Affirmed and Memorandum Opinion filed December 21, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00935-CR

ALTON JOSEPH THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1208893

MEMORANDUM OPINION

Appellant Alton Joseph Thomas appeals his conviction for possession of marijuana, weighing between four ounces and five pounds, claiming in a single issue that the trial court erred in denying his motion to suppress. Appellant asserts the officers did not have reasonable suspicion to stop and detain him and that his consent to a search was involuntary. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with the felony offense of possession of marijuana with two prior felony enhancements. Appellant filed a motion to suppress evidence. When

viewed in the light most favorable to the trial court's ruling,[1] the evidence from the hearing reflects the following:

Law enforcement officers in the narcotics division of the Houston Police Department were conducting undercover surveillance at a bus station, monitoring passengers as they arrived or departed. An officer observed appellant enter the bus station at 6:10 p.m. and stand in line to purchase a bus ticket. The officer described how appellant looked around him as he stood in line, as if appellant were looking for law enforcement officers in the vicinity. Based on his experience, the officer viewed appellant's conduct as characteristic of a person that is trying to smuggle contraband. The officer estimated that the next bus would have departed the station at 6:45 p.m., but noted that he would have to check his records.[2] In the officer's past experience, people who are under surveillance for narcotics smuggling rush into the bus station at the last minute and purchase a ticket to avoid spending too much time in the station where law enforcement officers could intervene.

The officer observed appellant purchase a bus ticket, enter a security check-point, and stand in line for an eastbound bus. Two officers approached appellant, identified themselves as law enforcement officers, and engaged in conversation with appellant. One asked questions of appellant, and the other officer stood nearby, listening to the conversation. Although appellant was simply talking with the officer, one of the officers believed appellant seemed a little nervous. The officer noted that appellant's hands were shaking as he handed his identification to another officer.

In response to the officer's questions, appellant acknowledged that the luggage he carried belonged to him. The officer asked appellant whether he would consent to a search of his bags; appellant consented. In searching appellant's luggage and backpack, the officers did not find any contraband. The officer asked appellant to consent to a

[1] *Baldwin v. State*, 278 S.W.3d 367, 369 (Tex. Crim. App. 2009).

[2] The officer testified at trial that the next bus would have departed at 6:15 p.m. or 6:20 p.m.

search of his person; appellant gave permission.[3] One officer, Officer Allen, patted down appellant and asked a second officer, Officer Hicks, to feel something on the inside of appellant's left leg beneath appellant's pants. Officer Hicks confirmed that "something [was] there," and based on his experience, Officer Hicks believed that the object he felt was marijuana.

As Officer Hicks produced handcuffs to detain appellant for further investigation and for the officers' safety, appellant fled from the officers. Although the officers ordered appellant to stop, appellant kept running. Other officers caught appellant outside the bus station and struggled to handcuff him to place him under arrest for evading arrest. In a subsequent search of appellant, the officers recovered two bags of marijuana in clear, plastic wrapping taped to appellant's leg and stomach.

According to the officer's testimony at the suppression hearing, appellant did not revoke consent at any time during their encounter. The officers did not tell appellant that he did not have to give consent to a search; nor did they tell appellant he was free to leave during the encounter.

The trial court denied appellant's motion to suppress, finding that appellant consented to a search of his bags and his person. The trial court ruled that upon feeling an object on appellant's leg, the officers had reasonable suspicion to detain appellant. The trial court found that before the officers could detain appellant, he fled, and pursuant to a search under a lawful arrest, the officers discovered the narcotics in appellant's possession.

After a trial, the jury found appellant guilty of the charged offense and assessed punishment at 540 days in jail and a fine.

[3] At trial, the officer testified that when appellant was first asked to consent to a search of his person, he stepped back as if he did not really want to be patted down, but nonetheless consented to the search. Because appellant stepped back from the officers, the officer asked a second time for consent to search his person; according to the officer, appellant again consented.

ISSUE PRESENTED

In a single issue, appellant asserts that the officers did not have reasonable suspicion to approach and detain him. Accordingly, appellant argues, because the detention was not supported by reasonable suspicion, the search of appellant was illegal and the marijuana seized in that the search should have been suppressed under the Fourth Amendment of the United States Constitution and article 1, section 9 of the Texas Constitution.

