Affirmed and Opinion filed March 9, 2000.

In The

Fourteenth Court of Appeals

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NOS. 14-98-00325-CR & 14-98-00326-CR

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SAMUEL THORN, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause Nos. 27,179 & 27,181

O P I N I O N

Appellant, Samuel Thorn Jr., was convicted of aggravated kidnaping and aggravated robbery and sentenced to 25 and 15 years imprisonment respectively. On appeal, he contends that the police lacked reasonable suspicion to detain him, that an unwritten confession was improperly admitted, and that the video line-up was suggestive and conducive to an irreparable misidentification. We affirm.

The record indicates that as Joann Pratt attempted to drive away from her son's day care center in Fort Bend County, she was approached by appellant. Appellant pointed a shotgun at her and instructed her to slide over to the passenger side of the mini-van. He demanded money and her driver's license,

threatening that if she spoke to the police, he would have someone kill her. Appellant drove around, apparently looking for someone, and eventually released Mrs. Pratt in a field. He drove off in the mini-van.

Later, as appellant was standing outside a convenience store in Harris County, he was approached by a Houston police officer who had no knowledge of the auto theft, but had noticed appellant acting suspiciously. The officer asked to see his driver's license. After initially complying, appellant pushed the officer and fled. The officer pursued appellant and arrested him for evading detention. Searching appellant's car, the police found a pistol, a shotgun, and a man locked in the trunk.[1] Appellant was given his statutory warnings by a magistrate, and then interviewed by Officer Roger Stoppelberg about his possible involvement in an armed robbery of a supermarket. Appellant eventually confessed, telling the Officer Stoppelberg that he had used a van during the robbery that he had stolen from a woman in Fort Bend County.

Officer Stoppelberg put appellant in a video line-up which he subsequently forwarded to Fort Bend County authorities. Mrs. Pratt identified appellant as her assailant.

Reasonable Suspicion to Detain

In his first point of error, appellant contends police lacked reasonable suspicion to detain appellant, that his arrest for evading detention was unlawful, and that all evidence flowing from it should be suppressed.[2]

Because the determination of reasonable suspicion involves mixed questions of law and fact, we review the issue de novo *See Guzman v. State*, 955 S.W.2d 85, 88 (Tex. Crim. App.1997) (citing *Ornelas v. United States*, 517 U.S. 690, 698, 116 S.Ct. 1657, 1661-63, 134 L.Ed.2d 911 (1996)).

A detention, however short, is a limitation on an individual's freedom. To justify a detention, the officer must have articulable facts which, in light of his experience and personal knowledge, warrant a

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[1] Appellant, in a separate case, was sentenced to 25 and 15 years imprisonment respectively for the aggravated kidnaping and aggravated robbery of Raymond Wright.

[2] A person evades detention if he "intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him." TEX. PEN. CODE ANN. § 38.04 (Vernon 1994).

reasonable suspicion that the person being detained has committed or is about to commit a crime. *See Davis v. State*, 947 S.W.2d 240, 244 (Tex. Crim. App.1997) (citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)) The facts and circumstances leading to reasonable suspicion need not be criminal in and of themselves; so long as they, in some way, increase the likelihood of criminal activity. *See Crockett v. State*, 803 S.W.2d 308, 311 (Tex Crim. App.1991).

The officers testified that, as they drove past the store at 12:45 a.m., they saw an empty car behind the store with its lights on and its engine running. The officers watched as two men, the only customers in the store, paced the floor and repeatedly looked down the aisles and out the windows. The officers thought the two men might be "casing" the store for a robbery. After the men noticed the officers, they quickly exited the store, walking in opposite directions. The officers detained the two men and asked for their licenses.

In light of the circumstances they observed, coupled with their experience, we find the officers articulated facts justifying reasonable suspicion and authorizing a lawful detention. Once appellant pushed the officer and ran; he was, of course, committing the offense of evading detention in the officer's presence and was properly arrested. *See* TEX. CODE CRIM. PROC. ANN. Art. 14.01 (Vernon 1977) (saying that "[a] peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view"). Appellant's first point of error is overruled.

