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⚖ Vol. 14, No. 16 - May 1, 2006

Case Name: *Anibal Montanez v. The State of Texas*

- OFFENSE : Possession of Controlled Substance
- COUNTY : Angelina
- COURT OF APPEALS : Waco 2004
- C/A CITATION : 143 S.W.3d 344
- C/A RESULT : Court of Appeals Affirmed
- CCA. CASE No . PD-0894-04
- DATE OF OPINION : April 26, 2006
- DISPOSITION : Court of Appeals Reversed
- OPINION BY: [Keasler, J.](#) VOTE : 5-1-3
- TRIAL COURT : 217th D/C; Hon. Paul White
- LAWYERS : David Cook (Defense); Clyde Herrington (State); Jeff Van Horn (SPA)

⚖ **70.02** Challenges to Prosecution / Suppression / Preservation of Error: Appellant filed a motion to suppress evidence. The trial judge indicated that he would read the trial briefs and rule later. After the conclusion of the hearing, the motion was never explicitly ruled on, and the Appellant pled guilty.

Holding: The trial judge deferred his ruling on the record, and the docket sheet reflects that "appeal preserved as to issues presented[.]" Appellant's amended notice of appeal also states, "This is notice of the defendant's right to appeal to the court of appeals from the judgment or other appealable order in this case." Included on the document containing Appellant's amended notice is the trial judge's certification of Appellant's right to appeal. The trial judge certified that Appellant's appeal "is in a plea-bargain case, and is on matters that were raised by written motion filed and ruled on before trial." To require that Appellant have requested a ruling, made a bill of exception, objected to the trial court's failure to rule, or supplemented the record on appeal, in order to have preserved the issue for appellate review, would directly conflict with the plain language of Rule 33.1(a)(2)(A), T.R.A.P., that permits an implicit ruling. We find that the actions and statements of the trial judge "unquestionably indicate" that the judge overruled Appellant's motion to suppress.

⚖ **31.053** Search & Seizure / Consent / Voluntariness: At a suppression hearing, Investigator Bridges, a member of the Deep East Texas Regional Narcotics Trafficking Task Force, testified that he stopped the vehicle Appellant, a native of Puerto Rico, was driving for traffic violations. He "felt like some type of illegal activity was occurring" based on his conversations with Appellant and his passenger, so he asked for Appellant's consent to search the vehicle. On cross-examination, Bridges acknowledged that Appellant did not speak English very well and that he had to repeat some questions, including his request for consent. But he stated that Appellant

answered his questions and they had "communicated quite well." Bridges testified that after his second request for consent, Appellant acquiesced by motioning toward the back of the vehicle and stating, "You want to check it out, you can check it out." While Bridges was conducting a search of the vehicle, another officer, a K-9 handler, arrived at the scene with a dog certified to detect the presence of narcotics. The handler testified that the dog gave a positive alert at the rear of the vehicle. Bridges testified that he told Appellant and his passenger that they were under arrest and then directed them to follow him to the task force headquarters in their vehicle. At the task force headquarters, the gas tank was removed from the vehicle, revealing seven kilos of cocaine. The Court of Appeals found the officer's testimony was contradicted by the video tape from his patrol car, reversed the trial court and ordered suppression (see [G&S](#) , Vol. 12, No. 23; 06/14/04 and Vol. 12, No. 36; 09/13/04).

Holding: The Court of Appeals held that "Giving proper deference to the trial court's determination, we nevertheless conclude that the record of the suppression hearing does not contain clear and convincing evidence to support the trial court's finding that Appellant freely and voluntarily consented to the search." In [Guzman v. State](#) , 955 S.W.2d 85 (Tex.Cr.App. 1997)(see [68](#), [Vol. 5, No. 38](#); 09/29/1997), we determined that when reviewing a trial court's decision to deny a motion to suppress, an appellate court "should 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." * * * Our precedent, as demonstrated by the cases discussed below, establishes that when an appellate court is asked to decide whether the State proved voluntary consent to search by clear and convincing evidence, the applicable standard of review is that set out in [Guzman](#). The court below applied the incorrect standard of review, as the deferential standard of review is the rule, not the exception.

Concurring / Dissenting Opinions: Judge Keller concurred without note. Judge Meyers dissented, stating "Man, these suppression hearings can be tricky little devils." He argued that the case was "identical to the issue we unanimously ruled on" in [Carmouche v. State](#), 10 S.W.3d 323 (Tex.Cr.App. 2000)(see [68](#), [Vol. 8, No. 4](#); 01/31/2000). "The Court of Appeals did not err by failing to apply a [Guzman](#) standard of review because there is no issue of credibility and demeanor of the witnesses in this case. This is not a review of a cold record, rather it is the Court of Appeals watching the exact same videotape that the trial judge watched and then holding that the trial judge made an incorrect ruling. Judge Johnson dissented but agreed with Judge Meyers. Judge Womack dissented, arguing that the Court has ruled on an issue the parties didn't brief ("I believe that the Court should give the parties notice of this decision and an opportunity to brief the issue").

Sidebars: ([Karyl Anderson Krug](#)) I agree with the dissenters. I am curious, since the sua sponte issue of preservation was decided in favor of Appellant, whether Judge Womack is saying that the State was denied due process?