Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00706-CR

TROY ANTHONY TAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 831,311

O P I N I O N

Troy Anthony Taylor ("appellant") appeals his conviction for unlawfully carrying a weapon within 300 feet of a school, on the grounds that, 1) the trial court erred in refusing to give the jury an instruction on the affirmative defense of traveling; 2) the trial court erred in denying appellant's request for a submission on the lesser included offense of unlawfully carrying a weapon; and 3) he was denied his right to effective assistance of counsel by his attorney's failure to challenge the legality of the stop in which the gun was discovered, and failing to object to alleged hearsay statements that came out during trial. We affirm.

I. Background

On December 15, 1999, appellant, after dropping his daughters off at school, was stopped by Houston Police Officers Reeves and McFadin who were working security at another school, the Corrective Learning Center. Officers Reeves and McFadin initiated the stop on the complaint of an unidentified woman who told the officers that appellant was bothering female students as they walked past his parked car. After stopping appellant, Officer Reeves approached appellant's vehicle and smelled a strong odor of marihuana coming from the car. Upon looking through the driver's window, Officer Reeves observed a handgun lying inside the open center console. Appellant was removed from the car and the gun was recovered.

Appellant testified that he was passing by the Corrective Learning Center on his way to make a deposit at Bank of America after dropping his children off at another school, and was then going to work. Appellant disputes Officer Reeves' assertion that the gun was in plain view, testifying that it was always in the closed console. Furthermore, appellant testified that he did not place the gun in the car, the car was his wife's car, and the gun was kept in the car "a lot" for her protection. Additionally, appellant admits that he knew the gun was in the vehicle because he was carrying a lot of money and needed protection.

II. The Affirmative Defense of Traveling

In his first point of error, appellant complains that the trial court erred in denying him an instruction on the affirmative defense of traveling. We disagree.

A person commits an offense of unlawfully carrying a weapon within a weapon free school zone if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club in a place that the person knows is within 300 feet of the premises of a school. *See* TEX. PEN. CODE ANN. § 46.02 (Vernon Supp. 2001) and TEX. PEN. CODE ANN. § 46.11 (Vernon Supp. 2001). It is a defense to prosecution under section 46.02 and 46.11 if the actor was "traveling" at the time of the commission of the offense. TEX. PEN. CODE ANN. § 46.15(b)(3) (Vernon Supp. 2001).

If evidence is introduced from any source which raises an issue on a defensive theory, the theory must, upon proper request, be included in the court's charge. *Birch v. State*, 948 S.W.2d 880, 884 (Tex. App.—San Antonio 1997, no pet.); *Ojeda v. State*, 712 S.W.2d 742 (Tex. Crim. App. 1986). A defendant is entitled to a charge on every issue raised by the evidence, whether it be strong, weak, unimpeached, or contradicted. *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993); *Lugo v. State*, 667 S.W.2d 144, 146 (Tex. Crim. App. 1984); *Birch*, 948 S.W.2d at 884. It is not the court's function to determine the credibility or weight to be given the evidence raising the defensive issue. *Gibson v. State*, 726 S.W.2d 129, 133 (Tex. Crim. App. 1987); *Birch*, 948 S.W.2d at 884. The fact that the evidence raising the issue may conflict or contradict other evidence in the case is not relevant to the determination of whether a charge on the issue must be given. *Gibson*, 726 S.W.2d at 133. In this case, therefore, we must determine whether there was any evidence to support the defensive theory of traveling.

Since 1871, a traveling defense has been provided by statute. *Birch*, 948 S.W.2d at 882; *Soderman v. State*, 915 S.W.2d 605, 609 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). Unfortunately, "traveling" has never been defined by statute, and the precise meaning of the term has been the subject of much debate. *Birch*, 948 S.W.2d at 882; *Soderman*, 915 S.W.2d at 609. In applying the term "traveling," courts have generally considered distance, time, and mode of travel. *Birch*, 948 S.W.2d at 882–83; *Soderman*, 915 S.W.2d at 609. One who goes from one point in one county to another point in another county has been held a "traveler" within the meaning of the statute. *Ballard v. State*, 74 Tex. Crim. 110, 167 S.W. 340, 340 (1914); *Campbell v. State*, 58 Tex. Crim. 349, 125 S.W. 893, 893 (1910); *Birch*, 948 S.W.2d at 883. This is particularly true where there is a real journey. *Smith v. State*, 42 Tex. 464, 465-66 (1875); *Birch*, 948 S.W.2d at 883. Where the distance is short and there is no real journey, one is not a traveler, although he may be going from one county to another. *Stanfield v. State*, 34 S.W. 116, 116 (Tex. Crim. App. 1896); *Blackwell v. State*, 34 Tex. Crim. 476, 31 S.W. 380, 380 (1895); *Birch*, 948 S.W.2d at 883.

