Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00517-CR

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FIDEL HERRERA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District court
Harris County, Texas
Trial Court Cause No. 762,872

O P I N I O N

Appellant, Fidel Herrera, was convicted of possession of cocaine and sentenced to two years imprisonment. On appeal, he contends the trial court erred in improperly overruling a motion to suppress. He also asserts the evidence is legally and factually insufficient to sustain the conviction. We affirm.

On a tip from an informant, plain clothes narcotics officer Frank Wood went to a gas station where he believed appellant would be in possession of narcotics. Officer Wood and Officer Juarez, a uniformed officer, approached the gas station simultaneously. Appellant saw the officers and began to run. The officers gave chase. As he was attempting to escape, appellant threw a large plastic bottle of Gatorade at Officer Juarez, splashing liquid in his face. Officer Juarez tripped the suspect and the officers were able

to subdue him. After he was handcuffed, he was searched. Officers found a zip-loc bag containing what was later determined to be cocaine in appellant's shirt pocket and a small bag of brightly colored balloons containing what was latter determined to be heroin in his right front pants pocket.

Probable Cause to Arrest

In his first point of error, Appellant contends the trial court committed error in overruling his motion to suppress, in that the state failed to establish sufficient facts constituting probable cause to stop or detain him.

Generally, a trial court's ruling on a motion to suppress is reviewed by an abuse of discretion standard. *See Maddox v. State*, 682 S.W.2d 563, 564 (Tex. Crim. App.1985). However, the instant case presents us with a question of law based on undisputed facts, thus we must conduct a de novo review. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

A seizure is made only when an individual has either actually yielded to an officer's show of authority or been physically forced to yield. *See Johnson v. State*, 912 S.W.2d 227, 232 (Tex. Crim. App. 1995) (adopting the federal definition of "seizure" under the Fourth Amendment). Since appellant did not yield to the officer's show of authority, he was not seized until Officer Juarez physically apprehended him. Appellant's conduct, prior to his arrest, constituted a Class C assault.[1] Since appellant committed an offense in the presence of the officers, they were authorized to arrest him. *See* TEX. CODE CRIM. PROC. ANN. Art. 14.01 (Vernon 1977) (saying that "[a] peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view"). Once lawfully arrested, the officers were authorized to make a search incident to the arrest. *See United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *Busby v. State*, 990 S.W.2d 263, 270 (Tex. Crim. App. 1999) (holding that a personal search was proper incident to a valid arrest); *Carrasco v. State*, 712 S.W.2d 120 (Tex.

[1] A person commits a class C assault if the person "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." TEX. PEN. CODE ANN. § 22.01(a)(c) (Vernon 1994).

Crim. App.1986). We find, therefore, that the officer's search was proper and that the trial court did not err in overruling appellant's motion to suppress. Appellant's first point of error is overruled.

Legal Sufficiency of the Evidence

In his second point of error, appellant contends the State did not bring forward legally sufficient evidence to show he had knowledge of the contents of the zip lock bag. The test for legally sufficient evidence is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Staley v. State*, 887 S.W.2d 885, 888 (Tex. Crim. App. 1994); *Geesa v. State*, 820 S.W.2d 154, 156 (Tex. Crim. App. 1991). This is a high burden. As the Court of Criminal appeals said in *Ex parte Elizondo*:

> When we conduct a legal sufficiency-of-the-evidence review . . . we do not weigh the evidence tending to establish guilt against the evidence tending to establish innocence. Nor do we assess the credibility of witnesses on each side. We view the evidence in a manner favorable to the verdict of guilty . . . [Regardless of] how powerful the exculpatory evidence may seem to us or how credible the defense witnesses may appear. If the inculpatory evidence standing alone is enough for rational people to believe in the guilt of the defendant, we simply do not care how much credible evidence is on the other side.

947 S.W.2d 202, 206 (Tex. Crim. App. 1996).

The State presented the testimony of three police officer's that appellant had a clear plastic baggy in his shirt pocket containing what was later determined to be cocaine. It is rational for a jury to conclude that an individual is aware of the contents of his shirt pocket, particularly when those contents are in a clear plastic bag. This is sufficient for a rational trier of fact to find appellant committed the elements of the offense. Appellant's second point of error is overruled.

Factual Sufficiency of the Evidence

Appellant's third point of error is that the State did not bring forward factually sufficient evidence that he was aware of the contents of the zip lock bag. A factual sufficiency review must be deferential to the trier of fact, to avoid substituting our judgment for theirs. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). The appellate court maintains this deference by reversing only when "the verdict

is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).

To prove unlawful possession of a controlled substance, the State must prove that the accused exercised control, management, and care over the substance; and that the accused knew the matter possessed was contraband. *Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995).

The officer's testimony was that when he was arrested appellant had a clear plastic baggy in his shirt pocket containing what was later determined to be cocaine. The conclusion that appellant therefore was aware of and exercised control, management, and care over the contents of his shirt pocket is not so against the great weight of the evidence presented at trial so as to be clearly wrong and unjust

Appellant's final point of error is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed December 2, 1999.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
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