NO. 12-14-00298-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ROBERT EUGENE PRITCHETT, APPELLANT	***§***	***APPEAL FROM THE 273RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SAN AUGUSTINE COUNTY, TEXAS***

MEMORANDUM OPINION

Robert Eugene Pritchett appeals his conviction for possession of a controlled substance in an amount less than one gram in a drug free zone. He raises five issues. We affirm.

BACKGROUND

Officer Jonathan Wayne Sowell of the San Augustine Police Department saw Appellant stopped in a vehicle in front of a suspected drug dealer's home. When Appellant drove away, Officer Sowell followed him. After about a half mile, Officer Sowell witnessed Appellant fail to stop until after the vehicle had entered the intersection rather than at the stop sign. Believing that Appellant had committed a traffic violation, Officer Sowell initiated a traffic stop.

Before Appellant stopped, Officer Sowell saw Appellant making furtive movements. After making contact with Appellant, Officer Sowell requested Appellant's driver's license, but Appellant did not have his driver's license with him. Officer Sowell then arrested Appellant for failing to display a driver's license. He also issued Appellant a warning for the traffic violation that precipitated the stop.

After arresting Appellant, Officer Sowell decided to impound the vehicle that Appellant was driving. As part of the impoundment procedure, he intended to conduct an inventory search of the vehicle. However, before Officer Sowell conducted an inventory search, Officer James

Blackwell, another officer with the San Augustine Police Department, arrived at the scene and noticed a white substance on the opened driver's side door of the vehicle. Officer Blackwell then looked at the bottom of the door and saw what appeared to be remnants of crack cocaine. He concluded that he could seize the substance based on the plain view doctrine.

Officer Blackwell conducted a field test of the substance, and the field test was positive for cocaine. Later, Stephanie Jackson, a forensic scientist with the Texas Department of Public Safety Crime Laboratory, conducted laboratory testing of the substance retrieved from Appellant's vehicle, and found it to contain a trace amount of cocaine. Appellant was indicted for the offense of possession of a controlled substance in an amount less than one gram in a drug free zone.[1]

Just before jury selection for the trial commenced, Appellant filed two motions to suppress evidence. The record does not show that the trial court ruled on either of the motions. The matter proceeded to a jury trial, and the State introduced evidence of the cocaine seized from the vehicle Appellant was driving. Appellant objected that the evidence was inadmissible because the roadside detention and impoundment were improper. The trial court overruled Appellant's objections. The jury found Appellant guilty of possession of a controlled substance in an amount less than one gram in a drug free zone. Appellant requested that the trial court determine punishment, and the trial court sentenced Appellant to community supervision for five years and a fine of $3,000. This appeal followed.

SUPPRESSION OF EVIDENCE

In his fifth issue, Appellant contends that the search of the vehicle was unconstitutional. In his fourth issue, he contends that the search was unconstitutional because reasonable alternatives to impoundment were available but refused.

Preservation of Error

Where a motion to suppress makes broad arguments and otherwise fails to bring the specific matter to the trial court's attention that an appellant later seeks to raise on appeal, error is not preserved. *See* ***Resendez v. State***, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009). Moreover, when considering an argument on a motion to suppress, a complaint that could, in isolation, be read to express more than one legal argument generally will not preserve all potentially relevant

[1] Appellant had driven within 1,000 feet of San Augustine High School.

arguments for appeal. *See* ***id.*** at 314. Only when there are clear contextual clues indicating that the party was, in fact, making a particular argument will that argument be preserved. ***Id.*** Thus, because appellate contentions must comport with specific assertions made in a motion to suppress, an appellant fails to preserve error when he files a motion to suppress arguing one legal theory at trial and then asserts a different legal theory on appeal. ***Rothstein v. State***, 267 S.W.3d 366, 373 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *see also* TEX. R. APP. P. 33.1.

Appellant filed two motions to suppress on the morning of jury selection. In his first motion, Appellant contended that (1) he had committed no traffic violation, so the traffic stop was improper, (2) he did not have access to the vehicle after he had been arrested, placed in handcuffs, and placed in the back of Officer Sowell's patrol car, so this was not a valid incident to arrest search, and (3) the vehicle should not have been impounded because a reasonable alternative to impoundment was present, so this was not a valid inventory search. In his second motion (filed fifteen minutes later than the first), Appellant contended that he was stopped without probable cause. Appellant failed to obtain a ruling on either of his motions to suppress.

