No. 14-24-00766-CR

In the Fourteenth Court of Appeals at Houston, Texas

ANDREW BYRON WALLACE
V.
THE STATE OF TEXAS

AMENDED BRIEF OF APPELLANT

On Appeal from the 10th District Court
Of Galveston County, Texas
Case No. 24CR3569

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January 24, 2025

List of Interested Persons

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The State of Texas was represented at trial by Ms. Erica Mercado, ADA, and Mr. Shawn Connally, ADA of the Office of the Criminal District Attorney of Galveston County, Texas

The State of Texas is represented on Appeal by Ms. Rebecca Klaren, ADA, of the appellate division of the Office of the Galveston County District Attorney.

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(TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

Statement of the Case and Procedural History

Appellant was indicted for possession of a controlled substance, to wit, cocaine. Indictment, CR 5. Trial counsel filed a motion to suppress, which was heard on July 24, 2024. The Trial Court overruled the Motion to Suppress; CR 27, Order Denying Motion to Suppress, September 13, 2024. The trial court certified Appellant's right to appeal the ruling on the motion to suppress only; CR 41. September 13, 2024; Thereafter, Appellant pleaded no contest and pursuant to a plea agreement was ordered to be placed on two years' deferred adjudication Order of Deferred Adjudication CR 35-40 (September 24, 2024.; A notice of appeal was filed, Notice of Appeal CR 49-51 on Monday, October 14, 2024, the 30th day as extended from Sunday, October 13.

Facts

Testimony of Thomas Knowlton

Knowlton has been an officer of the League City Police Department for approximately 16 years. RR 7/23.

The incident in question took place beginning September 12, 2023 instead of September 14 (Typographical Error in Officer's notes) RR 9/17.

At RR 10, Officer Knowlton began to testify to the statements of another officer (on the telephon) which other officer did not testify. The Court overruled Defendant's Hearsay objection. RR 10/25. Over that objection Officer Knowlton claimed that the absent/phone caller stated the anonymous "tipster" had said that:

- Defendant worked at the State Farm agency on Marina Bay/League City
- Defendant left every Wednesday during lunch break "to buy cocaine";
- Defendant drove a black Linkoln MKZ;
- The tipster provided the License Plate Number of the Lincoln MKZ and the home address of Defendant (apartment at 451 Constellation);
- Defendant drove to Friendswood to buy drugs; and
- Defendant had a firearm in a black backpack, mostly in the trunk of his car.

RR 11/5-22. Knowlton then testified that he himself called the "tipster" and obtained essentially the same information as above. RR 12/2-12.

On the basis of the above information, the police began a "surveillance" of Defendant RR 12/15.

At RR13 generally, Knowlton testified that he conducted a surveillance of Defendant visually ("the eye"). On his first surveillance, Knowlton observed that Defendant left his work "well after noon", went straight to his apartment and then came back to work before 1:00 p.m. when his lunch break ended. **On that first surveillance, Knowlton observed NOTHING that lead him to believe that an offense had occurred. RR 13/23.**

A second surveillance occurred on the same date at about 5;00 p.m. Police observed Defendant drive straight to his apartment; saw nothing; and left the surveillance at c. 6:30 p.m. RR 14/5.

The surveillance in question took place on September 27, 2023, beginning at 11:45 a.m. RR 14/14. At 11:59 the defendant got into his Lincon (as Knowlton phrased it, "just like the tip said." [*Quaere:* How else would one begin to use a motor vehicle?]. The police then observed Defendant drive Westbound, stop at a Wendy's, then stop at a bank ATM "drive up", and then to an address at the far

west side of League City near the Friendswood City Limit line; stop at that house for two minues, and then head back eastbound towards his workplace. RR 14-15.

The building where Defendant remained for two minutes was located at 5686 Country Glen [sic], on the far west side of League City. RR 15/23. Knowlton then stated that one of the officers on the surveillance claimed that that particular location had a "history of drugs and that the suspect that lived at a particular residence had a history of drugs." RR 16/3-7,

Knowlton described his experience and training in narcotics investigation. He testified that the supposed drug transactions last only a few minutes, and were typically paid for in non-traceable cash. 17 RR 3-13.

