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OPINION

A jury convicted appellant of the offense of Possession of a Controlled Substance With Intent to Deliver: Cocaine. See Tex. Health & Safety Code Ann. § 481.112(a) (Vernon Supp. 2001). Two prior felony convictions raised appellant's punishment status to that of an habitual offender. Appellant pleaded true to the two felony enhancement paragraphs and the jury assessed a forty-five (45) year sentence. Appellant raises a single issue for our consideration: "The trial court erred in denying Willie Lee Douglas' Motion to Suppress all evidence seized as the result of an illegal search of his vehicle in violation of the Fourth Amendment to the United States Constitution and Article I, section 9 of the Texas Constitution."

The record before us reflects the trial court conducted a pre-trial suppression hearing. At the conclusion of the testimony and arguments of counsel, the trial court denied appellant's suppression motion.¹ At the hearing, testimony from the two law enforcement personnel involved was elicited. A videotape, Defendant's Exhibit 1, was also admitted and played for the trial court. The videotape depicts the encounter between Department of Public Safety Troopers Shannon Conklin and Stephanie Johnson, and appellant and his nephew, Robert Hart. Neither appellant nor Hart testified at the suppression hearing.

As mentioned above, testimony was elicited from Troopers Conklin and Johnson, with Trooper Conklin being the lead officer during the encounter. Conklin testified that he checked appellant's vehicle via radar traveling 40 miles per hour (m.p.h.) in an area with the posted speed limit of 35 m.p.h. As Conklin and his partner began to pursue appellant's vehicle, the vehicle pulled into a gas station and eventually stopped next to a gas pump. Conklin identified the driver as Hart by a Texas "ID card" as Hart admitted he had no driver's licence. Conklin was informed by Hart that the vehicle was owned by appellant. Conklin then immediately began questioning Hart as to the itinerary and purpose of the trip, where Hart worked, where Hart lived, and inquired of Hart about his passenger. When asked to describe Hart's demeanor as he was identifying and talking to him, Conklin responded that "Mr. Hart appeared extremely nervous," and that Conklin observed "beads of sweat rolling off [Hart's] head," which Conklin thought unusual because it was a cool morning and Conklin was wearing a jacket. When asked by the State's attorney as to whether Hart was "hesitant" or "evasive" in answering his questions, Conklin merely responded that Hart "seemed like he was unsure of his answer." When asked next if Conklin observed Hart to be unable to stand still or to be unable to keep his hands in plain view, Conklin responded that he could not remember.



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Conklin then proceeded to identify appellant who was sitting in the front passenger's position in the vehicle. Appellant handed Conklin a valid Louisiana driver's license. Conklin, out of Hart's presence, also questioned appellant about the nature of his trip with Hart. At this point, the record reflects the following exchange between the State's attorney and Conklin on direct examination:

Q:[State] What did he [appellant] tell you in that regard?

A:[Conklin] During the interview I didn't understand him on some of the things. It just didn't make sense. And I tried to recap it to him or reask [sic] him what I thought he told me. And it - - it seemed like it - - it just didn't make any sense what he was telling.

Q: Were there - - were there discrepancies between what the defendant, Mr. Douglas, was telling you about the - - the trip that they were on and what Mr. Hart the driver had told you?

A: Discrepancies as far as the length of time, and the reason, yes, sir.

Q: Okay. And I guess, sir, as part of your - - your job as a DPS trooper over the last several years, sir, had you also become involved with individuals that you determined to be transporting either drugs or some other type of illegal contraband?

A: Yes, sir.

Q: Okay. And in - - in particular, when you have got multiple occupants of a vehicle, what are you looking for when you're questioning those people? If you're concerned that they may be transporting contraband of some sort?

A: Like the reason for their trip. If it's reasonable or not. The nervousness displayed by the occupants in the vehicle. Conflicting stories. Other things. Odors and stuff maybe emitting from the vehicle. Things along that line.

Q: Okay. Well, by the time you had finished questioning the passenger in the case, Mr. Douglas, I think you had testified that the driver was nervous and sweating?

A: Yes, sir.

Q: And that the stories were somewhat conflicting insofar as the purpose of the trip. That, I guess, heightened your sense of concern, if any, that they may have been trafficking some sort of contraband?

A: It - - it made me believe there was some form of criminal activity. Whether it be contraband or something else. But, yes, sir, it did.



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Following the interview of appellant, Conklin requested a criminal history check on both Hart and appellant from the local police dispatcher using Hart's ID card and appellant's driver's license. The dispatcher indicated that Hart had an arrest warrant outstanding for the offense of aggravated assault, and that Hart had apparently been arrested on some prior occasion for a controlled substance offense. With regard to appellant, there were no pending arrest warrants or pending criminal charges outstanding. However, the dispatcher did indicate that appellant had a history of "dangerous drug" "charges." Immediately after this direct examination testimony by Conklin, the following exchange took place:

Q:[State] Okay. Based upon what you had developed from that point in time, I guess, of the behavior of the occupants of the vehicle, the conflicting stories and now added to that the fact that both of the occupants of the vehicle had a criminal history that at least suggested arrests for drug activity before, did you feel at that point that you had a probable cause to search the vehicle?

A:[Conklin] Yes, sir, I felt before actually getting the history that I had probable cause just from their demeanor, their reason for the trip and the circumstances. Histories help me know if it is - - maybe if they are involved in some form of drug activity. Or if it is stolen property or forgery or just - - it kind of helps me. It is a tool to use to determine what kind of activity they might be involved in.

In addition to Conklin's belief he possessed probable cause to search appellant's vehicle, Conklin's direct examination testimony also indicates that he believed he was given permission by appellant to search the vehicle. Nevertheless, regardless of Trooper Conklin's ultimate opinions as to consent to search and probable cause, it has been held that it is the objective facts in existence at the time of the arrest or search, and not the subjective conclusions of the officer, which the reviewing court must scrutinize to determine the existence of probable cause. *Amores v. State*, 816 S.W.2d 407, 415 (Tex. Crim. App. 1991); *Johnson v. State*, 722 S.W.2d 417, 419 (Tex. Crim. App. 1986) (citing *Townsley v. State*, 652 S.W.2d 791, 796 (Tex. Crim. App. 1983)).

