Affirmed and Memorandum Opinion filed October 19, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00550-CR

ERNEST EUGENE HOWARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 1190594

M E M O R A N D U M O P I N I O N

Appellant, Ernest Eugene Howard, appeals from his conviction for possession of cocaine in an amount of less than one gram. A jury found him guilty, found two enhancement allegations to be true, and assessed punishment at 18 years' incarceration. In two issues, appellant contends that the trial court erred in (1) denying his motion to suppress certain evidence, and (2) sustaining the State's objection to certain other evidence. We affirm.

Background

At trial, Houston Police Officer Kirk Milton testified that on November 6, 2008, he was patrolling in an unmarked police vehicle with Sergeant Cullen Bean. While circling around a Shell gas station, known as a center for prostitution, Milton observed appellant come out of the store, pour wine into a Styrofoam cup, and drink it. According to Milton, the station was a "non-premise property," meaning that it did not "have a license for people to stand outside and drink." Milton further explained that it was a violation of law to consume alcohol on non-premise property.

The two officers approached appellant, identified themselves, and detained him. While conducting a "pat-down" search of appellant incident to arresting him for the alcohol consumption violation, the officers discovered a glass pipe in each of his front pants pockets. Milton explained that such pipes are used by some drug users to smoke crack cocaine. The pipes were subsequently submitted for testing, and an analyst with the Houston Police Department Crime Laboratory testified that residue in the pipes tested positive for cocaine. Officer Milton further testified that around the same time as appellant's arrest, another man was arrested at the gas station for public intoxication.

During cross-examination by appellant, acting pro se, Milton acknowledged that he could present no evidence that appellant was consuming alcohol on the store's premises except Milton's own testimony. Specifically, Milton acknowledged that he had not preserved either the Styrofoam cup, the bottle of wine, or the wine itself as evidence. He explained, however, that having found the glass pipes on appellant (possession of which could be a felony offense if they were found to contain cocaine), he felt that there was no need to preserve the evidence pertaining to the lesser (misdemeanor) charge of consuming alcohol on non-premise property. Appellant further questioned Milton regarding the charges against the other man arrested at the gas station. Milton again specifically indicated that the individual was arrested for public intoxication.

Appellant then attempted to introduce into evidence a complaint, along with some booking information, filed by Sergeant Bean allegedly against the other man arrested at

the scene of appellant's arrest. The complaint apparently charged the man with "transporting a prostitute to an area for profit."[1] During a conference outside of the jury's presence, the trial judge stressed that the complaint was not filed by Officer Milton. The State then objected to the proffered evidence on the grounds of "hearsay, relevance and improper predicate." The trial court sustained the objection.

Prior to trial, appellant's then counsel filed a motion to suppress any evidence pertaining to the glass pipes. In the motion, counsel stated only very generally that appellant was unlawfully detained and arrested without a warrant. The court carried the motion with the case and held a hearing outside the presence of the jury after the State rested. During the hearing, the State re-offered all of the evidence that had been admitted up to that point in the trial. Appellant then asserted that the State should have had "something in writing" like the "charge or the ticket or the complaint" regarding the consumption of alcohol offense to support the claim of probable cause to arrest. He further emphasized that Officer Milton did not see him with the glass pipes prior to arresting him; Milton only allegedly saw him drinking. According to appellant, in order to support the claim of probable cause based on the alcohol consumption observation, Milton needed to have charged appellant with consuming alcohol on non-premise property. The trial court denied the motion to suppress.

In his case-in-chief, appellant called only one witness, Kevin Bernard Davis, who testified that he saw and spoke to appellant at the gas station the night appellant was arrested. According to Davis, appellant exited the store, left the premises, and did not stand around on the premises drinking anything. Davis then saw two undercover police officers approach appellant. He said that appellant was holding a bag when he left the store, but Davis could not tell what was in the bag.

At the conclusion of the trial, the jury found appellant guilty, found two enhancement allegations true as instructed by the court, and assessed punishment at 18

[1] Although the complaint and booking information do not appear in the record, their contents were described in detail during a conference before the bench.

years in prison. Appellant now attacks the trial court's rulings on the motion to suppress and on the admissibility of the evidence pertaining to the other individual arrested that night.

Motion to Suppress

In his first issue, appellant contends that the trial court erred in denying his motion to suppress evidence relating to the two glass pipes allegedly found on his person. Specifically, appellant asserts that Officer Milton lacked probable cause for the alcohol consumption offense, and thus, the warrantless arrest and search of appellant violated the Fourth Amendment to the United States Constitution and Article I, section 9 of the Texas Constitution. U.S. Const. amend. IV; Tex. Const. art. I, § 9.[2] When a defendant seeks to suppress evidence on the basis of a Fourth Amendment violation, the burden of proof is initially on the defendant, but once the defendant produces evidence defeating the general presumption of proper police conduct, the burden of proof shifts to the State. *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). A defendant fulfills the initial burden of proof by establishing that a search or seizure occurred without a warrant. *Id*. Here, it was clear from Officer Milton's testimony that a search and seizure occurred and that no warrant was obtained. Accordingly, the burden shifted to the State to demonstrate the validity of the search and seizure. The trial court found that the State met that burden.

We review a trial court's ruling on a motion to suppress evidence under an abuse-of-discretion standard. *Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex. Crim. App. 1997). We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). At such a hearing, the trial court is the sole finder of fact and is therefore entitled to believe or disbelieve any or all of the testimony presented. *Id*. at 24-25. We give almost total deference to the trial court's determination of historical facts that depend on an

[2] Appellant does not assert that article I, section 9 provides him any greater protection than does the federal constitution; accordingly, we will not separately address his rights under the Texas Constitution.

assessment of witness credibility or demeanor, but review de novo the trial court's application of the law to the facts if resolution of those ultimate questions does not turn on an evaluation of credibility or demeanor. *See Guzman*, 955 S.W.2d at 89.

