Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01346-CR

———————————

WILLIAM D. MACON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 754,290

O P I N I O N

Convicted by a jury of possession of crack cocaine and sentenced by the trial court to thirty years imprisonment in the Texas Department of Criminal Justice, Institutional Division, appellant, William Macon asserts the trial court erred by: (1) denying his motion to suppress evidence when the State did not show probable cause for his arrest; (2) refusing to instruct the jury on the legality of the evidence obtained, in accordance with the provisions of article 38.23 of the Texas Code of Criminal Procedure; and (3) denying his motion to recuse the trial judge. We overrule all three of appellant's points of error and affirm the decision of the trial court.

BACKGROUND FACTS

Houston Police Officers D.L. Shadden and J.T. Bryson were on patrol when they encountered appellant walking down the street towards a pay telephone. The officers noticed that appellant was violating the law by walking in the middle of a street where sidewalks were provided. When Officer Shadden told appellant to approach the patrol car, appellant took off running. The officers followed on foot. During the pursuit, the officers saw appellant throw a pill bottle over a chain-link fence and then climb over the fence. Officer Shadden stopped to pick up the pill bottle, which he soon discovered contained ten or twelve rocks that later field tested positive for crack cocaine. Meanwhile, Officer Bryson continued to chase appellant, who jumped over two more fences in his effort to flee from the police officers. When trying to clear the last fence, appellant fell and Officer Bryson was able to handcuff him and lead him back to the patrol car. The officers then arrested appellant for possession of cocaine.

Appellant, who testified only at the hearing on the motion to suppress, gave a very different account of the facts leading to his arrest. Appellant stated that he used the sidewalk to walk two or three blocks from his mother's house to a pay telephone. He claimed that he was talking on the telephone when Officer Shadden approached him and told him to hang up. According to appellant, when he refused, several police officers stomped, kicked, and hog-tied him. Appellant denied he had any crack cocaine in his possession.

LACK OF PROBABLE CAUSE

In his first point of error, appellant contends the trial court erred by denying his motion to suppress evidence when the State did not show probable cause for his arrest. Because appellant was not arrested until after the cocaine was discovered, the existence of probable cause has no bearing on the admissibility of the evidence. The trial court was justified in denying the motion to suppress if either (1) the detention was legal or (2) there was no detention, and appellant voluntarily abandoned the property.[1]

[1] If there are no findings of fact and conclusions of law, we presume the trial court made findings (continued...)

Standard of Review

When reviewing a trial court's ruling on a motion to suppress, there are two standards of review which might apply. When the ruling is on the application of law to a fact question that depends upon an evaluation of credibility and demeanor, we review for an abuse of discretion. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). However, when the ruling is on an application of the law to a fact question that does *not* depend upon an evaluation of credibility and demeanor, we review the trial court's decision *de novo*. *See id*. Determinations of reasonable suspicion and probable cause are reviewed *de novo*. *See id*. at 87 (citing *Ornelas v. United States*, 517 U.S. 690 (1996)). In determining if the detention was legal and if the property was voluntarily abandoned, we review the trial court's decision *de novo*.

Legality of Detention

We first consider the legality of appellant's detention. Generally, a peace officer need not have probable cause to detain a person for investigation. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Garza v. State*, 771 S.W.2d 549, 558 (Tex. Crim. App. 1989); *Reynolds v. State*, 962 S.W.2d 307, 311 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). However, an officer must have "specific articulable facts which, in light of his experience and personal knowledge, together with other inferences from those facts" would justify the detention. *Reynolds*, 962 S.W.2d at 311 (citing *Johnson v. State*, 658 S.W.2d 623, 626 (Tex. Crim. App. 1983)). The detention is justified when the officer has a reasonable suspicion that (1) some activity out of the ordinary is occurring or has occurred, (2) some suggestion to connect the detained person with the unusual activity, and (3) some indication that the activity is related to a crime. *See id*.

---

[1] (...continued)
necessary to support its ruling as long as those findings are supported by the record. *See Josey v. State*, 981 S.W.2d 831, 837 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). In this case, there are no findings of fact or conclusions of law. Therefore, we must consider every possible finding by which the judge could have denied the motion to suppress which has a basis in the record. These findings are that (1) the detention was legal or (2) no detention occurred, and appellant voluntarily abandoned the property.

