No. _____

In The

Supreme Court of the United States

CASEY WELBORN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, Second District Of Texas, Fort Worth

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Fourth Amendment, may the government use parol evidence to supplement the information contained within the "four corners" of a search warrant affidavit, after the warrant is executed, in order to provide enough information to validate what before was a facially invalid search warrant request due to a lack of probable cause?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Casey Welborn respectfully petitions for a writ of certiorari to the Second District Court of Appeals in Fort Worth in Cause No. 02-14-00464-CR.

CITATION TO OPINIONS BELOW

The decision of the Second District Court of Appeals for the State of Texas, *State v. Welborn*, No. 02-14-00464-CR (Tex.App. – Fort-Worth, delivered July 30, 2015) (not designated for publication), is attached to this petition as Appendix A. The order denying Petitioner's request for discretionary review by the Texas Court of Criminal Appeals is attached as Appendix B.

JURISDICTION

The Court of Appeals delivered its opinion affirming Petitioner's conviction on July 30, 2015 in *State v. Welborn*, No. 02-14-00464-CR (Tex.App. – Fort-Worth, delivered July 30, 2015) (not designated for publication). The Court of Appeals ordered that its opinion not be published. On November 18, 2015, Petitioner's petition for discretionary review by the Court of Criminal Appeals was denied. Petitioner filed a timely petition for a writ of certiorari on February 10, 2016. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), the Petitioner having asserted

below and asserting in this petition the deprivation of rights secured by the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Ms. Welborn was charged by information with Driving While Intoxicated ("DWI") under Texas Penal Code § 49.04.

In the search warrant affidavit requesting authority to draw her blood, the officer states the time of arrest was specifically "Sunday, September 1, 2013 at 0352 hours." The officer requested the warrant on September 2, 2013, which was signed by the magistrate that same day at 5:30 a.m. (a minimum of 25 hours after the arrest time thereby rendering the request stale).

Ms. Welborn and her counsel subsequently filed a motion to suppress the blood test results, specifically

attacking the affidavit supporting the blood warrant. On November 3, 2014, hearing was held on the motion to suppress in which the trial court granted the motion to suppress, and entered findings of fact and conclusions of law indicating that a magistrate, when given the date of arrest, would have no knowledge the date specifically given in the affidavit was incorrect, thus, the 25-hour time gap between the stated arrest date in the affidavit and the warrant request rendered the search warrant request stale.

On July 30, 2015, the Court of Appeals reversed the order of the trial court, holding that because the trial court held the error was "clerical," parol evidence is allowed to explain it and ratify the warrant request after the fact. The appeals court, however, ignored the holding of the trial court that stated the magistrate would have no way of knowing there was any error at all. Such a holding by the appellate court, if allowed to stand, essentially holds that ALL errors can be corrected through parol evidence. This holding when utilized by the prosecution will allow the State to virtually correct and render valid any affidavit for a warrant ever requested that lacks probable cause or has incorrect information by simply claiming "clerical error."

On November 18, 2015, the Court of Criminal Appeals refused discretionary review on the issue.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because if this holding stands it will be effectively creating a bright-line rule that all errors or factually insufficient probable cause affidavits, supporting a warrant request, may be supplemented at a later date to validate an otherwise invalid search warrant request in direct contradiction to this Court's holdings and the U.S. Constitution.

This Court should grant certiorari in order to avoid the creation of a bright-line rule that all errors in warrants and probable cause affidavits supporting a warrant may be explained later using parol evidence. This bright-line rule: (1) violates the Fourth Amendment; and (2) allows the adequacy of an affidavit supporting a search warrant to no longer be governed by the rule that probable cause must be determined from the four corners of the affidavit alone, but instead parol evidence may be used to clarify and ratify any deficiencies the warrant may have.

