FILED BY CLERK
MAR 29 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FABIAN ARMANDO HERRERA, Appellant.	)	2 CA-CR 2011-0178 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CR2009274

Honorable R. Douglas Holt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Melissa M. Swearingen — Phoenix
Attorneys for Appellee

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By Dan Montgomery — Tucson
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B R A M M E R, Judge.

¶1 After a bench trial, appellant Fabian Herrera was convicted of aggravated driving under the influence of an intoxicant (DUI). The trial court suspended the imposition of sentence and placed Herrera on four years' probation. On appeal, Herrera

contends the court erred when it denied his motion to suppress all evidence obtained after he was stopped by a police officer on the ground the officer lacked reasonable suspicion to believe Herrera had committed a traffic violation. We affirm for the reasons below.

¶2 Herrera was stopped just before midnight one evening in February 2009 by a Pima police sergeant who had been on a DUI task force, after Herrera had made an improper right turn in his pickup truck. The officer approached Herrera and immediately noticed Herrera's eyes were bloodshot, his speech was slurred, and the odor of alcohol was coming from Herrera and the car. After conducting an investigation, the officer arrested Herrera for DUI. Herrera was subsequently charged with aggravated DUI, based on his having committed two or more previous DUI offenses within an eighty-four-month period and simple, non-aggravated DUI; driving with an alcohol concentration (AC) of .08 or more; and extreme DUI, based on his having an AC of .15 or more.

¶3 Before trial, Herrera filed a motion to suppress all evidence obtained after he was stopped, arguing, inter alia, the officer had lacked reasonable suspicion to justify the stop. In its response to the motion, the state asserted the officer had observed Herrera make the turn from an improper position in the roadway, which was the center of the roadway rather than the far right position. And, the state argued, having observed Herrera commit a civil traffic violation, the officer had the requisite reasonable suspicion justifying the stop; because the officer detected the odor of alcohol once he approached Herrera, the officer had sufficient basis for continuing the investigation and, ultimately, had probable cause to arrest Herrera.

¶4 After a two-day hearing in February 2010 and April 2010 that focused primarily on whether Herrera had violated traffic laws when he turned right and whether the officer's observation of a traffic violation was a sufficient basis for stopping Herrera, the trial court denied the motion. In its minute entry ruling on the motion, the court first noted the testimony of Pima police officer Sterling Shupe that he had been driving west on Seventh Street in Safford, behind Herrera; that Herrera had positioned the pickup truck in the middle of the roadway; and that Herrera had made a "wide right-hand turn from the center of 7th Street" onto Sixth Avenue. The court stated, "The sole issue in the pending suppression hearing is whether a relative[ly] minor deviation of traffic rules authorizes a police officer to conduct a traffic stop." Relying, in part on this court's decision in *State v. Livingston*, 206 Ariz. 145, 75 P.3d 1103 (App. 2003), the court reasoned it was required to consider the "totality of the circumstances" and determine whether Shupe had a valid, objective reason to stop Herrera. The court concluded the way Herrera had positioned the truck even before he had turned would have been a violation of A.R.S. § 28-721, which requires motorists to drive on the right side of the roadway, subject to exceptions the court found did not exist here. Distinguishing *Livingston* and rejecting, as not credible testimony, that the truck's size and turning radius made it impossible to make a legal right turn from the right portion of the roadway, the court denied the motion to suppress.

¶5 On appeal, Herrera contends the trial court erred when it concluded Shupe had a reasonable suspicion to justify the stop. Herrera asserts Shupe cited him for violating A.R.S. § 28-751(1), which provides that, when a person intends to make a right-

hand turn, "[b]oth the approach . . . and . . . [the] turn shall be made as close as practicable to the right-hand curb or edge of the roadway." Thus, Herrera maintains, Shupe "supposedly" stopped him for "not staying as far right as practical (sic)" while turning right and argues that, as in *Livingston*, "[s]uch a minor traffic infraction does not create a reasonable basis to stop defendant's automobile."

¶6 In reviewing a trial court's ruling on a motion to suppress evidence, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We will not disturb the trial court's ruling unless that court clearly has abused its discretion. *Livingston*, 206 Ariz. 145, ¶ 3, 75 P.3d at 1104. Although we defer to the court with respect to the factual findings that are the bases for its ruling, the court's legal conclusions regarding the lawfulness of the stop is a mixed question of fact and law, which we review de novo. *Id*.; *see also State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001). In reviewing the court's factual findings, we are mindful that it is for the trial court, not this court, to assess the credibility of the witnesses and weigh the evidence before it. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶7 Because a traffic stop is a seizure for purposes of the Fourth Amendment, *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996), to justify a stop on this ground the law enforcement officer effectuating the stop must have reasonable suspicion to believe the person he or she is stopping committed a traffic violation. *Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d at 1105; *see also* A.R.S. § 28-1594

(officer "may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of [Title 28]").

