Affirmed and Opinion filed March 28, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01531-CR

JOBER JERVIS MUNOZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 848, 088

O P I N I O N

Appellant Jober Jervis Munoz challenges the trial court's denial of his motion to suppress cocaine. In two points of error, appellant claims he was (1) stopped and detained without reasonable suspicion, and (2) arrested without probable cause. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 2000, Houston Police Narcotics Officer Glen Chance received a tip from a confidential informant he had used in the past. Officer Chance forwarded the tip to

Narcotics Officer Fred Wood, Jr.,who contacted the informant the following day. The informant told Officer Wood that two black Columbian males, one named "Johnny," and the other named "Howard," were cocaine dealers and were staying at the Best Western motel located on West Bellfort. The informant described "Johnny" as having a heavy build, with dark skin, about 5'6" in height, and around 30-35 years old. The informant described "Howard" as being very thin, with short black hair, about 6' in height, and approximately 40 years old. The informant described the vehicle the individuals drove as a blue Jeep-looking vehicle with a white hood.

With this information in hand, Officer Wood went to the Best Western. When he arrived, he saw a vehicle matching the description the informant had provided. Officer Wood spoke with the motel manager who told him two men roughly matching the descriptions the informant had provided were staying in a room that had been rented from May 16, 2000 to June 13, 2000 by a man named Johnny Alvarez. The manager gave Officer Wood Johnny Alvarez's Texas identification number, and also told him that motel records indicated a large number of phone calls had been made from that room. After obtaining a list of the phone calls, Officer Wood noted that two phone numbers appeared quite frequently. Officer Wood had these numbers traced and found that one of the numbers belonged to an apartment leased by a woman named Lashaunda Smith.

Officer Wood went to Smith's apartment complex to verify this information. He learned from the apartment manager that Smith was rarely seen in the area; however, two Columbian males, one heavy and one thin, frequently came and went from the apartment leased to Smith. The apartment manager also informed Officer Wood that appellant had tried to lease the same apartment as Smith, but was denied because of his criminal record. A few days after Smith leased the apartment, she added appellant's name to her lease.

On June 8, 2000, after corroborating most of the information provided by the informant, Officer Wood set up surveillance outside the apartment. He saw Alvarez and

appellant frequently, but never saw anyone who fit the description of Lashaunda Smith. After almost two weeks of surveillance, Officer Wood saw Alvarez leave the apartment with a brown paper bag. Alvarez was acting in a suspicious and anxious manner as he walked to the trunk of a maroon Nissan Maxima. Alvarez opened the trunk, looked around, and placed the brown paper bag in the trunk under clothing. Alvarez then got into the passenger side of the car. Soon thereafter, appellant walked out of the apartment toward the driver's side of the car, but turned and went back into the apartment before coming out a second time. Appellant then got into the car and drove away.

Officer Wood followed the Maxima. He noted that, in contrast to other times he had watched appellant driving, on this occasion appellant was driving more cautiously and well below the speed limit. Aware that appellant did not have a driver's license, Officer Wood called for a patrol car to make a traffic stop. As soon as the patrolman stopped the Maxima, Alvarez attempted to flee but was unsuccessful. Officer Steve Robinson, an interpreter, was called to the scene because appellant spoke very little English. Officer Robinson read appellant his *Miranda* rights in Spanish. Appellant gave the police officers his name, stated that he was from Colombia, and told them he did not have a driver's license. When appellant was asked for his consent to search the car, appellant replied that it was "not his car." In fact, both Alvarez and appellant denied ownership of the Maxima.

The police searched the car and found two rectangular pieces of powdered cocaine wrapped with duct tape. Appellant signed a consent form to search his apartment and gave the officers the key to his apartment.[1] Upon searching appellant's living quarters, the police found: (1) a kilogram of cocaine in a box of clothing in the living room; (2) an ounce of crack cocaine in a kitchen cabinet; (3) scales of the type used to measure cocaine; (4) brown plastic tape and duct tape; and (5) a hydraulic press.

