Reversed and Remanded; Majority and Dissenting Opinions filed December 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00282-CR

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ALEXANDER LEE CROMWELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Cause No. 98-37017

M A J O R I T Y O P I N I O N

After an adverse ruling on his motion to suppress and pursuant to a plea bargain, appellant, Alexander Lee Cromwell, entered a plea of nolo contendere to the misdemeanor offense of possession of marijuana in a useable quantity of under two ounces. The trial court assessed punishment at a $500 fine and confinement for 180 days in the Harris County Jail, probated for one year. On appeal, appellant presents one point of error challenging the denial of his motion to suppress. We reverse the judgment and remand the cause.

BACKGROUND

During the motion to suppress hearing, Officer Kirby Burton testified that at approximately 11:30 p.m. on September 12, 1998, he observed appellant driving while not wearing a seat belt. Officer Burton activated his emergency equipment and pulled appellant over to the side of the road. After stopping behind appellant's vehicle, Officer Burton claimed that he saw appellant make furtive movements. Officer Burton also noticed that there were three passengers in the vehicle. Soon thereafter two more patrol units arrived. The officers instructed the occupants to exit the vehicle, and proceeded to search them for weapons.

Officer Burton advised appellant that he was being stopped for a seatbelt violation. At this point all of the occupants were out of the vehicle, the doors of the vehicle were shut, and the occupants were under the supervision of three armed police officers. Officer Burton asked appellant several times for his consent to search the vehicle. When appellant refused to consent to the search, Officer Burton indicated that he would perform a "*Terry*" search of the vehicle. After he opened the driver's side door, Officer Burton noticed part of a clear plastic bag sticking out of the soft-side pocket in the door. Officer Burton pulled the bag out of the pocket, at which time he noticed that the plastic bag contained marijuana. The officers then arrested appellant for possession of thirteen grams of marijuana.

The only relevant disputed fact during the suppression hearing related to how quickly Officer Burton noticed the clear plastic bag. Officer Burton claimed that he saw the bag immediately after opening the vehicle's door. Appellant and his witness stated that the bag was hidden deep in the driver's side pocket, and that all three officers searched the vehicle for thirty minutes before finding the bag.

STANDARD OF REVIEW

The standard of review of a trial court's ruling on a motion to suppress is abuse of discretion. *See Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996); *Curry v.*

State, 965 S.W.2d 32, 33 (Tex. App.—Houston [1st Dist.] 1998, no pet.). We will independently review a trial court's determination of reasonable suspicion and probable cause, because this requires the application of law to facts. *See Ornelas v. United States*, 517 U.S. 690, 697 (1996); *Guzman v. State*, 955 S.W.2d 85, 87-88 (Tex. Crim. App. 1997); *Curry*, 965 S.W.2d at 34. We will, however, give great weight to certain inferences drawn by the trial judge.

The amount of deference a reviewing court affords to a trial court's ruling on a "mixed question of law and fact" (such as the issue of probable cause) often is determined by which judicial actor is in a better position to decide the issue. *See Guzman*, 955 S.W.2d at 87. Appellate courts should afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *See id.* at 89. The appellate courts may review de novo "mixed questions of law and fact" that do not require evaluations of credibility and demeanor. *See id.* at 87.

The relevant facts and circumstances are not in dispute in this case, and the resolution of this appeal does not turn on an evaluation of the credibility of a particular witness. Therefore, we review, de novo, the question of whether the detaining officer had a reasonable, particularized, and objective basis for performing a Terry search of appellant's vehicle. *See Guzman*, 955 S.W.2d at 89.

TERRY SEARCH

An officer may lawfully stop a motorist who commits a traffic violation. *See McVickers v. State*, 874 S.W.2d 662, 664 (Tex. Crim. App. 1993); *Armitage v. State*, 637 S.W.2d 936, 939 (Tex. Crim. App. 1982). The officer also may detain a person who commits a traffic violation. *See Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992). During the investigation, an officer has the right to request a driver's license, insurance papers, information on the ownership of the vehicle, the driver's destination, and the purpose of the

trip. *See Mohmed v. State*, 977 S.W.2d 624, 628 (Tex. App.—Fort Worth 1998, pet. ref'd); *Ortiz v. State*, 930 S.W.2d 849, 856 (Tex. App.—Tyler 1996, no pet.).

