**Affirmed and Opinion filed September 23, 1999.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-00109-CR**

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**THOMAS JEMMERSON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 208th District Court**
**Harris County, Texas**
**Trial Court Cause No. 756892**

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## O P I N I O N

A jury found Thomas Jemmerson guilty of the offense of possession of cocaine, enhanced by two prior felony convictions. The court assessed punishment at thirty years confinement. In eight points of error, appellant claims (1) the trial court erred in refusing to place his motion to suppress in the same legal position as it was before his first trial; (2) the trial court erred in submitting a question of law to the jury; (3) the evidence is insufficient to show he had no standing to challenge a warrantless search; (4) the evidence is insufficient to support the conviction; and (5) the trial court erred in allowing certain testimony on rebuttal. We affirm.

On November 12, 1996, at approximately 7:00 p.m., Officers Kravetz and Siens of the Houston Police Department were patrolling Nagle street, a known narcotics area, checking for drug activity. In response to citizen complaints, the officers went to a house located at 2318 Nagle. The house was dark, the grass was overgrown, trees had fallen in the yard, and the windows had been covered with plywood. The house appeared to be abandoned. Houston Lighting and Power had placed a red tag on the electric meter indicating the electricity had been turned off to the house. The latch on the front door was broken and the door was ajar. From all appearances, Officer Kravetz thought the house was being used as a "smoke house," an abandoned home where people come in off the street and smoke crack cocaine and marijuana.

Officers Kravetz and Siens walked through the open door and noticed old furniture and "junk" stacked almost to the ceiling. They heard muffled voices coming from a back room in the house, and walked toward the voices. Officer Kravetz found a blanket hanging over the entrance to a bedroom. He looked through a gap between the blanket and the doorway and saw appellant, two other men, and a woman sitting on crates at a make-shift table.

Appellant was leaning over the table making movements with his hands over a piece of glass. Officer Siens saw appellant push three white pieces from the table to the floor. Officer Kravetz recovered those items, which turned out to be 2.7 grams of cocaine wrapped in pieces of white plastic. Appellant was arrested and subsequently convicted for possession of cocaine.

In his first point of error, appellant claims the trial court erred in refusing to place his motion to suppress in the same legal position as it was before the first trial in violation of Texas Rule of Appellate Procedure 29.1.[1] Appellant was first tried in July, 1997. At the trial, appellant filed a motion to suppress, which the trial court denied. Appellant's trial ended in a mistrial due to a hung jury. Prior to appellant's second trial, appellant asked the court "to

[1] Rule 29.1 does not apply to this case; it refers to the effect of perfecting an appeal from an order granting interlocutory relief. Rule 21.9, however, refers to the effect the granting of a motion for new trial has on any pretrial proceedings in the first trial. We will address this point of error as if appellant intended to assert that the court violated Texas Rule of Appellate Procedure 21.9.

supplement the Motion to Suppress with evidence during the trial that will be presented." The trial court denied appellant's request, and stated that the prior ruling on the motion to suppress would remain the ruling of the court. Appellant claims the trial court's ruling violated Rule 21.9 of the Texas Rules of Appellate Procedure.

Rule 21.9 provides:

> Granting a motion for new trial restores the case to its position before the former trial, including, at any party's option, arraignment or pretrial proceedings initiated by that party. The prior conviction must not be regarded as a presumption of guilt, nor may it be alluded to in the presence of the jury that hears the case on retrial.

Initially, we note that Rule 21.9 does not apply to this case because no motion for new trial was granted. In this case, appellant's motion for mistrial was granted because the first jury could not reach a verdict. Generally a motion for mistrial and a motion for new trial are not the same. *See Rodriguez v. State*, 852 S.W.2d 516, 518 (Tex. Crim. App. 1993). Unlike an order for a new trial, the mistrial in appellant's first trial did not set aside a jury's verdict, but occurred prior to any finding or verdict of guilt. Under these circumstances, Rule 21.9 does not apply to appellant's second trial. Therefore, the trial court did not violate Rule 21.9.

Further, appellant has failed to preserve any error for review. Appellant requested the trial court to permit him to introduce supplemental evidence on his motion to suppress. He did not ask the trial court to place his motion to suppress in the same legal position it was in before the first trial. An appellate court must find that a party has failed to preserve error if the party fails to first allow the trial court an opportunity to make a ruling. *See Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986). Failing to present a particular argument to the trial court and then making that argument to the appellate court in effect usurps the trial court's function of ruling on such arguments. A point of error that does not comport with the trial objection presents nothing for review. *Coffey v. State*, 796 S.W.2d 175, 179 (Tex. Crim. App. 1990). Appellant's first point of error is overruled.

In his second point of error, appellant claims the trial court erred in submitting a question of law for resolution by the jury, i.e., whether appellant had a reasonable expectation of privacy in the house at 2318 Nagle. The trial court submitted an instruction to the jury that directed the jury to disregard the cocaine if they determined appellant held a privacy interest in the premises searched and had not abandoned the premises. The instruction was mandated by article 38.23(a) of the Texas Code of Criminal Procedure, which provides:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

Article 38.23 provides in mandatory terms that a jury is to be instructed to resolve factual disputes over whether evidence was illegally obtained, and therefore, inadmissible. *Thomas v. State,* 723 S.W.2d 696, 707 (Tex. Crim. App. 1986). An instruction under 38.23 directs a jury to disregard what it determines is illegally obtained evidence. *See Thomas,* 723 S.W.2d at 707. A trial court is required to include a properly worded article 38.23 instruction in the jury charge if there is a factual dispute as to how the evidence was obtained. *Brochu v. State,* 927 S.W.2d 745, 748 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

Here, appellant disputed the State's assertion that he did not have a privacy interest in the house. Appellant presented witnesses who testified that he lived at the searched premises. The State presented witnesses who testified that the house appeared abandoned and that appellant had not been given permission to live there. Given this factual dispute regarding whether appellant held a legitimate expectation of privacy in the house, the trial court was obligated to submit the instruction to the jury. Appellant's second point of error is overruled.

