In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00116-CR

THE STATE OF TEXAS, Appellant

V.

ROY ANDREW WEAVER, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 20,808

MEMORANDUM OPINION

The State appeals the trial court's ruling to exclude evidence that Roy Andrew Weaver asked to be excluded in his motion to suppress. Weaver's motion requested that the trial court suppress the methamphetamine discovered by officers during their search of a van that he used. After the search, Weaver was arrested for possessing a controlled substance. We affirm the trial court's ruling.

Background

Four officers with the Polk County Sherriff's Department arrived at Weaver's welding shop looking for a man, nicknamed "Bear," wanted in another county. The

officers did not have an arrest warrant for “Bear,” but they asked Weaver for permission to conduct a search for “Bear” on the business’s premises. Weaver told them that “Bear” was not there, and he then gave the officers permission to conduct a search. A van that Weaver used was parked at the shop. One of the officers explained that the van was parked at the “north side of the building back up to the big salle port on the building,” or a “loading/unloading” area for the business. The officers searched throughout Weaver’s shop looking for “Bear,” and they looked through the van’s windows during their search. The officers who testified at the suppression hearing stated that they did not detect anything suspicious either on the premises or in the van. After searching for five or ten minutes, the officers explained that they determined that “Bear” was not at Weaver’s shop.

Even though he was satisfied that “Bear” was not there, Sergeant Smith then asked Weaver if there were “any illegal guns, knives, narcotics, anything like that” at the shop. Weaver said that he had some guns inside his office and showed them to Sergeant Smith. Sergeant Smith learned that Weaver held a license to carry the guns Weaver had shown him. At that point, Sergeant Smith asked some questions about the van and asked if he could search the van; Weaver refused. Because Weaver refused to allow a further search, and based on Weaver’s actions when he refused consent to the request to search the van, Lieutenant Lowrie took his drug-dog to the parked van. Sergeant Smith also testified that when Weaver refused to consent to the search of the van, he signaled for Lieutenant

Lowrie to run the dog around the van. The dog alerted to the passenger door area of the van. When Sergeant Smith opened the van's door, he discovered a small tin canister containing methamphetamine and a pipe. Weaver was then arrested.

The trial court granted Weaver's motion to suppress and entered findings of fact and conclusions of law. The trial court's findings state that during the officers' search for "Bear," they "looked through the van windows and did not see ['Bear'] or any contraband." Additionally, the trial court found that before the van was searched, Weaver "did not exhibit any signs of being under the influence of a controlled substance and the officers did not see [Weaver] operate the van." The trial court also found that "[t]he officers['] primary purpose to be at [Weaver's] shop was over when they did not find ['Bear']." The trial court's conclusions state:

> 1. The officers exceeded the scope of their search after they did not find ["Bear"] and they did not have enough cause to conduct the canine search on the van which they did not see being operated.
>
> 2. The search was improper.

Standard of Review

We review a trial court's ruling on a motion to suppress evidence for abuse of discretion, using a bifurcated standard. *See Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); *Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex. Crim. App. 1997). We give "almost total deference" to a trial court's findings of historical facts that are supported by the record and to mixed questions of law and fact that turn on an evaluation

of credibility and demeanor. *Guzman*, 955 S.W.2d at 89. We review de novo a trial court's determination of the law and its application of law to the facts that do not turn upon an evaluation of credibility and demeanor. *Id.* With respect to a trial court's ruling on a motion to suppress, the trial judge "'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) (quoting *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999)). The trial judge "may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted. This is so because it is the trial court that observes first hand the demeanor and appearance of a witness, as opposed to an appellate court which can only read an impersonal record." *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000) (footnote citations omitted).

When, as in this case, the trial court makes explicit fact findings, we determine whether the evidence viewed in the light most favorable to the trial court's ruling supports the trial court's findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). We then review the trial court's legal ruling de novo unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id.* We will uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

Analysis

The Fourth Amendment to the United States Constitution and article I, section 9 of the Texas Constitution protect against unreasonable searches and seizures. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *Wiede*, 214 S.W.3d at 24. The well-established rule, subject to several specific exceptions, is that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.'" *U.S. v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (citations omitted). Voluntary consent to search is one of the recognized exceptions to the State's need to obtain a warrant to conduct a lawful search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Whether Weaver consented to the search of his van when he consented to the search of the shop's premises is the dispute in issue here.

Even when an individual voluntarily consents to a search, an officer's authority to perform the search is not without limit. *DuBose v. State*, 915 S.W.2d 493, 496 (Tex. Crim. App. 1996), *overruled on other grounds by Guzman*, 955 S.W.2d at 90. The extent of the search is limited to the scope of the consent given, and generally, the scope of the consent is defined by its expressed object. *Florida v. Jimeno*, 500 U.S. 248, 250-51, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991); *see also Valtierra*, 310 S.W.3d at 448-49. Here, the officers testified that the object of their search was to find "Bear."