STANDARD OF REVIEW

"In reviewing a trial court's ruling, an appellate court must first determine the applicable standard of review." *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). Because of a lack of clarity in this area of the law, we will attempt to set out our understanding of the standard an appellate court must use when reviewing a trial court's ruling on a motion to suppress evidence in violation of the Fourth Amendment. The leading Supreme Court case with regard to this standard is *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), and the leading Texas case, referencing *Ornelas*, is *Guzman*, 955 S.W.2d at 87.

In *Ornelas*, we see the procedural background to be important in understanding the Court's ultimate holdings. The defendants pleaded guilty to possession with intent to deliver cocaine and reserved for appeal the trial court's denial of their motion to suppress. *Ornelas*, 517 U.S. at 691. The issues before



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the trial court were the existence of reasonable suspicion to stop the defendants' vehicle, and the existence of probable cause to remove an interior panel of the vehicle following a consent to search. Id. The Court of Appeals for the Seventh Circuit stated the standard for reviewing the trial court's finding of reasonable suspicion and probable cause to search was to do so "deferentially," and "for clear error." Id. The Supreme Court disagreed, holding "the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed de novo." Id. We pick up the analysis of the Supreme Court as they set out what precisely is involved in reviewing a trial court's determination of the existence of reasonable suspicion and probable cause (all emphasis is added unless otherwise noted):

The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n. 19, 102 S.Ct. 1781, 1791, n. 19, 72 L.Ed.2d 66 (1982).

We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination. See, e.g., *Brinegar*, supra, (rejecting District Court's conclusion that the police lacked probable cause); *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (conducting independent review and finding reasonable suspicion). A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Brinegar*, supra, at 171, 69 S.Ct., at 1308. Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

In addition, the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles. See *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) (where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law").

Finally, de novo review tends to unify precedent and will come closer to providing law enforcement



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officers with a defined "set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981); see also Thompson v. Keohane, 516 U.S. 99, 115, 116 S.Ct. 457, 467, 133 L.Ed.2d 383 (1995) ("[T]he law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law," and those effects "serve legitimate law enforcement interests"). Ornelas, 517 U.S. at 696-98, 116 S.Ct. at 1661-62, 134 L.Ed.2d at 919-20.

From the above portion of Ornelas, we see the Court recognizing the two aspects of the typical hearing on a motion to suppress: 1) the taking of testimony and introduction of physical evidence ("determination of historical facts") and, 2) the subsequent application of the testimony and/or physical evidence to the established law by the trial court ("mixed question of law and fact"). We see the focus of the Ornelas Court to be almost entirely on the second aspect of the hearing, viz: whether or not the trial court correctly applied the established law to the previously determined historical facts.

In Guzman, the Court of Criminal Appeals was faced with various misinterpretations, and the resulting misapplications, of de novo review by reviewing courts. Guzman, 955 S.W.2d at 87-89. While Ornelas focused on the second aspect of a suppression hearing ("mixed question of law and fact") Guzman focused on the first aspect ("determination of the historical facts") and ultimately, we believe, harmonized the holdings in Ornelas with Texas appellate jurisprudence. This was done by the Guzman Court in the following way: 1) Reviewing courts should give "almost total deference" to the 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;" 2) Reviewing courts should give "almost total deference" to the trial court's application of "mixed questions of law and fact," (i.e., the trial court's application of the established law to the previously determined historical facts) ONLY "if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor;" and 3) Reviewing courts may engage in de novo review of the trial court's ultimate determination, (i.e., probable cause does or does not exist) ONLY when the ultimate determination did not turn on an evaluation of credibility and demeanor. Id. at 89 (emphasis added). This is clearly in-line with the concluding portion of Ornelas which begins with the statement: "Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for [abuse of discretion] ² and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Ornelas, 517 U.S. at 699, 116 S.Ct. at 1663, 134 L.Ed.2d at 920. Expanding on this point, the Ornelas Court added: "In a similar vein, our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists. . . . An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable." Id. at 700, 116 S.Ct. at 1663, 134 L.Ed.2d at 921.

An apparently exhausted Court of Criminal Appeals concluded its analysis in Guzman v. State by



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stating: "This is about as comprehensive a statement of the applicable standards that we can provide." Id. at 89. Nevertheless, the Court then immediately provided the citation to a portion of the concurring opinion by Presiding Judge McCormick in *Villarreal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996), which states, "[w]here the trial court 'is not in an appreciably better position' than the appellate court to decide the issue, the appellate court may independently determine the issue while affording deference to the trial court's findings on subsidiary factual questions." Id. For our purposes in the instant case, because there was no testimony introduced contradicting that provided by the two troopers, we will take as true their rendition of the historical facts as they unfolded following the stop of appellant's vehicle.³ That permits us to review, de novo, the trial court's implicit application of the law of voluntary consent to search, and the trial court's implicit application of the law of probable cause, to said historical facts⁴.

CONSENT TO SEARCH

Even though the record indicates that the video tape was played for the trial court during direct examination of Conklin, it was not until Conklin's cross-examination that a serious question arose as to the effectiveness of the consent, or, indeed, if appellant had even given consent at all. We reproduce the pertinent portion of Conklin's cross-examination as follows:

Q:[Defense Counsel] Okay. He give you consent to search the car?

A:[Conklin] Yes, sir.

Q: Do you mind if I search the car?" (sic) And he says "yes." You consider that agreeing to let you search the car?

[State's Attorney]: Judge, I'm going to object to that question. That is not what he said on the tape. I think the tape speaks for itself as to what the officer said.

[Defense Counsel]: You're right. I misworded it. "Mind if I search the car?"

[State's Attorney]: Again. Same objection, Judge. That's not what the tape - - -

[Defense Counsel]: Let's play the tape.

[State's Attorney]: Play it.

(Tape played from 7:05:55 to 7:06:05)

Q:[Defense Counsel] "Mind if I search the car?" That's what you said, wasn't it?



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A:[Conklin] Yes, sir.

Q: And what was his answer?

A: "Yes, sir." Yes.

Q: Answer was yes?

A: "Yes, sir," I think is what he said.

[State's Attorney]: Yeah, I want the whole thing.

