No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KEITHRICK THOMAS

Petitioner

v.

THE STATE OF TEXAS

Respondent

On Petition for Discretionary Review
to The Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Has a Fourth Amendment violation occurred, where an uninvited police officer approaches a vehicle passenger, after the passenger has exited the vehicle, and conducts a warrantless search of the passenger's pockets, in the driveway of the passenger's house?

LIST OF PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

Question Presented for Review..... i

List of Parties ii

Table of Contents..... iii

Table of Authorities..... v

Opinions Below.....1

Statement of Jurisdiction 1

Constitutional Provisions.....1

Statement of the Case.....2

Reasons for Granting the Petition 5

I. The Texas Court of Criminal Appeals' decision is repugnant to The Fourth Amendment 5

A. Officer Gemmill Intruded on Petitioner's Driveway, Uninvited, and the driveway of a residence is curtilage and is protected by the Fourth Amendment.....6

B. The Initial Intrusion of Officer Gemmill onto Petitioner's Driveway was not Supported by any Exception to the Warrant Requirement.....10

C. Officer Gemmill did not have Probable Cause to Conduct a Search for Non-Weapon Contraband; thus, the Seizure of any Contraband Cannot be Supported by the Plain View Exception to the

Warrant Requirement.....12
II. Conclusion.....15
III. Appendix.....1a
Table of Contents.....2a
230th District Court, Harris County, Texas
Findings of Fact and Conclusions of Law.....3a
230th District Court, Harris County, Texas
Judgment.....8a
14th Court of Appeals -Houston Division
Opinion.....15a
14th Court of Appeals -Houston Division
Judgment.....44a
Texas Court of Criminal Appeals Notice Granting
Petition for Discretionary Review.....45a
Texas Court of Criminal Appeals Opinion.....46a
Texas Court of Criminal Appeals Notice Denying
Motion for Rehearing.....48a

TABLE OF CITED AUTHORITIES

Cases:

Adams v. Williams, 407 U.S. 143 (1972).....12

Arizona v. Hicks, 480 U.S. 321 1987).....13

Baldwin v. State, 278 S.W. 3d 367 (2012).....14, 16

California v. Ciraolo, 476 U.S. 207 (1986).....9

Collins v. Virginia, 584 U.S. ____ (2018.....8, 9

Florida v. Jardines, 133 S.Ct. 1409 (2013).....8, 9, 10

Horton v. California, 496 U.S. 128 (1990).....10, 11, 12

Kothe v. State , 152 S.W. 3d 54 (2004).....15

Minnesota v. Dickerson, 508 U.S. 366 (1993).....13

Ohio v. Robinette, 519 U.S. 33 (1996).....15

Oliver v. United States, 466 U.S. 170 (1984).....9, 10

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 15

Rakas v. Illinois, 439 U.S. 128 (1978) 15

Silverman v. United States, 365 U.S. 505 (1961)).....9

State v. Betts, 397 S.W.3d 198, 206
(Tex. Crim. App. 2013).....11, 15

State v. Rendon, 477 S.W. 3d 805 (2015).....7, 8, 11

Terry v. Ohio, 392 U.S 1 (1968).....12

United States v. Jones, 132 S.Ct. 945 (2012).....10

Constitutional Provisions:

U.S. CONST. amend. IV
.....1, 2,4, 5, 6, 7, 8, 9, 10, 11, 12, 15

Statutes:

28 U.S.C. § 1257(a).....1

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is cited as Thomas *v. State*, No. PD-0790-17, 2018 WL 4472238 (Tx. Ct. Crim. App., September 19, 2018). The opinion of the 14th Court of Appeals is cited as *Thomas v. State*, No. 14-16-00230-CR, 2017 WL 2484366 (Tex. App. - Houston [14], June 8, 2017).

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The Texas Court of Criminal Appeals issued its Opinion on Petitioner's Petition for Discretionary Review on September 19, 2018, dismissing Petitioner's Petition for Discretionary Review as improvidently granted. The Texas Court of Criminal Appeals issued notice that Petitioner's Motion for Rehearing was denied on November 7, 2018. 28 U.S.S.C § 1257(a) confers jurisdiction on The United States Supreme Court.

CONSTITUTIONAL PROVISIONS

THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not

be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST., Amend. IV

STATEMENT OF THE CASE

On January 15, 2015, Officer Rohan Walker was sitting in an unmarked vehicle, assigned to targeting dope houses. (RR,12).[1] Officer Walker was watching 4306 Trafalgar [situated in Houston, Texas]. (RR, 13). According to Officer Walker, from a block away, Officer Walker observed a vehicle pull up to the Trafalgar residence. Petitioner Thomas exited the vehicle, walked into the garage of the Trafalgar residence, walked back out after a short time, got back into the vehicle and left the residence. (RR, 14).

Officer Elizabeth Gemmill [who was in a marked Houston Police Department vehicle] was also a part of the tactical unit. (RR, 23). Officer Gemmill was alerted to Petitioner Thomas. (RR, 24). Officer Gemmill's task was to find probable cause to pull the vehicle Petitioner Thomas was traveling in over. (RR, 35). Officer Gemmill witnessed

[1] "RR" refers to the trial court reporter's record and the number refers to the page number.

the driver of the vehicle, who was not Petitioner Thomas, commit a traffic violation, failing to signal when making a right turn. (RR, 36). Officer Gemmill did not observe Petitioner Thomas commit any traffic violation. (RR, 36).

By the time Officer Gemmill caught up with the vehicle Petitioner Thomas was a passenger in and ordered Petitioner Thomas to stop, Petitioner Thomas had already exited the vehicle and was walking up the driveway of Petitioner Thomas' home. (RR, 37); (RR, 39). Officer Gemmill asked Petitioner Thomas to stop, because Officer Gemmill wanted to detain Petitioner Thomas as a result of the traffic stop. (RR, 41). Officer Gemmill handcuffed Petitioner Thomas for officer safety, despite the fact Petitioner Thomas had complied with all Officer Gemmill's orders. (RR, 41, 51). At the time Officer Gemmill handcuffed Petitioner Thomas, Petitioner Thomas had not committed any crimes. (RR, 43).

Upon handcuffing Petitioner Thomas, Officer Gemmill testified Officer Gemmill saw the top of a pill bottle in Petitioner's pocket. (RR, 42). After seeing the top of the pill bottle, Officer Gemmill believed Officer Gemmill had the right to search Petitioner Thomas' person. (RR, 44). Upon searching Petitioner Thomas more intrusively, Officer Gemmill discovered two (2) more pill bottles. (RR, 44).

On January 15, 2015, Petitioner Keithrick Thomas

was arrested and charged with the offense of Possession of a Controlled Substance. (CR6)[2]. Petitioner Thomas filed a Motion to Suppress on November 23, 2015. (CR34). On February 23, 2016, a hearing was held at which time Petitioner first raised the issue presented herein. "…a person should be able to stand in their driveway, not commit any crimes, and no matter who they were driving with, they don't deserve to be handcuffed and searched. We have rights. And I'm asking that those rights be upheld today, Your Honor." (RR, 102). The trial court denied the Motion to Suppress. (CR38). After the Motion to Suppress was denied, Petitioner Thomas entered a plea of Guilty and was sentenced to two (2) years in the Texas Department of Criminal Justice. (CR58). On March 14, 2016, Petitioner Thomas timely filed notice of appeal. (CR62).

