Opinion issued June 25, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00083-CR

DANIEL JOSHUA HOWARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1478319

MEMORANDUM OPINION

After the trial court denied his motion to suppress evidence, appellant, Daniel Joshua Howard, pleaded guilty to possession with intent to deliver between four and 400 grams of 3,4-methylenedioxy methamphetamine (commonly called

"ecstasy").[1] After a presentence investigation, the trial court assessed appellant's punishment at 8 years' confinement, which it then suspended, placing appellant under community supervision for ten years. In five related issues, appellant contends the trial court erred in denying his motion to suppress. We affirm.

BACKGROUND

In August 2015, Special Agents Peck and Papanos of the Texas Department of Public Safety approached and knocked on appellant's door for a "knock-and-talk" investigation of suspected drug activity. Both officers were in plain clothes, wearing bulletproof vests, with their badges hanging from chains around their necks. Peck knocked on the door and stood to the side of the door awaiting a response. Both officers had their hands on the butt of their weapons but did not draw their weapons.

When appellant answered the door, the officers noted that appellant was wearing gym shorts, no shirt, and no shoes. Perceiving appellant not to be a threat, the officers removed their hands from their weapons. Peck asked appellant if he was willing to talk to them and gestured for appellant to come outside. The officers could smell the odor of marijuana through the opened door. Appellant indicated that he was willing to talk, stepped outside, and shook hands with Peck. Peck asked if anyone else was at home and when appellant responded affirmatively,

[1] *See* TEX. HEALTH & SAFETY CODE §§ 481.103, 481.113(d).

Peck asked appellant to go back into the apartment to retrieve his house guest, Kevin Pierce. While appellant was in the apartment, Peck leaned his head and part of his body through the door.

Once appellant and Pierce came out of the apartment, appellant spoke with Peck while Pierce spoke with Papanos. Peck told appellant that the officers had received a tip about the smell of marijuana coming from the apartment and he asked appellant if he had any marijuana. Appellant responded that there might be a small amount of marijuana in the kitchen; he also acknowledged that there were weapons in the apartment. The officers then asked appellant if he would consent to a search of his apartment; appellant replied that they should "get a warrant." The officers then escorted appellant and Pierce downstairs. At this point, the officers believed that they had probable cause to get a warrant based on the odor of marijuana they smelled coming from the apartment coupled with appellant's admission that he had marijuana in the apartment.

After speaking with the Intake Desk at the Harris County District Attorney's Office, Peck and Papanos performed a "protective sweep" of appellant's apartment. During the sweep, they noticed marijuana on the kitchen counter, as appellant had previously indicated. In an open safe, the officers also saw pills that, in their experience, appeared to be ecstasy.

After the protective sweep, Papanos left to get a search warrant, while Peck remained at the apartment with appellant and Pierce. The affidavit in support of the search warrant relied on the odor of marijuana emanating from appellant's apartment, as well as appellant's admission that there was marijuana in his kitchen. The affidavit did not rely on any information obtained during the protective sweep, such as the marijuana seen in the kitchen or the ecstasy pills seen in the open safe.

The officers executed the search warrant of appellant's apartment, finding 3.7 pounds of marijuana, 335 grams of hashish oil, 1,865 grams of ecstasy, 319 grams of methamphetamine, 343 grams of psilocybin, 29.1 grams of cocaine, 17.2 grams of Xanax, 20.9 grams of LSD, as well as 3 rifles, 6 pistols, and 3 shotguns.

Appellant moved to suppress the evidence seized from his apartment, arguing that (1) the officers illegally intruded on the curtilage of his home when they knocked on the door, (2) the officers did not *Mirandize* him before questioning him about whether he possessed marijuana, (3) the protective search was illegal, (4) the search warrant was invalid because it was overbroad and (5) the search warrant did not contain the requisite probable cause.

