Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00913-CR

TIRANCE L. HOWARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 808,639

O P I N I O N

Tirance L. Howard appeals his conviction by a jury of possession of a firearm by a felon. Appellant pleaded true to two enhancement paragraphs and the judge assessed thirty-five years confinement. Appellant argues that the trial court erred in denying his motion to suppress evidence of the two guns recovered from the glove box of his car because (1) the State failed to prove he voluntarily consented to a search of his car; and, in the alternative, (2) by the officer's popping open the glove box with a screwdriver, the search exceeded his consent. We affirm.

Facts

Aaron Gunter, morning host at college radio station KTSU, momentarily took a break to walk a listener to her car. When he returned, he immediately noticed his laptop computer was missing. Also gone were two members of the cleaning crew, who had been working in Gunter's office when he left. Appellant was one of the janitors. Gunter reported the theft to appellant's supervisor and TSU police.

Appellant's supervisor told appellant to meet Officer Mark Hamilton at TSU police department. Once there, Hamilton immediately gave appellant written *Miranda* warnings. Appellant initialed each warning and signed the bottom, which contained a waiver of his *Miranda* rights. Appellant then signed a "consent to search" form authorizing a complete search of all buildings and vehicles inside and outside 1408 Calumet #8. Hamilton stated that because appellant did not know the license number to his vehicle, he would fill in that information later. At trial, Hamilton read the consent form to the jury. The State then asked: "So he voluntarily waived those rights and let y'all search his residence?" Hamilton: "Yes." The State: "And then his car?" Hamilton: "Yes, sir, that's correct."

After searching appellant's apartment to no avail, the two men drove to appellant's vehicle, which was located on the TSU campus, approximately one-and-a-half miles away. Appellant then read Hamilton the license number of his vehicle while Hamilton wrote it on the consent form. Appellant did not re-sign the form. Hamilton asked appellant for a key but appellant stated he did not have one. However, Hamilton testified that appellant offered to open the vehicle with a coat hanger if Hamilton could locate one. Hamilton found a hanger and appellant used it to open the car.

Hamilton stated that once inside, he immediately noticed a strong odor of marijuana. He then found a two-inch marijuana "street roach" on the front seat. Hamilton testified that at that point he believed he had probable cause to search the entire vehicle. According to Hamilton, appellant then stated he had "a little weed" in the trunk. Appellant stated at least twice he did not have a key to the trunk. Hamilton tried to find a trunk latch in the glove compartment, however, it was locked as well. Hamilton then popped the glove box open with his screwdriver. Inside the glove box, Hamilton found two pistols, the subject of the indicted offense. In the trunk, Hamilton found more marijuana, as well as Gunter's laptop.

Voluntariness of Consent to Search

In his first issue, appellant claims the State did not prove that he voluntarily gave Hamilton consent to search his vehicle. In order for consent to be effective, it must be freely and voluntarily given. *See Reasor v. State*, 12 S.W.3d 813, 818 (Tex. Crim. App. 2000); *Johnson v. State*, 803 S.W.2d 272, 286 (Tex. Crim. App. 1990). The State stipulated at the suppression hearing that it did not obtain a search warrant. Therefore, the burden is on the State to show by clear and convincing evidence that the consent given was positive and unequivocal, and there must not be duress or coercion, express or implied. *See State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997). Whether a consent to search was in fact voluntary is a question of fact to be determined from the "totality of circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Reasor*, 12 S.W.3d at 818.

In reviewing a court's ruling on a motion to suppress, we give almost total deference to the trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We afford the same amount of deference to trial court's rulings on "application of law to fact" questions, also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Id.* The trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). When the record supports a finding that consent was freely and voluntarily given, we will not disturb that ruling. *See Johnson v. State*, 803 S.W.2d 272, 287 (Tex. Crim. App. 1990). We view the evidence in the light most favorable to the ruling of the trial court. *See Sandoval v. State*, 860 S.W.2d 255, 257 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd).

Appellant claims the consent to search form did not give Hamilton permission to search his vehicle because when appellant signed it, the vehicle identification information was not filled in. Additionally, appellant points out that the form only gives consent to search vehicles outside the Calumet apartment and

did not include his vehicle, located a mile-and-a-half away.[1] Finally, appellant claims that his actions subsequent to his signing of the consent form do not evince his consent to search his vehicle.

Appellant cites several cases suppressing the fruits of illegal searches as analogous to ours. However, our case presents a materially different factual scenario from those presented in appellant's cases, primarily in that they all contain significant evidence of some form of coercive influence where none is present here. For instance, in *Kolb v. State*, 532 S.W.2d 87 (Tex. Crim. App. 1976), the officers went to a warehouse and *told* the defendant from outside to open the sliding door. Once inside, the officers found marijuana. Although an officer testified that he "believed" but "wasn't sure" someone from inside assisted in opening the door, the court found that there was no evidence the defendant consented to the intrusion. Rather, the court observed, if the defendant assisted in any way, "it was obviously in submission to the demand of the officers that he open the door." *Id*. at 90. Therefore, the court found that rather than voluntarily consent to a search, the defendant merely acquiesced to a claim of lawful authority. *Id*. at 91.

