NO. 12-11-00186-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

THE STATE OF TEXAS, APPELLANT	***§***	***APPEAL FROM THE 173RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
TIMOTHY JAMES HUNT, APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

The State of Texas appeals the trial court's order granting Timothy James Hunt's motion to suppress evidence. We affirm the trial court's order.

BACKGROUND

On August 14, 2010, at approximately 3:00 a.m., Deputy Beddingfield of the Henderson County Sheriff's Department was dispatched to a home in Eustace, Texas, in response to a noise complaint. The complainant reported that he heard loud noises emanating from his neighbor's home that sounded like a set of drums. Deputy Long also arrived to provide assistance to Deputy Beddingfield.

The deputies walked to the neighbor's home, which was later identified as Appellee's home. A sidewalk led to the front door of the residence. There were no fences or other barriers impeding access to the front yard and front door of the home. While traversing the sidewalk, Deputy Long saw through a large window that a light was on in the home. The blinds covering the window were partially closed. From the deputies' position, they could see that the blinds were in front of transparent curtains. However, the officers were unable to clearly see through the window. But there was a small two inch gap between the blinds and the window sill that allowed

Deputy Long to see clearly into a portion of the home.

Deputy Long saw Appellee place a methamphetamine pipe up to his mouth. He notified Deputy Beddingfield. Deputy Long told Deputy Beddingfield to enter the home so they could make an arrest before any drugs were consumed. Deputy Beddingfield knocked on the door, and without waiting for a response, he simultaneously opened it and entered the residence. When he entered, Deputy Beddingfield saw Appellee holding the pipe. He also saw Kimberly Ann Wood, whom the deputies could not see when they peered through the gap at the window before entering the home.[1] Wood was holding an orange object in her hand at the time. Appellee and Wood were sitting on the couch when Deputy Beddingfield entered the residence. Alarmed by the entry, Appellee and Wood hid the pipe and the other object under a blanket on the couch. The deputies arrested everyone in the home, and looked under the blanket. They discovered that the orange object Wood held was a prescription bottle containing methamphetamine. They also found the pipe Appellee held to his mouth, which contained methamphetamine residue.

Appellee was indicted for the offense of possession of a controlled substance within 1,000 feet of a school zone. He filed a motion to suppress evidence on the ground that the search and all the fruits obtained from it were illegal. The trial court held a hearing on the motion and took the motion under advisement. The next day, the trial court issued an order granting the motion to suppress, without making findings of fact or conclusions of law. This appeal by the State followed.

MOTION TO SUPPRESS

In its sole issue, the State argues that the trial court abused its discretion when it granted Appellee's motion to suppress evidence.

Standard of Review

We review a ruling on a motion to suppress evidence for an abuse of discretion. ***Shepherd v. State***, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). We give almost total deference to a trial court's determination of historical facts, especially if those determinations turn on witness credibility or demeanor, and review de novo the trial court's application of the law to facts not based on an evaluation of credibility and demeanor. ***Neal v. State***, 256 S.W.3d 264, 281 (Tex.

[1] A third person, Brenda Carter, was also in the home at the time the deputies entered the residence. However, her involvement in the case is unclear based on the record developed thus far.

Crim. App. 2008). At a suppression hearing, a trial court is the exclusive trier of fact and judge of the witnesses' credibility. ***Maxwell v. State***, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). Accordingly, a trial court may choose to believe or to disbelieve all or any part of a witness's testimony. ***State v. Ross***, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). We review de novo all application of law to fact questions that do not turn on the credibility and demeanor of the witnesses. *See* ***Estrada v. State***, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005).

We review a trial judge's ruling on a motion to suppress by viewing all of the evidence in the light most favorable to the trial judge's ruling. ***State v. Castleberry***, 332 S.W.3d 460, 465 (Tex. Crim. App. 2011). Therefore, the prevailing party is entitled to "the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence." ***Id.*** Consequently, we are obligated to uphold the trial court's ruling on a motion to suppress if that ruling is supported by the record and is correct under any theory of law applicable to the case. *See* ***Armendariz v. State***, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003).