This investigative detention, based upon a valid traffic stop, is the type of detention in the case before us. Officer Burton lawfully stopped appellant for not wearing his seat belt. While the officer was within his rights to stop appellant for the traffic violation, he surpassed the scope of his authority when he proceeded to perform a *Terry* search of appellant and his vehicle. *Terry* and its progeny have carefully distinguished between the legal standard justifying the initial stop with the legal authority to do the search. A brief investigative detention is authorized once an officer has a reasonable suspicion to believe that an individual is involved in criminal activity. *See U.S. v. Cortez*, 449 U.S. 411, 417 (1981). However, the "exigencies" which permit the additional search are generated strictly by a concern for the safety of the officers. *See Terry*, 392 U.S. at 25-26 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."). Accordingly, the additional intrusion that accompanies a *Terry* search is only justified where the officer can point to specific and articulable facts which reasonably lead him to conclude that his safety is in danger. *See id.* at 26-27; *Worthey v. State*, 805 S.W.2d 435, 438 (Tex. Crim. App.1991). *Terry* does not authorize a search for weapons in all confrontational encounters. *See Maryland v. Buie*, 494 U.S. 325, 333-34 (1990).

During the hearing on the Motion to Suppress, Officer Burton stated that appellant made "furtive" motions, and that these motions coupled with the officer's police experience led Burton to believe that appellant may have been armed. However, when asked whether Officer Burton was afraid for his safety, the officer replied: "I'm always concerned for my safety, don't necessarily know that I was afraid, but I'm always concerned from my safety and for that of any person that I come in contact with." When the defense counsel proceeded to question Officer Burton regarding why he felt the need to check appellant's vehicle for weapons, the following

exchange took place:

> Counsel: Can you specify one act that put you in reasonable apprehension for your safety?
>
> Burton: I'm a 13-year police officer.
>
> Counsel: Can you give us one act that was done, one specific act?
>
> Burton: In regard to what, my safety or officers in general.
>
> Counsel: One specific act that you saw that day that made you be apprehensive for your own safety?
>
> Burton: That particular day, no, sir.
>
> * * *
>
> Counsel: Is there anything that happened at the car that you can verbalize to show your reasonable apprehension and fear?
>
> Burton: As I stated my concern is for my safety. And seeing that the odds are four to one and that once I see there are four people in the car and they are all young people I would say.

This testimony demonstrates that Officer Burton could not articulate any facts which, taken together with rational inferences from those facts, would warrant a man of reasonable caution to believe that continued detention was justified. *See Terry*, 392 U.S. at 21-22. Indeed, when viewed in an objective fashion, no known fact, or rational inferences from those facts, would support the conclusion that appellant possessed a weapon.

The only evidence regarding Burton's safety was his answer in response to the State's question asking him to vocalize a reason for his concern. Officer Burton replied that "furtive movements in the vehicle caused more concern for my safety than someone who does not make furtive movements in a vehicle." Burton never explained what it was about appellant's movements that made him fear for his safety. The State argues that these furtive movements, in conjunction with the officer's experience, made it reasonable for Burton to suspect that appellant might have possessed a weapon. We disagree. These reasons by themselves are merely "unparticularized" suspicions or "hunches" which *Terry* held are not enough to justify

a self-protective search. Officer Burton stopped appellant on a busy street at a location that was not designated a high crime area. During the detention appellant was cooperative, and a pat down search of the vehicle's occupants revealed nothing unusual. A search which continues after the officer determines the detainee is not armed exceeds the permissible bounds of *Terry*.[1] *See Lippert v. State*, 664 S.W.2d 712, 721 (Tex. Crim. App. 1984).

