



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-0212-15

CHRIS FURR, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT’S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRTEENTH COURT OF APPEALS
NUECES COUNTY**

MEYERS, J., filed a dissenting opinion.

DISSENTING OPINION

I was originally assigned this case and wrote an opinion holding that the stop and frisk of Appellant were unlawful. *See* the attached Exhibit A. The majority disagreed with me and has now issued an opinion that is not based on law, but on the feeling that the Appellant should not get relief. This is very similar to the Court’s holding in *Murray v. State*, 457 S.W.3d 446 (Tex. Crim. App. 2015), where the majority inferred that Murray had driven while intoxicated even though he was simply asleep in a car parked off of the

roadway. There was nothing to support that inference and there is nothing here to support the belief that the officer’s safety or that of others was in danger.

This case highlights how an officer can state even the most elusive characteristics of the interaction between himself and a suspect in order to justify his conduct toward the suspect. A glance, a “furtive” movement, anxiety, and evasiveness of a man in a homeless shelter who appeared to be “kind of out of it” are very tenuous reasons for violating someone’s Fourth Amendment rights. I would go back to the standard where we required specific articulable facts to raise reasonable suspicion that someone is engaged in criminal activity and where anonymous tips had to be independently corroborated for reliability. But I guess this case gives the majority all the feels and it just can’t resist upholding a detention and search.

I respectfully dissent.

Filed: September 21, 2016

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EXHIBIT A



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MEYERS, J., delivered the opinion of the Court.

OPINION

Appellant was charged with possession of less than one gram of a controlled substance after police found heroin on him during a pat down. Appellant filed a pretrial motion to suppress, which the trial court denied. Appellant then pled guilty and was sentenced to two years’ imprisonment, with the sentence suspended and Appellant placed on community supervision for three years. Appellant appealed the denial of the motion to

suppress, arguing that the actions of the officers constituted an illegal search and that the trial court erred in denying the motion. *Furr v. State*, No. 13-14-00287-CR, 2015 Tex. App. Lexis 526 (Tex. App.–Corpus Christi Jan 22, 2015) (mem. op., not designated for publication). The court of appeals affirmed the trial court’s ruling. We granted Appellant’s petition for discretionary review in order to determine whether, under the facts of this case, the officers were justified in conducting the stop and frisk of Appellant.

FACTS

Officers Mike Ayala and George Alvarez testified that they were separately patrolling the downtown area of Corpus Christi when an anonymous call came in that reported two white males, one in all black and one with a black shirt and brown backpack, using drugs on a specific street corner. Officer Ayala testified that this corner was located in a known “high crime, high drug” area. When Officer Alvarez drove by this location, he saw two males that fit the description. As he drove past the corner, he noticed in his mirror that the men were looking back at his car. Officer Alvarez then approached Appellant’s companion and, while speaking to him, saw Appellant retreat into the nearby Mother Teresa Shelter. Officer Ayala then arrived, and the two officers went into the shelter to make contact with Appellant. They made contact with Appellant in the yard of the facility, and Officer Ayala testified that Appellant was acting “kind of anxious, nervous, sweating.” Officer Ayala testified that Appellant seemed “out of it” and that he asked Appellant whether he had weapons on him. Appellant did not initially respond. Officer Ayala then conducted a weapons pat-down of

Appellant and felt something he knew to be a glass crack pipe in Appellant's pocket. Officer Ayala removed the pipe and two syringes from Appellant's pocket and placed him under arrest for possession of drug paraphernalia. The officer then pulled out Appellant's wallet to get his identification and found two balloons that he believed to contain heroin.

During the suppression hearing, Officer Ayala testified that he arrived after Appellant had already retreated into the shelter and was simply told about him by Officer Alvarez. However, because Appellant's clothing fit the description from the anonymous call, they went into the shelter to make contact with Appellant. Officer Alvarez explained that at the point when he made contact with Appellant, he was conducting an investigation, and Appellant was no longer free to leave. Officer Alvarez stated that he did not see Appellant commit a crime and that he was working only off of the anonymous call and the fact that the two individuals matched the clothing descriptions given in that call. Officer Ayala also explained that he conducted the weapons pat-down, or Terry frisk,¹ for the officers' safety, although he had no reason to believe that Appellant had weapons on him and said that he did not feel threatened or in danger. Officer Ayala testified that, because he would not take a

¹In *Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the Supreme Court held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

chance with someone who was supposedly using drugs, it was his procedure to pat down anyone in this situation, even if only tipped off by an anonymous call.

