Affirmed and Opinion filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-94-00721-CR

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PAUL SYLVIA DELEON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 94-03599

O P I N I O N

This case is before this Court on remand from the Texas Court of Criminal Appeals. *See DeLeon v. State*, 962 S.W.2d 600 (Tex.Crim.App. 1998).[1]

Paul Sylvia DeLeon (Appellant) was indicted for the first degree felony offense of possession of cocaine with intent to deliver. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(d) (Vernon Supp. 1999). Appellant pled not guilty and was tried by the court. Upon a guilty finding, the trial court sentenced Appellant to ten years' imprisonment in the

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[1] *See also DeLeon v. State*, 951 S.W.2d 283 (Tex.App.–Houston 1997), *vacated*, 962 S.W.2d 600 (Tex.Crim.App. 1998).

Institutional Division of the Texas Department of Criminal Justice and imposed a $100.00 fine. *See* TEX. PENAL CODE ANN. § 12.32 (Vernon 1974). On appeal, Appellant presents two issues, contending that (1) the trial court erred in overruling his motion to dismiss because his prosecution was barred by the Double Jeopardy Clause in that he was previously assessed a drug tax and penalty by the State Comptroller's Office, and (2) his warrantless arrest and the subsequent warrantless search of his residence violated the Fourth Amendment of the United States Constitution and Article I, Section 9, of the Texas Constitution. We affirm.

BACKGROUND

In February 1994, Houston Police Officer Steve Magness received information from a confidential informant that Appellant was selling cocaine from his residence. Police officers went to Appellant's residence and knocked on the front door. When Appellant opened the door, the officers observed Appellant smoking a marihuana cigarette, and they detected a strong odor of burning marihuana emanating from inside the residence. At that time, Officer Magness took Appellant into custody. The officers asked Appellant whether he would consent to a search of his residence. Appellant agreed and executed a written, voluntary consent to search. A search of Appellant's residence yielded a large quantity of marihuana and cocaine. Appellant was placed under arrest and transported to the Harris County Jail.

DISCUSSION

Double Jeopardy

The first issue we address is whether Appellant's prosecution for this offense violated the Double Jeopardy Clause because of the previous imposition of a drug tax and penalty against Appellant by the State Comptroller's Office.[2] In our original opinion, we held that such an imposition constituted a "punishment" for Appellant's offense, prohibiting a subsequent prosecution for the same offense. *See DeLeon* 951 S.W.2d at 286. In light of recent decisions by the Texas Court of Criminal Appeals bearing on this issue, we now take the

[2] *See* TEX. TAX CODE ANN. §§ 159.001–.301 (Vernon 1992 & Supp. 1999).

contrary view and hold that merely an "assessment" of a drug tax and penalty by the State Comptroller's Office will not bar a subsequent criminal prosecution for possession of a controlled substance. *See Ex parte Ward*, 964 S.W.2d 617 (Tex.Crim.App. 1998); *Ex parte Chappell*, 959 S.W.2d 627 (Tex.Crim.App. 1998).

In *Ex parte Ward*, the court held that the Texas Controlled Substances Tax becomes due immediately upon a person's "possession" of a taxable substance. 964 S.W.2d at 628. Therefore, liability on the tax is not dependant on a person's receipt of a tax determination notice from the comptroller's office. *Id.* Rather, once a person is found in possession of a taxable substance containing no payment certificates, the comptroller is responsible for collecting any unpaid taxes. *Id.* The court concluded that under the Supreme Court's holding in *Kurth Ranch*, the automatic statutory imposition of the tax cannot constitute "punishment." *Id.* (citing *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 784, 114 S.Ct. 1937, 1948, 128 L.Ed.2d 767, 781 (1994)). The court reasoned that imposition of the tax, notice of the tax determination, imposition of the tax lien, and payment of a portion of the tax does not constitute "punishment" so as to bar subsequent criminal proceedings. *Ex parte Ward*, 964 S.W.2d 629-34. The only way that a defendant can be "punished" so as to bar a subsequent criminal prosecution is by a final judgment of tax liability or by divestiture of ownership of property rights. *Id.* "[A]bsent full payment of the tax or a pay arrangement with the comptroller's office for the remaining amount due, there is no 'punishment' for purposes of the Double Jeopardy Clause's prohibition against multiple punishments." *Id.* at 632.

In this case, there is nothing in the record to indicate that Appellant paid any portion of the tax and penalty nor anything to indicate that he made any arrangements with the State Comptroller's Office to pay any remaining amounts due.[3] Under *Ex parte Ward*, mere assessment of a tax by the State Comptroller's Office is not sufficient to constitute "punishment" for purposes of the Double Jeopardy Clause prohibition against successive

[3] The State Comptroller's Office assessed a tax, penalty and interest against Appellant in the amount of $5,595.34 for "[f]ailure to pay the tax on the purchase, acquisition, importation, manufacture or production of . . . controlled substances . . . ." *See* TEX. TAX CODE ANN. § 159.101(a) (Vernon 1992).

punishments for the same offense. *See id.* at 630; *see also Ex parte Chappell*, 959 S.W.2d at 629-30; *see also Utley v. State*, 982 S.W.2d 15, 16-17 (Tex.App.–Houston [1st Dist.] 1998, pet. ref'd).

