Affirmed and Majority and Dissenting Opinions filed September 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00310-CR

FRANK LOUIS GULLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 823,973

M A J O R I T Y O P I N I O N

Frank Louis Gulley appeals a conviction for possession with intent to deliver a controlled substance on the ground that the trial court erred in denying appellant's motion to suppress. Appellant sought to suppress evidence that he contends was obtained as a result of an illegal stop and search. However, because appellant failed to sustain his initial burden to adduce evidence showing that the stop and search in question were conducted without a

warrant, his point of error presents nothing for our review.[1] Accordingly, appellant's point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[2]

Do Not Publish — TEX. R. APP. P. 47.3(b).

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1 *See Russell v. State*, 717 S.W.2d 7, 9-10 (Tex. Crim. App. 1986); *Hogan v. State*, 954 S.W.2d 875, 877-78 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd); *Highwarden, v. State*, 846 S.W.2d 479, 481 (Tex. App.—Houston [14th Dist.] 1993), *pet. dism'd, improvidently granted*, 871 S.W.2d 726, 726 (Tex. Crim. App. 1994) (noting that discretionary review had been granted (improvidently), among other grounds, on appellant's failure to produce sufficient evidence that she was arrested without a warrant).

2 Senior Chief Justice Paul C. Murphy sitting by assignment.

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D I S S E N T I N G O P I N I O N

Appellant appeals the trial court's denial of his motion to suppress. For the following reasons, I would sustain the point of error. Because the majority does not, I respectfully dissent.

On September 20, 1999, Officers Coffman and Pederson were on patrol when they observed a vehicle that did not have a rear license plate light. Upon further investigation, it was determined that the plates of that vehicle showed possible city traffic warrants. Moreover, Officers Coffman and Pederson observed that the driver of the vehicle failed to signal for a right turn. Officers Coffman and Pederson then initiated a traffic stop. Prior to coming to a complete stop, Officers Coffman and Pederson testified that they saw a "small rock" being thrown out of the driver's door. Officer Coffman approached the passenger's door where appellant was seated, and asked appellant to get out of the vehicle. As appellant was exiting the vehicle, appellant appeared to attempt to get by Officer Coffman. Officer Coffman reacted by restraining appellant against the vehicle, and conducting a pat down search for weapons. In the pocket of appellant's shorts, Officer Coffman felt a bulge, which the officer believed to be a pill bottle. Officer Coffman removed the pill bottle from appellant's pocket and found inside the bottle what appeared to be rocks of cocaine. A field test of the substance revealed that it was, in fact, cocaine.

As the movant in a motion to suppress evidence, a defendant must produce evidence that defeats the presumption of proper police conduct and therefore shifts the burden of proof to the State. *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986); *McGee v. State*, 23 S.W.3d 156, 161 (Tex. App.—Houston [14th Dist.] 2000, State's pet. granted, appellant's pet. ref'd). Once the defendant establishes that a warrantless search or seizure occurred, the burden shifts to the State either to produce evidence of a warrant or to prove the reasonableness of the search or seizure pursuant to one of the recognized exceptions to the warrant requirement. *Russell*, 717 S.W.2d at 9; *McGee*, 23 S.W.3d at 161. Although not raised by the State, the majority would require appellant to have affirmatively negated the existence of a search warrant. *See Badgett v. State*, 7 S.W.3d 645, 647–48 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Telshow v. State*, 964 S.W.2d 303, 307 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (requiring affirmative evidence showing that there was no warrant). I disagree.

The Court of Criminal Appeals in *Russell v. State*, in considering the threshold question of whether the defendant negated the existence of a warrant, held "[f]rom Officer Graves' testimony it is obvious that no warrant was obtained." 717 S.W.2d at 10. In examining this testimony, which the Court of Criminal Appeals attached as an appendix, Officer Graves is never directly asked whether he had a warrant, nor does he ever volunteer that he acted without a warrant. *See Russell*, 717 S.W.2d 11–13. Accordingly, the circumstances surrounding the search or seizure can necessarily negate the existence of a warrant, thereby satisfying a defendant's initial burden of establishing that a search or seizure occurred without a warrant. *See Russell*, 717 S.W.2d at 10; *McGee*, 23 S.W.3d at 162 (holding that the record clearly established that appellant's arrest was warrantless).

