Affirmed and Opinion filed November 4, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-01268-CR

THE STATE OF TEXAS, Appellant

V.

STEVEN BRADLEY ADAM, Appellee

On Appeal from the County Court at Law No. 2
Brazos County, Texas
Trial Court Cause No. 2202-97

O P I N I O N

The State of Texas (State) appeals from the trial court's order granting a motion to suppress. Steven Bradley Adam (Adam) was charged by information with possessing a usable quantity of marijuana of less than two ounces. He filed a pre-trial motion to suppress seeking to suppress the evidence against him because the initial stop and seizure were made without any reasonable suspicion or probable cause to believe he committed any offense. Following an evidentiary hearing, the trial court found that the search of Adam's vehicle was not reasonable and granted the motion to suppress. On appeal to this Court, the State assigns four issues, contending that (1) Adam freely and voluntarily consented to the search of his

vehicle, (2) Adam did not have an expectation of privacy in his vehicle and thus lacked standing to complain, (3) the police officers possessed "reasonable articulable suspicion to conduct the search," and (4) the trial court abused its discretion by ruling that Adam's counsel could inspect Officer Brown's police report during his testimony. We affirm.

BACKGROUND

Two College Station police officers were patrolling an area near the campus of Texas A & M University. They observed a vehicle towing a horse trailer, traveling northbound on Boyett Street. The vehicle stopped on the shoulder of the road, permitted traffic to pass, and the driver of the vehicle attempted to make a u-turn. The driver was unable to successfully complete the u-turn because the road was narrow and because he was operating a full-size truck with a large horse trailer in tow.[1] The police officers stopped their patrol unit behind the vehicle. Officer Thomas Brown approached Adam, the driver of the vehicle, questioned him and believed that Adam may be intoxicated. Officer Brown and Officer Kevin Dedeker administered field sobriety tests to Adam. Adam passed the tests. Nevertheless, the police officers believed it would be safer for Adam to contact someone else to come and drive Adam's vehicle home. Adam attempted to contact his wife but she was not home. Thus, Adam was going to drive his vehicle home. As Adam began entering his vehicle, Officer Dedeker asked him whether he had any weapons inside his vehicle. Adam responded that he did not. Officer Dedeker told Adam that he was "going to go ahead and do a quick *Terry*[2] search on the vehicle to ensure there wasn't any weapons before [he] let him back in the vehicle." Officer Dedeker opened the passenger door of Adam's vehicle and saw a "starter pistol" underneath the passenger seat. Officer Dedeker then walked to the driver's side of the vehicle, entered the vehicle and opened the "center console." Inside the console, Officer Dedeker found a nine millimeter handgun. Also inside the console was a "wooden box," approximately five square inches in size. Officer Dedeker opened the box and saw a "pipe" and he could detect "the odor of burnt

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[1] The horse trailer contained two horses.

[2] *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

marijuana . . . ." He also found a "plastic baggie" which contained a "usable amount" of marijuana. Adam was arrested and taken in custody.

STANDARD OF REVIEW

We generally review a trial court's ruling on a motion to suppress for abuse of discretion. *See Villarreal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App. 1996); *State v. Derrow*, 981 S.W.2d 776, 778 (Tex.App.–Houston [1st Dist.] 1998, pet. ref'd). We afford almost total deference to the trial court's fact findings, as we view the evidence in the light most favorable to the court's ruling. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997). Because we do not determine credibility, our *de novo* review of authority to consent, reasonable suspicion, and probable cause, mixed questions of law and fact, becomes a *de novo* review of legal questions. *See Ornelas v. United States*, 517 U.S. 690, 697-99, 116 S.Ct. 1657, 1661-62, 134 L.Ed.2d 911 (1996); *Guzman*, 955 S.W.2d at 87-89. On appeal, we are limited to determining whether the trial court erred in applying the law to the facts. *See id.*

DISCUSSION

A. Standing

In its second issue, the State contends that Adam lacked standing to complain about the search because there was no evidence that he had an expectation of privacy in his vehicle.

First, the State contends that Adam "never established through the evidence that this search was conducted without a warrant." The record clearly refutes this assertion. On direct examination by Adam's counsel, Officer Dedeker was asked, "Did you have a warrant to search his vehicle? Officer Dedeker responded, "No, I did not."