[1] At the motion to suppress hearing, appellant claimed his consent was not voluntary and he was not read *Miranda* rights.

Appellant was indicted for possession with the intent to manufacture or deliver a controlled substance (cocaine). Appellant filed a motion to suppress the fruits of the search. After a full evidentiary hearing, the trial court denied appellant's motion to suppress. Appellant then pleaded guilty with an agreed recommendation from the State. The trial court, in accordance with this agreement, sentenced appellant to twenty years' confinement in the state penitentiary and assessed a $100 fine. In this appeal, appellant challenges the trial court's ruling denying his motion to suppress.

II. JURISDICTION

When the State and the accused enter into a plea bargain and the accused is appealing from denial of a pretrial motion to suppress evidence, the appellate court must apply a two-step inquiry before reaching the merits of the issue. *Gonzales v. State,* 966 S.W.2d 521, 524 (Tex. Crim. App. 1998). The first part of the test is to identify what "fruits" the trial court refused to suppress. *McGlynn v. State,* 704 S.W.2d 18, 21 (Tex. Crim. App. 1982). The second part of the test requires a determination of whether those fruits were somehow used by the State. *Kraft v. State,* 762 S.W.2d 612, 613–14 (Tex. Crim. App. 1988). It must be clear from the appellate record what "fruits" are the subject of the motion to suppress. *Id.* Evidence has been "used" in securing the conviction, and the court should thus entertain the merits of the appeal, so long as the particular evidence the accused maintains should have been suppressed would have in any measure inculpated the accused. *Gonzales,* 966 S.W.2d at 523; *Kraft,* 762 S.W.2d at 615. If either of these prongs is not satisfied, we do not reach the merits of appellant's claim. *Id.*

Here, the first prong of the test is easily determined from the record. The fruit of the search is the crack cocaine recovered from both the car and the apartment. As for the second part of this analysis, the record indicates that in contesting appellant's motion to suppress and obtaining a ruling that the cocaine was admissible in its entirety, the State preserved the option to "use" the cocaine as evidence if the case went to trial. The court's ruling at the

hearing undoubtedly contributed in some measure to the State's leverage in the plea bargaining process. The more relevant evidence appellant knows could be used against him, the more likely is the fact that he would choose to relinquish his constitutional right to a trial in exchange for a favorable punishment recommendation. *See Mckenna v. State,* 780 S.W. 2d 797, 800 (Tex. Crim. App. 1989). Furthermore, the cocaine the police found in the car and the apartment strongly incriminates him on the possession charge. *See McGee v. State,* 23 S.W.3d 156 (Tex. App.—Houston [14th Dist.] 2000, pet. granted). Because this evidence is incriminating, we find that it has been used against appellant; thus, we will entertain the merits of his appeal. *See Kraft,* 762 S.W.2d at 615.

III. STANDARD OF REVIEW

We review the trial court's ruling on a motion to suppress evidence under an abuse of discretion standard. *Long v. State,* 823 S.W.2d 259, 277 (Tex. Crim. App. 1991). A trial court's ruling on a motion to suppress, if supported by the record, will not be overturned. *Hill v. State,* 902 S.W.2d 57, 59 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd). At a suppression hearing, the trial judge is the sole finder of fact. *Id.* at 59. The trial judge is free to believe or disbelieve any or all of the evidence presented. *Romero v. State,* 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

In reviewing a trial court's ruling on a motion to suppress, we afford almost total deference to the trial court's determination of the historical facts the record supports, especially when the trial court's findings turn on evaluating a witness's credibility and demeanor. *State v. Ross,* 32 S.W.3d 853, 856 (Tex. Crim. App. 2000); *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We afford the same amount of deference to the trial court's ruling on "application of law to fact questions," also known as "mixed questions of law and fact," if resolving those ultimate questions turns on evaluating witness credibility and demeanor. *Ross,* 32 S.W.3d at 856.