Appellant provides no evidence that would entitle him to the statutory affirmative

defense of traveling. It is undisputed that appellant's home, his children's school, and the bank are within close proximity to one another. As the above case law indicates, "traveling" encompasses more than mere movement, it requires a journey or trip over some distance---it requires a trip from a beginning point to a destination. While we recognize that appellant put forth evidence that he was going from his home to the bank after dropping his children off at school, this was insufficient to entitle him to the affirmative defense of traveling. Mere movement on the part of appellant, within a very confined area, is insufficient to entitle him to a statutory defense of traveling.[1] Moreover, the record indicates that at some point after dropping his children off at school and proceeding to the bank, appellant's traveling had ended. Appellant was observed parked outside another school, the Corrective Learning Center, harassing children as they walked by his car. Accordingly, the trial court did not err in failing to instruct the jury on the affirmative defense of traveling.

In addition to the statutory defense of traveling, there are other exceptions crafted by case law which arise when the defendant has a legitimate purpose to carry the weapon. *Deuschle v. State*, 109 Tex. Crim. 355, 4 S.W.2d 559, 561 (1927); *Birch*, 948 S.W.2d at 883; *Dixon v. State*, 908 S.W.2d 616, 619 (Tex. App.—Amarillo 1995, pet. ref'd). These case law exceptions have their roots in the statutory defenses that one may carry a weapon at home, at one's business premises, or while traveling. *Inzer v. State*, 601 S.W.2d 367, 368 (Tex. Crim. App. 1980); *Birch*, 948 S.W.2d at 884.

These exceptions have been held to include the right to carry a handgun home from the place of purchase; the right to carry a gun home from a place of business; the right to carry a pistol from a residence to the defendant's place of business; the right to carry a pistol from his place of business to his home when he has on his person a considerable sum of money; the right to carry a pistol to a repair shop; and the right to return a borrowed pistol. *Birch*, 948 S.W.2d at 884. Reflected in these exceptions is a recognition that since one has the right to

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[1] While mere movement with a handgun within a confined area will not entitle someone to the statutory defense of traveling, that mere movement with a handgun within a very confined area could still meet one of the "legitimate purpose" exceptions crafted by case law. *See Birch*, 948 S.W.2d at 883.

carry the handgun on one's premises, be it his home or his business, and has the right to carry the handgun while traveling, one should, as well, have the right to transport the handgun from one's home to one's business.

A legitimate purpose exception, however, is not unlimited. An accused is entitled to assert this exception only if: 1) the purpose for carrying the weapon was legitimate and not contrived; 2) the route taken was practical; 3) the accused's journey proceeded without undue or unreasonable deviation; and 4) the weapon was not carried habitually. *Johnson v. State*, 571 S.W.2d 170, 172 (Tex. Crim. App. 1978); *Cortemeglia v. State*, 505 S.W.2d 296, 297–98 (Tex. Crim. App. 1974); *Birch*, 948 S.W.2d at 884.

Thus, if some evidence existed that appellant had a legitimate purpose for carrying the handgun, he would have been entitled to an instruction in that regard. The evidence, however, fails to establish that appellant was entitled to a legitimate purpose exception for carrying a handgun. First, appellant's reason for carrying the handgun appears from the record to be entirely contrived. Appellant's statement to the police was that the gun was carried in the car by his wife for her protection, and the gun was kept in the car "a lot." At trial, appellant asserts that while he did not put the gun in the car, he knew it was there, and he needed it for his protection because he was going to the bank to make a deposit. Second, assuming for the sake of argument that appellant's reason for carrying the gun was to safely transport his money to the bank, appellant's own testimony was that he first dropped his children off at school, was then going to proceed to the bank, then proceed to work, and then presumably return home. This was not the most reasonable means of accomplishing his legitimate purpose of transporting his money to the bank. After making the bank deposit, appellant would only have been entitled to carry the handgun back home; his intention from the record was to carry the weapon to his place of employment.[2] Lastly, the evidence undisputably establishes that the

[2] We acknowledge that if appellant was proceeding to his business, he would have had the right to transport his handgun from his home to his place of business, the theory being that appellant has a right to carry a firearm on his own premises, be it his home or his business. *See Birch*, 948 S.W.2d at 884. However, appellant was not proceeding to his place of business; he was proceeding to his place of employment. Because appellant did not own the business, he would not have been entitled to carry a firearm

handgun was carried in that car habitually. By appellant's own admission, the handgun is kept in the car "a lot" for his wife's protection. Appellant, therefore, was not entitled to an instruction regarding traveling as it relates to a legitimate purpose exception. Accordingly, appellant's first point of error is overruled.

