YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Appellant failed to preserve error with respect to suppression of marijuana. [In the Interest of R.A.](06-3-12)

On June 27, 2006, the Houston Court of Appeals [14th Dist.], held that respondent failed to preserve error by failing to obtain a timely ruling on his motion to suppress or to properly and timely object to the admission of the evidence made the subject of the motion.

¶ 06-3-12. **In the Interest of R.A.**, MEMORANDUM, No. 14-04-00863-CV, 14-04-01180-CV, 2006 Tex.App.Lexis 5441 (Tex.App.— Houston [14th Dist.], 6/27/06).

Facts: On or about July 2, 2004, Bruce Zigmont, an off-duty deputy with the Harris County Sheriff's Department was shopping with his family. While leaving a meat market, he nearly collided with appellant. As the deputy passed the boy, he detected a strong odor, which he believed to be marijuana. The deputy then saw smoke coming from appellant's person. There was no one else nearby.

Deputy Zigmont contacted Deputy Stephen Herrmann, whom he knew to be on patrol in the area. Deputy Zigmont informed Deputy Herrmann that a male walking northbound on Freeport Street possibly possessed marijuana. Deputy Zigmont described the suspect as a Hispanic male, with a large, shaved head, who was olive-complected and wearing a white tee-shirt and blue denim shorts that fell below the knees. Deputy Herrmann and Deputy Zigmont had several telephone conversations verifying this description. At trial, Deputy Zigmont identified appellant as the person he encountered outside the meat market and then described to Deputy Herrmann.

After receiving the information from Deputy Zigmont, Deputy Herrmann advised him that he would check the area as soon as he completed another case. Shortly thereafter, Deputy Herrmann drove to the area and observed a male (appellant) who fit the description given by Deputy Zigmont. Deputy Hermann got out of his automobile, approached appellant, and asked to speak to him. Deputy Herrmann immediately noticed the smell of marijuana on appellant's person and clothing and asked appellant if he had any contraband or weapons. Appellant replied that he did not. Deputy Herrmann informed appellant that he needed to search appellant for "safety" purposes. During the pat-down, Deputy Herrmann felt a squishy, round object, which he believed to be either a cigar or marijuana, neither of which appellant, as a juvenile, was allowed to possess. Deputy Herrmann removed the object from appellant's pocket and placed it on the hood of his patrol car. He concluded that it was a cigar containing marijuana and arrested appellant for possession of marijuana.

Held: Affirmed

Memorandum Opinion: On appeal, appellant asserts that the trial court abused its discretion in denying his motion to suppress the marijuana. Without the marijuana, appellant argues, the evidence is legally and factually insufficient to support the trial court's adjudication. n2 The State responds that appellant failed to preserve this issue for appellate review. Accordingly, as a threshold matter, we consider whether appellant took the necessary steps to preserve error.

> n2 Appellant does not argue that the evidence is legally and factually insufficient *with* the marijuana properly admitted as evidence.

Appellant's motion to suppress the marijuana found on his person was based on illegal search and seizure grounds. Appellant did not obtain a hearing or ruling on his motion to suppress. The mere filing of the motion to suppress does not preserve error. To raise this complaint on appeal, appellant must demonstrate that he made a timely objection at trial. *See Ross v. State, 678 S.W.2d 491, 493 (Tex. Crim. App. 1984)*.

To be timely, an objection must be raised at the earliest opportunity or as soon as the ground of objection becomes apparent. *Martinez v. State, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993)*; *Johnson v. State, 803 S.W.2d 272, 291 (Tex. Crim. App. 1990)*, *overruled on other grounds, Heitman v. State, 815 S.W.2d 681, 685 (Tex. Crim. App. 1991)*. The record reflects that appellant failed to obtain a *timely* ruling on his motion to suppress. Although at trial appellant made objections to the admission of the marijuana, his objections came too late. Consequently, none of his objections preserved error for our review.

Deputy Herrmann's testimony on the first day of trial was substantially the same as his testimony on the second day. Appellant did not object during Deputy Herrmann's first day of testimony. n3 On the second day, however, appellant objected as follows:

Q: [**State**]: And is there any other articulate facts that would identify, lead you to believe that it was a cigar or other possible contraband?

A: **[Deputy]**: No. Besides the odor on his person. I mean, that was it. And I even asked him, "What is this?" Which I believe he stated-I don't know if he said cigar or marijuana. Which he was a juvenile. He is not supposed to have either one.

Defense Counsel: At this time I object to the evidence of the cigar, since I filed a motion to suppress. And ask for a running objection throughout the hearing. So, my objection will be observed for the purposes of the motion to suppress.

