Affirmed and Opinion filed September 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00591-CR

VERNON LEE BRACKENS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 807,173

O P I N I O N

Appellant, Vernon Lee Brackens, was convicted of murder and sentenced, by a jury, to twenty (20) years in the Institutional Division of the Texas Department of Corrections. In a single issue for review, appellant contends the trial court erred by admitting evidence obtained during a search that was invalid for lack of probable cause. We will affirm.

Background

During the evening hours of March 6, 1999, Arven Hightower was a passenger in a vehicle driven by Terrance Duncan (Informant). According to Informant, complainant was sitting in the right front seat and appellant was sitting in the right rear seat. As he was

driving, Informant saw and heard appellant fire four rounds into complainant's body. Informant followed appellant's instruction and drove the vehicle to a remote area where he observed appellant drag the body from the vehicle into a ditch. Thereafter, Informant drove appellant to his residence at 4421 Edmund Street in Houston, Texas. Informant stated that he saw appellant take a leather coat, blue cap, four fired shell casings, and several bloody bath towels out of the vehicle. During the morning hours of March 7, 1999, Informant drove the vehicle to the Southeast Command Station of the Houston Police Department. After obtaining Informant's consent to search the bloodstained vehicle, police officers received a report that a body had been found on the side of a road in the 13,400 block of Karalis Street. Informant accompanied police officers to the site and identified complainant's body.

Based on the foregoing information provided by Informant, police officers requested issuance of a warrant to search appellant's residence located at 4421 Edmund Street in Houston. Officer R. King prepared and signed an affidavit in support of the request for a warrant. The evidence to be seized included, but was not limited to, a pistol, leather jacket, blue cap, bloody clothing, towels, and fired or unfired cartridges. A Harris County Magistrate Judge granted authority for Officer R. King to enter appellant's premises and search for the described evidence. Thereafter, Informant accompanied officers to appellant's house where they seized some of the items listed in the warrant. Among the items recovered were two shirts, a bloodstained pair of shorts, a pair of shoes, and a jacket. All of these items were photographed.

Appellant's Contentions: Lack of Probable Cause

Appellant contended, in his written Motion To Suppress Evidence that "property was seized . . . *without a warrant*, in violation of his constitutional rights." In his sole issue for review, appellant contends the trial court erred by denying his motion to suppress evidence.

Appellant's lack of probable cause claim is grounded on alleged insufficiencies in

Officer King's affidavit. First, he contends King's affidavit did not establish a nexus between the place to be searched and the evidence that a crime was committed. Second, appellant suggests that the lapse of time – more than twenty-four hours passed from the time of Informant's observations until the time the warrant was issued – casts doubt upon whether the items to be seized were still located in appellant's residence. Third, appellant contends the averments in Officer King's affidavit did not establish the informant's reliability and credibility.

Rulings on Proffered Items

At the pre-trial suppression hearing, the court determined that there was probable cause to believe the items described by Informant were located in appellant's residence and denied Appellant's Motion to Suppress Evidence. After voir dire and before trial, the court asked if there was anything further from the State. Appellant raised his objection to evidence obtained during the search and based his argument on insufficiency of Informant's affidavit as follows:

> Mr. Duer: The witness that they got this information from, they have – is not stated in there that they ever had any dealings with him before, that he is either credible or reliable witness, and it is just taken at face value and we would object. And our position is that is insufficient to state probable cause to get a warrant, and we would ask that evidence in the form of pants – I think that's it – or shorts or pants.
>
> Ms. Chappell: That's the most important evidence of the case, yes.
>
> Mr: Duer: Or any evidence that pursuant to that warrant be suppressed based on insufficient affidavit, and that's the extent of our argument.

During trial, the State proffered photographs of two shirts, a pair of shoes, and a pair of bloodstained shorts seized during the search. Appellant's counsel stated that he had "no objection" to this proffer. Later, the State offered the pair of shorts into evidence without

objection from appellant's counsel. However, when the State offered the two shirts, counsel's objection was overruled. According to police laboratory reports and expert testimony, DNA from the blood on the shorts was consistent with blood extracted from the complaintant, Arven Hightower.

Waiver

The State contends appellant's failure to object to admission of the photographs and bloodstained shorts seized at his home resulted in waiver of any complaint regarding those items seized during the search. We agree. It is well settled that when a pre-trial motion to suppress evidence is overruled, an accused need not object to admission of that same evidence at trial in order to preserve error. *Sanders v. State*, 855 S.W.2d 151, 153 (Tex. App.—Houston [14th Dist.] 1993, no writ). However, when the accused affirmatively asserts that he has "no objection" to admission of evidence, he waives any error despite the pre-trial ruling. *Id.* Accordingly, we hold appellant waived error as to admission of items seized from his residence by affirmatively stating that he had no objection to photographs showing the same evidence. Moreover, assuming the trial court erred by admitting the shirts over appellant's objection, such admission was harmless. When a court errs by admitting evidence in violation of the Fourth Amendment, we must reverse unless we conclude beyond a reasonable doubt that the error did not contribute to conviction or punishment. *See* Tex. R. App. P. 44.2(a); *State v. Daugherty*, 931 S.W.2d 268, 274 (Tex. Crim. App. 1996). Appellant's objection to the State's offer of the two shirts came after the court admitted the shorts. Clearly, the photographs and bloodstained shorts (DNA matched to appellant) were strongly inculpatory. The shirts in question were not inculpatory evidence. Therefore, we hold admission of the shirts did not contribute to or enhance the likelihood of appellant's

conviction and/or punishment. *Id*. Accordingly, we overrule appellant's issue and affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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