In reviewing the trial court's decision on a motion to suppress, we consider *de novo* issues that are purely questions of law, such as whether reasonable suspicion or probable cause existed at the time of the search or seizure. *Guzman,* 955 S.W.2d at 89. If the trial court's ruling is reasonably supported by the record and is correct on any theory of law applicable to the case, we will sustain it upon review. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). This is true even if the decision is correct for reasons totally different from those espoused at the suppression hearing. *Id*.

IV. TRAFFIC STOP AND DETENTION

In his first point of error appellant contends Officer Wood's traffic stop was without reasonable suspicion and violated his rights under both the United States and the Texas Constitutions. Although appellant frames his argument in terms of both the United States and Texas Constitutions, he 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 make no distinction. *See Carmouche v. State*, 10 S.W.3d 323, 326 n.1 (Tex. Crim. App. 2000).

An investigative detention occurs when a police officer, under a display of law enforcement authority, temporarily detains a person for purposes of an investigation. *Johnson v. State*, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995). A law enforcement officer may stop and briefly detain persons suspected of criminal activity on less information than is constitutionally required for probable cause to arrest. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Davis v. State*, 947 S.W.2d 240, 244 (Tex. Crim. App. 1997); *Garza v. State*, 771 S.W.2d 549, 558 (Tex. Crim. App. 1989). However, the officer still must have reasonable suspicion to justify an investigative detention. *Davis*, 947 S.W.2d at 242-43. "Reasonable suspicion" requires that the officer have specific articulable facts that, in light of his experience and personal knowledge, together with rational inferences from those facts, would reasonably warrant the intrusion on the freedom of the detainee for further investigation. *Comer v. State*, 754 S.W.2d 656, 657 (Tex. Crim. App. 1986). These "articulable facts" must create a reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime. *Davis*, 947 S.W.2d at 244.

Whether reasonable suspicion is present is determined under an objective standard. *Terry*, 392 U.S. at 21-22; *Davis*, 947 S.W.2d at 243. The officer making an investigative detention or stop must be able to articulate something more than an unparticularized suspicion or hunch. *Williams v. State*, 621 S.W.2d 609, 612 (Tex. Crim. App. 1981). Reasonable suspicion is based on the totality of the circumstances and is dependent upon the reliability of the information possessed by the police. *Alabama v. White*, 496 U.S. 325, 330 (1990); *Guevara v. State*, 6 S.W.3d 759, 763 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd.).

A confidential informant can provide the requisite reasonable suspicion to justify an investigative detention provided additional facts are present to demonstrate the informant's reliability. *See Carmouche*, 10 S.W.3d at 326 (placing significant emphasis on informant's previous history of providing reliable information in finding warrantless detention justified based upon informant's tip); *State v. Sailo*, 910 S.W.2d 184, 189–90 (Tex. App.—Fort Worth 1996, pet. ref'd.) (stating that an informant's veracity, reliability, and basis of knowledge are highly relevant). In situations involving the police's use of an informant, we consider the informant's reliability in analyzing the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417 (1981) (stating that under the totality of the circumstances, the entire incident must be taken into account.); *see also Woods v. State*, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997). In addition, we consider, as part of the totality of the circumstances, whether an informant's tip contains details relating not only to easily obtainable facts and conditions existing at the time of the tip, but also to future actions of third parties not easily predicted. *Illinois v. Gates*, 462 U.S. 213, 241–46 (1983).

During the suppression hearing, when questioned as to the informant's reliability and credibility, Officer Wood testified that Officer Chance had dealt with the informant for approximately two years and always found the information the informant provided to be reliable and accurate. There is nothing in the record to suggest that Officer Wood had any reason to doubt the informant's reliability or credibility. In addition, Officer Wood was able to corroborate much of the information the informant provided. In a totality of the circumstances analysis, corroboration by the law enforcement officer necessarily goes to the quality and reliability of the information. *See Sailo*, 910 S.W.2d at 188.

