Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01351-CR

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ERIC BRIAN SCHMIDT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 751,182

O P I N I O N

Eric Brian Schmidt appeals from the denial by the trial court of his motion to suppress all the evidence in the charge against him for possession of less than one gram of cocaine. Appellant pleaded guilty pursuant to a plea bargain with the State, and the trial court assessed appellant's punishment at fourteen months imprisonment in the state jail division of the Texas Department of Criminal Justice (TDCJ). In issues one, two, three, four, five, and six, appellant contends the trial court erred in denying his motion to suppress because his warrantless arrest and subsequent search were unlawful under the state and federal constitutions, and article 38.23, Texas Code of Criminal Procedure. In issues seven and eight, appellant contends the

trial court abused its discretion in denying appellant's request for an evidentiary hearing on the motion to suppress under the state and federal constitutions. We affirm.

The trial court decided appellant's motion to suppress on the basis of affidavits. The Texas Code of Criminal Procedure provides:

> When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court.

TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1(6) (Vernon 1989 & Supp. 1999).

Appellant contends that Deputy Cook's affidavit did not present sufficient facts on which the trial court could make an independent determination that the initial stop was justified. In his affidavit, Deputy Cook stated:

> My name is Deputy J. Cook, a peace officer employed by the Harris County Sheriff's Office. I was in uniform and on patrol in a marked police vehicle on April 24, 1997, in the 400 Block of Coolaire, Crosby, Harris County, Texas, when I observed a green Chevrolet truck driven by the Defendant. I observed that the Defendant was driving the vehicle without wearing a seatbelt as required by state law. I performed a traffic stop of the Defendant's vehicle due to the seatbelt violation and made contact with the Defendant, a person I can identify by sight.
>
> Upon my initial contact with the Defendant, I noted an odor of alcoholic beverage about the Defendant's person, as well as blood shot eyes. Upon speaking with Defendant, I observed the Defendant to have slurred speech. The Defendant was unable to provide proper liability insurance for the vehicle and I noted that there was no proper state inspection sticker on the Defendant's vehicle. Due to the numerous traffic violations and the suspicion that the Defendant was driving while intoxicated, the Defendant was arrested at the scene. I conducted a search of the Defendant's person incident to the Defendant's arrest for the traffic violations and suspicion of driving while intoxicated. I found a glass tube with burnt edges and a Brillo pad in it in the

> Defendant's crotch area. Based on my training and experience, I recognized the glass tube in the Defendant's possession to be commonly used to smoke crack cocaine. I field tested the glass tube and it tested positive for cocaine residue, an amount less than 1 gram.

At the hearing on the motion to suppress, appellant provided his affidavit in which he alleged he was wearing his seat belt when he was stopped. In his affidavit, appellant stated he was driving west on Coolaire when he observed the deputy's car heading east on Melville. Coolaire and Melville streets were separated by a cemetery. Appellant further stated it was not possible for a person to see inside his truck to determine if the driver was wearing his seat belt because his side and rear windows were darkly tinted. After he was stopped, appellant stated he removed his seat belt, then handed Deputy Cook an insurance card that "apparently was not current," although he stated that he did have a current card in the glove compartment. Appellant stated he stepped out of his truck, and the officers started questioning him as to his reasons for being in the area. The officers ordered appellant to pull his pants down, and appellant complied. The officers then ordered appellant to pull his underpants down, and appellant complied. Seeing the stem of a crack pipe, the deputies knocked him to the ground. When on the ground, one of the deputies put his knee to appellant's chest and ordered him to pull the crack pipe out. Appellant complied, and the deputies said appellant would be sent to the penitentiary for this offense. Appellant was then placed in the patrol car without further incident.

Appellant did not state if his windshield was darkly tinted. Appellant's affidavit was silent on the deputy's accusations of his intoxication and lack of inspection sticker.

Appellant also furnished affidavits of his brother, Terry Dahlman, and his mother, Maryann Dahlman, which stated they followed appellant's truck at the same location and videotaped the truck from the rear to demonstrate the fact that no one could see through the rear window because it was darkly tinted. Appellant also furnished photographs of the rear window of his truck to demonstrate the impossibility of viewing the driver because of the dark tinting of the rear window.

Appellate courts should afford almost total deference to a 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 of the witnesses. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Appellate courts may review *de novo* "mixed questions of law and fact" not falling within this category. *Id.* If the trial court "is not in an appreciably better position" than the appellate court to decide the issue, the appellate court may independently determine the issue while affording deference to the trial court's findings on subsidiary factual questions. *Villarreal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996). The motion in this case was decided on affidavits, not on live testimony of the witnesses. Therefore, because the trial court's decision to grant or deny the motion to suppress did not turn on the court's assessment of witness credibility and demeanor, we will review the record *de novo*, with almost total deference to the trial court's determination of the historical facts. *Id.*

Appellant relied heavily on the fact that his side and rear window's were tinted, and a person could not see through them. However, appellant did not prove or assert that his *windshield* was tinted. In his statement, appellant admits that the deputy's car was driving toward him on an adjacent street, which would provide the officers with a view of the driver of any oncoming car through the windshield of that car. After the arguments of the State and appellant, the trial court stated on the record:

> Well, I find the affidavit of Deputy Cook to be believable and the details included here. I find that this was a search without a warrant, that it was – the search of an initial stop was based on probable cause of seeing that the defendant was not wearing a seat belt.