When the State offered Exhibit 1, the drug analysis report indicating that the substance was cocaine, one of Appellant's attorneys initially stated, "Judge, there is no objection." Appellant's other attorney objected on two grounds: that the roadside detention was improper and that the impoundment was improper. The trial court overruled Appellant's objections and admitted State's Exhibit 1. Thus, the only potential errors preserved by Appellant are that the roadside detention was improper, and the impoundment was improper. *See* TEX. R. APP. P. 33.1.

Standard of Review

We review a trial court's ruling on the suppression of evidence under a bifurcated standard of review. ***Hubert v. State***, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010); ***Carmouche v. State***, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). A trial court's decision to grant or deny a motion to suppress is generally reviewed under an abuse of discretion standard. ***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. Crim. App. 2008).

When ruling on a motion to suppress evidence, the trial court is the exclusive trier of fact and judge of the witnesses' credibility. *See* ***Maxwell v. State***, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). Accordingly, a trial court may choose to believe or disbelieve all or any part of a witness's testimony. *See* ***State v. Ross***, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

The prevailing party is entitled to "the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence." ***State v. Castleberry***, 332 S.W.3d 460, 465 (Tex. Crim. App. 2011). We review the trial court's legal conclusions de novo and uphold the ruling so long as it is supported by the record and correct under any legal theory applicable to the case. ***State v. Iduarte***, 268 S.W.3d 544, 548 (Tex. Crim. App. 2008); ***Banda v. State***, 317 S.W.3d 903, 907–08 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Legality of the Traffic Stop

A police officer may stop and detain a motorist who commits a traffic violation within the officer's view. *See* ***Whren v. United States***, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996); ***Garcia v. State***, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992). In addition, an officer may conduct a temporary detention if the officer has reasonable suspicion to believe that a person is violating the law. *See* ***Ford v. State***, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Reasonable suspicion is dependent upon both the content of the information possessed by the police and its degree of reliability. *See* ***Alabama v. White***, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301 (1990); ***Walter v. State***, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000).

A driver approaching an intersection with a stop sign must stop before entering the crosswalk or at the stop line. TEX. TRANSP. CODE ANN. § 544.010(a), (c) (West 2011). If the intersection has no crosswalk or stop line, the driver must stop at the place nearest the intersecting roadway where the driver has a view of approaching traffic. ***Id.***

Officer Sowell testified that he witnessed Appellant commit a traffic violation. He clearly testified that Appellant stopped in the intersection, rather than stopping in compliance with the mandate of section 544.010. He further testified that Appellant's bumper was over a manhole cover in the intersection when Appellant stopped. Defendant's Exhibit 4 shows the manhole cover well into the cross-street.

Appellant challenged Officer Sowell's testimony through cross-examination. He further questioned Officer Sowell regarding the absence of a video recording of their interaction. Officer

Sowell conceded that the video recording had been lost due to a computer crash at the San Augustine Police Department.

The question of whether Appellant properly stopped at the intersection can be resolved by an assessment of whether Officer Sowell's testimony was credible. We defer to the trial court's assessment of the facts before it. The trial court's determination that Appellant committed a traffic violation is reasonable in light of the evidence before it, and thus, the trial court did not abuse its discretion in concluding that the traffic stop was legal.

Legality of the Search

A warrantless search is unreasonable unless it falls within certain specific exceptions. *See* ***Allridge v. State***, 850 S.W.2d 471, 493 (Tex. Crim. App. 1991). However, when incriminating evidence is in the plain view of an officer, the officer may seize the evidence without violating the prohibition against unreasonable searches and seizures. ***Walter v. State***, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000). To satisfy the "plain view" doctrine, (1) law enforcement officials must have a right to be where they are, and (2) it must be immediately apparent that the items are associated with criminal activity. ***Id.***; *see* ***Horton v. California***, 496 U.S. 128, 135-36, 110 S. Ct. 2301, 2307, 110 L. Ed. 2d 112 (1990).

A police officer's observation of a traffic violation establishes probable cause to stop a car and, thus, provides the officer with a lawful vantage point from which he can look through the windows of a car into its interior. *See* ***Texas v. Brown***, 460 U.S. 730, 739-40, 103 S. Ct. 1535, 1542, 75 L. Ed. 2d 502 (1983); ***Walter***, 28 S.W.3d at 544-45. To immediately recognize a substance as evidence of criminal activity, a police officer need not have actual knowledge that the substance is contraband, but he must have "probable cause to associate the [substance] with criminal activity." ***Brown***, 460 U.S. at 741-42, 103 S. Ct. at 1543; ***Joseph v. State***, 807 S.W.2d 303, 308 (Tex. Crim. App. 1991). A police officer may use his training and experience in determining whether a substance in plain view is contraband. ***Brown***, 460 U.S. at 746, 103 S. Ct. at 1545 (Powell, J. concurring) (citing to ***United States v. Cortez***, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981)); ***Joseph***, 807 S.W.3d at 308.

