Affirmed and Opinion filed September 28, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00854-CR

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ERNESTO ARCEO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 757,243

O P I N I O N

The trial court found appellant, Ernesto Arceo, guilty after a bench trial of possession of more than 400 grams of cocaine with intent to deliver and sentenced him to twenty-five years' imprisonment. In four issues, appellant appeals that the trial court erred (1) in failing to suppress evidence of the cocaine because the police conducted an illegal protective sweep; (2) in failing to suppress evidence of the cocaine because police exceeded the scope of a legitimate protective sweep; and that in points (3) through (4) the evidence was legally and factually insufficient to show that he was aware that the substance wrapped in plastic was cocaine. We affirm the judgment of the trial court.

BACKGROUND

Through a series of wiretaps on cellular telephones, the United States Drug Enforcement Administration (DEA) became aware of three drug traffickers, Francisco Castillon, Ruben Muniz, and appellant, and of a forthcoming drug transaction involving these men in Harris County. On the night of the suspected drug transaction, law enforcement authorities followed each of the three men through a roundabout drive around the Houston area. First, Castillon, his wife, Muniz, appellant, and two other unidentified males met around 8:30 in the evening in the parking lot outside a Blockbuster video. After this meeting, appellant and Muniz drove in separate cars to a motel, where appellant picked up a white Cadillac. He and Muniz then drove, again in separate cars, to a house in west Harris County on San Gabriel street.

Once at the house, they pulled the white Cadillac into the garage and closed the door. Twenty minutes later, near midnight, Muniz left in the Cadillac. A short distance later, police stopped him for failing to wear a seatbelt and arrested him for driving with a suspended license. In the subsequent search of the Cadillac, officers found 100 pounds of marijuana in the trunk. While this took place, appellant remained at the house on San Gabriel, but Castillon, having arrived after his own circuitous driving route, watched the police arrest Muniz from a service station across the street.

Because the drug-laden white Cadillac had just departed the San Gabriel house, police approached the front door and announced their presence in a "knock and talk." Instead of answering the front door, appellant slipped out the backdoor and tried to scale the back fence. Officers wrestled him down, handcuffed him, and asked if anyone else was present inside the house. Appellant remained silent. The federal officer in charge at the scene then ordered a protective sweep of the house for officers' safety to determine whether anyone else remained in the house. During this sweep, officers kicked open a locked closet door and found 175 kilograms, of cocaine. Appellant's fingerprints were on the plastic that bound the kilos.

PROTECTIVE SWEEP

In his first point of error, appellant contends that evidence of the cocaine should have been suppressed because law enforcement officers were unjustified in conducting a protective sweep of the house. In his second point of error, he claims that if the protective sweep was justified, the cocaine should nonetheless be suppressed because the scope of the sweep was overly broad. We hold that the protective sweep was legal and that its scope was not overly broad. Thus, the trial court did not err in overruling appellant's motion to suppress.

In a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). The trial court may accept or reject any or all of any witness's testimony. *See Alvarado v. State*, 853 S.W.2d 17, 23 (Tex. Crim. App. 1993); *Allridge v. State*, 850 S.W.2d 471, 492 (Tex. Crim. App. 1991). The trial court resolves all conflicts in the testimony. *See Hawkins v. State*, 853 S.W.2d 598, 600 (Tex. App.--Amarillo 1993, no pet.).

On appeal, we must view the evidence in the light most favorable to the trial court's ruling at the suppression hearing. *See Upton v. State*, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993); *State v. Hamlin*, 871 S.W.2d 790, 792 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd). We normally address only the question whether the trial court improperly applied the law to the facts. *See Romero*, 800 S.W.2d at 543. We afford almost total deference to the trial court's determination of historical facts, as well as to the trial court's rulings on mixed questions of law and fact when determination of those questions turns on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

The Fourth Amendment to the United States Constitution bars unreasonable searches and seizures. *See Reasor v. State*, 12 S.W.3d 813, 816 (Tex. Crim. App. 2000). To determine whether a search is reasonable, the trial court weighs the individual's Fourth Amendment privacy interest against the promotion of legitimate governmental interests. Under this balancing test, a warrantless search of a house is generally not reasonable, but may

nevertheless be permitted when a strong public interest exists for the search. *See id.* One exception to the need for a warrant is a protective sweep by police officers.

