NO. 12-11-00221-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

VINCE MCCOY FIELDS, APPELLANT	***§***	***APPEALS FROM THE 123RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SHELBY COUNTY, TEXAS***

MEMORANDUM OPINION

Vince McCoy Fields appeals his conviction for possession of a controlled substance. In his sole issue on appeal, he argues that the trial court abused its discretion when it denied his motion to suppress evidence. We affirm.

BACKGROUND

On December 3, 2010, shortly after 11:00 p.m., Officer Steven Thornburgh of the Center Police Department and Detective Stephen Stroud were patrolling Center, Texas, when they observed a pedestrian later identified as Appellant "staggering" on the roadway. The officers were concerned for the pedestrian's safety, and they decided to investigate because they suspected Appellant was intoxicated.

When the officers initiated contact with Appellant, they smelled a strong odor of alcoholic beverages, and Appellant's speech was slurred. Officer Thornburgh believed he needed to frisk Appellant to conduct a weapons search. He testified later at the suppression hearing that he asked and obtained Appellant's permission to conduct a weapons frisk. While conducting the patdown, Officer Thornburgh felt what he believed to be a bottle in Appellant's right jacket pocket. He then asked for and obtained Appellant's permission to retrieve the bottle. The officers inspected

it, and immediately believed it to be phencyclidine (PCP), an illegal drug, due to the smell. Detective Stroud was familiar with PCP and knew that it had a distinctive odor. After confirming that the substance was PCP, the officers arrested Appellant.

Appellant was indicted for possession of a controlled substance. The court held a pretrial hearing on Appellant's motion to suppress, in which he alleged in pertinent part that he did not consent to the initial weapons frisk, and that Officer Thornburgh had no reasonable basis to frisk him for weapons. Officer Thornburgh and Detective Stroud testified at the hearing. The trial court denied the motion and proceeded to a jury trial. The parties relitigated the motion during the trial. After the trial, the jury found Appellant guilty of the offense. The jury then sentenced Appellant to fifty-five years of imprisonment and assessed a $5,000.00 fine. This appeal followed.

MOTION TO SUPPRESS

In his sole issue, Appellant argues that the trial court erred when it denied his 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 generally consider only the evidence adduced at the suppression hearing unless the parties consensually relitigate the issue at trial, in which case we also consider relevant trial testimony. ***Rachal v. State***, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996). 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. 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 a trial judge's ruling on a motion to suppress by viewing all of the evidence in the light most favorable to the 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).

Applicable Law

It is well settled under the Fourth and Fourteenth Amendments of the United States Constitution that a search conducted without a warrant issued upon probable cause is "per se unreasonable . . . subject to only a few specifically established and well lineated exceptions." ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043, 36 L. Ed. 2d 854 (1973). It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. ***Id.*** The validity of consent to search is a question of fact to be determined from all of the circumstances. ***Meekins v. State***, 340 S.W.3d 454, 458 (Tex. Crim. App. 2011). The Fourth and Fourteenth Amendments require that consent not be coerced by explicit or implicit means, or by implied threat or covert force, and voluntariness of a person's consent is also a question of fact. ***Id.*** at 458–59. The trial court must conduct a careful sifting and balancing of the unique facts and circumstances of each case in deciding whether a particular consent search was voluntary or coerced. ***Id.*** at 459; *see also* ***Valtierra v. State***, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010) ("The validity of an alleged consent to search is a question of fact to be determined from the totality of the circumstances.").

By looking at the circumstances leading up to the search, the reaction of the consenting person to pressure, and any other factor deemed relevant, a trial court can determine whether the statement of consent was given voluntarily. ***Reasor v. State***, 12 S.W.3d 813, 818 (Tex. Crim. App. 2000). Factors that can be taken into consideration are the consenting person's youth, education, and intelligence; the constitutional advice given to the person; the length of the detention; and the repetitiveness of the questioning. ***Id.*** Additional factors the court should consider in determining whether consent to search was free from coercion include any use of physical mistreatment, violence, threats, threats of violence, promises or inducements, deception or trickery, and the physical condition and capacity of the person consenting to the search within the totality of the circumstances. ***Meekins***, 340 S.W.3d at 460 n.26. Under Texas law, the state must prove voluntary consent by clear and convincing evidence. ***Valtierra***, 310 S.W.3d at 448.

"While this burden differs somewhat from that employed in the federal system, the legal analysis is the same in both Texas and federal courts: whether consent was voluntary is a factual question and must be analyzed based on the totality of the circumstances." ***Meekins***, 240 S.W.3d at 460. Because issues of consent are necessarily fact intensive, though, a trial court's finding of voluntariness must be accepted on appeal unless it is clearly erroneous. ***Id.***

Even without consent, in making an investigative stop based upon reasonable suspicion that criminal activity is afoot, the officer, for his own safety, may conduct a frisk or patdown search for weapons of the person investigated. ***Terry v. Ohio***, 392 U.S. 1, 26–27, 88 S. Ct. 1868, 1882–83, 20 L. Ed. 2d 889 (1968). However, the officer may conduct a patdown search incident to the detention only if he can point to objective particularized facts leading him to reasonably conclude that the suspect might possess a weapon. ***Sibron v. New York***, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917 (1968); ***Carmouche v. State***, 10 S.W.3d 323, 329 (Tex. Crim. App. 2000). A police officer's reasonable belief that a suspect is armed and dangerous may be based upon the nature of the suspected criminal activity. ***Terry***, 392 U.S. at 27–28, 88 S. Ct. 1882–83; ***Carmouche***, 10 S.W.3d at 330. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." ***Terry***, 392 U.S. at 27, 88 S. Ct. at 1883.

