Affirmed; Opinion of January 10, 2002 Withdrawn and Corrected Opinion filed January 31, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00083-CR

PRESTON WIGGINS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 85th District Court
Brazos County, Texas
Trial Court Cause No. 27,909-85

C O R R E C T E D O P I N I O N

We withdraw our opinion of January 10, 2002, and issue this corrected opinion in its place. Appealing his conviction for cocaine possession, appellant Preston Wiggins, Jr. challenges the trial court's ruling admitting evidence he claims was seized in violation of his rights under the Fourth Amendment of the United States Constitution. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the night of May 27, 2000, Bryan police officer Bryan Russell observed a vehicle parked illegally in an area known for its high crime and drug activity. Appellant sat in the driver's seat of the vehicle conversing with a man standing outside the vehicle. Officer Russell noted that the man talking with appellant was Christopher Nix, a known drug dealer.

As Officer Russell approached, appellant pulled his vehicle away without signaling. When Officer Russell pulled behind appellant's car to follow him, appellant turned into the parking lot of a convenience store without signaling. Officer Russell then activated his emergency lights and stopped appellant's vehicle in the parking lot. Appellant began moving suspiciously around the inside of the vehicle.

As Officer Russell approached appellant's car, he saw that appellant had a ten-dollar bill in his right hand. When Officer Russell asked appellant for his driver's license, appellant replied that he did not have one. Noticing appellant's nervousness, Officer Russell ordered appellant to exit the car. Appellant complied but tried to place his left hand inside his pocket several times, even after the officer had instructed him not to do so. Officer Russell then instructed appellant to place his hands on the trunk of the car. When he complied, the officer frisked appellant's outer clothing for weapons. During his search, Officer Russell discovered a plastic bag containing rocks of crack cocaine in appellant's left front pocket. Officer Russell arrested appellant and placed him in handcuffs. A further search of appellant's clothing revealed a blue coin holder and a plastic bag containing white residue. The residue was later determined to be crack cocaine.

Appellant was indicted for possession of less than one gram of cocaine. He pleaded not guilty. At trial, appellant objected to the admission of the cocaine seized during the search. The trial court overruled appellant's objection and admitted the evidence. A jury convicted appellant of the charged offense and assessed punishment at two years' confinement in a state jail facility.

II. ISSUE PRESENTED FOR REVIEW

In his sole point of error, appellant claims the trial court erred in failing to suppress the cocaine seized from him at the time of his arrest. He contends that the admission of the cocaine into evidence violated his rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Texas Constitution.

A. STANDARD OF REVIEW

In reviewing a trial court's decision whether to suppress evidence, we apply the abuse of discretion standard of review. *See Weathered v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000); *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). An abuse of discretion occurs when the decision is so clearly wrong as to lie outside the zone of reasonable disagreement or when the trial court acts arbitrarily and unreasonably, without reference to any guiding rules or principles. *See Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). Under this standard, the appellate court will uphold the trial court's evidentiary ruling unless there is no reasonable support for it. *See Moreno v. State*, 22 S.W.3d 482, 487 (Tex. Crim. App. 1999).

The trial court's decision whether to suppress evidence must be upheld if any theory is supported by the record, even if the record does not reflect or indicate that the trial court relied upon that theory. *Spence v. State*, 795 S.W.2d 743, 755 n. 11 (Tex. Crim. App. 1990). The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Meek v. State*, 790 S.W.2d 618, 620 (Tex. Crim. App. 1990). The trial court may believe or disbelieve all or any part of a witness's testimony. *Id.* The appellate court's review of the trial court's decision to admit evidence is limited to determining whether the trial court erred in applying the law to the facts. *Flores v. State*, 895 S.W.2d 435, 440 (Tex. App.—San Antonio 1995, no pet.).

B. PRESERVATION OF ERROR

The state contends that, because appellant did not base his objection at trial on the Fourth Amendment, he has waived any error. Just before admission of the cocaine evidence at trial, appellant's trial counsel made the following objection:

> Mr. Barron [defense counsel]: Your Honor, I'm going to object to the exhibits under the exclusionary rule – Texas Exclusionary Rule 38.23; the exclusionary rule in the Fifth [sic] Amendment of the United States Constitution and 14th; and Article I, Section 10 [sic] of the States [sic] Constitution.