Apparently to support the State's position, Knowlton testified that the… Defendant outbound did not adhere to all traffic requirements, but that on the way back to the office the Defendant observed all traffic and speed regulations meticulously. 17 RR 16-22. In other words, the Defendant obeyed the law driving back in the direction of his workplace.

At that point, Knowlton called others and instructed Officer Keith *"…that he should be stopped to further a drugs or narcotics investigation. And so, Officer Keith conducted a* ***traffic stop*** *on East Main Street."* 18RR 6-10.

Once the Defendant had been stopped, Officer Knowlton also stopped at the site. He observed Officer Keith ask permission of defendant to search the vehicle, which permission the Defendant Denied. RR 19/3. At that point, a dog ("K9") was called in. The name of the K9 is not revealed in the record but Officer Knowlton purported to list the dog's credentials (e.g., certification annually through something called "Dogs for Law Enforcement") and the dogs presumed expertise in detecting controlled substances. RR 19/12-15. It was noted that at the time in question the unnamed dog's certification was up to date. RR19/20.

The dog in question was apparently non-verbal, i.e., he or she did not bark, point or otherwise signal a response. Instead, the dog did what the police apparently characterized as a "passive alert", i.e., doing nothing but laying down. RR 19/24.

The dog was apparently a Well Rounded Pooch, or a Rennaissance Rover. Officer Knowlton added that the K9 was certified to detect "Marijuana, cocaine, heroine [sic] and methamphetamines." RR 20/4.

Officer Knowlton claimed that the K9 thus alerted twice on circumnavigating the Lincoln, for which the dog was rewarded with a tennis ball. RR20/16.

Following that "Dog and Pony Show", Knowlton then asked Defendant if he wanted to change his mind. Defendant at that point according to Knowlton said that Defendant did change his mind and "admitted there was cocaine and pills in the center console of the vehicle." RR 20/21.

Officer Knowlton and his crew apparently did not place weight on the supposed "admission" of Defendant, which was clearly given without a Miranda Warning and while Defendant was clearly in custody, i.e., surrounded by police in a constricted parking lot.

Instead, the police conducted a search based on "probable cause", i.e., "After we had probable cause from the dog sniff and then his admission, we searched the vehicle and found exactly what he [apparently the tipster] told us was in there and including a gun—in the vehicle in the backpack."

Cross Examination of Knowlton

Despite what the tipster claimed, Defendant did NOT make a trip to buy drugs or anything else on Wednesday, September 13, 2023. RR 25/19. However, Knowlton claimed "confirmation" or "corroboration" in the fact that on Wednesday, September 13, Defendant did in fact "leave for lunch", RR26/6.

Another non-productive surveillance was conducted on the evening of September 13, at 5:00 p.m. RR 27/17.

Knowlton admitted that in and of itself, one's leaving work to go to lunch was not suspicious. RR29/24. Knowlton actually saw defendant buy food at Wendy's. RR 30/4. Likewise, Knowlton saw Defendant stop at a "Wellby" bank ATM long enough to make a transaction, but did not actually see Defendant withdraw cash. RR 31/16. A cash withdrawal was confirmed, but "Post-Arrest." RR 32/14.

At the time of the arrest, Knowlton did not know whether Defendant was making a deposit or even checking his balance. RR 32/21-25.

One Detective Howard was at the house where the transaction supposedly occurred, but did not pre-arrest talk to anybody at that house. RR34/25-RR35/1.

Knowlton did not see Defendant Wallace "possess or retrieve any contraband while he was at that house." Answer: "Correct". RR 35/12.

Although the officers "inferred" that a drug transaction took place, "…Nobody actually saw drugs or money exchanged in any capacity while Drew Wallace was at that house." RR36/7.