There need only be one objective reason for the stop or detention. *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001). Officer Wood had two reasons. First, based on information provided by a reliable informant and corroborated by the officers (i.e., appellant was at the place the informant had indicated, and he and his car matched the descriptions the

informant had given the police), the officers had "reasonable suspicion" to stop and detain appellant after observing him and Alvarez put a brown paper bag in the car's trunk and drive away. *See Carmouche*, 10 S.W.3d at 328. Second, Officer Wood notified another officer to make a traffic stop because he had reason to believe appellant was driving a motor vehicle without a driver's license, a traffic violation under Texas law. *See* TEX. TRANS. CODE ANN. §§ 521.021, 521.025. Officer Wood's knowledge of this fact was based on the background check he made searching local, state, and national records with appellant's name and his Texas identification number.

Appellant contends that Officer Wood should have checked with the Colombian Embassy to determine whether he was licensed to drive. Appellant argues that police should not be able to detain foreign nationals driving in the country on business or vacation because searches of state and national records do not reveal that they have a license from a domestic jurisdiction. The record does not indicate how long appellant had been in the United States nor does it indicate the purpose of his stay. Thus, even assuming appellant was here on a temporary visa from Colombia, he was required to have a Texas driver's license to drive in Texas. *See* http://www.txdps.state.tx.us/administration/driver_licensing_control.htm (stating that depending on the country, an individual here on temporary visa may have to have a valid Texas license to drive). All records indicated appellant did not have a driver's license. "A peace officer may stop and detain a person operating a motor vehicle to *determine* if the person has a driver's license. *See* TEX. TRANS. CODE ANN. § 521.025(b); *see also McVickers v. State*, 874 S.W.2d 662, 664 (Tex. Crim. App. 1993) (holding that officer may stop and detain person for committing a traffic offense); *Garcia v. State*, 3 S.W.3d 227, 240 (Tex. App.—Houston [14th Dist.] 1999, no pet). If the record shows that the driver's license check was not the sole reason for the detention, the mere asking for a driver's license will not invalidate the stop. *See Faulkner v. State*, 549 S.W.2d 1, 3 (Tex. Crim. App. 1977); *Hall v. State*, 488 S.W.2d 788, 789 (Tex. Crim. App. 1973). On this record, the totality of the

circumstances shows that Officer Wood's warrantless stop and detention of appellant was justified. Accordingly, we overrule appellant's first point of error.

V. PROBABLE CAUSE TO ARREST AND SEARCH

In his second point of error, appellant claims his arrest was without probable cause and violated his rights under the Texas Constitution. We review *de novo* the determination of the existence of probable cause. *Guzman*, 955 S.W.2d at 87.

Article I, section 9 of the Texas Constitution guarantees the right to be secure from unreasonable searches and seizures made without probable cause. 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 the State of Texas shall be admitted against the accused in a criminal case. TEX. CODE CRIM. PROC. ANN. art. 38.23(a).

Generally, an arrest without a valid arrest warrant is unreasonable. *See Wilson v. State*, 621 S.W.2d 799, 803–04 (Tex. Crim. App. 1981). An exception to this rule allows a police officer to arrest a suspect without a warrant when the State shows: (1) the officer had constitutional probable cause, and (2) the arrest falls within an exception listed in Chapter 14 of the Texas Code of Criminal Procedure. *See Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989)).

"A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." TEX. CODE CRIM. PROC. ANN. art. 14.01(b). Thus, an officer may properly arrest without a warrant if facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a prudent man in believing that the arrested person is committing an offense. *Beverly v. State*, 792 S.W.2d 103, 105 (Tex. Crim. App. 1990). A warrantless arrest under Article 14.01(b) is justified when the police officer personally observed behavior that although not overtly criminal, is, when coupled with the officer's prior knowledge, sufficient to establish

probable cause that an offense was being or had been committed. *Lunde v. State*, 736 S.W.2d 665 (Tex. Crim. App. 1987); *see also Joseph v. State*, 3 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *De Jesus v. State*, 917 S.W.2d 458 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

Probable cause to arrest a person can exist based upon a tip from a reliable and credible informant, if the informant's information is highly detailed and, before making the arrest, the officers verify the details given by the informant. *See Draper v. United States*, 358 U.S. 307, 309 (1959) (finding probable cause when informant gave detailed physical description of the defendant, the clothing he was wearing, the bag he was carrying, and his habit of walking fast); *Whaley v. State*, 686 S.W.2d 950, 951 (Tex. Crim. App. 1985) (holding probable cause existed when informant described defendant wearing a white shirt with colored trim and blue jeans, and the bag he was carrying); *Curry v. State*, 965 S.W.2d 32, 34 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (finding probable cause when a detailed description of the defendant and his first name was provided).

