**Affirmed and Opinion filed August 31, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00818-CR**

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**CHARLES CHRISTOPHER RED, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180th District Court**
**Harris County, Texas**
**Trial Court Cause No. 803,240**

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## O P I N I O N

After denying his motion to suppress evidence, the trial court found Charles Christopher Red, appellant, guilty of possession of a controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(b) (Vernon Supp. 2000). The trial court assessed punishment at five years' probation. Appellant raises two points of error on appeal, complaining that the trial court erred in denying his motion to suppress evidence. We affirm the judgment of the trial court.

## BACKGROUND FACTS

Police Officer Vasquez was patrolling a subdivision late one evening on his bicycle, when he noticed a car parked on the street. Vasquez thought the circumstances seemed suspicious because the car's interior light was on, the two occupants were sitting low in their seats, and the driver was trying to light something near his mouth. Vasquez rode his bicycle closer to the car because he knew a lot of vehicles had been burglarized in the area.

When Vasquez was a few feet from the car, he smelled marijuana and alcohol. The driver noticed Vasquez, and he reached down with one hand, started the engine and tried to put the car into gear with the other hand. After Vasquez ordered the driver several times to turn the car's engine off, the driver complied and Vasquez removed him from the vehicle and handcuffed him.

Appellant was the passenger in the vehicle. As Vasquez was handcuffing the driver, appellant continuously pulled his hands down toward his waist and refused to keep his hands on the dashboard as Vasquez ordered. Vasquez also handcuffed appellant for safety reasons because Vasquez was alone, at night, without a radio. Vasquez then made the statement out loud that, "there better not be any dope in the car," to which Appellant replied, "I got a little bit here," and pointed to his right front pocket. Vasquez patted the outside of appellant's pocket, and found some green leafy substance that appeared to be marijuana. Vasquez arrested appellant for possession of marijuana, and a subsequent search revealed a rock of crack-cocaine in his right front pocket.

Appellant moved to suppress the physical evidence and his oral statement. The trial court denied appellant's motion, and he appeals the trial court's ruling on the motion.

## DISCUSSION AND HOLDINGS

In his first point of error, appellant argues that the trial court erred in denying his motion to suppress the physical evidence. Appellant argues that the contraband was illegally obtained and should not have been admitted into evidence because Vasquez lacked reasonable suspicion or probable cause to arrest, search, or detain him. We disagree.

**Standard of Review**

In reviewing a trial court's ruling on a motion to suppress evidence, an appellate court must determine the applicable standard of review. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App.1997). Where historical fact findings and rulings on the applicable law are based on an evaluation of credibility and demeanor, we give great deference to a trial court's determination of a mixed question of law. *See Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App.1998). However, mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor are reviewed *de novo*.[1] *See Guzman*, 955 S.W.2d at 87.

If the issue is whether an officer had probable cause, under the totality of the circumstances, the trial court is not in an appreciably better position than the reviewing court to determine the issue. *See id.* Although great weight should be given to the inferences drawn by trial judges, determination of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. *See Guzman*, 955 S.W.2d at 87 (citing *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). Similarly, whether a defendant was "detained" within the meaning of the Fourth Amendment is a mixed question of law and fact which is reviewed *de novo*. *See Hunter v. State*, 955 S.W.2d 102, 105 n. 4 (Tex. Crim. App.1997).

**Appellant's Detainment, Search, and Arrest**

Appellant first claims that Vasquez did not have reasonable suspicion to initially stop or detain him and had no probable cause to arrest him. Law enforcement officers may briefly

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[1] Cases involving an application of law to fact reviewed *de novo* exist when the State's evidence is uncontroverted, i.e., appellant has neither presented conflicting testimony nor contradicted the State's evidence in any way. *See State v. Ross*, 999 S.W.2d 468, 470-71 (Tex. App.—Houston [14th Dist.] 1999, pet. granted). These cases do not turn on "an evaluation of credibility and demeanor because the trial court does not have to decide which conflicting testimony deserves more weight." *Id.*

stop an individual suspected of criminal activity for an investigatory detention based on less information than is required for probable cause. *See Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed 2d 889 (1968). An officer must justify an investigative detention with specific articulable facts which, along with the officer's experience, personal knowledge, and logical inferences drawn from those facts, would warrant him in detaining the individual. *See Comer v. State*, 754 S.W.2d 656, 657 (Tex. Crim. App. 1986). These facts must create some reasonable suspicion that the detained person is, has been, or soon will be involved in criminal activity. *See Johnson v. State*, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995). The facts creating a reasonable suspicion do not themselves have to be criminal; they only need include facts which render the likelihood of criminal conduct greater than it would be otherwise. *See Crockett v. State*, 803 S.W.2d 308, 311 (Tex. Crim. App. 1991).

When we determine reasonable suspicion, we examine the totality of the circumstances surrounding the detention. *See Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed. 2d 301 (1990). "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, __ U.S. __, 120 S.Ct. 673, 676, 145 L.Ed. 570 (2000). A police officer may briefly stop a suspicious individual in order to determine his identity or to maintain his status quo momentarily while obtaining more information. *See Gearing v. State*, 685 S.W.2d 326 (Tex. Crim. App.1985). An occupant of an automobile is just as subject to a brief detention as a pedestrian. *See Adams v. Williams*, 407 U.S. 143, 148, 92 S.Ct.1921, 1924, 32 L.Ed.2d612 (1972); *Johnson v. State*, 658 S.W.2d 623, 626 (Tex. Crim. App.1983). As part of this temporary detention, an officer may ask that an individual step out of his automobile. *See Johnson*, 658 S.W.2d at 626.

