Affirmed and Opinion filed May 17, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00531-CR

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WILLIE HOUSTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 829,302

O P I N I O N

Over his plea of not guilty, a jury found appellant, Willie Houston, guilty of possession of marijuana in the third-degree. The jury, after finding the allegation in the enhancement paragraph true, assessed punishment at fifteen years confinement in the Institutional Division of the Texas Department of Criminal Justice. In two points of error, appellant complains the trial court erred in overruling appellant's motion to suppress and in denying appellant's request that the jury charge include a definition of probable cause. We affirm.

F A C T U A L B A C K G R O U N D

Narcotics Officer Armando Ordaz and his partner Sharon Pouncy, were working interdiction at a Houston Greyhound Bus Station. Officer Ordaz noticed appellant enter the station, and recalled appellant acting nervous and continuously scanning the lobby. Officer Ordaz noted that appellant had a new duffle bag with no identification tags, a characteristic he was trained to look for in the course of interdiction. Officers Ordaz and Pouncy approached appellant after he purchased his ticket and sat on a bench. Ordaz asked appellant for permission to speak with him and identified himself as a police officer. He questioned appellant while Pouncy was present. He asked appellant where he was traveling to and then asked if he could see appellant's bus ticket. Appellant proffered his ticket. Ordaz returned the ticket to appellant and then asked to see his identification. Appellant identified himself as Mr. R. McCoy, but stated that he had no identification. Ordaz noticed that appellant became extremely nervous and that there appeared to be some bundles bulging underneath appellant's pants. Ordaz then told appellant he was a narcotics officer and asked if appellant was carrying any narcotics on his person or in his bag. Appellant replied that he was not. Ordaz asked appellant if he could look inside his bag. Appellant agreed to the search of his bag. When appellant opened the bag, Ordaz detected a strong odor of marijuana. During that search, Officer Ordaz found the bag to contain clothes, duct tape, and a scale. When Ordaz searched the bottom of the bag, which was located on appellant's lap, he felt an object on appellant's leg. Ordaz asked appellant if he could pat him down and appellant agreed. Officer Ordaz detected the bundles through appellant's pant's and asked if the bulge was marijuana. Appellant admitted the bulge was marijuana. Officer Ordaz arrested appellant and removed 9.2 pounds of marijuana from appellant's body.

I.
Motion To Suppress

In his first point of error, appellant contends the trial court erred in denying his motion to suppress the marijuana. Appellant maintains that the marijuana was obtained as the result of an unlawful detention or arrest. Specifically, appellant claims he was detained at the time he consented to a search of his bag and person, but there was no reasonable suspicion or

probable cause to support his detention. Because a detention must be supported by reasonable suspicion, not probable cause, we will limit our focus in appellant's first point of error to whether the initial encounter between Ordaz and appellant was in fact a detention.

The question of whether appellant was detained is a mixed question of law and fact not turning on an evaluation of credibility and demeanor. *Hunter v. State*, 955 S.W.2d 102, 105 n.4 (Tex. Crim. App. 1997). We therefore review that question *de novo*. *Id.*

In *Florida v. Bostick*, the Supreme Court of the United States held that officers need not have any level of suspicion to simply ask for permission to do something so long as the officers don't indicate that compliance is required. 501 U.S. 429, 434 (1991). Therefore, not every encounter between police and citizens implicates the Fourth Amendment. *Hunter,* 955 S.W.2d at 103; *Bostick*, 501 U.S. at 434. A police officer is just as free as any other citizen to stop and ask questions of a fellow citizen. Such encounters are consensual "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business.' " *Bostick*, 501 U.S. at 434 (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). The Supreme Court in *Bostick* emphasized that

> [W]hen officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, . . .; ask to examine the individual's identification, . . .; and request consent to search his or her luggage, . . . as long as the police do not convey a message that compliance with their requests is required.

