In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00173-CR

PARKER JONATHAN ALLEMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 09-06597

MEMORANDUM OPINION

A grand jury indicted Parker Jonathan Alleman for possession of marijuana. Alleman filed a motion to suppress evidence, which the trial court denied. Alleman entered an unagreed plea of guilty and received five years of community supervision. The trial court certified Alleman's right to appeal. In three issues, Alleman challenges the denial of his motion to suppress. We affirm the trial court's order.

Factual Background

Lieutenant Tony Viator was monitoring traffic when he saw a Lincoln Town Car without a license plate displayed in the rear license plate bracket. When Viator

approached the vehicle, he noticed a temporary tag displayed on the back window, but Viator could not read the tag. He assumed the tag was a Louisiana temporary tag. Viator explained that, in Texas, a license plate must be properly displayed on the vehicle. Thus, he stopped the vehicle for a traffic violation.

Alleman, the driver, stepped out of the vehicle before Viator could approach. Viator directed Alleman to the rear of the vehicle and asked for his driver's license. While looking in the console, Alleman opened his cellular telephone and held it to his ear. Viator did not hear the phone ring and he noticed that Alleman was not speaking into the phone. Viator found this "kind of odd." Alleman told Viator that he had been on a two-day business trip, but had been wearing the same clothes. Alleman had no luggage, briefcase, paperwork, or anything else to indicate that he had been on a business trip. When Alleman retrieved his insurance papers, Viator smelled marijuana inside the vehicle. When Viator approached the driver's side of the vehicle, he saw what he believed to be marijuana residue on the floorboard. These facts led Viator to ask for Alleman's consent to search the vehicle. Alleman consented to a search of the vehicle.

Because he did not see anything in the passenger compartment, Viator's experience led him to believe that any marijuana would be in the trunk. When Viator opened the trunk, he smelled an "[o]verwhelming" odor of hydroponic marijuana, which is "more potent than your average marijuana plant." Viator arrested Alleman and proceeded to search the trunk. Viator found a bag in the trunk, but did not ask Alleman's

consent to open the bag. Viator unzipped the bag and found two Ziploc bags of marijuana, a pipe, and a small amount of marijuana with the pipe.

Viator testified that he had "reasonable suspicion, probable cause" to search Alleman's bag because Viator smelled marijuana, Alleman consented to the search of the vehicle, and Alleman told Viator that he had a marijuana pipe in the vehicle. Viator testified that Alleman's consent was "valid and voluntary."

In its order denying Alleman's motion to suppress, the trial court found: (1) Viator stopped Alleman's vehicle because "it had no license plate in the rear bracket," (2) when he approached the vehicle, Viator noticed a paper tag in the back window, but the tag was "difficult or impossible to read [] at a distance," (3) a temporary tag displayed in the rear window must be "visible and legible," (4) Viator had a "valid legal basis for stopping [Alleman's] vehicle," (5) Viator smelled marijuana when Alleman retrieved his insurance papers, (6) Viator asked for consent to search the vehicle, (7) Alleman freely and voluntarily consented to a search, (8) Viator's testimony is undisputed, and (9) as a result of Alleman's consent, Viator opened the trunk and found contraband.

Standard of Review

"We review a trial court's ruling on a motion to suppress under a bifurcated standard of review." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). "First, we afford almost total deference to a trial judge's determination of historical facts." *Id.* "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." *Id.* "He is entitled to believe or disbelieve all or part of the witness's testimony-even if that testimony is uncontroverted-because he has the opportunity to observe the witness's demeanor and appearance." *Id.* "If the trial judge makes express findings of fact, we view the evidence in the light most favorable to his ruling and determine whether the evidence supports these factual findings." *Id.* "Second, we review a trial court's application of the law of search and seizure to the facts *de novo.*" *Id.* "We will sustain the trial court's ruling if that ruling is 'reasonably supported by the record and is correct on any theory of law applicable to the case.'" *Id.* at 447-48 (quoting *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)).

