Reversed and Remanded; Majority and Dissenting Opinions filed January 20, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00499-CR

———————————

DANNY JOE MCGEE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 771262

M A J O R I T Y O P I N I O N

In this case, we decide if evidence seized from a suspect's anal region should be suppressed if that evidence is seized pursuant to a warrantless arrest. Because we do not find sufficient information in the record to support the trial court's ruling, we reverse the ruling of the trial court and remand this case for further proceedings.

I. FACTUAL SUMMARY

Houston Police Officer Steven Rowan was contacted one evening by a concerned citizen who told him that three men were selling crack cocaine in the area of Fleming and Cool Wood in Houston. The

citizen described the clothes and appearance of the three men, told Officer Rowan the names of two of them, and stated an individual named Joe was hiding narcotics "in his ass."

With this information, Officer Rowan and his partner decided to investigate the tip. Upon their arrival at the scene, Officer Rowan and his partner found three young men, one of whom was appellant, matching the descriptions given by the citizen. These three were surrounded by a haze of blue smoke, which Officer Rowan stated he thought to be marijuana smoke. The officers approached the three men, noted that the smell of marijuana emanated from all three of them, and proceeded to obtain identification from them. Officer Rowan confirmed that the names matched the names given by the concerned citizen, and determined that two of the men were juveniles. While one of the officers checked the appellant and the two juveniles for weapons, the other officer searched the area around appellant and his friends. This officer discovered a Swisher Sweet cigar containing a small amount of marijuana. Upon this discovery, the officers handcuffed the three, loaded them into the police car, and proceeded to a fire station less than a mile away, refusing to give an explanation for this strange destination.

At the fire station, Officer Rowan obtained some sanitary rubber gloves and proceeded to perform a visual check of the buttocks and external anal area of appellant and one of the two juveniles. During the search of appellant, Officer Rowan requested that appellant bend over a table, lower his pants and underwear, and spread his buttocks. When he refused, Officer Rowan kicked appellant’s legs apart, removed appellant's clothing, and spread appellant's buttocks himself. Officer Rowan testified that a plastic covered object was in plain view lodged between appellant’s buttocks. A field test showed this object to be crack cocaine. Officer Rowan testified that appellant was then placed under arrest and charged with possession of a controlled substance.

At the hearing on his motion to suppress, appellant related a different story from that of Officer Rowan. Appellant claimed that when the officers initially checked him for weapons, they also pulled on the waistband of appellant's pants and underclothes and looked down the front and back of appellant's pants, apparently in a search for crack cocaine. Appellant also claimed that the cocaine was not in plain view when Officer Rowan performed his search at the fire station. Rather, the cocaine was discovered after Officer Rowan probed inside appellant's anal cavity for an extended period of time. Appellant's

testimony was buttressed by one of the juveniles, who testified that Officer Rowan also digitally explored his anal cavity.

The trial court overruled the motion. Appellant then pled guilty to the State's possession charges, and instituted this appeal. Appellant asserts that the trial court erred in denying his motion to suppress because the narcotics were fruits of an unconstitutional arrest and search. Because we sustain appellant's first point of error, we do not reach his challenge to the constitutionality of Officer Rowan's search.

II. PRELIMINARY ANALYSIS

Before we can examine the propriety of the trial court's ruling on the motion to suppress, however, we must conduct a preliminary analysis to determine whether we can reach this issue at all. *Gonzales v. State*, 966 S.W.2d 521, 524 (Tex. Crim. App. 1998). In cases such as this one where the appellant pleads guilty after the trial court denies his motion to suppress, appellate courts must perform a two-pronged analysis. We must first identify what "fruits" the trial court refused to suppress. *Id*. (citing *McGlynn v. State*, 704 S.W.2d 18, 21 (Tex. Crim. App. 1982). The second part of the test requires an analysis of whether or not those fruits were somehow used by the State. *Id*. (citing *Kraft v. State*, 762 S.W.2d 612, 613-14 (Tex. Crim. App. 1988). If either of these prongs is not satisfied, we cannot address the merits of appellant's claim. *Id*.

In the present case, the first prong of the test is easily determined from the record. The fruit of the search is the crack cocaine recovered from appellant's anal region.

The second part of this analysis, in contrast, is not as apparent. Nothing in the record shows that appellant based his plea on the trial court's decision to admit the cocaine. Even though this is the case, the cocaine found on appellant goes a long way toward incriminating him on the possession charge asserted by the State. Since this evidence is incriminating, we find that it has been used against appellant, giving us the right to entertain his appeal. *Kraft*, 762 S.W.2d at 615.