[Defense Counsel]: Okay. Let me back up.

(Tape played from 7:06:05)

Q:[Defense Counsel] "Mind if I search the car?" He says, "Yes, sir." Is that correct?

A:[Conklin] Yes, sir.

Q: Yes. That is affirmative that he does mind you searching the car. That's what came out, wasn't it?

A: I took it as yes, it's okay to search the car.

Q: What if he had said, "no, I don't mind you searching the car?"

A: Sir, he didn't say anything.

Q: What if he had said to your question, "No, I don't mind?"

A: I guess it - - I don't know. It is hypothetical. He didn't say that.

Q: Well, we're not dealing with hypotheticals here. We're dealing with exactly what happened out there. You asked him, did you not, "Do you mind if I search your car," correct?

A: Yes, sir.

Q: And he said "yes, sir?"

A: Yes, sir.



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Q: Right? That's the affirmative answer to your question, correct?

A: Yes, sir.

Q: Okay. Now, at that the point you had no warrant for him, correct?

A: No, sir.

Q: If you asked him, "Mind if I search the car," what is he supposed to say if he does not want you searching the car? Yes, sir or no?

A: I don't know, sir.

Consent to search is one of the well-established exceptions to the constitutional requirements of both a warrant and probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854, 858 (1973); *State v. Ibarra*, 953 S.W.2d 242, 243 (Tex. Crim. App. 1997). "The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances.'" *Ohio v. Robinette*, 519 U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347, 355 (1996) (quoting *Schneckloth*, 412 U.S. at 248-49, 36 L.Ed.2d at 875). In order to be valid, the consent must not be "coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth*, 412 U.S. at 228, 36 L.Ed.2d at 863; see also *Allridge v. State*, 850 S.W.2d 471, 493 (Tex. Crim. App. 1991) ("The consent must be shown to be positive and unequivocal, and there must not be any duress or coercion.") (citation omitted). By the same token, consent is not established by "showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 549, 88 S.Ct. 1788, 20 L.Ed.2d 797, 802 (1968) (where officer falsely represented he had a valid search warrant, search not voluntary).

"Although the federal constitution only requires the State to prove the voluntariness of consent by a preponderance of the evidence, the Texas Constitution requires the State to show by clear and convincing evidence that the consent was freely given." *Carmouche*, 10 S.W.3d at 331; *Ibarra*, 953 S.W.2d at 245. If the record supports a finding by clear and convincing evidence that consent to search was free and voluntary, a reviewing court may not disturb that finding. *Carmouche*, 10 S.W.3d at 331. Furthermore, we are in somewhat of the same position as was the *Carmouche* Court (having a video tape of the events in question in addition to the transcribed testimony of the witnesses) when it included the following observation with regard to the scope of its review of the "consent to search" issue:

Guzman v. State, 955 S.W.2d 85 (Tex. Crim. App. 1997)] states that, "as a general rule, the appellate courts, including this Court, should give almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's findings are based on an evaluation of credibility and demeanor." *Guzman*, 955 S.W.2d at 89 (citation omitted). In the unique



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circumstances of this case, however, we decline to give "almost total deference" to the trial court's implicit findings under which the Court of Appeals found consent. First, we note that the trial court seems to have predicated its decision to admit the evidence on a finding of probable cause rather than on consent. Second, the nature of the evidence presented in the videotape does not pivot "on an evaluation of credibility and demeanor." Rather, the videotape presents indisputable visual evidence contradicting essential portions of [the requesting officer's] testimony. In these narrow circumstances, we cannot blind ourselves to the videotape evidence simply because [the requesting officer's] testimony may, by itself, be read to support the Court of Appeals' holding. *Carmouche*, 10 S.W.3d at 332.

Also like the circumstances in *Carmouche*, the record in the instant case reflects that, at the conclusion of the suppression hearing, the State placed much more confidence in its belief that Trooper Conklin had probable cause to search appellant's vehicle than in whether or not appellant gave consent to search the vehicle. It is more likely than not, therefore, that the trial court's decision to deny the suppression motion was based on a finding of probable cause rather than on consent. And, as in *Carmouche*, the nature of videotape evidence requires no credibility determination on the part of the viewer. As the State's Attorney so succinctly phrased it, "the tape speaks for itself."

A review of the videotape reflects that at the point Conklin made his request to appellant to search the vehicle, Hart had just been handcuffed by Conklin because of the outstanding aggravated assault arrest warrant. As he handcuffed Hart, Conklin stated, "Don't do anything stupid or I'll shoot you, you understand me." Conklin then immediately approached the passenger side of the vehicle and requested appellant to step out. Conklin stated to appellant, "He's wanted for aggravated assault - - turn and put your hands on the car." Conklin then did a full body frisk of appellant. During the frisk, Conklin asked appellant, "Ya'll have any illegal contraband in the car?" Appellant replied, "No, sir." Conklin then immediately asked, "Have you ever been arrested for narcotics?" Appellant answered, "Uh, no sir." Conklin immediately responded, "You've got four charges for drugs. You going to tell me again what you've been arrested for?" Appellant began speaking by saying, "Ok, those drugs that I was arrested for, all that . . .," but was abruptly cut off by Conklin's reply, "I didn't ask you that. I asked you if you've ever been arrested for narcotics." Again, appellant answered, "I've been arrested before, but . . .," and was again cut off by Conklin directing appellant with the following, "Step back there a second. Ya'll don't have anything illegal in the car, do you?" While appellant's reply is quite faint, the trial court, and the State, understood his response to be, "Yes, sir."⁵ Without really waiting for appellant's reply to this question, Conklin asks, "Mind if I search the car?" To this question, appellant's "Yes, sir" is a bit more audible. Conklin obviously felt he was given permission as his immediate response was, "Ok. Go ahead and step back there." Conklin then began his search of the interior of the vehicle, then the trunk, and finally under the hood where the contraband was ultimately located.