The trial court granted in part and denied in part appellant's motion to suppress. Specifically, the trial court determined that (1) the "knock and talk" procedure followed by the officers in this case was not an intrusion on appellant's curtilage, (2) appellant was not under arrest when questioned on the balcony of his

apartment and no *Miranda* warnings[2] were required, (3) the protective sweep of appellant's apartment was unconstitutional, but no evidence was seized as a result of the illegal search and no information discovered during the illegal search was used in establishing probable cause in the subsequent search warrant, (4) the portion of the search warrant authorizing seizure of "implements and instruments used in the commission of a crime" was overbroad, thus evidence seized on this basis was suppressed, and (5) the warrant contained probable cause to search for marijuana, but did not contain probable cause to search for "other narcotics and illegal substances, scales, narcotics packaging material, drug paraphernalia," thus evidence seized on this basis was suppressed. The trial court *did not* suppress the ecstasy pills that were in plain view in an open safe because, even though first observed in plain view during an initial unlawful entry, they were later obtained independently from activities untainted by the initial illegality. That is, the ecstasy pills were discovered in plain view while executing a valid search warrant.

MOTION TO SUPPRESS

In five issues on appeal, appellant contends that the trial court erred in denying, in part, his motion to suppress evidence. Specifically, he contends that (1) the evidence was the product of an unconstitutional search after the officers intruded on the curtilage of his home, (2) that appellant was subjected to custodial

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[2] *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

interrogation without receiving the required statutory warnings, (3) the trial court improperly applied the "independent-source" doctrine, (4) the trial court did not consider whether the taint of the illegal protective sweep was attenuated, and (5) the warrant was overbroad.

Standard of Review

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013); *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We apply a bifurcated standard of review, giving almost total deference to a trial court's findings of historical fact and credibility determinations that are supported by the record, while reviewing questions of law de novo. *Delafuente v. State*, 414 S.W.3d 173, 177 (Tex. Crim. App. 2013); *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). We view the evidence in the light most favorable to the ruling and uphold the ruling if it is correct on any theory of law applicable to the case. *Absalon v. State*, 460 S.W.3d 158, 162 (Tex. Crim. App. 2015).

Knock-and-Talk

In his first issue, appellant contends "[t]he trial court abused is discretion in denying appellant's motion to suppress evidence obtained through an illegal search which began the moment officers physically entered the curtilage of appellant's home for the express purpose of gathering incriminating evidence against appellant

in violation of the Fourth Amendment of the United States Constitution, Article I, Section 9 of the Texas Constitution, and Texas Code of Criminal Procedure Art. 38.23." Specifically, appellant argues that because "the officers' presence at that location was for the express purpose of conducting a search for illegal narcotics, [it] exceeded the scope of any express or implied license that is generally limited to knocking on someone's door." The State responds that the officers' approach of appellant's home was a valid "knock-and-talk" investigation. We agree with the State.

As long as a person in possession of property has not made express orders prohibiting trespass, a police officer may enter upon residential property, follow the usual path to the home's front door, and knock on it for the purpose of asking the occupant questions. *See Cornealius v. State*, 900 S.W.2d 731, 733–34 (Tex. Crim. App. 1995); *Nored v. State*, 875 S.W.2d 392, 396–97 (Tex. App.—Dallas 1994, pet. ref'd); *Davalos v. State*, No. 01-11-00069-CR, 2012 WL 1564549, at *2 (Tex. App.—Houston [1st Dist.] May 3, 2012, pet. ref'd) (mem. op, not designated for publication).

