IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1299-16

THE STATE OF TEXAS

v.

KIMBERLY FORD, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS NUECES COUNTY

WALKER, J., joined by ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

The Court of Appeals held that Officer Rogers did not have probable cause to arrest Appellee. Today, a majority of this Court reverses by concluding that there was probable cause. On this matter, I wholeheartedly agree. Based on several facts, Officer Rogers had probable cause to arrest Appellee: (1) Appellee admitted to the officer that she placed some store items in her purse; (2) upon inspection, Officer Rogers observed store items in Appellee's purse, which was zipped and covered by a jacket; and (3) the store cart Appellee was using contained other items from the store that were not in her purse. I agree that this is enough, and in this regard I have no objections with the

majority's analysis. Through his observations and interactions with Appellee, Officer Rogers discovered enough facts to support probable cause.

However, whether Officer Rogers had probable cause to arrest Appellee is of no consequence unless he had reasonable suspicion to stop her in the first place. The Trial Court concluded that Officer Rogers had neither reasonable suspicion nor probable cause. The Court of Appeals disagreed and found reasonable suspicion, but it upheld suppression because of a lack of probable cause. I disagree on both points. In my view, in addition to its handling of probable cause as discussed above, the Court of Appeals erred by misapplying the standard of review in its discussion of reasonable suspicion. Had it correctly done so, it would have upheld the Trial Court's ruling on that basis. Nevertheless, it ultimately came to the same decision to uphold the grant of Appellee's motion to suppress. Accordingly, I would affirm the judgment of the Court of Appeals, even though I do not endorse its reasoning.

The standard of review of a trial court's ruling on a motion to suppress bears repeating:

> [A]s a general rule, the appellate courts, including this Court, should afford 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. The appellate courts, including this Court, should afford the same amount of deference to trial courts' rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. The appellate courts may review *de novo* "mixed questions of law and fact" not falling within this category. This Court may exercise its discretion to review *de novo* these decisions by the intermediate appellate courts.

Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (internal citations omitted); *see also Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010) (stating same, specifically for review of rulings on motions to suppress). Additionally:

> Appellate courts view the evidence in the light most favorable to the trial judge's ruling–whether he grants or denies the motion. The winning side is afforded the "strongest legitimate view of the evidence" as well as all reasonable inferences that can be derived from it. We review a trial judge's application of search and seizure law to the facts *de novo*, and will affirm his ruling if the record reasonably supports it and it is correct on any theory of law applicable to the case.

State v. Duran, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013).

At the hearing on the motion to suppress, neither Officer Rogers nor his fellow responding officer, Tamez, testified. There was also no testimony from the store clerk, Maria Molina. *State v. Ford*, No. 13-15-00031-CR, 2016 WL 4939375, at *1 (Tex. App.–Corpus Christi-Edinburgh Sept. 15, 2016, mem. op., not designated for publication). There were no affidavits, even though a trial court may decide the motion with only affidavits. *See* Tex. Code Crim. Proc. Ann. art. 28.01 § 1(6) (West 2006 & Supp. 2016). Instead, the only evidence introduced by the State was a portion of Officer Rogers's written report. *Ford*, 2016 WL 4939375, at *1.

The Trial Court admitted the portion of the report into evidence and ultimately granted Appellee's motion to suppress. *Id.* at *2. After granting the motion, the Trial Court stated:

> And just for purposes of the record, the Court questions the reliability of the information contained within the report provided by Maria Molina to the officer. I question the reliability of the information that is contained with regard to the items and information. And I find insufficient evidence to support a charge of theft under the facts and circumstances as presented in the narrative. And the Court rightfully considers the accuracy, there not being anyone to substantiate the information that Maria Molina gave.

Id. The Trial Court's written findings of fact were that:

> 1. On January 9, 2013, a store employee of the Dollar General Store at Waldron and Glenoak in Corpus Christi, Nueces County, Texas called [the] Corpus Christi Police Department after becoming suspicious that [Appellee] was shoplifting.
> 2. When the police officer arrived, he found [Appellee] inside the store shopping.

3. When stopped by the officer, [Appellee] had not left the store.
4. When stopped by the officer, [Appellee] had not passed the checkout area of the store.