Turning to the merits of the appellant's challenge to the trial court's ruling, we must set up the standard of review in cases of this nature. We review a trial court's ruling on a motion to suppress based on an abuse of discretion standard. *Long v. State*, 823 S.W.2d 259, 277 (Tex. Crim. App.1991). At

a hearing on a motion to suppress, the trial court is the sole trier of fact and judge of the witnesses' credibility and the weight to be given their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App.1990). The trial judge may choose to believe or disbelieve any or all of a witness's testimony. *Green v. State*, 934 S.W.2d 92, 98 (Tex. Crim. App.1996). We must afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We also afford 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 ultimate questions turns on an evaluation of credibility and demeanor. *Id*. Further, the evidence is viewed in the light most favorable to the trial court's ruling. *Whitten v. State*, 828 S.W.2d 817, 820 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd).

III. THE WARRANTLESS ARREST CHALLENGE

We find that the trial court must have found appellant to be under arrest prior to the search for the search to be justifiable, especially since an intrusive search such as that conducted by Officer Rowan cannot be conducted on reasonable suspicion. *See Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed. 908 (1966). Under Texas law, the point at which a person is under arrest is clear. "A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person acting without a warrant." TEX. CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1994); *Hawkins v. State*, 758 S.W.2d 255, 259 (Tex. Crim. App.1988). "An arrest is complete when a person's liberty of movement is restricted or restrained." *Chambers v. State*, 866 S.W.2d 9, 19 (Tex. Crim. App.1993), *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1871, 128 L.Ed.2d 491 (1994). Conversely, an individual is not in custody or under arrest when he acts on the "invitation, urging or request of a police officer, and [is] not being forced, coerced or threatened." *Id*.

When a defendant seeks to suppress evidence because of an illegal arrest that violates the federal or state constitution, the defendant bears the initial burden to rebut the presumption of proper police conduct. *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App.1986); *Johnson v. State*, 834 S.W.2d

121, 122 (Tex. App.–Houston [1st Dist.] 1992, pet. ref'd). The defendant meets this burden by proving that police seized him without a warrant. *Russell*, 717 S.W.2d at 9. Once the defendant establishes that a warrantless search or seizure occurred, the burden shifts to the State either to produce evidence of a warrant or to prove the reasonableness of the search or seizure pursuant to one of the recognized exceptions to the warrant requirement. *Id*.

Here, the uncontroverted testimony elicited at the hearing revealed that prior to taking appellant to the fire station, Officer Rowan and his partner placed appellant in handcuffs and placed him in the back of the police vehicle. Officer Rowan testified that, at this point in appellant's detention, he was neither under arrest nor free to leave. Based on this testimony we find the only reasonable inference is that appellant was under arrest at the time the search was conducted, since his liberty of movement was restrained from the moment that he was handcuffed and placed in the police car. Further, it is clear from the record that appellant's arrest was warrantless. Since the evidence here clearly established the absence of a warrant, the burden rested upon the State to prove the existence of a valid exception.

In Texas, warrantless arrests are authorized only if (1) there is probable cause with respect to the seized individual, and (2) the arrest falls within one of the statutory exceptions delineated in the Code of Criminal Procedure. *Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989). Probable cause exists "when the facts and circumstances within the officer's personal knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that, more likely than not," a particular suspect has committed a crime. *Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App.1993).

We find sufficient factual information on the record to support probable cause for appellant's arrest. The concerned citizen informed Officer Rowan that appellant was in possession of and trafficking in illegal narcotics. Officer Rowan had found this informant reliable in the past. When the officers arrived on the scene, they observed a cloud of marijuana smoke around appellant and the two juveniles, whose descriptions perfectly matched the descriptions given by the informant. Further investigation revealed that the names given by the informant matched the names of the appellant and his cohorts. The officers also found marijuana in the area around appellant and the two juveniles, although they did not witness any of

them actually use the marijuana. Officer Rowan testified that, based on all of these facts, he believed it more likely than not appellant and his friends had been using narcotics just prior to his arrival on the scene. Based on the "laminated total" of these facts, we determine that the trial court did not abuse its discretion in determining Officer Rowan had probable cause to arrest appellant. *See McNairy v. State*, 835 S.W.2d 101, 106 (Tex. Crim. App. 1991) (citing *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1948)).

