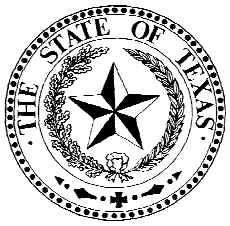
Affirmed and Opinion filed November 15, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00901-CR

KRISTI DALANE AINSWORTH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 15
Harris County, Texas
Trial Court Cause No. 0986901

O P I N I O N

Appellant, Kristi Dalane Ainsworth, appeals the trial court's denial of her motion to suppress marijuana obtained without a search warrant, citing lack of exigency justifying warrantless entry into her apartment and involuntariness of consent to search. We affirm.

I. BACKGROUND

At the motion to suppress hearing, the court heard testimony from a trooper involved in the search of appellant's apartment. Trooper James Holland, working off-duty at the apartment complex where he lived, saw appellant emerge from the driver's side of an

automobile that was stopped in a "moving lane of the parking lot, or fire lane." Appellant left the engine running while she and her male companion, who appeared to be intoxicated, walked into the apartment complex. When Trooper Holland approached the vehicle to investigate, he noticed an odor of marijuana (the vehicle's windows were open) and saw what appeared to be marijuana stems in the ashtray. He also noticed the vehicle running without an ignition key and suspected it was stolen. He then "ran a check" on the license plate and learned it was not reported stolen . The vehicle was registered to the occupant of apartment 414.

Trooper Holland then went to apartment 414 to continue his investigation, and, when he reached the top of the steps, appellant opened the door and nearly ran into him. She did not close the door; therefore, Trooper Holland could see inside the apartment. While asking appellant why the vehicle was parked in the street, running, without keys in its ignition, Trooper Holland detected the odor of burnt marijuana and noticed what appeared to be a marijuana joint burning in an ashtray inside the apartment. He also noticed appellant's male companion, inside the apartment, moving out of his sight. Trooper Holland was concerned for his safety. After appellant appeared to have followed Trooper Holland's eyes to the marijuana, she attempted to shut her apartment door, but he was already in the doorway, and the door hit him. So, he used his hands to brace the door and stop it from closing. He then entered the apartment, handcuffed appellant and her male companion, and called for help from the local police department. Trooper Holland then asked appellant questions about her automobile and the marijuana. Appellant volunteered that Trooper Holland could search her apartment because "[t]here wasn't anything in there."

Officer Don Hough of the Seabrook Police Department testified that he arrived on the scene and heard appellant tell Trooper Holland he could search her apartment and that she had nothing to hide. Officer Hough also testified that he found a marijuana joint still burning

in the ashtray. During a search of appellant's apartment, Trooper Holland found a bag containing an unspecified amount of marijuana in the kitchen.

Appellant was charged by information and complaint with the class B misdemeanor offense of possession of less than two ounces of marijuana. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121 (Vernon Supp. 2001). Appellant filed a motion to suppress physical evidence seized from her apartment on the basis that the search was warrantless and unsupported by probable cause, reasonable suspicion, or valid consent, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, in violation of Article I, section 9 of the Texas Constitution, and in violation of Article 38.23 of the Texas Code of Criminal Procedure. *See* U.S. CONST. amends. IV, XIV; TEX. CONST. art. I, § 9; TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979). After the trial court denied her motion to suppress evidence, appellant entered a plea of guilty. The trial court deferred adjudication of her guilt and placed her on community supervision for one year and assessed a $300 fine.

II. ISSUES PRESENTED FOR REVIEW

In her first point of error, appellant complains the trial court erred in denying her motion to suppress evidence seized from the warrantless search of and illegal entry into her apartment. In her second point of error, appellant contends the trial court erred in failing to suppress evidence seized from the search of her apartment because the State failed to prove the voluntariness of her consent to search.