Second, the State contends that Adam lacked standing to complain about the search because "there was no evidence before the trial court that [Adam] owned or even had a lawful possessory interest in the truck searched." The substantive question of what constitutes a "search" for purposes of the Fourth Amendment was effectively merged with what had been a procedural question of "standing" to challenge a search. *See Chapa v. State*, 729 S.W.2d 723, 727 (Tex.Crim.App. 1987) (citing *Rakas v. Illinois*,

439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 387 (1978)). It became a matter, not only of whether some "reasonable," "justifiable" or "legitimate expectation of privacy" in a particular place exists, which has been breached by governmental action, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220, 226 (1979), but also of who reasonably, justifiably or legitimately harbored that expectation. The litmus for determining existence of a legitimate expectation of privacy as to a particular accused is twofold: first, did he exhibit by his conduct "an actual (subjective) expectation of privacy;" and second, if he did, was that subjective expectation "one that society is prepared to recognize as 'reasonable.'" *Chapa*, 729 S.W.2d at 727 (quoting *Smith*, 442 U.S. at 740, 99 S.Ct. at 2580, 61 L.Ed.2d at 226-27).

In *Rakas*, the Supreme Court observed:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, *see* W. BLACKSTONE, COMMENTARIES, Book 2, ch. 1, and one who owns or lawfully possesses *or controls* property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

Id. (quoting *Rakas*, 439 U.S. at 144 n.12, 99 S.Ct. at 431 n.12, 58 L.Ed.2d at 401 n.12) (emphasis in original).

Here, the record clearly shows that Adam was solely in possession and control of his truck and horse trailer when the police officers approached him. By virtue of his sole occupation and control of the vehicle, Adam had a right to exclude others from entering the passenger compartment of his vehicle. Thus, under the circumstances and by his conduct, Adam exhibited an actual, subjective expectation of privacy inside the passenger compartment of his vehicle. *See id.*; *see also Rovnak v. State*, 990 S.W.2d 863, 870-71 (Tex.App.–Texarkana 1999, pet. filed). Clearly, society recognizes that such an expectation of privacy exists and is reasonable. *See id.; Rovnak*, 990 S.W.2d at 867-71. Accordingly, such expectation of privacy inside the passenger compartment of his vehicle gave Adam "standing" to challenge

the warrantless search and seizure made by Officer Dedeker. The State's contention to the contrary is without merit. Issue two is overruled.

B. Consent

In its first issue, the State contends that the trial court abused its discretion in granting Adam's motion to suppress because Adam freely and voluntarily consented to the search.

As noted, the search of Adam's vehicle and seizure of marijuana occurred after Adam was questioned by two police officers, following their observation of Adam attempting to make a u-turn with his truck and horse trailer.

When seeking the suppression of evidence based on allegations of unlawful search and seizure, the accused bears the burden of rebutting the presumption that the police conduct was proper. *See Russell v. State*, 717 S.W.2d 7, 9 (Tex.Crim.App. 1986). The presumption is rebutted by a showing that the search or seizure occurred without a warrant. *See Johnson v. State*, 864 S.W.2d 708, 714 (Tex.App.–Dallas 1993), *aff'd*, 912 S.W.2d 227 (Tex.Crim.App. 1995). The burden of proof then shifts to the State. If the State is unable to produce a warrant, it must prove the warrantless search or seizure was reasonable. *See Russell*, 717 S.W.2d at 9-10.

One of the established exceptions to the warrant and probable cause requirements of the Fourth Amendment is a search conducted pursuant to consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973). Constitutional proscriptions against warrantless searches and seizures do not come into play when a person gives free and voluntary consent to a search. *See Brimage v. State*, 918 S.W.2d 466, 480 (Tex.Crim.App. 1996), *cert. denied*, 519 U.S. 838, 117 S.Ct. 115, 136 L.Ed.2d 66 (1996) (voluntary consent to warrantless search violates neither the United States nor Texas Constitution, nor the laws of Texas).

Unlike the United States Constitution, under which prosecutors must prove by a preponderance of the evidence that consent to search was freely given, the Texas Constitution requires that the State prove by clear and convincing evidence that consent to search was freely given. *See State v. Ibarra*, 953

S.W.2d 242, 244-45 (Tex.Crim.App. 1997). For the consent to be voluntary, it must not be the product of duress or coercion, actual or implied. *See Allridge v. State*, 850 S.W.2d 471, 493 (Tex.Crim.App.1991), *cert. denied*, 510 U.S. 831, 114 S.Ct. 101, 126 L.Ed.2d 68 (1993). The burden to show voluntariness is not discharged by showing acquiescence to a claim of lawful authority. *See Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797 (1968) (when a peace officer represented that he had a valid search warrant when he did not, consent is not voluntary). Whether the consent to search was in fact voluntary is to be determined from the totality of the circumstances. *See Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2047-48. Whether the consenting person was in custody or restrained at the time is a factor to be considered in whether consent was voluntarily given. *See Carpenter v. State*, 952 S.W.2d 1, 4 (Tex.App.–San Antonio 1997), *aff'd*, 979 S.W.2d 633 (Tex.Crim.App. 1998).

