Opinion issued October 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00970-CR

HERBERT BANNY GIBBS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Case No. 1166203

MEMORANDUM OPINION

Appellant Herbert Banny Gibbs plead guilty to possession of a controlled substance with intent to deliver[1] and the trial court sentenced him to sixteen years

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[1] The substance was more than 400 grams of dihydrocodeinone. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3), 481.112(a), (f) (West 2010).

in prison. In two points of appeal, Gibbs argues that his consent to search was coerced and that he was without authority to give consent.

We affirm.

Factual Background

Houston police officers began surveillance of appellant pursuant to a tip that he was involved in drug trafficking. Officer Kowal testified that he saw appellant leave his apartment carrying a garbage bag, drive to a storage facility, punch in a code on a key pad, enter, and thereafter exit the facility with an object that he then placed on the bed of his truck. Officer Robertson testified that appellant then drove to a Walgreen's parking lot, where a dark-colored Tahoe was parked, took something from the bed of his truck, and exchanged it with the Tahoe driver for an unidentifiable wad, which he officer believed to be cash. Both appellant's vehicle and the Tahoe drove out of the parking lot immediately thereafter.

After appellant left the scene, the driver of the Tahoe was arrested and found to be in possession of 1,500 tablets of hydrocodone. Officer Kowal testified that the bag with the pills appeared to be the same bag he had seen appellant carrying when he left the storage facility.

Officer Gamble followed appellant to a store where appellant met his wife, Betty Brown. Gamble detained appellant, put him in the back of the patrol car, explained the situation to Brown, and read appellant his *Miranda* warnings.

Officer Gamble testified that appellant said he understood the legal warnings that were given to him.

Officer Gamble testified that Brown told him that the storage unit was in her name and she paid the bill, but that appellant used the unit and she had nothing to do with it. She asked if she was going to go to jail if anything was found in the unit. Gamble assured her that she would not go to jail for anything found in the unit and sought her consent to search the unit. Gamble further testified that she did not consent but did state that she did not want to go to jail and offered to take Gamble to the storage unit, traveling there in her own car.

Brown, on the other hand, testified that, when she asked the police officers what was going on, they said "y'all been selling pills," and that she felt that statement included her. She testified that Officer Gamble told her that if she did not take him to the storage facility, he would take her to jail. Despite the fact that she was not in custody or handcuffs, Brown testified that she felt obligated to do what Officer Gamble told her to do and did not feel free to leave. She did not volunteer.

When they arrived at the storage unit in their separate cars, police were already there, as was appellant. Officer Kowal testified that he identified himself to appellant and described the details of the investigation to him, including the fact that he was suspected of being a drug dealer who had more drugs in the storage

unit. Officer Kowal testified that appellant seemed to understand the police officer's purpose and when asked if he understood the legal warnings that had been given to him, appellant said that he did. Officer Kowal testified that Officer Goines asked appellant for a written consent to search the storage unit, explained the details of the consent to appellant, and told him it was voluntary. Officer Kowal testified that appellant read the consent, expressed no concerns about signing, and signed it. Appellant then gave the officers the gate code and the key to the storage unit and directed them to unit 519.

Appellant, however, testified that when he arrived at the storage unit he was surrounded by six or seven officers and felt he had no power to refuse consent to search. He testified that no one told him he did not have to consent to the search, but that instead they told him if he did not comply they would get a search warrant.

Appellant testified that he thought that because his name was not on the lease, he was protected and had the law on his side. Accordingly, when presented with a consent form, he testified that he signed it after writing the words "I do not understand why you asking me to sign this" at the top of the form. According to appellant, Officer Goines crumpled up that consent and threw it away. Appellant further testified that he was told that Brown would go to jail if he did not sign the consent form. Appellant testified that he needed Brown to stay out of jail so that she could pay for his lawyer. When Officer Goines handed him another consent

form, appellant testified that he had already made up his mind that he was protected because, as the storage unit was in Brown's name and not his, he believed that signing the consent meant nothing. He also believed that Brown would go to jail if he did not sign, and the "final piece" that caused him to sign the consent was to make sure Brown did not go to jail so she would be able to get to the money to pay his lawyer. Appellant signed the consent. Appellant also testified that, while Brown would not tell a lie, he personally would lie about anything. After appellant signed the consent, gave the officers the gate code and key to the storage unit, and identified the unit in question, the officers entered the storage unit and found approximately sixty pounds of prescription drugs, the majority of which was hydrocodone.