ANALYSIS

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). At a suppression hearing, the trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). We give almost total deference to the trial court's determination of historical facts that depend on credibility and demeanor, but review de novo the trial court's application of the law to the facts as resolution of those ultimate questions does not turn on the evaluation of credibility and demeanor. *See Guzman*, 955 S.W.2d at 89. When, as in this case, there are no written findings of fact in the record, we uphold the ruling on any theory of law applicable to the case and presume the trial court made implicit findings of fact in support of its ruling so long as those findings are supported by the record. *State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000). We view a trial court's ruling on a motion to suppress in the light most favorable to the trial court's ruling. *Wiede*, 214 S.W.3d at 24. If supported by the record, a trial court's ruling on a motion to suppress will not be overturned. *Mount v. State*, 217 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Did the officers have reasonable suspicion to detain appellant?

Appellant asserts that the officers did not have reasonable suspicion that he had engaged or would soon engage in criminal activity to warrant his detention. In a suppression hearing, the defendant bears the initial burden of rebutting the presumption that the police encounter was proper. *Russel v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). He can do so by showing that the search or seizure occurred without a warrant. *Id.* The burden then shifts to the State to either produce a warrant or prove that the warrantless search or seizure was reasonable. *Id.* at 9–10.

Not all encounters between police and private citizens trigger the protection of the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); *Hunter v. State*, 955 S.W.2d 102, 104 (Tex. Crim. App. 1997). An officer is as free as any other citizen to stop and ask questions of a fellow citizen; seizure under the Fourth Amendment does not occur under such circumstances. *See Bostick*, 501 U.S. at 434, 111 S. Ct. at 2386; *Hunter*, 955 S.W.2d at 104. A seizure occurs when officers, by means of physical force or show of authority, in some way restrain a citizen's liberty. *See Bostick*, 501 U.S. at 434 (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). A consensual encounter occurs when a reasonable person would feel free "to disregard the police and go about his business." *Hunter*, 955 S.W.2d at 104 (internal quotations omitted). We consider whether a seizure has occurred under the totality of circumstances by examining whether the officers' conduct communicated that appellant's compliance with their requests was required or that he was not free to otherwise terminate the encounter. *See id.*

Under the totality of the circumstances, the facts do not suggest that the officers conveyed a message that compliance with their requests was required. *See id.* The officers wore civilian clothing and their weapons were not visible. *See id.* When the officers approached appellant, they identified themselves as law enforcement officers. Police officers are free to stop and ask questions of a fellow citizen. *Id.* One officer

spoke with appellant as the other officers stood nearby, listening to the conversation. A single officer posing questions to appellant is less intimidating than multiple officers. *See id.* When the officer asked for consent to search appellant's bags, the officer did not suggest that he would obtain a search warrant if appellant did not consent to a search. *See id.* Although the officers did not advise appellant that he had a right to refuse consent to search, this is just a factor for considering whether the encounter constitutes a seizure. *See State v. Velasquez*, 994 S.W.2d 676, 679 (Tex. Crim. App. 1999). Furthermore, the encounter occurred in the open area of the bus station; the officers did not threaten appellant; and the officers did not touch appellant at this time. *See Jackson v. State*, 77 S.W.3d 921, 927 (Tex. App.—Houston [14th Dist.] 2002, no pet.). A reasonable person, under the facts of this case, would have felt free to walk away from the officers at any time during this encounter prior to the search of appellant's bags. *See Velasquez*, 994 S.W.2d at 679; *Hunter*, 955 S.W.2d at 104; *Jackson*, 77 S.W.3d at 927.

Appellant claims that when the officers identified themselves as law enforcement officers and asked for consent to search his bags, the officers' conduct was the "functional equivalent" of informing appellant he was detained. But these facts do not transform a voluntary encounter into a detention. *See Velasquez*, 994 S.W.2d at 678–79; *Hunter*, 955 S.W.2d at 106; *Jackson*, 77 S.W.3d at 927. "A police officer's asking questions and requesting consent to search do not alone render an encounter a detention." *Hunter*, 955 S.W.2d at 106. Because the facts do not show that the officers conveyed a message that appellant's compliance with their requests was required, the officers' encounter with appellant did not become a detention at that time. *See id.* Thus, no Fourth Amendment rights were implicated, and we need not reach the issue of whether the officers had reasonable suspicion to question appellant. *See Jackson*, 77 S.W.3d at 927.

Were the officers justified in conducting a search of appellant and his bags?

Appellant testified at trial that he did not consent to the officers' requests to search him or his bags. On appeal, appellant claims that any consent to search was involuntary. He claims that he did not know, and the officers never informed him, that he could decline their request to search him.

