Affirmed and Opinion filed March 21, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00958-CR

ROY LEE SALLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Cause No. 99-56154

O P I N I O N

A jury found appellant guilty of unlawfully carrying a handgun. The trial court sentenced him to 365 days confinement in the Harris County Jail and imposed a $4,000.00 fine. Appellant raises three issues on appeal: (1) the trial court erred in overruling appellant's motion to suppress the search of his vehicle and seizure of the handgun, and (2) the evidence was legally and (3) factually insufficient to support his conviction. We affirm the judgment of the trial court.

FACTUAL BACKGROUND

Appellant's stepdaughter, Natasha Wickware, testified that on December 26, 1999, appellant threatened to kill her—first during a telephone conversation and later that day in person as appellant brandished a handgun. Initially, Wickware was talking on the phone with her mother, appellant's wife, Mrs. Salley. Wickware could hear appellant in the background telling his wife to get off the telephone. Wickware encouraged her mother to call her back later; however, another child in appellant's home, Wickware's step-sister Lakesha, called Wickware back. While Wickware and Lakesha were talking, appellant got on the phone and threatened to shoot and kill Wickware if she came near appellant's home.

Concerned for her mother's and her sister's safety, Wickware called 911.[1] Harris County Deputy Constable John Chamberlain arrived at appellant's home and knocked loudly on the door. No one responded. Shortly thereafter, Wickware and her boyfriend, Victor Gibbs, arrived at appellant's home. Chamberlain explained that there was nothing he could do about their complaint at that time because appellant would not come to the door. Chamberlain then left.

Wickware and Gibbs walked into the next-door neighbor's front yard, and Mrs. Salley drove up to the Salley's house.[2] Appellant came out of the house. After Mrs. Salley went inside, appellant saw Wickware and Gibbs standing in the neighbor's yard, went toward them, and threatened to kill them both if they did not leave the neighborhood. Gibbs testified that appellant said, with his hand on a black and brown handgun in the waistband area of his pants, "Come in [my] yard; I'm going to kill you too." Wickware, who also saw the handgun, testified that when she and Gibbs began to drive away, she saw appellant

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[1] In addition to the threat on her life, Wickware told the 911 operator that appellant was currently out on bond for the offense of murder. While this information was kept from the jury at trial, it is relevant to our determination of appellant's argument before this court that the officers lacked probable cause to search his vehicle.

[2] Wickware testified that Mrs. Salley had left the house to take Lakesha to a relative's house because the child was frightened.

remove the handgun and wave it at them while threatening to kill them again. Thereafter, the Salleys got in their truck and left.

Wickware then made a second 911 call from her cellular phone. Chamberlain and another officer, Deputy David Jenkins, responded to the call and met Wickware and Gibbs at appellant's house. There, Wickware and Gibbs told the officers about appellant's behavior. As the three of them spoke, they saw appellant's car turn onto the street, and then abruptly turn around, run a stop sign and drive away quickly.[3] The officers pursued and ultimately stopped the car. Chamberlain asked Mrs. Salley, the driver of the car, if there were any weapons in the car. Both appellant and Mrs. Salley claimed there were none. Sensing that Mrs. Salley was afraid, Chamberlain asked her to step out of the truck.

As "a defensive measure," the officers handcuffed appellant and did a pat-down search for weapons. A weapons search of the car produced a loaded handgun and over twelve rounds of ammunition, some of which were hollow-point bullets. The contraband was found in the glove box on the passenger side where appellant had been sitting. According to Chamberlain, appellant seemed surprised and disappointed by the discovery of the weapon. When Chamberlain questioned Mrs. Salley about the handgun, she claimed it was not hers and she knew nothing about it. Wickware and Gibbs confirmed that the handgun recovered by the officers was the same handgun appellant had threatened them with earlier.

At trial, both Chamberlain and Jenkins stated on cross-examination that when they first approached the truck, they did not see appellant put anything in or take anything out of the glove box. Jenkins stated that Mrs. Salley did not appear to be afraid for her life at the time of the stop. Jenkins also testified that no discernable fingerprints were recovered from the handgun. On re-direct examination, Jenkins testified that, based on his experience as a

[3] Appellant's house is located on a dead end street.

police officer, it only takes a few seconds to put an object in a glove box, and similarly, fingerprints can be wiped away in a matter of seconds.