Appellant couches her arguments in terms of both the Fourth Amendment and Article I, Section 9, of the Texas Constitution. Appellant does not, however, separately brief her state and federal constitutional claims. We assume, therefore, that appellant claims no greater protection under the state constitution than that provided by federal constitution. *See Muniz v. State*, 851 S.W.2d 238, 251–52 (Tex. Crim. App. 1993) (declining to address an appellant's Texas constitutional claims because he proffered no argument or authority

concerning the protection provided by the Texas Constitution or how that protection differs from the protection provided by the United States Constitution and stating that state and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground). Accordingly, we base our decision on the Fourth Amendment grounds asserted by appellant. *See Johnson v. State*, 47 S.W.3d 701, 706 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

III. DENIAL OF MOTIONS TO SUPPRESS EVIDENCE

A. Standard of Review

We review the trial court's decision whether to admit or exclude evidence for an abuse of discretion. *Turner v. State*, 931 S.W.2d 52, 53 (Tex. App.—Houston [14th Dist.] 1996, no pet.). When a motion to suppress is presented, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The appellate court's only role is to decide whether the trial court improperly applied the law to the facts. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). Unless the trial court clearly abused its discretion, we will not disturb its findings. *Rivera v. State*, 808 S.W.2d 80, 96 (Tex. Crim. App. 1991).

Further, the appellate court affords nearly complete deference to the trial court's rulings on "mixed questions of law and fact," such as probable cause and reasonable suspicion, where the resolution of those questions turns on an evaluation of credibility and demeanor. *Guzman*, 955 S.W.2d at 89. Accordingly, the appellate court reviews the evidence in the light most favorable to the ruling of the trial court. *Id*.

On a motion to suppress, the movant 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). Once the defendant establishes police action was not supported by an

arrest or search warrant, the burden shifts to the State to prove the reasonableness of the search or seizure. *Id.* Here, the search at issue was warrantless. That appellant established this is undisputed.[1] Thus, the burden shifted to the State to prove that the trooper's entry into appellant's home was reasonable.

B. Evidence Derived From Warrantless Entry

In her first point of error, appellant claims the trial court erred in denying her motion to suppress evidence obtained from the illegal entry of police into her apartment because there was no legally sufficient reason, existence of an exigency, to enter the apartment without a warrant.

Whenever police enter a residential unit without consent of the residents, that entry constitutes a search. *McNairy v. State*, 835 S.W.2d 101, 106 (Tex. Crim. App. 1991) (citing *Katz v. United States*, 389 U.S. 347 (1967)). "In order for a warrantless search to be justified, the State must show the existence of probable cause at the time the search was made, and the existence of exigent circumstances which made the procuring of a warrant impracticable."[2] *Id.*; *Delgado v. State*, 718 S.W.2d 718 (Tex. Crim. App. 1986). The United States Supreme Court has established that even in the presence of probable cause, a warrantless search of a dwelling will withstand constitutional scrutiny "only in 'a few specifically established and well-delineated' situations." *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) (quoting *Katz*, 389 U.S. at 357). Those exceptions include situations in which police

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1 Both Trooper Holland and Officer Hough testified at the motion to suppress hearing that they entered appellant's apartment without a warrant.

2 The existence of probable cause is not at issue here. Trooper Holland testified that, from his vantage point outside the open apartment door, he smelled burnt marijuana and saw, what he believed, was a marijuana cigarette burning in an ashtray inside the apartment. Thus, Trooper Holland could pursue and arrest appellant without a warrant for committing an offense in his presence or view. *See* TEX. CODE CRIM. P. ANN. art. 14.01(b) (Vernon 1977). The knowing possession of marijuana is an offense under Texas Health and Safety Code section 481.115. TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon Supp. 2001).

have consent, are responding to an emergency or are in hot pursuit of a fleeing felon, and when contraband is in the process of being destroyed or about to be removed from the jurisdiction. *Id.* at 34–35. The State bears the burden of establishing the existence of these exceptions. *Gonzalez v. State*, 588 S.W.2d 355, 360 (Tex. Crim. App. 1979). We apply an objective standard of reasonableness in assessing an officer's belief that an emergency justified a warrantless entry. *See Janicek v. State*, 634 S.W.2d 687, 691 (Tex. Crim. App. 1982).