Under the particular circumstances reflected on the videotape, we find the record does not contain clear and convincing evidence that any "consent" upon appellant's part was given freely and



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voluntarily. While appellant was not facing a "darkened highway . . . closely surrounded by four police officers" as was the defendant in *Carmouche*, 10 S.W.3d at 332, appellant had just been informed his nephew had been arrested, and was in the process of being frisked while standing up against his vehicle and simultaneously being interrogated about his criminal history. Admittedly, appellant was not truthful about his prior arrest record for certain drug offenses. Nevertheless, Conklin became very confrontational at that point refusing to listen to appellant's attempt to explain his untruthfulness. Indeed, it seemed that once the police dispatcher provided Conklin with the information on both Hart and appellant, the search of the vehicle became inevitable. Conklin's own testimony at the suppression hearing bears this out.

It is also probable that when appellant responded, "Yes, sir," to Conklin's, "Mind if I search your car?", appellant was so totally flustered that he was merely acquiescing to Conklin's claim of authority with any affirmative word that would form in his mouth at that precise moment. Finally, as noted in *Carmouche*, appellant in the instant case was never told during this exchange that he had a right to refuse consent. *Id.* at 332-33. (citing *Schneckloth*, 412 U.S. at 248-49, and noting that, although not dispositive, suspect's knowledge of right to refuse consent is one factor to be taken into account when considering voluntariness). We therefore conclude, as did the Court in *Carmouche*, that under these particular circumstances a reasonable person would not have felt they had the choice to withhold consent to search. Thus, consent was not given voluntarily and Conklin's search may not be justified on that basis.

PROBABLE CAUSE

When attempting to get a firm grip on the law of "probable cause," a word that repeatedly comes to mind is "daunting," and with good reason. Even a brief survey of Fourth Amendment cases decided by the Supreme Court reveals the following observations:

Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, non-technical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1311, 93 L.Ed.2d 1879 (1949)); see *United States v. Sokolow*, 490 U.S. 1, 7-8, 109 S.Ct. 1581, 1585-1586, 104 L.Ed.2d 1 (1989). As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, *supra*, at 232, 103 S.Ct., at 2329. We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690, 694-695, 66 L.Ed.2d 621 (1981), and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found, see *Brinegar*, *supra*, at 175-176, 69 S.Ct., at 1310-1311; *Gates*, *supra*, at 238, 103 S.Ct. at 2332. We have cautioned that these two legal principles are not "finely-tuned standards," comparable to the standards of proof beyond a reasonable doubt or



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of proof by a preponderance of the evidence. *Gates*, supra, at 235, 103 S.Ct., at 2330-2331. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed. *Gates*, supra, at 232, 103 S.Ct. at 2329; *Brinegar*, supra, at 175, 69 S.Ct., at 1310 ("The standard of proof [for probable cause] is . . . correlative to what must be proved"); *Ker v. California*, 374 U.S. 23, 33, 83 S.Ct. 1623, 1630, 10 L.Ed.2d 726 (1963) ("This Cour[t] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application"; "[e]ach case is to be decided on its own facts and circumstances" (internal quotation marks omitted)); *Terry v. Ohio*, 392 U.S., at 29, 88 S.Ct., at 1884 (the limitations imposed by the Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases"). *Ornelas v. United States*, 517 U.S. 690, 695-96, 116 S.Ct. 1657, 1661-62, 134 L.Ed.2d 911, 918-19 (1996).

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). *United States v. Knights*, ___ U.S. ___, 122 S.Ct. 587, 591, 151 L.Ed.2d 497, 70 U.S.L.W. 4029 (2001).

The focus of this "balancing" of interests is, in our view, sharpened by the following observation taken from the Court's 1973 opinion in *Almeida-Sanchez v. United States*, which reversed a conviction involving border patrol search of a vehicle without probable cause, and ostensibly based upon a federal statutory provision authorizing such searches:

It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

'These (Fourth Amendment rights), I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.' *Brinegar v. United States*, 338 U.S. 160, 180, 69 S.Ct. 1302, 1313, 93 L.Ed. 1879 (Jackson, J., dissenting).

The Court that decided *Carroll v. United States*, supra, sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude - - the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the



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guarantee of the Fourth Amendment. Mr. Chief Justice Taft's opinion for the Court distinguished between searches at the border and in the interior, and clearly controls the case at bar:

'It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.' 267 U.S., at 153-154, 45 S.Ct., at 285. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273-75, 93 S.Ct. 2535, 2540, 37 L.Ed.2d 596, 603-04 (1973).

In an attempt to enlighten ourselves on the "touchstone" of the Fourth Amendment "reasonableness," we set out the following observations:

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll*, supra, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.

For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. *Chambers v. Maroney*, 399 U.S. 42, 51-52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419, 428 (1970).

A more recent exposition of "reasonableness" vis-a-vis the search of an automobile illustrates that the Court's view on this Fourth Amendment issue has been fairly consistent:

The Fourth Amendment generally requires police to secure a warrant before conducting a search. *California v. Carney*, 471 U.S. 386, 390-391, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). As we recognized nearly 75 years ago in *Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 69 L.Ed. 543 (1925), there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear in



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United States v. Ross, 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." (emphasis added) Maryland v. Dyson, 527 U.S. 465, 466-67, 119 S.Ct. 2013, 2014, 144 L.Ed.2d 442, 445 (1999). (emphasis added)

As further aid to a reviewing court, it must be remembered that, regardless of whether a given set of facts and circumstances are determined by a reviewing court to constitute probable cause, as opposed to reasonable suspicion, it is axiomatic that there is a higher standard for the existence of probable cause than for the existence of reasonable suspicion. Florida v. J.L., 529 U.S. 266, 272, 120 S.Ct. 1375, 1379, 146 L.Ed.2d 254 (2000); United States v. Brignoni-Ponce, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607, 616 (1975) ("[I]n appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime."); Almeida-Sanchez, 413 U.S. at 268 ("[T]here was no probable cause of any kind for the stop or the subsequent search - - not even the 'reasonable suspicion' found sufficient for a street detention and weapons search in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, and Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612.").

