YEAR 2005 CASE SUMMARIES

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

Respondent waived his objection to Motion to Suppress ruling by offering evidence establishing the same facts at trial. [In the Matter of R.J.R.](05-3-09)

On June 9, 2005, the El Paso Court of Appeals held that under the principle known as curative admissibility, the admission of improper evidence cannot be asserted as grounds for reversal on appeal where the defendant, on direct examination, gives testimony establishing the same facts as those to which an objection was raised.

05-3-09. In the Matter of R.J.R., UNPUBLISHED, No. 08-03-00392-CV, 2005 Tex.App.Lexis 4416, (Tex.App.— El Paso 6/9/05).

Facts: Midland Police Officer Gary Kennedy testified that on June 7, 2002, at approximately 4 a.m., while patrolling a high crime and drug area, he came in contact with the Appellant. He found the Appellant sitting in a 1987 Ford Tempo parked on Lee Street. He asked the Appellant for his name and date of birth. He then asked the Appellant to exit the vehicle because the Appellant was under age and in violation of the city's curfew law. He did a pat down to check for any weapons. He did not find any weapons, but he did notice a bulge in Appellant's pant pocket. Officer Kennedy then asked Appellant's permission to search inside his pockets, and Appellant consented. He testified that the bulge was soft and he could feel a substance inside the bag. Based on his experience, he believed it was contraband. He could also hear that it was a plastic bag. He then pulled out the bag and saw that it contained marijuana. Officer Kennedy then placed the Appellant under arrest.

On October 10, 2002, at approximately 6 a.m., Midland Police Officers Steven McNeill and Margarita Venegas were working undercover, patrolling in an unmarked white Chevrolet Astro van in an attempt to capture auto burglars. They received a call from dispatch that a male wearing dark clothing was prowling in the neighborhood of Crest and Ridgely. The individual was seen peering into the windows of parked cars, and it was reported that he could be armed. When Officers McNeill and Venegas received the call, two other marked vehicles had already been dispatched, but they went ahead and responded to the area as well.

Officer Venegas was driving the unmarked vehicle slowly through the neighborhood when they saw the Appellant wearing dark clothing riding a bicycle. Officer Venegas exited the vehicle and approached the Appellant; she identified herself as a police officer and asked him to stop. Appellant did not stop, but instead continued to pedal faster. Officer McNeill then testified that he stood in front of the bicycle, identified himself as a police officer, and asked Appellant to stop. Appellant did not stop, but rather veered to the left and evaded Officer McNeill. Officer McNeill then pulled the Appellant off his bicycle and the Appellant tried to pull away. Officer McNeill and Officer Venegas testified that they tried to pat down the Appellant, but that he was fighting them, attempting to escape. They finally wrestled him to

the ground. Appellant's pockets were bulging with approximately twenty items: a two-way radio, two cell phones, a fart machine, marijuana, an empty plastic bag, a homemade marijuana pipe, a cigarette lighter, a Playboy magazine, and a CD. The officers were able to locate the owners of the cell phones. The owners reported that the cell phones had been stolen from their cars.

Once Appellant was arrested, Detective Richard Faulkenberry of the Midland Police Department interviewed him, and attempted to get a statement. He also ran Appellant's fingerprints to see if there was a match with any auto burglaries in the past recent months. He found three cases with a positive match, which included theft of two firearms.

After further investigation, the Appellant was charged with: (1) theft of a firearm on or about September 19, 2002; (2) theft of a firearm on or about September 19, 2002; (3) burglary of a vehicle on or about September 19, 2002; (4) burglary of a vehicle on or about September 27, 2002; (5) burglary of a vehicle on or about October 4, 2002; (6) evading arrest or detention on or about October 10, 2002; (7) resisting arrest on or about October 10, 2002; (8) possession of a usable quantity of marijuana on or about October 10, 2002; (9) burglary of a vehicle on or about October 10, 2002; (10) burglary of a vehicle on or about October 10, 2002; and (11) possession of marijuana on or about June 7, 2003.

At the beginning of his jury trial, Appellant pled guilty to both vehicle burglaries occurring on or about October 10, 2002. Appellant's counsel then presented a motion to suppress evidence obtained on October 10, 2002. After hearing the testimony of Officer Steven McNeill, the trial overruled Appellant's motion. During the testimony of Officer Kennedy, Appellant's counsel also made an oral motion to suppress the evidence seized on June 7, 2002, which was also overruled by the trial court.