Appellant claims the State offered no evidence of emergency conditions, such as spoiling of evidence or likelihood of third party interference, justifying the warrantless entry into her home. In support, appellant states that "the record is clear that there were several officers on the scene."

Appellant's attempt to obstruct Trooper Holland's view by shutting him out of the apartment created exigent circumstances. The trooper testified as follows: "I saw marijuana or what appeared to be a marijuana joint burning. And, at that time, I guess she was following my eyes, that's when she decided to shut the door." This action could have led Trooper Holland to reasonably believe appellant may attempt to destroy or conceal evidence. When asked whether "Seabrook employs sufficient officers that you could have left someone at the scene to secure the scene while you sought a magistrate's warrant," Officer Hough said "Yes, sir." However, whether it was feasible to employ enough officers to secure the scene is not determinative of this point. The decision to enter the apartment occurred when Trooper Howell was the only officer present, and appellant's consent to search occurred just as Officer Hough was arriving. Officer Hough testified that any evidence existing *at that point* in the apartment "could be" there until he had time to obtain a search warrant but that he did not "know who else had access to the apartment." Moreover, the very condition in which Trooper Holland first saw the marijuana, burning in the ashtray, would have contributed to the destruction of the evidence if left undisturbed. Thus, we find the

State showed there were exigent circumstances, in addition to probable cause, justifying Trooper Holland's entry into appellant's apartment without a warrant. We further conclude that these exigent circumstances made the procurement of a warrant before entering the apartment impractical. Accordingly, we find that the trial court did not abuse its discretion in denying appellant's motion to suppress evidence by virtue of the warrantless entry into appellant's apartment.

We overrule appellant's first point of error.

C. Evidence Derived from Involuntary Consent to Search Apartment

Consent is a specifically established exception to the rule that warrantless searches are unreasonable per se. *See State v. Johnson*, 896 S.W.2d 277, 281 (Tex. App.—Houston [1st Dist.] 1995), *aff'd*, 939 S.W.2d 586 (Tex. Crim. App. 1996). Voluntariness of consent to search is a question of fact determined from the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). The State has the burden to prove the consent was voluntary by clear and convincing evidence. *See State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997). In doing so, the State must show the consent was positive and unequivocal and not the result of duress or coercion. *See Erdman v. State*, 861 S.W.2d 890, 895 (Tex. Crim. App. 1993). When the record supports a finding that consent was freely and voluntarily given, we do not disturb the trial court's ruling admitting evidence. *Johnson v. State*, 803 S.W.2d 272, 287 (Tex. Crim. App. 1990), *overruled on other grounds by Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991).

Far from any evidence that appellant was forced or coerced into allowing the search of her apartment, both Trooper Holland and Officer Hough testified they heard appellant volunteer that Trooper Holland could search her apartment. Specifically, Trooper Holland testified appellant told him he could search, that "[t]here wasn't anything in there" and "[t]here's nothing to worry about." Officer Hough testified that he heard appellant tell

Trooper Holland that he could search her apartment and that there was nothing to hide. Only the testimony of these officers was presented at the motion to suppress hearing. There was no evidence that appellant was forced to allow the search. Considering all of the evidence, the trial court was entitled to accept the officers' testimony and determine that appellant voluntarily consented to the search of her apartment. Having concluded the consent was voluntary, the marijuana discovered in plain view in the kitchen was admissible. Accordingly, we find that trial court did not abuse its discretion in denying appellant's motion to suppress evidence based on lack of consent to search the apartment.

We overrule appellant's second point of error.

The judgment of the trial court is affirmed.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed November 15, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
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