The State also has the burden of proof to show that a statutory exception allowing warrantless arrests applies, a burden which it fails to meet in this case. On appeal, the State argues that TEX. CODE CRIM. PROC. ANN. art. 14.04 justifies appellant's warrantless arrest. This provision states:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused." TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1994).

Thus, the State can utilize this exception if it shows it had "satisfactory proof" from a "credible person" that: (1) a felony had been committed; (2) the appellant was the offender; and (3) the appellant's escape was imminent. *DeJarnette v. State*, 732 S.W.2d 346, 349 (Tex. Crim. App. 1987); *Sklar v. State*, 764 S.W.2d 778, 780 (Tex. Crim. App. 1987); *Morelos v. State*, 772 S.W.2d 497, 501 (Tex. App.–Houston [14th Dist.] 1989, pet. ref'd). To utilize this provision, the "concrete factual situation spread on the record" must justify its application. *Stanton v. State*, 743 S.W.2d 233, 235 (Tex. Crim. App. 1988). This exception is strictly construed. *DeJarnette*, 732 S.W.2d at 349. Because the State satisfied only three of the exception's four criteria at the hearing, we must remand this case back to the trial court.

Here, we find the State has satisfied the "credible person" criterion of this exception. The State argues that the citizen's information is inherently credible, relying on the proposition that a concerned citizen, whose only contact with police is due to having witnessed a crime, is presumed reliable. This argument assumes the fact that the informant must be named or disclosed. *Esco v. State*, 668 S.W.2d 358, 360-61 (Tex. Crim. App. 1982). Here, the informant's identity was not disclosed. Even though the citizen's

reliability may not be presumed, Officer Rowan testified that he had relied on information provided by this concerned citizen before and had found him reliable. Though he also testified that he had not used information from this person before, if we resolve this factual dispute in favor of the trial court's denial of appellant's motion, we find the concerned citizen to be reliable in satisfaction of the statute.

The State also satisfied the "felony" requirement of Article 14.04. The citizen told police that appellant possessed and sold cocaine. Both of these offenses are felonies. TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon Supp. 1998) (delivery of cocaine); TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon Supp. 1998) (possession of cocaine). Thus, Officer Rowan was informed by a credible person that a felony had been committed.

Further, the State easily satisfied the requirement that appellant was the offender. The informant told officers that the appellant was both selling and in possession of crack cocaine. In fact, the informant mentioned the appellant by name. We therefore find sufficient proof in the record to satisfy this element.

Though the State satisfied these three elements at the hearing, it failed to meet its burden in proving the "escape" criterion. As the State correctly argues:

> Article 14.04 . . . does not require a showing that the offender in fact was about to escape, nor does it require a showing that there in fact was not time to procure a warrant. The statute merely requires a showing that the officer was acting upon satisfactory proof from representations by a credible person that the felony offender is about to escape, so that there is no time to procure a warrant. *Fry v. State*, 639 S.W.2d 463, 476 (Tex. Crim. App. 1982).

This element can be satisfied by a number of factors, including temporal proximity to the commission of the crime, physical proximity to the crime scene, and the suspect's knowledge of police pursuit. *See DeJarnette*, 732 S.W.2d at 352-53. However, none of these factors is dispositive of the issue. *Id.*

This case is factually similar to two other cases decided by the Court of Criminal Appeals, *Hardison v. State*, 597 S.W.2d 355 (Tex. Crim. App. 1980) and *Pearson v. State*, 657 S.W.2d 120 (Tex. Crim. App. 1983).

In *Hardison*, an unidentified informant told police that the appellant was dealing heroin in front of a barber shop on a particular street. 597 S.W.2d at 356. The informant described the appellant's clothing and stated that he stored the encapsulated heroin in his hatband. *Id*. The officer testified that he had used the informant on at least twelve prior occasions, and his information had proven reliable every time. *Id*. The officers went to the location immediately after being given the tip and observed the appellant for five to ten minutes. *Id*. at 356-57. Even though he did not commit a felony during this time, the officers approached the appellant, took his hat, and, upon finding heroin in the hatband, arrested the appellant. *Id*. at 357. The officer testified that he knew he could obtain a warrant, but gave no reason why he could not obtain one. *Id*. The court ruled this arrest invalid under art. 14.04 because there was no showing that the appellant was about to escape. *Id*. Although the test applied in *Hardison*, that there must be a showing that the suspect was about to escape, was later replaced with a lower threshold in *Fry*, we still find its facts a compelling analogue to this case.