Knowlton admitted that because of the way he and other officers were parked, they effectively blocked any exit from the parking lot where the arrest took place. RR 41/19 ("That entrance, yes, sir.")

Knowlton never personally met the anonymous person or "tipster." RR 42/9 ("No, sir.")

The person advising of the tipster's information had only a surmise that the house involved was a drug venue. That person did not, for example, state that the police had raided the house many times, or even arrested anyone there on "multiple occasions." RR 45/1-15.

No peace officer involved ever even applied for a search warrant. RR 46/20 ("Correct.")

The first time any involved officer ever laid eyes on any drugs was when they saw them, after the search, in the console of Defendant's Car ("Yes") 47 RR /16.

Likewise, Knowlton had no idea of when those drugs found their way into the console of the car. ("Correct") RR 74/22.

Officer Jonathan Keith

Officer Keith identified Appellant Wallace in the court. RR53/11.

Officer Keith confirmed that Defendant was not stopped for a traffic violation. RR 56/16 ("Correct.")

At RR 57 generally Keith characterized the defendant's proper driving as "counter-surveillance", e.g., pulling into parking lots and then pulling out. RR 57/16. [There was no mention of whether Defendant did or did not halt to use his cell phone, as required by law. See Texas Transportation Code Sec. 545.4251, "Use of Portable Wireless Communication Device for Electronic Messaging Offense")]

At RR60, Keith Described Defendant's arm as "shaking" as he produced his driver's license, etc. Note that thi2s was well after the "stop" from which time Defendant was in custody.

Keith also described the dog's use as an "open air sniff". RR61/9. Officer Keith then testified that Defendant appeared nervous during the "sniff". RR 61/18.

Like Officer Knowlton, Keither testified that the dog alerted "several times." RR 62/6. The video displayed Defendant at that time admitting there was cocaine in the car. RR 62/25.

Cross Examination of Officer Keith

Officer Keith admitted made the following admission:

Q: [By Defense Counsel Hobbs] And once he pulled over into this parking lot and y'all were essentially blocking him in, he was not free to leave at that point.

A: Correct.

RR 74/17.

Further:

Q: [By Defense Counsel Hobbs]: You're ware or are you aware that nervousness is not sufficient by itself to constitute suspicion of criminal activity?

RR 76/9.

Further:

Q: [By Defense Counsel Hobbs]: You don't know whether the dog actually alerted, right? You're just relying on what Detective Knowlton told you?

A: Yes

RR 77/25-78/1.

When Officer Keith wrote his report, he did not even mention the anonymous caller, or even the fact that he, Keith, was the one that took the call.

RR 79/24.

A: Correct.

There were no written findings of fact, nor did the trial judge recite any such findings into the record. See RR 93-94. That is because the objective facts are undisputed, as painfully revealed by the testimony of the officers themselves.

Issue For Review

Issue 1

The trial court erred in overruling Appellant's Motion to Suppress. RR 93-94;; CR 27; U.S. Constitution Amds. IV, V, VIII, IX and XIV; Texas Constitution art. I Secs. 9, 10, and 19; Texas Code of Criminal Procedure Arts. 38.21-23.

Summary of the Argument

This case was an obvious attempt by peace officers to evade the State and federal constitutional barriers against random and unreasonable searches and seizures. Issue 1 states Appellant's primary challenge, i.e, that the stop was ordered and only to investigate without any probable cause, i.e., underlying basis or observation of a criminal offense having been or about to be committed Appellant will address in advance the anticipated response of the State, which amounts to an ineffective reliance on the eventual discovery of drugs to retroactively justify the initial, unlawful stop.