The evidence at the hearing must show the informant's reliability and credibility. Evidence as to either the informant's specific veracity or his basis of knowledge is sufficient to show credibility and reliability. *Eisenhauer v. State*, 678 S.W.2d 947, 952 (Tex. Crim. App. 1984). An informant's reliability can be proved by showing the informant has provided truthful information in the past. *Rodriguez*, 838 S.W.2d at 782. An alternative is to corroborate the information through independent investigation. *Id.* Reliability is strengthened if the tip is based on personal observation rather than hearsay and if the tip is given in great detail, showing the informant has a strong basis for his knowledge. *Id*. When an informant has given reliable and credible information in the past, and all of the details of the informant's tip are corroborated except the question whether appellant possessed drugs, the police have probable cause to arrest and search the accused under the "totality of the circumstances" test. *See e.g., Whaley*, 686 S.W.2d at 951.

Based on the facts cited above, the officers had probable cause to believe that appellant had committed or was committing the crime of possession of a controlled substance. *See Jones v. State*, 640 S.W.2d 918, 920 (Tex. Crim. App. 1982) (tip of informant, who had provided true and correct information on two previous occasions and had given highly detailed description of appellant and location of drugs, was sufficient to establish probable cause); *Vasquez v. State*, 699 S.W.2d 294, 295 (Tex. App.—Houston [14th Dist.] 1985, no pet.) (probable cause established by the detailed and comprehensive nature of the informant's tip). The informant had a long track record of reliability and had provided credible and reliable information on several occasions for over two years and provided detailed information on the occasion in question. The police independently corroborated that information by personal observation and investigation.

Furthermore, the fact that Officer Wood conducted surveillance for two weeks following the informant's tip does not make the tip less credible. The amount of delay that will make information stale depends upon the particular facts of the case, including the nature of criminal activity and the type of evidence sought; a mechanical counting of days should not prevail over common sense and reasonableness. *See Hafford v. State*, 989 S.W.2d 439, 440 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd); *Ellis v. State*, 722 S.W.2d 192, 196 (Tex. App.—Dallas 1986, pet ref'd). When the facts indicate activity of a protracted and continuous nature, the passage of time becomes less significant. *See Lockett v. State*, 879 S.W.2d 184, 189 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd.). The criminal activity involved here is narcotics trafficking, an activity of a protracted and continuous nature. *See Rowell v. State*, 14 S.W.3d 806, 809 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 66 S.W.3d 279 (Tex. Crim. App. 2001). Therefore, the fact that Officer Wood watched appellant and his companion for over two weeks before making the stop did not lessen his belief that appellant was in the possession of a controlled substance.

In addition, once Officer Wood confirmed that appellant was driving without a driver's license, he had probable cause to arrest him. *See Synder v. State*, 629 S.W.2d 930, 933 (Tex. Crim. App. 1982); *Brown v. State*, 481 S.W.2d 106, 109 (Tex. Crim. App. 1972). Therefore, under the totality of the circumstances, we find probable cause existed to justify a warrantless arrest of appellant. *See Guzman*, 955 S.W.2d at 90. Moreover, because probable cause existed for appellant's warrantless arrest, the subsequent search of the car was justified. The police are authorized to search all persons they lawfully arrest. *See Chimel v. California*, 395 U.S. 752, 762–63(1969); *see also Turner v. State*, 499 S.W.2d 182 (Tex. Crim. App. 1973) (holding probable cause existed for arrest and search of car when officer observed the driver carrying a bag which he believed to contain contraband based on detailed information given to him). Once a person has been lawfully arrested, his privacy interests must yield, for a reasonable time and to a reasonable extent, to permit the police to search for weapons, means of escape, and evidence. *See Oles v. State*, 993 S.W.2d 103, 107 (Tex. Crim. App. 1999). Furthermore, a law enforcement officer may conduct a warrantless search of a motor vehicle if he has probable cause to believe the vehicle contains evidence of a crime. *Carroll v. United States*, 267 U.S. 132, 155–56 (1925); *Powell v. State*, 898 S.W.2d 821, 827 (Tex. Crim. App. 1994); *see also Josey v. State*, 981 S.W.2d 831(Tex. App.—Houston [14th Dist.] 1998, n.p.h.) (holding that warrantless search of a vehicle based upon probable cause, even in the absence of exigent circumstances, is lawful under article I, section 9 of the Texas Constitution).