Procedural Background

Appellant was charged with the felony offense of possession of a controlled substance with intent to deliver at least 400 grams of dihydrocodeinone. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3), 481.112(a), (f) (West 2010). The indictment included two enhancement paragraphs alleging prior felony convictions. Appellant filed a motion to supress challenging the admissibility of the evidence, specifically the hydrocodone, which he alleges was obtained in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments

to the United States Constitution, as well as Article I, Section 9 of the Texas Constitution.

After an evidentiary hearing, the trial court denied appellant's motion to suppress and entered findings of facts and conclusions of law concerning: (1) the voluntariness of the consent to search; (2) the details of the surveillance, arrest, and the signing of the consent; and (3) what the officers found in the storage unit. The court also entered conclusions of law as follows: (1) appellant was lawfully arrested; (2) he was given his statutory warnings; (3) he understood his warnings; (4) he "intelligently, freely and voluntarily" agreed to the consent to search; (5) he "intelligently, freely and voluntarily" signed a written consent to search; and (6) no force, promises, threats, or intimidation were used by police authorities either before or during the appellant's giving his consent to search.

Appellant entered a plea of guilty. The State agreed to abandon the two enhancement paragraphs, and the trial court granted appellant permission to appeal its ruling on the motion to supress. The trial court assessed punishment at sixteen years' confinement and this appeal followed.

Analysis

Appellant argues that his consent to search was coerced and he was without authority to consent to the search of the storage unit. By challenging the

voluntariness of consent and the authority to consent, appellant challenges the trial court's denial of appellant's motion to suppress evidence.

A. Standard of Review

We review a trial court's decision in 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. *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). This is especially true when the trial court's findings turn on evaluating a witness's credibility and demeanor. *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000). We give the same amount of deference to the trial court's ruling on mixed questions of law and fact when the question is resolved by evaluating credibility and demeanor. *Id.* at 856. Only pure questions of law are considered de novo. *Id.*

When, as here, a trial court makes explicit findings of fact, we determine whether the evidence, viewed in the light most favorable to the trial court's ruling, supports the findings. *See State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). If the trial court's ruling is reasonably supported by the record and is correct on any theory of law applicable to the case, the reviewing court will sustain it upon review. *Villareal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

B. The Voluntariness of Appellant's Consent

In his first issue, appellant asks us to decide if his consent to search was coerced and therefore not freely and voluntarily given.

1. The Law

Consent is among the most well-established exceptions to the presumption that a warrantless search is unreasonable. *Johnson v.* State, 226 S.W.3d 439, 443 (Tex. Crim. App. 2007); *Rodriguez v. State*, 313 S.W.3d 403, 406 (Tex. App.—Houston [1st Dist.] 2009, no pet.). For such a consent to be valid, however, it must be voluntary. *Reasor v. State*, 12 S.W.3d 813, 817 (Tex. Crim. App. 2000). A search made after voluntary consent is not unreasonable. *See id.* at 818. Whether consent was voluntary involves a question of fact that is determined from the totality of the circumstances. *Gutierrez v. State*, 221 S.W.3d 680, 686−87 (Tex. Crim. App. 2007); *Cadoree v. State*, 331 S.W.3d 514, 520 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

In the context of a motion to suppress, the State must prove voluntary consent by clear and convincing evidence. *See Carmouche*, 10 S.W.3d at 331. In order to be voluntary, consent must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S. Ct. 2041, 2048 (1973)). Consent must be shown to be positive and unequivocal. *Allridge v. State*, 850 S.W.2d 471, 493 (Tex. Crim. App.