Mrs. Salley testified for the defense and claimed she did not feel threatened by the events on December 26, nor did she feel that her life was in jeopardy. She stated that she never saw appellant in possession of a weapon that day. She also refuted Gibbs' testimony, saying that it was Gibbs who made the second call to appellant's house, and that it was Gibbs who threatened appellant's life rather than the contrary. Mrs. Salley further testified that appellant had never harmed her and that he was not a violent man. On cross-examination, however, the State asked about a prior incident when she had called the police, complaining that appellant had assaulted her. Mrs. Salley said she recalled the incident, but appellant had not hurt her.

As to the handgun found in the truck, Mrs. Salley testified that it was hers, explaining that she had purchased it at a pawn shop but never had it registered. She also claimed that it was she who put the handgun in the truck at some time prior to December 26. She explained that she had told the officers there were no weapons in the truck that day because she had forgotten the handgun was in the glove box. On re-cross examination, Mrs. Salley testified she did not have a concealed handgun permit for the weapon, and that although she had a receipt for the handgun's purchase, she did not bring it to court. There was evidence that appellant was the registered owner of the handgun.

DISCUSSION

In appellant's first issue for review, he complains that the trial court erred in overruling his motion to suppress the search of his vehicle and the seizure of his handgun. He challenges the reasonableness of the search and seizure under federal constitutional law. Specifically, he claims "[t]he State failed to establish that Deputy Chamberlain had probable cause to believe that a weapon was inside the appellant's vehicle."

STANDARD OF REVIEW

Generally, a trial court's ruling on a motion to suppress is reviewed by an abuse of discretion standard; but here, we are presented with a question of law based on undisputed facts, thus we apply a de novo standard of review. *Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999).

LEGAL BACKGROUND

The Fourth Amendment guarantees people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Thus, warrantless searches and seizures are generally per se unreasonable. *Mendoza v. State*, 30 S.W.3d 528, 531 (Tex. App—San Antonio 2000, no pet.). To determine the validity of a search and seizure under the Fourth Amendment, we consider whether the officer's actions were reasonable in light of the totality of the circumstances. *Torres v. State*, 868 S.W.2d 798, 801 (Tex. Crim. App. 1993); *Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991).

In a motion to suppress the evidence based on allegations of an unlawful search and seizure, the accused bears the burden of rebutting a presumption that the police conduct was proper. *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986). However, the accused may rebut the presumption with a showing that the search and seizure occurred without a warrant. *Id*. Upon such a showing, the burden of proof then shifts to the State, and if the State is unable to produce a warrant, it must prove the warrantless search or seizure was reasonable. *Id*. at 9-10. In the case at hand, the parties stipulated that the search of appellant's truck was made without a warrant. Thus, the State had the burden to prove that the search and the seizure of the handgun was reasonable under the Fourth Amendment. *Amores*, 816 S.W.2d at 413.

A warrantless search and seizure is only authorized if (1) there is probable cause with respect to object seized and (2) the seizure falls within one of the exceptions set forth in

Chapter 14 of the Code of Criminal Procedure. *Covarrubia v. State*, 902 S.W.2d 549, 553 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (citing *Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989)). Thus, to demonstrate the constitutionality of the search, the State must prove that (1) Chamberlain had probable cause to stop appellant's vehicle and (2) the search was conducted pursuant to one of the narrow exceptions to the warrant requirement. *Id*.

Probable Cause

Probable cause exists if the police have reasonably trustworthy information sufficient to warrant a reasonable person to believe a particular person has committed or is committing an offense. *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). And, "[w]here it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused." TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1997).

Chamberlain was dispatched to appellant's address twice in one day on a "weapons call," the calls coming just a little over an hour apart. On both occasions, Wickware and Gibbs told Chamberlain that appellant had made threats to kill Wickware over the telephone, and that later, in person, appellant threatened to kill both of them while brandishing a deadly weapon—a felony offense. TEX. PEN. CODE ANN. § 22.02(a)(2) (Vernon 1994). Additionally, when the officers were talking to Wickware and Gibbs in the next-door neighbor's front yard, appellant and his wife tried to evade the officers by "hurriedly pull[ing] into a driveway and [taking] off down the street at a high rate of speed." We conclude that under the totality of these circumstances, Chamberlain had probable cause to believe that appellant was or had committed a felony offense, and thus, he was justified in stopping and searching appellant's vehicle. *Id*.

