Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-15-00239-CR

The **STATE** of Texas,
Appellant

v.

Victoria Mari **VELASQUEZ**,
Appellee

From the County Court at Law No. 6, Bexar County, Texas
Trial Court No. 478295
Honorable Wayne A. Christian, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice
Dissenting Opinion by: Marialyn Barnard, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: February 3, 2016

REVERSED AND REMANDED

This case stems from the trial court's grant of Appellee Victoria Velasquez's motion to suppress. Because we conclude that Texas Code of Criminal Procedure article 28.01 requires the trial court to provide the defendant, defense counsel, and the State notice to appear before the court at the time and place for a pre-trial motion to suppress, we reverse the trial court's grant of Velasquez's motion to suppress and remand this matter to the trial court for further proceedings consistent with this opinion. *See* TEX. CODE CRIM. PROC. ANN. art. 28.01 (West 2006).

FACTUAL AND PROCEDURAL BACKGROUND

Velasquez was charged by information with intentionally or knowingly possessing a usable quantity of marijuana. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121(a) (West 2010). On April 13, 2015, the trial court granted Velasquez's motion to suppress and this appeal ensued.

A. Procedural History

The case was originally set for jury trial on February 23, 2015. On the State's first motion for continuance, the case was reset for trial on April 13, 2015. On February 26, 2015, Velasquez filed approximately sixteen pre-trial motions, including a motion to suppress asserting Velasquez was searched without a valid warrant. Attached to the motion to suppress was a request for a pre-trial hearing. The request for a hearing was never urged by Velasquez and the motion was never set for a hearing by the trial court.

Although the record is silent on announcements, both parties maintain that on April 13, 2015, the State and Velasquez announced ready for trial. The record, however, opens with the trial court's declaration:

> Cause 478295, The State of Texas versus Victoria Mari Velasquez. This is a motion to suppress. Defense, what is your basis for the motion to suppress?

Velasquez's counsel replied as follows:

> Your Honor, I believe that Ms. Velasquez was illegally detained and illegally searched. She was in a park minding her own business with her boyfriend. The car was legally parked. She had left her purse in the vehicle. A Park Ranger apparently was patrolling the area, saw the purse, waited at the car for her to come back with her boyfriend. When they arrived back at the car, the Park Ranger asked them what they were doing in the park. They said, "Walking around." He claims he smelled the odor of marijuana. He asked them if they had been smoking marijuana. The boyfriend said that he had and he handed a pipe. The Park Ranger then asked her, before reading her *Miranda* warnings, whether or not she had anything, and she said there was something in her purse, inside the locked vehicle. And he then asked them to open the vehicle and searched the purse and found marijuana.

The State acknowledged receipt of Velasquez's motion to suppress, but lodged several objections to a pre-trial hearing on the motion based on lack of notice;

> . . . I think that the State is afforded, first of all, notice, which we don't have.
>
> . . . .
>
> I'm going to object to no notice for the motion to suppress . . .
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> . . . .
>
> . . . I received no notice that we were having a motion to suppress hearing.

In response to the State's argument that "motions to suppress in our court run with trial," the trial court instructed the State of its intentions:

> . . . We're running [the motion to suppress] right now because you don't want to tell me your side of the story without having a motion to suppress, so we're having a motion to suppress. Do you want to tell me your side of the story or not?

The prosecutor declined to offer the police report or further evidence other than calling the officers to testify, and the trial court granted Velasquez's motion to suppress.

B. Trial Court's Findings of Fact and Conclusions of Law

The trial court made the following findings of fact and conclusions of law.

Findings of Fact

1. Defendant Victoria Marl Velasquez was arrested for the offense of Possession of Marihuana 0–2 ounces on or about the 14th day of December 2014.
2. The court takes judicial notice of the contents of the court's file and notes that this was a warrantless arrest. The court also takes judicial notice that 16 motions, including the Motion to Suppress Evidence, were filed with the court on February 26, 2015.
3. The court called the case and made it clear of its intention to hear the Motion to Suppress which was on file. The State was presented the opportunity to present evidence but refused to offer any evidence, including the police report of the offense alleged in this case. The State also acknowledged that they bore the burden of proof in this Motion to Suppress.

Conclusions of Law

Based on the above Findings of Fact, the Trial Court concludes that the search and arrest in this case was illegal, since conducted without a valid warrant, probable cause or reasonable suspicion, in violation of the Fourth and Fourteenth Amendments of the United States Constitution, Article 1 § 9 of the Texas Constitution and Article 38.23 of the Texas Code of Criminal Procedure, as well as Chapter 14 of the Texas Code of Criminal Procedure.

