Affirmed and Opinion filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-94-00801-CR

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MATTHEW TODD LEDFORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 667,696

O P I N I O N

This Case is before this Court on remand from the Texas Court of Criminal Appeals. *See State v. Ledford*, 970 S.W.2d 17 (Tex.Crim.App. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 595, 142 L.Ed.2d 537 (1998).

Matthew Todd Ledford (Appellant) was indicted for the first degree felony offense of possession of more than 400 grams of cocaine with intent to deliver. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(f) (Vernon Supp. 1999). Appellant pled not guilty and waived his right to a jury trial. Following his non-jury trial, the trial court assessed a $10,000 fine

against Appellant and sentenced him to fifteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. *See* TEX. PENAL CODE ANN. § 12.32 (Vernon 1994). On appeal to this Court, Appellant contends that the trial court erred in overruling his motion to suppress because his warrantless arrest was unlawful. We affirm.

BACKGROUND

Houston Police Officer William R. Rios received information from a confidential informant that Appellant was going to take possession of narcotics from another individual, identified as a Cuban male. Officer Rios went to the apartment complex where Appellant resided to set up surveillance. After Appellant left the apartment complex in his vehicle, Officer Rios followed behind until Appellant arrived at the Coco Loco Club. Appellant went inside the club and Officer Rios and other officers maintained surveillance outside the club. Sometime later, Appellant exited the club and met another individual in the parking lot. In the parking lot, the individual gave a package to Appellant.

Appellant placed the package in his vehicle and drove away from the club. Officer Rios and the other officers followed. While following behind, Officer Rios contacted marked patrol units to stop Appellant. After the stop, Officer Rios and Officer Wappes recovered approximately 2,000 grams of cocaine from inside Appellant's vehicle, located on the front seat.

DISCUSSION

Double Jeopardy

Though not challenged by Appellant on remand to this Court by the Court of Criminal Appeals, in our original opinion, we dismissed this case because of our holding that the assessment against Appellant of a drug tax and penalty by the State Comptroller's Office constituted a "punishment" for Appellant's offense, prohibiting a subsequent prosecution for the same offense. *See Ledford*, 970 S.W.2d at 17; *see also* TEX. TAX CODE ANN. §§

159.001–.301 (Vernon 1992 & Supp. 1999). On remand and in light of recent decisions by the Texas Court of Criminal Appeals bearing on this issue, we now take the contrary view and hold that merely an "assessment" of a drug tax and penalty by the State Comptroller's Office will not bar a subsequent criminal prosecution for possession of a controlled substance. *See Ex parte Ward*, 964 S.W.2d 617 (Tex.Crim.App. 1998); *Ex parte Chappell*, 959 S.W.2d 627 (Tex.Crim.App. 1998).

In *Ex parte Ward*, the court held that the Texas Controlled Substances Tax becomes due immediately upon a person's "possession" of a taxable substance. 964 S.W.2d at 628. Therefore, liability on the tax is not dependant on a person's receipt of a tax determination notice from the comptroller's office. *Id.* Rather, once a person is found in possession of a taxable substance containing no payment certificates, the comptroller is responsible for collecting any unpaid taxes. *Id.* The court concluded that under the Supreme Court's holding in *Kurth Ranch*, the automatic statutory imposition of the tax cannot constitute "punishment." *Id.* (citing *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 784, 114 S.Ct. 1937, 1948, 128 L.Ed.2d 767, 781 (1994)). The court reasoned that imposition of the tax, notice of the tax determination, imposition of the tax lien, and payment of a portion of the tax does not constitute "punishment" so as to bar subsequent criminal proceedings. *Ex parte Ward*, 964 S.W.2d 629-34. The only way that a defendant can be "punished" so as to bar a subsequent criminal prosecution is by a final judgment of tax liability or by divestiture of ownership of property rights. *Id.* "[A]bsent full payment of the tax or a pay arrangement with the comptroller's office for the remaining amount due, there is no 'punishment' for purposes of the Double Jeopardy Clause's prohibition against multiple punishments." *Id.* at 632.

In this case, there is nothing in the record to indicate that Appellant paid the full amount of the tax and penalty, nor anything to indicate that he made any arrangements with the State

Comptroller's Office to pay any remaining amounts due.[1] Under *Ex parte Ward*, mere assessment of a tax or the imposition of a tax lien by the State Comptroller's Office is not sufficient to constitute "punishment" for purposes of the Double Jeopardy Clause prohibition against successive punishments for the same offense. *See id.* at 630; *see also Ex parte Chappell*, 959 S.W.2d at 629-30; *see also Utley v. State*, 982 S.W.2d 15, 16-17 (Tex.App.–Houston [1st Dist.] 1998, pet. ref'd).

Warrantless Arrest and Warrantless Search of Vehicle

Appellant contends that the trial court erred in overruling his motion to suppress because his warrantless arrest and the subsequent warrantless search of his vehicle violated the Fourth Amendment of the United States Constitution and Article I, Section 9, of the Texas Constitution.