Federal and state laws provide that a police officer may approach a citizen in a public place or knock on a door to ask questions or seek consent to search. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991); *State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002); *Davalos*, 2012 WL 1564549 at *2. Courts have defined a

knock-and-talk as a noncustodial procedure in which the officer identifies himself and asks to talk to the home occupant, and then eventually requests permission to search the residence. *Hardesty v. Hamburg Twp*., 461 F.3d 646, 658 (6th Cir. 2006) (quoting *United States v. Chambers*, 395 F.3d 563, 568 n. 2 (6th Cir.2005)); *Davalos*, 2012 WL 1564549 at *2. The knock-and-talk strategy is a reasonable investigative tool. *See United States v. Lewis*, 476 F.3d 369, 381 (5th Cir. 2007); *see also Hardesty*, 461 F.3d at 658 (noting that knock-and-talk can be legitimate effort to obtain suspect's consent to search); *Davalos*, 2012 WL 1564549 at *2. The purpose of a knock-and-talk is not to create a show of force, make demands on occupants, or to raid a residence. *United States v. Gomez–Moreno*, 479 F.3d 350, 355 (5th Cir. 2007); *Davalos*, 2012 WL 1564549 at *2. Instead, the purpose of a knock-and-talk approach is to make investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupant's consent to search. *Gomez–Moreno*, 479 F.3d at 355; *Davalos*, 2012 WL 1564549 at *2.

A police officer need not have reasonable suspicion or a basis for suspecting a particular person to simply ask questions of that individual or request consent to search, so long as the officer does not indicate that compliance with his request is required. *See Bostick*, 501 U.S. at 434–35; *Perez*, 85 S.W.3d 819; *Hunter*, 955 S.W.2d at 104; *Davalos*, 2012 WL 1564549 at *2. Such an encounter is a consensual interaction, which the citizen is free to terminate at any time. *Hunter*,

955 S.W.2d at 104; *Davalos*, 2012 WL 1564549 at *2. The encounter is not considered a seizure, triggering Fourth Amendment scrutiny or constitutional analysis, unless it loses its consensual nature. *See Bostick*, 501 U.S. at 434; *Hunter*, 955 S.W.2d at 104; *Davalos*, 2012 WL 1564549 at *2.

Appellant's argument in his first issue hinges on his assertion that approaching his door for the purpose of investigating a crime is a trespass. We disagree with appellant's assertion. The Unites States Supreme Court has held that "a police officer not armed with a warrant may approach a home a knock precisely because that is 'no more than any private citizen might do.'" *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). Here, the officers were not trespassing when they approached appellant's door, and they did not need reasonable suspicion to knock and ask appellant questions. *See Bostick*, 501 U.S. at 434–35, 111 S. Ct. at 2386; *Perez*, 85 S.W .3d 819; *Hunter*, 955 S.W.2d at 104; *Davalos*, 2012 WL 1564549 at *2.

Accordingly, we overrule issue one.

Arrest v. Detention?

In his second issue on appeal, appellant contends that the "trial court abused its discretion when it denied Appellant's Motion to Suppress Statements after Defendant was ordered out of his home and subjected to custodial interrogation in violation of Texas Code of Criminal Procedure Art. 38.22 and *Miranda*."

Specifically, appellant contends that he was in custody when officers "ordered [him] out of his house" and questioned him and that, as a result, his admission that he had marijuana inside the house, cannot be used to establish probable cause for the warrant. The State argues that appellant was merely detained, not arrested, at that point in the investigation. We agree with the State.

An accused, held in custody, must be given certain warnings before custodial interrogation. *Miranda*, 384 U.S. at 471. Failure to comply with *Miranda* results in the forfeiture of the use of any statement obtained during interrogation. *See* TEX. CODE CRIM. PROC. art. 38.22 §§ 2(a), 3(a); *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

A person is in custody only if, under the circumstances, a reasonable person would believe that his freedom was restrained to the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 322–243 (1994).

Four general situations may constitute custody:

1. The suspect is physically deprived of his freedom of action in any significant way;

2. A law enforcement officer tells the suspect he is not free to leave;

3. Law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of action has been significantly restricted; and

4. There is probable cause to arrest the suspect, and law enforcement officers do not tell the suspect that he is free to leave.

Dowthitt v. State, 931 S.W.2d, 244, 255 (Tex. Crim. App. 1996).