The trial court has judicial discretion as to how to run its dockets and cases. In particular, the decision to set an article 28.01 hearing or motion to suppress is not mandatory, but within the trial court's discretion. *Calloway v. State*, 743 S.W.2d 645, 649 (Tex. Crim. App. 1998), *State v. Reed*, 888 S.W.2d 117, 119 (Tex. App.—San Antonio, no pet.). The court in this case, called the case for the suppression motion to be heard prior to trial.

"When a hearing on the motion to suppress is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court." TEX. CODE CRIM. PROC. ANN. art 28.01 Sec. 1(6) (Vernon 2013). "The statutory rule states that a motion to suppress 'may' be resolved by considering different possible means of acquiring information. It does not state that the motion 'shall be' or 'must be' resolved by these specific means. There is no suggestion in the plain language of the rule that this is an exhaustive list." *Ford v. State*, 305 S.W.3d 530, 538 (Tex. Crim. App. 2009).

28.01 Section 1 (6) uses the word "or" when listing the ways in which the court may determine the merits of a motion. Applying the same "plain language" analysis as applied in *Ford*, if the court was required to allow all means of proof in a hearing, the legislature could have used the word "and." "The trial court may conduct the hearing based on motions, affidavits, or testimony, but there is nothing in the statute to indicate that it must. It is merely an indication that such hearings are informal and need not be full-blown adversary hearings conducted in accord with the rules of evidence." *Id*. at 540. "Although it is better practice to produce the witness or attach the documentary evidence to an affidavit, art 28.01 § 1(6) did not create a 'best evidence' rule that mandates such a procedure in a motion to suppress hearing." *Id*. at 541.

The State in this case was afforded an opportunity to offer a police report or other evidence for purposes of the hearing. The State in fact *refused* to put on *any* evidence whatsoever.

The court GRANTS Defendant's Motion to Suppress.

In its sole issue on appeal, the State contends the trial court improperly held the pre-trial hearing without notice to the State.

ARGUMENTS OF THE PARTIES

The State contends Texas Code of Criminal Procedure article 28.01 requires notice be given to the parties before the trial court holds a hearing on a motion. *See* TEX. CODE OF CRIM. PROC. ANN. art. 28.01. The State argues it did not have any notice, much less adequate notice, that the trial court intended to hear the motion prior to the trial.

Velasquez counters the State did not request a continuance, but instead argued with the trial court on how the motion to suppress should be conducted. More specifically, Velasquez contends that when the State announces ready for trial, the State is announcing that it is ready for all pending motions, as well as to proceed with the trial on the merits. In other words, if the State announces ready for trial, the State is announcing ready for all motions and witnesses—"ready for trial is ready for everything."

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 28.01

A. Standard of Review

The question before this court is whether Texas Rule of Criminal Procedure article 28.01 § 1 requires the trial court to provide the State with notice prior to holding a hearing. "The amount of deference appellate courts afford a trial court's rulings depends upon which 'judicial actor' is better positioned to decide the issue." *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)); *State v. Brown*, 314 S.W.3d 487, 489 (Tex. App.—Texarkana 2010, no pet.). Whether article 28.01 requires notice to the State requires interpretation of a statute and is thus a question of law. *See Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015) (citing *Clinton v. State*, 354 S.W.3d 795, 799 (Tex. Crim. App. 2011)); *see also Bartlett v. State*, 249 S.W.3d 658, 671 (Tex. App.—Austin 2008, pet. ref'd) ("Whether a charging instrument provides sufficient notice to the accused is a question of law that we review de novo."); *State v. Barbernell*, 257 S.W.3d 248, 251–52 (Tex. Crim. App. 2008)

(same); *Moff*, 154 S.W.3d at 601 (same); *Hankins v. State*, 85 S.W.3d 433, 437 (Tex. App.—Corpus Christi 2002, no pet.) (same); *Janecka v. State*, 823 S.W.2d 232, 236 (Tex. Crim. App. 1990) (deciding failure to provide "some requisite item of 'notice'" in the charge regarding identity of the remunerator was a question of law).

"When the resolution of a question of law does not turn on an evaluation of the credibility and demeanor of a witness, then the trial court is not in a better position to make the determination, so appellate courts should conduct a *de novo* review of the issue." *Moff*, 254 S.W.3d at 601; *accord Morrison v. State*, 71 S.W.3d 821, 827 (Tex. App.—Corpus Christi 2002, no pet.) (determining "application of law to facts questions that do not turn upon credibility and demeanor" are reviewed de novo). In the present case, because we are called upon to determine whether the statute required the trial court to provide the State with notice of a hearing, "the trial court was in no better position than an appellate court to decide this issue." *Moff*, 154 S.W.3d at 601. We, therefore, apply a de novo review to whether the trial court erred in failing to provide the State notice under article 28.01 section 1. *See* TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1.