Lastly, we must touch upon a portion of Ornelas that has caused some confusion, with this court possibly contributing its fair share. ⁶ It is contained in a single paragraph, but does have great significance with regard to the standard of appellate review:

The Court of Appeals, in adopting its deferential standard of review here, reasoned that de novo review for warrantless searches would be inconsistent with the "'great deference'" paid when reviewing a decision to issue a warrant, see Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). See United States v. Spears, 965 F.2d 262, 269-271 (C.A:7 1992). We cannot agree. The Fourth Amendment demonstrates a "strong preference for searches conducted pursuant to a warrant," Gates, supra, at 236, 103 S.Ct., at 2331, and the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive. Ornelas, 517 U.S. at 698-99.

It would appear that the Court is making a distinction, for appellate review purposes, between warrantless searches and searches conducted pursuant to a warrant issued by a magistrate. This is so because, as the Court reminds both bench and bar, the Fourth Amendment prefers that law enforcement secure a warrant from a neutral magistrate prior to conducting a search or seizure. Because of the proliferation of "exceptions" to the warrant requirement, such a statement must seem, at first blush, to be a radical concept. Nevertheless, we do recognize the reasonableness of making such a distinction for appellate review purposes as we cannot ultimately permit "the tail to wag the dog" as this tends to reward less than acceptable investigative work by law enforcement at the expense of the privacy interests of citizens.



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The Court's distinction is also an apparent recognition of the fact that at a suppression hearing involving a search warrant, it is the "four corners" of the probable cause affidavit that is under scrutiny; while at hearings where a warrantless search was conducted, credibility determinations are a regular part of the trial court's "factfinding" duties. One should recall that both Ornelas and Guzman instruct reviewing courts to provide deference only to trial court rulings that involve credibility determinations. Since technically there is no credibility determination to be made when merely examining the "four corners" of a probable cause affidavit, the Ornelas Court has built in a "due deference" requirement at the appellate review level.

Therefore, for purposes of appellate review of Fourth Amendment issues involving probable cause, search warrant cases will always require a measure of deference to the magistrate's finding of probable cause, even though there is technically no credibility determination to be made, while cases involving warrantless searches will be reviewed without deference to the trial court's ultimate ruling when credibility of the witnesses is not involved. In the instant case, one should recall that there was no credibility issue before the trial court as no witnesses or other evidence refuted the "historical facts" as elicited from the troopers.

As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, 95 (1996). Therefore, appellant cannot, and does not, complain of the initial "detention" by the troopers for the traffic offense of speeding. Hart's failure to produce a valid driver's license permitted the troopers to continue to detain Hart and appellant in order to further investigate their backgrounds. It was certainly not unreasonable for Conklin to check both individuals for outstanding warrants. *Davis v. State*, 947 S.W.2d 240, 245 n. 6 (Tex. Crim. App. 1997). And under these particular circumstances, it was probably not unreasonable for Conklin to request information on the vehicle's ownership, the purpose of the trip, and the ultimate destination of the driver and passenger. See *Zervos v. State*, 15 S.W.3d 146, 151 (Tex. App.--Texarkana 2000, pet. ref'd).

In its brief, the State contends that the trial court "found" that the video tape revealed: "1) When asked if there were illegal narcotics in the car, Appellant replied 'yes, sir[.]' " Yet, as noted above, the question actually put to appellant by Conklin, as depicted on the video tape, was "Ya'll don't have anything illegal in the car, do you?" Even if we were to fully concede that appellant's reply was "Yes, sir," the State recognized the ambiguity in such a response during its re-direct questioning of Conklin at the hearing:

Q:[State] It really doesn't matter at that point what he said, did it?

A:[Conklin] Not really, sir, no, sir.

Q: One thing I noted, the first - - right before you asked him, "Mind if I search the car," you said, "You don't have anything illegal in the car?" Do you recall asking that?



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A: Yes, sir.

Q: And then he said, "Yes, sir," was how he responded. Yes, sir, I do have something illegal in the car? Or yes, sir, I don't have something illegal in the car? How did you interpret that?

A: Same way. I mean it is either way.

Q: In any event you felt like you had probable cause to search the car?

A: Yes, sir.

Q: Based on the conflicting stories based on the nervousness of the driver, his behavior, based on the criminal history involving drugs?

A: Yes, sir. (emphasis added)

We agree with the implication in both the State's question to Conklin and with Conklin's answer - - appellant's "Yes, sir" response was ambiguous at best based upon how Conklin's question was put. As such, we find that, under the totality of the circumstances from both testimony and video tape, appellant's response of "Yes, sir" does not provide a reasonable basis for searching appellant's vehicle for contraband. Under the particular circumstances as they were quickly unfolding, coupled with the particular way Conklin put the question to appellant regarding illegal contraband in the vehicle, we find that a response of "Yes, sir" is ambiguous at best and provides no support which would warrant a police officer of reasonable prudence in believing that contraband would be found upon a search of the vehicle. See *Garcia v. State*, 43 S.W.3d 527, 531 (Tex. Crim. App. 2001) (An officer's mistaken belief that a certain fact possesses a tendency to create reasonable suspicion is not determinative of whether reasonable suspicion actually existed.)

We next observe that when Conklin was provided information that an active arrest warrant was outstanding for Hart, clearly Conklin had probable cause to arrest Hart. At the same time, however, Conklin was also informed that appellant had no outstanding warrants, only a prior arrest for a drug-related offense. At this point, based upon the totality of the circumstances, the "known facts and circumstances" in Conklin's possession included: (1) Hart was nervous and sweating while being questioned; (2) Hart's version of the events surrounding the trip were somewhat inconsistent when compared with appellant's version, which was also confusing; (3) Hart had no valid driver's license and had an outstanding warrant of aggravated assault, and prior drug-related arrests; (4) Appellant had a history of "dangerous drug" "charges," from the information provided by the police dispatcher; and (5) appellant was not initially truthful about his prior drug-related arrest record. Taken together, these facts were sufficient to permit Conklin to continue detaining appellant for a reasonable amount of time in order to have his suspicions of the presence of drugs in the vehicle confirmed.⁷ However, at the point Conklin began his search of the vehicle, the facts before him amounted to



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nothing more than a hunch with regard to the presence of illegal contraband being located somewhere in the vehicle. "[The] demand for specificity in the information upon which police action is predicated is the central teaching of . . . Fourth Amendment jurisprudence." Terry, 392 U.S. at 21 n. 18, 88 S.Ct. at 1880 n. 18, 20 L.Ed.2d at 906 n. 18. Having found no outstanding warrants extant for appellant, Conklin should have turned the vehicle back over to appellant and taken Hart to the nearest facility for processing based upon the aggravated assault warrant.

