Opinion of August 31, 2000, Withdrawn, Affirmed and Corrected Opinion filed October 26, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00645-CR

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JOSEPH TORRES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 778,397

C O R R E C T E D O P I N I O N

Appellant, Joseph Torres, was charged with the felony offense of aggravated robbery. After the trial court denied his motion to suppress, appellant pled guilty and requested a pre-sentence investigation. At the punishment hearing, appellant was sentenced to eighteen years' confinement in the Texas Department of Criminal Justice, Institutional Division. In his sole point of error, appellant contends the trial court erred in denying his motion to suppress evidence and to suppress written and oral statements because his arrest was illegal. We affirm the decision of the trial court.

FACTUAL BACKGROUND

During the early morning hours of March 19, 1998, Gary Finkelman, a detective in the Spring Valley Police Department, received a call at home from his dispatcher notifying him of a robbery and a shooting involving several suspects. Detective Finkelman went to the scene of the offense where he met Officer James Christopher Welsh, also of the Spring Valley Police Department. The officers noted that the complainants' vehicle appeared to have been damaged by a shotgun. The Spring Valley officers then went to meet an officer from the Houston Police Department ("HPD") who was holding a possible suspect, Asa Sizemore. After being informed of his rights, Sizemore told Detective Finkelman that he and his friends had been out driving in a Suburban on the West Loop of Houston and that when they saw a couple driving a Lexus automobile, they decided to rob them. Sizemore and his friends followed the Lexus to the couple's home, where they attempted to carry out their plan. However, when the complainants fired a gun at them, the robbery suspects aborted their plan and fled the scene.

In addition to providing this helpful information about the offense, Sizemore also agreed to show the police officers where the other suspects lived. The officers went first to the apartment of Carlos Hernandez. Outside the apartment, the officers saw the vehicle reportedly used in the commission of the offense. Inside that vehicle were several spent shotgun shells, a black ski mask, and a roll of duct tape. Hernandez's father, who also lived in the apartment, let the officers inside, where they discovered Carlos Hernandez and Eric Rous, another suspect, as well as a shotgun, a shotgun case, and ammunition for the shotgun.

The police officers then went to appellant's apartment. Detective Finkelman and Officer Welsh went to the rear door of the apartment, and two HPD officers went to the front door. According to Detective Finkelman, appellant answered the rear door and let them in the apartment. As soon as the Spring Valley officers entered, they frisked appellant, handcuffed him, and read him his *Miranda* warnings. The HPD officers entered through the front door of the apartment. Officer Welsh asked appellant's mother, who also lived there, for consent to search the apartment. She agreed. The search produced some marijuana from appellant's bedroom and two shotguns that were partially hidden

underneath a plant on the front porch.

The officers took appellant to the police station and then to a magistrate, who again informed him of his rights. While appellant was in custody, the officers obtained statements from two of the other suspects, Hernandez and Rous. Their statements corroborated the information the officers had obtained from Sizemore and the complainants. Around 3:00 p.m., Detective Finkelman read appellant his rights again. After some discussion, appellant agreed to give a written statement, which he later read and signed.

STANDARD OF REVIEW

In his sole point of error, appellant claims his arrest was illegal and therefore, the trial court erred in denying his motion to suppress evidence and to suppress written and oral statements.[1] Although we generally review a trial court's ruling on a motion to suppress for an abuse of discretion, we use a *de novo* review when a question of law is based on undisputed facts. *See Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999). Because the facts regarding this search are undisputed, we review *de novo* the application of the facts that led the trial court to deny the motion to suppress.

PRESERVATION OF ERROR

The State first argues that appellant has not preserved error because he pled guilty without a plea bargain agreement. A recent decision of the Texas Court of Criminal Appeals has made it clear that a defendant may appeal a motion to suppress evidence after pleading guilty without a plea bargain agreement because the judgment would not be supported without the evidence. *See Young v. State*, 8 S.W.3d 656, 667 (Tex. Crim. App. 2000) (en banc). Here, the judgment of guilt is not independent of the trial court's ruling on the motion to suppress the written and oral statements. Therefore, we must consider appellant's point of error.

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[1] Appellant does not brief how the court erred in denying his motion to suppress evidence, i.e., the marijuana and the two shotguns. Points of error not briefed are waived. *See* TEX. R. APP. P. 38.1(h). Therefore, we will address only whether the written and oral statements should have been suppressed.