Officer Alvarez agreed that he conducts a Terry frisk every single time there is a call of this nature because there is a reasonable suspicion that any subject he is contacting on the street has weapons on them. He also agreed that he was not in fear of Appellant, and that, apart from the anonymous call, he did not have any reason to believe that Appellant had any weapons on him or was involved in criminal activity.

The trial court denied Appellant's motion to suppress without written findings of fact or conclusions of law. Appellant subsequently pled guilty to possession of heroin, reserving his right to appeal the trial court's suppression ruling.

COURT OF APPEALS

Appellant appealed the trial court's denial of his motion to suppress, arguing that the anonymous tip was not enough to provide the officers with the reasonable suspicion necessary to detain and frisk him.

The court of appeals first explained that, while a brief investigative detention is permitted where the officer has a reasonable suspicion that the individual is involved in criminal activity, the additional weapons frisk can occur only when there is a concern for officer safety. *Id.* at *9-10 (citing *Carmouche v. State*, 10 S.W.3d 323, 329 (Tex. Crim. App. 2000)). This means that the frisk is justified only when the officer has specific and articulable facts on which he can reasonably conclude the individual might be armed. *Id.* at *10. The

court of appeals also discussed anonymous tips, stating that they are rarely sufficient, alone, to establish the reasonable suspicion necessary and will require corroborated information in order to be determined reliable. *Id.* at *11-12 (quoting *Matthews v. State*, 431 S.W.3d 596, 603 (Tex. Crim. App. 2014); *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011)).

The court of appeals said that Appellant's case was unlike that of *Matthews*, in which we held that an anonymous tip alleging that an individual was selling cocaine at a specific location could establish reasonable suspicion because it was supported by sufficient signs of reliability. *Id.* at *14. It explained that the present case is distinguishable because: (1) *Matthews* did not consider reasonable suspicion to support a *Terry* frisk; (2) the tip contained a far more detailed description than the one in this case; and (3) there were additional factors in *Matthews*, like the time of day and behavior of the appellant, that supported a suspicion that the appellant was armed. *Id.* at *14-18. The court of appeals stated that, here, Appellant looking over his shoulder at the officer, and appearing nervous and sweating prior to the frisk were not enough to establish reasonable suspicion. *Id.* at *19. The court of appeals concluded, however, that the testimony that Appellant was "out of it" and "looked like he was under the influence of a drug," combined with his nervousness, did indicate the credibility of the anonymous tip, which supports a brief investigative detention. *Id.* at *19-20. The court of appeals then held that Appellant not initially responding when asked if he was carrying a weapon constituted a specific and articulable fact that indicated he may have

possessed a weapon, thus making the *Terry* frisk justified. *Id.* at *20-21.

The court of appeals affirmed the judgment of the trial court, and Appellant filed a petition for discretionary review with this Court. We granted review to determine whether the court of appeals erred in holding that the officer's stop and frisk of Appellant was justified.

ARGUMENTS OF THE PARTIES

Appellant's Argument

Appellant argues that the anonymous tip, without more, was not sufficient to justify the officers' stop and frisk. Because the tip was anonymous, Appellant explains that the officers must have independently corroborated the tip's information to establish that it was reliable in its assertion of illegality before conducting the investigative detention. Appellant asserts that the officers in this case verified only innocent details of the tip, such as the clothing description, prior to detaining him and that the only indication to the officers of drug activity—Appellant's sweat and nervousness—occurred at the moment of detention. Appellant points out that the officers never testified that either believed that Appellant was involved in, about to be involved in, or had been involved in, criminal activity.

Appellant contends that *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989), is informative in this case. There, federal Drug Enforcement Agency agents stopped Sokolow upon his arrival at the Honolulu airport based on the following information:

(1) he paid \$ 2,100 for two airplane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.