Appellant relies on the third category, arguing that "the objective circumstances of Defendant's detention, by the time he made any statements about marijuana, would lead a reasonable person to believe that he was physically deprived of the freedom of action to the degree associated with an arrest." We disagree.

In Texas, investigative stops are generally categorized as an "arrest" or "detention" depending upon several factors, including the amount of force displayed, the duration of a detention, the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and any other relevant factors. *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). And, when a person voluntarily accompanies law enforcement to a certain location, even though he knows or should know that law enforcement suspects that he may have committed or may be implicated in committing a crime, that person is not restrained or "in custody." *Livingston v. State*, 739 S.W.2d 311, 327 (Tex. Crim. App. 1987); *Miller v. State*, 196 S.W.3d 256, 264 (Tex. App.—Fort Worth 2006, pet. ref'd). As long as the circumstances show that a person is acting only upon the invitation, request, or

even urging of law enforcement, and there are no threats, either express or implied, that he will be taken forcibly, the accompaniment is voluntary, and such person is not in custody. *See Anderson v. State*, 932 S.W.2d 502, 505 (Tex. Crim. App. 1996); *see also Meek v. State*, 790 S.W.2d 618, 621-22 (Tex. Crim. App. 1990) (citing *Shiflet v. State*, 732 S.W.2d 622, 631 (Tex. Crim. App. 1985)).

Here, the officers told appellant that they were investigating possible drug activity, asked appellant if he would speak to them, and gestured for him to step outside, which appellant did. The officers initially had their hands on their weapons, but upon seeing that appellant was shirtless and in gym shorts, they took their hands off their weapons; their weapons were never drawn. Appellant was not transported to another location; the questioning was done just outside his apartment. Appellant was never not handcuffed, and officers did not tell him that they could smell the marijuana odor coming from his apartment. There were no threats, either express or implied, that the officers were going to take appellant into custody. Under these circumstances, the trial court did not err in concluding that appellant was not under arrest until *after* he told officers that he had marijuana in his apartment.[3] Because he was not under arrest when he made that statement to police, he was not entitled to *Miranda* warnings and the officers could use his

[3] The officers testified that once they had appellant's admission to possessing marijuana, along with the smell of marijuana from his apartment, they had probable cause to seek a warrant and hold appellant until they could do so.

voluntary statement made in response to noncustodial interrogation to establish probable cause in the search warrant.

We overrule issue two.

Independent Source Doctrine

In issue three, appellant contends the trial court erred in denying his motion to suppress after erroneously applying the "independent-source doctrine." Specifically, appellant contends that, but for the illegal protective sweep, the officers never would have even sought a search warrant and that without a warrant, the officers would not have lawfully discovered the ecstasy pills in plain view, i.e., they could not rely on having seen the pills during the illegal protective search.

"[T]he federal exclusionary rule generally requires suppression of both primary evidence obtained as a direct result of an illegal search or seizure, as well as derivative evidence acquired as an indirect result of unlawful conduct." *Wehrenberg v. State*, 416 S.W.3d 458, 464 (Tex. Crim. App. 2013) (citing *Segura v. United States*, 468 U.S. 796, 804). However, there are several exceptions to this rule, including the "independent-source" doctrine. *Id.* "At its core, the independent source doctrine provides that evidence derived from or obtained from a lawful source, separate and apart from any illegal conduct by law enforcement, is not subject to exclusion." *Id.* at 465 (citing *Murray v. United States*, 487 U.S. 533, 537 (1988); *Nix v. Williams*, 467 U.S. 431, 443 (1984)). In other words,

"notwithstanding a prior instance of unlawful police conduct, evidence actually discovered and obtained pursuant to a valid search warrant is not subject to suppression, so long as the police would have sought the warrant regardless of any observations made during the illegal [conduct]." *Id.* at 465–66 (citing *Segura,* 468 U.S. at 799). "Thus, in determining whether challenged evidence is admissible under the independent source doctrine, the central question is 'whether the evidence at issue was obtained by independent legal means.'" *Id.* at 465 (quoting *United States v. May*, 214 F.3d 900, 906 (7th Cir. 2000)).

