Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-96-01460-CR

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AMBROCIO PINA, III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 730,178

O P I N I O N

Over his plea of not guilty, a jury found Appellant, Ambrocio Pina, III,[1] guilty of intoxication manslaughter. *See* TEX. PEN. CODE ANN. § 49.08 (Vernon 1994). The jury assessed punishment at six years imprisonment in the Texas Department of Criminal Justice, Institutional Division. Pina appeals on four issues. We affirm the trial court judgment.

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[1] The Judgment of the trial court reflects that appellant's name is Ambrocio Pina. The Notice of Appeal, however, shows appellant's name as Ambrocio *Pena*. This Court follows the spelling on the trial court's judgment.

THE CONTROVERSY

On December 14, 1995, appellant, while intoxicated, ran a red light and drove his truck through the intersection of Pierce and Brazos streets in Houston, Texas. His truck slammed into a car driven by Joe Orlando. A Houston police officer, Alfred Alaniz, was one of the first officers to arrive at the scene. He testified that he believed appellant was drunk at the time of the accident. He also believed Orlando would die as a result of his injuries. Both Orlando and appellant were transported to Ben Taub Hospital, as a result of the injuries sustained in the accident..

Alaniz testified that he considered appellant to be under arrest for driving while intoxicated and that he went to appellant's hospital room in order to maintain custody of him. While in appellant's hospital room, Alaniz requested a blood sample from appellant. Alaniz read appellant the consent form, but received no verbal response from appellant. The only response Alaniz received is that appellant "just opened up his arm" for the nurse to draw the blood. The nurse drew the blood and gave Alaniz a vial of it.

Once Alaniz obtained the blood from appellant, he met with his supervisor, Sergeant Bradshaw, who advised Alaniz that he had decided to prepare an arrest warrant for appellant at a later date. Thus, when appellant was released from the hospital, he was not arrested until one month later. As a result of the accident, Orlando died. Appellant was convicted of intoxication manslaughter. Appellant appeals his conviction on four issues presented.

DISCUSSION AND HOLDINGS

In his first issue, appellant contends the trial court committed reversible error by allowing into evidence the blood alcohol test results over his timely objection. In his second issue presented, appellant contends the trial court committed reversible error by allowing into evidence the blood alcohol test results because appellant was not under arrest when the blood was drawn. And, in his third issue, appellant contends the trial court committed reversible

error by allowing the blood alcohol results into evidence when it was not shown that he refused to give a blood sample pursuant to 724.012 of the Texas Transportation Code.

The Texas Transportation Code provides the conditions of when a blood or breath specimen can be taken. It reads as follows:

> (a) One or more specimens of a person's breath or blood may be taken if the person is arrested and at the request of a peace officer having reasonable grounds to believe the person:
>
> (1) while intoxicated was operating a motor vehicle in a public place, or a watercraft: or
>
> (2) was in violation of Section 106.041, Alcoholic Beverage Code.
>
> (b) A peace officer shall require the taking of a specimen of the person's breath or blood if:
>
> (1) the officer arrests the person for an offense under Chapter 49, Penal Code, involving the operation of a motor vehicle or a watercraft;
>
> (2) the person was the operator of a motor vehicle or a watercraft involved in an accident that the officer reasonably believes occurred as a result of the offense;
>
> (3) at the time of the arrest the officer reasonably believes that a person has died or will die as a direct result of the accident; and
>
> (4) the person refuses the officer's request to submit to the taking of a specimen voluntarily.
>
> (c) The peace officer shall designate the type of specimen to be taken.

TEX. TRANSP. CODE ANN. § 724.012 (Vernon 1999). The State argues that because appellant was under arrest at the time the blood was taken, this statute controls in this case. We disagree because appellant was not under arrest at the time his blood was drawn.

An arrest occurs at the moment a person's freedom is restricted or restrained. The test to determine whether a person is under arrest is whether, considering all the circumstances, a reasonable person, innocent of any crime, would have considered himself under arrest, and not whether the defendant, with his subjective knowledge and fears, would have considered himself under arrest. *See Dancy v. State*, 728 S.W.2d 772, 778 (Tex. Crim. App. 1987). A

police officer's opinion that an arrest has or has not occurred is a factor to be considered, but is not determinative. *See Hoag v. State*, 728 S.W.2d 375, 378-79 (Tex. Crim. App. 1987); *Nottingham v. State*, 908 S.W.2d 585, 588 (Tex. App.—Austin 1995, no pet.).

In the present case, we find that there is insufficient evidence for us to conclude that appellant was under arrest at the time his blood was taken. While Alaniz testified that he thought appellant was under arrest, this is only one factor in the determination as to whether a person is under arrest. Based on this record, we believe a reasonable person could conclude that he was not under arrest at the time the blood was drawn. Alaniz never told appellant he was under arrest. He never read appellant his rights. He never handcuffed appellant to the bed, nor told him not to leave the hospital room. .

