Affirmed in Part; Reversed and Remanded in Part; Majority and Dissenting Opinions filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-01387-CR
NO. 14-97-01388-CR

THE STATE OF TEXAS, Appellant

V.

MILDRED JEAN HENDERSON and
MYRON BERNARD PALMER, Appellees

On Appeal from the 9th District Court
Waller County, Texas
Trial Court Cause Nos. 96-07-8539 and 96-07-8540

MAJORITY OPINION

After appellees were indicted for unlawful possession of cocaine in an amount more than four grams, the trial court conducted a hearing on the appellees' motion to suppress. The trial court heard testimony from the arresting officer and, after argument of counsel, granted the appellees' motion to suppress the cocaine found in the center console of the motor vehicle in which the appellees were traveling. The State brings two issues for review,

arguing the trial court erred in granting the motion to suppress because the appellees allegedly lacked standing to contest the search of the automobile and that the officer had reasonable suspicions to continue a temporary detention of the appellees after issuing a traffic warning citation. We affirm in part and reverse in part.

On May 24, 1996, Anthony Forroux, a Deputy with the Waller County Sheriff's Office, observed a blue Chevrolet traveling on Highway 6 in Waller County in the direction of College Station, Texas. Deputy Forroux stopped the vehicle for failure to maintain a single lane of traffic. The deputy testified that, in addition to the traffic violation, he suspected that the driver might be intoxicated due to the erratic driving. The blue Chevrolet contained three people, the driver, Mildred Henderson, a front seat passenger, Myron Palmer, and an elderly female in the back seat, Mrs. Croxdale. Henderson was a home nurse, who at that time was caring for Mrs. Croxdale.

Deputy Forroux asked Henderson to step outside the car. She complied and got out of the car while carrying her purse, which seemed out of the ordinary to the deputy. When he asked Henderson where she was coming from, she replied Navasota, Texas, which also seemed odd to the deputy because she was heading in the direction of Navasota. Deputy Forroux then asked Palmer where they had been and he replied in Houston. After asking Henderson again, she stated they were coming from Hempstead. Deputy Forroux ran Henderson's and Palmer's names through the computer and determined there were no outstanding warrants for either of the individuals. He then issued a warning citation to Henderson after which she asked if she was free to go. Deputy Forroux responded that she was not. Forroux testified that, during the encounter, Henderson seemed edgy and in a hurry and that Palmer was nervous, nearly to the point of shaking. Deputy Forroux then asked about Mrs. Croxdale who was extremely elderly, could not move or speak, was wearing a diaper and appeared to have urinated on herself. This is when he learned that Henderson was a home nurse for Mrs. Croxdale.

Deputy Forroux then asked Henderson if the vehicle contained any contraband or weapons and she replied, "No." Forroux asked Henderson twice for permission to search the vehicle, which was rented by Mrs. Croxdale's son. Henderson inquired why he wanted to search the car, but the record is silent on whether Deputy Forroux responded. Deputy Forroux then asked Henderson at least two more times if she had any weapons, guns, knives, or hand granades on her person. Eventually, Henderson indicated that she had a gun in her purse and began to open her purse, but Deputy Forroux grabbed her purse before she could open it. In the purse, Deputy Forroux discovered a small caliber handgun, so he placed Henderson under arrest. He told Palmer he was free to go, but having nowhere to go in the middle of Waller County, he chose to ride to the Waller County Sheriff's Office in a patrol unit that had appeared on the scene. By this time, there were at least two and possibly as many as four patrol units surrounding the car on the side of the road. The rental vehicle was taken to the Waller County's Sheriff's Office by one of the deputies and an emergency medical team was called to remove Mrs. Croxdale from the vehicle to check on her medical condition. Sometime later in the subsequent search of the vehicle, Sheriff's deputies discovered approximately 26 grams of cocaine in the center console and less than two ounces of marijuana in the passenger side of the car. At that time, Palmer was also arrested.

At the suppression hearing, Deputy Forroux testified that after issuing the traffic citation, he had no reasonable suspicion to suspect that any further crime was occurring yet he told her she was not free to leave. As noted earlier, Deputy Forroux initially pulled the vehicle over for suspicion of driving while intoxicated. He testified that Henderson did not appear intoxicated, did not smell of alcohol, did not smell of marijuana, and he saw no evidence of driving under the influence. His only "suspicions" were the conflicting stories of where the car had been and the fact that both Henderson and Palmer appeared nervous. He also testified that neither the cocaine nor the marijuana was in plain view in the vehicle

and the drugs were not discovered until the subsequent inventory search at the Sheriff's office. The trial court then granted the motion suppressing evidence of the cocaine and marijuana.

