NO. 12-11-00183-CR

N THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ALBERT DEMETRIC KENNEDY, APPELLANT	***§***	***APPEAL FROM THE 392ND***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Appellant, Albert Demetric Kennedy, was charged by indictment with possession of more than one gram but less than four grams of cocaine discovered during a patdown search. Appellant filed a pretrial motion to suppress illegally seized evidence. After a hearing, the trial court denied the motion. Appellant entered a plea of guilty without an agreed plea recommendation. The trial court assessed Appellant's punishment at imprisonment for ten years, probated for ten years.

In his sole issue, Appellant contends the trial court reversibly erred in denying his motion to suppress illegally seized evidence, because neither the detention nor the subsequent patdown were supported by reasonable suspicion. We affirm.

BACKGROUND

On May 19, 2010, ten officers from the Athens Police Department, the Henderson County Sheriff's Office, and the United States Marshals Service went to a residence at 1019 Third Street in Athens, Texas, in an attempt to locate and arrest Kedrick Hurd, a fugitive wanted for attempted murder. At the briefing before the execution of the arrest warrant, Athens Police Detective James Bonnette told Athens Police Officer Bill Carlow and the other participating officers that Hurd had shot his girlfriend, that he was armed and should be considered dangerous, and that he was a

known drug user. He also showed Officer Carlow a photograph of Hurd.

When the officers arrived at 1019 Third Street, they "set up a perimeter around the residence on the outside of the yard." Officer Carlow observed other officers with weapons drawn run toward a car parked in the backyard yelling for the occupants to "show their hands." Three males exited the car, one of which was later identified as the fugitive Hurd. Appellant got out from the front passenger side and appeared to be walking away when Athens Police Detective Parkins ordered him to the ground where he lay face down. Officer Carlow handcuffed Appellant, rolled him on his side, and swept his hand over his oversized, low-slung, dark baggy pants. As he did this, Officer Carlow observed what appeared to be a clear orange prescription bottle "poised" at the edge of Appellant's pants pocket. Officer Carlow could clearly see numerous rock-like objects in the bottle, which he believed to be crack cocaine. The bottle contained twenty-four white rocks later confirmed to be cocaine. Hurd and Appellant were arrested at the scene. The third occupant of the vehicle was released.

Standard of Review

In reviewing a trial court's ruling on a pretrial motion to suppress, an appellate court must give almost total deference to the trial court's resolution of questions of historical fact that the record supports, especially when based on an evaluation of credibility and demeanor. ***Amador v. State***, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); ***Guzman v. State***, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The evidence is examined in the light most favorable to the trial court's ruling. ***Wilson v. State***, 311 S.W.3d 452, 458 (Tex. Crim. App. 2010). This same standard also applies to mixed questions of law and fact if the resolution of those questions turns on an evaluation of credibility and demeanor. ***Amador***, 221 S.W.3d at 673; ***Guzman***, 955 S.W.2d at 89. Appellate courts review de novo "mixed questions of law and fact" that do not depend upon credibility and demeanor. ***Amador***, 221 S.W.3d at 673; ***Guzman***, 955 S.W.2d at 89.

Applicable Law

A brief investigative stop is authorized by the Fourth Amendment once an officer has a reasonable suspicion that an individual is engaged in criminal activity. ***Terry v. Ohio***, 392 U.S. 1, 25-26, 88 S. Ct. 1868, 1882, 20 L. Ed. 2d 889 (1968). Suspicion is something less than probable cause but more than a mere hunch. ***Derichsweiler v. State***, 348 S.W.3d 906, 916 (Tex. Crim. App. 2011). A stop is deemed an investigative detention when a police officer detains a person

reasonably suspected of criminal activity to determine his identity or to momentarily maintain the status quo to garner more information. ***Hoag v. State***, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987). The reasonableness of a temporary detention must be examined in the light of the totality of the circumstances. ***Balentine v. State***, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002). It is justified when the detaining officer has specific, articulable facts which, taken together with rational inferences from those facts, lead him to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity. ***Id***.

In an investigative detention, officers may use such force as is necessary to effect the goal of the detention. ***Rhodes v. State***, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997). Handcuffing of the person detained is ordinarily not proper in an investigative detention, but it may be resorted to in special circumstances such as when necessary for officer safety or to thwart a suspect's attempt to frustrate further inquiry. ***Id.***

In making an investigative stop based upon reasonable suspicion that criminal activity is afoot, the officer, for his own safety, may conduct a frisk or patdown search for weapons of the person investigated. ***Terry***, 392 U.S. at 26-27, 88 S. Ct. at 1882-83. However, the officer may conduct a patdown search incident to the detention only if he can point to objective particularized facts leading him to reasonably conclude that the suspect might possess a weapon. ***Sibron v. New York***, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903 (1968); ***Carmouche***, 10 S.W.3d at 329. A police officer's reasonable belief that a suspect is armed and dangerous may be based upon the nature of the suspected criminal activity. ***Terry***, 392 U.S. at 27-28, 88 S. Ct. 1882-83; ***Carmouche***, 10 S.W.3d at 330. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." ***Terry***, 392 U.S. at 27, 88 S. Ct. at 1883.

Discussion

Appellant claims the officers lacked the requisite reasonable suspicion of criminal activity on his part to detain him. He argues that he was merely in the vehicle with the fugitive, and the arrest warrant for Hurd did not describe or refer to him. He argues that mere presence at the scene of the execution of the arrest warrant for Hurd did not suffice to justify his detention. Since neither Detective Parkins nor Officer Carlow had reason to believe he had been, was, or was about to be engaged in criminal conduct, Appellant insists that he was illegally detained.

When the officers rushed the car with guns drawn shouting for the three occupants to get out and "show their hands," they could not tell which of the three was the fugitive wanted for attempted murder. But they had good reason to believe that at least one of the three was armed, had used a firearm in committing the attempted murder, and was dangerous. They also had reason to suspect that Hurd's companions might also be armed. It is safe to assume that the officers correctly thought that speed and surprise were essential to prevent Hurd's escape and to minimize the chance of violent resistance. Appellant argues that Officer Carlow had been shown a photograph of Hurd before the raid, but Officer Carlow had never seen Appellant or Hurd. It is reasonable to infer that in the feverish few moments immediately following their exit from the car, there was not time to safely and positively identify them until they were all detained. Appellant's detention was necessary for the officers' safety and to briefly preserve the status quo until the officers could positively determine which of the three was the fugitive.

Appellant maintains that even if Appellant's temporary detention was proper, Carlow's subsequent patdown search was not warranted. He contends that Officer Carlow could not point to specific, articulable facts that led him to reasonably suspect that Appellant was armed. In his testimony, Officer Carlow acknowledged that Appellant was cooperative, not combative, and that he did not hide his hands, reach in his pockets, or try to flee. Appellant argues the absence of several factors which, if present, serve to justify a patdown search. However, he ignores the special circumstances accompanying Hurd's apprehension. Neither Parkins nor Carlow had ever seen Hurd or Appellant. Both officers testified that they were attempting to arrest a fugitive believed to be armed and wanted for attempted murder. They believed his companions might also be armed. There was a clear need for surprise, speed, and the preservation of the status quo until the men had been positively identified. The same circumstances that authorized their detention justified the patdown search of Appellant. The situation was charged with a potential for violence. Concern for the officers' safety was properly a paramount concern. Appellant's sole issue is overruled.

DISPOSITION

The trial court's judgment is ***affirmed***.

BILL BASS
Justice

Opinion delivered March 30, 2012.
Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired Justice, Twelfth Court of Appeals sitting by assignment.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 30, 2012

NO. 12-11-00183-CR

ALBERT DEMETRIC KENNEDY,
Appellant

V.

THE STATE OF TEXAS,
Appellee

Appeal from the 392nd Judicial District Court
of Henderson County, Texas. (Tr.Ct.No. B-18,077)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be in all things **affirmed**, and that this decision be certified to the court below for observance.

Bill Bass, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Bass, Retired Justice, Twelfth Court of Appeals, sitting by assignment.

THE STATE OF TEXAS
M A N D A T E

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TO THE 392ND DISTRICT COURT of HENDERSON COUNTY, GREETING:

Before our Court of Appeals for the 12th Court of Appeals District of Texas, on the 30th day of March, 2012, the cause upon appeal to revise or reverse your judgment between

ALBERT DEMETRIC KENNEDY, Appellant

NO. 12-11-00183-CR; Trial Court No. B-18,077

Opinion by Bill Bass, Justice.

THE STATE OF TEXAS, Appellee

was determined; and therein our said Court made its order in these words:

"THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be in all things affirmed, and that this decision be certified to the court below for observance."

WHEREAS, WE COMMAND YOU to observe the order of our said Court of Appeals for the Twelfth Court of Appeals District of Texas in this behalf, and in all things have it duly recognized, obeyed, and executed.

WITNESS, THE HONORABLE JAMES T. WORTHEN, Chief Justice of our Court of Appeals for the Twelfth Court of Appeals District, with the Seal thereof affixed, at the City of Tyler, this the _____ day of _____, 201____.

CATHY S. LUSK, CLERK

By:_____
Deputy Clerk