Review of Recent Juvenile Cases (2010)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

In a Motion to Suppress, a trial judge can base his pre-trial ruling on the contents of an unsworn police report.[Ford v. State](10-10-1)

On October 21, 2009, the Texas Court of Criminal Appeals reversed the judgment of the Court of Appeals and affirm the trial court's judgment concluding that art. 28.01, § 1(6), does not mandate that all information considered by a trial judge must be accompanied by affidavit or testimony.

¶ 10-1-1**. Ford v. State**, No. PD-1753-08, 2009 WL 3365661 (Tex.Crim.App., 10/21/09).

Facts: Appellant filed a pre-trial motion to suppress evidence concerning his arrest, alleging that Deputy Halcomb searched his truck without a warrant or probable cause. Appellant testified at the hearing for the limited purpose of showing that his arrest was made without a warrant. The prosecutor did not cross-examine appellant, and he offered no live testimony. Instead, the prosecutor offered only Deputy Halcomb's unsigned, undated, and unsworn police report and gave a verbal summary of its contents to support his position that the officer had probable cause to search appellant's truck. Appellant objected to the admission of the report (1) as a violation of the hearsay rule; (2) because there was no sponsoring witness; and (3) as a violation of his right to confrontation under the Sixth Amendment. The prosecutor responded that hearsay is admissible in a suppression hearing; a suppression hearing deals only with preliminary issues; and the confrontation right attaches only at trial. The trial judge overruled appellant's objections and admitted the report into evidence. Based upon the information in that report, he denied appellant's motion to suppress. The trial judge made findings of fact and conclusions of law, the most important of which reads,

That the report submitted by Deputy Halcomb and entered into evidence is credible, and the Court accepts as true the submission of his offense report regarding his observations of the defendant and his conversations with the defendant.

Following the denial of his motion to suppress, appellant pled guilty to possession of less than two ounces of marihuana. The trial judge deferred the adjudication of his guilt and placed him on community supervision for twelve months.

On appeal, appellant argued that the trial judge erred in denying his motion to suppress because the arrest report was inadmissible. The court of appeals agreed, holding that in a suppression hearing, Texas Code of Criminal Procedure article 28.01, § 1(6), permits the trial court to determine the merits of a motion based on the motion itself, upon competing affidavits, or upon live testimony. The court of appeals concluded that only those three specific methods are permissible:

> In this case, the State failed to accompany its proffered documentary evidence with either some form of affidavit or live, sponsoring witness testimony. It is not enough for the State to

> ignore the requirements of Article 28.01(6), and merely read a police report to the trial court and then tender it-unsigned, undated, and unverified-as was done here.

Because the arrest report was the only evidence the State offered to establish probable cause to search appellant's truck, the court of appeals concluded that there was no basis for the trial court to deny Appellant's motion to suppress.

Held: Reversed Court of Appeals, and affirmed County Court's judgment (Evidence was sufficient, denying motion to suppress affirmed).

Opinion: May a trial judge base his pre-trial suppression ruling on the contents of an unsworn police report? In an appropriate situation, he may.

A hearing on a pre-trial motion to suppress is a specific application of Rule 104(a) of the Texas Rules of Evidence. This rule, based on longstanding common-law principles, explicitly states that a trial judge is not bound by the rules of evidence in resolving questions of admissibility of evidence, regardless of whether those questions are determined in a pre-trial hearing or at some time during trial. Both common law principles and Rule 104 provide the trial judge with an important "gatekeeping" role. They ensure that all evidence admitted at trial is relevant, reliable, and admissible under the pertinent legal principles. Although the present case does not deal with expert or scientific evidence, the underlying goal of Rule 104(a) is the same in a motion to suppress evidence: The trial judge makes a legal ruling to admit or exclude evidence based upon the relevance and reliability of the factual information submitted by the parties. The question in this case, then, is whether the trial judge used sufficiently reliable information, in the form of the unsworn offense report, when he ruled upon the merits of appellant's motion to suppress.

The court of appeals' holding turned on its reading of art. 28.01, § 1(6), of the Texas Rules of Criminal Procedure. That rule reads as follows:

> (6) Motions to suppress evidence-When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court.

In *Hicks v. State,* we reiterated our "plain language" approach to statutory analysis:

In *Boykin v. State,* we held that " [w]here the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.' " Therefore, when interpreting a statute, "we ordinarily give effect to that plain meaning." But we have acknowledged an exception to this rule: "where application of a statute's plain language would lead to absurd consequences that the Legislature could not *possibly* have intended, we should not apply the language literally." "If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous," then it is appropriate to seek the aid of extra textual factors to develop a reasonable interpretation of a statute.

