Opinion issued October 20, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-01071-CR

ANTHONY CHRIS COLEMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1136428

MEMORANDUM OPINION

Appellant Anthony Chris Coleman plead guilty to possession of cocaine[1], and "true" to two prior felony convictions alleged for purposes of enhancement. The trial court assessed punishment at 45 years' confinement, in accordance with

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[1] Specifically, appellant plead guilty to possession with intent to deliver at least 400 grams of cocaine, a first-degree felony.

appellant's agreement with the State. Appellant brings this appeal to challenge the denial of his motion to suppress evidence seized from his vehicle in a warrantless search that produced evidence partially relied upon as probable cause for a warrant to search his home.

We affirm.

BACKGROUND

In October 2007, Officer John Huston received information about possible narcotics activity at appellant's address in Missouri City. The informant gave Officer Huston appellant's name and his address and told him there might be some narcotics activity that day. He told him that appellant was selling cocaine out of his house.[2] A computer search on the name and address revealed that appellant had numerous prior narcotics arrests and that several of the arrests occurred at this address.

Officer Steffenauer assisted Huston in the surveillance of the address, with Steffenauer going to the given address and Huston coordinating other officers from nearby. Officer Steffenauer saw a man arrive in a black Chevy Trailblazer, go inside the house for about twenty minutes, come out of the house carrying a brick-like object, and leave in the same truck. This man was later identified as Defer

[2] Three weeks before the date of arrest, the same source had provided appellant's name and address and said appellant was selling cocaine from his home. This informant called again on the day of the arrest in this case.

Elomean. Officers Huston, Steffenauer, and Ong, another narcotics officer, followed the vehicle, and Huston directed Officer Hamilton, a uniformed officer, to stop it for an observed traffic violation. A narcotics dog was brought in and when the dog "alerted" on the vehicle, the officers searched it and found a kilogram of cocaine hidden in the driver's side door panel. Officer Steffenauer noted that this package of cocaine was consistent with the package he had seen Elomean carry from appellant's address.

During this same period, Officer Patel, who was conducting surveillance of appellant's house, saw appellant leave in the white Tahoe previously parked at the home. Three officers, including Huston, followed the white truck and when Huston saw appellant commit at least two traffic violations, he directed uniformed Officer Adams to make the traffic stop. Adams turned on his emergency equipment but appellant continued to drive for nearly a mile, passing multiple locations where he could have pulled over.

Officer Patel, too, had followed appellant from his house and was driving alongside appellant's truck when Officer Adams turned on his emergency flashers. Patel saw appellant making movements as if he were hiding something in the center console of his vehicle and transmitted this observation by radio to Officer Huston. When appellant did not slow down or pull over immediately, Officer

Huston drove his unmarked car in front of the Tahoe, slowed down, and appellant then pulled into a parking lot.

As soon as appellant stopped his vehicle, Officer Adams again noticed appellant reaching under the seat and towards the center console. Adams testified that the appellant "tensed up" as Adams approached to remove appellant from the car, which, in his experience, was a direct indication that there was going to be a fight. Adams removed appellant from the truck and arrested him for evading arrest.

Officer Adams testified that, based on his training and fourteen years experience making narcotics arrests, appellant's furtive gestures while being pulled over indicated that he might have been hiding a weapon or narcotics. Likewise, Officer Patel testified that his training and experience as a narcotics officer led him to believe that appellant's movements and gestures indicated that he was hiding narcotics or a weapon. When Officer Adams tried to remove appellant from the vehicle, he ordered appellant to the ground, but appellant did not comply. Officer Adams then took him to the ground, handcuffed him, patted him down for weapons, and placed him in the back of the patrol car. Adams found no weapons but did find a "large wad of cash."

Officer Huston arrived as Adams was walking appellant to the patrol car. He and Officer Steffenauer looked in appellant's truck and noted that the center

console area was open. Huston also noticed a Sprite bottle containing a red liquid in the driver's side cup holder which, based on his training and experience as a narcotics officer for ten years, he believed was codeine. Officer Steffenauer entered the car and one of the officers opened the bottle and smelled it. Huston testified that it smelled like a liquid that is consistent with codeine. Officer Steffenauer then saw and pulled from the open console a clear plastic bag containing what appeared to be cocaine. Thereafter, the officers drove appellant's vehicle to a park near his Missouri City home. On advice from the District Attorney's office, Huston summoned a drug dog to the residence and once the dog "alerted" on the residence, Huston obtained a search warrant for the premises. The search warrant for the residence relied upon the drugs discovered in appellant's vehicle, as well as the dog's "alert" on the house.