Even assuming, *arguendo*, that Officer Burton had a valid reason to perform a *Terry* search, the evidence of the marijuana would still need to be suppressed. The purpose of a *Terry* search is to neutralize a potentially volatile situation and allow an officer to investigate without fear of violence; it is not meant to discover evidence of a crime. *See Wood v. State*, 515 S.W.2d 300, 306 (Tex. Crim. App. 1974). The State makes the argument that the plastic bag was in clear sight, and therefore the officer had the right to seize it during his search for

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[1] The dissent holds that Officer Burton's testimony that there is always a possibility that there are weapons in the vehicle constitutes evidence of specific and articulable facts which reasonably warrant the officer's belief the suspect is dangerous, may gain control of a weapon, and thus requiring a search of the vehicle. We believe this to be an incorrect application of the law to the facts in the case *sub judice.*

Here, the arresting officers ordered the vehicle occupants to exit the vehicle and a patdown search ensued. This is exactly what the Supreme Court contemplated in *Pennsylvania v. Mimms*, 434 U. S. 106 (1997). In *Mimms*, the court held that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief they are armed and dangerous. *Mimms* does not hold that the scope of a routine traffic detention safety search extends to the interior of the automobile after the occupants have exited the vehicle. Indeed, in *Michigan v. Long*, the court explicitly acknowledged that the opinion in *Long* did not stand for the proposition that the police may conduct automobile searches whenever they conduct an investigative stop. *See* 463 U.S. 1032, 1050 n. 14 (1983). The *Long* court emphasized that officers may conduct area searches only when they have the level of suspicion identified in *Terry*. The articulable facts possessed by the officers detaining David Long which justified the search of the interior of his automobile were that he appeared to be under the influence of some intoxicant, they observed a large knife in the interior of the car, and Long was about to reenter the vehicle to obtain the registration pursuant to the officers' request. *See* 463 U.S. at 1035-1036. The court concluded that the officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons within his immediate grasp before permitting him to reenter his automobile. *See id.* at 1051.

Here, the officers had no articulable facts justifying a reasonable belief that the suspects were potentially dangerous and triggering the concomitant need to conduct an area search of the automobile for weapons. In the absence of such facts, the search conducted here of the interior of the vehicle exceeded the bounds of *Terry* and violated appellant's Fourth Amendment rights.

weapons. Even though an officer is justified in seizing contraband which falls within view, the officer must be legitimately in the position to view the object and it must be immediately apparent to him that the object is contraband. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Duncan v. State*, 549 S.W.2d 730, 732 (Tex. Crim. App. 1977). In the instant case, both the officer and the State admitted during the suppression hearing that Officer Burton had no knowledge of the contents of the bag until he took it out of the driver's side compartment. Only upon inspection of the bag did it become apparent that the bag contained marijuana. Even though we are aware of the popular use of plastic bags as containers for controlled substances, we cannot hold that the bag itself is contraband in the absence of some showing that the officer saw what appeared to be a contraband substance in the bag. Thus, the seizure of the marijuana did not fall within the "plain view" exception to the Fourth Amendment's warrant requirement.

After a review of the entire record, we conclude that Officer Burton had no reasonable, individualized suspicion, under the authority of *Terry*, to justify a search for weapons. We therefore hold that the trial court erred in denying appellant's Motion to Suppress the marijuana evidence. We sustain Cromwell's point of error, reverse the trial court's denial of his Motion to Suppress, and remand this cause for further proceedings consistent with this opinion.

/s/ Norman R. Lee
Justice

Judgment rendered and Majority and Dissenting Opinions filed December 7, 2000.
Panel consists of Justices Anderson, Frost, and Lee.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Norman R. Lee sitting by assignment.

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DISSENTING OPINION

I respectfully dissent with the majority's opinion in virtually all respects.

I. Standard of Review

While the majority accurately sets forth the standards of review regarding motions to suppress, it does not apply the correct standard in this case. Contrary to the majority's finding, the relevant facts and circumstances are in dispute. In a suppression hearing, the trial court is the sole trier of fact and the judge of the credibility of the witnesses. *See Romero v. State*,

800 S.W2d 539, 543 (Tex. Crim. App. 1990). As the trier of fact, the trial court can accept or reject any or all of the witnesses' testimony and resolve any and all conflicts in the witnesses' testimony. *See Alvarado v. State*, 853 S.W.2d 17, 23 (Tex. Crim. App. 1993).

