NO. 12-15-00043-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MIKO DEYOND PARKS, APPELLANT	***§***	***APPEAL FROM THE 159TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Miko Deyond Parks appeals the trial court's judgment of conviction and order of deferred adjudication and raises one issue challenging the trial court's denial of his motion to suppress. We affirm.

BACKGROUND

An Angelina County grand jury returned a two count indictment against Appellant for the offenses of possession of marijuana (count I) and possession of a controlled substance, namely, cocaine (count II). Appellant filed a motion to suppress alleging, among other things, that law enforcement entered his residence without a search warrant or consent. After conducting a hearing, the trial court denied Appellant's motion to suppress.

Thereafter, Appellant pleaded guilty to both offenses, but reserved his right to appeal the trial court's denial of his motion to suppress. The trial court found Appellant guilty of the offense as alleged in count I and assessed his punishment at one hundred nineteen months of confinement. However, the trial court deferred a finding of guilt as to a lesser included offense of count II, and placed Appellant on deferred adjudication community supervision for a period of ten years. This appeal followed.

WARRANTLESS ENTRY INTO RESIDENCE

In his sole issue, Appellant contends that the trial court erred in overruling his motion to suppress because the officer's entry into his residence was made without consent or exigent circumstances. The State contends that Appellant consented to the officer's entry, and that the consent was voluntary.

Standard of Review

Appellate review of a trial court's ruling on a motion to suppress involves a bifurcated analysis. ***Delafuente v. State***, 414 S.W.3d 173, 177 (Tex. Crim. App. 2013). First, we give almost total deference to a trial court's determination of the historical facts that the record supports, and second, we review de novo the trial court's application of the law to facts that do not turn on credibility and demeanor. ***Abney v. State***, 394 S.W.3d 542, 547 (Tex. Crim. App. 2013).

When the trial court fails to file findings of fact, we view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record. ***State v. Ross***, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000); *see also* ***Aguirre v. State***, 402 S.W.3d 664, 666–67 (Tex. Crim. App. 2013) (Cochran, J., concurring in refusal of petition for discretionary review). "The winning side is afforded the 'strongest legitimate view of the evidence' as well as all reasonable inferences that can be derived from it." ***State v. Duran***, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013) (citations omitted). We will uphold the trial court's ruling if it is correct under any theory of law applicable to the case. ***Elizondo v. State***, 382 S.W.3d 389, 393–94 (Tex. Crim. App. 2012).

Applicable Law

The warrantless entry into a residence by law enforcement is a "search" for purposes of the Fourth Amendment, and is presumptively unreasonable. ***Limon v. State***, 340 S.W.3d 753, 756 (Tex. Crim. App. 2011). However, this presumption may be overcome if it is shown that the owner or occupant voluntarily consented to the entry. *See* ***id.***; ***Valtierra v. State***, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010).[1]

The validity of an alleged consent to search is a question of fact that must be proved by clear and convincing evidence. ***Id.*** The voluntariness of consent is determined by analyzing the

[1] Investigator Compton testified that he did not enter Appellant's apartment under exigent circumstances. Thus, the sole issue is whether his entry was reasonable based on Appellant's alleged consent. Accordingly, we do not discuss the exigent circumstances exception to the warrant requirement. *See* TEX. R. APP. P. 47.1.

totality of the circumstances of the situation from the view of an objectively reasonable person, without regard for the subjective thoughts or intents of either the officer or the citizen. ***Tucker v. State***, 369 S.W.3d 179, 185 (Tex. Crim. App. 2012); ***Walker v. State***, 469 S.W.3d 204, 211 (Tex. App.—Tyler 2015, pet. ref'd). The evidence must show that the consent was positive, unequivocal, and not a result of duress or coercion, actual or implied. *See* ***State v. Weaver***, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011). Thus, the ultimate question is whether the person's "will has been overborn and his capacity for self-determination critically impaired," such that his consent must have been involuntary. ***Meekins v. State***, 340 S.W.3d 454, 459 (Tex. Crim. App. 2011) (repeated asking for consent does not result in coercion "particularly when the person refuses to answer or is otherwise evasive in his response").

A trial court's finding of voluntary consent is reviewed for abuse of discretion, and must be accepted on appeal unless it is clearly erroneous. ***Id.*** at 460; ***Johnson v. State***, 226 S.W.3d 439, 443 (Tex. Crim. App. 2007).

The Evidence

Greg Shroeder, an investigator for the Texas Department of Public Safety (DPS), was the first witness during the hearing on Appellant's motion to suppress. Investigator Shroeder testified that he received information from a confidential informant that Appellant was selling narcotics out of his apartment. Because the information was "relatively fresh," and he did not have the resources to perform undercover purchases to confirm whether narcotics transactions were taking place, Investigator Shroeder conducted a "knock and talk" at Appellant's apartment on July 31, 2013.