Here, appellant argues that Officer Vasquez's observations do not amount to reasonable suspicion because nothing connected him with any criminal activity; he claims that Vasquez's decision to detain him was based on a mere hunch.

Officer Vasquez was the sole witness for the State at the hearing on the motion to suppress. He testified that around one o'clock in the morning, he was patrolling a subdivision where many vehicles had been burglarized. He saw appellant's car parked on the street, with the interior light on, the two occupants sitting low in their seats, and the driver trying to light something near his mouth. When Vasquez was within a few feet of the car, he smelled marijuana and alcohol.[2] He was outnumbered by the suspects. The driver of the car, upon noticing him, started the car and only after several orders did he turn off the car. Consequently, Vasquez took the driver out of the car and handcuffed him. He left appellant in the car while he handcuffed the driver, but even appellant refused to follow his orders. While Vasquez was handcuffing the driver, appellant continuously pulled his hands down toward his waist, refusing to keep his hands on the dashboard as Vasquez ordered. Based on these facts, Vasquez was justified in asking appellant to step out of the vehicle to detain him.

Additionally, Vasquez's search and ultimate arrest of appellant was lawful. As we stated, when Vasquez was a few feet away from the vehicle, he smelled marijuana. Moreover, appellant refused to follow Vasquez's order to keep his hands on the dashboard. Most importantly, when Vasquez was handcuffing him, appellant offered that he had some "dope" in his front pocket. Under such circumstances, Vasquez had probable cause to search for marijuana and whatever "little bit" of dope appellant had in his pocket. *See State v. Ensley*, 976 S.W.2d 272, 275 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (holding that once an officer smells marijuana, probable cause exists to search for it); *see also Johnson v. State*, 722 S.W.2d 417, 420 (Tex. Crim. App. 1986) (holding that officer had probable cause to arrest murder suspect where among other factors, suspect admitted that master keys found at the scene were his). This also gave Vasquez a reason to search appellant. Thus, the search was

[2] Appellant assumes that Vasquez needed a reason to approach the vehicle; he did not. The car was parked on a public street. Vasquez had the right to approach it. *See Merideth v. State*, 603 S.W.2d 872, 873 (Tex. Crim. App.1980) (holding that an investigatory detention does not occur when an officer approaches a parked car in a public place).

legal and so was the subsequent arrest. *See Saenz v. State*, 632 S.W.2d 793, 797 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd). Accordingly, we overrule appellant's first point of error.

**Admission of Appellant's Inculpatory Statement**

In his second point of error, appellant argues that the trial court erred in denying the motion to suppress the inculpatory statement he made to Vasquez. Specifically, appellant argues that his statement that "he had some marijuana on him" was the result of a custodial interrogation without advising him of his rights. Again, we disagree.

The State may not use statements, either exculpatory or inculpatory, resulting from a defendant's custodial interrogation, unless the State shows that the defendant received procedural safeguards effective to secure the privilege against self-incrimination. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed2d 694 (1966); *Alvarado v. State*, 853 S.W.2d 17, 20 (Tex. Crim. App. 1993). For *Miranda* safeguards to apply, two elements must be present: (1) the suspect must have been "in custody," and (2) the police must have "interrogated" the suspect either by express questioning or its functional equivalent. *See Rhode Island v. Innis*, 446 U.S. 291, 300-302, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980). "Interrogation" refers not only to express questioning, but also to any words or actions by the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *See Innis*, 446 U.S. at 300-302, 100 S.Ct. at 1689-90. Whether some action constitutes an interrogation primarily depends on the perceptions of the suspect, rather than the intent of the police. *See id.* However, offhand remarks, not designed to elicit any kind of incriminating response, do not constitute an interrogation. *See id.* at 303.

Assuming that appellant was in custody when he made the incriminating statement, we conclude that the statement was not the result of a custodial interrogation. Vasquez removed appellant from the vehicle and immediately placed him in handcuffs. It was as he was handcuffing appellant that Vasquez made the statement out loud, "there better not be any dope

in the car." Appellant said, "I got a little bit here" and pointed to his front pocket. Vasquez testified that he did not direct the statement toward appellant or the driver; he was merely thinking out loud. Appellant did not testify at the suppression hearing, and when considered in the context of the interaction between Vasquez and appellant, we find that the statement was an offhand remark, not designed to elicit an incriminating response. *See Morris v. State*, 897 S.W.2d 528, 532 (Tex. App.—El Paso 1995, no pet.) (holding that officer's question was not the result of an interrogation when, taken in context of the interaction between appellant and the officer and the appellant did not testify at the suppression hearing, the question appeared to be nothing more than a sarcastic and challenging remark).

In short, the trial court could have reasonably concluded that Vasquez's statement was not designed or reasonably likely to elicit an incriminating response. Because appellant's comment about having marijuana in his pocket was not the result of interrogation, *Miranda* did not require its suppression. We overrule appellant's second point of error.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 31, 2000.
Panel consists of Justices Fowler, Edelman, and Baird.
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