Opinion issued May 3, 2012.

In The

Court of Appeals

For The

First District of Texas

NOS. 01-11-00069-CR
01-11-00070-CR

FERNANDO DAVALOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Case Nos. 1261747 & 1261748

MEMORANDUM OPINION

After the trial court denied his motion to suppress, appellant, Fernando Davalos, pleaded guilty to the offenses of possession with intent to deliver more

than 400 grams of cocaine[1] and possession with intent to deliver more than 400 grams of ecstasy.[2] The trial court then assessed punishment for each offense at 18 years' confinement to run concurrently. In his sole point of error, appellant complains that the trial court erred in denying the motion to suppress because the evidence against him was the product of an illegal search. We affirm.

BACKGROUND

On May 4, 2010, at approximately 10:50 p.m., appellant was asleep in his living room when six law enforcement officers in tactical uniforms arrived at his home. Two or three of these officers approached the front door and knocked, while the other officers remained in front of appellant's house. When appellant's mother opened the door, the officers told her they wished to speak with appellant and asked her to leave the front door open while she woke and retrieved her son.[3] Though appellant and his mother testified officers then entered the house without consent while the mother was retrieving her son, the officers testified the son came to the door and gave consent for the officers to enter. Once inside, the officers

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1 Trial court No. 1261747, appellate court No. 01-11-00069-CR.

2 Trial court No. 1261748, appellate court No. 01-11-00070-CR.

3 Appellant's mother testified at the suppression hearing that four officers knocked loudly on the door for approximately ten minutes while yelling for the mother to open the door. Additionally, one of the three officers who testified about the interaction at the front door with appellant's mother testified that officers instructed, rather than requested, appellant's mother to leave the front door open while she retrieved appellant.

performed a protective sweep of the home's first story, and then two or three officers sat with appellant at the kitchen table, while the others remained eight to ten feet away in another room. The officers told appellant they were conducting a narcotics investigation and asked for consent to search his home. After appellant consented orally to a search of his home, an officer asked appellant to read a consent form. The officer then read the consent form to appellant, and appellant signed the form. The subsequent search of appellant's home revealed the drugs underlying the offenses for which appellant was then arrested.

STANDARD OF REVIEW

In reviewing the trial court's ruling on a motion to suppress, we apply a bifurcated standard of review. *McKissick v. State*, 209 S.W.3d 205, 211 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (citing *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000)). We give almost total deference to the trial court's determination of historical facts that depend on credibility, while we review de novo the trial court's application of the law to those facts. *Id.* We review de novo the trial court's application of the law of search and seizure and probable cause. *Id.* (citing *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000); *Wilson v. State*, 98 S.W.3d 265, 271 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd)).

Because issues of consent are necessarily fact intensive, a trial court's finding of voluntariness must be accepted on appeal unless it is clearly erroneous. *Meekins v. State*, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011). 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). The reviewing court will sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Valtierra v. State*, 310 S.W.3d 442, 447–48 (Tex. Crim. App. 2010).

ANALYSIS

In his sole point of error, appellant contends that the police exceeded the scope of a valid "knock and talk" with an excessive show of force, which effectively "seized" him thereby rending his consent invalid.

Scope of "Knock-and-Talk"

As long as a person in possession of property has not made express orders prohibiting trespass, a police officer may enter upon residential property, follow the usual path to the home's front door, and knock on it for the purpose of asking the occupant questions. *Cornealius v. State*, 900 S.W.2d 731, 733–34 (Tex. Crim. App. 1995); *Washington v. State*, 152 S.W.3d 209, 214 (Tex. App.—Amarillo

Amarillo 2004, no pet.); *Nored v. State*, 875 S.W.2d 392, 396–97 (Tex. App.—Dallas 1994, pet. ref'd).

Federal and state laws provide that a police officer may approach a citizen in a public place or knock on a door to ask questions or seek consent to search. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991); *State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002); *Hunter v. State*, 955 S.W.2d 102, 104 (Tex. Crim. App. 1997). Courts have defined a knock-and-talk as a noncustodial procedure in which the officer identifies himself and asks to talk to the home occupant, and then eventually requests permission to search the residence. *Hardesty v. Hamburg Twp.*, 461 F.3d 646, 658 (6th Cir. 2006) (quoting *United States v. Chambers*, 395 F.3d 563, 568 n.2 (6th Cir. 2005)). The knock-and-talk strategy is a reasonable investigative tool. *See United States v. Lewis*, 476 F.3d 369, 381 (5th Cir. 2007); *see also Hardesty*, 461 F.3d at 658 (noting that knock-and-talk can be legitimate effort to obtain suspect's consent to search). The purpose of a knock-and-talk is not to create a show of force, make demands on occupants, or to raid a residence. *United States v. Gomez-Moreno*, 479 F.3d 350, 355 (5th Cir. 2007). Instead, the purpose of a knock-and-talk approach is to make investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupant's consent to search. *Id*.