When reviewing a trial court's decision on a motion to suppress, this court should afford almost total deference to a trial court's determination of the historical facts supported by the record. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The trial judge is the sole judge of the credibility of the witnesses who have offered evidence on the facts underlying the motion and of the weight to be given to their testimony. *Id*. This court should also afford the same amount of deference to a trial court's rulings on "application of law to fact question," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Id*. The appellate court may also review de novo "mixed questions of law and fact" not falling within this category. *Id*. This case presents a mixed question of law and fact which also turns on the credibility and demeanor of Deputy Forroux. Therefore, we should afford almost total deference to the trial court's resolution of this issue. We note, however, that we would reach the same result with a de novo review of the legality of the continued detention of Henderson and Palmer after Deputy Forroux issued the warning citation to Henderson.

In its first point of error, the State contends that Palmer and Henderson lacked standing to contest the search of the vehicle which uncovered the drugs, because neither had a possessory interest in the car which was rented by Mrs. Croxdale's son. In its second point of error, the State contends that Deputy Forroux had reasonable suspicions to continue to detain Palmer and Henderson after issuing the warning citation. Accordingly, the State argues that it validly obtained the cocaine and marijuana in a search incident to arrest or an inventory search. Because these issues are intertwined, we will discuss both issues simultaneously.

To establish standing to contest a search, a defendant must show a legitimate expectation of privacy in the area searched. *See Trinh v. State*, 974 S.W.2d 872, 874 (Tex. App.—Houston [14th Dist.] 1998, no pet.). As a general proposition, a passenger in a vehicle does not have a legitimate expectation of privacy in a vehicle where the passenger fails to assert a possessory interest in the vehicle or property seized. *See Meeks v. State*, 692 S.W.2d 504, 510 (Tex. Crim. App. 1985). However, "a mere passenger may challenge the search of a vehicle in which he was riding if the search resulted from an infringement of his own Fourth Amendment rights." *Trinh*, 974 S.W.2d at 874 (citing *Metoyer v. State*, 860 S.W.2d 673, 677 (Tex. App.—Fort Worth 1993, pet. ref'd)). A defendant who challenges the validity of the initial stop of a vehicle in which he was a passenger questions infringement of his own Fourth Amendment rights, regardless of whether he has an expectation of privacy in the place to be searched. *See Lewis v. State*, 664 S.W.2d 345, 348 (Tex. Crim. App. 1984). Here, the appellees do not contest the reasonableness of the initial stop. The question on appeal is whether Deputy Forroux had a reasonable suspicion to continue to detain appellees after issuing a warning citation.

The United States Supreme Court recently held that a "search incident to citation" was not permissible under the Fourth Amendment. *See Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484 (1998). The Supreme Court concluded that an Iowa statute authorizing the search of a vehicle following the issuance of a warning citation violated the Fourth Amendment because once an officer issues a citation, "all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." *Id*. at 488.

Here, however, the State contends that the vehicle was searched incident to a valid arrest after Henderson was arrested for possession of a weapon. The problem with this position is that Deputy Forroux had already accomplished the purpose of the initial stop

once he issued a warning citation to Henderson. Under Texas law construing the Fourth Amendment, Deputy Forroux accomplished the purpose of his investigative detention when he determined appellant was not intoxicated and issued a warning citation. *See Davis v. State*, 947 S.W.2d 240, 245 (Tex. Crim. App. 1997). We hold, therefore, that appellees have standing to contest the search of the vehicle which resulted from a seizure of their persons, in the form of the continued detention, which implicates the Fourth Amendment. This however, is not the end of our inquiry.

Deputy Forroux testified at the suppression hearing that after issuing the warning citation, he had no reasonable suspicion that a crime was occurring other than the fact that Henderson and Palmer were nervous and that there were conflicting stories about where the parties had been. As in *Davis* and *Knowles*, we hold the continued detention of Henderson was not based upon any articulable facts which, taken together with rational inferences from those facts, would warrant a person of reasonable caution in the belief that continued detention was justified. *See id.* We hold that the State demonstrated no reasonable suspicion for a continued detention of Henderson after issuing the warning citation for failure to maintain a single lane of traffic and, as such, the trial court correctly suppressed the evidence of the drugs.

