Affirmed and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01447-CR

ANTHONY LOUIS DIXON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 780,370

O P I N I O N

Appellant, Anthony Louis Dixon, pled guilty to possession of cocaine and was sentenced to 25 years imprisonment. In his sole point of error, appellant contends the trial court erred when it relied on affidavits, rather than live testimony, in a motion to suppress evidence.

Houston Police Officer Wayne Holmes received a tip that a woman, Tammi Damon, was selling drugs from her apartment. Holmes and another officer went to Ms. Damon's apartment, and she gave them consent to search. After they found trace amounts of heroin, Ms. Damon agreed to help the officers by paging her supplier. After waiting an hour, the officers thought the supplier would not show up and they prepared to leave. As they left the apartment, they saw a man who matched the description of Ms.

Damon's supplier. He was holding a bag of crack cocaine in his left hand. He was arrested and charged with possession of cocaine. Before trial, appellant moved to suppress the evidence. His motion was denied, and he entered into a plea bargain.

On appeal, appellant contends he was faced with a difficult dilemma. As an habitual offender, he faced the possibility of a lengthy sentence if convicted. The State, however, had offered appellant the minimum sentence for an habitual offender, i.e., 25 years, in exchange for a plea of guilty. Appellant wanted to pursue his motion to suppress, but did not want to reject the State's offer. Thus, appellant agreed to make his motion to suppress "dispositive" of the case.[1] If the trial court granted the motion, the State agreed it would dismiss the case; if the court denied the motion, appellant agreed to plead guilty pursuant to the terms of the plea bargain agreement. Accordingly, appellant contends the trial court was aware that appellant's only "day in court" would be the hearing on his motion to suppress.

The Code of Criminal Procedure grants to the trial court the authority to decide the merits of a motion to suppress upon opposing affidavits or oral testimony. *See* TEX. CODE CRIM. PROC. ANN. Art. 28.01, § 1(6) (Vernon 1989). Here, the trial court chose to determine the motion upon opposing affidavits. Appellant, however, contends that due to a complex series of inter-related factors, the trial court was obliged to grant him a "full evidentiary, adversarial hearing," namely, to determine his motion upon oral testimony. He claims that the trial court's determination of the motion upon opposing affidavits was improper in this instance because there is a "rampant" conspiracy among Houston police officers to deliberately write, even falsify, their offense reports to allege whatever facts are necessary to guarantee a conviction. Here, appellant contends the officers lied about his holding a bag of crack cocaine so that so that they would have the necessary "plain view" exception to justify the search. Without an opportunity to cross-examine the officers, appellant contends it was impossible for him to elicit evidence in support of his conspiracy theory.

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[1] The trial judge, explaining what a dispositive motion is, said "for the record, so that we are all clear, everybody understands what I mean when I say dispositive: the State loses, the State is prepared to dismiss the case. . . [a]nd if the Defense loses, are y'all prepared to either plead for a recommendation that the State has made or come to the court without an agreement?"

While appellant concedes he could have developed evidence of his conspiracy theory at trial, he did not want to go to trial for fear of receiving a harsh sentence. Accordingly, appellant contends the trial court abused its discretion in deciding the merits of his motion to suppress without hearing oral testimony.

The trial court had no obligation to even consider, much less decide, appellant's motion to suppress *prior* to trial. *See Calloway v. State*, 743 S.W.2d 645, 649 (Tex. Crim. App.1988) (holding that "[e]ven if a pretrial motion to suppress is called to the attention of the trial court, no error is presented if the trial court, in its discretion, declines to hear the same"). Moreover, the Legislature has expressly provided that a motion to suppress may be determined prior to trial on opposing affidavits. *See* TEX. CODE CRIM. PROC. ANN. Art. 28.01, § 1(6) (Vernon 1989). Further, it is not an abuse of discretion for a trial court to decide the matter upon opposing affidavits even if the credibility of a witness is at issue. *See Ackenback v. State*, 794 S.W.2d 567, 573 (Tex. App.–Houston [1st Dist.] 1990, pet. ref'd). If a defendant is dissatisfied with manner in which a trial judge has heard or considered his motion to suppress, he retains the right to raise and present all factual issues relating to his motion to suppress in the trial itself. *See Johnson v. State*, 743 S.W.2d 307, 309-10 (Tex. App.–San Antonio 1987, pet. ref'd); TEX. CODE CRIM. PROC. ANN. art. 38.23.

Appellant was undoubtedly presented with a difficult decision. This, however, is a common component of plea bargaining. Appellant could have gone to trial on the merits, objected to the admissibility of evidence, and had a full evidentiary hearing. He decided against this course of action because he considered the risk of a harsher sentence to be too great. The criminal legal process is "replete with situations requiring the making of difficult judgments as to which course to follow." *Cantu v. State*, 738 S.W.2d 249, 256 (Tex. Crim. App. 1987). The fact that appellant was compelled to make a difficult decision does not violate due process. *See Soria v. State*, 933 S.W.2d 46, 57 (Tex. Crim. App. 1996) ; *Vaughn v. State*, 931 S.W.2d 564, 568 (Tex. Crim. App. 1996); *Cantu*, 738 S.W.2d at 256.

Appellant's sole point of error is overruled.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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