In his brief, appellant suggests that Milton's testimony alone was not sufficient to prove that appellant was drinking on the gas station premises. He further asserts that there was no evidence that the gas station in question held an off-premise permit or that it displayed the sign, required by law, warning against consuming alcohol on the premises. However, in the trial court, appellant argued only that in order to support the claim of probable cause, based on the consumption of alcohol offense, the State needed "something in writing" like the "charge or the ticket or the complaint." He further emphasized that Officer Milton did not see him with the glass pipes prior to arresting him; Milton only allegedly saw him drinking. Because appellant's arguments on appeal do not comport with the arguments he made in the trial court, his appellate arguments were not preserved. *See, e.g., Rice v. State*, 195 S.W.3d 876, 882 (Tex. App.—Dallas 2006, pet. ref'd) (finding suppression of evidence arguments were not preserved where arguments on appeal did not comport with those made in the trial court).

Furthermore, even if they had been preserved, appellant's arguments are without merit. "'Probable cause' for a warrantless arrest exists if, at the moment the arrest is made, the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the person arrested had committed or was committing an offense." *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). The test uses an objective standard, taking into account the totality of the circumstances facing the arresting officer, and does not depend on the officer's subjective beliefs. *Id*. Probable cause requires greater proof than just the officer's bare suspicion but less than that required to sustain a conviction. *Id*.

As the sole judge of the credibility of the witnesses, the trial judge was entitled to believe Milton's testimony that he observed appellant drinking alcohol on the gas station

premises, even in the absence of corroborating evidence. *See Wiede*, 214 S.W.3d at 24-25; *see also State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002) ("An offense is deemed to have occurred within the presence or view of an officer when any of his senses afford him an awareness of its occurrence."). Additionally, although the State did not provide the gas station's liquor license, Milton testified that (1) he had worked in the vice division of the police department for several years, during which his duties had included enforcing liquor ordinances and checking liquor licenses, including, specifically, at stores like the gas station where appellant was arrested; (2) he knew that the station was a non-premise property and that it did not have a license "for people to stand outside and drink"; and (3) he saw appellant exit the store and then pour wine in a cup and drink it on the gas station premises. This testimony, in both its express information and its inferences, is sufficient for the trial court to conclude that probable cause existed for the liquor consumption violation. Specifically, given Milton's expressed experience enforcing and knowledge about liquor laws, his observation that appellant exited the gas station with a wine bottle presumably purchased in the store and drank said wine on the premises, we cannot say that the trial court erred in overruling the motion to suppress, even in the absence of the gas station's actual liquor license.

Lastly, concerning the lack of evidence that the gas station displayed a sign warning about consumption of alcohol on the premises, appellant provides no argument or analysis as to how this impacts the probable cause determination. We decline to speculate on whether it does. We overrule appellant's first issue.

Impeachment Evidence

In his second issue, appellant contends that the trial court erred in sustaining the State's objection when appellant offered the ticket and booking information pertaining to the other individual arrested on the night and at the location where appellant was arrested. Among other sustained objections, the State urged relevance as a ground for exclusion of the evidence. According to appellant, the evidence in question was relevant because it raised questions about Officer Milton's credibility regarding the events of that evening:

Milton testified that the other man was arrested for public intoxication; whereas, the ticket and booking information demonstrated that he was instead charged with transporting a prostitute for profit.[3]

We review a trial court's ruling on the admissibility of evidence under an abuse of discretion standard. *McCarty v. State*, 257 S.W.3d 238, 239 (Tex. Crim. App. 2008). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex. R. Evid. 401. All relevant evidence is admissible except as provided by Constitution, statute, or court rules. Tex. R. Evid. 402. "Evidence which is not relevant is inadmissible." *Id*.

Generally, a party is not entitled to impeach a witness on a collateral matter. *Ramirez v. State*, 802 S.W.2d 674, 675 (Tex. Crim. App. 1990). A collateral matter is one that is not relevant to proving a material issue in the case. *See id*. "The test as to whether a matter is collateral is whether the cross-examining party would be entitled to prove it as a part of his case tending to establish his plea." *Id*. (quoting *Bates v. State*, 587 S.W.2d 121, 133 (Tex. Crim. App. 1979)). Here, appellant provides no argument for the relevance of the excluded evidence—the complaint and booking information for the other arrested individual—to the issues in this case, other than asserting that such evidence allegedly impeaches Milton's testimony regarding the basis for another person's arrest that night. This is exactly the type of impeachment on a collateral matter prohibited by *Ramirez*.[4] The evidence was not relevant to issues in this case, and

[3] In discussing the proffered evidence with appellant and the prosecutor, the trial judge pointed out that the complaint and booking information were not prepared by Milton; thus, they did not directly refute his testimony that he believed the other individual was arrested for public intoxication and not a prostitution-related offense.

[4] As explained in *Ramirez*, there is an exception to the general rule permitting impeachment on a collateral matter when the witness has left a false impression concerning a matter relating to his or her credibility. 802 S.W.2d at 676. In short, the opposing party may impeach the witness to the extent necessary to correct the false impression. *Id*. Appellant does not point to, and we do not discern, any place in Milton's testimony where he left a false impression regarding his credibility that the excluded evidence could have corrected. Consequently, the exception to the general rule does not apply in this case.

therefore, the trial court did not err in excluding the evidence. We overrule appellant's second issue.

The trial court's judgment is affirmed.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Sullivan.
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