Affirmed and Opinion filed March 28, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00252-CR

FLOYD EDWARD FRANKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 862,071

O P I N I O N

Appellant, Floyd Edward Franks, was convicted of possession of a controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon Supp. 2002). In two points of error, appellant claims the trial court erred in (1) denying his motion to suppress and (2) denying his motion for mistrial based on jury misconduct. We affirm.

Background and Procedural History

On August 22, 2000, a store owner called the police around 7:45 a.m. to report a young black male selling drugs from a car parked in front of his store. Officer Roy

Thompson of the Houston Police Department responded to the call but found no one matching the description. The store owner stated the man had left but would probably return. Officer Thompson returned to the scene around 10 a.m., saw two black males near the front of the store, and got out of his patrol car to speak with them. Thompson testified that as he approached them, appellant reached into his right front pocket and threw an object to the ground. Thompson retrieved the object and saw that it was a matchbox containing what appeared to him to be numerous pieces of crack cocaine. Appellant was arrested and charged with possession of a controlled substance.

During the guilt-innocence phase of appellant's trial, a juror found a cartoon in a newspaper and showed it to some of the other jurors. The cartoon depicted a judge sentencing a defendant and stating "I sentence you to 25 years. However, with good behavior you should be out in time for lunch." The jury later found appellant guilty and assessed punishment at 50 years' confinement. This appeal followed.

Motion to Suppress

In his first point of error, appellant claims the trial court abused its discretion when it denied his motion to suppress evidence for lack of probable cause. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 2002). Generally, we review a trial court's denial of a motion to suppress under an abuse of discretion standard. *Oles v. State*, 993 S .W.2d 103, 106 (Tex. Crim. App. 1999). This court gives almost total deference to the trial court's determination of historical facts that involve a judge's evaluation of the credibility and demeanor of witnesses. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We view the evidence in the light most favorable to the trial court's ruling on mixed questions of law and fact. *See id.* However, a trial court's determination on a mixed question of law and fact, such as whether the officer had probable cause, should be reviewed *de novo* on appeal if its resolution does not turn on an evaluation of credibility and demeanor. *See id*.

In this case, Officer Thompson testified he was called to the scene to investigate a

complaint that a young black male was selling drugs in front of a store. Once Thompson arrived, he was informed that the suspect had left but would probably return. Officer Thompson later saw appellant and another man near the front of the store. During the hearing on the motion to suppress, Officer Thompson testified that appellant fit the earlier description of the suspect. Officer Thompson further testified that he drove up, exited his police car and walked toward appellant.

It is well established that officers may approach a citizen and ask questions. *See Florida v. Royer*, 460 U.S. 491, 497–98, 103 S. Ct. 1319, 1323-1324 (1983) (finding an officer may approach an individual and ask questions so long as the individual is free to ignore the officer and walk away); *see also Johnson v. State*, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995) (same). Such a circumstance, as in this case, is considered an "encounter" and not a "seizure." *See Johnson*, 912 S.W.2d at 235.

In addition, the officer testified he did not indicate to the two men that they were under arrest or not free to leave, and he did not attempt to physically restrain them. He testified that as he approached, appellant threw a small object to the ground about two feet away. Officer Thompson asked appellant and the other man to step away from the object. He then retrieved it and discovered that it was a matchbox containing what appeared to be numerous rocks of crack cocaine.

Abandonment of property occurs if a defendant intended to abandon the property and his decision to abandon it was not due to police misconduct. *McDuff v. State*, 939 S.W.2d 607, 616 (Tex. Crim. App. 1997); *see Armstrong v. State*, 966 S.W.2d 150, 151-52 (Tex. App.—Austin 1998, no pet.) (finding abandonment when a party threw a napkin filled with cocaine to the ground as officers approached to question him). When police take possession of property abandoned independent of police misconduct there is no seizure under the Fourth Amendment. *See McDuff*, 939 S.W.2d at 616. We find there was no police misconduct in this case and that Officer Thompson properly retrieved abandoned property. Accordingly, appellant's first point of error is overruled.

Juror Misconduct

In his second point of error, appellant claims the trial court erred in not granting his motion for mistrial based on jury misconduct. We review a trial court's denial of a mistrial under an abuse of discretion standard. *Trevino v. State*, 991 S.W.2d 849, 851 (Tex. Crim. App. 1999). Whether juror misconduct occurred and caused injury is a question of fact for the trial court. *Paton v. State*, 841 S.W.2d 886, 888 (Tex. App.—Corpus Christi 1992, no pet.). Appellant has the burden of proving the allegation of juror misconduct. *Hughes v. State*, 24 S.W.3d 833, 842 (Tex. Crim. App. 2000).

During the guilt-innocence phase of trial, a juror brought a Greensheet newspaper into the jury room. The newspaper contained a cartoon depicting a judge imposing a sentence, stating: "I sentence you to 25 years. However, with good behavior you should be out in time for lunch." The jurors explained that it was passed around as a "joke"[1] and the bailiff was asked by one of the jurors to show the cartoon to the judge. At the end of trial, after the incident was brought to the court's attention, the judge questioned each juror individually as to whether the cartoon influenced their decision. In fact, not all the jurors were aware of the cartoon or it's contents, but all replied that the cartoon was never mentioned during either the guilt/innocence or punishment deliberations. Further, each juror was polled and each replied that the cartoon did not influence his or her decision as to guilt or as to the assessment of punishment. Accordingly, appellant has failed to meet his burden of proving juror misconduct and his second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

[1] We note appellant's distress that some of the jurors found this cartoon humorous; while we may agree the timing was poor and, given the circumstances, the "joke" was in poor taste, there is nothing in the record to suggest the jurors allowed it to influence their decision.

Judgment rendered and Opinion filed March 28, 2002.

Panel consists of Justices Yates, Edelman, and Guzman. (Edelman, J. concurring in result only)

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