III. The Lesser Included Offense of Unlawfully Carrying a Weapon

Appellant, in his second point of error, contends that the trial court erred in failing to submit to the jury the lesser included offense of unlawfully carrying a weapon. We disagree.

A defendant is entitled to a jury instruction on a lesser included offense when, 1) the lesser included offense is included within the proof necessary to establish the offense charged, and 2) some evidence exists that if the defendant is guilty, he is guilty only of the lesser offense. *Penry v. State*, 903 S.W.2d 715, 755 (Tex. Crim. App. 1995); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993); *Bui v. State*, 964 S.W.2d 335, 340 (Tex. App.—Texarkana 1998, pet. ref'd). If evidence from any source raises the issue of a lesser included offense, a charge on that offense must be included in the court's charge. *Penry*, 903 S.W.2d at 755; *Bui*, 964 S.W.2d at 340.

There are two ways in which the evidence may raise the issue of a lesser included offense. *Bui*, 964 S.W.2d at 341; *Thomas v. State*, 919 S.W.2d 810, 812 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). First, there may be evidence which refutes or negates evidence of the greater offense. *Bui*, 964 S.W.2d at 341. Second, there may be evidence subject to different interpretations implicating the lesser included offense. *Id*.

There is no dispute that unlawfully carrying a weapon is a lesser included offense of unlawfully carrying a weapon within a weapon free school zone. The difference between unlawfully carrying a weapon and unlawfully carrying a weapon within a weapon free school zone is based upon the actor's knowledge that the offense of unlawfully carrying a weapon is being committed within 300 feet of the premise of a school. TEX. PEN. CODE ANN. § 46.11

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on the premises. Accordingly, appellant would have had no right to transport his handgun from his home to his place of employment.

(Vernon Supp. 2001). Therefore, in order for appellant to be entitled to the lesser included offense of unlawfully carrying a weapon, there must be some evidence that calls into question appellant's knowledge of being within 300 feet of a school. No such evidence is present in the record.

The record reflects that appellant knew the gun was in the car. The undisputed testimony also establishes that appellant lived in that neighborhood for thirty years and was well aware of the location and the function of the Corrective Learning Center. Moreover, appellant admits that, after dropping his children off at school, he purposefully drove past the Corrective Learning Center on his way to the bank. While appellant contests that he never parked or stopped near the Corrective Learning Center, both officers who stopped appellant testified that they observed appellant parked next to the school. Appellant has failed to establish that some evidence in record exists to reflect that if he were guilty, he was guilty only of unlawfully carrying a weapon. Accordingly, appellant's second point of error is overruled.

IV. Ineffective Assistance of Counsel

In appellant's third, fourth, fifth, and sixth points of error, appellant complains that he received ineffective assistance of counsel. Points of error three, five, and six all arise out of appellant's counsel's failure to attack the legality of the detention by way of a suppression hearing. Appellant's fourth point of error asserts that his counsel was ineffective for failing to object to hearsay testimony. We disagree.

To prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness, and, second, that the appellant was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The adequacy of defense counsel's assistance is based upon the totality of the representation rather than upon isolated acts or omissions of trial counsel. *Garcia v. State*, 887 S.W.2d 862, 880 (Tex. Crim. App. 1994). The burden is on appellant to prove by a preponderance of the evidence that counsel's representation fell below the standard of prevailing professional norms, and that

there is a reasonable probability that but for counsel's deficiency the result of the trial would have been different. *McFarland v. State*, 845 S.W.2d 824, 842 (Tex. Crim. App. 1992). In reviewing a claim of ineffective assistance, we entertain a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment and that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700.

A. Legality of the Detention

Failure to file a motion to suppress evidence does not constitute per se ineffective assistance of counsel. *Huynh v. State*, 833 S.W.2d 636, 638 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (finding that failure to file pretrial motions is not, in itself, deemed ineffective assistance of counsel); *Kizzee v. State*, 788 S.W.2d 413, 415 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd). Moreover, failure to object to evidence which is admissible is not ineffective assistance of counsel. *Jackson v. State*, 846 S.W.2d 411, 414 (Tex. App.—Houston [14th Dist.] 1992, no pet.); *Davis v. State*, 830 S.W.2d 762, 766 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). If appellant's detention was not unlawful, then trial counsel's failure to object to the admission of the handgun into evidence as "fruit of the poisonous tree" would not constitute ineffective assistance of counsel, because the evidence of the handgun would be admissible.

