Affirmed and Opinion filed March 22, 2001.

In The

Fourteenth Court of Appeals

NO. 14-97-00345-CR

KEVIN KYLE PEVER, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the County Criminal Court at Law No. 14
Harris County, Texas
Trial Court Cause No. 96-40685

O P I N I O N

A jury convicted Kevin Kyle Pever of the misdemeanor offense of impersonating a public servant. The trial court assessed punishment at one year in the Harris County Jail. In two points of error, appellant contends that a "protective sweep" conducted on his home violated his Fourth Amendment rights, and that the State failed to prove that appellant's consent to a search of his car was freely and voluntarily given. We affirm.

Appellant's first complaint pertains to police conduct when he was arrested at his home. When appellant opened his front door, he was immediately arrested, and police

conducted a "protective sweep" into his house. While inside the house, police seized several pieces of evidence. Appellant contends this sweep was an unreasonable search which violated the Fourth Amendment.

A "protective sweep" is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others" and is permissible under the Fourth Amendment. *Maryland v. Buie*, 494 U.S. 325, 328 (1990). A permissible sweep is analogous to the police officer's "stop and frisk" search for weapons on the street and serves a similar purpose. *Id.* at 331-332 (citing *Terry v. Ohio*, 392 U.S. 1 (1967)). The Supreme Court found that such a sweep is permissible under the Fourth Amendment "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337. The sweep must not be a "full search of the premises." *Id.* at 335. Rather, it may only extend "to a cursory inspection of those spaces where a person may be found" and may only last long enough to "dispel the reasonable suspicion of danger." *Id.* Furthermore, the protective sweep is not an automatic right police possess when making an in-home arrest. It is permitted only when "justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene." *Id.* at 336. Texas has adopted the test articulated in *Buie*. *Reasor v. State*, 12 S.W.3d 813, 816 (Tex. Crim. App. 2000).

In *Reasor*, the court of criminal appeals found that a protective sweep was illegal when the arresting officers could not articulate a single factor which led them to believe such a sweep was necessary. *Id.* at 817. In the instant case, Officer John Scott Siewert testified that the officers were serving an arrest warrant on a suspect who they believed to be armed, and who initially refused to come out of his residence. Additionally, Siewert testified there was another suspect in the case and that officers did not know where that suspect was when the warrant was served. This is a determination of a historical fact based on an evaluation

of credibility and demeanor which is entitled to near-total deference in the context of a motion to suppress hearing. *Guzman v. State*, 954 S.W.2d 85 (Tex. Crim. App. 1997). Appellant was arrested upon emerging from his residence, and officers immediately swept in to secure the scene for their safety. Based on this testimony, we find the testifying officers articulated facts which could lead a reasonable officer to feel the need to conduct a protective sweep for their safety. Appellant's first point of error is overruled.

In his second point of error appellant argued that his consent to search his vehicle was not freely and voluntarily given. The record contains a consent to search form signed by appellant. The crux of appellant's contention is that this form was signed after he was arrested, while in handcuffs, and after he says he was told he could avoid towing and impoundment charges only if he would consent to a search of his vehicle. He argues this combination of factors rendered his consent involuntary.

As a general rule, a warrantless search is "*per se* unreasonable." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent to search, when freely and voluntarily given, is an exception to the requirement of a valid search warrant. *Davis v. United States*, 328 U.S. 582, 593 (1946); *Johnson v. State*, 803 S.W.2d 272, 286 (Tex. Crim. App.1990), *overruled on other grounds by Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). One such established exception is a search conducted with the consent of the suspect. For consent to be a valid exception, however, that consent must be voluntary. Trial courts "must [assess] the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation" in assessing the voluntariness of consent. *Schneckloth*, 412 U.S. at 226. By looking at the circumstances leading up to the search, the reaction of the accused to pressure, and any other factor deemed relevant, a trial court can determine whether the statement of consent was given voluntarily. *Id.* For the consent to be voluntary, it must not be the product of duress or coercion, actual or implied. *Allridge v. State*, 850 S.W.2d 471, 493 (Tex. Crim. App. 1991). Whether the

consenting person was in custody or restrained at the time, and whether weapons were drawn at the time consent was granted, are factors to be considered in whether consent was voluntarily given. *Reasor*, 12 S.W.3d at 818-819; *Carpenter v. State*, 952 S.W.2d 1, 4 (Tex. App.—San Antonio 1997, *aff'd*, 979 S.W.2d 633 (Tex. Crim. App. 1998). Unlike the federal constitution, under which prosecutors must prove that consent to search was freely given by a preponderance of the evidence, under the Texas Constitution the standard the state must meet is that of clear and convincing evidence. *State v. Ibarra*, 953 S.W.2d 242, 244-245 (Tex. Crim. App.1997). Additionally, we must give proper deference to the trial court's determination, viewing the evidence in the light most favorable to the trial court's ruling. *See Upton v. State*, 853 S.W.2d 548, 553 (Tex. Crim. App.1993); *State v. Hamlin*, 871 S.W.2d 790, 792 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

We find *Reasor* instructive on this point. There the suspect was actually brought, in handcuffs, into his residence and asked to sign a consent to search form for his residence. *Id.* at 815. The trial court's finding that this consent was freely and voluntarily given was ultimately upheld. *Id.* at 819.

Taking *Reasor* as our text, then, we consider the differences between that case and our case. There are some distinctions in favor of appellant. After signing the consent to search form, Reasor actively cooperated with police, pointing out contraband and disregarding continued *Miranda* warnings as he did so. *Id.* Our record reflects no such cooperation here. Additionally, appellant in our case testified that he was threatened with additional towing charges and expenses, a factor not present in the *Reasor* case. Finally, Reasor had a friend who was initially arrested and then released prior to the giving of consent, another factor not present here.

On the other hand, Reasor's consent was tainted by an illegal protective sweep into the very area which he was being asked to consent to being searched; yet the *Reasor* court did not find this intrusion significant enough to render his consent involuntary. *Id.*

Furthermore, the officer in the present case who obtained appellant's signature on the consent to search form testified he did not threaten to have appellant's car towed. The trial court was entitled to believe the officer and disbelieve appellant on this point. Finally, we think it significant that the premises at issue in this case was not a residence, but a car. Officers testified that several items of police paraphernalia were visible from the outside of the car. The trial court was entitled to conclude that appellant saw no point in further resistance.

In light of all these factors, and viewing the evidence in the light most favorable to the trial court's ruling, we find no error. Appellant's second point of error is overruled and the judgment of the trial court is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed March 22, 2001.
Panel consists of Justices Cannon, Draughn, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Bill Cannon, Joe L. Draughn and Norman Lee sitting by assignment.