Here, unlike *Kolb*, there was no evidence of coercion by an officer. Hamilton did not order appellant to do anything, implicitly or otherwise. As stated, according to Hamilton, appellant agreed to a search of his vehicle and signed a consent form, but did not know the license number. After the apartment was searched, they immediately drove to the vehicle. Appellant then took an active role in assisting Hamilton complete the consent form by reading Hamilton the license plate number while Hamilton wrote it on the form. After that, he volunteered to open the vehicle and did so while Hamilton looked on. Appellant's acts, viewed in the totality of the circumstances, clearly exhibit his willingness to consent to a search of his vehicle.

We also note that some of the factors that may be examined to determine whether appellant freely and voluntarily consented to a search of his vehicle are: (1) whether, and to what extent, officers exhibited a show of force; (2) whether the actions of the arresting officers can be classified as flagrant misconduct;

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[1] We recognize that the search form, if read in isolation, would arguably not constitute consent to search appellant's vehicle if it were not on the premises of 1408 Calumet. However, we are bound to look to the totality of the circumstances in making our determination of whether appellant voluntarily consented to the search, not just this single piece of evidence. *See Schneckloth*, 412 U.S. at 227.

(3) whether the police threatened to obtain a search warrant if the detainee did not acquiesce, or whether the police claimed a right to search; (4) whether the police first gave the accused Miranda warnings; (5) whether the arrest was made in order to obtain consent; (6) whether the accused knew that he could refuse to allow a search; (7) whether consent was first offered by the accused or was in response to a police request; (8) the accused's education, intelligence, and physical condition; and (9) the proximity of the consent to the arrest, since an intervening time period can provide a degree of attenuation of the taint. *See Dawson v. State*, 868 S.W.2d 363, 368 (Tex. App.–Dallas 1993, pet. ref'd); *see also Arcila v. State*, 834 S.W.2d 357 (Tex. Crim. App. 1992) (citations omitted), *overruled on other grounds, Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997).

In applying these factors we observe: (1) Hamilton testified that he used no coercive measures to obtain appellant's consent to search; there is no evidence in the record to the contrary; (2) there is no evidence that Hamilton acted inappropriately in any way; (3) Hamilton did not threaten to obtain a search warrant if appellant did not consent; (4) Hamilton gave appellant his *Miranda* warnings in writing and appellant waived his corresponding rights in writing; (5) there is no claim that appellant was in custody until after the search revealed the contraband; (6) appellant was aware he could refuse the search because the written consent form he signed informed him of that right; (7) it appears that Hamilton asked appellant for permission to perform the search; (8) we have no evidence pertaining to appellant's education, intelligence, and physical condition; and (9) is not applicable. The only factor above that weighs in favor of appellant is that Hamilton asked him for permission to search. However, all the other applicable factors weigh heavily in support of a finding of voluntariness.

Therefore, upon considering the totality of the evidence in the light most favorable to the trial court's ruling, we hold the trial court did not err by concluding there was clear and convincing evidence that appellant voluntarily consented to the search of his vehicle. We overrule appellant's first issue.

Scope of Consent

Appellant's second issue is that even if he voluntarily consented to the search of his car, the fruits of the search should still be suppressed because they were found only after the officer exceeded the scope of appellant's consent.

Appellant's claim fails because once Hamilton entered the vehicle, he immediately smelled and saw marijuana. Appellant then admitted there was more marijuana in the vehicle. Under the "automobile exception" an officer may conduct a warrantless search of a motor vehicle if he has probable cause to believe the vehicle contains evidence of a crime. *See Powell v. State,* 898 S.W.2d 821, 827 (Tex. Crim. App. 1994). When a peace officer possesses probable cause that a motor vehicle contains contraband, he may search the entire vehicle including belongings that are capable of containing the object of probable cause. *See Wyoming v. Houghton,* 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); *Delgado v. State*, 718 S.W.2d 718, 722 (Tex. Crim. App. 1986). Such a search may extend not only to closed containers, but also to a car's trunk or glove compartment. *See United States v. Ross,* 456 U.S. 798, 823 (1982); *United States v. McSween*, 53 F.3d 684, 687 (5th Cir. 1995); *see also Carroll v. United States*, 267 U.S. 132 (1925) (removed auto upholstery to search for contraband); *Cardenas v. State*, 857 S.W.2d 707, 711-12 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd).

The strong odor of marijuana and the discovery of the marijuana cigarette, along with appellant's admission that there was more marijuana in the car, gave Hamilton probable cause to search the entire vehicle. *See Small v. State*, 977 S.W.2d 771, 774 (Tex. App.–Fort Worth 1998, no pet.); *Isam v. State*, 582 S.W.2d 441, 444 (Tex. Crim. App. [Panel Op.] 1979) (odor of marijuana alone is sufficient to constitute probable cause to search a suspect's vehicle, or objects within the vehicle). Therefore, any limits to appellant's consent did not at that point prohibit Hamilton from popping open the glove box with his screwdriver. We therefore overrule this issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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