NO. 07-05-0298-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL B

JANUARY 22, 2007

JERMAINE E. GARMON,

Appellant

v.

THE STATE OF TEXAS,

Appellee

FROM THE 140TH DISTRICT COURT OF LUBBOCK COUNTY;

NO. 2004-406,266; HON. JIM BOB DARNELL, PRESIDING

Memorandum Opinion

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Jermaine E. Garmon (appellant) appeals his conviction for possessing, with intent to deliver, a controlled substance. Via four issues, he contends that the trial court erred in overruling his motion to suppress. The motion should have been granted because he

was not given his *Miranda* warnings prior to making statements, according to appellant. Furthermore, his consent was allegedly involuntary.[1] We affirm.

Background

The facts show that appellant was under arrest for an unrelated offense when he asked permission to use the bathroom in his residence. Permission was granted. An officer (Salmon) accompanied appellant and, without informing appellant of his *Miranda* rights, asked if "there was anything illegal, anything [the officer] should know about inside the residence . . . ." Appellant allegedly directed Salmon to a laundry hamper where marijuana was discovered. According to the officer, he then asked appellant for consent to search the house, and appellant granted him same. Appellant denied being asked for consent, though.

During the search, cocaine and marijuana were found in the hamper. Over $6000 was found elsewhere in the house. Effort was made to also search the room of appellant's brother, Robert. According to Salmon, he received permission from Robert to do so. Robert, however, denied this.

Fruits of the search formed the basis of a subsequent prosecution of appellant. He sought to suppress their use, asserting before the trial court that the search was defective because it occurred without consent. The trial court rejected the contention.

[1]Appellant's first appointed counsel filed an *Anders* brief. In reviewing the record, we concluded that there was an arguable ground for appeal on that question, and we abated the cause for the appointment of new counsel. The trial court appointed new counsel, and the latter filed the brief upon which we act.

Standard of Review

In reviewing a trial court's ruling upon a motion to suppress, we grant almost complete deference to its resolution of historical facts irrespective of whether those facts were disputed or dependent upon the credibility and demeanor of the witnesses involved. *Montanez v. State*, 195 S.W.3d 101, 106-08 (Tex. Crim. App. 2006). It, therefore, follows that the trial court may believe or disbelieve all or any part of a witness' testimony offered at the suppression hearing, even if that testimony was uncontroverted. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). Finally, when, as here, no findings of fact are made, we must view the evidence in a light most favorable to the trial court's decision and assume that it entered findings which support its decision as long as those findings can be supported by the record. *Id*.

Application of Standard

Issue One – Failure to Mirandize

Appellant initially contends that the trial court erred in overruling his motion to suppress evidence obtained under his alleged consent to search because he was not *Mirandized* before granting consent. We overrule the issue.

It is undisputed that the officer did not *Mirandize* appellant before asking about the presence of drugs and for consent to search. Yet, our Court of Criminal Appeals has held that the exclusionary rule applies to statements but not the fruits of the statement. *Baker*

v. State, 956 S.W.2d 19, 22 (Tex. Crim. App. 1997).[2] Thus, the contraband discovered by the police here was and is not subject to suppression.

Issue Four – Consent to Search

Through his fourth issue, appellant contends that the trial court abused its discretion in finding that he consented to the search. This is purportedly so because the testimony of the officer to whom consent was allegedly given was not credible. We overrule the issue.

As previously mentioned, the officer testified that both appellant and his brother consented to the search. Needless to say, appellant and his brother contradicted him. Because of that, the credibility and demeanor of the witnesses came at issue and saddled the trial court with the duty of deciding who to believe. Thus, we are obligated not only to grant almost complete deference to the trial court's resolution of that factual dispute, *Montanez v. State*, *supra*, but also to view the evidence in a light most favorable to that decision. *Ross v. State*, *supra*. So, the testimony of the officer coupled with appellant's personal interest in the outcome of the prosecution and his brother's potential interest in supporting appellant provided evidentiary basis for the trial court to side with the officer and implicitly find consent.

---

[2]We realize that the holding in *Baker* was criticized in *In re H.V.*, 179 S.W.3d 746 (Tex. App.–Fort Worth 2005, pet. granted). But, that same court later followed *Baker* in *Akins v. State*, 202 S.W.3d 879 (Tex. App.–Fort Worth 2006, no pet.) (refusing to suppress evidence of methamphetamine discovered as a result of appellant's statement despite the lack of *Miranda* warnings). Moreover, the appellant in *H.V.* had invoked his right to counsel or silence, whereas the appellant at bar has not argued that he had. Finally, the Court of Criminal Appeals granted review of *H.V.*, and until it modifies or rejects *Baker* we are obligated to follow that opinion.

Issues Two and Three – Voluntariness of Consent

In the last two issues, appellant asserts that any consent he granted was involuntary. This contention, however, was not raised below. Instead, appellant represented to the trial court that the "argument is about whether or not there was consent or not." So, because the legal contention asserted in issues two and three fails to comport with that raised below, it was not preserved for review. *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App.1999) (stating that the argument raised on appeal must comport with that asserted at trial, otherwise it is waived).

Accordingly, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice

Do not publish.