¶8 In *Livingston*, the officer had stopped the defendant for briefly driving over the shoulder line on a dangerous, curved road, a possible violation of A.R.S. § 28-729. 206 Ariz. 145, ¶¶ 4-5, 10, 75 P.3d at 1105-06. That statute provides, "If a roadway is divided into two or more clearly marked lanes for traffic, . . . [a] person shall drive a vehicle as nearly as practicable entirely within a single lane." § 28-729(1). Granting Livingston's motion to suppress, the trial court had found her brief deviation from the marked lane did not justify the stop. *Livingston*, 206 Ariz. 145, ¶ 8, 75 P.3d at 1105. We rejected the state's claim on appeal that the court had abused its discretion, reasoning that the use of the phrase, "as nearly as practicable," in the statute demonstrated the legislature did not intend to include "brief, momentary, and minor deviations." *Id.* ¶ 10. We observed, "In evaluating the reasonableness of a stop, the trial court must evaluate the totality of the circumstances." *Id.* n.1. Given the totality of the circumstances in that case, which included the curved and dangerous road and the court's finding that the infraction had been "isolated and minor," we concluded the court had not abused its discretion in granting the defendant's motion to suppress. *Id.* ¶ 12.

¶9 In this appeal, Herrera relies to a large extent on *Livingston* and focuses primarily on the record as it pertains to his alleged violation of § 28-751. Herrera challenges the accuracy of Shupe's testimony that Herrera had not made the turn as far to the right as practicable in light of the "expert testimony" to the contrary by a traffic reconstructionist. But Herrera essentially ignores the fact the trial court found Shupe had

reason to believe Herrera had violated § 28-721 before he had made the right turn. As the court noted, § 28-721 requires drivers to "drive . . . on the right half of the roadway"; the statute does not include the phrase "as close as practicable," contained in § 28-751(1) and § 28-729(1), the statute in *Livingston*. The court reasoned, "There is no language in § 28-721 that gives . . . Herrera any 'wiggle room,'" which, in the court's view, is precisely what "as nearly as practicable" gave the defendant driver in *Livingston*.

¶10 The record supports the trial court's finding that Shupe had reasonable grounds to suspect Herrera had violated § 28-721. Shupe testified what first had "caught [his] attention" was that Herrera's truck was in a turn position that was "improper" based on the requirements of § 28-751, and that this was the reason he stopped Herrera. He also testified, however, that Herrera had stopped at the stop sign "all the way in the left-hand part of the lane . . . nowhere near the right-hand portion of the traffic lane." Shupe explained that, although there was no center line on Seventh Street, "if there would have been a painted center . . . line, . . . I believe [Herrera's truck] would have been over it to the left in the oncoming traffic lane." Shupe testified further that Herrera was far enough to the left that Shupe "could have pulled to the right of him, in between his car and the parking spaces," without entering the striped parking spaces near the corner. Herrera was so far to the left that Shupe thought Herrera was going to either continue driving straight or make a left turn. On the second day of the suppression hearing, held after Shupe, at the court's direction, drove Herrera's truck and made a right turn at the same intersection, Shupe again described the truck's position before he had stopped Herrera, stating it was

"well left of the end of" the stop bar line. He stated he had stopped Herrera because he was positioned too far to the left.

¶11 The trial court also found "it was entirely possible and practicable for Mr. Herrera to initiate his right-hand turn from the right half of the roadway." Based on its use of the term, "practicable," the court therefore implicitly found Herrera could have made the turn without violating § 28-751, constituting a second violation that provided a reasonable basis for stopping Herrera. The court's conclusion was based in part on its express rejection of "any testimony regarding the so called turning radius of this truck," stating it did "not believe that this truck was incapable of turning into the northbound right half of the roadway on 6th Avenue." Not only was it the court's prerogative to reject that testimony as not credible, *see Cid*, 181 Ariz. at 500, 892 P.2d at 220, Shupe testified on the second day of the hearing that he had driven the truck and had approached the stop bar as far to the right as he could. Shupe stated he had made the turn comfortably from that position, "never crossed any center lines," and, in his opinion, "made the turn easily."

¶12 Just as we could not say in *Livingston* that the trial court abused its discretion by finding the violation there had been brief and insignificant and in statutory compliance and, under those circumstances, had not been practicable, here we cannot say the court abused its discretion by rejecting Herrera's argument that his compliance with § 28-751 had not been practicable. The discretion rests with the trial court to make such determinations and to decide, based on the circumstances and evidence before it, whether any deviation by the defendant had been an isolated incident and so insignificant that it

could not have amounted to a violation of the statute. *Cid*, 181 Ariz. at 500, 892 P.2d at 220 (trial court vested with discretion to assess credibility of witnesses and weigh evidence). The court concluded Shupe had reasonable grounds to suspect Herrera had violated § 28-721, § 28-751, or both statutes. The court did not err because the record before us and the totality of the circumstances provide a "'particularized and objective basis'" for believing Herrera had committed a traffic offense. *Livingston*, 206 Ariz. 145, ¶ 9 & n.1, 75 P.3d at 1105 & 1106 n.1, *quoting Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778.

¶13 Because the trial court did not abuse its discretion by denying Herrera's motion to suppress evidence, we affirm his conviction and the probationary term.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge