Opinion issued August 31, 2010

In The

Court of Appeals

For The

First District of Texas

No. 01-09-00530-CR

No. 01-09-00531-CR

ZALANDTRICE MARQUISE LEWIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case Nos. 1150487 & 1150488

MEMORANDUM OPINION

After the trial court denied his motion to suppress, Zalandtrice Marquise Lewis pled guilty to possession of codeine[1] and to possession of cocaine with the intent to deliver.[2] He also pled true to a prior felony enhancement paragraph in each indictment.[3] Pursuant to his plea agreement, he was sentenced to twenty years in prison on both cases, to run concurrently. We determine whether the trial court abused its discretion in denying appellant's motion to suppress. We affirm.

Background

Appellant, driving alone in his own vehicle, was pulled over by Houston Police officers after they saw him speed, swerve and hit the right curb, and then swerve into the left lane, almost hitting another car. Thinking that appellant might be intoxicated, officer Juan Rangel activated his emergency lights and appellant slowed to about 10 to 15 miles per hour, and, some one-half mile later, pulled over.

As Rangel approached the driver's side of the car, he saw appellant reach toward the back seat and noted that appellant kept nervously looking over his shoulder. When appellant rolled down the driver's side window, Officer Rangel

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1 Trial court cause number 1150487; appellate court cause number 01-09-00530-CR. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.114(a),(e) (Vernon 2010), 481.105 (Vernon 2010)(more than 400 grams).

2 Trial court cause number 1150488; appellate court cause number 01-09-00531-CR. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(a), (e), 481.102 (3)(D) (Vernon 2010)(more than 200 grams and less than 400 grams).

3 *See* TEX. PENAL CODE ANN. § 12.42 (c)(1) (Vernon Supp. 2009).

smelled raw unburnt marijuana emanating from inside the vehicle. Illuminating the car's front ashtray with his flashlight, Rangel saw a "long and skinny" "joint," a "marijuana cigar," curved and thinner than a regular cigar. To Rangel, the joint appeared to have "just been prepared" and made from a cigar that had been altered by having its tobacco replaced with marijuana.[4]

Rangel ordered appellant out of the car, believing, based on the odor of marijuana and the appearance of the joint, that it was marijuana. Appellant opened the door and announced, "I'm an informant for HPD narcotics." Rangel believed appellant was trying to divert his attention, asked appellant to turn around, and informed him that he was being arrested for possession of marijuana. When Rangel sought to cuff him, appellant struck the officer in the chest, and ran away. Rangel caught him and, subsequent to a struggle requiring the assistance of Rangel's partner, Officer Taiwan Parker, appellant was arrested.

A clear plastic bag containing marijuana and $1,995 in cash was found in the pockets of appellant's jeans, and the inventory search of the vehicle attendant to his arrest produced a bottle of codeine cough syrup, 68 grams of crack cocaine, and 202.4 grams of powder cocaine.

Appellant was charged, in two separate indictments: for possession of at least 400 grams of codeine with the intent to deliver and possession of 200-400

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[4] Rangel testified that he had considerable experience as a police officer in recognizing the odor of marijuana and recognizing marijuana joints.

grams of cocaine with the intent to deliver, both enhanced by his prior felony conviction. Motions to suppress asserting no probable cause for arrest were heard in both cases, at which appellant called officers Rangel and Parker. Appellant did not testify. The trial court denied the motions to suppress and appellant subsequently pled guilty in both cases pursuant to a plea bargain.[5]

Motion to Suppress

In three issues, appellant complains about the trial court's denial of his motions to suppress, asserting that the trial court erred in denying the motion to suppress in violation of (1) the Fourth Amendment to the United States Constitution, (2) Article I, § 9 of the Texas Constitution, and (3) article 38.23 of the Texas Code of Criminal Procedure.[6] Appellant argues all three issues together and does not provide a specific discussion or analysis under any provision other than the Fourth Amendment. In his unitary argument, appellant asserts that there was no probable cause to arrest him and therefore the evidence found in the

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[5] Several months later, after the trial court's jurisdiction had expired over the case, appellant filed motions in the trial court requesting the court to file findings of fact and conclusions of law regarding the motions to suppress in both cases. The trial court denied the request. Appellant does not complain on appeal about the trial court's denial of his request, nor has he requested that we abate this appeal and order the trial court to enter such findings.