In the appeal to the 14th Court of Appeals - Houston Division, Petitioner argued: Appellant Keithrick Thomas was not availed of Appellant Thomas' Constitutionally protected rights. Appellant Thomas was wrongfully convicted of Possession of a Controlled Substance, in derogation of the Fourth Amendment, because the trial court erroneously denied Appellant Thomas' motion to suppress. On June 8, 2017, The 14th Court of Appeals

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[2] "CR" refers to Clerk's Record and the number refers to the page number.

issued an opinion, affirming the trial court's judgment, holding that the search of Petitioner was not unreasonable and the seizure of the controlled substance was not illegal. On September 6, 2017, Petitioner Thomas filed a Petition for Discretionary Review, presenting the issue in the same manner as presented before this Court. On November 22, 2017, the Texas Court of Criminal Appeals granted the Petition for Discretionary Review and granted oral argument. Oral arguments were made on May 16, 2018. The Texas Court of Criminal Appeals issued its Opinion on September 19, 2018, dismissing the Petition as improvidently granted. Petitioner filed a Motion for Rehearing on October 5, 2018. The Texas Court of Criminal Appeals issued notice that Petitioner's Motion for Rehearing was denied on November 7, 2018. All opinions, judgments and findings of fact and conclusions of law are included in the appendix attached to this petition, and fully incorporated by reference. This petition requests an examination of the holdings of the courts below.

REASONS FOR GRANTING PETITION

I. The Texas Court of Criminal Appeals' Decision is Repugnant to The Fourth Amendment

The Texas Court of Criminal Appeals, Petitioner's last resort in Texas, has decided an important question of federal law in a way that conflicts with the relevant

decisions of this honorable Court. The decisions of the courts below cannot rest on non-federal grounds. The decisions of the courts below are against the validity of and repugnant to the Fourth Amendment of the United States Constitution.

A. Officer Gemmill Intruded on Petitioner's Driveway, Uninvited, and the Driveway of a Residence is Curtilage and is Protected by the Fourth Amendment.

Officer Gemmill gave the following testimony [RR, 39 and 26 - 27]:

> Question: Okay. And so -- because I'm unclear with the way you just answered. Are you certain that your lights were on at the time he got out of the vehicle?
>
> Gemmill: I'm not certain. My focus -- my attention was on Mr. Thomas who was exiting the vehicle and I gave him orders to stop.
>
> Question: Okay. Now, when you gave him -- and pulled up to him and gave him orders to stop, he was already walking, correct, on the driveway?
>
> Gemmill: [H]e has to be, yes, ma'am, for the -- on

the stop.

Question: Did you notice anything -- did you notice the defendant doing anything unusual while he -- after he stepped out of the vehicle and was walking up towards the residence?

Gemmill: I remember when he was walking towards the residence, he had a beer can in one of his hands. I approached him and I put the beer can on the ground…

The Texas Court of Criminal Appeal's decision to dismiss Petitioner Thomas' Petition for Discretionary Review is inconsistent with decisions of the United States Supreme Court. The State of Texas has also backpedaled on more Constitutionally sound opinions previously issued by The Texas Court of Criminal Appeals, regarding the issue of Fourth Amendment protection of curtilage. In *State v. Rendon*, 477 S.W. 3d 805 (Tex. Crim. App., 2015), the Court was asked to decide whether it constitutes a search within the meaning of the Fourth Amendment for law-enforcement officers to bring a trained drug-detection dog directly up to the front door of an apartment-home for the purpose of conducting a canine-narcotics sniff. The Court

answered that it did. Consistent with the reasoning of the United States Supreme Court's opinion in *Florida v. Jardines*, 133 S.Ct. 1409 (2013), the Texas Court of Criminal Appeals concluded that the officers' use of a dog sniff at the front door of the apartment-home of Michael Eric Rendon, appellee, resulted in a physical intrusion into the curtilage that exceeded the scope of any express or implied license, thereby constituting a warrantless search in violation of the Fourth Amendment.

At the time the Texas Court of Criminal Appeals dismissed Petitioner Thomas' Petition for Discretionary Review and at the time The Texas Court of Criminal Appeals denied Petitioner Thomas' Motion for Rehearing, The Texas Court of Criminal Appeals was fully aware of this honorable Court's decision in *Collins v. Virginia*, 584 U.S. ___ (2018). Either the Texas Court of Criminal Appeals chose to ignore this Court's decision or was uncertain about whether the holding in *Collins* was applicable only to the automobile exception; and, not the occurrence of a search of a person and seizure of that person's possessions, in the driveway of a person's home - without a warrant and without probable cause. This Petition should be granted, so that the warrant requirement exceptions to the Fourth Amendment will be clear. Does not the Fourth Amendment protect the search of and seizure of possessions from a person more than or at

least equally as the Fourth Amendment protects the search of an automobile; particularly where the person is in the confines of his home or private areas immediately attached thereto?

The Fourth Amendment's protection of curtilage has long been black letter law. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Collins v. Virginia*, 584 U.S. ___ (2018) quoting *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Ibid.* (quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). To give full practical effect to that right, the Court considers curtilage—"the area 'immediately surrounding and associated with the home' "—to be "'part of the home itself for Fourth Amendment purposes.' " Jardines, 569 U.S., at 6, 133 S.Ct. 1409 (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 212–213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *United States v. Jones*, 565 U.S. ___, 132 S.Ct. 945, 950 - 951, n. 3 (2012); *Jardines*, 569 U.S., at 11, 133 S.Ct. 1409. Such conduct thus is presumptively unreasonable absent a warrant. The " 'conception defining the curtilage' is ... familiar enough that it is 'easily understood from our daily experience.' " *Jardines*, 569 U.S., at 7, 133 S.Ct. 1409 (quoting *Oliver*, 466 U.S., at 182, n. 12, 104 S.Ct. 1735). Just like the front porch, side garden, or area "outside the front window," *Jardines*, 569 U.S., at 6, 133 S.Ct. 1409, the driveway enclosure where Officer Rhodes searched the motorcycle constitutes "an area adjacent to the home and to which the activity of home life extends,' " and so is properly considered curtilage, *id*., at 7, 133 S.Ct. 1409 (quoting *Oliver*, 466 U.S., at 182, n. 12, 104 S.Ct. 1735).

B. The Initial Intrusion of Officer Gemmill onto Petitioner's Driveway was not Supported by any Exception to the Warrant Requirement.

The Fourth Amendment of the United States Constitution protects an individual's right to be secure in person and property. *Horton v. California*, 496 U.S. 128, 133 (1990). The plain view doctrine underscores the significant difference between searches and seizures.

Horton, 496 U.S. at 133. "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." Id. When an article is in plain view, neither its observation nor its seizure involves an invasion of privacy. Id. In other words, "[w]here the initial intrusion that brings the officer within plain view of the article is supported . . . by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate." *Horton*, 496 U.S. at 135. An officer has a right to be where he is, for purposes of the plain view doctrine, if he "did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton*, 496 U.S. at 136).

The seizure of an object in plain view is justified if (1) the officer is lawfully where the object can be "plainly viewed, " (2) the "incriminating character" of the object is "immediately apparent, " and (3) the officer has the right to access the object. *State v. Betts*, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013).

Officer Gemmill indeed violated the Fourth Amendment in arriving in Petitioner's driveway. *State v. Rendon*, 477 S.W. 3d 805 (2015) would indicate that, in the instant case, Officer Gemmill was on Appellant Thomas' private property and not lawfully where the pills could be plainly viewed. After reviewing the testimony presented at the motion to suppress, the14th Court of Appeals - Houston

believed that the incriminating character of the first pill bottle was not immediately apparent. (*See Appendix* - "Although it was not immediately apparent that the pill bottle contained Xanax pills that were not prescribed to appellant, Officer Gemmill did have probable cause to associate the pill bottle with contraband and criminal activity.") The first two (2) prongs of Texas' *State v. Betts*, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013) plain view exception have not been met; nor has the *Horton* requirement that the officer not violate the Fourth Amendment to arrive at the place from where the officer is viewing the object. Officer Gemmill had no right to even access Petitioner Thomas' property, let alone the pills in Petitioner Thomas' pocket.