> And it's my contention that the officer did not have probable cause to arrest the defendant -- or would not have arrested the defendant had he not by plain field, I guess, under *Minnesota v. Minnek* found what he thought to be cocaine in the plastic bag. Of course, the Court can decide whether or not the officer could, in fact, do that -- distinguish rocks of crack cocaine from other substances.
>
> Also the officer did the pat-down for a weapon. The officer said that certainly what he felt was not a weapon.
>
> . . .
>
> The Court: Very well. It appears to me that the officer had a reasonable basis for stopping the vehicle, and on the basis of what I've heard so far he had a reasonable basis for asking him to step out of the car and to pat him down.
>
> The primary basis for your objection is whether or not he could make a reasonable conclusion that what he felt in his pocket was crack cocaine; and taking all circumstances into account, I think a reasonable person could make that conclusion.

It is clear from this exchange that appellant's counsel identified the basis for his objection as lack of probable cause and articulated the grounds he claimed entitled him to relief. To preserve error, a party objecting to the admission of evidence must state the specific ground for the objection if the specific ground is not apparent from the context. TEX. R. EVID. 103(a); *see also* TEX. R. APP. P. 33.1; *Bird v. State*, 692 S.W.2d 65, 70 (Tex. Crim. App. 1985). Although trial counsel said "Fifth" Amendment rather than "Fourth" Amendment, the basis for the objection—lack of probable cause—was apparent from counsel's references to probable cause and the exclusionary rule. Accordingly, we find that appellant has preserved his Fourth Amendment objection for appellate review.

C. PROBABLE CAUSE

Appellant frames his argument in terms of both the United States and Texas Constitutions. Appellant, however, does not separately brief his state and federal constitutional claims. An appellant claiming relief under both the federal and state constitutions must "analyze, argue or provide authority to establish that his protection under the Texas Constitution exceeds or differs from that provided to him by the Federal Constitution." *Arnold v. State*, 873 S.W.2d 27, 33 (Tex. Crim. App. 1993). Therefore, we

assume that appellant claims no greater protection under the state constitution than that provided by the federal constitution. *See Muniz v. State*, 851 S.W.2d 238, 251-52 (Tex. Crim. App. 1993). In any event, although not bound by the Fourth Amendment jurisprudence of the United States Supreme Court when interpreting the Texas counterpart, Texas courts generally follow that jurisprudence. *See Aitch v. State*, 879 S.W.2d 167, 171-72 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). The Texas Court of Criminal Appeals has observed that Article I, section 9 of the Texas Constitution does not provide greater protection than the Fourth Amendment and may, in fact, provide less protection. *Hulit v. State,* 982 S.W.2d 431, 436 (Tex. Crim. App. 1998). Because neither appellant nor the state urges any reason to interpret Article I, section 9 differently from the Fourth Amendment, we will make no distinction. *See Carmouche v. State*, 10 S.W.3d 323, 326 n. 1 (Tex. Crim. App. 2000).

The Fourth Amendment of the United States Constitution and Article I, section 9 of the Texas Constitution guarantee the right to be secure from unreasonable searches and seizures made without probable cause. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9. No evidence obtained by an officer or other person in violation of any provisions of the constitution or laws of this state or the United States shall be admitted against the accused in a criminal case. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2000).

Appellant concedes that Officer Russell had reasonable suspicion to stop his vehicle. He further concedes that, given his furtive movements inside the car and his insistence on placing his hand in his pocket, the officer performed a legal *Terry* search[1] on his outer clothing. Appellant contends, however, that the officer exceeded the scope of the *Terry* search for weapons and that the resulting seizure of the cocaine was not based on probable cause. Appellant relies on *Minnesota v. Dickerson*, a case in which the United States Supreme Court expanded the permissible bounds of a *Terry* search and held that "[i]f a

[1] *Terry v. Ohio* authorizes a pat-down search for weapons when the officer is justified in believing that the detainee may be armed and presently dangerous. 392 U.S. 1, 29-30 (1968); *see also Davis v. State*, 829 S.W.2d 218, 221 (Tex. Crim. App. 1992). The purpose of a *Terry* search is to neutralize a potentially dangerous situation and allow an officer to investigate without fear of violence. *Wood v. State*, 515 S.W.2d 300, 306 (Tex. Crim. App. 1974).