1991). We consider the following factors in determining voluntariness: appellant's age, education, and intelligence; the length of detention; any constitutional advice given to the defendant; the repetitiveness of the questioning; and the use of physical punishment. *See Reasor*, 12 S.W.3d at 818. We also consider whether appellant was in custody, handcuffed, or had been arrested at gunpoint; whether *Miranda* warnings were given; and whether appellant had the option to refuse to consent. *See Flores v. State*, 172 S.W.3d 742, 749–50 (Tex. App.—Houston [14th Dist.] 2005, no pet.). In examining the totality of the circumstances surrounding consent to search, the trial court should consider the circumstances before the search, reaction of the accused to pressure, and any other factor deemed relevant. *Reasor*, 12 S.W.3d at 818.

2. Trial

The trial court made findings of fact and conclusions of law to the effect that: (1) appellant consented to search the storage unit in question intelligently, freely, and voluntarily; (2) he intelligently, freely, and voluntarily signed a written consent to search; and (3) no force, promises, threats, or intimidation were used by police authorities either before or during appellant's giving his consent to search the storage unit. Accordingly, we must determine whether the evidence, viewed in the light most favorable to the trial court's ruling, supports the findings. *See Kelly*, 204 S.W.3d at 818.

a. The State's Evidence

The State called four police officers to the stand to testify concerning the surveillance operation, appellant's arrest, and the search of the storage unit. Each testified that appellant signed the consent of his own free will and without coercion.

Officer Kowal testified as follows: (1) he asked Officer Gamble if appellant had been given his legal warning and was told that he had; (2) Officer Kowal asked appellant if he understood his legal warnings and appellant said he did; (3) appellant appeared coherent and not mentally deficient; (4) Officer Kowal heard Officer Goines explain to appellant that they would like his consent to look in the storage unit and further explain the details of the consent; (5) appellant did not express concern to him about signing the consent; (6) appellant did not ask questions about the consent; and (7) Officer Kowal never saw appellant threatened or heard a threat made towards Brown.

Officer Richardson also testified as to the voluntary nature of the consent. She testified that: (1) no one threatened appellant, but that Officer Goines gave him the consent form and he signed; (2) she heard Officer Goines talk to him about the consent and read appellant's warnings to him; (3) she got the impression that appellant understood the consent form and voluntarily gave his consent; and (4) the police did nothing to make appellant worry about Brown being arrested.

Officer Gamble testified that he arrested appellant and read him his *Miranda* warnings. He further testified that appellant indicated that he understood those warnings. He denied that he ever threatened Brown in any way or did anything to make appellant believe that he was going to arrest Brown if consent was not given. Officer Goines testified that: (1) back at the storage unit, appellant's warnings were read again; (2) he read the consent to appellant, explained it, and asked if he had questions, as was his regular practice; (3) appellant asked no questions about the consent, but only wanted to make sure Brown would not be charged; and (4) he never told appellant that his wife would be arrested and he never threatened her.

b. Appellant's Evidence

Brown testified that Officer Gamble told her that if she did not take him to the storage unit, he would take her to jail and thus she felt obligated to do so. She further testified that she called her lawyer and passed the phone to Officer Gamble, and that after the phone call Officer Gamble said, "All bets are off. Everything I find in the storage belongs to you." She further testified that Officer Goines told her that if she signed a release to have her home searched, he would not take her to jail.

Appellant also testified that, while he was in custody and surrounded by officers, the police asked permission to search the storage unit. He further testified that, as his name was not on the lease, he thought he could use that fact as an

excuse not to let them in. According to appellant, Officer Goines told him that Brown was on her way over there to let the police in and both he and Brown were going to jail. Because appellant needed Brown free to be able to secure the money to pay his lawyer, he signed the consent form.

c. Issues Raised Concerning Voluntariness of Consent

In light of the fact that he was under arrest at the time of the consent, surrounded by officers, and believed his wife was going to be arrested, appellant's testimony raises questions about the voluntariness of his consent.