Standard of Review

The applicable standard or review was most recently explained in *State v. Stubbs*, 2024 WL 5252055 *1 (Tex. App.—Houston [14th Dist] Dec. 31, 2024):

> We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. See *Lerma v. State*, 543 S.W.3d 184, 189-90 (Tex. Crim. App. 2018). We defer to a trial court's findings of fact that are supported by the record but review de novo the trial court's application of the law to historical facts. *Id.* Our deferential review of the trial court's factual determinations also applies to the trial court's conclusions regarding mixed questions of law and fact that turn on credibility or demeanor. *State v. Ortiz*, 382 S.W.3d 367, 372 (Tex. Crim. App. 2012); *Valterra v. State*, 310 S.W.3d 410, 447 (Tex. Crim. App. 2010). We will sustain the trial court's ruling if it is reasonably supported by the record and correct under any theory of law applicable to the case. *Laney v. State*, 115 S.W.3d 854, 857 (Tex. Crim. App. 2003).

The objective facts are clear in the record and demonstrate what the police did—and more critically did not—know at the time of the challenged stop. **This appeal revolves on the Court of Appeals *de novo* review of the trial court's application of the law to those facts.**

Arguments and Authorities

Argument and Authorities Under Issue 1

Issue 1 Restated

The trial court erred in overruling Appellant's Motion to Suppress. RR 93-94;; CR 27; U.S. Constitution Amds. IV, V, VIII, IX and XIV; Texas Constitution art. I Secs. 9, 10, and 19; Texas Code of Criminal Procedure Arts. 38.21-23.

Merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative.

Gilbert & Sullivan
The Mikado, Act II

That epigram sums up this case. The police officers and the prosecution essentially conceded that there was no probable cause to justify the stop and ensuing search and arrest, and so relied on retroactive "corroboration" of what was discovered after the stop, contrary to the settled law of Texas.

Particularly applicable is *Garcia v. State*, 43 S.W.3d 527 (Tex. Crim. App. 2001) holding in effect that an officer's perception of a child passenger's glances did not provide objective basis for a stop, and that the ensuing discovery of an offense would not resurrect the stop from suppression. The Court of Appeals initially suppressed the stop, 3 S.W.3d 227 and the Court of Criminal Appeals affirmed the Court of Appeals, remanding the case.

The substance in question was marijuana, found subsequent to the challenged stop. *Garcia, supra*, 43 S.W.3d at 528. That stop was based on a peace officer's subjective interpretation of the objective fact that a child passenger in the car looked back at the officer in a manner which suggested—at least to the officer—that the child might not be wearing a seat belt, i.e., a fig-leaf offense to justify an illegal stop.

The State's first problem in Gonzales—as here—is that "…reasonable suspicion exists if the officer has specific articulable facts that, when combined with rational inferences from those facts, would support The standard is an objective one: there need only be an objective basis for the stop; the subjective intent of the officer conducting the stop is irrelevant."

Garcia, supra, 43 S.W.3d at 530.

The Garcia court further observed that whether "…reasonable suspicion (consisting of objective, articulable facts) existed to stop the vehicle in the first place." *Id.* The court then held that, "…while the contention that the child looked back in a suggestive manner may be consistent with [officer] Sills' testimony, such a contention goes beyond the realm of reasonable inference." *Id.* at 531.

As the Court further noted in assessing the officer's claim:

> But this kind of testimony could be given in any case and could simply reflect an officer's mistaken belief that a certain fact possesses a tendence to create reasonable suspicion.

Garcia, supra, at 531.

We recap the objective facts in this case:

- The tipster related the following information about Appellant: his lunch habits; his car and license plate; his habit of stopping at a bank; and the fact that he (legally) had a gun in his car; an accusation that he was buying drugs at a house in "Friendswood". Aside from the accusation of drugs, all of the other bits of information could have been gleaned by anybody (including a police operative) and were simply innocuous facts which could not singly or in combination suggest any illegality.
- Nothing was observed on the first surveillance. RR 13/23/
- The allegation that the house near the Friendswood line was a drug den was an unsupported allegation which, in itself, would not support a finding of reasonable suspicion. RR16/3-7. See, e.g., *Gurolla v. State*, 877 S.W.2d 300, 303 (Tex. Crim. App. 1994); Cf. *Crain v. State*, 315 S.W.3d 43, 49(Tex. Crim. App. 2010): "Neither time of day nor level of criminal activity in an area are suspicious in and of themselves…Neither fact proves that the suspect is engaged in any sort of criminal offense." *Crain, supra,* at 49.