Discussion

At trial, the parties presented conflicting evidence as to whether Appellant "staggered" in the roadway. But on appeal, Appellant does not question whether the initial stop and investigatory detention were justified. Rather, the issues he raises in this appeal are whether Appellant freely and voluntarily consented to a patdown search for weapons, and if not, whether the arresting officers had reasonable suspicion to believe that Appellant possessed a weapon to justify the search.

1. Consent to Search

Officer Thornburgh testified at the suppression hearing and during the trial that Appellant provided consent to search. The video of the stop was admitted into evidence at the suppression hearing, and at the trial itself. The video shows that after Appellant was stopped and the officers began their public intoxication investigation, Officer Thornburgh stated, "I'm gonna check your eyes right quick, ok," while reaching for his pen to conduct the horizontal gaze nystagmus (HGN) test. Appellant did not respond, and Officer Thornburgh asked, "You don't have any weapons or

anything like that in your pocket, do you?" Appellant replied, "No, sir." Officer Thornburgh then asked, "Do you mind if I pat you down for your safety as well as mine?" Appellant did not respond, and approximately four seconds later, the officer said, while moving towards Appellant, "I'm going to pat you down for your safety as well as mine, okay?" Appellant responded, "Yes, sir." Officer Thornburgh conducted the search, felt an object that resembled a bottle, and said, "What's this?" Appellant said that it was a bottle, and Officer Thornburgh asked if he could remove it. Appellant replied in the affirmative. Once removed from Appellant's jacket pocket, the officers discovered the contents of the bottle—PCP.

Prior to the search, Officer Thornburgh was standing only a few feet from Appellant. Detective Stroud also exited the vehicle and stood behind Appellant outside of his view. During the search, Detective Stroud removed his taser from its holster, although there is nothing in the record to show that Appellant was aware of that fact. Furthermore, the taser was not removed from the holster until after Officer Thornburgh obtained consent to conduct a weapons search, felt the bottle, and said, "What's this?"

Viewing the evidence in the light most favorable to the trial court's ruling on the motion, we conclude that Appellant provided his consent to a weapons frisk. Officer Thornburgh clearly asked whether he could search Appellant for weapons. He received no reply from Appellant. Then Officer Thornburgh motioned towards Appellant and stated that he would search him for weapons, but added the phrase, "okay," to form an interrogatory. Appellant immediately said "Yes." "[R]epeatedly asking for consent does not [necessarily] result in coercion, particularly when the person refuses to answer or is otherwise evasive in his response." ***Meekins***, 340 S.W.3d at 464. Most confrontations with the police are uncomfortable, given the implicit difficulty in refusing any request from a peace officer who stands cloaked in the authority of law enforcement. ***State v. Velasquez***, 994 S.W.2d 676, 679 (Tex. Crim. App. 1999). But "the Constitution does not guarantee freedom from discomfort." ***Id.*** Indeed, 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.3d at 333. Appellant failed to assert those rights here when he voluntarily consented to a weapons frisk. We cannot conclude that the trial court's implied finding that Appellant consented to the frisk was clearly erroneous.

2. <u>Search without consent</u>

Even if Appellant had not consented to the search, the trial court could have concluded that

Officer Thornburgh was justified in conducting the search under the circumstances.

Appellant points out that Officer Thornburgh testified that he never feared for his safety. Consequently, his argument continues, no search was justified. "There is no requirement that a police officer feel personally threatened or be 'absolutely certain' that the suspect is armed in order to conduct a pat-down search." ***Glazner v. State***, 175 S.W.3d 262, 265 (Tex. Crim. App. 2005). Officer Thornburgh's testimony that he did not subjectively fear Appellant is not dispositive of whether the officer could legally frisk Appellant for weapons. *See* ***Griffin v. State***, 215 S.W.3d 403, 409 (Tex. Crim. App. 2006). The ultimate test is an objective one. The test is whether the facts available to Officer Thornburgh at the time of the frisk "would warrant a reasonably cautious person to believe that the action taken was appropriate." *See* ***id.***; *see also* ***State v. Castleberry***, 332 S.W.3d 460, 469 (Tex. Crim. App. 2011).

Viewing the evidence in the light most favorable to the trial court's ruling, the record shows that Detective Stroud testified the area was a dark, high crime area that was "very well-known for narcotics sale[s]." The officers initiated contact because Appellant was "staggering" on the roadway. Once Officer Thornburgh began talking to Appellant, he detected the odor of alcohol and noticed that Appellant had slurred speech. Officer Thornburgh began to conduct the HGN test, which requires both of the officer's hands to be occupied when the test is given at night. One hand must operate a flashlight, while the other hand manipulates a pen for the suspect to follow with his eyes. In addition, the officer is in close proximity to the suspect at the time he administers the test. Finally, the officer must concentrate on administering the test to observe clues of intoxication. Thus, the officer is placed in a position of vulnerability while administering the HGN test.

Moreover, it is apparent from the video that Officer Thornburgh commenced the HGN test, recognized that he would be vulnerable, aborted the HGN test, and then asked for consent to search for weapons. Officer Thornburgh also testified that he would be placed in a vulnerable position while administering the HGN test. Further, as we noted above, Appellant initially did not answer when Officer Thornburgh asked if he could search him for weapons. This is an additional circumstance that would justify the search. Taken together, all of these circumstances could have led a reasonable person to conclude that a weapons frisk was necessary.

Appellant's sole issue is overruled.

DISPOSITION

We ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered June 13, 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

JUNE 13, 2012

NO. 12-11-00221-CR

VINCE MCCOY FIELDS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 123rd Judicial District Court of
Shelby County, Texas. (Tr.Ct.No. 11CR-18,251)

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 judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **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.