Historically, a trial court's decision on a motion to suppress has been reviewed under an abuse of discretion standard. *See Villareal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). As a general rule, we should give almost total deference to a trial court's determination of historical facts supported by the record, especially when the trial court's fact findings are based on the evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We should also give the same amount of deference to the trial court's rulings on "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *See id.* We may review *de novo* mixed questions of law and fact not falling within this category. *See id.* Moreover, if the trial court does not file findings of fact and conclusions of law, we presume the trial court made findings necessary to support its ruling so long as those implied findings are supported by the record. *See Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000); *see also State v. Simmang*, 945 S.W.2d 219, 221-22 (Tex. App.—San Antonio 1997, no pet.). In this case, the trial court did not make express findings of historical facts, so we must review the evidence in the light most favorable to the trial court's ruling at the suppression hearing. *See Carmouche*, 10 S.W.3d at 328.

Here, the relevant facts are in dispute, as the State and the appellant present very different versions of the event in question. Officer Burton testified that he discovered the plastic baggie containing marijuana in appellant's car immediately upon opening the car door. In contrast, appellant and his witnesses testified that it was only after an extended search of the vehicle that one officer discovered the contraband hidden deep in the side pocket of the car door. Because these critical facts are in dispute, and their resolution necessarily depends on an evaluation of the credibility and demeanor of the witnesses who testified, this court should give almost total deference to the trial court's determination of the historical facts the record

supports. *See Guzman*, 955 S.W.2d at 89; *see also Coomer v. State*, No. 719-00, 2000 WL 1474111 (Tex. Crim. App. Oct. 4, 2000); *Walter v. State*, No. 1321-99, 2000 WL 1348504, at *2 (Tex. Crim. App. Sept. 20, 2000). Although Officer Burton's testimony conflicts with the testimony of the appellant and his witnesses, the trial court denied the motion to suppress, implicitly finding Officer Burton credible.

We review *de novo* the trial court's application of the law of search and seizure. *See Guzman*, 955 S.W.2d at 88-89. Applying this standard to the trial court's ruling on the question of whether the officer had sufficient basis to conduct a *Terry* search, the majority again reaches the wrong decision.

II. Validity of *Terry* Search

If the circumstances give the officer reason to believe the person detained is armed and dangerous, a police officer who has lawfully detained a person for investigation of suspected criminal activity may conduct a limited search for weapons. *See Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Spillman v. State*, 824 S.W.2d 806, 811 (Tex. App.—Austin 1992, pet. ref'd). Under some circumstances, this right to conduct a protective frisk also extends to the passenger compartment of the detainee's automobile:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "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, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (quoting *Terry*, 392 U.S. at 21, 88 S.Ct. at 1868).

In determining whether an officer acted reasonably in a particular case, the court must give due weight to the specific reasonable inferences which the officer is entitled to draw from

the facts in light of his experience. *See id.* Here, Officer Burton, a thirteen-year veteran, testified that he stopped appellant's vehicle because appellant was not wearing a safety belt. The officer described the circumstances leading to the search with particularity, explaining that after he activated the emergency equipment in his patrol car, he observed furtive movements on the driver's side of the appellant's vehicle. The officer testified that the vehicle's four occupants were all young people, three of whom were male. It was very late at night. The officer's vehicle was not equipped to check for criminal warrants. Explaining his concerns about safety under these circumstances, Officer Burton stated that he was unable to determine "*if someone was reaching down to retrieve an object or hide something*," and those types of furtive movements usually make an officer "*very nervous because there is no telling what can happen*." The officer, in relaying his reasons for the weapons search, gave the following testimony:

> Q. [By the prosecutor] Now when you say you were afraid for your safety as far as the defendant is concerned, what did you think might have been under the seat or somewhere else?
>
> A. There is always a possibility that there are weapons in the vehicle or on the person, so in regard to my safety and for that of the person you always want to keep officer safety at the top of your mind when making contact with any violator or any subject.