Id. at 3. The Court held that the agents' stop of Sokolow was justified because his actions, taken together, were sufficient to create a reasonable suspicion that he was committing a drug crime. *Id.* at 11. Appellant asserts that in the present case, unlike in *Sokolow*, not only was the tip completely anonymous, but the actions of Appellant observed by the officers, even taken together, failed to corroborate the anonymous tip that "drug activity" was occurring.

Appellant criticizes the court of appeals's conclusion that the totality of the circumstances supported the stop and frisk as vague and alleges that it did not conduct the proper analysis of the evidence. Appellant is also critical of the court of appeals' reliance on language from *Martinez*, in which we upheld the suppression of evidence obtained from a traffic stop that occurred based on an anonymous description of the vehicle, when the reliability of the caller was unknown and there were no specific facts suggesting that criminal activity was afoot. 348 S.W.3d 919. Appellant argues that the evidence in this case should be suppressed because, like in *Martinez*, there was no "connection to the unusual activity" that created a reasonable suspicion on which the officers could stop and frisk Appellant.

Appellant also points to *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), in which the Supreme Court held that an anonymous tip that a person was carrying a gun was, without more, insufficient to justify a police officer's stop and frisk of

that person. *Id.* at 274. There, the Court explained that reasonable suspicion requires a tip to demonstrate knowledge of concealed criminal activity, not just tend to identify a certain individual. *Id.* at 272. The Court concluded that the tip, because it provided only a description of a subject, lacked the indicia of reliability, such as predictive information on which the police could test the informant's credibility, that are required to justify a stop and frisk. *Id.* at 274. Appellant believes that his case presents the same scenario as that in *J.L.*, and that the officers did not have the necessary reasonable suspicion to stop and frisk him because they did not corroborate the anonymous tip of "drug activity" prior to detaining him. Appellant contends that a Fourth Amendment balancing test dictates that his stop and frisk was unreasonable and asks this Court to reverse the judgment of the court of appeals.

State's Argument

The State asserts that the detention of Appellant did not begin until the frisk itself and, therefore, anything that happened prior to the frisk can be considered in determining reasonable suspicion. The State argues that, although there is no direct evidence of the credibility of the anonymous caller, the relative contemporaneity, the high-crime location of the incident, Appellant's altering course and retreating into the shelter upon seeing law enforcement, and Appellant's nervousness, unresponsiveness, and possible intoxication are all factors that, together, are sufficient to raise a reasonable suspicion that Appellant was engaged in criminal activity.

The State contends that the officers' frisk of Appellant was justified if, in addition to

a having a reasonable suspicion of criminal activity, they also reasonably believed that he was armed and dangerous. The State explains that this belief can be predicated on the type of criminal activity that is suspected and that this Court has recognized that it is “objectively reasonable for a police officer to believe that persons involved in the drug business are armed and dangerous.” *Griffin v. State*, 215 S.W.3d 403, 409 (Tex. Crim. App. 2006). The State argues that, although there was no evidence that Appellant was a drug dealer, his flight, furtive behavior, and his appearance of being high all corroborated the tip that he had been using drugs. Because it is inherently difficult to separate drug dealers from drug users, the State contends, officers should not be prevented from conducting a pat down of someone who is observed with drugs in a high crime area. The State also asserts that there was a heightened danger that the officers needed to guard against in this case because the incident took place in a homeless shelter, Appellant appeared to be under the influence of drugs, and Appellant did not initially respond when asked whether he had a weapon. For these reasons, the State believes that the trial court correctly denied Appellant’s motion to suppress and that we should affirm the judgment of the court of appeals.

STANDARD OF REVIEW

We review a trial court’s denial of a motion to suppress under a bifurcated standard of review. *Delafuente v. State*, 414 S.W.3d 173, 177 (Tex. Crim. App. 2013). We afford almost complete deference to the trial court’s determination of historical facts, especially when based on “an assessment of credibility and demeanor,” but conduct a *de novo* review

of mixed questions of law and fact that do not hinge on credibility or demeanor determinations. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). When the trial court does not make express findings of fact, as in this case, we view the evidence in the light most favorable to the trial court's rulings and will assume that it made findings that are consistent with its ruling and supported by the record. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). If the ruling of the trial court is correct under any applicable theory of law, we will sustain the trial court's decision. *Arguellez v. State*, 409 S.W. 3d 657, 662-63 (Tex. Crim. App. 2013). While the trial court is the sole factfinder at the suppression hearing, the conclusion of whether the totality of circumstances is sufficient to support the necessary reasonable suspicion of criminal activity will be reviewed *de novo*. *Madden v. State*, 242 S.W.3d 504, 517 (Tex. Crim. App. 2007).