Two United States Supreme Court cases addressing the independent-source doctrine are *Murray v. United States* and *Segura v. United States.* In *Murray*, police officers entered a warehouse without a warrant and found marijuana. 487 U.S. at 535. Thereafter, a magistrate issued a warrant to search the warehouse, and the police again searched the warehouse. *Id.* The defendant moved to suppress the evidence of the marijuana based on the illegality of the first search. The *Murray* court reasoned that if the search warrant was based on probable cause that was independent of the initial illegal search, the police officers' initial illegal search of the warehouse did not require suppression of the evidence. 487 U.S. at 543. In so holding, the court stated:

> To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result

> of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the same position they would have occupied if no violation occurred, but in a worse one.
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> . . .
>
> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id. at 541–42 (internal citations omitted). Because the record was insufficient to determine the issue, the *Murray* Court remanded the case to determine whether the "warrant-authorized search of the warehouse was an independent source of the challenged evidence." *Id.* at 543–44, 108 S. Ct. 2529.

In *Segura*, the police officers' initial illegal entry did not require suppression of evidence because they subsequently obtained a search warrant to search the same premises based on information acquired independently of the illegal initial entry. 468 U.S. at 814–16. The Court explained that it had granted certiorari "to decide whether, because of an earlier illegal entry, the Fourth Amendment requires suppression of evidence seized later from a private residence pursuant to a valid search warrant which was issued on information obtained by the police before the entry into the residence." *Id.* at 797–98. In determining "whether the evidence first discovered during the search of the apartment pursuant to a valid warrant issued

the day after the entry should have been suppressed as 'fruit' of the illegal entry[,]" *id.* at 798, the Court stated:

> The illegality of the initial entry . . . has no bearing on [on this issue]. The resolution of this second question requires that we determine whether the initial entry tainted the discovery of the evidence now challenged. On this issue, we hold that the evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued wholly on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were unrelated to the entry and therefore constituted an independent source for the evidence under *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920).

Id. at 799. The Court concluded that the evidence obtained by the police when they searched the premises pursuant to the warrant should not be suppressed, explaining that:

> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged. This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of that search, wholly unrelated to the prior entry. The valid warrant search was a "means sufficiently distinguishable" to purge the evidence of any "taint" arising from the entry.

Id. at 814.

The Texas Court of Criminal Appeals has similarly held that the independent-source rule applies in Texas and that it does not circumvent Texas's statutory exclusionary rule under section 38.23 of the Texas Code of Criminal Procedure. *See Wehrenberg*, 416 S.W.3d at 467–70.

In this case, the record supports the trial court's finding that "the officers did not seize any evidence as a result of their illegal entry, nor did they use any information obtained from their illegal entry to establish probable case for the search warrant[,]" and that "police officer had probable cause **prior to** their illegal entry and search of the defendant's apartment under the guise of a protective sweep." Indeed, Officer Papanos testified that the officers decided to get a warrant as soon as they had evidence of (1) the odor of marijuana emanating from the apartment, and (2) appellant's admission that he had marijuana in the kitchen. Because both of these pieces of information were available to the officers before they conducted the illegal sweep, and none of the evidence observed in the unconstitutional sweep was used to obtain the warrant, the trial court did not abuse its discretion in concluding that the "independent-source doctrine" applied, under circumstances similar to those presented in *Segura*.

We overrule issue three.

Attenuation of the Taint from Illegal Search

In issue four, appellant contends that the trial court erred in denying appellant's motion to suppress without considering whether the taint of the illegal protective sweep was sufficiently attenuated, arguing that the search warrant obtained after the warrantless police entry was the "fruit" of prior Fourth Amendment violations.

