Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00684-CR

COREY SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 834,796

O P I N I O N

Appellant, Corey Smith, was convicted by a jury of the felony offense of possession of between four and two hundred grams of cocaine. The trial court assessed punishment at thirty years confinement in the Institutional Division of the Texas Department of Criminal Justice. In two issues, appellant claims the trial court erred: (1) in failing to include in its charge an instruction on a lesser included offense, and (2) in denying his motion to suppress evidence. We affirm.

The record reflects two off-duty police officers were providing security services for an apartment complex when they observed appellant and his two companions in the rear parking lot. Although the officers had been providing security for the complex for more than a year, they did not recognize the men. The officers grew more suspicious when they saw the men cup their hands around their eyes and begin

peering through the windows of a parked car. Because there had been problems in the area with car burglaries, narcotics, and criminal trespass, the officers approached the men and asked if they lived in the complex. All three men ran in different directions; one officer pursued appellant.

As appellant fled, he removed a bag from his pocket. When appellant tripped and fell, the bag tore and the contents, later identified as cocaine, spilled upon the ground. Appellant then tried to crawl under a car, stuffed the plastic bag in his mouth, and began throwing chunks of crack cocaine under the car. After the officer had handcuffed appellant, he immediately began to recover cocaine from the ground where appellant was arrested. Cocaine residue was found in the torn bag and on appellant's clothing.

In his first issue for review, appellant contends the trial court erred in failing to include an instruction on the lesser included offense of possession of less than one gram of a controlled substance. Before a charge on a lesser included offense is warranted, the offense must be included within the proof necessary to establish the offense charged, and some evidence must exist in the record that would permit a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser offense. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994); *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). Here, the first prong of the test is satisfied because the offense of possession of less than one gram of cocaine is included within the proof necessary to establish the offense of possession of between four and two hundred grams of cocaine. The record, however, contains no evidence satisfying the second prong, i.e., there is no evidence to suggest that if appellant is guilty, he is guilty only of the lesser offense.

The State introduced the following exhibits at trial: (1) three evidence baggies containing 1.1 grams, 3.6 grams, and 31.9 grams of cocaine respectively which represented the cocaine recovered by police from three specific areas on the ground where appellant fled, fell, and attempted to dispose of the contraband; (2) the plastic baggie containing cocaine residue that tore and which appellant put in his mouth; and (3) the sweatshirt appellant was wearing at the time of his arrest which also had traces of cocaine residue. Appellant would be entitled to an instruction on the lesser offense if there was some evidence that he possessed only the plastic bag or the sweatshirt. *See Bignall*, 887 S.W.2d at 23 (holding that anything more than a scintilla of evidence is sufficient to entitle defendant to a lesser charge). However, the appellant and his companions ran in different directions; appellant was the only suspect to be captured in the area

from which the aforementioned cocaine was recovered. No evidence was presented to suggest the cocaine came from another source or that it did not belong to appellant.

Appellant also suggests he was entitled to an instruction on the lesser offense because the chemist who weighed and tested the cocaine used random samples from the baggies to identify the contraband as cocaine. Testing substances by random sampling goes to the weight of the evidence. *Gabriel v. State*, 900 S.W.2d 721, 722 (Tex. Crim. App. 1995); *Enriquez v. State*, 21 S.W.3d 277, 278 (Tex. Crim. App. 2000). Here, the State's chemist testified that she performed screening tests, chemical tests, and gas chromatography analysis on a sample from each of the bags of cocaine. All the tests indicated the substance was cocaine. Chemical analysis of contraband by testing representative samples does not, by itself, constitute evidence that the defendant possessed a lesser quantity of the contraband. The contentions raised in appellant's first issue for review are overruled.

In his second issue, appellant contends the trial court erred in denying his motion to suppress the cocaine. In reviewing a trial court's ruling on a motion to suppress, we apply a bifurcated standard, giving almost total deference to the trial court's determination of historical facts and reviewing *de novo* the court's application of the law of search and seizure. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Appellant asserts the police had no reasonable suspicion or probable cause to justify his detention or arrest.

To justify a temporary detention, the officer must have specific articulable facts which, in light of his experience and personal knowledge, together with inferences from those facts, would reasonably warrant the intrusion on the freedom of the individual stopped for further investigation. *Moody v. State*, 778 S.W.2d 108, 110 (Tex. App.—Houston [14th Dist.] 1989, no writ), citing *Terry v. Ohio*, 392 U.S. 1 (1968). In considering whether a stop is warranted the totality of the circumstances must be considered. *Carmouche*, 10 S.W.3d at 328, citing *United States v. Cortez*, 449 U.S. 411, 417 (1981). Here, two experienced officers observed appellant and two other men looking into the windows of a car in an area where there had been incidents involving criminal trespass, narcotics and car burglaries. The officers had provided security at the complex for over a year and did not recognize any of the men. When asked if they lived at the complex, the men fled. We find this conduct was reasonably suspicious and authorized the police to detain the men to establish their identities and preserve the status quo until the nature of their

activities could be determined. As appellant ran, he attempted to discard a baggie and otherwise dispose of what appeared to be illegal contraband. Thus, the police officer had probable cause to believe appellant had committed a felony in his presence, i.e., that he was in possession of crack cocaine.

Considering the totality of the circumstances, we find the officers had reasonable grounds to initially detain, and then later to arrest, appellant. Accordingly, the motion to suppress was properly denied. Appellant's second issue is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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