Affirmed and Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00305-CR

AARON ALBERTO BARRIOS-QUIROZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 769,407

O P I N I O N

Appellant was charged by indictment with the offense of possession of between 50 and 2,000 pounds of marijuana. After the trial court denied his pretrial motion to suppress, appellant pled no contest to the charge and agreed to the prosecutor's recommendation for punishment. Complying with the plea-bargain agreement, the trial court accepted appellant's plea and assessed punishment of four years confinement at the Texas Department of Corrections, Institutional Division. Appellant brings this appeal complaining of the trial court's error in denying his motion to suppress. We affirm.

Jurisdiction of Appeal

Initially, the State argues this court has no jurisdiction over appellant's appeal because appellant's notice of appeal did not comply with Appellate Rule 25.2(b)(3). We disagree. Appellate Rule 25.2(b)(3) states the following:

> (3) But if the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under Code of Criminal Procedure article 1.15, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must:
>
> (A) specify that the appeal is for a jurisdictional defect;
>
> (B) specify that the substance of the appeal was raised by written motion and ruled on before trial; or
>
> (C) state that the trial court granted permission to appeal.

TEX. R. APP. P. 25.2(b)(3).

Appellant's general notice of appeal stated:

> COMES NOW THE DEFENDANT AARON BARRIOS-QUIROZ, on this the 10th day of March, A.D. 1998, and within thirty days of sentence having been pronounced in the above numbered and styled cause and, excepting to the ruling of the court, filed this written notice of appeal of said conviction to the Court of Appeals pursuant to Texas Rules of Appellate Procedure 40(b)(1).

Appellant has not amended his notice of appeal to meet Appellate Rule 25.2(b)(3)'s simple requirements. *See* TEX. R. APP. P. 25.2(d); . Consequently, appellant's general notice of appeal does not meet Rule 25.2(b)(3)'s requirement of specifying "that the substance of the appeal was raised by written motion and ruled on before trial." *See* TEX. R. APP. P. 25.2(b)(3)(B).

This Court recently issued an *en banc* opinion discussing the issue before us. *See Gomes v. State*, — S.W.2d —, 1999 WL 459537 (Tex. App.–Houston [14th Dist.] July 8, 1999, no pet. h.) (en banc) (Wittig, J.). We determined in *Gomes* this Court had jurisdiction because the record revealed "the substance of Appellant's appeal was raised by written motion and ruled on before trial, in substantial compliance with [Appellate] Rule 25.2(b)(3)(B)." *Id* at *2; *see* TEX. R. APP. P. 25.2(b)(3)(B). In *Gomes*, the defendant filed a general notice of appeal that did not comply with Rule 25.2(b)(3). But, Gomes' notice of appeal contained a "handwritten notation on the upper, right-hand corner, indicating that

the appeal is limited to the trial court's ruling which denied Appellant's motion to suppress." *Id.* at *2. Also, Gomes' judgment of conviction, signed by the trial court, stated the notice of appeal was filed on a motion to suppress.

In the instant case, we have jurisdiction to review appellant's point of error because after reviewing the record, we find the following: (1) a docket sheet entry stating appellant has the right to appeal the motion to suppress; (2) appellant's nolo contendere plea, signed by the trial court, reserving the right to appeal the motion to suppress; and most importantly, (3) the judgment, also signed by the trial court, which states appellant entered the plea bargain expressly reserving his right to appeal the motion to suppress. *See Gomes,* 1999 WL 459537 at *2. Accordingly, appellant substantially complied with Appellate Rule 25.2(b)(3)(B) and we have jurisdiction to consider his sole point of error.[1]

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[1] Several other appellate districts have decided they *do not* have jurisdiction to consider pretrial rulings if an appellant's notice of appeal does not comply with Rule 25.2(b)(3). *See Anthony v. State*, 962 S.W.2d 242, 244 (Tex. App.–Austin 1998, no pet.); *Hulshouser v. State*, 967 S.W.2d 866, 868 (Tex. App.–Fort Worth 1998, pet. ref'd, untimely filed); *Rigsby v. State*, 976 S.W.2d 368, 369 (Tex. App.–Beaumont 1998, no pet.) (per curiam) ("[Appellant] filed a general notice of appeal; he has not specified in his notice any of the three matters set out in Rule 25.2(b)(3)."); *Johnson v. State*, 978 S.W.2d 744, 746 (Tex. App.–Eastland 1998, no pet.); *Vidaurri v. State*, 981 S.W.2d 478,479 (Tex. App.–Amarillo 1998, pet. granted); *Tressler v. State*, 986 S.W.2d 381, 382 (Tex. App.–Waco 1999, no pet.); *Hernandez v. State*, 986 S.W.2d 817, 818-19 (Tex. App.–Austin 1999, pet. ref'd) ("Because [appellant's] notice of appeal does not contain the necessary recital [from Appellate Rule 25.2(b)(3)], she [] cannot appeal the substance of any pretrial ruling."); *Trollinger v. State*, 987 S.W.2d 166, 167 (Tex. App.–Dallas 1999, no pet.); *Brunson v. State*, 995 S.W.2d 709, 711-12 (Tex. App.–San Antonio 1999, no pet. h.); *Sherman v. State*, — S.W.2d —, 1999 WL 442039, No. 05-97-00621-CR (Tex. App.–Dallas July 1, 1999, no pet. h.).