police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity *immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. . . . " 508 U.S. 366 (1993). To fall under this "plain feel" exception, the object's identity must be immediately apparent and incriminating in nature. *State v. Davis*, 988 S.W.2d 466, 467 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Campbell v. State,* 864 S.W.2d 223, 226 (Tex. App.—Waco 1993, pet. ref'd.). "If an officer is legitimately conducting a *Terry* frisk, no additional privacy interest is implicated by the seizure of an item whose identity is already plainly known through the officer's sense of touch." *Carmouche*, 10 S.W.3d at 330. After recognizing this "plain feel" exception, the *Dickerson* court concluded that the seizure involved was constitutionally invalid because the officer did not immediately recognize as cocaine a lump he felt in the suspect's pocket. *Id*. at 377-78. It was only through continued exploration of the suspect's pocket that the officer was able to determine the illegal nature of the lump. *Id.* Thus, for a search to pass constitutional muster under *Dickerson*, there must be some evidence upon which to conclude that the incriminating nature of the contraband was immediately apparent to the searching officer. *In the Matter of L.R.*, 975 S.W.2d 656, 658-59 (Tex. App.—San Antonio 1998, no pet.).

This case falls within the "plain feel" exception and is distinguishable from *Dickerson.* Unlike the officer in *Dickerson*, Officer Russell testified that as he searched appellant for weapons it became immediately apparent to him that he felt crack rocks in appellant's left front pocket. Officer Russell, who had an extensive background in narcotics investigations and arrests, had no doubt that the square rocks he felt were crack cocaine. Testifying on direct examination, Officer Russell explained:

> Q: [By Prosecutor]: All right. And as you were patting him down, did you feel anything that got your attention?
>
> A[Officer Russell]: In his left pocket.
>
> Q: Okay. Approximately where did you- - where in the left front pocket?
>
> A: It was in the front left pocket. It was on the very top of the pocket almost sticking out.
>
> Q: And what was it that you felt?

A: I felt a plastic bag with crack rocks in it.

Q: Now, did you know immediately that it was crack cocaine just from touching it on top?

A: Yes, I did.

Q: Had you seen crack rocks before?

A: Yes, I have.

Q: On many occasions or few.

A: Many occasions.

During cross-examination, Officer Russell further testified as follows:

Q: [by defense counsel]: Now, when you felt this plastic bag, you immediately knew that it was rocks of crack cocaine?

A: Yes, I did.

Q: Well, could it not have been aspirin in a plastic bag?

A: Not to the consistency that I felt.

Q: Tell me -- can you describe your tactile sensation?

A: Square rocks that I felt in the plastic bag.

Q: Square rocks. Could it have been something else?

A: No.

Q: Candy?

A: No.

Evidence confiscated as a result of a *Terry* search is not admissible if the record reflects that, when the police officer felt the object, the police officer concluded that the object was not a weapon, but nonetheless continued to examine the object to determine its identity. *Dickerson*, 508 U.S. at 377-78. On the other hand, if the officer discovers contraband other than weapons during a legal *Terry* search, he is not required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *See Michigan v. Long*, 463 U.S. 1032 (1983); *see also Alexander v. State*, 879 S.W.2d 338, 343 (Tex. App.—Houston [14th Dist. 1994], pet. ref'd.).

After reviewing the evidence in the light most favorable to the trial court's ruling, we do not find the trial court's decision to admit the evidence to lie outside the zone of reasonable disagreement. The trial court was free to believe Officer Russell's testimony that

he immediately recognized the rocks he felt to be cocaine, based on the officer's experience and training. Moreover, the record does not reflect that Officer Russell manipulated the objects in appellant's pocket to determine their identity, but that the nature of the substance was immediately apparent to him. Under these circumstances, Officer Russell's confiscation of the crack rocks was justified. *See, e.g., Garcia v. State,* 967 S.W.2d 902, 907 (Tex. App.—Austin 1998, no pet.) (holding that officer could, under "plain feel" exception, seize an object he detected during a protective pat down and immediately recognized as crack pipe)*; Strickland v. State*, 923 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

III. CONCLUSION

We find that the trial court did not abuse its discretion in refusing to suppress evidence of the cocaine seized from appellant. Accordingly, we overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 31, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).