The evidence in the record sufficiently demonstrates that Officer Burton had specific and articulable facts warranting a reasonable belief that the circumstances posed a danger. Moreover, the record shows that these circumstances justified taking preventive measures to ensure there were no weapons within appellant's grasp so that when Officer Burton allowed appellant and his companions back in the vehicle, he and the other police officers he had summoned for assistance would be safe. Viewing the evidence in the light most favorable to the trial court's ruling, the State proved that Officer Burton had specific, articulable facts that reasonably warranted a belief that appellant's vehicle contained a weapon or that appellant himself was dangerous. Thus, a *Terry* search was justified.

III. Validity of Seizure

The majority, however, holds that even if it had found the *Terry* search valid, "the evidence of the marijuana would still need to be suppressed" because Officer Burton had no knowledge of the contents of the plastic bag until he took it out of the driver's side compartment. The record shows that upon opening the driver's side door, Officer Burton saw "a clear glassy baggie" sticking out of an elasticized pocket in the vehicle door. According to the officer, "[o]nce the door was open, it was right there in plain view" and he saw the marijuana "immediately."[1]

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[1] On cross examination, Officer Burton testified:

Q. [By defense counsel] Officer, you testified earlier that you dug into the side pocket and you found the marijuana. Isn't it not true that your police report clearly says that the marijuana was sticking out of the side pocket in plain view?
A. The glassy baggie was sticking out in plain view, yes, sir.
Q. *So therefore you saw that marijuana immediately, did you not*?
A. *Yes, sir.*
Q. *Didn't take five minutes to find the marijuana. It was right there*?
A. *Yes, sir.*
Q. *In fact, you didn't need to ask my client permission to search the vehicle because it was in plain view; is that correct*?
A. *With the door open, yes, sir, it was in plain view.*
Q. And the door was open when he got out of the car; is that correct?
A. He opened the door to exit the vehicle.
Q. And that's when you saw the marijuana?
A. No, sir.
Q. That's not when you saw the marijuana?
A. No, sir.
Q. You did not see the marijuana when the door was open in front of your eyes hanging out there. You didn't see it at that time; is that what your telling me?
A. Yes, sir, that's correct.
Q. You only saw it once you put your hand inside the pocket five minutes later?
A. No, sir.
Q. *When did you see it?*
A. *When I opened the door.*

(emphasis added).

The marijuana was located within the passenger compartment of the vehicle, an area clearly under the driver's immediate control. Moreover, this area was both suitable and accessible as a place for a driver to conceal a weapon. In conducting the search for weapons, the officer saw the marijuana in plain view, in an area he was justified in searching. Under these circumstances, there is no sound basis for suppressing the evidence. *See Richardson v. State*, 823 S.W.2d 773, 776 (Tex. App.—Fort Worth 1992, no pet.) (holding a proper *Terry* stop, when coupled with the "plain view" doctrine, authorized seizing the contraband). The Texas Court of Criminal Appeals, in reiterating this well-settled rule, recently stated:

> The plain view seizure doctrine requires a two-prong showing: (1) that law enforcement officials see an item in plain view at a vantage point where they have the right to be, and (2) it is immediately apparent that the item seized constitutes evidence—that is, there is probable cause to associate the item with criminal activity.

Martinez v. State, 17 S.W.3d 677, 685 (Tex. Crim. App. 2000). For reasons noted above, the officers had a right to conduct the search. They saw the plastic baggie containing marijuana in plain view,[2] at which point it became immediately apparent that there was probable cause to associate the item with criminal activity, i.e., possession of marijuana.

IV. Conclusion

In sum, the evidence in the record supports the trial court's conclusion that Officer Burton articulated reasonable grounds to fear for his personal safety and to conduct a *Terry* search for his own protection and the protection of his fellow officers. When, in doing so, Officer Burton discovered a plastic bag of marijuana in plain view, he was authorized to seize this contraband from the appellant's vehicle. Because the search and seizure was legal, there was no basis for suppressing this evidence. The trial court did not err in overruling appellant's motion to suppress, and this court should affirm the lower court's ruling.

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[2] Although the majority states that "both the officer and the State admitted during the suppression hearing that Officer Burton had no knowledge of the contents of the bag until he took it out of the driver's side compartment," there are no such statements in the record.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Majority and Dissenting Opinions filed December 7, 2000.

Panel consists of Justices Anderson, Frost and Lee.[3]

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

[3] Senior Justice Norman Lee sitting by assignment.