Here, the record is silent on the reasons for the trial court's ruling, there are no explicit fact findings, and neither party timely requested findings and conclusions from the trial court. Therefore, we imply the necessary fact findings to support the trial court's ruling if the evidence, viewed in the light most favorable to the trial court's ruling, supports those findings. *See* ***State v. Kelly***, 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006). "Appellate courts should also keep in mind that the party with the burden of proof assumes the risk of nonpersuasion." ***Id.*** at 819. "If this party loses in the trial court and the trial court makes no explicit fact findings, then this party should usually lose on appeal." ***Id.***

Applicable Law

A warrantless search of a residence is presumptively unreasonable. ***Gutierrez v. State***, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). When a defendant attempts to suppress evidence based on a warrantless search or seizure, the state has the burden of showing both (1) that probable cause existed at the time the search was made, and (2) that exigent circumstances requiring immediate entry made obtaining a warrant impracticable. ***McNairy v. State***, 835 S.W.2d 101, 106 (Tex. Crim. App. 1991). Probable cause to search exists where "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." ***Id.*** If probable cause exists, exigent circumstances may require immediate, warrantless entry by

police officers who are "(1) providing aid or assistance to persons whom law enforcement reasonably believes are in need of assistance; (2) protecting police officers from persons whom they reasonably believe to be present, armed, and dangerous; [or] (3) preventing the destruction of evidence or contraband." ***Gutierrez***, 221 S.W.3d at 685.

When the police cite possible destruction of evidence as an exigent circumstance, the state must demonstrate the police "could have reasonably concluded that evidence would be destroyed or removed before they could obtain a search warrant." ***McNairy***, 835 S.W.2d at 107. Courts should consider the following five circumstances that are relevant to a reasonable determination that evidence might be destroyed or removed:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant . . . ; (2) reasonable belief that the contraband is about to be removed . . . ; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought . . . ; (4) information indicating the possessors of the contraband are aware that the police are on their trail . . . ; and (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.

Id. (quoting ***United States v. Rubin***, 474 F.2d 262, 268 (3d Cir. 1973)). It is the state's burden to prove any exigency. *See* ***Illinois v. Rodriguez***, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148 (1990); ***Hubert v. State***, 312 S.W.3d 554, 561-62 (Tex. Crim. App. 2010).

Discussion

The State argues, and Appellee agrees, that the deputies could have walked up to the residence to investigate the initial noise complaint.[2] The issues in this appeal are whether the deputies' actions in peering through the two inch gap at the window constitute a "search," and if so, whether the trial court could have reasonably concluded the State failed to prove that exigent circumstances existed to justify immediate entry into the residence.

When the deputies looked through the window, they observed Appellee holding a pipe that Deputy Long testified is used for smoking methamphetamine. But the deputy also testified that he did not see any smoke coming from the pipe, and that Appellee was not holding an ignition source for smoking anything in the pipe. Deputy Long testified that, at the time, he could see only Appellee in the house. He could not see Wood or the prescription bottle containing what was later identified as methamphetamine. He also testified that he saw no drugs at that time.

[2] The parties differ in the permitted scope of the initial investigation of the noise complaint, but that is not at issue in this appeal.

Nevertheless, he instructed Deputy Beddingfield to enter the residence. Deputy Beddingfield knocked twice as he simultaneously entered the residence.