In his third, fourth, and fifth points of error, appellant claims the evidence is insufficient to support the jury's finding that he did not have a legitimate expectation of privacy in the searched premises, i.e. that the evidence is insufficient to support the finding that he had no standing to challenge the search. To determine whether appellant had standing to challenge the search, we consider the following factors: (1) whether the alleged aggrieved person has a property or possessory interest in the thing seized or the place searched; (2) whether he was legitimately on the premises; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, prior to the search, he took normal precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy. *Calloway v. State*, 743 S.W.2d 645, 651 (Tex. Crim. App. 1988).

As to the first and second factors, the evidence shows that appellant was not the owner of the premises, nor did he have any right to be in possession of or living on the premises. The owner of the property, Homer McCoy, testified that he was the legal owner of the property and had not given appellant permission to live in the house. McCoy had turned off water and electricity to the house and had placed plywood over the windows. He testified that anyone who was in the house was there without his consent. Appellant testified that the Reverend Berryman of a nearby church had given him permission to live in the house. Reverend Berryman, however, told Officer Kravetz that he had no authority to allow appellant to live in the house.

With regard to the third factor, appellant did not exercise complete dominion over the premises and did not have the right to exclude others. A defense witness testified that appellant did not stay at the house all the time. Further, he stated that, "It was used for anybody that wanted to sleep over there."

As to the fourth, fifth, and sixth factors, the evidence showed that the front door was open, allowing access to anyone. The blanket over the room where appellant was found, was loosely hung, and could easily be seen through. The house was used by anyone who wanted to sleep there. The structure was uninhabitable. The yard was overgrown, trees had fallen

in the yard, and the windows were boarded up. There was no electricity or water to the house. The front door latch was broken and the house appeared to be abandoned. Those conditions do not comport with historical notions of privacy. Appellant's third, fourth, and fifth points of error are overruled.

In his sixth and seventh points of error, appellant claims the "admissible" evidence is legally and factually insufficient to support his conviction. More specifically appellant contends the cocaine found during the search is inadmissible because appellant had a reasonable expectation of privacy on the premises. Appellant does not complain of insufficiency of the evidence pertaining to any other elements of the charged offense.

Appellant's claim has no merit because when evaluating the sufficiency of the evidence, we must look at all of the evidence presented, whether properly or improperly admitted. *Bobo v. State*, 843 S.W.2d 572, 575-576 (Tex. Crim. App. 1992). Therefore, even if the cocaine were inadmissible, it is still considered in a sufficiency review. Further, in our disposition of appellant's third, fourth, and fifth points of error, we determined the cocaine was admissible. Therefore, the evidence was sufficient to support appellant's conviction. Appellant's sixth and seventh points of error are overruled.

In his eighth point of error, appellant claims the trial court erred in overruling his motion to quash the testimony of Homer McCoy because it was irrelevant. Appellant contends that McCoy did not own the house and the fact that he did not give permission to appellant to live on the premises was irrelevant.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Bell v. State*, 938 S.W.2d 35, 49 (Tex. Crim. App. 1996); TEX. R. EVID. 401. Under Rule 401, for evidence to be admissible, it must be material. To be material, evidence must support a proposition that is provable or a controlling matter. If the proposition sought to be proved is material, then Rule 401 requires

that the offered evidence proves the proposition. Texas Rules of Evidence Handbook, Third Edition, 1998.

Homer McCoy testified that he had owned the house at 2318 Nagle for approximately fifteen years. He did not give appellant permission to live on the property. His testimony was relevant to the issue of appellant's reasonable expectation of privacy in the premises. Appellant urges that McCoy's testimony is not relevant because he did not possess legal title to the property. McCoy admitted that he had quitclaim deeded the property to his daughter so that she could secure a loan. The daughter was to deed the property back to him, but while she held the property in her name, a tax lien attached to the property.

Although McCoy did not have clear title to the property, his testimony was relevant to the issue of appellant's standing. The jury could reasonably conclude that McCoy was the owner of the property to the extent that he had a greater right to possession of the property than appellant. Owner is defined as a person who has title to the property, whether lawful or not, or a greater right to possession of the property than the actor. TEX. PENAL CODE § 1.07(A). Under the facts testified to by McCoy, his right to the property is superior to that of appellant. McCoy's testimony tended to make it more probable that appellant had no standing to challenge the search. Further, there was testimony that appellant told Officer Kravetz that Reverend Berryman had given him permission to live on the property. McCoy's testimony was relevant to show that Reverend Berryman did not have authority to give appellant permission to live on the property. McCoy's testimony was relevant and admissible. Appellant's eighth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed September 23, 1999.

Panel consists of Justices Fowler, Edelman and Hutson-Dunn.[2]

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[2] Senior Justice D. Camille Hutson-Dunn sitting by assignment.