A "protective sweep" is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 328, 110 S. Ct. 1093, 108 L. Ed.2d 276 (1990). In *Buie*, the Court permitted a protective sweep, holding:

> that as an incident to an arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Id. at 334. The Court imposed further parameters under which a protective sweep is legal. The sweep must not be a "full search of the premises." *Id.* at 335. Rather, it may only extend "to a cursory inspection of those spaces where a person may be found" and may only last long enough to "dispel the reasonable suspicion of danger." *Id.* Furthermore, the protective sweep is not an automatic right police possess. It is permitted only when "justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene." *Id.* at 336.

Appellant claims that the protective sweep of the San Gabriel house was unjustified for three reasons. First, he argues that police detained, not arrested, him. Second, he contends that police seized him in the backyard, not inside the house as required. Third, he claims that the police had no articulable facts that an individual who posed a danger to those on the arrest scene was inside the house. We address each argument in turn.

First, the trial court found that the federal law enforcement agents on the scene had arrested, not merely detained appellant. This finding is substantiated by the testimony of Special Agent Kevin Stanhill, the DEA's agent in charge at the scene. Agent Stanhill testified that appellant was under arrest when officers handcuffed him in the backyard because they took

away his freedom of movement. Agent Stanhill knew that law enforcement would file charges against appellant that night because of the marijuana retrieved from the white Cadillac. Viewing this evidence in the light most favorable to the trial court's ruling, we find that the trial court did not err in finding that the federal authorities had arrested appellant.

Second, we address appellant's contention that the protective sweep was illegal because he was arrested outside the house. While it is true that in *Buie* the police arrested a defendant inside of his home, protective sweeps are not limited to cases where the defendant is arrested inside a residence and not a step beyond. Officers have a right to conduct a protective sweep even if the arrest is near the door but outside the residence. *See United States v. Meza-Corrales*, 183 F.3d 1116, 1124 (9th Cir. 1999); *United States v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989); *United States v. Jackson*, 700 F.2d 181, 189-90 (5th Cir. 1983); *State v. Revenaugh*, 992 P.2d 769, 772-73 (Idaho 1999) (citing *Hoyos*); *State v. Kosman*, 892 P.2d 207, 211-12 (Ariz. Ct. App. 1995) (citing *Hoyos*); *but see United States v. Brodie*, 975 F. Supp. 851 (N.D. Tex. 1997) (protective sweep unjustified when police arrested defendant on the bottom step of his front porch).

In *Hoyos*, the court explained that whether the arrest occurs inside or outside the residence is unimportant if the exigencies to support a protective sweep exist. "A bullet fired at an arresting officer standing outside a window is as deadly as one projected from one room to another." *Id*. 1397.

Here, the evidence shows that officers grabbed appellant after he exited the backdoor and as he tried to scale a the six-foot privacy fence in the backyard. They were only fifteen to twenty-five feet away from the back door, which remained open. Officers could not clearly see inside the door into the living room because the room was lit only by the television. One officer, however, saw a knife on the floor. Clearly, the house was an area from which an attack could have been unexpectedly launched, and the officers' close proximity to the house placed them at risk. An arrest in a defendant's backyard is as "unlike an encounter on the street or along a highway" as is an in-home arrest. *See Buie*, 494 U.S. at 331 (noting that an in-home

arrest puts an officer at a disadvantage of being on his adversary's "turf"). Thus, we hold that the protective sweep was not illegal because appellant's arrest occurred outside the residence.

Thirdly, appellant argues that the protective sweep was illegal because the police possessed no articulable facts that an individual was inside the house who posed a danger to the officers or who might destroy evidence. However, officers testified that they knew about the two unidentified males who had previously met with appellant, Muniz, and Castillon. These two males' presence was not accounted for in the several hour lapse between the meeting at Blockbuster and the time appellant and Muniz arrived at the San Gabriel house. Further, the law enforcement authorities had no previous knowledge about the San Gabriel house, so it had not been under surveillance. While police had no specific information that the two males were in the house, the other three suspects were all present within two blocks of the house. Further, police had observed Muniz making "heat runs" around the house when he first arrived, looking for narcotics officers in the area. Appellant tried to flee when police approached. Thus, police knew that the suspects involved in the drug transaction had taken actions to evade narcotics officers. Lastly, because of the 100 pounds of marijuana in the Cadillac, narcotics officers knew that the San Gabriel house was a "stash house," which police testified is never left unguarded. These articulable facts give rise to a reasonable suspicion that the San Gabriel house harbored the remaining two unindentified men, who, as suspects in a high-level narcotics operation, posed a danger to officers.