This Court has clearly held that for a magistrate, in making a determination of probable cause, it is of no consequence that the affiant or affiants might have had additional information which could have been given to the issuing magistrate. "**It is elementary that in passing upon the validity of the warrant, the reviewing court may consider Only information brought to the magistrate's attention**." *Aguilar v. Texas*, 378 U.S. 108, 109, n.1

(1964) (emphasis in original), citing *Giordenello v. United States*, 357 U.S. 480, 486 (1958).

Here, the facts are such that the State is attempting to alter the probable cause affidavit with more facts after learning the facts given were insufficient or wrong.

The State is hiding behind the guise of it was only correcting a "clerical error." However, if that line of reasoning is taken to its logical conclusion, ALL errors could be claimed by the State to be "clerical" ones and thus ALL errors could be corrected to validate a warrant after the fact by parole evidence.

At what point should the line be drawn at which an affidavit for a warrant is to be reviewed? It is our position that this Court and the Constitution have already drawn that line in the sand. That line has been drawn at the time the warrant request is made.

This Court has already expounded on the importance of honesty and specificity when applying for a warrant to invade the privacy of an individual against their will. If we allow parol evidence to be used to explain mistakes in affidavits, the State will utilize that decision to make what is contained within the four corners of an affidavit request moot. It will continually point to this decision to claim ALL errors that are clerical (of which they can assert any error is) can be explained at a later date to validate a warrant. The State will claim the officer really meant to put "this" or really meant "this address" or "this

date" or "this item" or "this information." Eventually there will be no protection from incorrect information provided to the magistrates, thus rendering the need for magistrate approval meaningless if the officer can just put incorrect information.

While this case seems like just a simple mistake by the officer, if the appellate court's decision is allowed to stand, it will have far-reaching consequences.

We ask this Court simply to allow us the opportunity to fully brief the issue and show why this freedom from unreasonable searches, by way of incorrect information provided in an affidavit, is so important to not only Ms. Welborn but also the nation.

CONCLUSION

For the reasons herein alleged, Petitioner prays this Court grant certiorari.

Respectfully submitted,

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APPENDIX A

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00464-CR

THE STATE OF TEXAS — STATE

V.

CASEY WELBORN — APPELLEE

FROM COUNTY CRIMINAL COURT
NO. 4 OF DENTON COUNTY
TRIAL COURT NO. CR-2013-07913-D

MEMORANDUM OPINION[1]

I. INTRODUCTION

The State of Texas appeals the trial court's order granting appellee Casey Welborn's motion to suppress the results of a blood draw performed pursuant to a warrant. In one issue, the State argues that the trial court abused its discretion by suppressing the evidence "because the one instance of the incorrect date in the affidavit supporting the search warrant for blood was a clerical error that was explained by parol evidence." Because we conclude that the trial court erroneously applied the law, we will reverse and remand.

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[1] *See* Tex. R. App. P. 47.4.

II. BACKGROUND

During his 7:00 p.m. to 7:00 a.m. shift that spanned the dates of September 1, 2013, to September 2, 2013, Carrollton Police Officer William Trim wrote an affidavit for a search warrant to draw blood from Welborn. Trim's pursuit of a search warrant stemmed from him having pulled over Welborn's vehicle, allegedly because Trim had witnessed it swerving in and out of a single lane of traffic. By Trim's account, further field-sobriety tests led him to believe that Welborn was driving while intoxicated.

In his "Affidavit for Search Warrant for Blood," there appear two different dates for the stop. In the first paragraph, Trim wrote that Welborn committed the offense of DWI "on or about the 02 day of September, 2013." Later, in paragraph five of the affidavit, Trim wrote that the stop occurred "[o]n, Sunday, September 1, 2013, at approximately 0352 hours." Yet again, at the end of the affidavit, Trim signed that he swore to the facts alleged "on this the 2 day of September, 2013." Trim also had this page notarized.

After presenting the affidavit to a magistrate, the magistrate issued a "Search Warrant for Blood." The warrant incorporated Trim's affidavit, commanded the seizure of Welborn, and authorized a compelled blood draw from her person. The warrant states that it was "[i]ssued at 5:30 o'clock A.M. on this the 2nd day of September, 2013" and was signed by the magistrate.