Appellant filed a pretrial motion to suppress the results of the warrantless search of his vehicle, as well as to suppress the results of the search of his house based on the evidence derived from the warrantless search of the vehicle. The trial court denied the motion after hearing, stating:

> At this time the Motion to Suppress is denied. Specifically, I find that the officers had the right to arrest the defendant for the traffic violations and for evading arrest in that motor vehicle. I find that the search of the vehicle was authorized under the law as an inventory search, since they were responsible for the security of the vehicle at that time. I find that they had the right to inventory the car. Also, though it's not specifically part of the hearing, I make a finding that the search warrant is valid and that probable cause is stated in the

> affidavit. And that would be of the search warrant for the home, of course.

Appellant appeals from this denial of the motion to suppress evidence.

STANDARD OF REVIEW

We review the trial court's ruling on a motion to suppress for abuse of discretion. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We will affirm the ruling, therefore, "if it is reasonably supported by the record and is correct under any theory of law applicable to the case." *Ramos v. State*, 245 S.W.3d 410, 418 (Tex. Crim. App. 2008). We must view the evidence in the light that most favors the ruling, because the trial court is "uniquely situated" to observe the demeanor and the appearance of witnesses at the hearing and is "the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony." *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007) (citing *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000) (additional citations omitted)).

Where, as here, the totality of the circumstances test applies, we must (1) consider the circumstances without "isolating and then discounting each fact and circumstance" that may have influenced the trial court's ruling, and (2) defer almost totally to factual determinations by the trial court that are supported by the record. *See Wiede*, 214 S.W.3d at 28.

ANALYSIS

In two points of error, appellant argues that (1) the trial court's finding that the evidence was seized during an inventory search is not supported by the record and (2) the denial of appellant's motion to suppress evidence was error because the search cannot be upheld under any other exception to the warrant requirement. In its reply, the State does not argue that the evidence supports the trial court's findings concerning an inventory search, but rather that the search was permissible pursuant to the automobile exception to the warrant requirement and that the police were justified in conducting the search incident to appellant's arrest for evading by motor vehicle to uncover evidence relevant to the arrest offense. We will address appellant's second point of error first.

THE AUTOMOBILE EXCEPTION TO WARRANTLESS SEARCH

Evidence seized by police without a warrant may be admissible only if an exception to the Fourth Amendment's warrant requirement applies. *Neal v. State*, 256 S.W.3d 264, 282 (Tex. Crim. App. 2008). It is undisputed that the search of appellant's vehicle was warrantless. Thus the search was unreasonable per se. *See Wiede*, 214 S.W.3d at 24. Accordingly, the State must establish an exception to the warrant requirement. *Neal*, 256 S.W.3d at 282 (citing *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005)).

The Supreme Court has recently re-iterated that if there is "probable cause to believe a vehicle contains evidence of criminal activity," police officers are justified in searching "any area of the vehicle in which the evidence may be found." *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1721 (2009). A totality of the circumstances analysis controls whether probable cause to search without a warrant exists. *See Neal*, 256 S.W.3d at 282−83; *Whaley v. State*, 686 S.W.2d 950, 951 (Tex. Crim. App. 1985). In reviewing whether Officers Huston and Steffenauer had probable cause, we defer almost totally to the trial court's express or implied determination of historical facts, and review the court's application of the law of search and seizure to the facts found *de novo*. *See Wiede*, 214 S.W.3d at 25; *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000).

Probable cause to search exists when the totality of facts and circumstances known to the officer is sufficient to warrant a belief by a person of reasonable prudence that contraband or evidence of a crime will be found in the place to be searched. *See Wiede*, 214 S.W.3d at 24; *cf.*, *Neal*, 256 S.W.3d at 282 (stating that probable cause to search exists when there is a "fair probability" of finding inculpatory evidence at the location being searched) (citing *Wiede*, 214 S.W.3d at 24 n.29 (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)).[3]

[3] The Court of Criminal Appeals has described probable cause as "the sum total of layers of information, and not merely individual layers and considerations" upon