Thus, because the police were justified in conducting a protective sweep, we hold that the trial court did not err in overruling appellant's motion to suppress. We overrule point of error one.

In his second point of error, appellant claims that law enforcement officers exceeded the scope of a permissible protective sweep. He argues that officers should not have kicked down the door to the locked closet where they found the cocaine. However, the evidence showed that the closet was large enough to hide someone. It was locked by a deadbolt, and

from the outside, it could only be opened by key. Officers could not tell whether it could also be locked from the inside. In a protective sweep, officers are permitted to search any space where a person may be found. *See Reasor*, 12 S.W.3d at 816. Because a person might have been hiding in the closet, the law enforcement officers did not exceed the scope of a permissible protective sweep when they kicked in the door. Accordingly, the trial did not err in refusing to suppress evidence of the cocaine found in the closet, and we overrule point of error two.

KNOWLEDGE ABOUT CONTRABAND

In points of error three and four, appellant contends that the evidence is legally and factually insufficient to show that he was aware that the kilos in the closet were contraband. To "prove unlawful possession of a controlled substance, the State must show that appellant exercised care, control, and management over the contraband; and that appellant knew that what he possessed was contraband." *Avila v. State*, 15 S.W.3d 568, 573 (Tex. App.–Houston [14th Dist.] 2000, no pet.).

When reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995); *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.–Houston [14th Dist.] pet. ref'd). The trier of fact is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See id.* This standard of review is the same for both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

When reviewing the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict

only if it is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although an appellate court is authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential to avoid substituting our judgment for that of the factfinder. *See id.* at 133; *Roberts v. State*, 987 S.W.2d at 163.

The evidence shows that wiretaps and surveillance indicated that appellant was involved in narcotics transactions. He was observed at a narcotics meeting with other drug traffickers, and spoke to one of these traffickers in front of the stash house immediately before the trafficker began "heat runs" to determine if police were nearby. The car that appellant drove to the stash house departed the house full of marijuana. Appellant remained alone in the stash house, which police testified is typically not left without a guard. When police arrived and knocked on the front door, appellant tried to flee out the back, over the fence. *See Cowley v. State*, 310 S.W.2d 340, 342 (Tex. Crim. App. 1957).

Further, the evidence showed that police recovered 175 kilograms of cocaine from a closet in the house. The cocaine was packaged in kilo-sized, individual bricks in a manner unmistakably typical for narcotics. The evidence also showed that bricks of cocaine so packaged are a very hard, unlike marijuana, which is softer. Touching the package would give an individual a greater indication of what was inside the wrap, though merely touching the outermost layer of plastic wrapping would not. The evidence further showed that two of appellant's fingerprints were recovered from the outermost layer of plastic surrounding the cocaine bricks. The evidence does not show with what pressure appellant touched the plastic, and thus the bricks it wrapped. While appellant contends that his fingerprints on the packages constitute insufficient evidence of knowing possession of contraband, we disagree. The fingerprints, in conjunction with the other evidence outlined above, is both legally and factually sufficient evidence of appellant's knowing possession of cocaine and his care, control, and management of it. *See Dickey v. State,* 693 S.W.2d 386, 389 (Tex. Crim. App. 1984) (facts and circumstances must create a reasonable inference that appellant knew of the controlled substance's existence and exercised control over it); *Classe v. State*, 840 S.W.2d 10, 12 (Tex.

App.–Houston [14th Dist.] 1992, pet. ref'd); *Silmon v. State*, 793 S.W.2d 90, 94 (Tex. App.–Texarkana 1990, no pet.) (fingerprints can link defendant to cocaine found in another room); *Hill v. State*, 755 S.W.2d 197, 201 (Tex. App.–Houston [14th Dist.] 1988, pet. ref'd) (large amount of narcotics can be indicative of knowledge). Accordingly, we overrule points of error three and four.

Having overruled all four of appellant's points of error, we affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed September 28, 2000.

Panel consists of Justices Cannon, Draughn, and Lee.*

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

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee, sitting by assignment.