Affirmed and Opinion filed March 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00915-CR

MARCUS HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause No. 99-11515

O P I N I O N

Appellant was charged by information with possession of less than two ounces of marihuana. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121 (Vernon Supp. 2000). After appellant filed a motion to suppress, the trial court conducted a hearing on June 25, 1999, and denied the motion. Appellant pleaded guilty pursuant to a plea agreement, and the court assessed punishment at two days in jail with a $200 fine. We affirm.

I. Background

At approximately 10:45 p.m. March 17, 1999, Baytown Police Officer Donald Rymer

saw a red pickup truck parked in J.C. Holloway Park. Rymer entered the park, parked behind the truck, walked to the passenger's side, and asked the passenger his name. The passenger gave his name and produced his identification. The officer noticed a strong odor of alcohol on the passenger's breath and inside the truck He saw beer cans on the truck floor and noticed the passenger had blood-shot eyes and slurred speech. The officer arrested the passenger for public intoxication.[1] About this time, another Baytown officer, Gabriel Canejo, arrived. Rymer asked Canejo to have the driver, appellant, step out of the truck. Rymer testified that he wanted Canejo to perform sobriety tests on appellant to determine whether appellant had been drinking and whether appellant was fit to drive the truck. As appellant got out of the truck, Canejo saw a clear plastic bag on the driver's side floorboard. Canejo testified that he recognized the material as marihuana. Appellant was arrested for possession.

II. Discussion

In his first point of error, appellant complains that the trial court erred in denying his motion to suppress because the curfew ordinance that Officer Rymer relied upon for the initial investigative stop was not in effect or operative when appellant was detained.

Baytown has a city ordinance closing city parks from 10 p.m. to 5 a.m. "when posted." *See* BAYTOWN, TEX., CODE § 17-4.1 (Adopted 1991). Officer Rymer testified that it was his usual practice not to cite people in the park after curfew but to advise people of the curfew and to ask them to leave. The evidence further shows that the park had no posted sign informing people of the curfew. Appellant argues that because the closing hours were not posted, the park was, in effect, not closed and that the officer had no lawful reason to investigate appellant's truck.

When reviewing a trial court's decision on a motion to suppress, we afford almost

[1] "A person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another." TEX. PEN. CODE ANN. § 49.02(a) (Vernon Supp. 2000).

total deference to a trial court's determination of historical fact. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We review de novo "mixed questions of law and fact" not falling within that category. *Id.* We will sustain a trial court's decision if the decision is correct under any theory of law applicable to the case. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). No stop or detention occurs, for Fourth Amendment purposes, if an officer merely approaches a person in a public place and asks questions, as long as the person is free to leave. *Daniels v. State*, 718 S.W.2d 702, 704-05 (Tex. Crim. App. 1989). Police are as free as anyone else to ask questions of their fellow citizens. *Holladay v. State*, 805 S.W.2d 464, 471 (Tex. Crim. App.1991).

Here, the facts are not disputed. Officer Rymer saw appellant's pickup truck in a city park at night after 10 p.m. He did not actively stop the truck, which already was parked, but did position his car behind the truck, for "officer's safety." Rymer agreed that because his car was positioned behind the truck, the truck could not back up and leave. The record does not reveal the location's traffic layout. It cannot be determined whether it would have been convenient or reasonable for the officer to park elsewhere. Rymer testified that he at first thought the truck was unoccupied but that as he pulled up behind the truck, he saw two people in the cab. Regardless of the officer's belief with respect to the curfew and the legal significance of the lack of a posting sign, the officer was free to approach the truck to advise the occupants of the curfew and to ask them to leave. *See Daniels*, 718 S.W.2d at 704-05. We note that in the absence of a curfew sign, the officer's practice of orally advising people of the curfew provides the same notice that would have been provided by a sign. The officer parked behind and approached an already-stopped truck. The officer may even have temporarily blocked egress. We do not view these actions as constituting an investigative detention within the purview of the Fourth Amendment. *See United States v. Encarnacion-Galvez* , 964 F.2d 402 (5th Cir. 1992) (finding no seizure where agents, in plain clothes and without weapons displayed, parked vehicle near automobile occupied by defendant without blocking automobile's egress and asked for identification and citizenship verification);

Merideth v. State, 603 S.W.2d 872, 873 (Tex. Crim. App.1980) (finding no investigatory detention when officer approached parked car in public place and knocked on window); *Isam v. State*, 582 S.W.2d 441, 444 (Tex. Crim. App. 1979) (finding no investigatory stop where officer walks up to car stopped at stop light). We overrule appellant's first point of error.

In his second point of error, appellant complains that the officer had no reasonable suspicion that criminal activity was in progress and that the officer, therefore, had no reason to detain appellant and his companion.

To justify an investigative detention, an officer must have a reasonable suspicion, based on specific articulable facts that, in light of the officer's experience and general knowledge, lead the officer to the reasonable conclusion that criminal activity is under way and the detained person is connected to the activity. *Holladay*, 805 S.W.2d at 471. An officer may seize evidence in plain view if the officer has the right to be where the discovery is made and if it is immediately apparent to the officer that the item is evidence, that is, if the officer has probable cause to associate the property with criminal activity. *Hillsman v. State*, 999 S.W.2d 157, 161 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

Here, after Officer Rymer approached the truck, he noticed an odor of alcohol coming from the passenger cab. He saw beer cans on the floor. He noticed the passenger had bloodshot eyes and slurred speech. As he arrested the passenger for public intoxication, he asked Officer Canejo to test the driver of the pickup. Officer Rymer testified that he wanted to determine whether the driver, appellant, also had been drinking and whether appellant was fit to drive. The officers had reasonable suspicion to justify detaining appellant temporarily to determine if he too had been drinking. Officer Canejo was entitled to be in the park beside the truck and was entitled to detain appellant. When appellant exited the truck, Officer Canejo saw in plain view the plastic bag containing what he believed to be marihuana. The detention of appellant was lawful, and the subsequent discovery and seizure of the contraband also was lawful. We overrule appellant's second point of error.

III. Conclusion

Having overruled appellant's two points of error, we affirm the judgment of the court below.

PER CURIAM

Judgment rendered and Opinion filed March 15, 2001.
Panel consists of Justices Anderson, Hudson, and Seymore.
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