- Driving too carefully on the way back to work. RR 17/16-2. The leap from this fact to criminal activity was pure police alchemy.
- Stopping at an ATM RR 18/6-10.
- Having lunch at Wendy's RR 26/6.
- As of the Stop, NOBODY saw drugs or money change hands at the house near the Friendswood line. RR 36/7.
- **No drugs were seen by any officer until after the stop. RR 47/16.**
- As of the Stop, there was NO Traffic violation. RR 56/16
- Alleged "counter-surveillance" (subjective) referred to occasional stops on the return to work, ignoring the possibility that such stops were not only not illegal but equally consistent with a citizen observing restrictions on use of cellphones while driving. See Texas Transp. Code Sec. 545.4251.
- Q: You're aware or are you aware that nervousness is not sufficient by itself to constitute suspicion of criminal activity? ("Correct") RR 76/11. Simple nervousness is typical of any citizen confronted with peace officers, and has never supported by itself a claim of reasonable suspicion. See, e.g., *Wade v. State*, 422 661, 668 (Tex. Crim. App. 2013)(Nervousness "…is not particularly probative because most

> citizens with nothing to hide will nonetheless manifest an understandable nervousness in the presence of [an] officer.")

Before the trial court, the state stressed that the eventual discovery of some cocaine somehow corroborated the "tip" and legalized the initial stop. See, e.g., RR 82-83; in initial comments by prosecutor. But the "corroboration" was only of routine matters of a distinctly non-criminal nature, e.g., lunch habits, going to the ATM, and punctually observing a lunch break. Such leaps are simply "circular reasoning." See and compare, *Monjaras v. State*, 679 S.W.3d 834, 858 (Tex. App.—Houston [1st Dist.] 2023, no pet.)(Goodman, J., concurring).

Such *post hoc* "corroboration" of an otherwise illegal stop has never been condoned. *Garcia, supra,* at 530. That holding has support in other cases. See, e.g., *Amores v. State,* 816 S.W.2d 407, 415 (Tex. Crim. App. 1991):

> [T]o determine the existence of probable cause, we look to the facts known to the officers at the time of the arrest; subsequently discovered facts or later acquired knowledge …cannot retrospectively serve to bolster probable cause at the time of the arrest.

Amores, v. State, supra at 415.

The trial court did not issue written findings nor articulate specific findings. Instead, the trial court's "findings" and ruling are contained in one brief paragraph:

> The Court: All right. The test her is the totality of the circumstances.; and you sure would've like to have a lot more evidence and

> information that what they had. What they had is what they had. Nd based on that, they followed through. Things—it was a future activity confirmed. And so, I do believe that there was sufficient grounds to do the stop, and the Motion to Suppress will be denied.'

RR 93-94; See Order Denying, CR 27. The nearest thing to an objective finding in that brief passage would be that the police should have had more facts, i.e., the very sparsity of the record.

Totality and Logical Force

Texas cases do not permit a of reasonable suspicion by adding up innocuous facts and finding somehow that the legal whole is greater than the factual parts:

> In this instance, however, the logical force of the four circumstances on which the State relies is inadequate to support a finding of reasonable suspicion even when they are considered together in the context of all the evidence. These four circumstances remain inadequate when considered together because even in combination, they show Monjaras behaving as any citizen might without appearing unusual in his surroundings or rendering himself suspect.

Monjaras v. State, 679 S.W.3d 834, 859 (Tex. App. Houston [1st Dist.] 2023, no pet.)(Goodman, J., concurring).

The State in reply may correctly cite *Loesch v. State,* 958 S.W. 2d 830, 832 (Tex. Crim. App. 1997) for the proposition that a reviewing court should not analyze facts individually but instead should "look at all the facts together." However, even under *Loesch*, this case should be governed by *Garcia, supra*, since

all the objective facts together at the time of the stop only demonstrate a citizen going about his daily, noncriminal routine.