Protective Searches

Upon a reasonable belief that an individual is armed and dangerous, a police officer may conduct a limited search for weapons for safety reasons. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Aguirre*, 5 S.W.3d 911, 914-15 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In the case of a roadside stop, an officer may conduct a protective search of the vehicle's passenger compartment if he has a reasonable belief, based upon specific and articulable facts and the inferences rationally drawn from those facts, that the detainee may pose a threat to him. *Michigan v. Long*, 463 U.S. 1032, 1050-51, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983); *Goodwin v. State*, 799 S.W.2d 719, 727-28 (Tex. Crim. App. 1990). The test is whether a reasonably prudent person under the circumstances would be warranted in the belief that his safety or that of others was in danger. *Long*, 463 U.S. at 1050.

At the suppression hearing, Chamberlain testified that the officers decided to temporarily detain appellant and search the vehicle for safety concerns because he was told about appellant's recent arrest for murder and appellant's earlier threats to kill Wickware and Gibbs with a handgun. Under these circumstances, we believe that the weapons search was reasonable. Consequently, we hold that the trial court acted properly in denying appellant's motion to suppress the evidence and overrule appellant's first issue on appeal.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In appellant's second and third issues for review, he complains that the evidence against him is legally and factually insufficient to support his conviction for the offense beyond a reasonable doubt. For the reasons stated below, we disagree.

STANDARD OF REVIEW

We apply different standards when reviewing the evidence for factual and legal sufficiency. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2789, 61 L. Ed. 2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust; or (2) the adverse finding is against the great weight and preponderance of the available evidence. *Id*. The *Johnson* court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9. We are mindful, however, that due deference is not absolute deference. *Id*. at 7.

ANALYSIS

A person commits an offense of unlawfully carrying a weapon "if he intentionally, knowingly, or recklessly carries on or about his person a handgun . . . . " TEX. PEN. CODE ANN. § 46.02 (Vernon 2001). The State was required to prove that (1) appellant knew of the handgun's existence and (2) that he exercised actual care, custody, control, or management over it. *Corpus v. State*, 30 S.W.3d 35, 37-38 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Appellant's complaint on appeal challenges only the element of knowledge and concedes that under the case law, the element of control was proven, citing *Contreras v. State*, 853 S.W.2d 694, 696 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). Therefore,

we address only whether the evidence was legally and factually sufficient to show that appellant had knowledge of the weapon's existence in the glove box.

Legal Sufficiency of the Evidence

When both legal and factual sufficiency points of error are raised, we examine the legal sufficiency of the evidence first. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996).

We find there was sufficient evidence in the record to show that appellant had knowledge of the presence of the handgun. Two witnesses testified that appellant had possession of the handgun just prior to the seizure of the weapon. Also, the weapon was in the glove box of appellant's car, directly in front of him, making it very easy for him to have placed it there. Moreover, an inference of appellant's knowledge could have been drawn from appellant's apparent attempt to evade the police. *See King*, 895 S.W.2d at 703. In viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Garrett*, 851 S.W.2d at 857. Appellant's second issue on appeal is overruled.

Factual Sufficiency of the Evidence

In addition to the evidence favoring the prosecution, there was testimony favorable to the appellant introduced at trial. Specifically, when asked if there were any weapons in the vehicle, appellant and Mrs. Salley both claimed that there were none. Mrs. Salley testified that she put the handgun in the car sometime prior to the day in question, explaining that she had simply forgotten about putting the handgun in the glove box. Additionally, Chamberlain testified that appellant appeared to be surprised and disappointed when the handgun was discovered. However, when viewing all the evidence, we conclude that the evidence favoring appellant was not greatly outweighed by the evidence supporting the conviction. *See Johnson*, 23 S.W.3d at 11. Therefore, we overrule this complaint.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed March 21, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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