Later, Welborn filed a motion to suppress the results of the blood draw. In her motion and at the suppression hearing, Welborn argued that because Trim's affidavit stated that his stop of her vehicle occurred on "Sunday, September 1, 2013, at approximately 0352 hours," and that because the warrant was signed by the magistrate "at 5:30 o'clock A.M. on this the 2nd day of September, 2013," there was a twenty-six hour period between her detention and the issuance of the warrant. Thus, Welborn argued, under the court of criminal appeals's decision in *Crider v. State*, the results of the blood draw should be suppressed. 352 S.W.3d 704, 707-08 (Tex. Crim. App. 2011) (holding that, due to alcohol's dissipation from bloodstream, the lack of specific time in search-warrant affidavit, which left possible twenty-five hour period between arrest and issuance of warrant, vitiated probable cause to uphold warrant).

At the suppression hearing, Trim testified that the September 1, 2013 date was a "clerical error" and that he stopped Welborn's vehicle at 3:52 a.m. on September 2, 2013, The trial court granted Welborn's motion to suppress. In its findings of fact, the trial court found that Trim's testimony was "credible and truthful" and that the "September 1, 2013" date found in his affidavit was a "clerical error." In its conclusions of law, however, the trial court stated that it "relied on *Crider*" in making its determination to suppress the results of the blood draw. The State now appeals.

III. Discussion

In the determinative part of its sole point, the State argues that the trial court erred by granting Welborn's motion to suppress because the "one instance of the incorrect date in the [warrant's] supporting . . . affidavit . . . was a clerical error." And, the State argues, because the clerical error was explained through parol evidence and because the trial court found the parol evidence to be true, the trial court should not have concluded that the results of the blood draw performed on Welborn should be suppressed. We agree with the State.[2]

A. Standard of Review and Applicable Law

The police may obtain a defendant's blood for a DWI investigation through a search warrant. *Beeman v. State*, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002); *see* Tex. Code Crim. Proc. Ann. art. 18.01(j) (West 2015); *State v. Johnston*, 305 S.W.3d 746, 750-51 (Tex. App. – Fort Worth 2009, pet. struck). A search warrant cannot issue unless it is based on probable cause as determined from the four corners of an affidavit. U.S. Const. amend. IV; Tex. Const. art. I, § 9; Tex. Code Crim. Proc. Ann. art, 18.01(b) (West 2015) ("A sworn affidavit . . . establishing probable cause shall be filed in every instance in which a search warrant is requested."); *Nichols v. State*, 877 S.W.2d 494, 497-98 (Tex. App. – Fort Worth 1994, pet. ref'd).

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[2] Welborn did not submit briefing in this case.

When reviewing a magistrate's decision to issue a warrant, we apply the deferential standard of review articulated by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983). *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007); *Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004). Under that standard, we uphold the probable cause determination "so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." *Gates*, 462 U.S. at 236, 103 S. Ct. at 2331 (*citing Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736, (1960), *overruled on other grounds by U.S. v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, (1980)); *see Swearingen*, 143 S.W.3d at 810.

When reviewing the trial court's ruling on a motion to suppress when the trial court made explicit fact findings, as here, we determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports those fact findings. *State v. Kelly*, 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006). We then review the trial court's legal ruling de novo unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id.* at 818.