Prior to permitting appellant to re-enter his vehicle, Trooper Conklin would have been permitted to search the passenger compartment for weapons for his personal safety as well as that of his partner, Trooper Johnson. See Knowles v. Iowa, 525 U.S. 113, 117-18, 119 S.Ct. 484, 142 L.Ed.2d 492, 498-99 (1998). While this limited exception to the warrant requirement permitted Trooper Conklin's search of the passenger area of appellant's vehicle for safety reasons, Conklin continued with what amounted to a general exploratory search, of the entire vehicle without probable cause. Such exploratory searches are clearly impermissible. See Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); Joseph v. State, 807 S.W.2d 303, 307 (Tex. Crim. App. 1991).

We conclude our probable cause analysis by quoting selected portions of United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), a case turning on the presence or absence of "reasonable suspicion" for the stop of a vehicle. We feel it strongly speaks to the situation with which we are faced in the instant case, in that the Cortez Court seems to crystalize what is meant, for Fourth Amendment purposes, by the requirement to consider the "totality of the circumstances" when a reviewing court is attempting to determine if probable cause has been established from a set of particular historical facts:

But the essence of all that has been written is that the totality of the circumstances - - the whole picture - - must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. See, e.g., Brown v. Texas, supra, at 51, 61 L.Ed.2d 357, 99 S.Ct. 2637; United States v. Brignoni-Ponce, supra, at 884, 45 L.Ed.2d 607, 95 S.Ct. 2574.

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions - - inferences and deductions that might well elude an untrained person.

The second element contained the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in Terry v. Ohio, supra, said that "[t]his demand for specificity in the information upon which



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police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Id., at 21, n. 18, 20 L.Ed.2d 889, 88 S.Ct. 1868, 44 Ohio Ops 2d 383 (emphasis added). See also *Brown v. Texas*, supra, at 661-663, 59 L.Ed.2d 660, 99 S.Ct. 1391; *United States v. Brignoni-Ponce*, 422 U.S., at 884, 45 L.Ed.2d 607, 95 S.Ct. 2574.

This case portrays at once both the enormous difficulties of patrolling a 2,000-mile open border and the patient skills needed by those charged with halting illegal entry into this country. It implicates all of the principles just discussed -- especially the imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion. We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement. Here, fact on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on "Chevron." Id. at 418-19, 101 S.Ct. at 690, 66 L.Ed.2d at 629.

In the instant case, Trooper Conklin's law enforcement background was elicited as follows:

Q:[State] How are you employed?

A:[Conklin] Texas Department of Public Safety, Highway Patrol Service.

Q: Okay. How long have you been involved with the DPS patrol, sir?

A: Since August 16th, 1996.

Q: And are you a certified peace officer here in the State of Texas?

A: Yes, sir.

Thereafter, we have no solid evidence that Trooper Conklin had any experience with regard to investigating drug trafficking or drug traffickers. Nor are we made aware of the number of encounters with persons ultimately found to be transporting drugs Trooper Conklin had experienced prior to his encounter with appellant. We are given "hints" that Trooper Conklin did have some experience with drug traffickers from the following testimony:

Q:[State] Okay. And I guess, sir, as part of your - - your job as a DPS trooper over the last several years, sir, had you also become involved with individuals that you determined to be transporting either drugs or some other type of illegal contraband?

A:[Conklin] Yes, sir.



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Q: Okay. And in -- in particular, when you have got multiple occupants of a vehicle, what are you looking for when you're questioning those people? If you're concerned that they may be transporting contraband of some sort?

A: Like the reason for their trip. If it's reasonable or not. The nervousness displayed by the occupants in the vehicle. Conflicting stories. Other things. Odors and stuff maybe emitting from the vehicle. Things along that line.

Later, a second "hint" appeared:

Q:[State] And what did you find if anything in terms of drugs or illegal contraband?

A: Due to a search under the engine compartment, I noticed that the entire engine was dirty. On the air breather -- and which from my experience I know it is an area that people use to conceal contraband -- there were fresh prints or smudge markings on top of the air breather. I had unsnapped the air breather. Pulled the air filter out. And there was a plastic bag of white powder which I believed to be cocaine.

This is certainly evidence of "experience" of a kind, but nowhere in the record does Conklin explain or expound upon, based upon his training and experience, how the five known historical facts set out above permitted him to reasonably infer or reasonably deduce that appellant's automobile contained contraband. Without this type of testimony, as observed by the Court in *Cortez*, any such inferences or deductions made by Conklin regarding the five historical facts "might well elude an untrained person." If the State, through Conklin, intended to supply greater inferences from the five objective facts as set out above, Conklin "gave neither the trial court, nor this Court, any objective way of determining what else he may have meant." *Garcia*, 43 S.W.3d at 531. From the totality of the circumstances provided in the record before us, we are simply not prepared to lower the bar so as to essentially equate the established legal construct of "probable cause" to the level of what could possibly be merely "reasonable suspicion," or even less. "[T]he legal rules for probable cause and reasonable suspicion acquire content only through application." *Ornelas*, 517 U.S. at 697, 116 S.Ct. at 1661, 134 L.Ed.2d at 919. (emphasis added) We conclude that the trial court erred in finding a free and voluntary consent to search on the part of appellant, and/or of finding probable cause to support Trooper Conklin's search of the vehicle. The contraband recovered from said search should have been suppressed.

Appellant's suppression motion also prayed for suppression of "[a]ny statements" obtained from appellant. Generally, evidence obtained as a direct result of illegal police conduct, be it illegal arrest or illegal search, is suppressed either by cases providing the remedy of exclusion of such evidence for violations of the Fourth Amendment and/or Article 1, section 9 of the Texas Constitution, or by statutory provisions such as Tex. Code Crim. Proc. Ann. art. 38.23 (Vernon Pamph. 2001). See *Boyd v. United States*, 116 U.S. 616, 638, 6 S.Ct. 524, 29 L.Ed. 746, 754 (1886); *Bell v. State*, 724 S.W.2d 780, 787



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(Tex. Crim. App. 1986).

