Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00458-CR

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MICHAEL ALLEN BURTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 806,167

O P I N I O N

Appellant was charged by indictment with the offense of possession of a controlled substance, namely, cocaine. The indictment also alleged two prior felony convictions for the purpose of enhancing the range of punishment. Appellant waived his right to trial by jury and the trial court carried appellant's motion to suppress along with the trial of the case. The trial court denied the motion to suppress and found appellant guilty of the charged offense. Appellant then pled true to the enhancement allegations and the trial court assessed punishment at two years confinement in the Texas Department of Criminal Justice--Institutional Division. We affirm

Appellant's sole point of error contends the trial court erred in overruling the motion to suppress because the actions of the police officers were not supported by probable cause.

I. Standard of Review

In reviewing the trial court's ruling on a motion to suppress evidence, an appellate court should defer to the trial court's ruling on issues involving the application of law to facts, particularly if the resolution of the ultimate question turns on an evaluation of the credibility or demeanor of the witness. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App.1997); *Victor v. State*, 995 S.W.2d 216, 224 (Tex. App.—Houston [14th Dist.] 1999, pet ref'd). Questions which do not turn upon the application of historical fact to law are reviewed *de novo*. *See Guzman*, 955 S.W.2d at 87-88. The test for the existence of probable cause is "whether at that moment the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing the arrested person had committed or was committing an offense." *Guzman*, 955 S.W.2d at 90 (citing *Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App.1989)).

II. Factual Summary

With these standards in mind, we set forth the following summary of the testimony offered at the trial of this case. David Nieto was assigned to the vice division of the Houston Police Department on August 10, 1998, the date of the alleged offense. Nieto and his partner, Officer Jeffrey Shipley, were operating in an undercover capacity when they entered the Northwest News, a sexually oriented business. The business was divided into two sections. The front section displayed videos and magazines. The back section contained several viewing booths where the patrons could watch videos. Nieto and Shipley paid the $6.00 fee necessary to enter the back section of the business.

Nieto described the viewing booths as being made of plywood or sheet rock and approximately 8' by 5' in size with an opening at the top. As Nieto and Shipley were conducting their investigation for public lewdness, indecent exposure and prostitution, they noticed appellant and another male enter one of the booths. Nieto occupied the adjacent booth. Nieto

overheard a conversation between appellant and his companion. A short while later, Nieto smelled the odor of burning marijuana. He then peered through a hole in the wall and saw appellant smoking something. Although Nieto could not tell exactly what appellant was smoking, he believed it to be a marijuana cigarette. Nieto then left his booth to report to Shipley.

Shipley knocked on the door of appellant's booth and a voice from inside the booth asked, "What's up?" Shipley responded, "Hey, do you have anymore?" Appellant's companion released the latch and opened the door to the booth. Nieto and Shipley displayed their badges and identified themselves as peace officers. At this time, appellant threw a cigarette box to the floor and shoved something in his mouth. Shipley's attempt to stop appellant from swallowing was unsuccessful. Shipley then recovered the cigarette box and discovered a rock of crack cocaine in the bottom of the package.

III. Analysis

Appellant contends Officers Nieto and Shipley acted without probable cause. However, the odor of marijuana can supply probable cause for a warrantless arrest. *See Isam v. State,* 582 S.W.2d 441, 444 (Tex. Crim. App.1979); *Jackson v. State*, 745 S.W.2d 394, 396 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd); *Saenz v. State*, 632 S.W.2d 793, 795 (Tex. App.—Houston [14th Dist] 1982, pet. ref'd); *Alexander v. State,* 630 S.W.2d 355, 357 (Tex. App.—Houston [1st Dist.] 1982, no pet.). Similarly, the odor of marijuana establishes probable cause for a police officer to search for contraband. *State v. Ensley*, 976 S.W.2d 272, 275 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

Appellant argues the probable cause was illegally gained. Appellant contends his right to privacy in the viewing booth was violated by Nieto. We recognize that appellant had an expectation of privacy in the viewing booth. *See Liebman v. State*, 652 S.W.2d 942, 946 (Tex. Crim. App. 1983). *See also Buchanan v. State,* 471 S.W.2d 401, 403-04 (Tex. Crim. App.1971) (expectation of privacy in a toilet stall); *Cook v. State,* 762 S.W.2d 714, 715 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (same); *State v. Brown*, 929 S.W.2d 588, 592

(Tex. App.—Corpus Christi 1996, pet. ref'd)(same). However, that expectation of privacy was not violated when Nieto smelled the marijuana, which is what established probable cause in this case.[1] In *Ensley*, the officer smelled the odor of marijuana emanating from gift wrapped packages. 976 S.W.2d at 274. The *Ensley* Court held that once the officer detected the odor of marijuana emanating from the packages, he had sufficient probable cause to search the packages even without a warrant or the defendant's consent. 976 S.W.2d at 275. The same is true here.

The fact that Nieto arguably violated appellant's right to privacy by peering through the hole in the wall *after* smelling the burning marijuana distinguishes this case from those relied upon by appellant where the violation of the right to privacy occurred *before* probable cause was established. *See Brown*, 929 S.W.2d at 593; *Wilkins v. State*, 829 S.W.2d 818, 820 (Tex. App.—Austin 1992, no pet.).

Accordingly, appellant's point of error is overruled and the judgment of the trial court affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed March 2, 2000.
Panel consists of Justices Fowler, Edelman, and Baird.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

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[1] Whether Nieto actually smelled the marijuana was a point of dispute in the trial court. Nieto testified he smelled marijuana. However, that fact was not mentioned in the offense report. Nieto attributed the omission to Shipley who prepared the report. In any event, we must defer to the trial court on questions of credibility. *See Guzman*, 955 S.W.2d at 89.

[2] Former Judge Charles F. Baird sitting by assignment.