The issue for us to decide is whether appellant's initial detention, which led to the discovery of the handgun, and his subsequent arrest, was a violation of appellant's rights under the United States and Texas constitutions. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9.

Although not every encounter between the police and a citizen implicates constitutional concerns, *State v. Grant*, 832 S.W.2d 624, 625–26 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd), when a police officer accosts an individual and restrains his freedom of movement,

it becomes an investigative stop or a detention. *Norman v. State*, 795 S.W.2d 249, 250 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). A police officer may stop a suspicious individual in order to determine his identity or maintain the status quo while obtaining more information. *Hoag v. State*, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987); *Gearing v. State*, 685 S.W.2d 326, 327–28 (Tex. Crim. App. 1985). To justify such a detention, the officer must have specific and articulable facts, which in light of his experience and personal knowledge, would reasonably warrant the intrusion on the freedom of the citizen stopped. *Hoag*, 728 S.W.2d at 380. These facts must result in a reasonable suspicion that some activity out of the ordinary has occurred, that the person is connected with the activity, and that the activity is related to a crime. *Johnson v. State*, 658 S.W.2d 623, 626 (Tex. Crim. App. 1983); *Crooks v. State*, 821 S.W.2d 666, 668 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

In the present case, appellant was stopped after a woman approached Officers Reeves and McFadin and told them that there was a man in a yellow Mustang that was bothering the female students as they walked past his car on their way to the entrance of the Corrective Learning Center. At the time the woman pointed out appellant, he was parallel parked near the corner of the block. Officers Reeves and McFadin, after receiving the complaint from the woman, began to pull out from where they were parked to investigate further. Upon doing so, appellant moved from where he was parallel parked into a moving lane of traffic and then stopped for approximately two minutes without any apparent cause. Once appellant began moving again, Officers Reeves and McFadin pulled out behind appellant and initiated the stop. After stopping appellant, both Officers testified that they smelled marijuana and observed a green leafy substance in a water bottle and in appellant's mouth. Moreover, Officer Reeves observed a handgun in plain view. Appellant was taken out of the car and placed under arrest. We find that appellant was lawfully detained for the purpose of further investigation. *See Terry*, 392 U.S. at 30; *Hoag*, 728 S.W.2d at 380. Because appellant's handgun was found following a lawful detention, it was admissible against him at trial. Therefore, even if appellant's counsel had a hearing on his motion to suppress the handgun, we cannot say that

such a motion would have been granted. We hold that counsel's failure to obtain a hearing on appellant's motion to suppress did not constitute ineffective assistance of counsel. Likewise, since we cannot say that appellant's motion to suppress would have been granted, we cannot find that appellant's counsel's failure to object at trial to the admission of the handgun constituted ineffective assistance of counsel. Lastly, since it is reasonable to conclude that the handgun was seized as a result of a lawful detention, it was not unreasonable for appellant's counsel to not seek an article 38.23 instruction regarding the legality of the officers obtaining the handgun. Appellant's third, fifth and sixth points of error are overruled.

B. Hearsay

Appellant argues that the record reflects ineffective assistance of counsel because inadmissible hearsay was admitted during the trial to which counsel failed to object. Specifically, the State elicited the following testimony from Officer McFadin:

[PROSECUTOR]: What was it that caused you to watch the defendant?

[WITNESS]: A female citizen pulled up and told us that there was a gentleman in a yellow Mustang and she pointed out a car that was bothering the female students as they walked past his car.

[PROSECUTOR]: After that citizen told you that, what did you and – what did you do?

[WITNESS]: We started to pull out to go in and investigate.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. TEX. R. EVID. 801(d). In order to successfully argue on appeal that trial counsel's failure to object to hearsay evidence constituted ineffective assistance of counsel, appellant must show that the trial judge would have committed error in overruling such an objection. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). The record in this case does not indicate why appellant's trial counsel failed to object to the complained of testimony. Therefore, appellant has failed to rebut the strong presumption that this was reasonable trial strategy. In addition, the question asked by the

prosecutor–what was it that caused you to watch the defendant--did not call for a hearsay response. Although defense counsel might have objected after the answer was given and requested an instruction to disregard, doing so might have done more to emphasize the testimony than remove it from the juror's consideration. Under these circumstances, appellant has not shown that trial counsel's failure to object to the testimony rendered his performance deficient. Therefore, appellant's fourth point of error is overruled.

V. Conclusion

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[***]

Do Not Publish TEX. R. APP. P. 47.3(b).

[***] Senior Chief Justice Paul C. Murphy sitting by assignment.