The primary purpose of the federal exclusionary rule and of article 38.23 is to deter unlawful police conduct by precluding the use against the accused of evidence obtained by illegal police activity.⁸ See also *United States v. Calandra*, 414 U.S. 338, 347-48, 94 S.Ct. 613, 38 L.Ed.2d 561, 571 (1974). The federal exclusionary rule and article 38.23 extend not only to evidence obtained as a direct result of an illegal arrest, search, or seizure, but also to evidence obtained as an indirect result of an illegal arrest, search, or seizure, known as the "fruit of the poisonous tree." See *Wong Sun v. United States*, 371 U.S. 471, 485-86, 83 S.Ct. 407, 9 L.Ed.2d 441, 453-54 (1963); *Smith v. State*, 542 S.W.2d 420, 422 (Tex. Crim. App. 1976); *State v. Mayorga*, 876 S.W.2d 176, 177 (Tex. App.--Dallas 1994), *aff'd* and *remanded*, 901 S.W.2d 943 (Tex. Crim. App. 1995).

On the other hand, both the federal and state exclusionary rules allow the admission of otherwise tainted evidence if the connection between the initial illegality and the discovery of the challenged evidence has become so attenuated as to dissipate the taint of the prior illegality. See *Wong Sun*, 371 U.S. at 487-88, 9 L.Ed.2d at 455; *Johnson v. State*, 871 S.W.2d 744, 751 (Tex. Crim. App. 1994) (holding attenuation analysis applicable under article 38.23 as a method of determining whether evidence was "obtained" in violation of law). Evidence is not classified as a fruit requiring exclusion merely because it would not have been discovered "but for" the primary illegality. See *Wong Sun*, 371 U.S. at 487-88, 9 L.Ed.2d at 455. Rather, the issue is whether the evidence was obtained by exploitation of the primary illegality or by means sufficiently distinguishable to be purged of the primary taint. See *id.* at 488, 9 L.Ed.2d at 455. The prosecution bears the burden of showing unlawfully obtained evidence is admissible under an exception to the federal exclusionary rule. See *Brown v. Illinois*, 422 U.S. 590, 604, 95 S.Ct. 2254, 45 L.Ed.2d 416, 427 (1975); *Alderman v. United States*, 394 U.S. 165, 183, 89 S.Ct. 961, 22 L.Ed.2d 176, 192 (1969); see also *Nix v. Williams*, 467 U.S. 431, 444-45, 104 S.Ct. 2501, 81 L.Ed.2d 337, 387-88 (1984) (burden of proof on prosecution to show exception to exclusionary rule by preponderance of evidence). The prosecution also has the burden under article 38.23 to show the applicability of the attenuation doctrine to challenged evidence. See *Brown*, 422 U.S. at 604, 45 L.Ed.2d at 427; *Boyle v. State*, 820 S.W.2d 122, 131 (Tex. Crim. App. 1989), *disavowed* on other grounds by, *Gordon v. State*, 801 S.W.2d 899, 911 n. 13 (Tex. Crim. App. 1990) (burden on State to prove attenuation).

In Texas, reviewing courts apply the following four-factor attenuation test found in *Brown v. Illinois*:

- (1) the giving of Miranda warnings;
- (2) the temporal proximity of the arrest and the confession;
- (3) the presence of intervening circumstances; and
- (4) the purpose and flagrancy of the official misconduct. See *Dowthitt v. State*, 931 S.W.2d 244, 261



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(Tex. Crim. App. 1996).

In the instant case, the record reflects that Conklin first encountered appellant and Hart at about 7:00 a.m. Based upon the video, the arrest took place about twenty minutes after the initial encounter. The record further reflects that appellant was informed of his Miranda rights at the time of his arrest and prior to writing the statement. State's Exhibit 1, a copy of appellant's statement, indicates that it began at "8:30 a.m." with the statement completed at "8:55 a.m." The testimony is silent as to any intervening circumstances, such as being taken before a magistrate, speaking to an attorney, or any unforeseen interruptions during the taking of the statement. With regard to purpose and flagrancy of Conklin's illegal search, we find the following taken from *Brown v. Illinois* to be uncannily appropriate, even though in *Brown* the police misconduct involved an illegal arrest:

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." (footnote and record references omitted) The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. *Brown v. Illinois*, 422 U.S. at 605, 45 L.Ed.2d at 428.

It is clear from viewing the videotape that, from the start of the encounter with Hart, Conklin's actions had the "quality of purposefulness" to them of establishing a set of factors, commonly known as a "drug courier profile," as to Hart and appellant in order to eventually justify a search of the vehicle. Conklin immediately separated Hart and appellant so that he could interview each of them out of ear-shot of the other, his attempts to "clarify" the stories provided by Hart and appellant served only to increase confusion rather than diminish it, and Conklin's failure to appreciate that appellant's "Yes, sir" literally meant appellant did indeed mind if Conklin searched his vehicle, point to this "quality of purposefulness" which culminated in the illegal search of the vehicle. Other than speeding and driving without a licence, the record provides nothing to indicate that at the time of the search of the vehicle, probable cause existed to believe that either Hart or appellant were engaged in or were about to engage in a specific criminal offense of any kind, or that the vehicle did contain contraband. Conklin simply "embarked upon this expedition for evidence in the hope that something might turn up." *Id.*

While the giving of the Miranda warnings is a factor that militates in favor of the State, the very brief time between the illegal search and the taking of the statement, the lack of any intervening circumstances and the expeditionary purpose for the search of the vehicle favor a finding that the taint of the illegal search had not been sufficiently attenuated by the time the statement was taken. It has been held that "time" is the least important factor, see *Bell*, 724 S.W.2d at 788, and that "purpose and flagrancy of official misconduct" weighs heaviest, *Self v. State*, 709 S.W.2d 662, 668 (Tex. Crim. App. 1986), in evaluating any attenuation of taint. The trial court therefore erred in failing to suppress the statement.