C. Officer Gemmill did not have Probable Cause to Conduct a Search for Non-Weapon Contraband; thus, the Seizure of any Contraband Cannot be Supported by the Plain View Exception to the Warrant Requirement.

Protective searches should be limited and are not related to seizing evidence or other non-weapon contraband. *See Adams v. Williams*, 407U.S. 143, 146 (1972). A valid investigative detention can confer upon an officer the authority to pat down the suspect for weapons. *Terry v. Ohio*, 392 U.S 1, 29 (1968). Under the " plain feel"

doctrine, an officer conducting a pat-down may seize an object " whose contour or mass makes its identity immediately apparent" as contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 375 -376 (1993). But when the conditions of the " plain feel" doctrine (or the " plain view" doctrine) are not present, an officer conducting a valid investigative detention must have probable cause in order to conduct a search for non-weapon contraband or other evidence. *Arizona v. Hicks*, 480 U.S. 321 (1987).

Officer Gemmill admitted that there were no facts which would have lead Officer Gemmill to believe that there was probable cause to believe Petitioner Thomas had committed any crime at the point Officer Gemmill handcuffed Petitioner Thomas. (RR, 44). Officer Gemmill frisked Petitioner Thomas, after Officer Gemmill handcuffed Petitioner Thomas. (RR, 41). Officer Gemmill did not find any weapons on Petitioner Thomas. (RR, 42).

Officer Gemmill testified Officer Gemmill saw the top of a pill bottle in Petitioner's pocket. (RR, 42). After seeing only the top of the pill bottle, Officer Gemmill believed Officer Gemmill had the right to search Petitioner Thomas' person. (RR, 44). Upon searching Petitioner Thomas more intrusively, Officer Gemmill discovered two (2) more pill bottles. (RR, 44). Officer Gemmill never conducted a pat down for safety, after Officer Gemmill discovered the narcotics on Petitioner Thomas. (RR, 18).

Baldwin v. State, 278 S.W. 3d 367 (2009) addressed the issue of pat-down searches. In *Baldwin*, at the time he reached into appellant's pocket, Deputy Smith had the following information: (1) a woman he knew by sight was so concerned about an unknown man walking in the neighborhood that she called the police, (2) appellant fit the general description given by the woman, (3) appellant was dressed all in black, (4) appellant was looking into houses, but the officer had not ascertained from what vantage point this took place, (5) there had been several recent burglaries in the area, (6) the area was a " medium" crime neighborhood, (7) it was 10:30 at night, (8) upon seeing the deputy, appellant began to walk more quickly, (9) appellant was very nervous, glancing around, scanning the area, and refusing to make eye contact with the deputy, and (10) appellant asked why he needed to present his identification. Without finding the necessity to decide whether Deputy Smith effectuated an arrest or an investigative detention, or whether reasonable suspicion existed to support an investigative detention, the Texas Court of Criminal Appeals found there was no valid basis for an arrest. The Court opined that had there been a valid basis for an investigative detention, there was no valid basis for reaching into appellant's pocket to procure his wallet. The Court concluded that these circumstances did not give rise to the relatively high level of suspicion that

would constitute probable cause to arrest. “Because Deputy Smith did not have probable cause to arrest at the time, reaching into appellant's pocket cannot be justified by the "search incident to arrest" doctrine.” Id. at 370 -371.

II. CONCLUSION

Proof of "a reasonable expectation of privacy" is at the forefront of all Fourth Amendment claims. Any defendant seeking to suppress evidence obtained in violation of the Fourth Amendment must first show that he personally had a reasonable expectation of privacy that the government invaded. Kothe v. State , 152 S.W. 3d 54, 59 (2004) quoting Rakas v. Illinois, 439 U.S. 128, 139 (1978). The Supreme Court has held that Fourth Amendment "reasonableness" is measured "in objective terms by examining the totality of the circumstances"; it "eschew[s] bright-line rules, instead emphasizing the fact-specific nature of the ... inquiry." Ohio v. Robinette, 519 U.S. 33, 39 (1996). It requires a balance between the public interest served and the individual's right to be free from arbitrary detentions. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

In reaching its decision in the instant case, The Texas Criminal Court of Appeals has ignored its own precedents set in *Rendon, Betts* and *Baldwin.* The lower

courts' decisions in this case allow law enforcement to enter an individual's private property, without a warrant, and conduct a search and seizure. Moreover, this case merits review, because the lower courts' decisions disturb the well-settled principle of the expectation of privacy this Court has set forth.

WHEREFORE PREMISES CONSIDERED, Petitioner Thomas prays this Court grant this Petition for Writ of Certiorari, reverse the decision of the lower courts and effect an outcome consistent with prior decisions of this Court.

Respectfully submitted,

/s/ NWestbrooks
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APPENDIX

TABLE OF CONTENTS

230th District Court, Harris County, Texas
Findings of Fact and Conclusions of Law.....3a
230th District Court, Harris County, Texas
Judgment.....8a
14th Court of Appeals -Houston Division
Opinion.....15a
14th Court of Appeals -Houston Division
Judgment.....44a
Texas Court of Criminal Appeals
Notice Granting Petition for Discretionary
Review.....45a
Texas Court of Criminal Appeals
Opinion.....46a
Texas Court of Criminal Appeals Notice Denying Motion for
Rehearing.....48a

CAUSE NO. 14546020

THE STATE OF TEXAS	**§**	**IN THE 230th DISTRICT**
	§	**COURT**
	§	
VS.	**§**	**OF**
KEITHRICK THOMAS	**§**	**HARRIS COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 23rd 2015 Keithrick Thomas filed a dispositive motion to suppress which was denied and subsequently, the he was sentenced to 2 years in the Texas Department of Corrections. Keithrick Thomas was represented by Letitia Quinones and Assistant District Attorney Neil Krugh prosecuted for the State of Texas.

The Court, having observed the demeanor of the witnesses and the manner in which each testified, judging their credibility, and after hearing the arguments of counsel, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Defendant, Keithrick Thomas, was charged by indictment in the above styled and numbered cause with the felony offense of Possession of a Controlled Substance.

2. Officer Rohan Walker and Officer Elizabeth Gemmill are credible and reliable witnesses who testified witnesses who testified truthfully at the motion to suppress.

3. On January 15, 2015, the Defendant, later identified as Keithrick Thomas, was seen by Officer Walker, who was working surveillance in plain clothes, exit the passenger side of a vehicle and enter a residence known for the sale of narcotics located at 4306 Trafalgar, Houston, Harris County, TX.

4. Office Gemmill executed a narcotics search warrant at 4306 Trafalgar, prior to January 15, 2015.

5. Office Gemmill previously arrested other individuals who have gone into and come from 4306 Trafalgar, Houston, Harris County, TX for possession of a controlled substance.

6. Officer Walker saw the Defendant exit the residence after a short time and back into the passenger side of the vehicle.

FILED

Chris Daniel
District Clerk
Time: May 19, 2016
Harris County, Texas
By _____5____s
Deputy

7. Officer Walker's partner relayed this information to Gemmill who was in a marked patrol unit.

8. Officer Gemmill's vehicle caught up to the vehicle which failed to signal a turn.

9. The vehicle came to a stop in front of 4322 Grapevine, Houston, Harris County, TX, which is the Defendant's address.

10. The Defendant began walking up the driveway and was seen by Officer Gemmill making furtive movements towards his midsection where he had a pocket on each side of his hoodie.

11. Officer Gemmill placed the Defendant into handcuffs for her safety based on the Defendant's furtive movements.

12. While placing the Defendant into handcuffs, Officer Gemmill observed the top of a prescription bottle in the Defendant's left pants pocket.