Suppression of the Oral Confession

In his second point of error, appellant contends the trial court erred in denying his motion to suppress the unwritten, custodial confession he made to Officer Stoppelberg.

In order to protect the rights of defendants, "[n]o oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless [detailed recording procedures are followed]" TEX. CODE CRIM. PROC. ANN. Art. 38.22 § 3(a) (Vernon 1997). This rule does not apply, however, to "any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused." *Id.* at 3(c). Facts "found to be true" means those facts that the police were unaware of at the time of the

confession and which, after the confession, are found to be true. *Gunter v. State*, 858 S.W.2d 430, 448 (Tex. Crim. App.1993).

Appellant claims the exception is not applicable to the facts presented here because no facts were *found* to be true. Rather, appellant contends the police were already aware of the kidnaping and robbery of Mrs. Pratt. The State argues that while the Fort Bend County authorities were aware of the kidnaping and robbery, Officer Stoppleberg was unaware of the crimes until they were disclosed by appellant's confession. He later confirmed the truth of the appellant's statements when he contacted the Fort Bend County authorities. The issue, then, is *who* must be unaware of the facts and circumstances.

"[T]he cases. . . clearly seem to require that the facts asserted in the statement must have been unknown by the *officer who obtained the statement*." Robert R. Barton, *The Code Means What it Says: Revisiting the Admissibility of Corroborated Unwritten Custodial Statements*, 26 TEX. TECH L. REV. 779, 800 (1995). For example, in *Chase v. State*, 508 S.W.2d 605, 609 (Tex. Crim. App. 1974) (overruled on other grounds) , the defendant made a confession which included the fact he had used a plywood board taken from a wall of his brother's bedroom to transport the victim's body. Although police had already discovered the board lying near the body, they were unaware of its significance. Police subsequently went to the defendant's home and matched the board to one that had been taken from his brother's bedroom. The Court held the confession was admissible because "[t]he origin of the plyboard was unknown to the officers prior to [defendant's] statement." It is apparent that the court's reference to "officers," meant the officers to whom the defendant made the statement.

Similarly, in *Wilson v. State*, 473 S.W.2d 532, 534 (Tex. Crim. App. 1971), the defendant made an unwritten statement in which he admitted leaving a stolen car at a specific location. The officers to whom the statement was made went to the specified location, but did not find the car. The officers learned that another police officer had already found the car and impounded it. Nevertheless, the statement was deemed admissible because "it led to the recovery of the stolen car." *Id*. at 535. Implicit in the decision is that the prior knowledge of the impounding officer was not imputed to the officers to whom the statement was made.

Because Officer Stoppelberg first learned of the kidnaping and robbery in Fort Bend County from appellant and later verified these facts from authorities in that county, appellant's statement was properly admissible under 38.22 §3(c). Appellant's second point of error is overruled.

The Video Line-Up

In his third point of error, appellant contends the trial court erred in denying his motion to suppress the video line-up. Appellant argues the line-up was impermissibly suggestive because height and complexion discrepancies between appellant and the other individuals were so pronounced as to focus attention upon appellant. However, the video line-up was not offered or admitted in evidence and, thus, is not in the appellate record. It is unclear on what basis appellant expects us to evaluate his point of error. We note, however, that the complainant made an in-court identification of appellant, without objection, before any testimony was offered regarding the line-up identification. By failing to object to the in-court identification, appellant waived any error regarding the out-of-court identification. *See Perry v. State*, 703 S.W.2d 668, 670-71 (Tex. Crim. App. 1986); *Van Zandt v. State*, 932 S.W.2d 88, 94-95 (Tex. App.–El Paso 1996, pet. ref'd).

Appellant's third point of error is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed March 9, 2000.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
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