Warrantless searches are "per se unreasonable," unless they fall under one of a few specific exceptions. *Rayford v. State*, 125 S.W.3d 521, 528 (Tex. Crim. App. 2003) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)); *Reasor v. State*, 12 S.W.3d 813, 817 (Tex. Crim. App. 2000). Consent to search is one of the well-established exceptions to the constitutional requirement that a police officer have both a warrant and probable cause before conducting a search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Texas law requires the State to prove voluntariness of consent to search by clear and convincing evidence, rather than by a mere preponderance of the evidence. *Reasor*, 12 S.W.3d at 817. To be valid, a consent to search must be positive and unequivocal, and must not be the product of duress or coercion, either express or implied. *Id.* at 818.

The trial court must look at the totality of the circumstances surrounding the statement of consent in order to determine whether consent was given voluntarily. *Id.* A showing that a suspect has been warned that he does not have to consent to the search and has a right to refuse is of evidentiary value in determining whether a valid consent was given. *See Johnson v. State*, 68 S.W.3d 644, 653 (Tex. Crim. App. 2002). But the absence of such information does not automatically render an accused's consent involuntary. *Id.* Other facts for consideration include the accused's age, education, and intelligence, the constitutional advice given to the accused, the length of detention, the repetitive nature of questioning, and the use of physical punishment. *See Reasor*, 12 S.W.3d at 818.

According to evidence presented at the suppression hearing, appellant agreed to talk to the officers from the time the plain-clothes officers approached appellant and identified themselves. Throughout the encounter, appellant continued to speak with the officers. The officers did not indicate appellant was under arrest, and there is no indication in the record that the officers threatened appellant with a search warrant in the event he refused to cooperate. The officers did not have their weapons drawn during their encounter nor did the officers threaten or touch appellant or take him to a secluded area to gain his consent. *See Jackson*, 77 S.W.3d at 929. Officer Hicks testified both at the suppression hearing and at trial that appellant affirmatively consented to a search of both his person and his bags. Another officer confirmed in his trial testimony that he overheard appellant give consent to search his bags. According to the officers' trial testimony, appellant stepped back before the officers patted him down, and so the officers asked a second time if they could search his person; appellant did not revoke consent and again agreed to the search. Under these facts, the consent was positive and unequivocal. *See id.* Although the officers did not warn appellant that he did not have to consent to the search, this fact is not dispositive when considering whether an accused voluntarily gave consent. *See id*. In contrast, appellant testified at trial that he did not give consent to a search. Appellant also testified that the officers did not verbally threaten him.

The trial court impliedly found that appellant's consent was voluntary by denying appellant's motion to suppress, which indicates that the trial court found the officers' testimony to be credible. *See Hunter*, 955 S.W.2d at 102 n.2. In determining appellant's voluntariness in consenting to the search, the trial court was settling a question of fact and its determination is entitled to almost complete deference. *See id.* (resolving conflict in evidence as to whether consent was given by deferring to trial court's ruling on motion to suppress, because trial court was sole finder of fact at the suppression hearing to determine witnesses' credibility). Deferring, as we must, to the trial court's determinations of credibility and historical facts, we cannot conclude that the trial court abused its discretion in determining that appellant's consent was voluntary or that the

State failed to meet its burden in establishing the voluntariness of appellant's consent by clear and convincing evidence.[4] *See id.* Therefore, the trial court did not err in denying appellant's motion to suppress evidence obtained from the search for lack of consent. *See Jackson*, 77 S.W.3d at 929. We overrule appellant's sole issue on appeal.

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Brown.
Do Not Publish — TEX. R. APP. P. 47.2(b).

[4] Appellant cites *Mitchell v. State*, 831 S.W.2d 829 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd), for support that when officers do not have reasonable suspicion to detain a suspect, then "any subsequent consent to search is not valid." Appellant's reliance on this case is misplaced. Contrary to what appellant suggests, the voluntariness of an accused's consent is not dependent on the existence of reasonable suspicion. The court in *Mitchell* determined that the accused's detention was illegal because no reasonable suspicion existed and that the accused's subsequent consent to a search was not voluntary because the search was inevitable. *See id.* at 833, 834. No facts in this case suggest that the search of appellant or his bags was inevitable. *See id.* at 834 (involving an accused who would have had to forfeit his bag to officers or forfeit a bus ticket and miss the bus had he not consented to a search).