The Court: Your objection is overruled.

Defense Counsel: Can I have a running objection?

The Court: You can have a running objection, and that's overruled, as well.

. . .

Q: **[State]:** And in your training and experience, do you believe this to be marijuana?

Defense Counsel: Again, Your Honor, for the purposes of the record, to be extra cautious for the motion to suppress. And, again, I'm asking for a running objection.

The Court: The objection is overruled, and you're allowed a running objection, which is overruled.

Because Deputy Herrmann already had testified to these matters by the time appellant objected on the second day, appellant's objections were not timely, and thus did not preserve any error in regard to suppression of the marijuana. *See Fuentes v. State, 991 S.W.2d 267, 273 (Tex. Crim. App. 1999)* (stating the objecting party must continue to object each time objectionable evidence is offered otherwise, the objection is waived); *Marini v. State, 593 S.W.2d 709, 714 (Tex. Crim. App. 1980)* (holding that defendant waived error in admission of LSD tablets and marihuana by failing to object to testimony of officer with regard to finding those drugs); *Turner v. State, 642 S.W.2d 216, 217 (Tex. App.-Houston [14th Dist.] 1982, no writ)* (stating that defendant's complaint with regard to admission of exhibits seized after search incident to arrest waived for failure to object to preceding testimony of officer regarding arrest and items found in search). n4

> n3 In addition, Deputy Zigmont testified *before* Deputy Herrmann, as to the facts displaying appellant's possible possession of marijuana. Without objection, Deputy Zigmont testified that when appellant approached him, he noticed the smell of marijuana on appellant and saw the smoke coming from appellant's person.
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> n4 Even if these objections were timely, appellant's mere reference that he had a motion to suppress on file is not a proper objection. *See Villareal v. State, 811 S.W.2d 212, 217 (Tex. App.-Houston [14th Dist.] 1991, no writ)* (stating that an objection to the admission of evidence must be specific and the grounds for the objection must be clearly expressed in order to preserve error). Despite appellant's reference to a motion to suppress "on file," he did not alert the trial court to the alleged errors of which he now complains.

Prior to the actual admission of the marijuana into evidence, appellant again objected:

State: The State would like to offer this into evidence as Petitioner's 2A and B and its contents.

. . .

Defense Counsel: I'm going to object on the basis of, he hasn't established that he knows for sure that's the same marijuana that was taken from--on July 2nd, from this respondent.

The Court: It will be overruled. P2A and B are admitted.

This objection failed to preserve error because it does not comport with the objection appellant now urges on appeal. The "chain of custody" objection appellant made at trial is not sufficient to preserve error on his contention that the trial court erred in not suppressing evidence of the marijuana based on the grounds asserted in his motion to suppress, which do not include a "chain of custody" objection. *See Wilson v. State, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002)* (holding that if the objection in the trial court differs from the complaint on appeal, the defendant has failed to preserve error for review); *Broxton v. State, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995)* (stating to preserve error for appellate review, complaint on appeal must comport with objection at trial, and an objection stating one legal theory may not be used to support a different legal theory on appeal).

Finally, after the evidence was admitted and the State rested, appellant asserted the following objection:

The Court: State rests.

Defense Counsel: At this time, Your Honor, the respondent urges his motion to suppress the marijuana. And we would submit this memorandum of law in support of the motion to support.

(content of counsel's argument omitted)

The Court: Okay. I have already admitted the marijuana into evidence. And the motion to suppress at this time is moot. And I will go ahead and deny it.

Defense Counsel: But I had a running objection, Your Honor, before it was admitted.

The Court: And I understand. And the motion is denied. The motion to suppress is denied.

Appellant's urging of his motion to suppress after the evidence already had been admitted was too late to preserve error on this point. *See Ross, 678 S.W.2d at 493* (holding that when no pretrial hearing is held, defendant must properly object when evidence is offered at trial to preserve error on appeal; if timely objection is urged at trial, suppression hearing is then conducted during trial outside the presence of the jury).

Conclusion: We conclude that appellant failed to preserve error with respect to suppression of the marijuana because he failed to obtain a timely ruling on his motion to suppress or properly and timely object to the admission of the evidence made the subject of this motion. Accordingly, we overrule appellant's sole issue in both cases and affirm the trial court's judgments. n5

> n5 Because appellant failed to preserve error as to whether the trial court abused its discretion in denying his motion to suppress, we do not reach the merits of that argument or the merits of his sufficiency challenge. We therefore find no basis to disturb the trial court's judgment revoking appellant's prior probation.