B. Preservation of Error

Contrary to Velasquez's contention, the record clearly shows the State repeatedly objected to the trial court's proceeding with the motion to suppress without notice of such. *See* TEX. R. APP. P. 33.1. On three different occasions, the State's objections were sufficiently clear to make the trial court aware that the State did not have notice. *See Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005); *see also Ford*, 305 S.W.3d at 533. Although many of the State's objections were focused on whether the State had the right to present witnesses, the prosecutor was clearly objecting to the actual hearing itself. *See Layton v. State*, 280 S.W.3d 235, 239 (Tex. Crim. App. 2009); *see also Ford*, 305 S.W.3d at 533 (finding parties need not recite "magic words" to preserve error).

C. Texas Code of Criminal Procedure Article 28.01

This appeal requires a determination of whether the hearing before the trial court was a pre-trial hearing pursuant to article 28.01. TEX. CODE CRIM. PROC. ANN. art. 28.01.

The record reflects the matter was "set for trial," but the record is void of any evidence that the trial court called the case for trial. During the hearing, the trial court was adamant that pursuant to *Ford*, 305 S.W.3d at 539, it had the authority to determine the merits on the motion and arguments of counsel, and that it was not required to allow the State to present oral testimony.

1. Ford v. State *Limited to Pre-Trial Hearings*

In *Ford v. State*, the Texas Court of Criminal Appeals held that, "[a] trial judge may use his discretion in deciding what type of information he considers appropriate and reliable in making his pre-trial ruling." *Id*. The court continued, "[a]lthough it is better practice to produce the witness or attach the documentary evidence to an affidavit, art. 28.01, § 1(6), did not create a 'best evidence' rule that mandates such a procedure in a motion to suppress hearing." *Id*. Whether a trial court allows testimony or conducts a motion to suppress in accordance with *Ford* is solely within the trial court's discretion; however, hearings conducted pursuant to *Ford* are pre-trial hearings. *Id*. at 537. Other courts citing *Ford* as authority for the type of evidence utilized during a motion to suppress are all pre-trial motions to suppress. *See, e.g.*, *Pineda v. State*, No. 13-13-00574-CR, 2015 WL 5311237, at *2 (Tex. App.—Corpus Christi Sept. 10, 2015, no pet.) (mem. op., not designated for publication) (identifying the type of evidence utilized during a *Ford* motion to suppress hearing), *Wall v. State*, No. 02-13-005-52-CR, 2015 WL 2169307, at *4 (Tex. App.—Fort Worth May 7, 2015, pet. ref'd) (mem. op., not designated for publication) (same); *Schultz v. State*, 457 S.W.3d 94, 98 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (same); *Murray v. State*, No. 05-12-00922-CR, 2014 WL 316604, at *2 (Tex. App.—Dallas Jan. 29, 2014, no pet.) (mem.

op., not designated for publication) (same); *Garcia v. State*, 327 S.W.3d 243, 247 (Tex. App.—San Antonio 2010, no pet.) (same).

The *Ford* opinion followed a series of opinions explaining that because a motion to suppress is a determination of preliminary questions, absent exceptions of privilege, neither evidentiary rules nor the Confrontation Clause are applicable. *See Vennus v. State*, 282 S.W.3d 70, 72 n.1 (Tex. Crim. App. 2009) (citing *Granados v. State*, 85 S.W.3d 217, 226–30 (Tex. Crim. App. 2002)) ("[T]he rules of evidence do not apply to suppression hearings."); *Graves v. State*, 307 S.W.3d 483, 489 (Tex. App.—Texarkana 2010, pet. ref'd) (evidentiary rules); *Vanmeter v. State*, 165 S.W.3d 68, 74 (Tex. App.—Dallas 2005, pet. ref'd) (Confrontation Clause). We, therefore, conclude that a hearing conducted pursuant to *Ford v. State*, 305 S.W.3d at 539, is limited to pre-trial hearings where the trial court is making determinations on preliminary questions.

2. The Trial Court's Explanation

The trial court specifically said the motion to suppress hearing was *not* being carried with trial and that the trial court intended to proceed with the article 28.01, section 1(6) hearing at that moment. TEX. CODE CRIM. PROC. ANN. art. 28.01.

> [W]e're not running this one with the trial.
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> . . . .
>
> Per *Ford v. State*, I'm not going to let you call any witnesses. I don't have to, and I'm not going to.

We interpret the trial court's explanation as evidence that the trial court considered the hearing a pre-trial matter. *See id*. art. 28.01, § 1(6); *see also Ford*, 305 S.W.3d at 533 (allowing the trial court to proceed without oral testimony or cross-examination *in a pre-trial suppression hearing*); *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002) (allowing the trial court discretion in determining the merits of a motion to suppress). Additionally, the trial court's

conclusions of law specifically refer to article 28.01 and its application under *Ford*. *See Ford*, 305 S.W.3d at 533.

Having determined the trial court proceeded with the pre-trial motion to suppress, we turn to the applicable section of article 28.01. *See* TEX. CODE OF CRIM. PROC. ANN. art. 28.01.