13. Officer Gemmill retrieved the prescription bottle

and noticed that it did not have a label on the outside.

14. Officer Gemmill found that the prescription bottle had Xanax m it and the Defendant did not have a prescription for Xanax.

15. Officer Gemmill then searched the Defendant for more narcotics and found another pill bottle in the Defendant's front right pants pocket.

16. The second pill bottle found in the Defendant's front right pants pocket had a label on it that did not belong to the Defendant.

17. The second pill bottle found in the Defendant's front right pants pocket had a razor blade and crack cocaine inside of it which field tested positive for cocaine in the amount of 3.81 grams.

CONCLUSIONS OF LAW

1. The officers' testimony established specific, articulable facts and reasonable inferences substantial enough to support reasonable suspicion that the Defendant had been engaged in criminal activity. *Ford v. State,* 158 S.W.3d 488, 492 - 493 (Tex. Crim. App. 2005)

2. The investigative detention of the Defendant was lawful in order to ensure officer safety, maintain the status quo, and ensure the continued presence of the Defendant during the course of a brief investigation. *State v. Sheppard,* 271 S.W.3d 281,291 (Tex. Crim. App. 2008)

3. Officer Gemmill had probable cause to search the Defendant after she observed in plain view the top of the pill bottle, which based on her training and experience contained contraband, inside of the Defendant's left pants pocket. *State v. Dobbs,* 323 S.W.3d 184, 189 (Tex. Crim. App. 2010)

4. A person's conduct when viewed in the light of the totality of the circumstances give rise to reasonable suspicion. *Woods v. State,* 956 S.W.2d 33, 37 (Tex. Crim. App. 1997)

SIGNED AND ENTERED this 18TH day of

/s/ Brad Hart
HON. Brad Hart
230th District Court
Harris County, Texas

THE STATE OF TEXAS CASE NO. 1454620010

INCIDENT NO./TRN: 9170516456456A001

THE STATE OF TEXAS	§	IN THE 230TH DISTRICT
	§	
v.	§	COURT
	§	
THOMAS, KEITHRICK	§	HARRIS COUNTY, TEXAS
	§	
STATE ID NO. TX07880403	§	

JUDGEMENT OF CONVICTION BY COURT - WAIVER OF JURY TRIAL

Judge Presiding: Hon. BRAD HART Date Judgment Entered:

03/14/2016

Offense for which Defendant Convicted:

POSSESSION OF A CONTROLLED SUBSTANCE, COCAINE, WEIGHING MORE THAN 1 GRAM AND LESS THAN 4

GRAMS

Charging Instrument:	Statute for Offense:
INDICTMENT	N/A

Date of Offense:

01/15/2015

Degree of Offense: Plea to Offense: Findings on Deadly Weapon:

3RD DEGREE FELONY GUILTY

N/A Terms of Plea Bargain:

WITHOUT AN AGREED RECOMMENDATION

Plea to 1st Enhancement Paragraph: N/A

Plea to 2nd Enhancement Paragraph: N/A

Findings on 1st Enhancement Paragraph: N/A

Findings on 2nd Enhancement/Habitual:N/A

Date Sentence Imposed: 03/14/2016 Date Sentence to Commence: 03/14/2016

Punishment and Place of Confinement:

2 YEARS INSTITUTIONAL DIVISION, TDCJ

THIS SENTENTCE SHALL RUN CONCURRENTLY

SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR: N/A

Fine: $N/A Court Costs: $As Assessed Restitution: N/A Restitution Payable to: Victim (see below} Agency/Agent (see below}

Sex Offender Registration Requirements do not apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was N/A.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

From 01/15/2015 to 01/18/2015

Time Credited: From 03/14/2016 to 03/14/2016

If Defendant is to serve sentence in county jail or is given credit towards fine and costs, enter days credited below.

N/A DAYS NOTES:

N/A

All pertinent information, names and assessments Indicted above are incorporated into the language of the Judgment below for reference.

This cause was called for trial in Harris County, Texas. The State appeared by her District Attorney.

Counsel/Waiver (select one}

X Defendant appeared in person with Counsel.

__Defendant knowingly, intelligently and voluntarily waived the right to representation by counsel in writing in open court.

Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea indicated above. The Court then admonished Defendant as required by law. It appeared to the Court that the Defendant was mentally competent to stand trial, made the plea freely and voluntarily, and was aware of the consequences of this plea. The Court received the plea and entered it of record. Having heard the evidence submitted,

the Court found Defendant guilty of the offense indicated above. In the presence of Defendant, the Court pronounced sentence against Defendant.

The Court **FINDS** the Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that the Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 §9.

The Court **ORDERS** Defendant punished as indicted above. The Court **ORDERS** Defendant to pay all fines, court costs and restitution as indicated above.

Punishment Options (select one)

X **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of The State of Texas or the Sheriff of this County to take, safely convey, and deliver the Defendant to the Director, Institutional Division, TDCJ. The Court **ORDERS** the Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** the Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of the sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the **Harris County District Clerk's Office.** Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any

remaining unpaid fines, court costs and restitution as ordered above.

__ **County Jail Confinement.** The Court **ORDERS** the Defendant immediately committed to the custody of the **Sheriff of Harris County, Texas** on the date the sentence is to commence. Defendant shall be confined in the **Harris County Jail** for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the **Harris County District Clerk's Office.** Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs and restitution as ordered above.

__ **Fine Only Payment.** The punishment assessed against the Defendant is for fine only. The Court **ORDERS** Defendant to proceed immediately to the **Office of the Harris County District Clerk**. Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered above in this cause.

Execution/Suspension of Sentence

__ The Court **ORDERS** Defendant's sentence **EXECUTED.**

__ The Court **ORDERS** Defendant's sentence of confinement **SUSPENDED.** The Court **ORDERS** Defendant placed on community supervision for the

adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated. The Court further **ORDERS** that if the defendant is convicted of two or more offenses in a single criminal action, that each cost or fee amount must be assessed using the highest category of offense. Tex. Code Crim. P. art. 102.073.

Furthermore, the following special findings or orders apply:

Signed and entered on 03/14/2016

/s/Brad Hart

BRAD HART

JUDGE

PRESIDING

Notice of Appeal Filed: 03/14/2016_____

Mandate Received:_____ Type of Mandate:_____

After Mandate Received. Sentence to Begin Date is _____

Jail Credit _____

Def. Received on at __ AM __ PM

By:. Deputy Sheriff of Harris County

Clerk: M. Iiolmon

Case Number: 145462001010

Defendant: THOMAS, KEITHRICK

FIN (CAS 20.10): EN/KR04 999 LCBT: LCB EN/KRI18999 13/993

Affirmed and Memorandum Opinion filed

June 8, 2017.

THE STATE OF TEXAS

In The

Fourteenth

Court of Appeals

NO. 14-16-00230-CR

KEITHRICK THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal

from the 230th

District Court

Harris County,

Texas

Trial Court

Cause No.

1454620

M E M O R A N D U M O P I N I O N

Appellant Keithrick Thomas pleaded guilty to possession of cocaine, and the trial court sentenced him to two years' confinement. Appellant contends the trial court erroneously denied his motion to suppress. We affirm because appellant was justifiably detained incident to a traffic stop, a pill bottle containing Xanax was in plain view and lawfully seized, and appellant's further search that uncovered cocaine in a second pill bottle constituted a lawful search incident to arrest.

BACKGROUND

Appellant was indicted for possession of a controlled substance, namely cocaine, weighing more than one gram and less than four grams. Appellant filed a motion to suppress and the trial court held a hearing on his motion on February 23, 2016.