The State contends that Adam freely and voluntarily consented to the search because "the only evidence at the hearing was that [Adam] consented to the search." We disagree. In its findings of fact and conclusions of law, the trial court found that Adam's consent to the search of his vehicle was not voluntary. Moreover, our review of the record shows that Adam did not freely and voluntarily consent to the search of his vehicle. The record shows that Officer Dedeker is the police officer who searched Adam's vehicle and discovered the handgun and marijuana. Officer Dedeker testified that he did not have a warrant to search the vehicle but told Adam that he "was going to go ahead and do a quick *Terry* search on the vehicle . . . ." This testimony shows Adam was not given a choice whether to consent to the search. Further, when questioned whether he had "permission" from Adam to search his vehicle, Officer Dedeker responded, "Not that I recall."[3] In considering the totality of the circumstances, we conclude that the State failed to produce clear and convincing evidence that Adam's consent to the search of his vehicle, if any, was freely and voluntarily given. *See Ibarra*, 953 S.W.2d at 244-45. Issue one is overruled.

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[3] We note that in Officer Brown's testimony, he stated during cross-examination by the State that Adam gave Officer Dedeker permission to search his vehicle. However, Officer Brown neither searched Adam's vehicle nor himself sought consent from Adam to search his vehicle. It was within the discretion of the trial court to reject this testimony in determining whether Adam freely and voluntarily consented to the search of his vehicle. *See Guzman*, 955 S.W.2d at 87-89.

C. Probable Cause

In its third issue, the State contends that the search of Adam's vehicle was lawful because the two police officers possessed "reasonable articulable suspicion to conduct the search."[4]

Assuming the initial detention of Adam was lawful, under both the United States and Texas Constitutions, a police officer may conduct a warrantless search of an automobile if he has probable cause to believe a crime has been committed and there is contraband located somewhere inside the vehicle. *See Carroll v. United States*, 267 U.S. 132, 158-59, 45 S.Ct. 280, 287, 69 L.Ed. 543 (1925); *Hollis v. State*, 971 S.W.2d 653, 655 (Tex.App.–Dallas 1998, pet. ref'd). The automobile exception does not require the existence of exigent circumstances in addition to probable cause. *See Michigan v. Thomas*, 458 U.S. 259, 261-62, 102 S.Ct. 3079, 3080-81, 73 L.Ed.2d 750 (1982); *State v. Guzman*, 959 S.W.2d 631, 634 (Tex.Crim.App. 1998). The justifications for this exception are that vehicles are readily mobile and the expectation of privacy with respect to an automobile is relatively low. *See Aitch v. State*, 879 S.W.2d 167, 173 (Tex.App.–Houston [14th Dist.] 1994, pet. ref'd). In determining probable cause, courts must consider the totality of the circumstances. *See Angulo v. State*, 727 S.W.2d 276, 278 (Tex.Crim.App. 1987). Probable cause exists when the facts and circumstances within the officer's knowledge and about which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that a crime has been committed. *See Amores v. State*, 816 S.W.2d 407, 413 (Tex.Crim.App. 1991). The sum of the information known to the officers at the time of a search is to be considered in determining whether there was sufficient probable cause. *See Turcio v. State*, 791 S.W.2d 188, 191 (Tex.App.–Houston [14th Dist.] 1990, pet. ref'd).

Both police officers in this case testified that before questioning Adam, they did not observe him violate any traffic laws. They also testified that after Adam passed a field sobriety test, he was free to leave

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[4] We note that the State's brief violates Rule 38.1(h), which provides that an appellant's "brief must contain a clear and concise argument for the contentions made, with appropriate *citations to authorities* and to the record." TEX. R. APP. P. 38.1(h) (emphasis added). The State's brief contains no citations to any authority to support its contention that the police officers possessed "reasonable articulable suspicion to conduct the search."

and was not being detained. However, while entering his vehicle, the Officer Dedeker told Adam that he was going to search his vehicle. The State contends that the subsequent search of Adam's vehicle was reasonable because Officer Dedeker testified that "farm trucks commonly contain firearms" and because Officer Brown testified that he "had feelings of insecurity."

In considering the totality of the circumstances, we hold that the police officers in this case lacked probable cause to believe a crime had been committed or that there was contraband located inside Adam's vehicle. *See Hollis*, 971 S.W.2d at 655.