A jury heard the testimony of Appellant's arresting officers: Officer McNeill and Officer Venegas; of Detective Faulkenberry; of Officer Augusto Albo, who responded to a auto burglary on September 27, 2002; and of Officer Elias Hernandez, who responded to the auto burglary on October 4, 2002. There was also testimony from two victims of the auto burglaries. Identification Specialist, for the City of Midland, Karen Hare also testified as to the positive identification of Appellant's fingerprints in three of the cases. Crime Lab Investigator Bob Wheeler also testified that the amount of marijuana found in Appellant's pocket on both June 7 and October 10 was of a usable quantity.

The jury also heard the testimony of the Appellant. He testified that he had in fact broken into some vehicles in October of 2002. He testified that he would go from block to block checking for unlocked vehicles. He would only break into a vehicle if it was unlocked, moving on to the next car if it was locked. First, he would travel one side of the block, and then the other, and then finally move on to the next block, following the same procedure. He further testified that he did this three or four times a week. He would steal small items, such as CDs that would fit in his pant pockets, which he would later sell to his friends. He also testified that on June 7, he did in fact have a usable quantity of marijuana on his person, but that on October 10, the quantity was not a usable amount. He also provided testimony regarding the incident on October 10 and the other burglaries he was charged with.

At the conclusion of the trial, the jury found Appellant guilty on all counts, and assessed a punishment of confinement to the Texas Youth Commission for a period not to exceed the time when he turns twenty-one years of age. Appellant timely filed this appeal.

Held: Affirmed.

Opinion: In Issues One, Two, and Six, Appellant challenges the denial of his motion to suppress. n1 Appellant's motion to suppress was seeking to have the evidence seized on June 7, 2002 and on October 10, 2002 and all information obtained on that date to be suppressed on the grounds that the stop was

done without a warrant and without probable cause. In evaluating Appellant's argument, we will apply criminal law. *See In the Matter of R.S.C., 940 S.W.2d 750, 751-52* (Tex.App.--El Paso 1997, no writ), stating that delinquency proceedings are quasi-criminal in nature and that juveniles are entitled to many of the constitutional protections that are afforded to adult criminal defendants.

> n1 Appellant's brief contains the following heading for Issue Six: "The evidence was legally insufficient to sustain a finding of that Appellant committed the offense of possession of marijuana on October 10, 2002." However, other than providing us with the standard for a legal sufficiency review, Appellant provides no analysis, beyond simply stating the standard of review. In the body of his argument, we understand him to be making a challenge to the denial of his motion to suppress and we will address Issue Six accordingly.

A defendant may waive a prior objection to evidence by offering the same evidence or evidence establishing the same facts as trial. *In the Matter of R.S.C., 940 S.W.2d at 752*, *citing Narvaiz v. State, 840 S.W.2d 415, 430 (Tex.Crim.App. 1992), cert. denied*, *507 U.S. 975, 113 S. Ct. 1422, 122 L. Ed. 2d 791 (1993)*; *Maynard v. State, 685 S.W.2d 60, 65 (Tex.Crim.App. 1985)*; *Nicholas v. State, 502 S.W.2d 169, 174-75 (Tex.Crim.App. 1973)*. Under the principle known as curative admissibility, the admission of improper evidence cannot be asserted as grounds for reversal on appeal where the defendant, on direct examination, gives testimony establishing the same facts as those to which an objection was raised. *See Rodriguez v. State, 919 S.W.2d 136, 138 (Tex.App.--San Antonio 1995, no pet.)*, *citing Thomas v. State, 572 S.W.2d 507, 513 (Tex.Crim.App. 1976)*.

Appellant testified at trial regarding the information and evidence he attempted to suppress with his motion. Appellant testified that he was in fact in possession of the marijuana on the night of June 7, 2002 and October 10, 2002, and that he was in possession of the alleged stolen items on October 10, 2002. In providing such testimony, Appellant established facts consistent with those he tried to suppress. Thus, we hold that Appellant has waived such issues on appeal. *See Rodriguez, 919 S.W.2d at 138.* Appellant's Issues One, Two, and Six are overruled.