A police officer need not have reasonable suspicion or a basis for suspecting a particular person to simply ask questions of that individual or request consent to search, so long as the officer does not indicate compliance with his request is required. *See Bostick*, 501 U.S. at 434–35, 111 S. Ct. at 2386; *Perez*, 85 S.W.3d 819; *Hunter*, 955 S.W.2d at 104. Such an encounter is a consensual interaction, which the citizen is free to terminate at any time. *Hunter*, 955 S.W.2d at 104. The encounter is not considered a seizure, triggering Fourth Amendment scrutiny or constitutional analysis, unless it loses its consensual nature. *See Bostick*, 501 U.S. at 434; *Hunter*, 955 S.W.2d at 104. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may a court conclude that a seizure has occurred. *Bostick*, 501 U.S. at 434. Courts will uphold knock-and-talk procedures as constitutionally permissible consensual encounters, "[s]o long as a reasonable person would feel free to disregard the police and go about his business." *Hunter*, 955 S.W.2d at 104 (quoting *Bostick*, 501 U.S. at 434, 111 S. Ct. at 2386). Whether a consensual encounter loses its consensual nature and is thereby rendered a seizure is evaluated under the totality of the circumstances and "the dispositive question is whether the officers conveyed a message to appellant that compliance with their requests was required." *Hunter*, 955 S.W.2d at 104.

Appellant argues that his consent is invalid because it resulted from an unlawful seizure that occurred when officers entered his house without consent and detained him inside his home. The first part of this contention—that officers entered appellant's home without consent—is supported by testimony of appellant and his mother. However, three of the officers who participated in the search testified at the suppression hearing that they entered appellant's home only after receiving consent from both appellant and his mother. The trial court could therefore have reasonably resolved this conflicting testimony in favor of the officers having entered upon consent. *Daniels v. State*, 718 S.W.2d 702, 704 n.1 (Tex. Crim. App. 1998), *overruled on other grounds*, *Juarez v. State*, 758 S.W.2d 772, 780 n.3 (Tex. Crim. App. 1988) ("It was for the trial court, as the sole finder of fact at the suppression hearing, to determine whose version of the facts was true[.]").

Appellant argues, however, that even if he consented to the officers entering his home, the officers' overall behavior constituted a seizure. Specifically, appellant contends that six officers in tactical uniforms arriving at a late hour would have given a reasonable person the impression an emergency was occurring and that he or she was not at liberty to refuse to open the door. Although six officers arrived at appellant's house at approximately 11 p.m., the record is uncontroverted that when appellant's mother opened the door the officers

immediately explained to her they were at the home for the purpose of speaking with appellant. If indeed appellant's mother had only opened the door to officers because she believed an emergency was occurring, at this point she could have declined to speak further with the officers and closed the door.

There is also conflicting testimony regarding the number of officers who knocked on the door, whether officers yelled for appellant's mother to open the door, whether officers asked or ordered her to leave the door open, and whether officers waited for consent before entering the home. However, the trial court could have reasonably resolved these inconsistencies in favor of its ruling. Indeed, the trial court's findings of fact include a finding that the officers who testified at the suppression hearing were credible.

In the light most favorable to the trial court's ruling, the record reflects that officers lawfully entered appellant's home with the occupants' consent. Two or three officers then sat with appellant at the kitchen table, without blocking his path to the front door, and asked for and received appellant's consent to search, both orally and in writing. Nothing in the record shows that appellant's consent was required or that he was compelled to comply with the officers' request.

Appellant cites several non-binding decisions from other jurisdictions finding that factually similar, but not identical, knock-and-talk scenarios resulted in seizures. These cases might suggest that the trial court in this case would have been

within its discretion to find the appellant had been seized, but the cases do not demonstrate that the trial court's decision to deny the motion to suppress was clearly erroneous.

