablet to indicate that he "exercised control, retained control," or that Lollis had an understanding with C.L. that the tablet was private. *See id.; see also Howard v. State,* 239 S.W.3d 359, 364 (Tex. App.—San Antonio 2007, pet. ref'd) (explaining in a case involving a spouse's consent to search a truck that although testimony showed that wife did not know how to drive the vehicle, there was also no testimony of "any conscious effort by appellant to deny her access") Therefore, the trial court did not abuse its discretion when it allowed information obtained from the tablet to be introduced at trial. We overrule Lollis's sole issue on appeal.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on February 3, 2020
Opinion Delivered July 8, 2020
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Before McKeithen, C.J., Kreger and Horton, JJ.