It is well settled that the detention is justified when a person commits a traffic violation in an officer's presence. *See McVickers v. State*, 874 S.W.2d 662, 664 (Tex. Crim. App. 1993) (running a red light); *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992) (running a stop sign); *Armitage v. State*, 637 S.W.2d 936, 939 (Tex. Crim. App. 1982) (driving with a defective taillight). The Texas Transportation Code makes it an offense for a pedestrian to walk along a roadway if an adjacent sidewalk is provided. *See* TEX. TRANSP. CODE ANN. § 552.006(a) (Vernon 1999). Officer Shadden testified that he saw appellant walking in the middle of the street when an adjacent sidewalk was available, an act the officer believed to be in violation of a city ordinance. Because appellant committed a traffic violation in Officer Shadden's presence, the detention was justified.

Appellant argues that the detention, search, and arrest were illegal because Officer Shadden based his probable cause upon a city ordinance that did not exist. While there may have been no city ordinance prohibiting one from walking in the street where sidewalks are available, the Texas Transportation Code clearly prohibits this activity. *See* TEX. TRANSP. CODE ANN. § 552.006(a) (Vernon 1999). The Texas Court of Criminal Appeals has held "[a]s long as an actual violation occurs, law enforcement officials are free to enforce the laws and detain a person *for that violation*, . . . regardless of the officer's subjective reasons for the detention." *Garcia*, 827 S.W.2d at 944. Officer Shadden detained appellant for the violation of walking in the middle of the street when a sidewalk was provided. His subjective reasons, including his thoughts as to whether the act violated a city ordinance or a state law, are irrelevant.[2]

Evidence that is seized as a result of a legal detention is admissible. *See Williams v. State*, 835 S.W.2d 781, 783 (Tex. App.—Houston [14th Dist.] 1992, no pet.). Having determined the detention was legal, any evidence seized was admissible. *See id.* The trial

[2] It is not reasonable to suggest that a police officer must know exactly which governmental entity promulgated each law. There are thousands of laws enacted by the city, state, and nation. We cannot expect a peace officer, who is making split-second decisions every day as to whether an offense is being committed, to know which governmental entity enacted each law.

court properly denied the motion to suppress.

Voluntary Abandonment[3]

Alternatively, the trial court could have determined that appellant was not detained and the crack cocaine was not taken in a protected seizure, but rather was voluntarily abandoned. According to Officer Shadden, appellant was running from the officers when they found the cocaine.

An individual is not temporarily seized or detained when fleeing officers after being asked to stop. *See Crawford v. State*, 932 S.W.2d 672, 673-74 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *see also California v. Hodari, D.*, 499 U.S. 621, 626 (1991) (finding defendant was not seized when he fled an approaching police car and officers gave chase, believing his flight justified their decision to pursue and detain him). Here, appellant did not respond to Officer Shadden's request for him to approach the patrol car but instead immediately fled. Under this factual scenario, appellant was not temporarily seized or detained. Thus, the only way the crack cocaine would not be admissible in evidence is if it were taken in a seizure protected under the Fourth Amendment.

Generally, when police seize voluntarily abandoned property, the seizure is not protected under the Fourth Amendment. *See McDuff v. State*, 939 S.W.2d 607, 616 (Tex. Crim. App. 1997); *Hawkins v. State*, 758 S.W.2d 255, 257 (Tex. Crim. App. 1992). Property is voluntarily abandoned when (1) the defendant intended to abandon the property and (2) the defendant's decision to abandon it was not due to police misconduct. *See McDuff*, 939 S.W.2d at 616 (citing *Brimage v. State*, 918 S.W.2d 466, 507 (Tex. Crim. App. 1996); *Comer v. State*, 754 S.W.2d 656, 659 (Tex. Crim. App. 1986)). Intent to abandon may be inferred from words spoken, acts done, other objective facts, and relevant circumstances. *See McDuff*, 939 S.W.2d at 616 (citing with approval *U.S. v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973)). To intend to abandon, the accused does not have to intend to abandon the item in the strict property-right

[3] Although we have already found the motion to suppress was proper, we will nevertheless consider whether the court could have based its decision on the property being voluntarily abandoned.

sense but merely must intend to voluntarily relinquish his interest so that he can no longer reasonably expect privacy in it. *See id*. Courts have found that when an individual throws crack cocaine onto the ground, the individual means to abandon the property. *See, e.g., Armstrong v. State*, 966 S.W.2d 150, 154 (Tex. App.—Austin 1998, no pet.) (finding throwing crack cocaine onto the ground when talking with police showed intent to abandon); *Crawford*, 932 S.W.2d at 674 (finding throwing down crack cocaine during flight from police was voluntary abandonment). Appellant threw the crack cocaine to the ground and so intended to abandon the property. No police misconduct occurred because, as noted, the officers had reasonable suspicion to try to detain appellant. Under these facts, the appellant voluntarily abandoned the crack cocaine; thus, the police did not acquire it in a protected seizure under the Fourth Amendment. Consequently, the trial court did not err in denying appellant's motion to suppress. The first point of error is overruled because the trial court was justified in finding either (1) the detention was legal or (2) there was no detention, and appellant voluntarily abandoned the property.