The State would have this Court hold that police officers have probable cause to conduct a warrantless search of any vehicle on a Texas roadway, characterized by an officer as a "farm truck," merely because "farm trucks commonly contain firearms." This contention is patently unreasonable. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *Amores*, 816 S.W.2d at 413. The State would also have this Court hold that when a police officer has "feelings of insecurity," the police officer has probable cause to conduct a warrantless search of a vehicle for weapons. During the course of a temporary detention, an officer may conduct a limited search for weapons if reasonably warranted for his safety or the safety of others. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889, 909 (1968); *Ardoin v. State*, 955 S.W.2d 420, 423 (Tex.App.–Beaumont 1997, no pet.). The search may include the passenger compartment of an automobile if the "police officer possesses a reasonable belief based upon 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1050-51, 103 S.Ct. 3469, 3481, 77 L.Ed.2d 1201 (1983) (quoting *Terry*, 392 U.S. at 21, 88 S.Ct. at 1880); *see also Goodwin v. State*, 799 S.W.2d 719, 728 (Tex.Crim.App. 1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 902, 112 L.Ed.2d 1026 (1991). The search must be limited to areas in which a weapon may be hidden. *See Long*, 463 U.S. at 1049, 103 S.Ct. at 3480-81. "[T]he issue is whether a reasonably prudent man in the [same] circumstances would be warranted in the belief that his safety or that of others was in danger." *Id*. at 1050, 103 S.Ct. at 3481.

Officer Brown's testimony that he had "feelings of insecurity" is not *specific and articulable* testimony showing *facts* that indicate he had a reasonable belief that his safety or that of others was in danger. *See id*. at 1050-51, 103 S.Ct. at 3481 (emphasis added). The record is entirely devoid of any facts to suggest that the police officers possessed the belief that Adam was "dangerous" and that he may "gain immediate control of weapons." *See Ardoin*, 955 S.W.2d at 422. Consequently, Officer Dedeker's search of Adam's vehicle was not constitutionally reasonable. *See Terry*, 392 U.S. at 27, 88 S.Ct. at 1883. The trial court did not abuse its discretion therefore in granting Adam's motion to suppress. Issue three is overruled.

D. Police Report

In its fourth issue, the State contends that the trial court abused its discretion by allowing Adam's counsel to inspect Officer Brown's police report during his direct examination testimony.[5] The State relies on Rule 615. *See* TEX. R. EVID. 615(a); *see also* TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1979).

The record shows that Officer Brown was relying on the police report he prepared to answer Adam's counsel's questions on direct examination. Rule 612 provides that an adverse party is permitted to inspect a writing if "a witness uses a writing to refresh memory for the purpose of testifying either . . . while testifying . . . or before testifying, in criminal cases." TEX. R. EVID. 612. We have previously held that while Rule 612 technically does not apply where a criminal defendant calls an officer as a witness on direct examination, the provisions of the rule nonetheless equally apply in a case where a party calls a police officer as an adverse witness who relies on a police report to refresh his recollection. *See State v*.

[5] Generally, police reports and offense reports are not discoverable because they are work product of the police and are exempt from pre-trial discovery. *See Brem v. State*, 571 S.W.2d 314, 322 (Tex.Crim.App. 1978).

Williams, 846 S.W.2d 408, 411 (Tex.App.–Houston [14th Dist.] 1992, pet. ref'd).[6] Although Officer Brown was called as a witness by Adam on direct examination, he was clearly an "adverse witness." Thus, the trial court did not abuse its discretion in permitting Adam's counsel to inspect Officer Brown's police report during his direct examination testimony. Issue four is overruled.

The trial court's order granting Adam's motion to suppress is affirmed.[7]

PER CURIAM

Judgment rendered and Opinion filed November 4, 1999.
Panel consists of Justices Yates, Fowler, and Frost.
Do Not PUBLISH—TEX. R. APP. P. 47.3(b).

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[6] Interpreting former Rule of Criminal Evidence 611. *See Williams*, 846 S.W.2d at 411. There is no substantive difference between current Rule of Evidence 612 and former Rule of Criminal Evidence 611.

[7] In his cross-point, Adam contends that the State's notice of appeal does not comply with article 44.01(a)(5) and therefore this Court is without jurisdiction over the State's appeal. Article 44.01(a)(5) provides that the State may appeal an order granting a motion to suppress "if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purposes of delay and that the evidence, confession, or admission is of substantial importance in the case." TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(5) (Vernon Supp. 1999). We observe that the State filed two, timely notices of appeal. In both notices, the prosecutor certified that the appeal "is not taken for the purpose of delay . . . ." In the first notice of appeal, the prosecutor addressed the evidence and the motion to suppress. However, the State's notice of appeal does not certify that the evidence suppressed "is of substantial importance in the case." *See id.* We nevertheless conclude that for the purposes of this case only, the State's notice of appeal is in substantial compliance with article 44.01(a)(5). Thus, we have jurisdiction.