Affirmed and Opinion filed December 13, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01158-CR & NO. 14-99-01159-CR

THETAUS ROBERT VAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law Number 9
Harris County, Texas
Trial Court Cause No. 99-21157; 99-21158

O P I N I O N

A jury convicted appellant, Thetaus Robert Van, on two counts of furnishing alcohol to a minor. *See* TEX. ALCO. BEV. CODE ANN. § 106.06 (Vernon Supp. 2001). In one point of error, appellant claims the trial court erred in denying his motion to suppress because officers lacked probable cause and exigent circumstances to conduct a warrantless search of appellant's backyard. We affirm.

Background and Procedural History

Harris County Deputy Terry Albritton responded to a disturbance call in Katy on October 31, 1998, about juveniles who had broken a fence. At the broken fence, Deputy

Albritton could hear loud noises and, through a separate fence, could see a Halloween party taking place in appellant's backyard. Through the slats of appellant's fence, he saw about fifty juveniles holding clear plastic cups with yellow liquid that looked like beer. The deputy drove around the block to the adjoining cul-de-sac in front of appellant's house, where from his patrol car he saw two juveniles walking down the driveway. One of them was holding a plastic cup of beer. After making eye contact with the deputy, the juveniles ran behind the house. The deputy parked his car in the driveway and followed them into the backyard. Deputy Brian Scudder of the Harris County Constables Office testified that as he approached the house he saw the two juveniles run into the backyard away from Deputy Albritton. Deputy Albritton testified that the juveniles yelled "cops, cops," dropped their cups and fled from the backyard by both breaking through and jumping over the fence. The deputies contained the backyard to prevent the juveniles from fleeing. They testified they saw a keg of beer next to a swimming pool, plastic cups all over the ground, and they smelled a "strong odor of alcoholic beverage." They began checking identifications to verify the juveniles were not of legal drinking age and issued minor in possession citations.

Deputy Albritton asked who lived in the house and Michael Silvernell responded. Silvernell went into the house to get his parents, who came outside to talk with the deputies. Appellant, Silvernell's stepfather, was arrested and charged with two counts of furnishing alcohol to a minor.

Appellant moved to suppress the search of his backyard. The trial court denied the motion, finding that there was no reasonable expectation of privacy and that the officers had probable cause to investigate an offense that occurred in their presence. Appellant was found guilty on both counts, and the jury assessed punishment at 180 days in jail and a two thousand dollar fine. This appeal followed.

Standard of Review

In reviewing the trial court's ruling, this court gives almost total deference to the trial

court's determination of historical facts that involve a judge's evaluation of the credibility and demeanor of the witnesses who testify. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We view the evidence in the light most favorable to the trial court's ruling on mixed questions of law and fact. *See id.* However, a trial court's determination on a mixed question of law and fact, such as whether an officer had probable cause, may be reviewed *de novo* on appeal if its resolution does not turn on an evaluation of credibility and demeanor. *See id*.

Analysis

Appellant argues that the officers' entry into his backyard violated his rights under the Fourth Amendment of the United States Constitution and article I, section 9 of the Texas Constitution, both of which protect against unreasonable searches and seizures. This protection includes a home and the curtilage of the home as well. *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 1742 (1984); *Atkins v. State*, 882 S.W.2d 910, 912 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Appellant argues that his backyard falls within the curtilage of his home.