"The Dog And Pony Show"

"The infallible dog is a creature of legal fiction.". a
Illinois v. Caballes, 543 U.S. 405, 411 (2005)
Souter, J., Dissenting

There was no pony, but the police resorted to using an allegedly remarkable dog to intimidate the Defendant into giving an ostensible confession and consent to search the vehicle.

Too little attention has been focused on such police tactics. The Texas Court of Criminal Appeals has to expressed strong skepticism towards the rote acceptance of canine "testimony." See *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010), reversing and rendering a judgment of acquittal in part due to the inadequacy of a canine "scent lineup" *Id.* at 883.

Surprisingly, the testifying officer in *Winfrey* also admitted that you could not convict a person simply on the "testimony" of a dog. *Id.* at 882. The Winfrey court's analysis focused in part on the anomaly between "scent lineup testimony" and more conventional canine tasks such as the tracking of human suspects. Id. at 882.

Here, the canine handler himself did not testify nor did any witness provide firsthand knowledge of the dog's qualifications or "credentials" other than second

hand information about a group identified as "Dogs for Law Enforcement" RR 19/12-15.

A useful analogy might be if a human with superior olfactory senses (e.g., a profession wine taster) were called to testify that he or she could likewise various different narcotics by simply walking around a vehicle. Such testimony could never survive the tests of Texas Rule of Evidence 702.

Most experts under Rule 702 are required to demonstrate a reliability rate. In this and similar cases, however, there is no confirmation in the record of reliability or "false positives", because there is no plausible scenario in which the dog handlers would be called upon to give such evidence; their task is to justify stops and searches.

The State at hearing never attempted to properly show the dog's credentials. What was stated was that the dog had been "certified" by somebody or something called "Dogs for Law Enforcement" RR 19/12-15 which, *dehors* the record, is apparently a private 501(c)(3) organization. It is not an official organization, such as the State's DPS training school, mentioned in *Jones v. State*, 2016 WL 2587187 at *2 (Tex. App.—Houston [1st Dist.] 2016, no pet.). Likewise, there was no effort to detail the training supposedly given to that dog. Id. Cf. *Trejos v. State*, 243 S.W.3d 30, 50 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd.)(regarding qualifications of trainer regarding use of a cadaver dog).

Another and more obvious problem appears in this record: The dog was **rewarded** with a tennis ball. RR20/16. But what was the dog "rewarded" for? Was the reward for signaling the presence of drugs, as the Officer subjectively claimed? Or wat the dog simply "rewarded" for lying down and thus ostensibly justifying the officer's claim that the dog had indeed detected cocaine? Or had the dog been conditioned, somewhat like Pavlov's hound, to expect a reward (i.e., the toy tennis ball) when ever he gave the "passive" signal?

The opportunities for manipulating evidence through the use of "trained" dogs is troubling, and calls for far greater inquiry than was presented in this case.

Conclusion

A disturbing pattern emerges. Despite decades of constitutional, statutory and judicial efforts to restrain arbitrary exercise of public officials, the peace officers in this case have assiduously attempted to shortcut the law. The efforts of the police, stretching over a week or more, reveal what appears to be an unlawful *modus operandi* on the part of police in League City and probably elsewhere in the State. The Court of Appeals is urged to emphatically stop such practices.

Prayer

Appellant prays that this case be reversed and a judgment of acquittal entered, or alternately that this case be reversed and remanded.

Respectfully submitted,

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Certificate of TRAP 9 Compliance

Applicable portions of the foregoing brief contain 4,127 words in Times New Roman 14 point type.

Mark W. Stevens

Certificate of Service

A true and correct copy of the foregoing Combined Brief with Exhibits has been serv4d upon state's counsel Rebecca Klaren, ADA by electronic filing on January 22, 2025.

Mark W. Stevens

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