TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-532-6282

Web Site: www.texindbar.org

Vol. 8, No. 9, March 6, 2000

Case Name: Mark Edward Reasor v. The State of Texas

- OFFENSE: Possession of Controlled Substance
- COURT OF APPEALS: San Antonio 1998
- C/A CITATION: 988 S.W.2d 877
- C/A RESULT: Conviction Reversed
- COUNTY: Bexar
- CRIM. APPEALS No. 0681-99
- DATE OF OPINION: March 1, 2000
- JUDGE: Holland, J.
- DISPOSITION: Court of Appeals Reversed - Conviction Affirmed

31.041 Search and Seizure / Search Incident to Arrest("Protective Sweeps"): A San Antonio deputy sheriff ("Bellino") received information from an informant that Appellant would be in possession of and distributing cocaine. Bellino, joined by three other deputies, began surveillance at Appellant's house about 8:30 p.m., and around 9:40 PM, Appellant and a companion left Appellant's house, and the officers followed them. Appellant made three brief stops at three different apartment complexes and returned to his house. Bellino testified in the motion to suppress evidence that this behavior was "common for individuals who are delivering narcotics." When Appellant got back to his house, the police officers blocked his car in the driveway and identified themselves as police officers with their weapons drawn. The officers checked Appellant and his companion for weapons. When Bellino approached Appellant's car, he noticed a brown pouch containing a white, powdered substance laying open on the dash. The officers secured this evidence and advised Appellant of his Miranda warnings. Appellant indicated that he understood his rights and was willing to talk to the officers. Appellant's companion was permitted to leave after the police officers were assured that the companion was not involved in any illegal activity. At this point, three officers entered Appellant's house to conduct a "protective sweep" of the residence. When the officers finished, they brought Appellant back into the house to interrogate him. There, while handcuffed, Appellant signed the Miranda warning form and the consent to search form. Appellant identified the substance found in his car as cocaine, and he pointed out other controlled substances in his bedroom and living room. The police also found additional drug paraphernalia, including a triple-beam scale and a ledger containing customer's names. The trial court denied the motion to suppress, and Appellant subsequently pleaded guilty to the possession of a controlled substance. On appeal, Appellant claimed that the trial court violated his federal and Texas constitutional rights because the consent to search his house was not freely and voluntarily given. Appellant also asserted that the "protective sweep" was illegal, and thus, it tainted his consent. The Court of Appeals agreed and concluded that prosecutors "made no showing that the officers had 'articulable facts' which led them to believe that there might be someone else in the residence." Additionally, the Court of Appeals concluded that the consent to search Appellant's house was not voluntary under the totality of the circumstances. As support for that conclusion, the court cited the facts that Appellant was arrested at gunpoint, that he was handcuffed at the

time he gave consent, and that police had already searched his vehicle and "swept" his house (see Greenwood & Schulman, Vol. 7, No. 10; March 15, 1999).

Holding: In Maryland v. Buie, 494 U.S. 325 (1990), the United States Supreme Court considered whether the Fourth Amendment would permit officers to conduct a protective sweep incident to an arrest and concluded that "The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." [In the instant case] Bellino did not express his belief that any third persons were inside Appellant's home. Nor did Bellino once articulate his belief that a third person inside the home was attempting to jeopardize either his or the public's safety. In fact, Bellino specifically stated that he considered the appellant's driveway a safe place for both him, his fellow officers and the appellant. Since Bellino failed to express a single articulable fact necessitating a protective sweep, we conclude this sweep was illegal.

Comments: (David A. Schulman) This is a potentially dangerous decision for Texas residents. In Buie, the question was whether officers who had entered the defendant's house pursuant to a warrant for his arrest could then conduct a "protective sweep" of his house. The language from Buie cited by this Court refers to "an in-home arrest." In this case, Appellant was clearly under a warrantless arrest outside of his house. This wasn't an "in-home" arrest, while this was, in fact, an illegal sweep under Buie, it was illegal because the deputies shouldn't have entered Appellant's house at all. Because this opinion fails to recognize the difference between an "in-home" arrest and an arrest outside the home, I have no doubt that some officers will start using it as the basis for entering the home of every person they arrest who is unfortunate enough to head for home when he's being followed.

G/S 31.05 Search & Seizure / Consent Searches: The State also claimed that the Court of Appeals erred in finding that Appellant's consent to the search of his house was invalid, arguing that the evidence presented showed by clear and convincing evidence that Appellant voluntarily consented to the search of his home. The State also asserted that the Court of Appeals failed to defer to the trial court's findings of fact and conclusion that the consent was voluntary.

Holding: In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Supreme Court held that "When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." Several factors support the State's contention that it did prove by clear and convincing evidence Appellant voluntarily consented to the search of his home. First, the protective sweep of the house did not yield any incriminating evidence. At the point Appellant consented to the search of his home, the police had not yet discovered any evidence against him except for the substance seen in Appellant's car in plain view. Any taint from the illegal entry was sufficiently attenuated when the police obtained Appellant's consent to search his home. Second, the police had questioned Appellant's companion and had let that companion leave. This fact demonstrates the reasonableness of the arresting officers. Third, Appellant was given his Miranda warnings twice - once when he was arrested and once right before he pointed out additional evidence in his home. He had also signed both a Miranda warning form and a consent to search form. Furthermore, Appellant was repeatedly warned that he had the right to remain silent throughout questioning, as shown by the following testimony from the hearing on the motion to suppress. Considering all of the circumstances and giving proper deference to the trial court's determination, we hold that the State proved by clear and convincing evidence that Appellant consented to the police search of his home. In fact, not only did he consent, but he cooperated with the police officers and showed them the illegal narcotics hidden in his home.