In *Pearson*, an unidentified, reliable informant notified police that the appellant was at a bar and had in his possession a Tylenol box containing heroin. 657 S.W.2d at 120. The informant told police that the Tylenol box was located in the appellant's vest pocket. *Id*. The police officers went to the bar, asked the appellant, who was on duty and at work in the bar, to come outside with them, and placed him under arrest. *Id*. at 121. They discovered the Tylenol box containing heroin exactly where the informant said it would be. *Id*. Looking to *Hardison* for guidance, the court there held the warrantless arrest invalid because there was no showing that the officers were acting upon satisfactory proof from a credible source that the appellant was about to escape. *Id*.

Here, there is also no showing that appellant was about to escape. There is no evidence that appellant had been informed of the police investigation. Appellant was found exactly where the citizen told officers he would be found. Further, when the officers approached the appellant and asked him to place his hands on the patrol car, he complied. Rather than indicating that appellant was about to escape, the facts of this case seem to indicate the contrary result.

The State relies heavily on *DeJarnette* in support of its argument that the officers perceived appellant was about to escape. In that case, a bystander observed two men apparently rob another man

on the street, throw him down, kick him, stab him, and then walk away. 732 S.W.2d at 348. The eyewitness described the assailant to police officers. *Id*. Officers began asking people in the area if they had observed anyone matching the assailant's description. *Id*. One person stated that he had seen someone matching that description at a bar a few blocks away. *Id*. Fifteen minutes after the crime was committed, the officers proceeded to the area around the bar, observed appellant walking away from the scene on a public street, and arrested him. *Id*. The court held this arrest valid under Article 14.04, since the totality of the circumstances supported the arresting officer's belief that appellant was attempting to escape. *Id*. at 353.

We find this case to be far more similar to *Hardison* and *Pearson* than *DeJarnette*. Here, there was no evidence that appellant was about to escape, either from the citizen's tip or from the officers' observations. In *DeJarnette*, the appellant had fled the scene and was seen walking away from the area where the crime was committed. Further, the facts of the case established a close proximity in time between the commission of the crime and the suspect's apprehension. Here, there is no evidence in the record to substantiate escape on the part of appellant, nor is there sufficient information from which to judge temporal proximity. Thus, we do not find *DeJarnette* dispositive of this case.

The State argues that we should infer escape since appellant was found on a public street, again relying on language in *DeJarnette*. We cannot agree. To so hold would be to eviscerate the general rule that officers obtain a warrant prior to an arrest, since every warrantless arrest in a public place would become justifiable under Article 14.04. Further, we are not inclined to believe that *DeJarnette* stands for the proposition that suspects found on public streets are inherently about to escape. Rather, we feel that the suspect's presence on a public street is yet another factor to consider when analyzing escape under Article 14.04. *See DeJarnette*, 732 S.W.2d at 353 n. 3 ("In the instant case, however, appellant was found on a public street *in the act of leaving the scene very shortly after commission of the offense*. Without considering more than the facts presented in the instant case, we find that appellant's acts in *leaving the scene* so closely after commission of the offense are relevant to the issue of imminent escape.") (emphasis added).

Here, no evidence supporting escape was offered at the motion to suppress hearing. Because the State failed to meet its burden, we find no evidence to support the trial court's denial of appellant's motion to suppress on this issue.

IV. HARM

Having reached this conclusion, we must now conduct a harm analysis. TEX. R. APP. PROC. 44.2(a) (Vernon Pamph. 1999); *State v. Daugherty*, 931 S.W.2d 268, 273 (Tex. Crim. App. 1996). Factors the Court should consider in this analysis include: (1) the source of the error; (2) the nature of the error; (3) whether or to what extent it was emphasized by the State; (4) the error's probable collateral implications; (5) how much weight a juror would probably place on the error; and (6) whether declaring the error harmless would encourage the State to repeat it with impunity. *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App.1989).