A peace officer may arrest a driver for failure to wear a seat belt. TEXAS TRANS. CODE ANN. §§ 543.001, 545.413 (Vernon 1995 & Supp. 1999). *Madison v. State*, 922 S.W.2d 610, 612 (Tex.App.— Texarkana 1996, pet ref'd). Because appellant committed an offense, his stop and arrest were reasonable, notwithstanding the officer's other motives, if any, in stopping and detaining him. *Oretega v. State*, 861 S.W.2d 91, 94-95 (Tex. App. — Houston [1st Dist.]

1993, pet ref'd). Accordingly, we defer to the trial court's finding of fact that Deputy Cook observed appellant not wearing his seat belt. On *de novo* review, we find Deputy Cook had probable cause to arrest appellant upon observing him operating his vehicle without a seatbelt. The stop and arrest were valid and the trial court did not err in denying appellant's motion to suppress for lack of probable cause to arrest.

Appellant contends that his arrest without probable cause violated the Fourth Amendment of the United States Constitution, and Article I, § 9 of the Texas Constitution. Appellant asserts that Article I, § 9 of the Texas Constitution affords greater protection than the Fourth Amendment in this context. Although Texas courts are not bound by Fourth Amendment precedent when interpreting Article I, § 9 of the Texas Constitution, *Heitman v. State*, 815 S.W.2d 681, 690 (Tex.Crim.App.1991), we find no authority requiring a more restrictive standard for reviewing investigative stops, arrests, or probable cause under Article I, § 9 than that required under the Fourth Amendment. *Murray v. State*, 864 S.W.2d 111, 115 (Tex.App.--Texarkana 1993, pet. ref'd). Absent an affirmative act of the Texas Legislature or decision by the Court of Criminal Appeals overruling earlier decisions in this area, this court will interpret Article I, § 9 as consistent with the interpretation of the Fourth Amendment by the United States Supreme Court and the Court of Criminal Appeals. *Id.* at 116 (citations omitted); *see State v. Grant*, 832 S.W.2d 624, 628 (Tex.App.--Houston [14th Dist.] 1992, pet ref'd). *See also Tate v. State*, 939 S.W.2d 738, 750 (Tex.App.–Houston[14thDist.] 1997, pet. ref'd). Having found the warrantless arrest was made with probable cause under the state and federal constitutions, we overrule appellant's points of error one and two.

In point three, appellant contends his warrantless arrest violates article 38.23, Texas Code of Criminal Procedure. Because we have found that Deputy Cook had probable cause to arrest appellant, there was no violation of any provisions of the state and federal constitutions, nor any violation of the state and federal laws. Point of error three is overruled.

In points four, five, and six, appellant contends Deputy Cook's "strip search" of appellant was illegal and unreasonable. Appellant did not raise the legality of the search in his

motion to suppress, nor did he raise the issue at the hearing on the motion to suppress. Appellant contested only the issue of Deputy Cook's probable cause to arrest appellant because of a seat belt violation. Appellant has preserved nothing for our review. TEX. R. APP. P. 33.1(a); *Etheridge v. State,* 903 S.W.2d 1, 16 (Tex.Crim.App.1994). Points of error four, five, and six are overruled.

In points seven and eight, appellant contends the trial court abused its discretion in denying appellant's request for and evidentiary hearing on his motion to suppress with live testimony from the witnesses instead of affidavits. Appellant argues that denial of this motion violates his constitutional rights to confrontation of witnesses and due process.

As discussed above in this opinion, article 28.01, § 1(6), Texas Rules of Criminal Procedure, grants the trial court discretion in (1) granting a hearing on the motion to suppress, and (2) hearing the merits "upon affidavits, or upon oral testimony." *Id.* This same argument was made by the appellant in *Ackenback v. State,* 794 S.W.2d 567, 573 (Tex.App.–Houston[1st Dist.] 1990, pet. ref'd), and the court of appeals found that the denial of an evidentiary hearing by the trial court after a hearing had been held on affidavits was not an abuse of discretion. *Id.* The court of appeals found no constitutional infringements on the rights of the appellant in that case as a result of the refusal of the trial court to grant an evidentiary hearing. *Id*. In this case, we find that the trial court did not abuse its discretion in denying appellant a hearing with oral testimony, and appellant's constitutional rights have not been violated. We overrule appellant's points of error seven

and eight, and we affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Sears, Cannon, and Lee.[1]

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

[1] Senior Justices Ross A. Sears, Bill Cannon, and Norman R. Lee, sitting by assignment.