However, this argument is disposed of by our answer to the previous issue. As stated in *Seguro*, "The valid warrant search [which did not rely on information obtained during the illegal sweep] was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the [prior illegal] entry. 468 U.S. at 814.

We overrule issue four.

Doctrine of Severability

In issue five, appellant contends the trial court erred in denying his motion to suppress evidence "seized pursuant to a constitutionally overbroad warrant that lacked particularly and authorized wholesale exploratory rummaging through appellant's residence and belongings[.]" Specifically, appellant contends that the trial court "abused its discretion when it applied the doctrine of severability to the warrant instead of suppressing the entirety of the search warrant."

Trial court's findings related to severability

In its findings of fact and conclusions of law, the trial court held as follows:

> In the case at hand, the Defendant contends, in part, that the search warrant is overbroad. The Court finds, for the most part, the search warrant is not overbroad because it lists the specific items to be seized. The only item in the list that is not specifically described is contained in the following phrase: "*implements and instruments used in the commission of a crime*." The Court finds that "*implements and instruments used in the commission of a crime*" is overbroad and does not particularly describe the property to be seized and, as a result would permit exploratory rummaging through a person's belongings.

The trial court also concluded that there was no probable cause in the warrant to search for the following: (1) other narcotics and illegal substances, (2) scales, (3) narcotics packaging material, and (4) drug paraphernalia.

As a result of these two findings, the trial court suppressed any items that were seized on the basis of being an "implement and/or instrument used in the commission of a crime" and other narcotics and illegal substances, scales, narcotics packaging materials, and drug paraphernalia.

But, the trial court applied the rule of severability to the search warrant and did not suppress the evidence seized pursuant to the warrant that did not fall into the above categories.

Analysis

Appellant argues that the warrant was, essentially, a general warrant and "[t]he severability doctrine cannot retroactively justify a general search where officers exceeded the scope of a search warrant in seizing property."

Appellant primarily complains that the warrant was overly broad in asking for certain specific items, including other narcotics, scales, narcotics packaging materials, and drug paraphernalia, while only listing probable cause for marijuana. The trial court agreed but granted suppression only as to the items it deemed overbroad. Appellant argues that, by including the overbroad language, the warrant was a "general warrant" and all items recovered should have been suppressed.

However, even when a warrant contains impermissibly broad language, only seized items not covered by the particularized portions of the warrant should be excluded from evidence on that basis. *See Ramos v. State*, 934 S.W.2d 358, 363 (Tex. Crim. App. 1996); *Walthall v. State*, 594 S.W.2d 74, 79 (Tex. Crim. App. 1980). In this case, after severing out the general language "implement and/or instrument used in the commission of a crime" and the categories for which there was no probable cause (other narcotics and illegal substances, scales, narcotics packaging materials, and drug paraphernalia), there remained specific categories that were not general, i.e., marijuana and firearms. *See Andresen v. Maryland*, 427 U.S. 463, 481 (1976) (noting general language in warrant was part of the same

sentence as the specific language); *United States v. Bithoney*, 631 F.2d 1, 2 & n.1 (1st Cir. 1980) (holding warrant was adequately specific because "[i]t undertook to narrow and identify the documents subject to seizure, breaking them down into specific categories" and construing more general language so as not to defeat particularity of warrant as whole).

In both the *Walthall* and *Ramos* cases, the Court of Criminal Appeals cautioned that some warrants, which are essentially general in nature *except for minor items that meet the requirement of particularity*, may not be severable into valid and invalid portions. *Walthall*, 594 S.W.2d at 79; *Ramos*, 934 S.W.2d at 363 n.7.

However, the items that remained in the warrant after the doctrine of severability was applied—marijuana and firearms—cannot be described as "minor items." Indeed, the warrant specifically detailed that it was to search for marijuana and firearms, and there was probable cause for both of those items based on appellant's statements to police. Thus, the warrant was not a general warrant and the doctrine of severability was properly applied.

We overrule issue five.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

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