Id. Based on the evidence and the findings of fact, the Trial Court's conclusions of law included a statement that the officer did not have reasonable suspicion to believe that Appellee had committed a crime at the time he stopped Appellee and searched her purse. *Id.* As stated above, while not included in the findings of fact, the Trial Court did state, "And just for purposes of the record, the Court questions the reliability of the information contained within the report provided by Maria Molina to the officer. I question the reliability of the information that is contained with regard to the items and information." *Id.* It is apparent that the facts in the police report that tended to establish reasonable suspicion carried little weight with the Trial Court, and that is why the Trial Court concluded that the evidence did not establish reasonable suspicion.

The findings are part of the record, and the Court of Appeals was bound to give those findings "almost total deference." *See Guzman*, 955 S.W.2d at 89. Nevertheless, a reading of that Court's opinion shows that it gave virtually no deference to the Trial Court's findings. Although it quoted the findings in the "Background" section of its opinion, it appears that the Court of Appeals applied the law to only the facts as presented in the unsworn police report to find that reasonable suspicion existed. The relevant portion of the Court of Appeals's opinion, applying the "facts" to the law, states:

> The trial court found that Officer Rogers responded to the Dollar General based on a report from a store employee, who suspected Ford of stealing merchandise. Morever, upon arriving at the store, the employee provided Officer Rogers with a description of the suspect that fit Ford's description "exactly." Based on these facts, we conclude that the trial court erred in concluding that Officer Rogers did not possess reasonable suspicion to detain Ford because Officer Rogers had specific articulable facts from the store employee that would lead him to reasonably conclude

that Ford had engaged in criminal activity inside of the store.

Ford, 2016 WL 4939375, at *4. But "these facts" as described by the Court of Appeals omit the oral finding that the information provided by the store employee, Molina, was of questionable reliability. In other words, Molina's information was not credible. It should be noted that when a trial judge admits hearsay evidence, there is nothing in our law that requires the judge to treat the hearsay evidence as credible. As the sole trier of fact, the Trial Court was free to disbelieve some, all, or none of the information provided by Molina, even uncontroverted hearsay. *State v. Ross*, 32 S.W.3d 853, 857 (Tex. Crim. App. 2000). Appellate courts are bound to afford "almost total deference" when it comes to matters of credibility on determinations of historical fact and even on mixed questions of fact and law if such questions are based on an assessment of credibility or demeanor. *Guzman*, 955 S.W.2d at 89.

Furthermore, this case does not appear to be the type of case where the trial court's findings are not given due deference as was the case in *Carmouche v. State*, 10 S.W.3d 323 (Tex. Crim. App. 2000). In that case, we declined to give the trial court findings "almost total deference" where there was indisputable visual evidence to the contrary. *Id.* at 332. This case is different from *Carmouche*. Here, the evidence is a page from a non-testifying officer's unsworn report. There was no witness to authenticate that the page was actually from Officer Rogers's report. There was no witness to testify that the page accurately reflected what Officer Rogers saw, heard, or experienced on the day in question. It was unsworn, it was hearsay, and the critical information for reasonable suspicion analysis, the information supposedly told to Officer Rogers by Maria Molina, was itself hearsay within hearsay. The information supposedly provided by Molina, reflected only in the unsworn report, can hardly be called "indisputable" evidence in the same class as the recorded footage in

Carmouche.

Accordingly, the Court of Appeals erroneously analyzed reasonable suspicion in light of only the unsworn report, instead of in the light most favorable to the Trial Court's ruling. The Trial Court concluded that the stop was made absent reasonable suspicion. When a stop is effectuated absent reasonable suspicion, the fruit of the illegal stop is inadmissible. Virtually all of the State's evidence was obtained after the stop and was, therefore, fruit of that illegal stop. But even though the Court of Appeals concluded that there was reasonable suspicion, it upheld the Trial Court's suppression ruling based on a lack of probable cause. Because I agree with the Court of Appeals's decision to uphold the Trial Court's ruling, I would affirm the judgment of the Court of Appeals, even though I disagree with the Court of Appeals's analysis. Because this Court does not do so, I respectfully dissent.

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