Reversed and Remanded and Opinion filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00136-CR

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JOHN DONALD LARWAY, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court of Law No. 7
Harris County, Texas
Trial Court Cause No. 97-37474

O P I N I O N

Appellant was charged with the misdemeanor offense of driving while intoxicated. The trial court denied appellant's motion to suppress and found him guilty on his plea of nolo contendere. The trial court assessed punishment at 90 days confinement in the Harris County Jail, suspended for 9 months, and a $200 fine. In a single point of error, appellant contends that the trial court erred in overruling his motion to suppress. We reverse and remand.

The State contends appellant failed to preserve for appellate review the issue of whether the trial court erred in denying appellant's motion to suppress. The State complains, namely, that appellant failed to state that the subject matter of his appeal was raised by written motion

and ruled on before trial. Consequently, according to the State, appellant's failure to comply with notice requirements precludes our review of nonjurisdictional defects. *See Watson v. State*, 924 S.W.2d 711, 715 (Tex. Crim. App. 1996).

In a case involving an appeal from a judgment rendered on the defendant's plea of nolo contendere, where the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must either (1) specify that the appeal is for a jurisdictional defect; (2) specify that the substance of the appeal was raised by written motion and ruled on before trial; or (3) state that the trial court granted permission to appeal. *See* TEX. R. APP. P. 25.2 (b)(3). In the instant case, the notice states that the trial court granted its permission for appeal. Additionally, the notice was signed by the trial court when it set the appeal bond, further indicating permission to appeal. Therefore, appellant conformed to the requirements of the rule by including within his notice the fact that he had received permission of the trial court to appeal the denial of the motion to suppress. As such, appellant properly preserved his right to appeal.

Generally, an appellate court grants almost complete deference to a trial court's findings of historical facts that the record supports, especially if the trial court's findings involve an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). An appellate court should give similar deference to a trial court's rulings on "mixed questions of law and fact," (*e.g.*, probable cause) if resolution of the ultimate issue is based on the evaluation of witness credibility and demeanor. *See id*. An appellate court may review, *de novo*, "mixed questions of law and fact" not falling within this category. *See id*. Specifically, if the question concerns whether an officer had probable cause to seize a suspect, under the totality of the circumstances, the trial court is not in an appreciably better position than the appellate court in making that determination. *See id*. at 87.

In his sole point of error, appellant claims the trial court erred in denying his motion to suppress evidence because the State did not show probable cause for his arrest. When a defendant seeks to suppress evidence, the burden of proof is initially on that defendant to

defeat the presumption of proper police conduct. *See Russell v. State,* 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). The defendant meets this initial burden by establishing that a search or seizure occurred without a warrant. *See id*. If the defendant establishes there was no warrant, the burden shifts to the State. *See id*. If the State provides evidence of a warrant, the burden is shifted back to defendant to show the legality of the warrant. *See id*. at 10. If the State is unable to produce evidence of a warrant, it must prove the reasonableness of the search or seizure. *See id*.

Whether probable cause exists for warrantless arrest is determined under the totality of the circumstances test. *See Amores v. State,* 816 S.W.2d407, 413 (Tex. Crim. App. 1991). An officer has probable cause to make an arrest when he knows of facts and circumstances, from a reasonably trustworthy source, that are sufficient in themselves to justify the belief of a reasonable person that a particular person has committed or is committing an offense. *See Lunde v. State,* 736 S.W.2d 665, 667 (Tex. Crim. App. 1987).

In the instant case, appellant produced evidence of a warrantless arrest at the suppression hearing and met his burden under *Russell*. The burden then shifted to the State to prove that it had probable cause to make a warrantless arrest. The State, however, presented no evidence concerning the circumstances surrounding appellant's arrest. Neither the arresting officer nor appellant testified. Absent testimony relating to the circumstances surrounding appellant's arrest, the State could not carry its burden to establish the reasonableness of the warrantless search or seizure. To render a decision based on these facts would require us to ignore our responsibility to decide questions based on facts supported by the record. Accordingly, we reverse the trial court's judgment and remand this case for further proceedings consistent with this court's opinion.

PER CURIAM

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

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