In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00488-CR

STEVE LEE STEPHENS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Montgomery County, Texas
Trial Cause No. 09-246535

MEMORANDUM OPINION

Steve Lee Stephens was charged with possession of marijuana. Stephens filed a motion to suppress, which the trial court denied. Pursuant to a plea agreement, Stephens pleaded guilty to possession of marijuana, the trial court assessed a fine and court costs, and the trial court suspended Stephens's driver's license for 180 days. In one issue, Stephens challenges the denial of his motion to suppress. We affirm the trial court's judgment.

Background

Officer Jarrod Sullivan testified that he was on routine patrol when he saw a vehicle sitting stationary at a green light. Sullivan testified that the driver appeared "kind of slumped over in his seat[.]" The driver remained slumped over and sat at the light through at least two green light cycles. Sullivan testified that the driver had committed the traffic offense of obstructing a highway. Sullivan testified to his belief that the driver was asleep at the wheel. Sullivan believed that the driver posed a danger to himself or others. Sullivan and another officer decided to conduct a welfare check.

Sullivan activated his emergency lights and approached the vehicle. The officers walked to the passenger window of the vehicle and found the driver slumped over and asleep at the wheel with his foot on the brake and the vehicle in drive. The officers shined their flashlights into the vehicle to look for weapons. Sullivan testified that he saw a crack pipe in plain view in the vehicle's console and that the pipe had a streaking pattern consistent with pipes that have been used to burn cocaine. Sullivan testified that he has seen this type of pipe before and that he had no doubt the pipe constituted drug paraphernalia. Sullivan testified that the crack pipe was immediately apparent to him. The driver was still passed out when officers observed the crack pipe.

Sullivan knocked on the driver's side window several times, but the driver failed to respond. When the driver awoke, he acted strange, confused, disoriented, scared, and startled. The officers managed to get the driver to open the vehicle door, place the

vehicle in park, and step out of the vehicle. Sullivan did not smell any marijuana, could not recall smelling alcohol, and could not recall whether the driver's eyes were bloodshot. Sullivan testified that the driver had a "wild look in his eye[,]" kept looking in different directions, and began clenching his fists. Sullivan testified that the driver was over six-feet tall, weighed 240 pounds, and was a "good size bigger" than Sullivan. The driver's behavior caused Sullivan to grow concerned that the driver might attempt to flee or start a fight and that the driver might be concealing a weapon on his person or have access to a weapon in the vehicle. Sullivan felt it necessary to handcuff the driver for officer safety. The driver complied with Sullivan's request to turn around and Sullivan applied one handcuff, but the driver began pulling away as if to break Sullivan's grasp. After a brief struggle, Sullivan handcuffed the driver and placed him in a patrol vehicle. Sullivan testified that the driver was detained, not under arrest.

Sullivan testified that his observance of the crack pipe justified a search of the vehicle. Sullivan seized the crack pipe from the driver's vehicle. While retrieving the crack pipe, Sullivan observed a small glass canister with a metal lid. The canister was on the front passenger floorboard of the vehicle and contained a "greenish brown leafy substance" that, based on his training and experience, Sullivan recognized as marijuana. Sullivan also observed a pack of rolling papers in the middle of the floorboard. Sullivan identified the driver of the vehicle as Stephens.

In his motion to suppress, Stephens alleged violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, article I, sections 9, 10, and 19 of the Texas Constitution, and article 38.23 of the Code of Criminal Procedure. *See* U.S. Const. amends. IV, V, VI, XIV; *see also* Tex. Const. art. I, §§ 9, 10, 19; Tex. Code. Crim. Proc. Ann. art. 38.23 (West 2005). He argued that his arrest and any evidence was obtained without a warrant, probable cause, or other authority. The trial court denied Stephens's motion to suppress.

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. 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. 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.
>
> 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. When findings of fact are not entered, we "must view the evidence 'in the light most favorable to the trial court's ruling' and 'assume the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record.'"
>
> Second, we review a trial court's application of the law of search and seizure to the facts *de novo.* 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 (internal footnotes omitted).

Motion to Suppress

In his sole issue, Stephens contends that the trial court improperly denied his motion to suppress because the plain view doctrine did not apply to the search of his vehicle. The State contends that the search was authorized by the plain view doctrine and the automobile exception to the warrant requirement.

"[T]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable." *Walter v. State*, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000). The plain view doctrine applies when (1) law enforcement officials are lawfully where the object can be plainly viewed, (2) the incriminating character of the object in plain view is immediately apparent, and (3) the officials have the right to access the object. *Keehn v. State*, 279 S.W.3d 330, 334-35 (Tex. Crim. App. 2009). Stephens argues that the State failed to establish the second and third prongs of the plain view doctrine. The immediacy prong of the plain view doctrine requires that "viewing officers [] have probable cause to believe an item in plain view is contraband before seizing it." *State v. Dobbs*, 323 S.W.3d 184, 189 (Tex. Crim. App. 2010). Probable cause exists where the facts available to the officer would warrant a man of reasonable caution to believe that certain items may be contraband. *Tex. v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). "[I]t does not demand any showing that such a belief be correct or more likely true than false." *Id.* "An officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person."

Nichols v. State, 886 S.W.2d 324, 326 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Absent exigent circumstances, the plain view doctrine "can never justify a search and seizure without a warrant when law enforcement officials have no lawful right to access an object." *Keehn*, 279 S.W.3d at 335.

"Under the automobile exception, law enforcement officials may conduct a warrantless search of a vehicle if it is readily mobile and there is probable cause to believe that it contains contraband." *Id*. "Probable cause to search exists when there is a 'fair probability' of finding inculpatory evidence at the location being searched." *Neal v. State*, 256 S.W.3d 264, 282 (Tex. Crim. App. 2008). "[I]f an officer has lawfully observed an object of incriminating character in plain view in a vehicle, that observation, either alone or in combination with additional facts, has been held sufficient to allow the officer to conduct a probable cause search of the vehicle." *U.S. v. Sparks*, 291 F.3d 683, 690 (10th Cir. 2002).

The trial court's findings of fact and conclusions of law included findings that the plain view doctrine applied to Sullivan's observance of the crack pipe and that the subsequent search of the vehicle was, therefore, legal. These findings are supported by the record. *See Valtierra*, 310 S.W.3d at 447-48. Sullivan's testimony establishes that, based on his training and experience, it was immediately apparent to him that the crack pipe seen in plain view was contraband. *See Brown*, 460 U.S. at 742; *see also Dobbs*, 323 S.W.3d at 189; *Nichols*, 886 S.W.2d at 326. Once Sullivan saw the crack pipe in

plain view, he had a lawful right to access the crack pipe. *See Hill v. State*, 303 S.W.3d 863, 874 (Tex. App.—Fort Worth 2009, pet. ref'd) (finding that officers identified crack cocaine in plain view in Hill's vehicle and lawfully seized the crack cocaine per the plain view doctrine). Observance of the crack pipe in plain view gave Sullivan probable cause to believe that the vehicle might contain further inculpatory evidence and gave Sullivan probable cause to further search the vehicle pursuant to the automobile exception to the warrant requirement. *See Sparks*, 291 F.3d at 690; *see also Neal*, 256 S.W.3d at 282. Under these circumstances, the trial court did not abuse its discretion. We overrule Stephens's sole issue and affirm the trial court's judgment.

AFFIRMED.

_____

STEVE McKEITHEN
Chief Justice

Submitted on June 10, 2011
Opinion Delivered July 13, 2011
Do Not Publish

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