In any event, appellant does not have standing to challenge the search of the vehicle. The right to challenge the lawfulness of a search is limited to persons with standing – that is, to those who have a reasonable expectation of privacy in the area searched. *See Goehing v. State*, 627 S.W.2d 159, 164 (Tex. Crim. App. [Panel Op.] 1982). The defendant has the burden to establish standing to object to a search. *State v. Klima*, 934 S.W.2d 109, 110 (Tex. Crim. App. 1996). We review standing *de novo*, as it is a question of law. *State v. Johnson*,

896 S.W.2d 277, 285 (Tex. App.—Houston [1st Dist.]1995), *aff'd*, 939 S.W.2d 586 (Tex. Crim. App. 1996).

Appellant, at the time of the search and again during the motion to suppress hearing, denied that he owned the car and claimed that it must have been Alvarez's car. Although it is not apparent who owned the Maxima appellant and Alvarez were driving, appellant unequivocally denied ownership of the car and presented no evidence that he had a reasonable expectation of privacy in the car or the property seized from its trunk. Therefore, appellant lacked any standing to challenge the search of the Maxima. *See State v. Allen,* 53 S.W. 3d 731 (Tex. App.—Houston [1st Dist.] 2001, n. pet. h.).

As to the police's search of the apartment, appellant consented to this search. Consent to search is an established exception to a search without a warrant. *See Davis v. United States*, 328 U.S. 582, 593(1946). To rely on this exception, however, that consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). "When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248. "Unless a person is unconscious or incapacitated, all statements made could be considered voluntary in the sense of representing a choice of alternatives." *Id.* at 223–24.

In determining whether a defendant's consent was voluntary, the State is required to prove the voluntariness of consent by clear and convincing evidence. *State v. Ibarra*, 953 S.W.2d 242, 243 (Tex. Crim. App. 1997). The trial court must look at the totality of the circumstances surrounding the statement of consent in order to determine whether consent was given voluntarily. *Lackey v. State*, 638 S.W.2d 439, 447 (Tex. Crim. App. 1982).

The record indicates with clear and convincing evidence that appellant's consent to the search of the apartment was voluntary. After hearing his *Miranda* rights read in Spanish,

appellant indicated he understood them. Officer Robinson explained the consent form in Spanish and informed appellant that he had the right to refuse to give consent. Immediately thereafter, appellant voluntarily signed the consent form and gave the officers the key to the apartment. There is no evidence that appellant's consent was tainted by any threats or coercion; instead, it was freely and voluntarily given. *See Maixer v. State*, 753 S.W.2d 151, 156 (Tex. Crim. App. 1988) (finding that the shorter the time between the arrest and appellant's statements, the more likely that the consent was not tainted by police misconduct).

Under the totality of the circumstances we find (1) probable cause existed for appellant's warrantless arrest; (2) the search of the car was justified as a search incident to an arrest and because appellant lacks standing to challenge the search; and (3) appellant voluntarily consented to the search of the apartment. We overrule appellant's second point of error and find the trial court did not abuse its discretion in denying appellant's motion to suppress.

Having found no error, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed March 28, 2002.

Panel consists of Chief Justice Brister and Justices Anderson and Frost.

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