Affirmed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-01306-CR

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THE STATE OF TEXAS, Appellant

V.

PARISH MASON, Appellee

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 19,657-C

O P I N I O N

The State of Texas (State) appeals from the trial court's order granting a motion to suppress evidence. Parish Mason (Mason) was indicted for possession of four grams or more but less than 200 hundred grams of cocaine. Mason filed a pre-trial motion to suppress seeking to have the evidence against him excluded from his trial because he contended that the search of the automobile he was operating and the seizure of cocaine was unlawful. Following an evidentiary hearing, the trial court granted the motion, finding that Mason had standing to challenge the search and seizure and that "the continued detention and search of [Mason's] automobile appears legally unjustified . . . ." On appeal to this Court, the State contends that (1) the trial court abused its discretion in ruling that Mason had standing to challenge the

warrantless search and seizure, and (2) the trial court abused its discretion in ruling that the continued detention and warrantless search of the automobile operated by Mason was unlawful. We affirm.

BACKGROUND

Officer Barry Gresham works for the Central East Texas Narcotics Task Force. On the evening in question, Officer Gresham's patrol unit was parked in the median along Interstate 45, near Huntsville. Mason was traveling northbound on Interstate 45. As Mason's automobile passed Officer Gresham, the officer noted that Mason was traveling at an unusually slow rate of speed and was straddling the solid white line separating the right lane of travel and the shoulder of the highway. Officer Gresham began following Mason and activated his emergency lights to signal Mason to stop. After both vehicles stopped, Mason told Officer Gresham that the reason he was driving slowly was because his automobile had a flat tire. Officer Gresham confirmed that the automobile had a flat tire.

Officer Gresham inspected Mason's driver's license and proof of insurance. He also inspected Mason's two female passengers' respective driver's licenses. There were no arrest warrants reported. Mason told Officer Gresham that the automobile was borrowed from one of the passengers' father. Officer Gresham questioned Mason and his two passengers about where their journey originated and their destination. Officer Gresham was told that they began their trip in Houston and were destined for Madisonville. Officer Gresham issued Mason a "warning" and indicated that he was free to leave.

Officer Gresham testified, however, that he was suspicious about Mason because he appeared nervous and because the automobile did not belong to him. Officer Gresham asked Mason whether he would consent to a search of his automobile. Mason refused. Officer Gresham told Mason that he was going to have his narcotics canine walk around the automobile. The canine's actions indicated that narcotics might be present near the right front seat of the automobile. Officer Gresham told Mason that he was going to search the automobile based upon the canine's actions. The search revealed a "storage pouch" behind the right front passenger's seat, containing cocaine. Mason was arrested.

STANDARD OF REVIEW

We generally review a trial court's ruling on a motion to suppress for abuse of discretion. *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. *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 facts, becomes a *de novo* review of legal questions. *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. *Id*.

DISCUSSION

In its first point of error, the State contends that the trial court abused its discretion in ruling that Mason had standing to challenge the warrantless search and seizure.

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. *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.'" *id. 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.

(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 Mason was in possession and control of the automobile when Officer Gresham stopped him. By virtue of his control of the vehicle, Mason had a right, therefore, to exclude others from entering the passenger compartment of the automobile. Thus, under the circumstances and by his conduct, Mason exhibited an actual, subjective expectation of privacy inside the passenger compartment of the automobile. *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 automobile gave Mason "standing" to challenge the warrantless search and seizure made by Officer Gresham.

The State contends that because the automobile was "borrowed" and did not therefore belong to Mason, he had no expectation of privacy therein. However, the Court of Criminal Appeals has held that where a defendant has "borrowed" an automobile from its owner and has not relinquished possession, he or she possesses standing to challenge a warrantless search and seizure. *See Wilson v. State*, 692 S.W.2d 661, 664 (Tex.Crim.App. 1984). So long as there is no affirmative evidence showing that the automobile was stolen or taken without the consent of its owner, the borrower of an automobile has a reasonable expectation of privacy inside the automobile, including its trunk contents, and standing to challenge a warrantless search and seizure. *See id.* at 664, 670-71. The record shows that at the time of the warrantless search and seizure by Officer Gresham, Mason had consent to borrow the automobile from its owner and had not relinquished possession. Thus, he had standing to challenge the warrantless search and seizure. *See id.* Point one is overruled.