Whether a particular area is included within the curtilage of a home is determined by whether appellant had a reasonable expectation of privacy in the area. *Bower v. State*, 769 S.W.2d 887, 896 (Tex. Crim. App. 1989), *overruled on other grounds by Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991). The factors to consider in determining whether an area is considered curtilage include (1) the proximity of the area to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the use to which the area is put, and (4) the steps taken to protect the area from observation by a passerby. *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 1139 (1987). In this case, appellant's backyard was surrounded by a fence and can be considered within the curtilage.[1]

[1] We note, however, Deputy Albritton's view of the minors in possession of alcohol as seen through the slats of the fence is not in violation of the Fourth Amendment; there is no legitimate expectation of

In order to justify Deputy Albritton's warrantless entry upon appellant's property, the State must show the existence of probable cause at the time the search was made, and the existence of exigent circumstances which made the procuring of a warrant impracticable. *McNairy v. State*, 835 S.W.2d 101, 106-07 (Tex. Crim. App. 1991); *Delgado v. State*, 718 S.W.2d 718 (Tex. Crim. App. 1986). Probable cause to search exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe evidence of a crime would be found. *McNairy*, 835 S.W.2d at 106. In this case, Deputy Albritton saw the juveniles in the backyard holding plastic cups containing a yellow liquid that he believed to be alcohol, and he testified he could smell the strong odor of beer. The trial court found probable cause existed because the officer was investigating the crime of minors in possession, which he saw occurring in his presence. *See* TEX. ALCO. BEV. CODE ANN. § 106.05 (Vernon Supp. 2001).

If probable cause is present, the inquiry becomes whether exigent circumstances existed to obviate the need for a warrant and to justify the initial warrantless entry into appellant's backyard. *See McNairy*, 835 S.W.2d at 107; TEX. CODE CRIM. PROC. ANN. art. 14.05 (Vernon Supp. 2001). A police officer may make a warrantless entry under exigent circumstances, such as during the "hot pursuit" of a fleeing felon. *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S.Ct. 2091, 2097-98 (1984). However, the Supreme Court in *Welsh* decided that a non-jailable, civil traffic offense was not sufficiently serious to allow a warrantless entry when there was no immediate or continuous pursuit. *Id.* at 754, 104 S.Ct. at 2100. The Court left open the question of whether exigent circumstances may be created during non-felony offenses. *Id.* at 749 n.11, 104 S.Ct. at 2097 n.11. Texas courts have addressed this issue and have held that a police officer can make a warrantless entry if in hot pursuit of a suspect who committed a misdemeanor punishable by confinement in jail. *See Waugh v. State*, 51 S.W.3d 714, 718 (Tex. App.—Eastland 2001, no pet.) (holding police

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privacy and no search within the meaning of the Fourth Amendment when the general public can view the area as seen by the officer. *See Texas v. Brown*, 460 U.S. 730, 740,103 S.Ct. 1535, 1542 (1983); *see also Bower*, 769 S.W.2d at 897.

officers may make a warrantless entry into home after marijuana possession suspect fled from and attempted to shut police officers out of the house); *see also LaHaye v. State*, 1 S.W.3d 149 (Tex. App.—Texarkana 1999, pet. ref'd) (holding police officers may make a warrantless entry into home while in hot pursuit of a person suspected of driving while intoxicated); *Winter v. State*, 902 S.W.2d 571 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (same).

In this case, Deputy Albritton testified the two juveniles immediately fled into the backyard after making eye contact with the officer while holding cups of beer. A minor in possession offense can be punishable by confinement in jail. *See* TEX. ALCO. BEV. CODE ANN. § 106.071(c) (Vernon Supp. 2001). In addition to committing the minor in possession offense, the juveniles further committed the offense of evading detention or arrest. *See* TEX. PEN. CODE ANN. § 38.04(a) (Vernon Supp. 2001). This offense is punishable by confinement in jail. *See* TEX. PEN. CODE ANN. §§ 38.04(b), 12.22 (Vernon Supp. 2001); *see also Waugh*, 51 S.W.3d at 718 n.3 ("Evading detention and attempting to destroy or conceal evidence during an investigation are jailable offenses . . . ."). Therefore, the officers were justified in immediately entering appellant's backyard to contain the backyard and prevent the juveniles from flight. Appellant's sole point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed December 13, 2001.
Panel consists of Justices Yates, Edelman, and Wittig. (Wittig, J. concurring in result only).
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