While being in custody and in the presence of uniformed police officers are factors to be considered in determining the voluntariness of consent, these are not determinative and can be overcome by demonstrating the lack of coercion in acquiring consent. *See Reasor*, 12 S.W.3d at 817–18. In *Reasor*, the defendant was arrested at gunpoint and was handcuffed when he gave the State consent to search. *Id.* at 818. Moreover, the police's entry into his home was illegal and the consent was given after they had taken the defendant inside his home. *Id.* The Court of Criminal Appeals, however, found that, despite these facts, several factors supported the State's contention that it proved by clear and convincing evidence that the defendant voluntarily consented to the search of the house. *Id.* at 819. These factors included the defendant having been given his *Miranda* warnings twice and signing a consent to search form. The court found, accordingly, that "the

record demonstrate[d] that appellant understood his legal rights and chose not to assert them at that time." *Id.* In consideration of all the circumstances "and giving proper deference to the trial court's determination," the Court of Criminal Appeals held that the State proved by clear and convincing evidence that appellant had consented to the police search of his home. *Id.* at 818.

Similarly, although appellant signed the consent form while in handcuffs, the evidence demonstrates that he was cooperative and assisted the officers in their investigation. He gave them the gate code and the key to the storage unit, as well as instructing the officers which unit to search. Moreover, he had his *Miranda* warnings read to him more than once, and appeared to be coherent and to understand and appreciate the warnings. Officer Goines testified that he read and explained the consent form to appellant and that the form itself stated that appellant had the right to refuse consent.

Moreover, there is no evidence of any physical coercion or punishment of appellant, nor evidence of lengthy detention or unduly repetitive questioning of appellant, who had two years of college education and had previously owned his own business. Beyond his formal education, appellant had a lengthy involvement with narcotics and was well aware of the implications of consent forms. *See id.* (listing age, education, intelligence, length of detention, repetitiveness of questioning, and use of physical punishment as factors in determining

voluntariness). None of these factors indicate that appellant's consent to search was involuntary or coerced.

We conclude that the fact that appellant was in custody and in the presence of uniformed police officers at the time he signed the consent form does not overcome the "almost complete" deference we are to show to the trial court's conclusion that the consent was voluntary. *See Schneckloth*, 412 U.S. at 248–49, 93 S. Ct. at 2059.

Nor does appellant's fear of his wife's potential arrest require us to find that appellant's consent was involuntary. Were the evidence to establish that the police officers told appellant his wife would be arrested if he refused to sign the consent form, the voluntariness of the consent would surely be in question. *See Flores*, 172 S.W.3d at 752 ("Such antagonistic action by the police against a suspect's family is a factor which significantly undermines the voluntariness of any subsequent consent given by the suspect."). The evidence, however, does not so establish.

While appellant and Brown both testified that the officers had threatened Brown with arrest, that testimony is contradicted by the testimony of all four officers involved, each of whom testified that no such threat had been made. Thus the trial court's findings in this matter turned entirely upon its evaluation of the witnesses' "credibility and demeanor." *See Ross*, 32 S.W.3d at 856. The trial judge presiding at a suppression hearing 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). In light of the deference to be given the trial court's findings and the facts herein, we conclude that the State met its burden to prove the voluntariness of appellant's consent.

d. Conclusion

We overrule appellant's first issue.

C. Appellant's Authority to Consent

In his second issue, appellant asks us to decide if he had authority to give consent to the search of the storage unit.

1. The Law

The "co-occupant consent rule," another exception to the Fourth Amendment rule prohibiting searches without warrants, recognizes the validity of searches with the voluntary consent of a person possessing authority. *Georgia v. Randolph*, 547 U.S. 103, 109, 126 S. Ct. 1515, 1520 (2006). That person may be the person against whom evidence is sought, or a fellow occupant who shares common authority over the property, when the suspect is absent. *Id.* A third party may properly consent to a search when he has control over and authority to use the premises being searched. *Balentine*, 71 S.W.3d at 772 (citing *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988 (1974)). This exception for consent extends even to entries and searches with the permission of a co-owner whom the

police reasonably, but inaccurately, believe to possess shared authority as an occupant. *Id.*