At the hearing, Houston Police Officer Rohan Walker testified that he was part of a tactical unit conducting surveillance of a house located on 4306 Trafalgar Street on January 15, 2015. Narcotics previously had been recovered from that house. Officer Walker testified that he observed a car driving up to the house, appellant exiting the passenger side of the car, appellant walking into the garage of the house, appellant

coming out of the garage just a short time later, appellant getting back into the passenger side of the car, and the car driving off.

After appellant exited the house and got back into the car, Officer Walker called police officers in a marked unit and provided a description of the car appellant was in so the police officers could "develop the P[robable] C[ause] to stop the vehicle." Officer Walker testified that, based on his training and experience, he "believed that there was some type of narcotics or illegal activity" because "it's a known dope house that we've gotten narcotics the same way before in the past." Officer Walker testified that he has in the past "arrested people that have gone into that house and come back out [a] short time later."

Houston Police Officer Elizabeth Gemmill testified that she was assigned to the tactical unit on January 15, 2015. The unit's assignment that day was to monitor "a known narcotics house that in the past was known to distribute narcotics;" the house was located on 4306 Trafalgar Street. Officer Gemmill testified: "[W]e've run the narcotics search warrant at that location before. We — we've also made several traffic stops of individuals that were seen going in and out of that location on prior dates who were found in possession of controlled substances."

Officer Gemmill testified that she and other officers had arrested individuals coming from the house for narcotics "for a few weeks before" January 15, 2015.

Officer Gemmill and her partner Officer Gilcrest, who were nearby in a marked car, were told by Officer Walker via radio that "there's a vehicle that parked in front of the house. The passenger, [appellant], stepped out of the vehicle. Went inside the garage. A short time later came out and got back in the vehicle and left the location." Officer Gemmill and Officer Gilcrest started following the car. They observed that its driver failed to use a turn signal when making a right turn. They caught up to the car "as it came to a stop in front of a house and initiated a traffic stop." The house was appellant's residence, but Officer Gemmill was unaware of that fact. Officer Gemmill testified that she and Officer Gilcrest pulled up behind the car, turned on the police car lights, and appellant exited the car and started walking in the driveway towards his residence. At that point, Officer Gemmill instructed appellant to stop walking; she told him to stop because she "wanted to detain — detain him as a result of a traffic stop."

According to Officer Gemmill, appellant turned around when she instructed him to stop. Appellant was holding a beer can in one of his hands, and he started

"making movements toward his midsection area" — toward his waistband. Officer Gemmill ordered him to stop "for officer safety" reasons because appellant made "a furtive movement" and "[a] lot of times, the midsection is where people carry guns and any weapons or anything like that." Officer Gemmill testified: "I approached him and I put the beer can on the ground and detained him for officer safety since he made that furtive movement." Officer Gemmill stated that she detained appellant by placing him in handcuffs" because "I don't have to worry about [appellant making] that movement again towards [his] waistband and me not being able to prevent that movement." She then frisked appellant. As she was handcuffing appellant, she noticed "[t]here was a pill bottle protruding from one of his pant pockets." She could see "in plain view" the cap of the pill bottle and a "little bit of the orange."

Based on her experience, Officer Gemmill thought that narcotics were in the prescription pill bottle she saw in appellant's pocket because "oftentimes people . . . carry their narcotics within pill bottles." Officer Gemmill removed the pill bottle from appellant's left front pant pocket, "saw that it did not have defendant's name on it and it had Xanax tablets inside of it." Officer Gemmill stated that, "[a]fter finding narcotics within that pill

bottle in plain view, yes, after that I conducted a full search of his person." Officer Gemmill testified: "By finding that, it led me to believe that perhaps there may be more illegal narcotics on his person and I continue[d] my search to find another pill bottle that did not have his name on it with crack cocaine inside of it" in the front right pant pocket.

Officer Gemmill testified that she was the only one who approached appellant and interacted with him. During the traffic stop, Officer Gilcrest "approached the driver who was also making a furtive movement." Officer Gemmill also testified that it is "unusual for somebody to get out of the vehicle" when a traffic stop is made and that it generally leads her to believe that the person "want[s] to get away from" police. Officer Gemmill stated that, "when the traffic stop was conducted and [appellant] got out of the passenger seat," she believed appellant "wanted to get away" from her or the traffic stop.

Appellant also testified at the hearing. He stated that his girlfriend, Erica Fisher, drove him to a store on the morning of January 15, 2015, so he could buy a case of beer and then dropped him off at the house on 4306 Trafalgar Street. Appellant testified that his friends Clifton and Charlie Johnson lived at the house and that he arrived at their house for a visit around 9:00 a.m.

Appellant claimed that he spent the entire day at his friends' house playing video games, watching television, talking, and drinking beer. Appellant claimed that he called his father's friend John Bradshaw to pick him up at his friends' house between 3:00 and 4:00 p.m. When Bradshaw picked him up, appellant "entered the back passenger seat" of Bradshaw's car because the front seat was wet.

Appellant testified that he did not see a police car, see police car lights, or hear sirens when Bradshaw stopped in front of his house. Appellant testified that he exited the car after Bradshaw pulled in front of his house, walked up his driveway, pulled out the last beer can from a carton, went to the trash can to throw away the empty beer carton, opened up the beer can, and started walking towards his house. Appellant then noticed a police car turning the corner at a fast speed. Appellant testified that he did not "believe that as they were driving really fast that they were coming for" him or he "probably would have run."

Appellant testified that the police car stopped in front of his house as he was walking towards his front door. According to appellant, two police officers exited the police car. Officer Gemmill approached him, did not ask him any questions, immediately handcuffed his hands

behind his back, and started searching his pockets. Appellant denied making a furtive movement or reaching for his midsection and claimed that he could not have reached for his midsection because he was holding a beer in his hand. Appellant also denied that any pill bottles were protruding from his pockets and claimed that the bottles were "completely concealed." Appellant admitted having a previous conviction for possession of cocaine and for possession of a firearm as a felon.

Appellant's friend, Clifton Johnson, also testified at the hearing. Clifton testified that he resides in the house on 4306 Trafalgar Street. Clifton remembered appellant coming to his house around 9:00 a.m. on January 15, 2015. He confirmed that appellant spent the day at his house playing video games, watching television, and drinking beer until appellant left around 3:30 or 4:00 p.m. Clifton admitted having a previous conviction for possession of a controlled substance, for tampering with evidence, and for theft.

Clifton's 85-year-old grandfather, Charlie Johnson, testified at the hearing. Charlie stated that he remembered January 15, 2015 "very, very, very vaguely" because his memory was not as good as it used to be. Charlie stated that appellant was always at his house on 4306 Trafalgar Street, but Charlie "couldn't say" how long

appellant was at his house on January 15, 2015. Charlie stated that he "imagin[ed]" appellant spent "[p]robably all day" at his house. Charlie admitted that the police had executed a search warrant at his house "one day last year" and that the police arrested his son for drug possession. Charlie could not remember if the police executed another search warrant at his house at some other time in the past.

After the hearing, the trial court denied appellant's motion to suppress on February 23, 2016. Appellant pleaded guilty to possession of a controlled substance, namely cocaine, weighing more than one gram and less than four grams. Appellant was sentenced to two years' confinement. The trial court later entered findings of fact and conclusions of law on May 18, 2016. Appellant filed a timely notice of appeal.

ANALYSIS

Appellant argues in his sole issue that the trial court erroneously denied his motion to suppress because (1) appellant's initial detention was unlawful; (2) appellant's detention "was not temporary and was overly intrusive;" (3) Officer Gemmill unlawfully seized the first pill bottle containing Xanax from appellant's pocket; and (4) Officer Gemmill unlawfully searched appellant's person and seized from another pocket a second pill bottle

containing cocaine.