ILLEGAL ARREST

The Fourth Amendment of the United States Constitution and article I, section 9 of the Texas Constitution protect an "'individual's legitimate expectation of privacy from unreasonable government intrusions.'" *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (quoting *Richardson v. State*, 865 S.W.2d 944, 948 (Tex. Crim. App. 1993)). Generally, an arrest or search without a valid warrant is unreasonable. *See Franklin v. State*, 976 S.W.2d 780, 781 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (citing *Wilson v. State*, 621 S.W.2d 799, 803-04 (Tex. Crim. App. 1981)). An exception to this rule allows an officer to arrest a suspect without a warrant when the State shows: (1) the officer had probable cause, and (2) the arrest falls within an exception listed in Chapter 14 of the Texas Code of Criminal Procedure. *See McGee v. State*, 23 S.W.3d 156, 161 (Tex. App.—Houston [14th Dist.] 2000, pet. filed August 18, 2000) (citing *Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989)).

The officers arrested appellant without a warrant. The State defends the warrantless arrest by asserting compliance with article 14.03(a)(1) of the Texas Code of Criminal Procedure. Article 14.03(a)(1) provides:

> (a) Any peace officer may arrest, without warrant:
>
> > (1) persons found in *suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony*, violation of Title 9, Chapter 42, Penal Code, *breach of the peace*, or offense under Section 49.02, Penal Code, or threaten, or are about to commit some offense against the laws . . . .

TEX. CODE CRIM. PROC. ANN. art. 14.03(a)(1) (Vernon 1977) (emphasis added). This statute is "the functional equivalent of probable cause." *Muniz v. State*, 851 S.W.2d 238, 250 (Tex. Crim. App. 1993) (quoting *Johnson v. State*, 722 S.W.2d 417, 421 (Tex. Crim. App. 1986), *overruled on other grounds by McKenna v. State*, 780 S.W.2d 797, 800 (Tex. Crim. App. 1989)). Therefore, if the State shows a defendant's arrest meets the requirements of article 14.03(a)(1), the arrest is lawful. *See id.*

In determining if the arrest was lawful under article 14.03, we must first determine whether the accused was in a suspicious place and then determine if the circumstances show that the accused was guilty of some felony or breach of the peace. *See Crowley v. State*, 842 S.W.2d 701, 703 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). Few places are *per se* suspicious. *See Johnson*, 722 S.W.2d at 421; *State v. Parsons*, 988 S.W.2d 264, 268 (Tex. App.—San Antonio 1998, no pet.). A place may become suspicious because of additional facts available to the officer and any reasonable inferences which can be drawn from such facts. *See id*. We should apply article 14.03 "to authorize warrantless arrests in only *limited situations*" so as to attain the legislative intent of Chapter 14, which is to protect individual rights and further legitimate law enforcement. *Johnson*, 722 S.W.2d at 421 (emphasis added); *Holland v. State*, 788 S.W.2d 112, 115 (Tex. App.—Dallas 1990, pet. ref'd). The determination of whether a place is suspicious is highly fact specific. *See Crowley*, 842 S.W.2d at 703; *Holland*, 788 S.W.2d at 114.

In assessing whether appellant's apartment was a suspicious place, we begin by emphasizing the special protection the United States Constitution gives to the home. Generally, the Fourth Amendment requires only a showing of probable cause to make an arrest without a warrant. *See Wright v. State*, 7 S.W.3d 148, 150 (Tex. Crim. App. 1999) (en banc). However, the State must show both probable cause *and exigent circumstances or consent* to enter a home without a warrant for the purpose of either arrest or search. *See Minnesota v. Carter*, 525 U.S. 83, 100 (1998); *Cornealius v. State*, 870 S.W.2d 169, 172 (Tex. App.—Houston [14th Dist.] 1994), *aff'd*, 900 S.W.2d 731 (Tex. Crim. App. 1995) (citations omitted). Therefore, the federal constitution imposes a stricter burden upon the State when a person's home is involved. Likewise, we believe the state constitution also protects a home more than most other places. Because state law already requires exigent circumstances, consent, or another Chapter 14 exception to exist before an officer can arrest someone, a court should find a home is a "suspicious place" only in extremely limited circumstances.

Our analysis begins with a consideration of other situations in which courts have found a home to be a suspicious place. Generally, these cases involve specific evidence which directly connected the crime to the defendant or the place. In *Muniz*, the police had probable cause and were let into the house by the

defendant's brother. 851 S.W.2d at 251. The defendant's wife nodded towards the bedroom, and his brother went directly to the closet in that room, opened the door, and motioned for the defendant to come out. *See id*. Under these circumstances, it was reasonable for the officer to conclude that the defendant was hiding in the closet. *See id*. The court held that the defendant's home was a suspicious place. *See id*. If the defendant had not been hiding, undoubtedly the home would not have been a suspicious place.