The question concerning Palmer, the passenger, is more problematic. In *Davis*, a passenger was subjected to a continued detention, but only the driver was arrested. *See* 947 S.W.2d at 245. Similarly, *Knowles* did not involve a passenger arrested after an illegal, continued detention. *See* 525 U.S. 113, 119 S.Ct. 484 (1988). The Texas Court of Criminal Appeals, however, addressed this situation in *Lewis v. State*, 664 S.W.2d 345 (Tex. Crim. App. 1984).

There, the court held that the continued detention of a passenger was not a "but-for" cause of the search that uncovered drugs leading to the passenger's conviction. *Id.* at 349.

The court held that once the initial legal detention became an illegal one, the passenger's presence was irrelevant to the officer's decision to search because the police officer could have allowed the passenger to leave without hampering his ability to search the car. *Id.* The court upheld the search, holding "the purportedly illegal search was not come at by exploitation of the appellant's continued detention or removal from the vehicle." *Id.*

Here, Palmer's arrest was not effected by exploitation of his continued detention or removal from the vehicle being driven by Henderson. We feel that *Lewis* cannot be reconciled with the later *Davis* and *Knowles* opinions and that a dichotomy now exists in the area of Fourth Amendment protection of drivers versus passengers subjected to an illegal, continued detention. Arguably, both *Davis* and *Knowles* could be extended to passengers, but, as an intermediate appellate court, we are also bound by the *Lewis* case, which defeats Palmer's arguments in his motion to suppress. *See* 664 S.W.2d at 349.

Accordingly, applying Texas Law as we must, albeit reluctantly, we hold that the trial court erred in suppressing the evidence of the cocaine as to Palmer. We note that this state of Fourth Amendment interpretation leads to illogical results and recommend that the Texas Court of Criminal Appeals correct this apparent dichotomy. We reverse the judgment as to Palmer and remand that portion of the case for trial. We affirm the judgment of the trial court as to Henderson.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justice Draughn, Sears and Robertson.[1]

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

[1] Senior Justices Joe L. Draughn, Ross A. Sears, and Sam Robertson sitting by assignment.

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DISSENTING OPINION

Only one witness, the arresting officer, testified at the suppression hearing. There were no disputed facts for the trial judge to resolve. He did not resolve any — he merely granted the motion to suppress. Based upon this record we cannot, as asserted by the majority, defer "to the trial court's resolution of this issue."

As I read the majority opinion it abolishes the requirement that the subject of a search establish standing. In this case there is absolutely no showing that either Mildred Henderson or Myron Palmer (the appellees) had any expectation of privacy *in the automobile* because neither of them asserted a possessory interest in the vehicle or the drugs seized. It is important to remember that the person of neither appellee was searched.

Henderson was not arrested until she told the deputy sheriff that she had a pistol in her purse and was attempting to remove it therefrom when the deputy grabbed her bag. Palmer was told at the scene he was free to go, but chose to ride in a patrol car to the sheriff's office. It was only after the drugs were found in the automobile that he was placed under arrest.

Both appellees concede in their brief on appeal "that the initial stop, whether to investigate the possibility of an intoxicated driver or simply for writing a warning ticket for failure to stay in a single marked lane, was reasonable and justified." Neither, on this record, has standing to contest the search. *See Lewis v. State*, 664 S.W.2d 345, 348 (Tex. Crim. App. 1984).

The majority states, however, that "appellees have standing to contest the search of the vehicle which resulted from a seizure of their persons, in the form of the continued detention." I disagree.

This holding, as to Palmer, is directly contrary to the holding of the court in *Lewis v. State*, 664 S.W.2d 345 (Tex. Crim. App. 1984), because, as with *Lewis*, Palmer's detention was not necessary to perform the search.

Concerning Henderson there are four factors which I believe control. First, she concedes that her initial seizure was justified. Second, her continued detention, during which the officer was questioning her, was justified because of the circumstances observed

by the arresting officer. Third, when she admitted having a pistol in her purse, her arrest was authorized. Finally, the drugs were found in the automobile as a result of an inventory search at the sheriff's office.

Believing that the majority errs in applying principles of law governing search and seizure, I respectfully dissent.

/s/ Sam Robertson
Justice

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