According to Officer Sowell, Officer Blackwell arrived as Officer Sowell was preparing to conduct an inventory search of the vehicle. Officer Sowell recalled that prior to his actually beginning the inventory process, Officer Blackwell observed what appeared to be cocaine residue on the side paneling of the car and crumbs of what appeared to be crack cocaine in the door panel.

Officer Blackwell's testimony was consistent with Officer Sowell's account. According to Officer Blackwell's testimony, he arrived at the scene of the traffic stop and spoke briefly with Appellant and Officer Sowell. Officer Blackwell then walked to the vehicle. Appellant had left the driver's side door of the vehicle open after he exited the vehicle. Officer Blackwell noticed a suspicious substance on the door panel that, based on his experience, he suspected was cocaine. Specifically, he saw white smears and streaks on the door panel and saw small pieces or granules of a substance that was "waxy" and "soapy." Officer Blackwell testified that he had been a narcotics officer for five years, the substance on the car door "jumped out" at him, and that cocaine has the same texture and appearance. The officer continued that based on his experience and training, he was "pretty sure" that the substance was cocaine. Officer Blackwell stopped searching and conducted a field test on the substance, which confirmed the presence of cocaine. Officer Sowell then performed the inventory search of the vehicle.

The trial court reasonably could have determined that Officer Blackwell had the right to be near the open driver's side door at the time of the traffic stop, he observed the cocaine in plain view, and that based on his experience as a narcotics officer, he immediately recognized the substance as cocaine. *See* ***id.*** Because the trial court's ruling is supported by the plain view doctrine, the trial court did not err in admitting the evidence. *See* ***Iduarte***, 268 S.W.3d at 548.

We overrule Appellant's fifth issue. Because we have held that Officer Blackwell's discovery of the contraband was within plain view, we need not address Appellant's fourth issue pertaining to impoundment. *See* TEX. R. APP. P. 47.1.

REQUEST TO READ STATUTE INTO EVIDENCE

In his third issue, Appellant contends the trial court erred when it sustained the State's objection to Appellant's motion to read into the record a portion of the Texas Transportation Code. Appellant argues that the statute would have aided the jury's understanding of the law applicable to a motorist stopping at an intersection.

Standard of Review and Applicable Law

A trial court has considerable discretion in determining whether to exclude or admit evidence. *See* ***Montgomery v. State***, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990); ***State v. Dudley***, 223 S.W.3d 717, 724 (Tex. App.—Tyler 2007, no pet.). Absent an abuse of discretion, we will not disturb a trial court's decision to admit or exclude evidence. *See* ***Martin v. State***, 173

S.W.3d 463, 467 (Tex. Crim. App. 2005). If the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the ruling was made, then we must uphold the judgment. ***Id.*** The jury is the judge of the facts, but it receives the law from the court. TEX. CODE OF CRIM. PROC. ANN. art. 36.13 (West 2007).

Discussion

Appellant sought to read into the record Texas Transportation Code Section 544.010(c). The State objected that the trial court is responsible for instructing the jury as to what the law is. The trial court sustained the State's objection. The trial court further stated that the charge would contain "all the instructions as far as the law is concerned."

The charge did not include the specific wording of section 544.010(c). However, the jury was instructed that it was not to consider any evidence obtained from the search if it believed that Appellant properly stopped at the intersection. Appellant made no objections or requests for additional instructions to the trial court's charge. Appellant has not directed us to, and our research has not uncovered, any authority that the trial court abused its discretion. Accordingly, we overrule Appellant's third issue.

EXCULPATORY EVIDENCE

In his first and second issues, Appellant contends that the State violated his right to due process by failing to disclose material evidence favorable to Appellant's defense and preserve a recording of Appellant's alleged traffic violation and the subsequent detention and search.