In *Crowley*, the defendant was involved in a traffic accident and fled the scene. 842 S.W.2d at 702. The occupants of the other car involved in the accident followed the defendant to a private residence and saw her pull into a detached garage and shut the door. *See id*. One of the occupants in the car stayed to watch the garage while the other went to call the police; the defendant did not leave the garage and was still there when the police arrived. *See id*. at 702-03. Because the witnesses had followed the defendant directly from the scene of the accident and because the defendant had been hiding in the garage while under surveillance until the police arrived, the *Crowley* court held the garage of the private residence was a suspicious place. *Id*. at 703.

The Dallas court of appeals has held that a defendant's apartment was a suspicious place because: (1) a car registered to the defendant had been used in a robbery shortly before the arrest, (2) the defendant was identified as the probable culprit, (3) and the defendant's apartment had been placed under surveillance in the belief that defendant could soon be found there. *See Wilson v. State*, 722 S.W.2d 3, 4 (Tex. App.—Dallas 1986, no pet.). Had the vehicle used in the robbery not been in the front yard, undoubtedly the apartment would not have been a suspicious place.

These cases are all distinguishable from the facts presented in the record now before us. Unlike *Muniz*, the officers in this case were not led to appellant hiding in a closet. Unlike *Crowley*, no one had watched appellant hiding since the time of the crime. Unlike *Wilson*, no items used in the robbery were located in plain view outside the apartment. There was no evidence that anyone saw the shotguns on the front porch before the arrest or even that the HPD officers on the front porch spoke to the Spring Valley officers on the back porch before the arrest. Whatever the officers discovered inside the apartment after appellant's arrest will not *ex post facto* make the apartment a suspicious place. Such a holding would

give police officers free reign to search any home at any time and virtually eliminate the protections of the Fourth Amendment of the United States Constitution and article I, section 9 of the Texas Constitution. Considering that article 14.03(a)(1) authorizes warrantless arrests in only limited situations, we find that, standing alone, an apartment where a suspected criminal is purportedly residing is not a suspicious place. Because we conclude that appellant was not arrested in a suspicious place, we do not even reach the second part of article 14.03(a)(1), i.e., whether the circumstances show that appellant was guilty of some felony or breach of the peace. The arrest was illegal.

ATTENUATED TAINT

Evidence obtained "in violation of any provision of the Constitution or law of the State of Texas" should be excluded. TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 2000). However, if the taint between the arrest and the evidence was sufficiently attenuated, the State may still use the evidence. *See Dowthitt v. State*, 931 S.W.2d 244, 261 (Tex. Crim. App. 1996). In determining if the taint is attenuated, Texas courts apply the four-factor attenuation test found in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), which considers:

(1) whether *Miranda* warnings were given,
(2) the temporal proximity of the arrest and the confession [sic]
(3) the presence of intervening circumstances, and
(4) the purpose and flagrancy of the official misconduct.

Id. (citing *Bell v. State*, 724 S.W.2d 780, 788 (Tex. Crim. App. 1986); *Self v. State*, 709 S.W.2d 662, 666 (Tex. Crim. App. 1986)).

Miranda warnings by themselves cannot attenuate the taint, but they are an important factor in determining whether the defendant gave the confession in response to the officers exploiting an illegal arrest. *See Maixner v. State*, 753 S.W.2d 151, 156 (Tex. Crim. App. 1988); *Wilkins v. State*, 960 S.W.2d 429, 432 (Tex. App.—Eastland 1998, pet. ref'd); *Owens v. State*, 875 S.W.2d 447, 451 (Tex. App.—Corpus Christi 1994, no pet.). In this case, the officers gave appellant *Miranda* warnings twice, and a magistrate also gave him the warnings before appellant gave his statement. These warnings were also

printed on the statement, which appellant read, corrected, and indicated he understood before signing. Appellant does not contend that he did not understand his rights or that he invoked them.

The second factor in determining if the taint between the arrest and the evidence was sufficiently attenuated is based on the reasoning that the shorter the time, the more likely the taint of the illegal detention has not been purged. *See Maixner*, 753 S.W.2d at 156; *Roth v. State*, 917 S.W.2d 292, 304 (Tex. App.—Austin 1995, no pet.). In this case, approximately twelve hours elapsed between the time appellant was arrested and the time he confessed.