I. Standard of Review

We review a trial judge's ruling on a motion to suppress under a bifurcated standard of review. *Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016). First, we afford almost total deference to a trial judge's determination of historical facts. *Id*. The judge is the sole trier of fact and judge of witnesses' credibility and the weight to be given their testimony. *Id*. The judge is entitled to believe or disbelieve all or part of a witness's testimony — even if that testimony is uncontroverted — because the judge can observe the witness's demeanor and appearance. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

When the trial judge makes express findings of fact, we afford those findings almost total deference as long as the record supports them. *State v. Castleberry*, 332 S.W.3d 460, 465 (Tex. Crim. App. 2011). "Therefore, the prevailing party is entitled to 'the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence.'" *Id*. (quoting *State v. Garcia– Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008)).

Second, we review a judge's application of the law to the facts *de novo*. *Weems*, 493 S.W.3d at 577. We will

sustain the judge's ruling if the record reasonably supports that ruling and is correct on any theory of law applicable to the case. *Id*.

II. Traffic Stop

We begin our analysis by addressing appellant's contention that his initial detention was unlawful because the traffic stop of the vehicle in which he was a passenger was "not at all random" and "[f]rom the inception, Officer Gemmill's sole, deliberate purpose was to search Appellant Thomas and seize any contraband [he] may have possessed."

A violation of a traffic law is sufficient authority for an officer to stop a vehicle. *Josey v. State*, 981 S.W.2d 831, 837 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Thus, if an officer has a reasonable basis for suspecting a person has committed a traffic offense, the officer legally may initiate a traffic stop. *Miller v. State*, 418 S.W.3d 692, 696 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd.). A lawful traffic stop is ordinarily a temporary and reasonable detention of the driver and passengers. *See Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Josey*, 981 S.W.2d at 837.

An objectively valid traffic stop is not unlawful just because the detaining officer has some ulterior motive

for making the stop. *Kelly v. State*, 331 S.W.3d 541, 549 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Nor can an officer's stated purpose for a stop either validate an illegal stop or invalidate a legal stop because its legality rests on the totality of the circumstances viewed objectively. *Miller*, 418 S.W.3d at 696.

Texas Transportation Code section 545.104 states that an operator (1) "shall use the signal authorized . . . to indicate an intention to turn, change lanes, or start from a parked position;" or (2) "intending to turn a vehicle right or left shall signal continuously for not less than the last 100 feet of movement of the vehicle before the turn." Tex. Transp. Code Ann. § 545.104(a), (b) (Vernon 2011). Officer Gemmill testified that she observed Bradshaw commit a traffic violation when he failed to "use his turn signal when he made a right turn." Appellant also acknowledged in his brief: "The driver of the vehicle failed to used [sic] his turn signal to indicate a right turn."

Because appellant was a passenger in a vehicle lawfully detained for a traffic violation, Officer Gemmill was justified in also detaining appellant for investigative purposes. *Josey*, 981 S.W.2d at 838; *see also Johnson*, 555 U.S. at 333. We reject appellant's contention that his detention was unlawful from its inception; we conclude that appellant was lawfully detained following a lawful traffic stop.

II. Detention

We next address appellant's argument that his detention incident to the traffic stop "was not temporary and was overly intrusive."

A. Overly Intrusive Detention

Appellant contends that his detention was "overly intrusive" for two reasons. First, Officer Gemmill "was unlawfully on Appellant Thomas's property" and "physically intruded into the curtilage that exceeded the scope of any express or implied license." Second, appellant should not have been handcuffed "for officer safety" when he "did not continue to make the 'furtive' movement" and "Officer Gemmill testified that Appellant Thomas had complied with all [of] Officer Gemmill's orders and Officer Gemmill was not in fear for her safety."

Appellant's assertion that Officer Gemmill was unlawfully on his property and "intruded into the curtilage," more specifically appellant's driveway, is incorrect. Because appellant was a passenger in a vehicle lawfully detained for a traffic violation, Officer Gemmill was justified in also detaining appellant for investigative purposes. *Josey*, 981 S.W.2d at 838; *see also Johnson*, 555 U.S. at 333. The fact that appellant chose to not remain in the vehicle when police officers initiated a

lawful traffic stop but exited the vehicle and began walking in his driveway does not transform his lawful detention into an unlawful intrusion into the curtilage or appellant's property. *See Davis v. State*, 905 S.W.2d 655, 661-62 (Tex. App.—Texarkana 1995, pet. ref'd).

We also reject appellant's contention that his detention was overly intrusive because Officer Gemmill handcuffed him after he complied with Officer Gemmill's order and stopped making any furtive movement, and Officer Gemmill was not in fear for her safety.

During an investigatory stop, a police officer may use such force as is reasonably necessary to effect the goal of the detention: investigation, maintenance of the status quo, or officer safety. *Rhodes v. State*, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997); *Chambers v. State*, 397 S.W.3d 777, 781 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). A court must determine reasonableness from a reasonable police officer's perspective at the scene, making allowances for the fact that officers must often make quick decisions under tense, uncertain, and rapidly changing circumstances. *Chambers*, 397 S.W.3d at 782. Thus, the handcuffing of a vehicle's occupants may be appropriate under certain circumstances to effectuate officer safety or thwart an attempt to frustrate further inquiry. *Hill v. State*, 303 S.W.3d 863, 872 (Tex. App.—Fort Worth 2009, pet. ref'd); *see State v. Sheppard*, 271 S.W.3d 281,

289 (Tex. Crim. App. 2008).

At the motion to suppress hearing, Officer Gemmill testified that appellant immediately exited the car after the traffic stop was initiated. Officer Gemmill instructed appellant to stop walking away because she wanted to "detain him as a result of a traffic stop." She testified that it is "unusual for somebody to get out of the vehicle" when a traffic stop is initiated and that it generally leads her to believe that the person "want[s] to get away from" police. When Officer Gemmill instructed appellant to stop, he turned around and started "making movements toward his midsection area" — toward his waistband. Officer Gemmill testified that she ordered appellant to stop "for officer safety" reasons because appellant made "a furtive movement" and "[a] lot of times, the midsection is where people carry guns and any weapons or anything like that."

Contrary to appellant's contention, Officer Gemmill did not testify that she was not in fear for her safety, and there is no evidence in the record to indicate that "Officer Gemmill was not in fear for her safety." Nor is the fact that appellant "did not continue to make the 'furtive' movement" and "complied with all [of] Officer Gemmill's orders" evidence that Officer Gemmill was safe and that appellant would not have again attempted to reach for his waistband to potentially access a weapon and attack

Officer Gemmill had she not handcuffed him.

Officer Gemmill testified that she detained appellant by handcuffing him "for officer safety since he made that furtive movement," and because "I don't have to worry about [appellant] make that movement again towards [his] waistband and me not being able to prevent that movement." Additionally, Officer Gemmill did not have any backup help because her partner, Officer Gilcrest, was occupied with the vehicle's driver, Bradshaw, "who was also making a furtive movement" during the traffic stop.