"[T]he Fourth Amendment strongly prefers searches to be conducted pursuant to search warrants." *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). Therefore, "purely *technical* discrepancies in dates or times do not automatically

vitiate the validity of search or arrest warrants." *Green v. State,* 799 S.W.2d 756, 759 (Tex. Crim. App. 1990). The two objectives of the law concerning search warrants are to ensure there is adequate probable cause to search and to prevent a mistaken execution against an innocent third party. *Id.* at 757. These objectives are not furthered by rigid application of the rules concerning search warrants. *Id.* at 759. To avoid providing protection to those whose appeals are based not on substantive issues of probable cause, but rather, on technical default by the State, we review technical discrepancies under the totality of the circumstances test enunciated by United States Supreme Court in *Gates*, 462 U.S. at 236, 103 S. Ct. at 2331; *Green*, 799 S.W.2d at 758. Due to the nature of these technical defects, parol evidence, in the form of explanatory testimony, may be used to cure the defect. *Id.* at 760.

B. The Clerical Error Did Not Vitiate Search Warrant's Validity

In one part of Trim's affidavit, he wrote that that the stop and the events giving rise to the stop and arrest of Welborn occurred on September 1, 2013. Nevertheless, Trim explained at the suppression hearing that the September 1, 2013 date was an error and that the stop actually occurred on September 2, 2013. The trial court found this testimony to be true and specifically found that the September 1, 2013 date was a "clerical error." Viewing the evidence in the light most favorable to the trial court's findings,

these findings of fact are supported by the record. *See Kelly*, 204 S.W.3d at 818-19.

The trial court, however, relied on the court of criminal appeals's decision in *Crider* in reaching its legal conclusion that this clerical error vitiated the magistrate's search warrant. In *Crider*, the court held that an affidavit in support of a search warrant that left a possible twenty-five hour gap between the officer's stop of Crider and the magistrate's signing of the search warrant for blood failed to contain "sufficient facts within its four corners to establish probable cause that evidence of intoxication would be found in appellant's blood at the time the search warrant was issued." *Crider*, 352 S.W.3d at 711.

Crider, however, is distinguishable from the facts of the present case because here "there exists a discrepancy in dates" instead of containing no date at all. *Green*, 799 S.W.2d at 760; *Crider*, 352 S.W.3d at 711. In instances such as this case, "parol evidence to explain the error on the face of the instrument" may be considered in determining whether the issuing magistrate had a substantial basis in issuing its warrant. *Green*, 799 S.W.2d at 761; *see Rougeau v. State*, 738 S.W.2d 651, 663 (Tex. Crim. App. 1987) (upholding warrant because evidence showed affidavit dated January 6, 1977, instead of January 6, 1978, was clearly typographical error), *cert. denied*, 485 U.S. 1029 (1988), *overruled on other grounds by Harris v. State*, 784 S.W.2d 5, 19 (Tex. Crim. App. 1989); *Lyons v. State*, 503 S.W.2d 254, 256 (Tex. Crim. App. 1973) (upholding warrant when evidence was introduced to

show that the police officer mistakenly typed "March" instead of "July" on the affidavit); *Martinez v. State*, 285 S.W.2d 221, 222 (Tex. Crim. App. 1955) (upholding warrant when testimony was offered that "December" was mistakenly written on warrant affidavit instead of "January").

We hold that because the trial court found, through parol evidence, that the September 1, 2013 date was a "clerical error" and because it found that the correct date was September 2, 2013, the trial court should have legally concluded that the clerical error did not vitiate the search warrant. *See Schornick v. State*, No. 02-10-00183-CR, 2010 WL 4570047, at *3 (Tex. App. – Fort Worth Nov. 4, 2010, no pet.) (mem. op., not designated for publication) (holding that trial court did not err by denying motion to suppress when trooper testified that erroneous date on affidavit was a clerical error). Accordingly, we sustain the State's sole issue.

IV. CONCLUSION

Having sustained the State's sole issue, we reverse the trial court's order and remand this case to the trial court for further proceedings consistent with this opinion.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: DAUPHINOT, WALKER, and MEIER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: July 30, 2015

APPENDIX B

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

11/18/2015 **COA No. 02-14-00464-CR**

WELBORN, CASEY [SEAL]

Tr. CL No. CR-2013-07913-D **PD-1058-15**

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

Abel Acosta, Clerk

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* DELIVERED VIA E-MAIL *