Affirmed and Opinion filed October 21, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-01131-CR

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MARVIN LLOYD BISHOP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 791,147

O P I N I O N

Marvin Bishop (Appellant) was indicted for the second degree felony offense of possession of cocaine, weighing one gram or more but less than four grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(c) (Vernon Supp. 1999). His indictment included enhancement paragraphs because of two previous felony convictions. Appellant pleaded not guilty to the instant offense and "true" to the respective enhancement paragraphs. Following his trial, a jury found Appellant guilty and found his enhancement paragraphs "true." The jury sentenced Appellant to forty years' confinement in the Institutional Division of the Texas

Department of Criminal Justice. On appeal to the Court, Appellant contends that the trial court erred in denying his motion to suppress because (1) the arresting police officer lacked probable cause to make the initial stop, (2) his warrantless arrest was unlawful, (3) the warrantless search of his person was unlawful, (4) his statements made to the arresting officer were inadmissible in that no *Miranda* warnings were issued, and (5) the evidence confiscated by the arresting officer was not voluntarily abandoned but merely relinquished as a direct result of police misconduct. We affirm.

BACKGROUND

Houston Police Officer Joseph Mabasa observed Appellant sitting on the seat of his bicycle, "blocking a moving lane of traffic." Appellant was also drinking a beer. He was talking to another person who was seated on the sidewalk next to the street. After stopping his patrol unit and speaking with Appellant, Officer Mabasa noted that Appellant's speech was slurred, his eyes were red and glassy, and he was unable to properly respond to questions. Officer Mabasa concluded that Appellant was intoxicated and posed a danger to himself and others. Thus, Officer Mabasa placed Appellant under arrest for public intoxication and impeding traffic. Following the arrest, Officer Mabasa asked Appellant whether he had in any weapons in his possession. Appellant responded that he had some "razor blades" in his wallet. Appellant gave the razor blades to Officer Mabasa. Officer Mabasa testified that the razor blades were covered with a white powdery residue. A field test showed that the substance was cocaine.

Accompanied by Police Officer Max Sullivan, Officer Mabasa gratuitously allowed Appellant to take his bicycle to his former landlord's residence, nearby, before being handcuffed and placed inside his patrol unit. After his landlord indicated that she would take possession of Appellant's bicycle, Appellant attempted to also give her his baseball cap. Officer Sullivan grabbed the cap first and searched it. Officer Sullivan pulled back the cap's headband and discovered the presence of what appeared to be three large chunks of crack

cocaine. Officer Sullivan testified that Appellant responded by saying "you can't blame me for trying." A field test confirmed that the substance was cocaine.

STANDARD OF REVIEW

In *Guzman v. State*, 955 S.W.2d 85 (Tex.Crim.App.1997), the Court of Criminal Appeals outlined the standard of review appellate courts must use in motion to suppress cases. In *Guzman*, the court held that courts of appeals should afford almost total deference to a trial court's determination of the historical facts that the record supports. *Id*. at 89. Furthermore, the courts of appeals should afford the same amount of deference to the 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 on an evaluation of credibility and demeanor. *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. *Id*. Therefore, because the trial court's decision to grant or deny the motion to suppress turned on the court's assessment of witness credibility and demeanor, we will review the record applying a deferential, abuse of discretion standard of review. *See id*.; *see also Carmouche v. State*, 989 S.W.2d 392, 393 (Tex.App.–Beaumont 1999, pet. granted).

DISCUSSION

In his five issues, Appellant contends that his arrest and the subsequent search of his person and baseball cap were unlawful. He argues therefore that the trial court abused its discretion in denying his motion to suppress. We address Appellant's issues conjunctively.

Section 42.03 of the Penal Code provides that a person commits the offense of obstructing a highway or street if the person, without legal privilege or authority, intentionally, knowingly, or recklessly obstructs a highway or street to which the public or a substantial

group of the public has access.[1] *See* TEX. PENAL CODE ANN. § 42.03(a) (Vernon 1994). Upon observing Appellant impeding the flow of traffic on a public street, section 42.03 of the Penal Code authorized Officer Mabasa to approach Appellant and conduct an investigative detention. *See Carmouche*, 989 S.W.2d at 394. During his investigative detention, Officer Mabasa testified that Appellant appeared intoxicated and posed a danger to himself and others. His conclusion was based upon the following factors: (1) Appellant's appearance, which included red, glassy eyes and slurred speech, (2) his inability to respond to questions, and (3) the fact that Appellant was stopped on a public street, sitting on his bicycle, impeding the flow of traffic. "A person commits an offense [of public intoxication] if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another." *See* TEX. PENAL CODE ANN. § 49.02(a) (Vernon 1994). Based upon the factors set forth above, we hold that Officer Mabasa possessed sufficient probable cause to arrest Appellant for obstructing a public street and public intoxication. *See Simpson v. State*, 886 S.W.2d 449, 455 (Tex.App.–Houston [1st Dist.] 1994, pet. ref'd).

Searches made incident to a lawful arrest and which are otherwise proper in scope are excepted from both state and federal constitutional search warrant requirements. *Simpson*, 886 S.W.2d at 454. We have already concluded that Officer Mabasa's arrest of Appellant was lawful. Thus, Officer Mabasa's search of Appellant incident to his arrest was lawful. Further, Officer Sullivan's subsequent search of Appellant's baseball cap after he attempted to pass it to a third party was lawful. *See id.* Accordingly, the razor blades seized by Officer Mabasa and the cocaine seized by Officer Sullivan were properly admitted in evidence. *See id.* at 454-55.

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[1] Appellant contends that because he infers from the record that there was no traffic on the street when he was approached by Officer Mabasa, no probable cause existed for the initial investigatory detention on the offense of obstructing a public street. Assuming *arguendo* that the record supports Appellant's contention, we note that whether traffic existed or not at the time of the obstruction is not an element of the offense of obstructing a highway or street. The statute only requires that the person be obstructing a highway or street "to which the public . . . *has access* . . . ." *See* TEX. PENAL CODE ANN. § 42.03(a)(1) (Vernon 1994) (emphasis added).

The trial court did not abuse its discretion in denying Appellant's motion to suppress.[2] Appellant's five issues are respectively overruled.

The judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed October 21, 1999.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
Do Not Publish—TEX. R. APP. P. 47.3(b).

[2] Appellant also contends that his statements made to police concerning his possession of razor blades should have been suppressed because the officers failed to issue *Miranda* warnings to him. Assuming *arguendo* that Appellant's affirmative response to Officer Mabasa's question concerning whether Appellant had any weapons should have been suppressed, the error was harmless. Appellant's razor blades were seized by Officer Mabasa incident to a lawful arrest. *See Simpson*, 886 S.W.2d at 454. Thus, the evidence would have been discovered and was inadmissible in any event. We are authorized to conclude that an error is harmless when we are able to determine beyond a reasonable doubt, as here, that the error did not contribute to the conviction or punishment. *See* TEX. R. APP. P. 44.2(a).