With regard to the deputies' actions in peering through the gap at the window, the court of criminal appeals has held that the police did not conduct a search when they looked into a window through a two inch gap between partially drawn draperies and saw stolen merchandise. ***Johnson v. State***, 469 S.W.2d 581, 583-84 (Tex. Crim. App. 1971). Moreover, it does not matter that the deputies had to strain in order to view the activities of the home's occupants. "[T]he police are free to observe circumstances and evidence that are in 'plain view' to the public . . . . That the policeman may have to crane his neck, or bend over, or squat, does not render the doctrine inapplicable, so long as what he saw would have been visible to any curious passerby . . . ." ***Duhig v. State***, 171 S.W.3d 631, 636 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (quoting ***Hamilton v. State***, 590 S.W.2d 503, 504-05 (Tex. Crim. App. 1979)). Consequently, the State is correct that the deputies did not conduct a "search" when they looked through the two inch gap at the window. That does not end the inquiry, however.

To justify the deputies' entry into the home, as we have noted, the State bore the burden of proving exigent circumstances. ***Keehn v. State***, 279 S.W.3d 330, 335 (Tex. Crim. App. 2009) ("Plain view, in the absence of exigent circumstances, can never justify a search and seizure without a warrant when law enforcement officials have no lawful right to access an object."). At the hearing, the officers testified that the only reason they entered the home was to prevent the destruction of the evidence through the consumption of the drugs. Therefore, we apply the ***McNairy*** factors to examine whether the trial court could have reasonably concluded that the State failed to prove exigent circumstances to justify immediate entry into the home.

First and foremost, we note that the deputies testified that they did not fear for their safety, and that they believed the occupants of the home were completely unaware of their presence before Deputy Beddingfield entered the home. These factors, when viewed in conjunction with the fact that the deputies saw no one consuming any drugs, weigh in favor of the trial court's implied ruling that the State failed to prove exigent circumstances. Next, there is no testimony about the amount of time that would have been necessary to obtain a warrant. Therefore, this factor is neutral. Finally, given the nature of methamphetamine itself—i.e. that it is smoked—and the fact that the deputies saw Appellee hold a methamphetamine pipe to his mouth, they had a reasonable belief that drugs would soon be consumed. This factor weighs in favor of a finding

that exigent circumstances existed at the time of the entry.

Viewed in the light most favorable to the trial court's ruling, the evidence introduced at the suppression hearing shows that (1) the deputies never actually saw any drugs at all prior to entering the residence, (2) they saw only a man holding a methamphetamine pipe to his mouth with no smoke emanating from it or an ignition source, and (3) the occupants of the home were unaware of the deputies' presence. Based upon this evidence, the trial court reasonably could have concluded that these facts outweighed the exigencies, or at least the State failed to prove the requisite exigent circumstances to necessitate immediate entry into the home. Therefore, the trial court reasonably could have concluded that the entry was illegal and the fruits obtained from the entry should be suppressed. Thus, the trial court did not abuse its discretion in granting Appellee's motion to suppress.

Finally, the State argues that the purpose of the exclusionary rule would not be furthered by suppression of the evidence in this case. The purpose of Article 38.23 of the Texas Code of Criminal Procedure and the federal exclusionary is "to deter unlawful conduct on the part of law enforcement personnel and to close the doors of our courts to illegally obtained evidence." ***Brick v. State***, 738 S.W.2d 676, 679 n.5 (Tex. Crim. App. 1987). Since we have concluded that the trial court acted within its discretion in granting the motion to suppress, we also conclude that suppression of the fruits of the entry into the home and subsequent seizure of evidence will deter the officers from engaging in such conduct under similar circumstances in the future.

The State's sole issue is overruled.

DISPOSITION

Having overruled the State's sole issue, we ***affirm*** the trial court's order granting Appellee's motion to suppress evidence.

BRIAN HOYLE
Justice

Opinion delivered September 12, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

SEPTEMBER 12, 2012

NO. 12-11-00186-CR

THE STATE OF TEXAS,
Appellant
V.
TIMOTHY JAMES HUNT,
Appellee

Appeal from the 173rd Judicial District Court
of Henderson County, Texas. (Tr.Ct.No. B-18,228)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the trial court's order.

It is therefore ORDERED, ADJUDGED and DECREED that the trial court's order granting Appellee's motion to suppress evidence **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.