An application of these factors reveals that this error was not harmless. First, the source of this error was the police officer, who on the record admitted that he felt that a strip search of appellant was justified during an investigatory stop. Second, this error was constitutional in nature, since the search deprived appellant of his right to be free from unreasonable searches and seizures under the Texas Constitution. Third, though the case did not go before a jury, it is doubtless that the State would place great emphasis on the narcotics in its argument to the jury, since the narcotics seized from appellant are the only direct evidence possessed by the State establishing that he was in possession of a controlled substance. Fourth, the collateral consequences of the trial court's error probably resulted in appellant's guilty plea, even though the evidence used to obtain that plea might have been obtained in violation of appellant's rights. Fifth, a jury would probably place great weight on the admissibility of the evidence for the same reason it is important to the State's case–it is the only direct evidence of the crime. Finally, holding this error harmless would likely foster the continuation of this practice by police officers, especially since Officer Rowan testified that such arrests and searches were common practice.

Because we do not find the trial court's error harmless, we reverse the trial court's ruling and remand. Further, because we find constitutional error under appellant's first point, we do not reach the issue of the constitutionality of the police officer's warrantless search of appellant.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed January 20, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Publish — TEX. R. APP. P. 47.3(b).

Reversed and Remanded; Majority and Dissenting Opinions filed January 20, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00499-CR

———————————

DANNY JOE McGEE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 771,262

D I S S E N T I N G O P I N I O N

Appellant was arrested without a warrant. To support the warrantless arrest, the State relies upon Article 14.04 of the Code of Criminal Procedure. Under the provisions of this article, a peace officer is authorized to arrest the accused without a warrant if he has received a report from a credible person that the accused has committed a felony and is about to escape. Because the record contains no evidence appellant was about to escape, the majority holds the trial court erred in denying appellant's motion to suppress. I disagree.

If we were limited in our analysis to determining solely whether Article 14.04 justifies appellant's warrantless arrest, I might find myself in agreement with the majority. However, if a trial judge's decision is correct on any theory of law applicable to the case, it should be sustained. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *State v. Morgan*, 841 S.W.2d 494, 496 (Tex. App.–El Paso 1992, no pet.). Thus, I do not believe our disposition of this case is limited by the arguments and authorities presented in the State's brief. Rather, we are obliged to rightly decide the issues presented by an appellant regardless of whether the State, as the appellee, has correctly articulated the law or even filed a brief. In a criminal appeal, the State's brief is frequently of great assistance to this Court, but it in no way restricts our consideration of the law or the rationale we may employ in our decision. It is the appellant who carries the burden of showing error on appeal, and it is appellant's brief which defines the issues that will be considered on appeal.

Here, the facts surrounding appellant's arrest are disputed. In such cases, we must begin our review by deferring to the lower court's determination of the historical facts. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). Examining the record in the light most favorable to the trial court's ruling, it appears the police were contacted by a concerned citizen whose reliability had been established on previous occasions.[1] This person reported to police that three men were presently selling crack cocaine near the intersection of Fleming and Cool Wood. The citizen further gave the police the names of the three men, described their appearance in detail, and said appellant was hiding the cocaine "in his ass."

The police knew from past experience that it is common for narcotics dealers to hide their contraband by wedging it between their buttocks.

---

[1] The arresting officer gave conflicting testimony regarding whether the citizen had provided him with reliable information on a previous occasion. However, at a suppression hearing, the trial judge is the sole and exclusive trier of fact and judge of the credibility of the witnesses, as well as the weight to be given their testimony. *See DuBose v. State*, 915 S.W.2d 493, 496 (Tex. Crim. App. 1996). Thus, in the absence of specific findings, we must presume the trial judge found the citizen's reliability had been previously established.

Police went to the intersection of Fleming and Cool Wood where they saw three men matching the description given by the citizen. The officers also noticed the men were surrounded by a cloud of "blue" smoke. The officers approached the men, confirmed their identities by name, smelled the odor of marihuana on all three suspects, and found a small quantity of marihuana in a cigar wrapper on the ground.

At this point, I think the police had abundant probable cause to believe that appellant was in possession of crack cocaine and that the contraband was hidden in the cleft of his buttocks. In other words, the police had probable cause to believe appellant was committing an offense in their presence.

Article 14.01

"A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon 1977). Thus, an officer may properly arrest without a warrant where facts and circumstances within the officers' knowledge and of which he had reasonably trustworthy information are sufficient to warrant a prudent man in believing that the arrested person is committing an offense. *See Magic v. State*, 878 S.W.2d 309, 312 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd).