Investigator Shroeder testified that he wore plain clothes when he went to Appellant's apartment because people are less willing to talk to him when he is in uniform. As he approached Appellant's apartment, Investigator Shroeder smelled an odor of marijuana, and two uniformed DPS agents waited in a nearby stairwell.

Investigator Shroeder testified that Appellant answered the door in response to his knock and that an "overwhelming" odor of marijuana emanated from the apartment. He stated that the door to the apartment was "fully opened" and he saw a woman and a handgun on the couch located in the living room. When he mentioned the smell of marijuana, Appellant told Investigator Shroeder that he and the woman on the couch had just finished smoking marijuana.

According to Investigator Shroeder, he advised Appellant that he was investigating a narcotics complaint and told him that he "wanted to discuss it further with him in the residence."

Investigator Shroeder could not remember the specific words he said, nor the words or actions Appellant used to indicate consent. Nevertheless, he maintained that his presence in Appellant's apartment was justified by consent.

Investigator Shroeder prepared an affidavit to memorialize his investigation and interaction with Appellant. The affidavit contains no statements that Investigator Shroeder entered the apartment upon being granted consent. The only statement contained in the affidavit relating to Investigator Shroeder's and the other agents' initial entry into the apartment is as follows: "Investigators entered the residence and secured the firearm on the couch."

The State called DPS Agent Myles Holland to testify after Investigator Shroeder's testimony concluded. Agent Holland was not standing next to Investigator Shroeder when he knocked on Appellant's door, and was not present when Investigator Shroeder entered the apartment. However, Agent Holland testified that when he went into Appellant's apartment, everyone was talking about the handgun, the situation was "low key," and "appeared all to be consensual." He explained that "[t]here was no—absolutely been no verbal altercations and/or requests from Mr. Parks . . . as far as the agents being in their house."

Appellant and his then-girlfriend, Magin Watts, testified that Appellant did not consent to Investigator Shroeder's entry into the apartment. Contrary to Investigator Shroeder's testimony, Appellant explained that he opened the door only a few inches and that Investigator Shroeder could not see inside the apartment. He testified that

> [t]]he officer said could you step back. Could you step back, I'm Officer Shroeder, I believe, with the DPS. You know, you need to step back and he waived [sic] guys up and guys starting coming up then. And say, you need to step back. I smell marijuana, so you need to get back. So then they all came in.

Appellant denied giving Investigator Shroeder permission to enter the apartment, but confirmed that he and Watts shared a marijuana joint that morning.

Discussion

The trial court did not file, nor did Appellant request, any findings of fact in this case. Appellant contends that the State did not satisfy its burden because Investigator Shroeder could not testify to the "words or phrases that [Appellant] used to freely, voluntarily, positively, or unequivocally give consent[.]" We agree that Investigator Shroeder could not recall what, if any, words Appellant used to grant entry into the apartment. However, in addition to words, consent may be given by action or shown by circumstantial evidence. *See* ***Valtierra***, 310 S.W.3d at 448. And "mere acquiescence" may constitute a finding of consent. ***Meekins***, 340 S.W.3d at 463–64.

The evidence showed that the length of time between Investigator Shroeder's initial contact with Appellant and his alleged consent was short, and that he did not engage in repeated or prolonged questioning of Appellant prior to his entry. *See* ***Tucker***, 369 S.W.3d at 185 (discussing factors to consider in evaluating voluntariness of consent). Agent Holland's testimony that there were no verbal altercations and everything seemed consensual reinforces Investigator Shroeder's testimony that Appellant consented to his entry. *See* ***Meekins***, 340 S.W.3d at 463 ("If appellant had intended to refuse consent, it seems reasonable that he would have objected [or] complained[.]").

We note Appellant's testimony that he did not give Investigator Shroeder permission to enter the apartment. But the trial court was within its discretion to find Appellant's recollection of events not credible, based on his appearance, tone, and demeanor, and also because Appellant (and Watts) were admittedly under the influence of marijuana when Investigator Shroeder knocked on the door. *See* ***Ross***, 32 S.W.3d at 855 (explaining that reason trial judge may believe or disbelieve all or any part of a witness's testimony is "because it is the trial court that observes first hand the demeanor and appearance of a witness[.]").

Conclusion

After viewing the totality of the circumstances in the light most favorable to the trial court's ruling, we conclude that the trial court's implied finding of voluntary consent is not clearly erroneous. *See* ***Meekins***, 340 S.W.3d at 460; ***Johnson***, 226 S.W.3d at 443. The trial court did not abuse his discretion in denying Appellant's motion to suppress. ***Meekins***, 340 S.W.3d at 460. Accordingly, we overrule Appellant's sole issue on appeal.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the judgment of the trial court.

GREG NEELEY
Justice

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

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JANUARY 6, 2016

NO. 12-15-00043-CR

MIKO DEYOND PARKS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 159th District Court
of Angelina County, Texas (Tr.Ct.No. 2014-0129)

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.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.