In ruling on a motion to suppress, the trial court is the sole trier of fact and may choose to believe or disbelieve any or all of a witness's testimony. *Villareal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App. 1996). We do not engage in our own factual review. Rather, our review is limited to whether the trial court properly applied the law to the facts. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990).

In *Guzman v. State*, the Court of Criminal Appeals held that appellate courts should afford almost total deference to a trial court's determination of the historical facts that the record supports. 955 S.W.2d 85, 89 (Tex.Crim.App. 1997). Furthermore, appellate courts should afford the same level of deference to a trial court's rulings on application of law to fact questions, referred to as mixed questions of law and fact, if the resolution of those ultimate questions turns upon an evaluation of credibility and demeanor of witnesses. *See id.* However, *de novo* review of these mixed questions of law and fact may be applied where the resolution thereof is not restricted to an evaluation of credibility and demeanor. *See id.* An appellate

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[1] The State Comptroller's Office assessed a tax and penalty against Appellant in the amount of $420,000. *See* TEX. TAX CODE ANN. § 159.101(a) (Vernon 1992).

court should reverse a trial court's ruling on a motion to suppress only when the court abuses its discretion. An abuse of discretion occurs when it appears the trial court applied the wrong legal standard, or when no reasonable view of the record could support the trial court's conclusion under the correct law and the facts, viewed in the light most favorable to its legal conclusion. *Villareal*, 935 S.W.2d at 138; *Banda v. State*, 890 S.W.2d 42, 51-2 (Tex.Crim.App. 1994).

Appellant contends that his warrantless arrest by police officers was unlawful. Appellant challenges the denial of his motion to suppress evidence in light of an alleged lack of probable cause for the initial stop and subsequent warrantless arrest and search. To justify a warrantless arrest, the State has the burden to prove probable cause existed when the officer made the arrest. *Roberts v. State*, 545 S.W.2d 157, 158 (Tex.Crim.App. 1977); *Brown v. State*, 986 S.W.2d50, 51-2 (Tex.App.–Dallas 1999, no pet.). Probable cause to arrest without a warrant exists if at the moment of arrest "the facts and circumstances within the officer's knowledge and of which [the officer] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrested person] had committed or was committing an offense." *Lunde v. State*, 736 S.W.2d665, 667 (Tex.Crim.App. 1987); *Brown*, 986 S.W.2d at 52. A showing of probable cause requires less evidence than is necessary to support a conviction. *Brown*, 986 S.W.2d at 52. We examine the "totality of the circumstances" to determine whether probable cause existed at the time of the warrantless arrest. *Amores v. State*, 816 S.W.2d 407, 413 (Tex.Crim.App. 1991).

Officer Rios had more than eleven years' experience as a Houston police officer and more than five years' experience working in the narcotics division of the Houston Police Department. On the day of Appellant's arrest, Officer Rios received information from a confidential informant who he deemed reliable and credible. The informant told Officer Rios that a drug transaction was going to occur in a specific part of town. The informant identified Appellant as the person who was to receive a large quantity of narcotics. The informant identified the person who was to make the delivery of narcotics as a Cuban male. The

informant also specifically described the rental vehicle that Appellant would use to drive to the location where the transaction would occur. Officer Rios set up surveillance at Appellant's apartment complex and observed Appellant drive away in the rental vehicle described by the informant. After Appellant arrived at a night club, Officer Rios and other officers set up surveillance in the night club parking lot. The officers subsequently observed an individual, with a handgun secured in the waistband of his pants, who matched the description gave by the informant, deliver a package to Appellant. After Appellant drove away from the night club with the package, Houston police officers stopped Appellant. Officer Rios and Officer Wappes discovered what they believed to be approximately 2,000 grams of cocaine lying on the front seat of Appellant's vehicle. A filed test by Officer Rios confirmed the substance was cocaine.

We conclude, considering the totality of the circumstances, that Officer Rios possessed sufficient probable cause to stop Appellant and make a warrantless arrest. *See Lunde*, 736 S.W.2d at 667; *Brown*, 986 S.W.2d at 52. Consequently, the subsequent warrantless search of Appellant's vehicle incident to his arrest was lawful. *See Reasoner v. State*, 988 S.W.2d 877, 881 (Tex.App.–San Antonio 1999, pet. filed); *Rincon v. State*, 979 S.W.2d 13, 16-17 (Tex.App.–Houston [14th Dist.] 1998, no pet.).[2] Therefore, the trial court did not err in overruling Appellant's motion to suppress. Points of error one through three are respectively overruled.

[2] The court's decision to uphold the lawfulness of the warrantless arrest and search in *Reasoner* was based upon virtually identical facts as the instant matter. *See Reasoner*, 988 S.W.2d at 879-81.

The judgment is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justices Amidei, Edelman and Lee.[3]

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

[3] Senior Justice Norman Lee sitting by assignment.