Thus, we must look first to the specific words in art. 28.01 to determine its meaning. The statutory rule states that a motion to suppress "may" be resolved by considering different possible means of acquiring information. The rule does not state that the motion "shall be" or "must be" resolved by these specific means. There is no suggestion in the plain language of the rule that this is an exclusive list. Instead, the statutory language supports the notion that a motion to suppress is an informal hearing in which the trial judge, in his discretion, may use different types of information, conveyed in different ways, to resolve the contested factual or legal issues. The State argues that the structure and language of the statute points to the conclusion that the

legislature intended to give the trial court latitude to hold a "non-traditional, informal hearing that need not necessarily include witnesses, testimony, or even formal evidence."

Appellant argues that the plain language of the statute lends itself to the narrow construction used by the court of appeals. He cautions that a permissive reading of the statute will render it without any real effect and asks us to conclude that the legislature intended the statute to establish a mandatory, not discretionary, procedure for conducting suppression hearings.

Because the legislature carefully used the term "may" throughout art. 28.01 when it intended discretionary acts and procedures and used the terms "must" or "shall" when it intended mandatory acts or procedure, we conclude that the legislature intended to establish a discretionary and informal procedure for the trial court to conduct suppression hearings under art. 28.01, § 1(6). The legislature suggested, but did not require, several different methods to determine the merits of a motion to suppress, including information and facts set out in the motion itself, affidavits, or oral testimony. In sum, under the *Boykin* "plain language" analysis, we conclude that art. 28.01 means what it says when it uses the permissive term "may": A trial judge may use his discretion in deciding what type of information he considers appropriate and reliable in making his pre-trial ruling. We conclude that the trial judge did not abuse his discretion in relying upon an unsworn hearsay document. Deputy Halcomb's offense report could have been, but was not required to be, accompanied by an affidavit stating that "this is a true and accurate copy of my offense report."

Finally, we must determine whether the trial court abused his discretion by relying upon this particular unsworn hearsay document. If the source and content of the hearsay document were unreliable, then the trial court did not adequately perform his "gatekeeper" function. In this case, we conclude that Officer Halcomb's offense report contains sufficient indicia of reliability to serve as the factual basis for the trial court's ruling. The offense report includes appellant's name, correct offense date, and specific information that coincides with the same basic information to which appellant testified at the hearing. Furthermore, it is a criminal offense to file a false police report. Although the trial judge was clearly not required to believe the information contained within Deputy Halcomb's report, the document itself is a government record and of a type that a trial judge may consider reliable in a motion to suppress hearing, even though it is hearsay and is not admissible at a criminal trial on the merits.

In *United States v. Matlock,* the Supreme Court held that in a suppression hearing "the judge should receive the evidence and give it such weight as his judgment and experience counsel." And if there is nothing in the record to "raise serious doubts about the truthfulness of the statements themselves," then there is "no apparent reason for the judge to distrust the evidence." Several federal cases have also held that a trial court may rely upon unsworn documentary evidence in a motion to suppress hearing.

Art. 28.01, § 1(6), comports with *Matlock*. The trial court *may* conduct the hearing based on motions, affidavits or testimony, but there is nothing in the statute to indicate that it *must.* It is merely an indication that such hearings are informal and need not be full-blown adversary hearings conducted in accord with the rules of evidence.

Significantly, appellant did not argue that Deputy Halcomb's offense report was, in any way, unauthentic, inaccurate, unreliable, or lacking in credibility. Appellant did not contest the accuracy of the facts within that offense report; he argued only that the report could not be considered without the shepherding wings of a sponsoring witness or affidavit. Had appellant complained about the reliability, accuracy, or sufficiency of the information supporting the trial judge's ultimate ruling on the motion to suppress, this would be a very different case. The prosecutor was perfectly willing to sponsor Deputy Halcomb's testimony if he arrived in time for the hearing, but the trial judge, hearing no complaint about the accuracy of the report, did not wait. He was prepared to rule on the motion based on the deputy's offense report. Although it is better practice to

produce the witness or attach the documentary evidence to an affidavit, art. 28.01, § 1(6), did not create a "best evidence" rule that mandates such a procedure in a motion to suppress hearing. Thus, we cannot say that the trial judge abused his discretion in considering and relying upon Deputy Halcomb's offense report, which he found, in the absence of any objection to its specific contents, to be credible and reliable.

Conclusion: The Court of Appeals was mistaken in concluding that art. 28.01, § 1(6), mandates that all information considered by a trial judge must be accompanied by affidavit or testimony. Accordingly, we reverse the judgment of the court of appeals and affirm the trial court's judgment.