Based on the record before us, we conclude that Officer Gemmill used force reasonably necessary to effect the goal of the detention, namely to assure officer safety, maintain the status quo, and conduct the investigation of a traffic violation. *See Rhodes*, 945 S.W.2d at 117. Officer Gemmill was justified in handcuffing appellant to effectively provide for her and her partner's safety while they attempted to investigate the traffic violation they observed before initiating the traffic stop. *See Chambers*, 397 S.W.3d at 781-82 ("[A]lthough [Officer] Sanchez used a weapon and handcuffs to detain Chambers, this amount of force was reasonable under the circumstances. [Officer] Sanchez was on heightened alert while his partner was preoccupied with another suspect when he saw Chambers

reach for what [Officer] Sanchez suspected may have been a weapon The handcuffs were therefore used to ensure [Officer] Sanchez's safety during his investigation, which is particularly reasonable given that [Officer] Sutton was not available to assist him at the time."); *Hill*, 303 S.W.3d at 872 (holding that police officer was justified in handcuffing appellant for officer safety while attempting to investigate traffic violation when evidence showed that, as officers conducted a stop for traffic violations, appellant and the front passenger acted out of the ordinary by opening the doors and immediately exiting the vehicle and appellant reaching towards his shirt as he was exiting the vehicle); *see also Rivas v. State*, No. 04-14-00037-CR, 2014 WL 7339364, *1-3 (Tex. App.—San Antonio Dec. 23, 2014, no pet.) (mem. op., not designated for publication) (holding that police officer was justified in handcuffing appellant for officer safety when the officer stopped a vehicle for a traffic violation, and appellant, who was a passenger in the vehicle, exited the vehicle, opened the trunk, and started searching in the trunk).

Accordingly, we conclude that appellant's detention was not "overly intrusive."

B. Temporary Detention

We now turn to appellant's assertion that his detention was not temporary because, "[o]nce the traffic

matter was disposed of, the detention should have ended at that point."

"A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation." *Johnson*, 555 U.S. at 333. Following a lawful stop, police may lawfully detain the driver and all passengers "pending inquiry into a vehicular violation." *Id.* at 327, 333. The temporary seizure of the driver and passengers is reasonable and ordinarily remains reasonable for the duration of the stop, which "ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Id.* at 333. Once the traffic stop investigation is concluded, the police officer may no longer detain the driver and passengers, who must be permitted to leave. *See Kothe v. State*, 152 S.W.3d 54, 63-64 (Tex. Crim. App. 2004). However, if an officer develops reasonable suspicion during a valid traffic stop and detention that the detainee is engaged in criminal activity, prolonged or continued detention is justified. *Richardson v. State*, 402 S.W.3d 272, 277 (Tex. App.—Fort Worth 2013, pet. ref'd); *see Goudeau v. State*, 209 S.W.3d 713, 719 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

Appellant seems to argue that his detention was not temporary because the investigation of the traffic violation had concluded and the traffic stop had ended at

the time appellant was told to stop walking in the driveway and was handcuffed. The evidence in the record does not support his argument. Instead, the evidence shows that the investigatory stop had just begun when Officer Gemmill stopped and handcuffed appellant. Thus, the traffic stop was in progress and had not concluded. Nor had the investigatory stop ended when Officer Gemmill "discovered the pill bottles immediately after Officer Gemmill detained Appellant Thomas."

Accordingly, we reject appellant's argument that his detention was not temporary because he was detained "once the traffic matter was disposed of."

III. Plain View Doctrine

We now turn to appellant's argument challenging the seizure of the first pill bottle containing Xanax as being unjustified under the plain view doctrine. Appellant contends that Officer Gemmill illegally searched him and "discovered the pill bottle" immediately after she detained him. Appellant contends that the seizure of the first pill bottle containing Xanax was not justified because the "incriminating character of the pill bottle was not immediately apparent to Officer Gemmill" as required by the plain view doctrine.

The Fourth Amendment protects against

unreasonable searches and seizures. *Walter v. State*, 28 S.W.3d 538, 540 (Tex. Crim. App. 2000). "The capacity to claim the protection of the Fourth Amendment depends upon whether the person has a legitimate expectation of privacy in the invaded place." *Id.* at 541. A warrantless search of either a person or property is considered per se unreasonable subject to well established exceptions to the warrant requirement. *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). Although commonly classified as an exception to the warrant requirement, the plain view doctrine is not truly an exception because the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable. *Walter*, 28 S.W.3d at 541.

Thus, if an item is in plain view, neither its observation nor its seizure involves any invasion of privacy. *Id.* The rationale of the plain view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment. *See Illinois v. Andreas*, 463 U.S. 765, 771 (1983). A seizure of an object is lawful under the plain view doctrine if three requirements are met. *Keehn v. State*, 279 S.W.3d 330, 335 (Tex. Crim. App. 2009). First, police officers must lawfully be where the object can be "plainly

viewed." *State v. Betts*, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013) (citing *Keehn*, 279 S.W.3d at 335). Second, the "incriminating character" of the object in plain view must be "immediately apparent" to the police officers. *Id.* Third, the officials must have the right to access the object. *Id.*

Appellant challenges only the second prong. This immediacy prong requires merely a showing of probable cause that the item discovered is incriminating evidence; actual knowledge of the incriminating evidence is not required. *Goonan v. State*, 334 S.W.3d 357, 361 (Tex. App.—Fort Worth 2011, no pet.) (citing *Joseph v. State*, 807 S.W.2d 303, 308 (Tex. Crim. App. 1991)); *see State v. Dobbs*, 323 S.W.3d 184, 189 (Tex. Crim. App. 2010). Probable cause exists when the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). Known facts and circumstances include those personally known to police officers or those derived from a "reasonably trustworthy" source. *Id.* An officer also may rely on training and experience to draw inferences and make deductions as to the nature of the item seen. *Nichols v. State*, 886 S.W.2d 324, 325-26 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

Here, Officer Gemmill testified that she was

assigned to monitor "a known narcotics house that in the past was known to distribute narcotics." She testified that she and other officers had executed a narcotics search warrant at that house before and had arrested individuals for narcotics coming from that house "for a few weeks before." She stated that she and other officers "also made several traffic stops of individuals that were seen going in and out of that location on prior dates who were found in possession of controlled substances."

Officer Gemmill testified that Officer Walker had informed her by radio that there was "a vehicle that parked in front of the house. The passenger, [appellant], stepped out of the vehicle. Went inside the garage. A short time later came out and got back in the vehicle and left the location." When Officer Gemmill and her partner initiated a traffic stop, appellant immediately exited the car, leading her to believe appellant wanted to "get away." Because appellant made movements towards his waistband, Officer Gemmill handcuffed him and observed "in plain view" a "pill bottle protruding from one of his pant pockets."

Based on her experience, Officer Gemmill knew that individuals often "carry their narcotics within pill bottles" and without a label or name on it. Officer Gemmill testified that she removed the pill bottle she saw "sticking

out" of appellant's pocket and immediately saw it did not have appellant's name on it "and it had Xanax tablets inside of it." It is undisputed that Xanax is a controlled substance. *$132,265.00 in U.S. Currency v. State*, 409 S.W.3d 17, 24 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see* Tex. Health & Safety Code Ann. §§ 481.002(5), 481.104(a) (Vernon Supp. 2016); *Gibson v. State*, 233 S.W.3d 447, 450 (Tex. App.—Waco 2007, no pet.) (Xanax is alprazolam). And as a controlled substance, it is illegal to possess Xanax without a valid prescription. *See Glenn v. State*, 475 S.W.3d 530, 539 (Tex. App.—Texarkana 2015, no pet.).