In its second point of error, the State contends that the trial court abused its discretion in ruling that the continued detention of Mason and the warrantless search and seizure were unlawful.

It is clear that circumstances short of probable cause may justify temporary detention of a person operating an automobile for purposes of investigation. *Davis v. State*, 947 S.W.2d 240, 244 (Tex.Crim.App. 1997). To justify an investigative detention, the police officer must have specific articulable facts, which, premised upon his experience and personal knowledge, when coupled with the logical inferences from those facts would warrant the intrusion on the detainee. *Id*. These facts must amount to more than a mere hunch or suspicion. *Id*. The articulable facts used by the officer must create some reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detainee with the unusual activity, and some indication the unusual activity is related to a crime. *Id*.

An investigative detention of a person operating an automobile must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Id*. at 245. The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Id*. "The propriety of the stop's duration is judged by assessing whether the police diligently pursued a means of investigation that was likely to dispel or confirm their suspicions quickly." *Davis*, 947 S.W.2d at 245 (quoting *Perez v. State*, 818 S.W.2d 512, 517 (Tex.App.–Houston 1991, no pet.)).

In the instant case, Mason was stopped for suspicion of committing a traffic offense; that is, driving too slowly on a interstate highway and failing to properly maintain his lane travel. The parties do not contest the reasonableness of the stop. Therefore, we begin our inquiry with the assumption that this investigation was reasonable. Officer Gresham's investigative detention of Mason was required to be temporary and could last no longer than was necessary to determine the reason for Mason's slow rate of speed and his failure to stay in his lane of travel. *See id*. Moreover, Officer Gresham was required to employ the least intrusive means reasonably available to verify or dispel his suspicion of a traffic offense in a short period of time. *See id*. His suspicion was dispelled with Mason's explanation that he was pulling off the highway because his automobile had a flat tire. In sum, the purpose of the investigative detention was effectuated

when Officer Gresham confirmed that the reason for Mason's driving behavior was due to his automobile having a flat tire. *See id.*

Nevertheless, Officer Gresham continued to detain Mason and the automobile. This continued detention revealed that Mason and his two female passengers each possessed a valid driver's license and that there were no warrants for their arrest. The continued detention of Mason was based upon Officer Gresham's conclusion that Mason appeared nervous and that the automobile did not belong to Mason. However, this conclusion was not based upon articulable facts which, taken together with rational inferences from those facts, would warrant a man of reasonable caution in the belief that continued detention was justified. *See Davis*, 947 S.W.2d at 245. Indeed, when viewed in an objective fashion, no known fact, or rational inferences from those facts, would support the conclusion that Mason nor his two female passengers were engaged in or soon would engage in criminal activity. *See id.* Officer Gresham obviously made the same determination because he issued Mason a "warning" and indicated that he was free to leave. *See id.* Consequently, the trial court's finding that there was no reasonable suspicion that Mason was engaged in criminal activity is supported by the record. *See id.*

We now turn to consider the continued detention of the automobile. First, we note that even though Mason was free to leave, he was effectively restrained because his only visible means of transportation was the detained automobile. *See id.* at 246. Therefore, in detaining the automobile, Officer Gresham was effectively depriving Mason of his liberty interest of proceeding with his itinerary. *See Davis*, 947 S.W.2d at 246 (citation omitted). As previously noted, there was no lawful justification for Mason's continued detention.

Second, when Officer Gresham decided to detain the automobile to allow his canine to "sniff" for narcotics, the record shows that the he knew that the automobile was not reported stolen and that its insurance papers were in proper order. There was no odor of alcohol nor any type of drug emanating from the automobile. In short, there was nothing out of the ordinary about the automobile nor was there any indication that the automobile was in any way related with criminal conduct. *See id.* Consequently, the trial court's finding that the continued detention of the automobile was not lawful is supported by the record. Point two is overruled.

We discern no abuse of discretion in granting Mason's motion to suppress. Accordingly, the trial court's order is affirmed.

PER CURIAM

Judgment rendered and Opinion filed November 24, 1999.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
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