Motion to Suppress

In three issues, Alleman contends that the stop and search of his vehicle was conducted in violation of the Fourth and Fourteenth Amendments of the United States Constitution, Article I, Section 9 of the Texas Constitution, and Article 38.23 of the Texas Code of Criminal Procedure.[1]

The Stop

In issue one, Alleman contends that the stop of his vehicle was illegal and pretextual because (1) Viator acted without either reasonable suspicion or probable cause

[1] Alleman does not provide separate analysis for his Federal Constitutional, State Constitutional, and State law complaints. We will address his arguments collectively. *See Peterson v. State*, 857 S.W.2d 927, 930 n.1 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (citing *McCambridge v. State*, 712 S.W.2d 499, 501-502 n.9 (Tex. Crim. App. 1986)).

that a violation of the law had occurred, and (2) any reasonable suspicion or probable cause dissipated once Viator learned that a temporary tag was displayed.

The stopping of an automobile by law enforcement amounts to a seizure within the meaning of the Fourth Amendment. *See Corbin v. State*, 85 S.W.3d 272, 276 (Tex. Crim. App. 2002). "A seizure based on reasonable suspicion or probable cause will generally be reasonable." *Id*. (citing *Whren v. U.S.*, 517 U.S. 806, 818, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Terry v. Ohio*, 392 U.S. 1, 21-23, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

Reasonable suspicion exists where an officer has "specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity." *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001). "[A] traffic violation committed in an officer's presence authorizes an initial stop." *Armitage v. State*, 637 S.W.2d 936, 939 (Tex. Crim. App. 1982). "During an investigation of a traffic violation, if an officer develops reasonable suspicion that another violation has occurred, the scope of the initial investigation expands to include the new offense." *Goudeau v. State*, 209 S.W.3d 713, 719 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

"Probable cause exists when the facts and circumstances, based on reasonably trustworthy information, are sufficient to warrant a reasonable person to believe that a crime has been committed." *Hall v. State*, 297 S.W.3d 294, 298 (Tex. Crim. App. 2009).

"[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Walter v. State*, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000) (citing *Whren*, 517 U.S. at 810).

Texas law requires a vehicle to "display two license plates, at the front and rear of the vehicle. . . ." Tex. Transp. Code Ann. § 502.404(a) (West Supp. 2010).[2] "A license plate . . . or a temporary cardboard tag . . . shall be displayed in accordance with board rules." Act of May 1, 2001, 77th Leg., R.S., ch. 76, § 10, 2001 Tex. Gen. Laws 121, 123 (current version at Tex. Transp. Code Ann. § 503.069(a) (West Supp. 2010)). Board rules require a temporary tag to be legible. *See* 29 Tex. Reg. 9674 (2004) *repealed* 31 Tex. Reg. 847 (proposed October 14, 2005) (former 16 Tex. Admin. Code § 111.9(b)); *see also* 43 Tex. Admin. Code § 215.151(a) (2010).

Viator initially did not see a tag displayed on the back of Alleman's vehicle. When he saw the temporary tag attached to the back window of the vehicle, the tag was improperly displayed, *i.e.*, the tag was not legible. This violates Texas traffic laws. *See* 29 Tex. Reg. 9674; *see also* 43 Tex. Admin. Code § 215.151(a); *Green v. State*, 866 S.W.2d 701, 703 (Tex. App.—Houston [1st Dist.] 1993, no pet.). Thus, Viator was authorized to stop Alleman's vehicle. *See Walter*, 28 S.W.3d at 542; *see also Armitage*, 637 S.W.2d at 939; *Palacios v. State*, 319 S.W.3d 68, 73 (Tex. App.—San Antonio 2010,

[2] Because the amended version of section 502.404 contains no material changes applicable to this case, we cite to the current version of the statute. *See* Tex. Transp. Code Ann. § 502.404 (West Supp. 2010).

no pet.); *U.S. v. Daniels*, 265 Fed. Appx. 219, 221-22 (5th Cir. 2008); *Green*, 866 S.W.2d at 702-04; *Foster v. State*, 814 S.W.2d 874, 878 (Tex. App.—Beaumont 1991, pet. ref'd).