For example, in *De Jesus v. State*, 917 S.W.2d 458 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd), police arrested the defendant after a narcotics dog "alerted" on one of her bags at the airport. De Jesus argued that because her arrest was unlawful, the subsequent search of her luggage was improper, and the cocaine found therein should have been suppressed by the trial court. Relying upon Article 14.01, this Court held that police had probable cause to believe De Jesus was committing an offense in their presence, i.e., she was in possession of narcotics contraband. *Id*. at 461.

Likewise, the officers here had probable cause to believe appellant was in possession of crack cocaine. Under Article 14.01, it is not necessary that an officer be certain that an offense has been or is being committed, so long as he has reasonably trustworthy information that would warrant a prudent person in believing that the arrested person has committed or is committing an offense. *Id*. Moreover, in assessing probable cause to believe an offense has been or is being committed, the officer is not restricted solely to

information or facts which he has personally observed. *See Beverly v. State*, 792 S.W.2d 103, 105 (Tex. Crim. App. 1990) In addition to his own observations, an officer may rely on reasonably trustworthy information provided by another person in making the overall probable cause assessment. *Id.*; *see also Astran v. State*, 799 S.W.2d 761, 764 (Tex. Crim. App. 1990).

Accordingly, I believe the police were authorized under Article 14.01 to arrest appellant without a warrant.

Article 14.03

A peace officer may also arrest without a warrant any person found in a suspicious place or under circumstances which reasonably show that he has committed a felony or is about to commit some offense against the laws of this state. *See* TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon Supp. 2000).

In *Romero v. State*, 709 S.W.2d 53 (Tex. App.–Fort Worth 1986, no pet.), a woman told a police officer that her ex-husband had beaten her. The officer could see that the woman had a cut lip, blood in her hair, and a swollen eye. The woman described and named her assailant, said she was fearful he would return, and that he had recently been living with some friends one block away. Approximately 45 minutes to an hour later, the officer spotted a person fitting the description of the woman's ex-husband sitting on the porch of a house about a block away from the woman's residence. When the officer inquired as to his identity, the man gave the officer a fictitious name. However, in the officer's opinion, the man matched a photograph given to him by the woman. The man was arrested and found in possession of cocaine. Citing Article 14.03, the court wrote: "The former wife's obvious injuries; plus her statements recounting his assault; plus her fear that he would do it again; plus his location only a block away; plus appellant's giving of a false name and other lies all compounded to give Endsley, the policeman, all the probable cause he needed to make an immediate arrest."

Similarly, here the police: (1) had been given a detailed report by a concerned citizen that appellant and two other named and described individuals were presently selling cocaine at a specific location; (2) knew the citizen was reliable because he had previously given police information that proved to be true and

correct; (3) were told the appellant was hiding his contraband between his buttocks; (4) knew from experience that this was a common method of hiding contraband; (5) observed and confirmed all aspects of the information provided by the citizen other than possession of cocaine; (6) smelled the odor of marihuana on the appellant; and (7) found a small amount of marihuana on the ground. As in *Romero*, I believe that under Article 14.03, the police had all the probable cause they needed to make an immediate arrest.[2]

Conclusion

The thrust of articles 14.01(b) and 14.03(a)(1) are essentially the same, i.e., that an officer may arrest an offender without a warrant when the officer has probable cause to believe that an offense is being committed in his presence, or that the person has in the past committed, or is about to commit, some offense. *See Kite v. State*, 788 S.W.2d 403, 405 (Tex. App.–Houston [1st Dist.] 1990, no pet.). Neither article requires a showing that appellant was about to escape. Accordingly, I would affirm the judgment of the trial court, and for these reasons I respectfully dissent.

/s/ J. Harvey Hudson
Justice

---

[2] *See Rodriguez v. State*, 775 S.W.2d 27 (Tex. App.–Houston [14th Dist.] 1989, pet. ref'd), where a Houston Police Narcotics Division officer received word from a reliable and credible confidential informant that appellant would soon arrive at a certain McDonald's restaurant driving a vehicle containing a large amount of cocaine. Approximately a dozen police officers converged on the crowded location with weapons drawn. Appellant was arrested without a warrant as he walked from the parking lot. After his arrest, appellant gave a written consent to search his vehicle and advised police that it contained five duffle bags of cocaine. On appeal, Rodriguez challenged the validity of his arrest. This Court held the record supported a finding of probable cause for a warrantless arrest of the defendant on suspicion of possession of a controlled substance. *Id*. at 31.

Judgment rendered and Opinion filed January 20, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Publish — TEX. R. APP. P. 47.3(b).