[6] *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005) ("No evidence obtained by an officer or other person in violation any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.").

subsequent inventory search of his vehicle should have been suppressed as "fruit of the poisonous tree."[7] *See State v. Iduarte*, 268 S.W.3d 544, 550 (Tex. Crim. App. 2008) (recognizing the "fruit of the poisonous tree" doctrine under which even indirect products of Fourth Amendment violations are excluded).[8]

We review a trial court's decision denying a motion to suppress for an abuse of discretion, under a bifurcated standard of review, giving almost total deference to the trial court's determination of historical facts that depend on credibility and reviewing de novo the trial court's application of the law to those facts. *See Balentine v. State*, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). In a suppression hearing, the trial judge is the sole trier of fact and judge of the credibility of the witnesses. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). When, as here, the trial court makes no explicit findings of historical fact, we review the evidence in the light most favorable to trial court's ruling, and assume the trial court made implicit findings of fact supported in the record. *See Balentine*, 71 S.W.3d at 768.

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[7] Appellant does not raise any other challenge to the inventory search.

[8] However, the court of criminal appeals also noted that evidence should not be classified as fruit requiring exclusion merely because it would not have been discovered "but for" the primary violation and that the more apt question was whether the evidence objected to came as a result of the exploitation of that illegality or by a different means that was sufficiently distinguishable so as to be purged of the primary taint. *State v. Iduarte*, 268 S.W.3d 544, 550–51 (Tex. Crim. App. 2008).

Although listing three issues on appeal, appellant raises only one argument. Appellant acknowledges that, under well-established authority, the odor of marijuana coming from his vehicle gave Officer Rangel probable cause *to search* appellant's vehicle. *See United States v. Johns*, 469 U.S. 478, 482, 105 S. Ct. 881, 884 (1985). But appellant asserts that probable cause to search is distinct from probable cause to arrest, and he argues that while Rangel had probable cause *to search* the vehicle, Rangel did not have probable cause to *arrest* him for possession of marijuana. In support of his argument, appellant cites *State v. Steelman*, 93 S.W.3d 102 (Tex. Crim. App. 2002), for the proposition that odor of marijuana is insufficient to provide probable cause for a warrantless arrest.[9] He further asserts that the officer's view of the suspected marijuana in his car did not provide probable cause to arrest because the officer could not be sure that the "joint" contained marijuana without actually smelling it. Appellant provides no authority for the latter contention.[10]

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[9] Under state law, an officer may arrest a person without a warrant only if (1) probable cause for the arrest exists and (2) at least one of the statutory exceptions to the warrant requirement is met. *See McGee v. State*, 105 S.W.3d 609, 614 (Tex. Crim. App. 2003). Appellant challenges only the first of these two requirements. However, we note that an officer may arrest a person without a warrant for any offense committed in his presence or within his view. *Id*.; *see also* TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 2005).

[10] Appellant's sole citation for this argument is *Shelley v. State*, 101 S.W.3d 606, 611 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). In *Shelley*, we held that officers had reasonable suspicion to detain a person based on their observation that the person was carrying a baggie that appeared to contain narcotics. *Id*. *Shelley* did

In order to establish probable cause to arrest, the evidence must show that, at the time of the arrest, "the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense." *Steelman*, 93 S.W.3d at 107 (quoting *Beverly v. State*, 792 S.W.2d 103, 105 (Tex. Crim. App. 1990)) (internal quotations omitted). In other words, probable cause to search requires evidence that a crime has been committed or is being committed in some particular place, while probable cause to arrest requires evidence that a crime has been committed or is being committed by a particular person. *See Parker v. State*, 206 S.W.3d 593, 596–97 (Tex. Crim. App. 2006). Thus the first portion of a probable cause analysis, whether there is evidence that a crime has been or is being committed, is identical as to both probable cause to search and probable cause to arrest. *See id.* at 596. It is only in the second portion of the probable cause analysis—whether the probable cause points to a particular place (permitting a search) or to a particular person (permitting an arrest)—that probable cause *to search* and probable cause *to arrest* differ. *Id.*

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not involve a question of probable cause to arrest and does not support appellant's contention that such evidence would not provide probable cause to arrest. Probable cause to arrest was simply not an issue before us in *Shelley*.