The majority holds that because appellant did not specifically negate the existence of a warrant, he has failed to meet his initial burden. Here, it is clear from the record that appellant's arrest was warrantless. The circumstances of appellant's arrest clearly negate the existence of a search warrant. *See McGee*, 23 S.W.3d at 162. Having determined that appellant has satisfied his initial burden of proving that a search was conducted without a warrant, I must now determine whether the search was valid pursuant to one of the recognized exceptions to the warrant requirement.

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) authorizes an officer, without probable cause for arrest, to conduct a limited search of the detainee's outer clothing for weapons when specific and articulable facts lead him to reasonably conclude that the person with whom he is dealing is armed and dangerous. 392 U.S. at 21, 88 S.Ct. at 1879-81. The purpose of a limited search for weapons following an investigative stop is not to discover evidence of a crime, but to allow the officer to pursue the investigation without fear of violence. *Davis v. State*, 829 S.W.2d 218, 220 (Tex. Crim. App.1992). "If in the course of a pat-down frisk the officer satisfies himself that the suspect has no [such] weapons, the officer has no valid reason to further invade the suspect's right to be free of police intrusion absent probable cause to arrest." *Lippert v. State*, 664 S.W.2d 712, 721

(Tex. Crim. App.1984). However, the United States Supreme Court has held that "[i]f a 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[.]" *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334, 346 (1993); Not only must the item's identity be immediately apparent, but also its incriminating nature. *McAllister v. State*, 34 S.W.3d 346, 352 (Tex. App.—Texarkana 2000, pet. ref'd).

Officer Coffman testified on direct examination to the following:

> Q. What happened next?
>
> A. I went to pat him down, pat Mr. Gulley down. In his right front pocket, there was a bulge – pants pocket there was a bulge. I grabbed hold of it, it felt to me like a pill bottle. At which time I shook it and it rattled.

Additionally, while being cross examined, Officer Coffman testified:

> Q. When you pat him down, from your testimony, you feel a bottle in his right front short's pocket?
>
> A. What I thought was a pill bottle, that is correct.
>
> Q. You didn't really know what it was?
>
> A. No.
>
> Q. But to you it seemed like a prescription pill bottle?
>
> A. Yes.
>
> Q. Wasn't a weapon?
>
> A. I couldn't tell if it was a weapon.
>
> Q. In your testimony you said it was a prescription bottle?
>
> A. I felt that it was.

Q. Now, you tell me if it's illegal to have a prescription bottle in your pocket?

A. No, sir.

* * *

Q. You didn't feel any contraband when you patted him down?

A. That's correct.

Q. You didn't feel a piece of rock cocaine in his pocket?

A. That's correct.

Officer Coffman's testimony not only reveals that he didn't believe the bulge in appellant's pocket was a weapon, it was also not immediately apparent to Officer Coffman that the bulge was contraband. Accordingly, Officer Coffman was unjustified in reaching into appellant's pocket, removing the pill bottle, and testing its contents. I would conclude that the trial court abused its discretion in not granting appellant's motion to suppress.

Under the harmless error analysis, this court will reverse the conviction unless we determine, beyond a reasonable doubt, that the error made no contribution to the conviction. TEX. R. APP. P. 44.2(a). Because there is no evidence of possession of cocaine other than the improperly admitted cocaine, I cannot say beyond a reasonable doubt that it did not contribute to his conviction. For these reasons, I would sustain appellant's sole point of error. Because the majority does not, I dissent.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[***]

Do Not Publish TEX. R. APP. P. 47.3(b).

[***] Senior Chief Justice Paul C. Murphy sitting by assignment.