While conducting the traffic stop, Viator observed several facts that led him to believe that another offense was occurring: (1) Alleman stepped out of his vehicle almost immediately after being stopped, (2) Alleman silently held his telephone to his ear, (3) Alleman claimed to be on a business trip, but had no clothing or other items to corroborate this claim, (4) Viator smelled marijuana when Alleman retrieved his insurance papers, and (5) Viator saw what appeared to be marijuana residue when he walked to the driver's side door of the vehicle. The record indicates that Viator's investigation of the traffic offense was incomplete when these facts came to light. *See Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004) ("[T]here is an additional component to a routine traffic stop--the license and warrants check,"); *see also Goudeau*, 209 S.W.3d at 720. Thus, during his investigation, Viator developed reasonable suspicion that another violation, *i.e.*, possession of marijuana, had occurred, which expanded the scope of his initial investigation to include the new offense. *See Goudeau*, 209 S.W.3d at 719; *see also Bachick v. State*, 30 S.W.3d 549, 552 (Tex. App.—Fort Worth 2000, pet. ref'd). He further developed probable cause to suspect Alleman to be in violation of Texas's controlled substance laws. *See Moulden v. State*, 576 S.W.2d 817, 818-20 (Tex. Crim. App. 1978); *see also Foster*, 814 S.W.2d at 879.

Accordingly, Viator's stop of Alleman was proper under either a reasonable suspicion or probable cause standard. We overrule issue one.

The Consent

In issue two, Alleman argues that his consent to search was "not shown to have been obtained by means sufficiently distinguishable to be purged of the primary taint on the illegal stop." However, because the stop was valid, Alleman's consent is untainted. *See Kothe*, 152 S.W.3d at 67 ("Since neither the initial stop nor its duration violated the Fourth Amendment, Mr. Kothe's consent to search his car was not unconstitutionally tainted."). We overrule issue two.

The Search

In issue three, Alleman complains that the search of the bag found in the trunk of his vehicle exceeded the scope of his consent.[3] He cites *State v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd on other grounds*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990) and *Cardenas v. State*, 857 S.W.2d 707 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) to support this position.

"The scope of a warrantless search of an automobile [] is not defined by the nature of the container in which the contraband is secreted." *U.S. v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). "[I]t is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Id.* "[T]he

[3] Alleman also states that the search was tainted by an illegal stop. As previously discussed, the stop was not illegal.

scope of the warrantless search . . . is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Id*. at 825. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id*.

In *Wells*, a trooper obtained Wells's consent to search the trunk of his vehicle. *See Wells*, 539 So.2d at 465-66. The police impounded the vehicle and pried open a locked suitcase found in the trunk. *Id*. at 466. The Florida Supreme Court held, "If [] consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis." *Id*. at 467. "[G]eneral consent to look in an automobile trunk in this case did not constitute permission to pry open a locked piece of luggage found inside." *Id*. at 468. The Court explained that "[t]he very act of locking such a container constitutes a manifest denial of consent to open it, readily discernible by all the world." *Id*.

In *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991), Officer Trujillo advised Jimeno of his belief that Jimeno's vehicle carried narcotics, obtained Jimeno's consent to search his vehicle, and found a folded paper bag in the passenger side of the vehicle. *See Jimeno*, 500 U.S. at 249-50. Trujillo opened the bag and found cocaine. *Id*. The United States Supreme Court distinguished *Wells:* "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has

agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag." *Id*. at 251-52. The Court held:

> [I]t was objectively reasonable for the police to conclude that the general consent to search [Jimeno's] car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. "Contraband goods rarely are strewn across the trunk or floor of a car." The authorization to search in this case, therefore, extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor.
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> . . . .
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> A suspect may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization.

Id. (internal citations omitted). "The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile." *Id*. at 249.