Facts and circumstances personally known to an officer encompass the officer's "training, knowledge, and experience," but the officer's subjective intent, motivation, or "hunch" are not. *See id.* at 25 (citing *United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 751 (2002); *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 1543 (1983) (additional citations omitted)). Probable cause may be based on an officer's training and investigative experience. *See Keehn v. State*, 279 S.W.3d 330, 336 (Tex. Crim. App. 2009) ("And based on his training and investigative experience concerning the production of methamphetamine, [the officer] had probable cause to believe that the tank contained anhydrous ammonia."). A finding of probable cause alone is sufficient to satisfy the automobile exception to the Fourth Amendment warrant requirement. *See Dixon v. State*, 206 S.W.3d 613, 619 n.25 (Tex. Crim. App. 2006).

"Furtive gestures" alone, however, are not sufficient for probable cause to conduct a warrantless search. *See Wiede*, 214 S.W.3d at 25; *Canales v. State*, 221 S.W.3d 194, 200 (Tex. App.—Houston [1st Dist.] 2006, no pet.). And while probable cause may arise from information supplied by a confidential informant, corroboration is required. *See Eisenhauer v. State*, 678 S.W.2d 947, 955 (Tex. Crim. App. 1988). Tips and information with no indicia of reliability require

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which a reasonable and prudent person acts. *Estrada v. State*, 154 S.W.3d 604, 609 (Tex. Crim. App. 2005).

something more, such as observed activity, to elevate the level of suspicion. *Parish v. State*, 939 S.W.2d 201, 204 (Tex. App.—Austin 1997, no pet.).

EVIDENCE OF PROBABLE CAUSE

Appellant claims that "apart from Officer Huston's claim that he could recognize liquid Codeine from its appearance alone" the State offered no evidence to show that the police had probable cause to believe appellant's vehicle contained contraband at the time of the warrantless search. The record, however, reveals sufficient evidence of probable cause to justify the warrantless search.

Initially, Officer Huston had information from an informant that appellant, a person who had been arrested for narcotics offenses numerous times, was selling drugs from his home, where some of his prior arrests had occurred, and that there would be narcotics activity that day. Although such a "tip" alone does not provide probable cause, the tip "combined with independent police investigation may provide a substantial basis for the probable-cause finding." *Lowery v. State*, 843 S.W.2d 136, 141 (Tex. App.—Dallas 1992, pet. ref'd) (citing *Janecka v. State*, 739 S.W.2d 813, 825 (Tex. Crim. App. 1987)). The police investigation in this case resulted in confirmation that appellant had a history of arrests for narcotics offenses at the very residence in question and the subsequent drug arrest of a man who, evidence suggests, obtained the drugs from appellant.

Further, when the marked patrol car turned on his emergency lights, appellant drove for almost a mile thereafter, all the while being observed by an officer making furtive gestures towards his center console while driving and immediately after he stopped. Two officers testified that they witnessed these movements and their extensive experience led them to believe appellant was hiding a weapon or narcotics at the time. "Furtive movements are valid indicia of *mens rea* and, when coupled with reliable information or other suspicious circumstances relating the suspect to the evidence of crime, may constitute probable cause." *Smith v. State*, 542 S.W.2d 420, 421 (Tex. Crim. App. 1976) (citing *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889 (1968)).

Finally, Officer Huston recognized the red liquid on the dash as probably being codeine. Although appellant dismisses this fact as of no importance, Huston's observations were based on his experience and training in narcotics and as such relevant to a finding of probable cause. *See Keehn*, 279 S.W.3d at 336; *Hayward v. State*, No. 01-08-00949-CR, 2009 WL 1813185, at *4 (Tex. App.—Houston [1st Dist.] June 25, 2009, pet. dism'd) (mem. op., not designated for publication) (officers' testimony that they recognized clear liquid in brown bottle as "very likely" PCP because it is typically transported in such bottles held not to be "hunch, surmise, or suspicion," but based on "their training and experience,

which the trial court expressly and properly considered as part of the totality of circumstances").

We hold, therefore, that the totality of circumstances known to the officers and presented to the trial court warranted a belief by a person of reasonable prudence that contraband would be found inside the vehicle and around the area of the center console. Accordingly, the court did not err by denying appellant's motion to suppress.[4]

We overrule appellant's second issue.

CONCLUSION

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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[4] Having determined that the warrantless search was justified by the automobile exception, we need not address appellant's first point of error which has been rendered moot.