D. Application of Texas Code of Criminal Procedure Article 28.01

Whether the State is entitled to notice of a hearing on a pre-trial motion to suppress is an issue of first impression. We must therefore look to the plain language of the statute. *See Reinke v. State*, 348 S.W.3d 373, 374 (Tex. App.—Austin 2011), *aff'd*, 370 S.W.3d 387 (Tex. Crim. App. 2012) (looking to the statute's plain meaning when faced with an issue of first impression); *State v. Mason*, 980 S.W.2d 635, 638 (Tex. Crim. App. 1998).

Article 28.01 provides as follows:

> Sec. 1. The court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct the defendant and his attorney, if any of record, and the State's attorney, to appear before the court at the time and place stated in the court's order for a conference and hearing. The defendant must be present at the arraignment, and his presence is required during any pre-trial proceeding. The pre-trial hearing shall be to determine any of the following matters:
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> . . . .
>
> (6) Motions to suppress evidence—When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court;

Id. art. 28.01, § 1(6).

The Code of Criminal Procedure does not require the trial court to set a motion to suppress for a hearing prior to trial. *See Ford*, 305 S.W.3d at 534–35; *see also Calloway v. State*, 743 S.W.2d 645, 649 (Tex. Crim. App. 1988). However, when a trial court determines a matter should be heard prior to trial on the merits, article 28.01 requires the trial court to "direct the defendant and his attorney, if any of record, ***and the State's attorney***, to appear before the court ***at the time***

and place stated in the court's order for a conference and hearing." TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1 (emphasis added).

We, therefore, conclude that because the trial court proceeded with Velasquez's motion under the auspices of article 28.01, the trial court was required to provide the State with notice of the hearing. Here, the trial court provided no notice to the State. The dissent relies on *State v. Wolfe*, 440 S.W.3d 643 (Tex. App.—Austin 2011, pet. ref'd), to conclude that service of Velasquez's motion to suppress, coupled with the trial setting, constituted notice to the State that the trial court would hold a pre-trial hearing prior to the commencement of trial. *Wolfe*, however, is distinguishable.

Pursuant to Wolfe's motion to suppress, a visiting judge heard testimony from the Travis County Sheriff's Office deputy who initiated the stop in question. *Id*. at 644. The visiting judge denied the motion to suppress. *Id*. Five years later, when the case was finally called for trial, defense counsel requested the trial court, with a different judge presiding, to reconsider the motion to suppress. *Id*. The trial court granted the motion. *Id*. On appeal, the State argued "the trial court erred in reconsidering and granting Wolfe's motion to suppress without providing the State with prior notice that the motion would be reconsidered on that particular date and without holding a second evidentiary hearing." *Id*. The appellate court held as follows:

> While the motion to suppress was reconsidered by a judge other than the visiting judge who originally denied the motion, the suppression motion was both considered and reconsidered by the same county court at law. Thus, the trial court here acted within its discretion to reconsider its own earlier suppression ruling.

Id. at 644–45.

Article 28.01 only applies to the following pre-trial matters: (1) arraignment of the defendant and appointment of counsel; (2) defendant's pleadings; (3) special pleas; (4) exceptions to the form or substance of an indictment; (5) motions for continuance; (6) motions to suppress;

(7) motions for change of venue; (8) discovery issues; (9) entrapment; and (10) motions for appointment of an interpreter. *See* TEX. CODE OF CRIM. PROC. ANN. art. 28.01. Unlike Velasquez's motion to suppress, Wolfe's motion to reconsider was not a motion controlled by article 28.01. Thus, the requirements of article 28.01 were neither considered by the *Wolfe* court nor applicable to the State's complaint. *See Wolfe*, 440 S.W.3d at 644.

Additionally, in *Wolfe*, the trial court's actions stemmed from a motion for reconsideration of a trial court's previous ruling following a contested hearing; Wolfe's motion to reconsider and Velasquez's pre-trial motion to suppress are procedurally disparate. *See id.* at 644–45. Finally, the *Wolfe* opinion specifically notes that because "the State [never] objected to the trial court's reconsideration of the suppression ruling" at the trial setting, the State failed to preserve error regarding its "lack-of-notice complaint." *Id*. at 645. As such, *Wolfe*'s holding was specifically limited to the trial court "exercising its discretion to reconsider a prior interlocutory ruling." *Id*. at 646. Accordingly, *Wolfe* is inapplicable to the case at hand. Based on a plain reading of article 28.01, we conclude the trial court erred by proceeding with the pre-trial motion to suppress hearing without notice to the State. *See Reinke*, 348 S.W.3d at 374. Accordingly, we reverse the trial court's order granting Velasquez's motion to suppress and remand this matter to the trial court for further proceedings consistent with this opinion.

Patricia O. Alvarez, Justice

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