It is not a party's legal property interest that determines authority to consent, but instead, consent derives from the mutual use of the property. *Welch v. State*, 93 S.W.3d 50, 53 (Tex. Crim. App. 2002). The relevant inquiry is not which party has a superior interest in the property, but whether the party giving consent has joint access to and control of the property for most purposes at the time consent is given. *Id.* Third-party consent is valid if the third party has mutual access and control over the property searched and if it can be said that appellant "assumed the risk" that the third party would consent to a search. *Id.*

The consent of one who possesses common authority over premises or effects is valid as against an absent, non-consenting person with whom that authority is shared. *Matlock*, 415 U.S. at 170, 94 S. Ct. at 993. If, however, the objecting party is present, his objection is "dispositive as to him, regardless of the consent of a fellow occupant." *Randolph*, 547 U.S. at 122−23, 126 S. Ct. at 1528. The State has the burden of establishing common authority. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797 (1990).

2. Application of Law to the Facts

Here, Officer Gamble's testimony regarding his conversation with Brown about the storage unit established that Brown had nothing to do with the storage

unit— other than that the lease was in her name and she paid the bill—that appellant alone used the storage. Brown herself testified that only appellant used the storage unit and that she had nothing to do with it apart from paying the bill. Brown testified that she had a key to the storage unit but never kept anything in there. Appellant possessed the gate code and the keys to the unit and he alone used the storage unit. We conclude that appellant had control and authority over the premises being searched and therefore he could properly consent to a search. *See Matlock*, 415 U.S. at 171, 94 S. Ct. at 993.

Appellant argues, however, that Brown had superior authority to consent to search. According to appellant, while *Matlock* holds that the consent of one who possesses common authority over premises or effects is valid against the absent, non-consenting person with whom the authority is shared, *Matlock* does not apply when a person with a superior privacy interest is present. *See United States v. Impink*, 728 F.2d 1228, 1234 (9th Cir. 1984).

Appellant's claim that Brown had the superior privacy interest is, however, without support in the record or the law. The record reveals that Brown's only connection with the storage unit was that her name was on the lease and that she paid the bills, while appellant was the only party who actually used the unit. As we have noted above, it is not a party's legal property interest that determines authority to consent, but rather, consent derives from the mutual use of the

property. *Welch*, 93 S.W.3d at 53. We conclude that Brown did not have a superior privacy interest to appellant in the storage unit.

Furthermore, the facts in this case are distinguishable from *Impink*. *Impink* involved a situation in which a landlord granted consent to search premises when the tenant was present and objected. *Impink*, 728 F.2d at 1234. The Ninth Circuit held that "where a suspect is present and objecting to a search, implied consent by a third party with an inferior privacy interest is ineffective." *Id.* at 1234.

Here, while Brown was indeed present when the search took place, the record does not reveal that she objected. Officer Gamble testified that when he asked her if she would consent to the search, Brown did not refuse consent but only reiterated that she did not want to go to jail. When he assured her that she was not going to jail, Officer Gamble testified that Brown volunteered to take him to the storage unit.

Brown testified that she was threatened with jail if she did not take Officer Gamble to the storage unit. Brown did not testify, however, that she was asked for and refused to give consent to enter the storage unit. Accordingly, *Impink* is distinguishable.

Finally, the Texas Court of Criminal Appeals has declined to follow the holding in *Impink*. *See Welch*, 93 S.W.3d at 55. Instead, the court in *Welch* held that the relevant inquiry is not whether the defendant held a superior privacy

interest to the third party granting consent, but: (1) whether that third party "ha[d] mutual access to and control over the property for most purposes" at the time he granted consent; and (2) whether the defendant had "assumed the risk" in giving such joint access and control that the third party would consent to a search. *Id.* at 55, 57.

We conclude that the answer to these questions in this case, as in *Welch*, is "yes." Appellant had joint access and control over the storage unit when he signed the consent form. Brown assumed the risk that appellant would consent to a search when she gave up the storage unit to his use. Moreover, as in *Welch*, although Brown was present at the search and withheld consent, she did not explicitly refuse consent. We hold that appellant had authority to give consent for the warrantless search of the storage unit.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Keyes, concurring without opinion.

Do not publish. TEX. R. APP. P. 47.2(b).