

Whitley v. State

Court of Appeals of Texas, Fourth District, San Antonio

June 6, 2018, Delivered; June 6, 2018, Filed

No. 04-17-00438-CR

**Reporter**

2018 Tex. App. LEXIS 4002 \*; 2018 WL 2694559

Arthur WHITLEY, Appellant v. The  
STATE of Texas, Appellee

**Notice:** PLEASE CONSULT THE TEXAS  
RULES OF APPELLATE PROCEDURE  
FOR CITATION OF UNPUBLISHED  
OPINIONS.

**Subsequent History:** Petition for  
discretionary review refused by In re  
Whitley, 2019 Tex. Crim. App. LEXIS 210  
(Tex. Crim. App., Feb. 27, 2019)

**Prior History:** [\*1] From the 187th  
Judicial District Court, Bexar County,  
Texas. Trial Court No. 2015CR8583. The  
Honorable Laura Lee Parker, Judge  
Presiding.

**Disposition:** AFFIRMED.

**Core Terms**

cell phone, murder, probable cause, search  
warrant, inferences, four corners

**Case Summary**

**Overview**

**HOLDINGS:** [1]-Affidavit stated defendant  
was present at the murder scene, and the  
magistrate inferred the cell phone data could  
confirm defendant's geographic location. In  
addition, the affidavit stated defendant fled  
the scene with another individual, and the  
magistrate inferred the cell phone data could  
identify this other individual who could be  
either a witness or an accomplice.  
Accordingly, based on the four corners of  
the affidavit and the inferences the  
magistrate could draw based on the facts  
provided, the magistrate properly  
determined the affidavit established a nexus  
between the cell phone data and potential  
evidence regarding the murder. Because the  
affidavit provided the magistrate with a  
substantial basis for concluding that  
probable cause existed, the motion to  
suppress was properly denied, Tex. Const.  
art. I, § 9; U.S. Const. amend. IV.

**Outcome**

Judgment affirmed.

**LexisNexis® Headnotes**

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > Examination Upon Application

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Totality of Circumstances Test

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

#### HN1[] Examination Upon Application

A magistrate cannot issue a search warrant unless it is based on probable cause as determined from the four corners of the affidavit. The four corners of an affidavit supporting a search warrant are sufficient if, from the totality of circumstances reflected in the affidavit, the magistrate was provided with a substantial basis for concluding that probable cause existed. Probable cause for a search warrant exists if, under the totality of circumstances presented to the magistrate in an affidavit, there is at least a fair probability or substantial chance that evidence of a crime will be found. In interpreting affidavits for search warrants courts must do so in a common sense and realistic manner. A magistrate, in assessing probable cause, may draw inferences from the facts. Therefore, although the magistrate's determination of probable cause must be based on the facts contained within the four corners of the affidavit, the magistrate may use logic and common sense to make inferences based on those facts.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Probable Cause Determinations

#### HN2[] Probable Cause

An appellate court gives great deference to a magistrate's decision to issue a warrant, in keeping with the constitutional preference for a warrant. Where the underlying circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Basis of Knowledge

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > Examination of Affiants

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Totality of Circumstances Test

Criminal Law & Procedure > ... > Search Warrants > Confidential Informants > Credibility, Reliability & Veracity

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Rights > Search & Seizure > Scope of Protection

### HN3[+] Basis of Knowledge

The reliability of the affiant and his sources of information are part of the totality of the circumstances that the magistrate should evaluate in making a probable-cause determination. The reliability of bystanders or victim-eyewitnesses to a crime need not be established in the affidavit. Instead, the citizen-informer is presumed to speak with the voice of honesty and accuracy. On the other hand, tips from anonymous or first-time confidential informants of unknown reliability must be coupled with facts from which an inference may be drawn that the informant is credible or that his information is reliable.

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > Examination Upon Application

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

### HN4[+] Examination Upon Application

In the issuance of a warrant, a magistrate may use logic and common sense to make inferences from the facts stated in the affidavit.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Constitutional Law > ... > Fundamental

### HN5[+] Expectation of Privacy

The Texas Court of Criminal Appeals has held that call logs and cell site location information are not constitutionally protected under the *Fourth Amendment* or *Tex. Const. art. I, § 9* because they constitute records held by a third party service provider in which a defendant has no legitimate expectation of privacy.

**Counsel:** For APPELLANT: Jorge G. Aristotelidis, San Antonio, TX.

For APPELLEE: Jay Brandon, Assistant District Attorney, San Antonio, TX.

**Judges:** Opinion by: Sandee Bryan Marion, Chief Justice. Sitting: Sandee Bryan Marion, Chief Justice, Karen Angelini, Justice, Irene Rios, Justice.