An earlier case, *Bell v. State*, 881 S.W.2d 794, 796-99 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd), out of this court, shows the deficiencies in the present case as to whether appellant was arrested. The facts of *Bell* are almost identical to the facts of appellant's case. However, in *Bell*, the police officer read the defendant the consent form and twice told him he was under arrest for driving while intoxicated before taking a sample of blood. *See id.* at 800. Here, while there is evidence that Alaniz read appellant a consent form, there is no evidence that Alaniz told appellant that he was under arrest. Without such a communication or some other form of evidence, we find a reasonable person could conclude that he was not under arrest. Because appellant was not under arrest at the time his blood was drawn, section 724.012 of the Texas Transportation Code is inapplicable in this case. Appellant argues that without appellant's arrest, any action by the State was an illegal search and seizure by the State. We disagree.

Both the United States and Texas constitutions protect citizens from unreasonable searches and seizures. *See Kolb v. State,* 532 S.W.2d 87, 89 (Tex. Crim. App. 1976). A warrantless search or seizure is per se unreasonable, subject to a few well-defined and limited exceptions. *See United States v. Karo*, 468 U.S. 705, 717, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). One of the specifically established exceptions to the warrant requirement is a search

conducted with consent. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Kolb,* 532 S.W.2d at 89. The burden is on the State to show by clear and convincing evidence that the consent was freely and voluntarily given. *See State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997); *Meeks v. State*, 692 S.W.2d 504, 509 (Tex. Crim. App. 1985). "The burden requires the prosecution to show the consent given was positive and unequivocal and there must not be duress or coercion, actual or implied." *Meeks*, 692 S.W.2d at 509.

Although appellant argues he did not consent to the search, he cannot point to any evidence in the record to support this argument. Nor, does appellant claim he was coerced into giving the blood. The record reflects that appellant, who was not under arrest, was approached by a police officer who was investigating the accident. The police officer asked appellant to give a blood sample and read him the consent form. Although appellant did not sign the consent form, he immediately opened his arm to allow the nurse access to his vein to draw the blood. In addition, there is no evidence in the record that appellant was under duress or somehow coerced into consenting to the drawing of his blood. Thus, based on the evidence, we believe appellant by his actions consented to the drawing of his blood, thus waiving his constitutional right to be free from an unreasonable search and seizure. We, therefore, overrule appellant's first, second, and third issues presented.

In his fourth issue, appellant contends the trial court erred by allowing a medical examiner to testify about the autopsy of the victim without that examiner having any personal knowledge of the autopsy. Appellant argues that his constitutional right to confront and cross examine the doctor who actually conducted the autopsy and prepared the report was violated. The autopsy report was prepared by Doctor Nancy Krohn, of the medical examiner's office; however, another medical examiner, Tommy Brown, testified at trial. Appellant's argument appears to be that this autopsy report did not meet the evidentiary requirements of a hearsay exception, because the doctor who conducted the autopsy and prepared the report was not present at the trial. We disagree with appellant's argument, for two reasons.

First, the case law clearly states that in situations like this, autopsy reports are admissible into evidence under the hearsay exception for public records. *See Butler v. State*, 872 S.W2d 227, 237-38 (Tex. Crim. App. 1994); *Garcia v. State*, 868 S.W.2d 337, 341-42 (Tex. Crim. App. 1993). Thus, the trial court did not err in allowing the autopsy report into evidence.

Second, appellant wanted to cross examine Krohn, who prepared the autopsy report, to show that it was possible that the wreck did not kill the victim but rather that he died as a result of a heart attack. The report stated that the victim, Orlando, died as a result of a crushed abdomen caused by the car wreck. The autopsy showed that Orlando had an enlarged heart and severe blockage of his arteries. Appellant wanted to show that Orlando's bad heart was the potential cause of death. Appellant did not need to cross-examine Krohn to get this evidence into the record. This same evidence was entered into the record through Brown's testimony. After repeated questions about the condition of Orlando's heart, Brown conceded that the bad heart could have caused Orlando's death. Thus, the trial court did not err by allowing Brown to testify about the autopsy report Krohn prepared.

Although we do not believe the trial court erred, if it did err, such an error would involve a constitutional right and would be subject to a harmless error analysis. In a Rule 44.2(a) harmless-error analysis, this court must reverse the trial court judgment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction. *See* TEX. R. APP. P. 44.2(a). In this case, appellant wanted evidence of an alternate cause of death to be brought before the jury. He wanted to use Krohn to bring forth such evidence. However, he was able to bring forth this evidence through Brown's testimony. Thus, appellant accomplished his goal. We believe, beyond a reasonable doubt, any error in allowing Brown to testify about Krohn's report was harmless.

We, therefore, overrule appellant's fourth issue presented and affirm the judgment of the trial court.

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Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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