The standard for measuring the scope of the defendant's consent is one of "objective reasonableness," meaning what the typical reasonable person would have understood by the exchange between the officer and the individual. *Jimeno*, 500 U.S. at 251; *Valtierra*, 310 S.W.3d at 449. In *Jimeno*, the United States Supreme Court held the defendant's consent to a police officer's request to "search his car" for narcotics extended to a search of a paper bag located within the car which turned out to contain narcotics. 500 U.S. at 251-52. The Court reasoned that because the defendant had not limited the scope of the officer's search, it was objectively reasonable that the car's search would include inspecting closed containers within the car that might contain narcotics. *Id.*

In this case, the trial court was entitled to determine that the purpose of the search was to look for "Bear." Based on the evidence at the suppression hearing, the trial court was further entitled to determine that the purpose of the search, to which Weaver consented, was complete when the officers determined that "Bear" was not present. Because the officers' search for "Bear" ended, the trial court could further reasonably determine that the officers needed Weaver's permission to search the van before it could be lawfully searched without the officers first getting a search warrant.

Finally, the officers did not contend that while conducting their search for "Bear" they developed probable cause to believe the van contained drugs. *See McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003) ("Pursuant to the Fourth Amendment, a warrantless search of either a person or property is considered per se unreasonable

subject to a ‘few specifically defined and well established exceptions.’”) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993)); *see also Wiede*, 214 S.W.3d at 24 (stating that “a warrantless search of a vehicle is reasonable if law enforcement officials have probable cause to believe that the vehicle contains contraband”). “Probable cause to search exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality of a crime or evidence of a crime will be found.” *Estrada v. State*, 154 S.W.3d 604, 609 (Tex. Crim. App. 2005).

In this case, the evidence shows that when the officers’ search for “Bear” ended, they had not observed anything suspicious. Because the trial judge could have determined that Weaver’s consent to search for “Bear” had ended, the trial court could reasonably find that the officers, without establishing probable cause, were not entitled to search for other purposes unrelated to that of their initial search. Under the facts of this case, we conclude the trial court did not abuse its discretion in granting Weaver’s motion to suppress. The trial court’s ruling is affirmed.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on August 5, 2010
Opinion Delivered September 8, 2010
Do Not Publish
Before McKeithen, C.J., Gaultney and Horton, JJ.

DISSENTING OPINION

I respectfully dissent. The trial court concluded that "[t]he officers exceeded the scope of their search after they did not find ["Bear"] and they did not have enough cause to conduct the canine search on the van which they did not see being operated." The primary reason the officers went to the site was to arrest "Bear," who worked at the welding shop. Apparently he was wanted "for engaging in organized crime." One of the officers testified "[w]e knew of methamphetamine being distributed and also used at that location." In talking with Weaver, one officer asked him "if he had any illegal guns, knives, narcotics, anything like that." The issue presented in this appeal is whether the canine sniff of the exterior of the van while the officers were talking with Weaver was an impermissible "search" for Fourth Amendment purposes.

Generally, a sniff of the exterior of a vehicle by a dog trained to detect the odor of narcotics does not constitute a "search" for purposes of the Fourth Amendment. *See City of Indianapolis v. Edmond,* 531 U.S. 32, 40, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) ("[A]n exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics."); *see also Illinois v. Caballes,* 543 U.S. 405, 410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."); *United States v. Place,* 462 U.S. 696,

707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) ("[T]he sniff discloses only the presence or absence of narcotics, a contraband item."); *Haas v. State,* 172 S.W.3d 42, 51 (Tex. App.--Waco 2005, pet. ref'd) ("Even in the absence of reasonable suspicion, a sniff of the outside of a vehicle by a trained canine *during* a routine, valid traffic stop is not a search within the meaning of the Fourth Amendment."). Similarly, in a case where officers were allowed into a motel room with a trained dog, the dog sniffing articles in the dwelling while the officers talked to the occupant was not considered a "search" for Fourth Amendment purposes. *See United States v. Esquilin,* 208 F.3d 315, 318 (1st Cir. 2000).

Law enforcement, like the public generally, may enter commercial premises expressly or impliedly held open to the public. *See United States v. Reed,* 733 F.2d 492, 500-01 (8th Cir. 1984). In this case the officers were on the business premises legally with the consent of the owner. They had not been asked to leave. Although the owner refused consent to a search of the van, the canine sniff of the exterior of the van, made while officers were questioning Weaver, was not a "search" for Fourth Amendment purposes. *See Josey v. State,* 981 S.W.2d 831, 845 (Tex. App.--Houston [14th Dist.] 1998, pet. ref'd) ("A canine sniff is not a search under the Fourth Amendment of the United States Constitution or under Article I, Section 9 of the Texas Constitution."). The officers were not required to see the vehicle "being operated" before the canine sniff of the exterior of the van. After the dog alerted to the drugs, a search of the interior of the van was justified under the circumstances. *See id.* at 845-46 (probable cause to search

interior of vehicle); *De Jesus v. State,* 917 S.W.2d 458, 461 (Tex. App.--Houston [14th Dist.] 1996, pet ref'd); *Walsh v. State,* 743 S.W.2d 687, 689 (Tex. App.--Houston [1st Dist.] 1987, pet. ref'd). Because the trial court's legal conclusion was in error, we should reverse the order and remand the case for further proceedings.

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DAVID GAULTNEY
Justice

Dissenting Opinion
Delivered September 8, 2010