In considering the third factor, the presence of intervening circumstances, we note that taking the accused before a neutral and detached magistrate is an intervening circumstance. *See Jones v. State*, 833 S.W.2d 118, 125 (Tex. Crim. App. 1992); *Owens*, 875 S.W.2d at 452; *Cornealius*, 870 S.W.2d at 173. Here, Appellant was taken before a magistrate after his warrantless arrest.

Both the United States Supreme Court and the Texas Court of Criminal Appeals have emphasized the importance of the fourth factor, the purpose and flagrancy of the official misconduct. *See Brown v. Illinois*, 422 U.S. at 603-04; *Self*, 709 at 667. "The clearest indications of attenuation should be required where police conduct is flagrantly abusive." *Bell*, 724 S.W.2d at 789. Flagrantly abusive conduct includes "an arrest which is unnecessarily intrusive on personal privacy." *Id*. (citing *Brown*, 422 U.S. at 611-612 (Powell, J., concurring in part)). In determining if the arrest at issue can fairly be characterized as unnecessarily intrusive, we consider whether the manner of the arrest suggests that it was calculated to cause surprise, fright, and confusion. *See id*. at 790. However, "'there is a significant distinction between police action which is unlawful because violative of constitutional provisions and police action which merely fails to accord with statute, rule or some other non-constitutional mandate.'" *Duncan v. State*, 639 S.W.2d 314, 318 (Tex. Crim. App. 1982) (quoting *Ralph v. Pepersack*, 335 F.2d 128, 136 (4th Cir. 1964)); *see also Brick v. State*, 738 S.W.2d 676, 681 (Tex. Crim. App. 1987) (suggesting that when illegality rests solely upon violation of statute, it may well influence assessment of purposefulness and flagrancy of police conduct).

Here, four uniformed police officers entered appellant's apartment around 3:00 a.m. Within

moments of entry, appellant was frisked and handcuffed. There is no evidence that appellant threatened the officers or that the officers observed any evidence linking him or the place to the crime prior to the arrest. Absent such circumstances, we find that a foursome of uniformed officers appearing at an apartment door in the middle of the night is unnecessarily intrusive on personal privacy and, in conjunction with immediately handcuffing appellant, is calculated to cause surprise, fright, and confusion. Nevertheless, in this case, the police officers had probable cause to arrest appellant.[2] Therefore, police conduct, which might otherwise be deemed flagrantly abusive, may not be characterized in that fashion. Furthermore, even where police conduct is flagrantly abusive, the other factors can operate to attenuate the taint. *See Bell*, 724 S.W.2d at 789. Therefore, even if we assume the police officers' conduct was flagrantly abusive, such a finding would only require the other factors to show "the clearest indications of attenuation" in order to find the taint sufficiently attenuated. *Id*. On this record, the other factors strongly suggest that the taint was attenuated. Appellant was repeatedly given *Miranda* warnings, both orally and in writing, and he repeatedly waived them. A considerable amount of time, approximately twelve hours, passed before appellant gave his confession. Also, an intervening circumstance occurred between appellant's arrest and the statements—he appeared before a magistrate less than an hour after his arrest and was properly apprized of the accusation against him and of his rights. Additionally, the police officers had probable cause to arrest appellant.

The purpose of the inquiry into the four factors is to determine whether there was a causal connection between the arrest and the giving of the statement. *See Wilkins v. State*, 960 S.W.2d 429, 433 (Tex. App.—Eastland 1998, pet. ref'd). After reviewing all four factors, we find there was no causal connection between the two. We conclude the arrest was sufficiently attenuated from appellant's

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[2] Probable cause exists when the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that a particular person has committed or is committing an offense. *See Guzman v. State*, 955 S.W.2d 85, 90 (Tex. Crim. App. 1997). Sizemore's version of the events of the evening coincided with the complainants' version. He had also identified two other suspects and led the officers to the home of one suspect, where the vehicle used in the offense and paraphernalia used in the robbery were found. When Sizemore told the officers that appellant was also involved and took the officers to appellant's apartment, the officers had probable cause to arrest appellant.

confession to purge any taint of illegality. Accordingly, we find the trial court did not err in denying appellant's motion to suppress the written and oral statements.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Anderson, Frost, and Lee.[3]

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

[3] Senior Justice Norman R. Lee sitting by assignment.