Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00667-CR

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LEROY JOHNSON, A/K/A WILLIE DUNN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 777,530

O P I N I O N

Appellant was charged with aggravated robbery. Prior to trial, appellant filed a motion to suppress, which the trial court denied after a hearing. Following a jury trial, appellant was found guilty and sentenced to thirty-five years' confinement by the trial court under two prior enhancement paragraphs. Appellant presents two points of error, complaining of the trial court's denial of his motion to suppress and of a variance between the complainant's name in the indictment and in the reporter's record. We overrule both points and affirm.

On July 21, 1997 at about 2:30 a.m., the night cashier of a Houston convenience store saw a man come into the store and pull a stocking cap down over his face. The man then robbed the night cashier at gunpoint, put the money in a paper bag and fled.

Some twenty minutes later, a car in which appellant was a passenger with two other men was pulled over by Houston police for a broken tail light. None of the occupants were able to produce a driver's license or other identification. Upon request by the officer, the driver of the vehicle consented to a search of the car. A ski mask and a gun were found on the rear floorboard where appellant had been riding, and a paper bag filled with change was found in the front passenger's seat. The police officer was unaware at that time of the earlier robbery nearby. Appellant was initially arrested for unlawful possession of the handgun, but was later charged with the robbery. The night cashier identified appellant as the man who had robbed her.

In his first point of error, appellant argues that the trial court erred in overruling his motion to suppress physical evidence, as the broken tail light was not probable cause for a traffic stop. This lack of probable cause, he argues, tainted the driver's subsequent consent to search the car and violated his rights under the Fourth Amendment of the United States Constitution and under Article I, Section 9 of the Texas Constitution. Appellant's entire probable cause argument on appeal turns on whether the broken tail light showed red light, white light, or a combination of the two colors.

Appellant, however, did not raise this issue in his motion to suppress or present any evidence at the suppression hearing as to the visible color of the tail light or inquire into the police officer's probable cause for stopping the vehicle. The record reflects appellant asking the officer only generalized questions at the hearing regarding the traffic stop:

> Q: Did you come across a car that you made a traffic stop that had something wrong with it?
>
> A: Yes.
>
> * * *
>
> Q. Driving with something wrong with your traffic signal is that an arrestable offense under 6701 statutes of the traffic codes?

A: I don't know about the code just refer to - you got to be more specific of what you're trying to ask.

* * *

Q: Do you specifically know about defective tail light?

A: If it's not working, it's not on, if it's cracked.

Q: If it's cracked?

A: If it's not working, it's not supposed to show white light to the rear or show any white light.

Only at trial, after denial of the motion to suppress, did appellant question the officer as to probable cause and the condition of the tail light that evening:

Q: Now can you tell the jury why it is that you decided to stop this automobile, this Cadillac Moritz at 2:53 a.m.?

A: Well I observed it to have a broken rear tail light and it showed a white light to the rear.

Q: And is that a traffic violation of the laws of the State of Texas to have your equipment in that particular condition?

A: Yes. It's a violation. All your equipment has to be with no cracks showing anything to the rear.

We generally review a trial court's ruling on a motion to suppress for abuse of discretion. However, when presented with a question of law based on undisputed facts, we apply a de novo review. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Where the resolution of mixed questions of law and fact turn on credibility and demeanor, we still review the evidence in light most favorable to the trial court's ruling. *Id*. at 89. The party bringing the motion to suppress bears the burden of establishing all of the elements of his Fourth Amendment claim. *State v. Mercado*, 972 S.W.2d 75, 77 (Tex.Crim. App. 1998). Appellant did not present evidence on the issue during the hearing, and did not establish his claim, and we find no error in the trial court's denial of the motion to suppress.

Even assuming the trial evidence had been introduced for purposes of the suppression hearing, there is sufficient evidence that the police officer had probable cause to stop the

vehicle. The officer testified that the tail light "showed a white light to the rear," and that this was a violation of state motor vehicle laws. This was sufficient reasonable suspicion of a traffic violation to stop the vehicle. *See Texas Department of Public Safety v. Hindman,* 989 S.W.2d 28 (Tex. App.-Fort Worth 1998, no pet.) Appellant's reliance on *Vicknair v. State*, 751 S.W.2d 180 (Tex. Crim. App. 1986) is misplaced. In *Vicknair*, the broken tail light continued to show the statutory red light in combination with white, while in the instant case, the officer only testified to seeing white light visible from the broken tail light.

Moreover, the driver of the vehicle in which appellant was riding consented to the officer's search of the vehicle. As much as appellant did not claim an ownership or possessory interest in the vehicle, and as the initial stop was lawful, he has no standing to challenge the search of the vehicle. *Trinh v. State*, 974 S.W.2d 872 (Tex. App. – Houston [14th Dist.] 1998, no pet.). It was appellant's burden to establish all of the elements of his Fourth Amendment claim, including proof of his privacy interest in the vehicle searched. This he did not do, and the trial court properly overruled the motion to suppress. *Mercado,* 972 S.W.2d at 77. Appellant's first point of error is overruled.

By his second point of error, appellant complains that the complainant's name in the indictment is "Maryland More" but that the reporter's record shows it as "Marilyn Moore." This, he argues, is a fatal variance requiring reversal of his conviction. We disagree.

A variation between the allegation and proof of a complainant's name will not destroy the validity of a conviction "so long as the names sound alike or the attentive ear finds difficulty distinguishing them when pronounced." *Farris v. State,* 819 S.W.2d 490, 496 (Tex. Crim. App. 1990), *cert. denied*, 503 U.S. 911, 112 S. Ct. 1278 (1992), *overruled on other grounds by Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1993). This is the rule of *idem sonans*. The Texas Court of Criminal Appeals has long recognized application of this rule to names with similar pronunciations but slightly different spellings: *Jenke v. State,* 487 S.W.2d 347, 348 (Tex. Crim. App. 1972) ("Mahaffrey" and Mahaffey"); *Smith v. State*, 468 S.W.2d 824, 825 (Tex. Crim. App. 1971) ("Wallman" and "Waldman"); *Raven v. State,* 193 S.W.2d

527 *(Tex. Crim. App. 1946)* ("Zoder" and "Zoda"). Nor is there any evidence in the record that appellant was misled to his prejudice by any spelling error. We find that idem sonans. We find that *idem sonans* applies to "Maryland More" and "Marilyn Moore" in that the attentive ear would have difficulty in distinguishing them when pronounced. We find no fatal variance that would cause the evidence to be legally or factually insufficient to support the conviction, and overrule appellant's second point of error.

We affirm the trial court's judgment.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Sears, Cannon, and Lee.[1]

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

[1] Senior Justices Ross A. Sears, Bill Cannon and Norman R. Lee sitting by assignment.