**Opinion by:** Sandee Bryan Marion

**Opinion**

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## MEMORANDUM OPINION

Arthur Whitley was convicted in a bench trial of murder and possession of a firearm by a felon. In his first issue on appeal, Whitley asserts the trial court erred in denying his motion to suppress because the affidavit in support of the search warrant authorizing the search of his cell phone lacked probable cause. Whitley also argues the trial court erred in alternatively denying his motion to suppress on the basis that he

had a reduced expectation of privacy in his cell phone. Because we hold the affidavit contained probable cause to support the issuance of the search warrant, we overrule Whitley's first issue and affirm the trial court's judgment.

## BACKGROUND

Arthur Whitley and the murder victim, Michael, were cousins. On the night of Michael's [\*2] murder, Whitley was living in a halfway house following his release from federal prison. The evidence at trial established Whitley snuck out of the halfway house and was driven to an abandoned house where Michael and others were sitting outside.<sup>1</sup> Whitley walked up to Michael and shot him several times before fleeing the scene and returning to the halfway house.

During the course of the investigation, Detective Michael Muniz obtained a warrant to search the contents of Whitley's cell phone. The affidavit in support of the search warrant stated the following:

Your Affiant is assigned to the Homicide Unit of the San Antonio Police Department and was assigned to investigate the murder designated by case number SAPD15111127. On 05/26/2015 officers of the San Antonio Police Department responded to 311 Ferris in the City of San Antonio for a shooting. Upon arrival they discovered Michael Whitley seated in a lawn chair, deceased from an apparent gunshot

wound. Witnesses were located and transported to Police Headquarters to provide statements in this case. A witness identified Arthur Whitley arriving at 311 Ferris and then pulled out a handgun from his waistband and shot Michael Whitley multiple [\*3] times before fleeing the scene along with another individual. An arrest warrant was obtained charging Michael [sic] Whitley with the offense of murder. Later the same day, the 26th of May, Michael [sic] Whitley was arrested. Michael [sic] Whitley was found to be in possession of the phone named in this warrant and reported it was his phone. It is the belief of your Affiant, through his experience, cell phones contain evidence of geographical information of where an individual was, the individuals the person was in contact with on a specific date and time to include witnesses, accomplices, a list of contacts, photographs and videos identifying these contacts.

In his motion to suppress, Whitley challenged the affidavit, asserting it lacked probable cause. The trial court overruled the motion. On appeal, Whitley challenges the trial court's ruling.<sup>2</sup>

## STANDARD OF REVIEW AND GOVERNING LAW

<sup>2</sup>In its brief, the State asserts Whitley's complaint on appeal was waived by defense counsel responding he had "no objection" when the State offered into evidence photographs of text messages and photographs found in Whitley's cell phone. Because we overrule Whitley's complaint on its merits, we will assume for purposes of this opinion that the complaint was preserved.

<sup>1</sup>Michael was known to sell drugs at that location.

**HN1** [¶] A magistrate cannot issue a search warrant unless it is based on probable cause as determined from the four corners of the affidavit. *State v. Elrod*, 538 S.W.3d 551, 556 (Tex. Crim. App. 2017); *Gonzales v. State*, 481 S.W.3d 300, 306 (Tex. App.—San Antonio 2015, no pet.). "The four corners of an affidavit supporting a search warrant are sufficient if, from the totality of circumstances reflected in the affidavit, the magistrate was provided [\*4] with a substantial basis for concluding that probable cause existed." *Gonzales*, 481 S.W.3d at 306. "Probable cause for a search warrant exists if, under the totality of circumstances presented to the magistrate in an affidavit, there is at least a 'fair probability' or 'substantial chance' that evidence of a crime will be found." *Id.* "[I]n interpreting affidavits for search warrants courts must do so in a common sense and realistic manner." *Elrod*, 538 S.W.3d at 556 (internal quotation omitted). "A magistrate, in assessing probable cause, may draw inferences from the facts." *Id.* "Therefore, although the magistrate's determination of probable cause must be based on the facts contained within the four corners of the affidavit, the magistrate may use logic and common sense to make inferences based on those facts." *Id.*

**HN2** [¶] We give great deference to a magistrate's decision to issue a warrant, in keeping with the constitutional preference for a warrant. *Elrod*, 538 S.W.3d at 556-57; *Gonzales*, 481 S.W.3d at 306. "[W]here [the underlying] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate

has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, [\*5] manner." *Gonzales*, 481 S.W.3d at 306.

## ANALYSIS

Whitley argues the affidavit lacked probable cause because the affidavit did not establish: (1) the credibility of the eyewitness referenced in the affidavit; or (2) a nexus between the data on the cell phone and the murder.

**HN3** [¶] "The reliability of the affiant and his sources of information are part of the totality of the circumstances that the magistrate should evaluate in making a probable-cause determination." *Murray v. State*, 534 S.W.3d 540, 543 (Tex. App.—San Antonio 2017, no pet.). "[T]he reliability of bystanders or victim-eyewitnesses to a crime need not be established in the affidavit." *Gonzales*, 481 S.W.3d at 308 (internal quotation omitted). Instead, "[t]he citizen-informer is presumed to speak with the voice of honesty and accuracy." *State v. Duarte*, 389 S.W.3d 349, 356 (Tex. Crim. App. 2012). On the other hand, "tips from anonymous or first-time confidential informants of unknown reliability must be coupled with facts from which an inference may be drawn that the informant is credible or that his information is reliable." *Id.* at 358.