JURY INSTRUCTION

In his second point of error, appellant contends the trial court erred by refusing to instruct the jury on the legality of the evidence obtained in a warrantless search. Article 38.23 of the Texas Code of Criminal Procedure provides:

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

Absent a dispute over the facts surrounding a defendant's arrest, the trial court need not give an Article 38.23 instruction. *See Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996). Although the testimony of appellant and Officer Shadden conflicted at the suppression hearing,

at trial, the appellant put forth no facts to contest the legality of the search or the arrest. Because the jury did not hear conflicting facts surrounding the search, it was not necessary for the trial court to give an Article 38.23 instruction.

At trial, there was a dispute regarding the law authorizing appellant's arrest. Officer Shadden testified that a city ordinance prohibited appellant from walking in the street where sidewalks are provided. Appellant put on an expert who testified that, contrary to Officer Shadden's belief, there was no such city ordinance. The determination of whether there was a law authorizing the arrest is a question of law. Questions of law are not for the jury but rather are the province of the trial court. Therefore, when the dispute is over the applicable law, an Article 38.23 instruction is not necessary. For this reason, appellant was not entitled to an instruction to the jury on the legality of the evidence. The second point of error is overruled.

MOTION TO RECUSE

In his third point of error, appellant contends the administrative judge erred by denying appellant's motion to recuse the trial judge for bias. The standard of review for a motion to recuse is abuse of discretion. *See Kemp v. State*, 846 S.W.2d 289, 306 (Tex. Crim. App. 1992) (citing TEX. R. CIV. P. 18a(f)); *see also Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (finding explicitly that rule 18a applies to criminal cases).[4] When abuse of discretion is the standard, we cannot reverse a trial judge's ruling if the ruling is within the zone of reasonable disagreement. *See Kemp*, 846 S.W.2d at 306 (citation omitted). In this abuse of discretion analysis, we must consider "the totality of the evidence" elicited at the recusal hearing. *See id*.

To disqualify a judge for bias, the trial court must decide if the movant produced facts sufficient to "establish that a reasonable man, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial judge." *Id*. at 305 (citing *Chitimacha Tribe of*

[4] These cases, and most of the ones that follow, purport to concern disqualification. There are only three constitutional grounds for disqualification and bias is not one of them. *See* TEX. CONST. Art. V, § 11. One ground for recusal is bias. *See* TEX. R. CIV. P. 18(b)(2). Therefore, these cases actually involve recusal.

Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982)). Generally, only bias from an extrajudicial source requires recusal. *See Quinn v. State*, 958 S.W.2d 395, 402-03 (Tex. Crim. App. 1997) (citing *Kemp v. State*, 846 S.W.2d 289, 305-06 (Tex. Crim. App. 1992)). In applying the reasoning of the United States Supreme Court on when a judge is recusable for bias, we have previously held:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed toward the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

Ludlow v. DeBerry, 959 S.W.2d 265, 271 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (quoting *Liteky v. United States*, 510 U.S. 540, 550 (1994)). However, bias can arise from within the proceeding if the alleged bias indicates a high degree of favoritism or antagonism that makes fair judgment impossible. *See id.* at 271 (citing *Liteky*, 510 U.S. at 555). Ordinarily, to establish bias, the movant must show the bias (1) came from an extrajudicial source, i.e., did not arise during the pendency of the trial court proceedings, (2) resulted in an opinion on the merits on some basis other than what the judge learned from his participation in the case, and (3) denied appellant due process because of its nature and extent. *See Kemp*, 846 S.W.2d at 306 (citations omitted).

In the case before us, appellant argues that the extrajudicial source arose when the trial judge held defense counsel in contempt and issued a writ of attachment for appellant's counsel. Additionally, the trial judge allegedly caused appellant's counsel to be arrested and escorted across the street to her courtroom after the administrative judge denied the appellant's motion to recuse. Appellant claims the trial judge then berated and humiliated defense counsel for at least twenty minutes. While this incident is an extrajudicial source because it did not arise during the pendency of the trial court proceeding, there is no evidence that the court's decision was not based on the merits, i.e., on some basis other than what the judge learned in the case. Also, after carefully reviewing the record, we find the judge conducted the trial in a fair and

impartial manner. There is no evidence to support the notion that appellant was denied due process of law.

Although the acts of the trial judge may have been extreme, without the requisite showings, we cannot say that appellant produced sufficient facts to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial judge. We hold that the administrative judge did not abuse his discretion by overruling appellant's motion to recuse. Therefore, the third point of error is overruled.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed December 23, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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