Opinion of September 16, 1999, Withdrawn, Reversed and Remanded and Corrected Opinion filed November 4, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00136-CR

JOHN DONALD LARWAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 7
Harris County, Texas
Trial Court Cause No. 97-37474

C O R R E C T E D O P I N I O N

Appellant was charged with the misdemeanor offense of driving while intoxicated. The trial court denied appellant's motion to suppress and found him guilty on his plea of nolo contendere. The trial court assessed punishment at 90 days confinement in the Harris County Jail, suspended for 9 months, and a $200 fine. In a single point of error, appellant contends that the trial court erred in overruling his motion to suppress. We reverse and remand.

The State contends appellant failed to preserve for appellate review the issue of whether the trial court erred in denying appellant's motion to suppress. The State complains that appellant failed to state

that the subject matter of his appeal was raised by written motion and ruled on before trial. Consequently, according to the State, appellant's failure to comply with notice requirements precludes our review of nonjurisdictional defects. *See Watson v. State*, 924 S.W.2d 711, 715 (Tex. Crim. App. 1996).

In a case involving an appeal from a judgment rendered on the defendant's plea of nolo contendere, where the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must either: (1) specify that the appeal is for a jurisdictional defect; (2) specify that the substance of the appeal was raised by written motion and ruled on before trial; *or* (3) state that the trial court granted permission to appeal. *See* TEX. R. APP. P. 25.2 (b)(3) (emphasis added). In the instant case, the notice states the trial court granted appellant permission to appeal the denial of the motion to suppress. The notice was signed by the trial court. Therefore, appellant conformed to the requirements of the rule by including within his notice the fact that he had received permission of the trial court to appeal the denial of the motion to suppress. As such, appellant properly preserved his right to appeal.

In his sole point of error, appellant claims the trial court erred in denying his motion to suppress. Generally, an appellate court grants almost complete deference to a trial court's findings of historical facts that the record supports, especially if the trial court's findings involve an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). An appellate court should give similar deference to a trial court's rulings on "mixed questions of law and fact," (e.g., probable cause) if resolution of the ultimate issue is based on the evaluation of witness credibility and demeanor. *See id*. An appellate court may review, *de novo*, "mixed questions of law and fact" not falling within this category. *See id*. Specifically, if the question concerns whether an officer had probable cause to seize a suspect, under the totality of the circumstances, the trial court is not in an appreciably better position than the appellate court in making that determination. *See id*. at 87.

Before trial, appellant filed a motion to suppress. In that motion, appellant alleged he was arrested without a warrant and without probable cause. He claimed his arrest violated the Texas Constitution and numerous provisions of the Texas Code of Criminal Procedure. In the motion, he also stated that he did not consent to the breath test taken by the officer. In conclusion, appellant asked that all evidence seized

by the State be suppressed. At the hearing on the motion to suppress, however, appellant argued only that the motion to suppress should be granted based on collateral estoppel.

Despite appellant's failure to specifically argue the other grounds raised in his written motion, we find appellant is still entitled to raise on appeal the issue of his warrantless arrest. The Court of Criminal Appeals has specifically held that a timely filed motion to suppress is sufficient to preserve error *even without oral argument at the suppression hearing*. *See Eisenhauer v. State*, 754 S.W.2d 159, 161 (Tex. Crim. App. 1988), *overruled on other grounds*, *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991) (emphasis added). *See also Vicknair v. State*, 670 S.W.2d 286, 288 (Tex. App.--Houston [1st Dist.] 1983, pet. ref'd). "It logically follows that a motion to suppress will be sufficient to preserve and alleged error where the oral argument covers some, but not all, of the grounds raised in the motion." *Eisenhauer*, 754 S.W.2d at 161. In *Vicknair*, the State argued the appellant had waived his right to complain about an illegal traffic stop because he did not argue that the stop was illegal during the motion to suppress hearing. *See id*. The court of appeals disagreed. *See id*. Noting that it is the State's burden to prove the validity of a warrantless search or arrest, the court of appeals held it was unnecessary for the appellant to argue all grounds raised in the written motion to suppress at the suppression hearing. *See id*. The court found that the filing of the written motion placed the issue before the trial court. *See id*. Accordingly, in this case, we find appellant has preserved the right to complain about the denial of his motion to suppress based on the absence of a warrant because he alleged that ground in his written motion.

When a defendant seeks to suppress evidence, the burden of proof is initially on that defendant to defeat the presumption of proper police conduct. *See Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). The defendant meets this initial burden by establishing that a search or seizure occurred without a warrant. *See id*. If the defendant establishes there was no warrant, the burden shifts to the State. *See id*. If the State provides evidence of a warrant, the burden is shifted back to defendant to show the illegality of the warrant. *See id*. at 10. If the State is unable to produce evidence of a warrant, it must prove the reasonableness of the search or seizure. *See id*.

In the instant case, the State stipulated to the absence of a warrant. Thus, appellant produced evidence of a warrantless arrest at the suppression hearing and met his burden under *Russell*. The burden then shifted to the State to prove that it had probable cause to make a warrantless arrest. The State, however, presented no evidence concerning the circumstances surrounding appellant's arrest. Neither the arresting officer nor appellant testified. Absent testimony relating to the circumstances surrounding appellant's arrest, the State did not carry its burden to establish the reasonableness of the warrantless search or seizure. Accordingly, we reverse the trial court's judgment and remand this case for further proceedings consistent with this court's opinion.

PER CURIAM

Judgment rendered and Corrected Opinion filed November 4, 1999.
Panel consists of Justices Amidei, Edelman, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).