In *Cardenas*, Officer Fountain obtained consent to "look in [Cardenas's] car." *Cardenas*, 857 S.W.2d at 711. He suspected that the tire well contained a hidden compartment, so the vehicle was towed and a subsequent search of the tire well led to the discovery of cocaine. *See id*. at 708-09. Citing *Jimeno*, the Fourteenth Court held:

> Fountain did not tell Cardenas what he was looking for, and so the scope of the search could not be defined by the object sought. Therefore, we cannot ascribe to our objectively reasonable person an awareness that Cardenas knew that Officer Fountain would search wherever drugs or other targeted contraband might be found, including the concealed tire well.

Id. at 711 (internal citations omitted). The Court concluded "that it was not objectively reasonable that Cardenas' oral consent to 'a look in his car' would include authorization for the police to tow his car to a police garage or break into the concealed tire well." *Id*.[4]

However, in *U.S. v. Crain*, 33 F.3d 480 (5th Cir. 1994), the Fifth Circuit rejected Crain's argument "that because the troopers never stated, or even implied, what they were looking for in the car, the jury could not have reasonably inferred that Crain's general consent would include consent to open a closed paper bag shoved under the seat." *Crain*, 33 F.3d 480, 484 (5th Cir. 1994). The Court explained:

> Florida v. Jimeno . . . states that police do not have to separately request permission to search each closed container in a vehicle, and that the driver's general consent to a search of the car includes consent to examine a paper bag on the floor of the car. Jimeno also notes that the suspect has the right to limit the scope of his consent as he chooses, but in this case, none of the three men attempted to limit the scope of the search. This Circuit, relying on Jimeno . . . has held that an individual's consent to an officer's request to "look inside" his vehicle is equivalent to general consent to search the vehicle and its contents, including containers such as luggage.

Id. (citing *Jimeno*, 500 U.S. at 251; *U.S. v. Rich*, 992 F.2d 502, 508 (5th Cir.), *cert. denied*, 126 L.Ed.2d 312, 114 S.Ct. 348 (1993)) (internal citations omitted).

In this case, the odor of marijuana gave Viator probable cause to search the vehicle. *See Miller v. State*, 608 S.W.2d 684, 685 (Tex. Crim. App. 1980); *see also*

[4] The court nevertheless found the search proper because Cardenas signed a written consent form that allowed a search of the "vehicle . . . including containers and contents," the tire well was an "integral component" of the vehicle, and the officer had probable cause to search the vehicle. *Cardenas v. State*, 857 S.W.2d 707, 711-17 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

Dickey v. State, 96 S.W.3d 610, 613 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The record does not indicate whether Alleman was aware that Viator intended to search for narcotics. Nevertheless, Alleman consented to a search of his vehicle and placed no limitations on the search. *See Crain*, 33 F.3d at 484; *see also Lemons v. State*, 298 S.W.3d 658, 661 (Tex. App.—Tyler 2009, pet. ref'd) ("[I]f an officer makes a general request to search and the individual consents, knowing that there are unlocked containers in the car, the individual should expressly limit his consent to the vehicle but not the containers or, at the very least, object when the officer begins to open the container."). Based on his experience and the absence of marijuana in the vehicle's interior, Viator believed that marijuana would be found in the trunk. Viator also knew, from Alleman, that a pipe was in the vehicle. Viator smelled marijuana when he opened the trunk, prompting him to open the bag and find the marijuana and other contraband. The record does not indicate that the bag was locked or required Viator to break in. *See Wells*, 539 So.2d at 468; *see also Cardenas*, 857 S.W.2d at 711. Under the circumstances of this case, it was objectively reasonable for Viator to believe that the scope of Alleman's general consent permitted him to open the bag found in the trunk. *Jimeno*, 500 U.S. at 249; *see Crain*, 33 F.3d at 484-85; *see also Lemons*, 298 S.W.3d at 661. We overrule issue three.

Having overruled Alleman's three issues, we affirm the trial court's order denying Alleman's motion to suppress.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on December 20, 2010
Opinion Delivered January 19, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.