Accordingly, the trial court did not err in overruling Appellant's motion to dismiss on the basis of double jeopardy. Issue one is overruled.

Warrantless Arrest and Warrantless Search of Residence

In his second issue, Appellant contends that the trial court erred in overruling his motion to suppress because his warrantless arrest and the subsequent warrantless search of his residence violated the Fourth Amendment of the United States Constitution and Article I, Section 9, of the Texas Constitution.

In ruling on a motion to suppress, the trial court is the sole trier of fact and may choose to believe or disbelieve any or all of a witness's testimony. *Villareal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App. 1996). We do not engage in our own factual review. Rather, our review is limited to whether the trial court properly applied the law to the facts. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990).

In *Guzman v. State*, the Court of Criminal Appeals held that appellate courts should afford almost total deference to a trial court's determination of the historical facts that the record supports. 955 S.W.2d 85, 89 (Tex.Crim.App. 1997). Furthermore, appellate courts should afford the same level of deference to a trial court's rulings on application of law to fact questions, referred to as mixed questions of law and fact, if the resolution of those ultimate questions turns upon an evaluation of credibility and demeanor of witnesses. *See id.* However, *de novo* review of these mixed questions of law and fact may be applied where the resolution thereof is not restricted to an evaluation of credibility and demeanor. *See id.* An appellate court should reverse a trial court's ruling on a motion to suppress only when the court abuses its discretion. An abuse of discretion occurs when it appears the trial court applied the wrong legal standard, or when no reasonable view of the record could support the trial court's conclusion under the correct law and the facts, viewed in the light most favorable to its legal

conclusion. *Villareal*, 935 S.W.2d at 138; *Banda v. State*, 890 S.W.2d 42, 51-2 (Tex.Crim.App. 1994).

Appellant contends that his warrantless arrest by police officers was unlawful. The record shows that Appellant opened the front door of his residence in response to a knock on the door by police officers. Officer Magness observed Appellant smoking a marihuana cigarette and detected the odor of burning marihuana coming from inside Appellant's residence.

Nothing in our Constitutions prevents a police officer from addressing questions to citizens on the street; it follows that nothing would prevent him from knocking politely on any closed door. *Rodriguez v. State*, 653 S.W.2d 305, 307 (Tex.Crim.App. 1983). Further, nothing in the statutes or governing constitutional provisions requires any citizen to respond to a knock on his door by opening it. *Id.* Indeed, the very act of opening the door exhibits an intentional relinquishment of any subjective expectation of privacy, particularly when illegal activity may be readily detected by smell and sight by anyone standing at the doorway. *Id.*

Because Office Magness readily observed Appellant's commission of an offense "within his view," his warrantless arrest was lawful. *See id.*; TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977). No warrant was required. *See id.*

Appellant also contends that the warrantless search of his residence by police officers was unlawful. Searches conducted without a search warrant issued on probable cause are usually unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). An exception is a search conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973); *Reyes v. State*, 741 S.W.2d 414, 430 (Tex.Crim.App. 1987). The prosecution bears the burden of showing by clear and convincing evidence that any such consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968); *Reyes*, 741 S.W.2d at 430. This burden requires the prosecution to show the consent was positive and unequivocal, free of duress or coercion. *Meeks v. State*, 692 S.W.2d 504, 509 (Tex.Crim.App.

1985). The question of voluntariness of the consent is a question of fact to be determined from the totality of the circumstances. *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2047; *Reyes*, 741 S.W.2d at 430. An otherwise voluntary consent is not vitiated by the fact an officer asserts that he could or would obtain a search warrant if consent is refused. *Grant v. State*, 709 S.W.2d 355, 357 (Tex.App.–Houston [14th Dist.] 1986, no pet.).

The record shows that following his arrest, Officer Magness explained to Appellant that he had enough information to secure a narcotics search warrant. Officer Magness testified that Appellant responded by saying that it was not necessary to obtain a search warrant because he would voluntarily show the officers where his illegal drugs were located. Before beginning the search, Officer Magness asked Appellant to provide a written consent to the search. Prior to signing the written consent, Officer Magness testified that he orally issued Appellant his *Miranda*[4] warnings. *See Reyes*, 741 S.W.2d at 431 (the issuing of *Miranda* warnings is an important factor in determining the voluntariness of a consent to search). Appellant told Officer Magness that he understood his rights. Appellant then signed the written consent document and the police officers, with Appellant's assistance, searched the residence. The officers discovered a large quantity of cocaine located in Appellant's bedroom.

Officer Magness testified that at no time did he nor any other police officer threat or coerce Appellant into consenting to the search of his residence; it was within the discretion of the trial court to reject any testimony to the contrary. *See Guzman*, 955 S.W.2d at 89. The totality of the circumstances shows that Appellant consented to the search, freely and voluntarily. *See Schneckloth*, 412 U.S. at 246-50, 93 S.Ct. at 2058-59; *Reyes*, 741 S.W.2d at 430. Thus, the trial court did not err in overruling Appellant's motion to suppress. Issue two is overruled.

The judgment is affirmed.

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justices Amidei, Anderson, and Lee.[5]

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

[5] Senior Justice Norman Lee sitting by assignment.