For these reasons we find that the knock-and-talk procedure did not result in a seizure.[4] Thus, we turn to the issue of whether appellant voluntarily consented to the search of his home.

Consent

Under the Fourth and Fourteenth Amendments, a search conducted without a warrant based on probable cause is "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Meekins*, 340 S.W.3d at 458 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041 (1973)). One of those exceptions is a search conducted with a person's voluntary consent. *Id.* Valid consent must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 459 (quoting *Schneckloth* 412 U.S. at 228). The voluntariness of consent is a fact question determined by analyzing all of the circumstances of a particular situation. *Id.* The trial judge must conduct a careful

[4] Even if the knock-and-talk procedure had resulted in a seizure, this would not have necessarily invalidated appellant's consent to search his home. *Brick v. State*, 738 S.W.2d 676, 681 (Tex. Crim. App. 1987) (discussing procedure analyzing admissibility of evidenced derived from consensual search following unlawful arrest).

sifting and balancing of the unique facts and circumstances of each case in deciding whether a particular consent search was voluntary or coerced. *Id.*

Courts review the totality of the circumstances of a particular police-citizen interaction from the point of view of the objectively reasonable person, without regard for the subjective thoughts or intents of either the officer or the citizen. *Id.* (citing *Maryland v. Macon*, 472 U.S. 463, 470–71, 105 S. Ct. 2778 (1985)). The ultimate question is whether the person's "will ha[s] been overborne and his capacity for self-determination critically impaired," such that his consent to search must have been involuntary. *Id.* (quoting *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820 (1976)).

Under Texas law, the State must "prove the voluntariness of a consent to search by clear and convincing evidence." *Id.* (quoting *State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997)). In this analysis of voluntariness courts may consider numerous factors, including "physical mistreatment, use of violence, threats, threats of violence, promises or inducements, deception or trickery, and the physical and mental condition and capacity of the defendant within the totality of the circumstances." *Id.* at 460 n.26 (quoting *United States v. Pena*, 143 F.3d 1363, 1367 (10th Cir. 1998)). We may additionally consider 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 v. State*, 12 S.W.3d 813, 818 (Tex. Crim. App. 2000). We may also consider whether appellant was in custody, or had been arrested at gunpoint; whether appellant was warned that he need not consent, 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.

In this case, appellant argues his consent was coerced because six officers dressed in tactical gear arrived at his home late at night, accused him of drug crimes before requesting consent, failed to ascertain that he was able to speak English, failed to read him his *Miranda* rights, failed to inform him he could speak to a lawyer, and failed to inform him he could refuse consent.

We note initially that officers and appellant's mother testified to appellant's ability to speak, understand, read, and write English, and appellant himself testified at the suppression hearing without a translator. Further, neither *Miranda* warnings nor awareness of a right to refuse are required for voluntary consent. *See Rayford v. State*, 125 S.W.3d 521, 528 (Tex. Crim. App. 2003). And, although six officers entered appellant's home, only two or three sat with him at his kitchen table when

consent was obtained, and officers did not block the path from the kitchen table to the front door.

Regarding appellant's assertion that officers accused him of drug crimes before seeking consent, the record does reflect that officers told appellant they were conducting a narcotics investigation and wished to search his home for drugs. However, appellant has not explained how this fact might contribute to coercion, nor have we found any authority that consent is involuntary when officers inform a suspect of the nature of an investigation or the object of an intended search.

While the late-night arrival of six officers dressed in tactical uniforms might create an intimidating environment, we are unpersuaded the circumstances were sufficient to overbear appellant's will and critically impair "his capacity for self-determination." *Meekins*, 340 S.W.3d at 459 (quoting *Watson*, 423 U.S. at 424). Indeed, "the Constitution does not guarantee freedom from discomfort," *Carmouche v. State*, 10 S.W.3d 223, 333 (Tex. Crim. App. 2000) (quoting *State v. Velasquez*, 994 S.W.2d 676, 679 (Tex. Crim. App. 1999)), and "the Constitution presumes that an actor is invested with a vibrant sense of his own constitutional rights and will assert those rights when they are implicated." *Carmouche*, 10 S.W.2d at 333.

Viewing the totality of the circumstances in the light most favorable to the trial judge's ruling, we conclude the trial court's determination that appellant voluntarily consented was not clearly erroneous.

CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

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

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