In *Steelman*, officers smelled the odor of marijuana coming from inside a house after the door was opened, entered the home without consent, and arrested all persons inside. *Steelman*, 93 S.W.3d at 104. In holding that the officers did not have probable cause to arrest the man who opened the door for possession of marijuana without a warrant, the Court of Criminal Appeals stated that the smell of burning marijuana coming from a house in which several people were present, standing alone, did not give officers probable cause to believe that the man who had opened the door had committed the offense of possession of marijuana in their presence. *Id.* at 108. The court noted that an arresting officer "must have specific knowledge that the person to be arrested has committed the offense" and that, in that case, the officers "had no idea who was smoking or possessing marijuana, and they certainly had no particular reason to believe that [Steelman] was smoking or possessing marijuana." *Id.* at 108, 109.

The Court of Criminal Appeals has subsequently clarified that *Steelman* does not stand for the proposition that the odor of marijuana was insufficient to establish probable cause to believe that someone had committed or was then committing the offense of possession of marijuana. *See Parker*, 206 S.W.3d at 598; *Estrada v. State*, 154 S.W.3d 604, 608 (Tex. Crim. App. 2005). Rather, *Steelman* simply stands for the well-established principle that, in order for there to be probable cause to arrest, the evidence must "point like a beacon to the specific

person to be arrested," and that the odor of marijuana coming from a house with multiple people inside, standing alone, was insufficient to establish that the particular person arrested had committed an offense in the officer's presence. *Parker*, 206 S.W.3d at 597, 598; *Estrada*, 154 S.W.3d at 608. Moreover, the *Parker* court noted, the odor of marijuana alone could be dispositive to establish probable cause in some circumstances, and the odor of marijuana could also be used as a factor, along with other facts, that, viewed in their totality, could lead a reasonable officer to conclude, with a fair probability, that a crime was being committed. *Parker*, 206 S.W.3d at 599–600.

In the present case, the evidence established that appellant was the only person in the car at the time that the odor of marijuana was detected and that a suspected marijuana joint was seen near appellant. Although appellant argues that the suspected marijuana joint could not supply probable cause to arrest unless the officer actually knew that it was marijuana by a confirming smell test, the U.S. Supreme Court has held that an officer need not have actual confirmation of the illegality of a substance in order to have probable cause. *See Texas v. Brown*, 460 U.S. 730, 741–42, 103 S. Ct. 1535, 1543 (1983) (holding that probable cause merely requires that facts available to officer would warrant man of reasonable caution to believe that items are contraband; probable cause did not require showing that such belief was correct or more likely true than false; and police

officer did not have to have "near certainty" or "know" that items were contraband in order to have probable cause); *see also Delgado v. State*, 718 S.W.2d 718, 721 (Tex. Crim. App. 1986) (stating, in upholding warrantless arrest for possession of heroin thought to be in hypodermic syringe, "The standard is 'probable cause,' not 'proof beyond a reasonable doubt.' Thus the fact that the hypodermic syringe . . . later was shown not to contain a controlled substance . . . is of no consequence.") Accordingly, Rangel was not required to confirm that the suspected joint actually contained marijuana before he could have probable cause to arrest appellant for possession of marijuana. *See Delgado*, 718 S.W.2d at 721.

Under the totality of the circumstances of this case, the evidence was "sufficient to warrant a prudent man in believing that [appellant] had committed or was committing" the offense of possession of marijuana. We hold that the trial court did not abuse its discretion in denying appellant's motion to suppress, and we overrule all three of appellant's issues.

Conclusion

We affirm the judgment of the trial court in each cause number.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

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