Applicable Law

The state has a constitutional duty under both the United States and Texas constitutions to disclose evidence favorable to the defendant. *See* ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963); ***Wyatt v. State***, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000); ***Thomas v. State***, 841 S.W.2d 399, 402 (Tex. Crim. App. 1992) (en banc). To find reversible error on a ***Brady*** claim, a defendant must show that (1) the state failed to disclose evidence, (2) the withheld evidence is favorable to him, and (3) the evidence is material. *See* ***Pena v. State***, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011).

But when the issue involves the state's failure to preserve evidence that may have been useful to the appellant, we apply a different test from that used in a typical ***Brady*** analysis. *See* ***Ex parte Napper***, 322 S.W.3d 202, 229 (Tex. Crim. App. 2010). When "potentially exculpatory

evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." ***Arizona v. Youngblood***, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988); ***Swearingen v. State***, 303 S.W.3d 728, 734 (Tex. Crim. App. 2010). Absent a showing of bad faith, the state's failure to preserve potentially useful evidence does not violate due process. ***Id.***; ***Ex parte Brandley***, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989) (en banc).

Bad faith is more than simply being aware that one's action or inaction could result in the loss of something that is recognized to be evidence. ***Ex parte Napper***, 322 S.W.3d at 238. Bad faith cannot be established by showing that evidence was destroyed without thought or due to common practice. *See* ***id.*** Moreover, bad faith is not established by showing there was an unreasonable belief that proper procedure was being followed. *See* ***id***. Instead, bad faith requires a showing of improper motive, such as a personal animus against the defendant or a desire to prevent the defendant from obtaining useful evidence. ***Id.***

Discussion

Appellant first claims that the San Augustine Police Department's policy regarding impounding vehicles was relevant to the legality of the inventory search and should have been disclosed. Sergeant Shannon Brazeal of the San Augustine Police Department confirmed that the department has a policy governing the impoundment of vehicles and that he refused to release the policy to Appellant. Consequently, the policy is not in the record. Sergeant Brazeal testified that he did not release the policy because the subpoena served was issued by a private criminal defense attorney rather than a government official. Sergeant Brazeal declined to release the requested information after discussing the subpoena with the San Augustine County District Attorney's office.

The evidence established that Officer Sowell conducted an inventory of the vehicle, and that he did not have a record of the inventory search in his report. But Officer Sowell further stated that the evidence found was based on Officer Blackwell's observation and the plain view doctrine, not on an inventory search.

Based on the record, Appellant's claim of a ***Brady*** violation fails because he did not establish that the policy would have been favorable to his defense and that the failure to disclose it was material. *See* ***Pena***, 353 S.W.3d at 809. Because the policy was not produced, the State could not establish that the inventory search was valid. *See* ***Garza***, 137 S.W.3d at 882. However,

the State sought to establish that the search was proper based upon the plain view doctrine. Because the State did not rely on the inventory search exception, Appellant failed to establish that the policy was material. *See* ***Pena***, 353 S.W.3d at 809.

Second, Appellant argues that the recording from Officer Sowell's on-vehicle camera could have contained exculpatory material, but the San Augustine Police Department lost the video. Officer Sowell testified that the video recording device on his vehicle was working the day he stopped Appellant. However, Officer Sowell further testified that the video was lost when the police department's computer hard drive crashed. Sergeant Brazeal confirmed that the video had been lost because of a computer crash. The San Augustine Police Department attempted, but was unable, to retrieve the lost recording.

The record does not establish that the department acted in bad faith when it failed to preserve the recording of Officer Sowell's interaction with Appellant. Instead, the record shows that the prosecution turned over the remaining recording and that the loss of the recording from Officer Sowell's on-vehicle camera was simply the result of a computer crash, not bad faith on the part of any officer.[2] Appellant failed to establish that the State violated his due process rights. *See* ***Swearingen***, 303 S.W.3d at 734; ***Ex parte Napper***, 322 S.W.3d at 229, 238. Accordingly, we overrule Appellant's first and second issues.

DISPOSITION

Having overruled Appellant's first, second, third, and fifth issues, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered April 6, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

[2] Officer Blackwell's patrol unit contained a video cassette recorder (VCR) that used videotapes to make recordings. His patrol vehicle is the only San Augustine vehicle containing a VCR. The videotape recording in Officer Blackwell's patrol vehicle is not helpful because Officer Sowell's patrol vehicle obscured the camera's view.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 6, 2016

NO. 12-14-00298-CR

ROBERT EUGENE PRITCHETT,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 273rd District Court
of San Augustine County, Texas (Tr.Ct.No. CR-13-8411)

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., Hoyle, J., and Neeley, J.