Id. at 435. As in all cases involving a determination of whether a "seizure" has occurred for Fourth Amendment purposes, the particular encounter is assessed by looking at the totality of the circumstances. *Id*. at 439. The *Bostic* Court also stated "[t]he Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." *Id.*

In the instant case, the encounter between appellant and the officers was not rendered a "detention" simply by virtue of the fact that the officers asked for appellant's identification

and requested to search his bag. *Hunter,* 955 S.W.2d at 103. Rather, the dispositive question is whether the officers conveyed a message to appellant that compliance with their requests was required. *Id.*

The officers were dressed in plain clothes and their weapons were concealed. They approached appellant and Officer Ordaz asked appellant if he could speak with him and identified himself as a police officer. Officer Pouncy was present during the encounter. Ordaz asked appellant some questions about his travel plans and then asked to see his bus ticket. Ordaz returned the ticket to appellant and asked to see his identification. Appellant stated that he had none. Ordaz then identified himself as a narcotics officer. Ordaz asked appellant if he was carrying narcotics on his person or in his bag. Appellant replied that he was not. Ordaz asked appellant if he had any problems with him checking the bag and appellant said "no." When Ordaz asked appellant if he could pat him down, appellant agreed. When Ordaz asked appellant if the bundles in appellant's pant were marijuana, appellant stated that they were.

Several facts bear on whether the officers conveyed a message that compliance with their requests was required. Here, it should be noted, the facts are virtually identical to the facts in *Hunter* where the Court found no detention occurred. Here, as in *Hunter,* the officers were dressed in plain clothes. Their weapons were concealed throughout the encounter. To the extent that two officers are more intimidating than one, only Ordaz actually engaged appellant. Ordaz did not retain appellant's ticket, but gave it back to him. Ordaz did not affirmatively state that he believed appellant was carrying drugs. There is nothing in these facts that conveyed a message that appellant was required to comply with Ordaz' requests. Under virtually identical facts, the *Hunter* Court held there was no indication the officers conveyed a message that appellant was required to answer their questions or permit the search of his bag or person. *Id*. at 106. We perceive no basis for a different result here. Therefore, we overrule appellant's first point of error.

II.

Jury Charge

In his second point of error, appellant contends the trial court erred in denying his request that the jury charge include a definition of probable cause.

As noted above, appellant consented to the search of his bag and his person. A search and seizure conducted pursuant to consent is an exception to the warrant and probable cause requirements of the Fourth Amendment to the United States Constitution and Article 1, § 9 of the Texas Constitution. *DeLeon v. State*, 985 S.W.2d 117, 119 (Tex. App.—San Antonio 1998, pet. ref'd). The basis for this exception which permits a search or seizure without a warrant is that a person who consents to a search or seizure waives his or her constitutional right to be free of unreasonable searches and seizures. *Id*., citing *Meeks v. State*, 692 S.W.2d 504, 509 (Tex. Crim. App. 1985).

Here, appellant consented to the search of his bag and his person. Moreover, after the bag was opened and the officer smelled the odor of marijuana and detected an object attached to appellant's leg, appellant gave the officer permission to conduct a pat down search, and responded affirmatively to the officer when asked whether the bundles attached to his leg were marijuana. At every step of the way appellant consented to the requests of the officers.[1] There was no detention, and based on the appellant's consent to all of the officer's requests, appellant waived his right to be free from unreasonable searches and seizures. *Id*. Accordingly, no fact issue was presented as to whether the officers had probable cause to search for the marijuana because the need for probable cause had been waived. Thus, there was nothing for the jury to consider and no need for a definition of probable cause. Even if appellant had not consented to the search of his bag and his person, the officers had probable cause to pursue the search based on the odor of marijuana. We overrule appellant's second point of error.

Accordingly, we affirm the judgment of the trial court.

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[1] For this reason we need not address appellant's contention the search of appellant's bag, which first alerted Ordaz to a bundle attached to appellant's leg, exceeded the scope of the consent.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed May 17,2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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