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Tex. R. App. P. 44.2(a) provides that if the appellate record reveals constitutional error that is subject to harmless error review, the reviewing court must reverse a judgment of conviction unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction. In the instant case, the four witnesses at trial were Troopers Conklin and Johnson, the chemist from the crime lab who confirmed the contraband was cocaine, and appellant in his own defense. Normally, without the contraband, the State cannot successfully prosecute an accused. See *Veal v. State*, 28 S.W.3d 832, 838 (Tex. App.--Beaumont 2000, pet. ref'd) (citing to *Villalobos v. State*, 999 S.W.2d 132, 136 (Tex. App.--El Paso 1999, no pet.), and *Graham v. State*, 893 S.W.2d 4, 8 (Tex. App.--Dallas 1994, no pet.)). However, we also have appellant's incriminating statement that should have been suppressed as well as the contraband. This statement affirmatively linked appellant to knowing possession of the contraband located in his vehicle. See *Brown v. State*, 911 S.W.2d 744, 748 (Tex. Crim. App. 1995); *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). We cannot say that the trial court's error in failing to suppress both the contraband and the statement made no contribution to appellant's conviction beyond a reasonable doubt. The appellate issue before us is sustained. The judgment of the trial court is reversed and the cause remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Submitted on November 6, 2001

Do Not Publish

CONCURRING OPINION

I agree totally with Chief Justice Walker's standard of review and probable cause analyses and concur with the result. I write only to differ slightly with the Chief on the consent issue. Under the question posed and the answer given, I do not believe consent was given. But I do agree that the record does not contain clear and convincing evidence that the consent, if given at all, was free and voluntary. Therefore, I briefly concur.

DON BURGESS, Justice.

Concurrence Delivered

DISSENTING OPINION

Officer Conklin testified appellant consented to the search. The majority concludes the consent was not voluntary. Based on the officer's testimony, I disagree with that conclusion.

I also disagree with the majority's conclusion that Officer Conklin lacked probable cause. We should



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give due weight to the trial court's determination that the officer was credible and that the inferences he drew from the circumstances were reasonable. The presence of a videotape does not necessarily transform the standard of review into a de novo standard. The officer testified that he stopped the car because of a traffic violation, and then he discovered the driver had no license. The officer found inconsistencies in the stories of the passenger and the driver; he learned that the driver had an outstanding warrant for his arrest, that appellant had an arrest record for drug offenses, and that appellant was untruthful about his drug arrest record; and he observed the driver was sweating and nervous. Based on his experience in law enforcement, Officer Conklin concluded probable cause existed to search the vehicle. The trial court heard his testimony, viewed the videotape, and agreed with that conclusion. While the majority calls the officer's conclusion "a hunch," I give due weight to the trial court's determination that the officer was credible and that the inferences the officer drew from the circumstances were reasonable.

The majority concludes that the videotape generally supports the officer's testimony. For that reason, this case is not like *Carmouche*. In *Carmouche*, a videotape provided "indisputable visual evidence contradicting essential portions" of the officer's testimony. See *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000).

Bottom line, I am troubled by what I perceive to be the majority's substitution of its interpretation of the circumstances -- based apparently on a review of the videotape. For example, the majority interprets the officer's actions as having the "quality of purposefulness." My review of the videotape shows mounting concern by the officer as he learns more and more about the circumstances he and his partner have confronted. I would give due weight to the trial court's determination that the officer was credible and that the inferences the officer drew from the circumstances were reasonable. I respectfully dissent.

DAVID B. GAULTNEY, Justice.

Dissent Delivered

1. When a pretrial motion to suppress evidence is overruled, the accused need not subsequently object to the admission of the same evidence at trial in order to preserve error. When, however, a party affirmatively asserts during trial that he or she has "no objection" to the admission of the complained-of evidence, said party waives any error in the admission of the evidence despite the pretrial ruling. *Gearing v. State*, 685 S.W.2d 326, 329 (Tex. Crim. App. 1985), rev'd on other grounds, 956 S.W.2d 33 (Tex. Crim. App. 1997); *Harris v. State*, 656 S.W.2d 481, 484 (Tex. Crim. App. 1983). In the instant case, the State marked Exhibits 2 through 7 during the trial. The State then began questioning Trooper Conklin as to the exhibits. The State then only tendered into evidence Exhibits 2 through 6. The following exchange then took place: [State's Attorney]: Judge, at this time the State would offer into evidence State's Exhibits numbers 2 through 6. [Trial Counsel]: 6? [State's Attorney]: Yeah, I'm not going to offer 7. [Trial Counsel]: I have got no objection to that. THE COURT: State's Exhibits Numbers 2 through 6 are admitted into evidence. Because it is unclear whether appellant's trial counsel was indicating that he had no objection to the State's decision not to offer Exhibit 7, which was merely a



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container, or was announcing a blanket "no objection" to the contraband, we will not find waiver of the issue for appellate purposes, in the interest of justice.

2. See Ornelas, 517 U.S. at 695 n. 3, 116 S.Ct. at 1661 n. 3, 134 L.Ed.2d at 918 n. 3.

3. It has been held that when "indisputable visual evidence" contradicts essential portions of an officer's testimony, the reviewing court does not have to give "almost total deference" to the trial court's implicit determinations of the historical facts. *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000). In the instant case, the video tape depiction of the events generally supports the testimony of the troopers. Any possible discrepancies will be considered by us as implicitly establishing a fact favorable to the trial court's implicit rulings of either the presence of voluntary consent and/or probable cause for the search of appellant's vehicle, so long as implying said fact is reasonable under the totality of the circumstances.

4. We use the word "implicit" because we have no formal findings of fact and conclusions of law in the record before us. As these were the only two rules of law that would have permitted the troopers to lawfully search appellant's vehicle under the facts of this case, we will focus our analysis on those two alone.

5. We will explain why this response is not as significant as it appears in our analysis of probable cause, *infra*.

6. See the comments contained in the Fifth District's case, *Lane v. State*, 971 S.W.2d 748, 752 n. 3 (Tex. App.--Dallas 1998, pet. ref'd), regarding our discussion of Ornelas and *Guzman v. State* in *Barton v. State*, 962 S.W.2d 132, 137 (Tex. App.--Beaumont 1997, pet. ref'd).

7. This is typically accomplished by use of a "drug-sniffing" dog.

8. Specifically, article 38.23(a) provides: No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