Motion to Suppress

Appellant presented the following issue: Does a trial court err in denying a defendant's written motion to suppress when the facts as stated by the arresting officer fail to establish reasonable suspicion to detain a citizen? We find appellant did not meet the initial burden of proving the police seized him without a warrant.

"When a defendant seeks to suppress evidence because of an illegal arrest that violates the federal or state constitutions, the defendant has the initial burden to produce evidence that defeats the presumption of proper police conduct." *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App.1986); *see Garcia v. State*, 979 S.W.2d 809, 811 (Tex. App.–Houston [14th Dist.] 1998, no pet.); *White v. State*, 871 S.W.2d 833, 835 (Tex. App.–Houston [14th Dist.] 1994, no pet.). The defendant can meet this initial burden by proving that the police seized him without a warrant. *See Garcia*, 979 S.W.2d at 811. "Once a defendant proves that the police seized him without a warrant, the burden of proof then shifts to the State." *Id.*; *see also State v. Hooper*, 842 S.W.2d 817, 822-23 (Tex. App.–El Paso 1992, no pet.) (Barajas, J., concurring opinion) (discussing the respective burdens of proof in a motion to suppress hearing). However, if the defendant does not produce any evidence that the arrest occurred without a warrant, the defendant fails to meet his initial burden and the burden of proof never shifts to the State. *See id.*

On appeal, the State argues appellant has not met *Russell*'s requirement of proving the search was without a warrant. All defendants can meet *Russell*'s minimal burden of proving there was no warrant for the search — by simply asking the officers if they had a warrant for the arrest. *See Hogan v. State*, 954 S.W.2d 875, 877-78 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd); *White*, 871 S.W.2d at 835 (Officers were not asked whether there was a warrant).

In our case, appellant was not given any opportunity to question the officers because, as is this particular trial court's custom, the motion to suppress hearing was held on affidavits. Thus, he could only satisfy the *Russell* burden by using police officer affidavits. Appellant and the State submitted four affidavits to the trial court during the motion to suppress: (1) a police officer, who claimed to have stopped the co-defendant for an arrest warrant from South Houston Police Department; (2) a private investigator;

(3) a co-defendant and (4) appellant. Only the private investigator's affidavit mentioned the absence of a warrant when he stated the clerks of the South Houston Police Department and the South Houston Municipal Courts stated there was no warrant outstanding for the co-defendant.

Appellant's circumstantial evidence of the absence of a warrant is not enough, however, to shift the burden of proof to the State because it does not directly show the absence of a warrant. *But see e.g., Sims v. State*, 980 S.W.2d 538, 541 (Tex. App.–Beaumont 1998, no pet.) (Burgess, J., concurring opinion) (This evidence may be sufficient in other court of appeals districts). As we stated in the following passage from *Telshow v. State*, 964 S.W.2d 303, 307 (Tex. App.–Houston [14th Dist.] 1998, no pet.):

> We do not believe it is asking too much of defense counsel to merely demonstrate, through questions put to a witness, the nonexistence of a warrant at the time of the arrest. *See Russell*, 717 S.W.2d at 9 (noting "defendant must *produce evidence* that defeats the presumption of proper police conduct and therefore shifts the burden of proof to the State") (emphasis added). Error relating to an illegal search or seizure must be based on an affirmative showing, not mere speculation or innuendo. To allow here, as Telshow urges, the burden of proof to shift to the State without the requisite affirmative showing of the absence of a warrant would create a *de facto* exception, based on the totality of the facts at the hearing, to the burden of proof in a hearing on a motion to suppress evidence. In essence, Telshow seeks to shift the initial burden of proof when the testimony at the suppression hearing *circumstantially* demonstrates the defendant was arrested without a warrant. We cannot accept this proposed erosion of the burden of proof at a suppression hearing. The defendant has the burden to prove the seizure occurred without a warrant, but Telshow failed to produce any evidence establishing that fact. Thus, the burden never shifted to the State to either produce evidence of a warrant or prove the reasonableness of the search or seizure pursuant to one of the recognized exceptions to the warrant requirement. This court addressed the same argument in *White*. In *White*, this court rejected the argument that absence of a warrant, which shifts the burden of proof, can be demonstrated by circumstantial testimony. *See* 871 S.W.2d at 836. We agree with, and are bound by the *White* opinion. *See also Johnson* v. State, 834 S.W.2d 121 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd) (holding that burden never shifted to State despite appellant's argument that testimony at the suppression hearing demonstrated circumstantially he was arrested without a warrant). Thus, because Telshow did not produce evidence affirmatively showing no warrant existed, his points of error three and four are overruled.

964 S.W.2d at 307. *See Blondett v. State*, 921 S.W.2d 469, 472-73 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd); *Highwarden v. State*, 846 S.W.2d 479, 480-81 (Tex. App.–Houston [14th Dist.] 1993, pet. dism'd 871 S.W.2d 726 (Tex. Crim. App. 1994)). Accordingly, because appellant has not

proven the search occurred without a warrant and shifted the burden of proof to the State, he has not overcome the presumption of proper police conduct. *See Russell*, 717 S.W.2d at 9. Thus, we overrule his point of error.

The order denying appellant's motion to suppress is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Justices Draughn, Lee, and Hutson-Dunn.[*]

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

[*] Senior Justices Joe Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.