In this case, the affidavit refers to witnesses being taken to police headquarters to provide statements. The affidavit then states

the source of information was a witness, and the details provided in the affidavit established the witness was an eyewitness to the murder. Because the magistrate [\*6] could have determined from the four corners of the affidavit that the source of the information was an eyewitness to the offense who was taken to police headquarters to provide a statement, we overrule Whitley's complaint that the affidavit was required to establish the eyewitness's credibility. *See Duarte*, 389 S.W.3d at 356; *Gonzales*, 481 S.W.3d at 308.

Whitley next contends the affidavit failed to establish a nexus between the cell phone data and the murder. As previously noted, however, HN4[] a "magistrate may use logic and common sense to make inferences" from the facts stated in the affidavit. *Elrod*, 538 S.W.3d at 556. In this case, the affidavit stated Whitley was present at the murder scene, and the magistrate could have inferred the cell phone data could confirm Whitley's geographic location.<sup>3</sup> In addition, the affidavit stated Whitley fled the scene with another individual, and the magistrate could have inferred the cell phone data could

identify this other individual who could be either a witness or an accomplice. Accordingly, based on the four corners of the affidavit and the inferences the magistrate could draw based on the facts provided, the magistrate could have determined the affidavit established a nexus between the cell phone data and potential evidence [\*7] regarding the murder.

Because the affidavit provided the magistrate with a substantial basis for concluding that probable cause existed, Whitley's first issue is overruled, and we need not address Whitley's challenge to an alternate basis for the trial court's ruling.

## CONCLUSION

The trial court's judgment is affirmed.

Sandee Bryan Marion, Chief Justice

DO NOT PUBLISH

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<sup>3</sup> We note HN5[] the Texas Court of Criminal Appeals has held "that call logs and cell site location information are not constitutionally protected under the Fourth Amendment or Article I, Section 9 of the Texas Constitution because they constitute records held by a third party service provider in which appellant has no legitimate expectation of privacy." *Cervantes-Guerrera v. State*, 532 S.W.3d 827, 832 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Hankston v. State*, 517 S.W.3d 112, 121-22 (Tex. Crim. App. 2017); *Love v. State*, No. AP-77, 543 S.W.3d 835, 2016 Tex. Crim. App. LEXIS 1445, 2016 WL 7131259, at \*3 (Tex. Crim. App. Dec. 7, 2016); and *Ford v. State*, 477 S.W.3d 321, 330 (Tex. Crim. App. 2015)).



**Fourth Court of Appeals  
San Antonio, Texas**

July 30, 2018

No. 04-17-00438-CR

Arthur **WHITLEY**,  
Appellant

v.

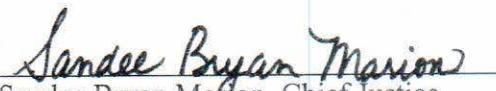
The **STATE** of Texas,  
Appellee

From the 187th Judicial District Court, Bexar County, Texas  
Trial Court No. 2015CR8583  
The Honorable Laura Lee Parker, Judge Presiding

**O R D E R**

Sitting: Sandee Bryan Marion, Chief Justice  
Karen Angelini, Justice  
Marialyn Barnard, Justice  
Rebeca C. Martinez, Justice<sup>1</sup>  
Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice  
Irene Rios, Justice

Appellant's Second, Unopposed Motion for Extension of Time to File Motion for Panel and *En Banc* Rehearing is GRANTED. Appellant's Motion for Rehearing and Motion for Rehearing *En Banc* are DENIED.

  
Sandee Bryan Marion, Chief Justice

<sup>1</sup> Dissents to the denial of the Motion for Rehearing *En Banc* without requesting a response. TEX. R. APP. P. 49.2.

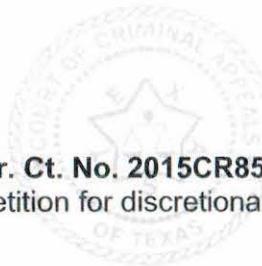
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 30th day of July, 2018.



*Keith E. Hottle*

Keith E. Hottle  
Clerk of Court

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2/27/2019

**WHITLEY, ARTHUR**

**Tr. Ct. No. 2015CR8583**

**COA No. 04-17-00438-CR**

**PD-0929-18**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

GEORGE WILLIAM ARISTOTELIDIS  
LAW OFFICE OF JORGE G. ARISTOTELIDIS  
TOWER LIFE BUILDING  
SAN ANTONIO, TX 78205  
\* DELIVERED VIA E-MAIL \*