Although it was not immediately apparent that the pill bottle contained Xanax pills that were not prescribed to appellant, Officer Gemmill did have probable cause to associate the pill bottle with contraband and criminal activity. Based on the evidence in the record, Officer Gemmill presented sufficient facts and circumstances demonstrating her belief that the pill bottle she saw in plain view was of "incriminating character." *See McGaa v. State*, No. 04-14-00052-CR, 2014 WL 5176652, *at 1, 3-4 (Tex. App.—San Antonio Oct. 15, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that second prong of plain view doctrine was met; even though it was not immediately apparent that the pills police officer seized were not prescribed to appellant, the court held

that officer had "probable cause to associate the pill bottle with criminal activity" based on testimony that (1) he was notified that "a suspicious person" was passed out in a vehicle; (2) he arrived at the scene and observed appellant seemingly asleep in the driver's seat with the motor running; (3) when appellant did not react to his knocking on the passenger-side window, he looked inside the car and observed a pill bottle with the cap on between appellant's legs; (4) "since the pill bottle was in plain view, he grabbed it, put it on top of the car, turned the engine off, put the keys on top of the car, and then started talking to the driver;" (5) he requested appellant's identification, checked the pill bottle, and discovered appellant's identification did not match the prescription label on the pill bottle; (6) he "called poison control to identify the pills;" and (7) arrested appellant for possession of a controlled substance); *Barron v. State*, No. 08-99-00493-CR, 2001 WL 564266, at *4 (Tex. App.—El Paso May 25, 2001, no pet.) (not designated for publication) (holding that second prong of plain view doctrine was met; although officer admitted that it was not immediately apparent to him that the white pill in plain view inside vehicle on console was an illegal substance, his suspicion of such, his later examination of the pill and determination that the pill was an illegal substance, the reckless driving, and the occupants' denial of being on

medication provided sufficient probable cause); *see also Lopez v. State*, 223 S.W.3d 408, 411, 417 (Tex. App.—Amarillo 2006, no pet.) (noting "that certain objects not inherently suspicious can become so under certain circumstances" and "can provide probable cause to invoke the plain view doctrine;" holding that police officer "had probable cause to believe the plastic baggie presented evidence of a crime sufficient to satisfy the immediately apparent prong" of the plain view doctrine based on evidence that (1) appellant was stopped in a high crime area; (2) officer "observed a 'tiny bit' of a plastic baggie in the crease around the gas cap compartment located on the rear driver's side; and (3) officer, "in his experience, could conceive of no other reason for a plastic baggie to be visible in the crease of the gas cap compartment other than to conceal narcotics").

We conclude that appellant was not illegally searched, and the pill bottle containing Xanax was legally seized under the plain view doctrine. No Fourth Amendment violation occurred because Officer Gemmill did not search appellant and was justified in seizing the Xanax pill bottle pursuant to the plain view doctrine.

IV. Search Incident to Arrest

Finally, we address appellant's argument that Officer Gemmill "unreasonably searched [him] and

illegally seized" a second pill bottle containing cocaine from his pocket after discovering and seizing the first pill bottle containing Xanax. The State counters that appellant's warrantless search was reasonable as a search incident to arrest.

"Pursuant to the Fourth Amendment, a warrantless search of either a person or property is considered per se unreasonable subject to a 'few specifically defined and well established exceptions.'" *McGee*, 105 S.W.3d at 615 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)). Those exceptions include voluntary consent to search, search under exigent circumstances, and search incident to arrest. *Id.*; *Perez v. State*, 495 S.W.3d 374, 385 (Tex. App.—Houston [14th Dist.] 2016, no pet.). It is the State's burden to show that the search falls within one of these exceptions. *McGee*, 105 S.W.3d at 615; *Perez*, 495 S.W.3d at 385.

Thus, under the Fourth Amendment, police officers may search an arrestee incident to a lawful arrest. *State v. Granville*, 423 S.W.3d 399, 410 (Tex. Crim. App. 2014). The justification for permitting such a warrantless search is the need (1) "for officers to seize weapons or other things which might be used to assault on officer or effect an escape;" and (2) "to prevent the loss or destruction of evidence." *Id.* Officers are permitted to search a

defendant, or areas within the defendant's immediate control, to prevent the concealment or destruction of evidence; this includes searching in and removing property from a defendant's pockets. *Meiburg v. State*, 473 S.W.3d 917, 922 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

It is irrelevant whether the arrest occurs immediately before or after the search, as long as sufficient probable cause exists for the officer to arrest before the search. *State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999); *Glenn*, 475 S.W.3d at 540; *Meiburg*, 473 S.W.3d at 922; *Branch v. State*, 335 S.W.3d 893, 901 (Tex. App.—Austin 2011, pet. ref'd). Probable cause justifying an arrest requires the officer to have a reasonable belief that, based on the facts and circumstances within the officer's personal knowledge or of which the officer has reasonably trustworthy information, an offense has been committed. *See Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005); *Smith v. State*, 491 S.W.3d 864, 870 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

As we have discussed above, Officer Gemmill legally seized the first pill bottle containing Xanax. Xanax is a controlled substance. *$132,265.00 in U.S. Currency*, 409 S.W.3d at 24; *see* Tex. Health & Safety Code Ann. §§

481.002(5), 481.104(a). Because Xanax is a controlled substance, it is illegal to possess Xanax without a valid prescription. *See Glenn*, 475 S.W.3d at 539. Appellant did not have a valid prescription for the Xanax contained in the unlabeled pill bottle Officer Gemmill seized, and Officer Gemmill had probable cause to arrest appellant for possession of the controlled substance. *See id*. at 540-41.

Given that Officer Gemmill had probable cause to arrest appellant, she was also permitted to conduct a search of appellant incident to that arrest, and her reaching into appellant's pocket for the second pill bottle containing cocaine qualified as a search incident to arrest. *See Baldwin v. State*, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009); *Branch*, 335 S.W.3d at 901. It is irrelevant that appellant's arrest had not occurred before the search because probable cause to arrest was established before the search was conducted; thus, the search of appellant's person was a lawful search incident to arrest. *See Ballard*, 987 S.W.2d at 892; *Glenn*, 475 S.W.3d at 540; *Branch*, 335 S.W.3d at 901.

We conclude that Officer Gemmill did not unreasonably search appellant and illegally seize the second pill bottle containing cocaine from his pocket. Accordingly, the trial court did not err in denying appellant's motion to suppress. We overrule appellant's

sole issue.

CONCLUSION

Having overruled appellant's sole issue, we affirm the trial court's judgment.

/s/ William J. Boyce Justice

Panel consists of
Justices Boyce, Busby,
and Wise. Do Not
Publish — Tex. R. App.
P. 47.2(b).

June 8, 2017

THE STATE OF TEXAS

JUDGMENT

The Fourteenth Court
of Appeals

KEITHRICK
THOMAS, Appellant

NO. 14-16-00230-CR V.

THE STATE OF
TEXAS, Appellee

This cause was heard on the transcript of the record of the court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED**.

We further order this decision certified below for observance.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

STATE OF TEXAS

11/22/2017 **COA No. 14-16-00230-CR**

THOMAS, KEITHRICK **Tr. Ct. No. 1454620**

PD-0790-17

On this day, the Appellant's petition for discretionary review has been granted. The original and ten copies of the appellant's brief must be filed with this Court within 30 days. The State's brief is due 30 days after the timely filing of the appellant's brief. ORAL ARGUMENT WILL BE PERMITTED

Deana Williamson, Clerk

NICOLETTE WESTBROOKS
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COURT OF CRIMINAL APPEALS

OF TEXAS

IN THE COURT OF

CRIMINAL

APPEALS OF

TEXAS

NO. PD-0790-17

KEITHRICK THOMAS,

Appellant

v.

THE STATE OF

TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

PER CURIAM.

Appellant pleaded guilty to possession of cocaine after the trial court denied his motion to suppress. Appellant challenged the denial of his motion to suppress on appeal, and the court of appeals affirmed. This Court initially granted discretionary review to examine that

holding. Having examined the record and briefs, we conclude that our decision to grant review was improvident. We therefore dismiss Appellant's petition for discretionary review as improvidently granted.

Delivered September 19, 2018

Do Not Publish

COURT OF CRIMINAL APPEALS

TEXAS

OF TEXAS

11/7/2018

THOMAS, KEITHRICKTr. Ct. No.

1454620 PD-0790-17

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

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* DELIVERED VIA E-MAIL *