DISCUSSION

We must first examine whether the officers had a reasonable belief, based on specific articulable facts, that Appellant was engaged in criminal activity so as to make their initial stop and detention of him justified. *Terry*, 392 U.S. at 21-23; *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001). This standard is an objective one that disregards the subjective intent of the officer and, rather, looks at whether the basis for detention was objectively justifiable. *Wade v. State*, 422 S.W.3d 661, 668 (Tex. Crim. App. 2013). While only some minimal level of justification for the stop is needed, the officer must have more than an inarticulable hunch or mere good-faith suspicion that a crime was in progress. *Foster v. State*,

326 S.W.3d 609, 614 (Tex. Crim. App. 2010); *Derichsweiler v. State*, 348 S.W.3d 906, 916 (Tex. Crim. App. 2011). In deciding whether an officer had a reasonable suspicion, we examine the facts that were available to the officer at the time of the investigative detention. *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997). We also look to the totality of the circumstances, so that events that seem innocent in isolation may suggest imminence of criminal conduct when considered together. *Wade*, 422 S.W.3d at 668. If we determine that the officers did have a reasonable suspicion of criminal conduct, we then examine whether they had an objectively reasonable belief that Appellant was armed. *Id.* at 669. If it is determined that there was no reasonable suspicion on which to detain an individual, then the investigative detention and subsequent frisk violate the Fourth Amendment.

An officer's suspicion may be based on information provided by an informant's tip, rather than the officer's own observations, if that tip exhibits "sufficient indicia of reliability." *Alabama v. White*, 496 U.S. 325, 327, 332, 110 S. Ct. 2412, 110 L.Ed. 2d 301 (1990). An anonymous tip alone rarely contains the required indicia because it does not demonstrate the basis of the informant's knowledge or their veracity. *Id.* If they are suitably corroborated, however, anonymous tips can be sufficient. *Florida v. J.L.*, 529 U.S. at 270. For example, in *Alabama v. White*, an anonymous tip to police stated that a woman would leave a specific apartment building in a brown Plymouth station wagon with a broken tail light and that the woman would be transporting cocaine. 496 U.S. at 327. After corroborating innocent details, the officers stopped the woman and found cocaine. *Id.* at 331. Although the

Supreme Court indicated that this was a close case, it held that the officer's suspicion did become reasonable after the police surveillance. *Id.* at 332. It explained that the accurate prediction of the woman's future behavior demonstrated the tipster's "special familiarity," which indicated that he or she had "reliable information about that individual's illegal activities." *Id.* In contrast, in *Florida v. J.L.*, the Supreme Court held that an anonymous tip that simply alleged that an individual was carrying a gun lacked the "moderate indicia of reliability present in *White* and essential to the Court's decision." 529 U.S. at 271.

Officer Ayala testified that, at the point when they made contact with Appellant, they were conducting an investigation and that Appellant was no longer free to leave. This means that Appellant was detained at the first point of contact and that only circumstances that were evident to the officers prior to that point can be considered in determining whether they had a reasonable suspicion of criminal activity. Here, the circumstances evident to the officers prior to the detention were: (1) the anonymous tip; (2) the location being a "high drug, high crime" area; and (3) Appellant looking over his shoulder as he walked into the shelter.

The anonymous tip in this case lacked suitable indicia of reliability that would allow for it to provide the officers with reasonable suspicion. As in *Florida v. J.L.*, this tip contained no predictive information on which to test the tipster's credibility or knowledge. *Id.* It contained only the barest allegation of drug use along with a physical description of the alleged users. There was no information by which to identify the informant or hold him or her accountable. As the Supreme Court has stated, a tip that provides an "accurate description

of a subject's readily observable location and appearance" is reliable for the limited purpose of correctly identifying the individual being accused, but it "does not show that the tipster has knowledge of concealed criminal activity." *Id.* at 272. Reasonable suspicion requires that the tip's assertion of criminal conduct be reliable. *Id.* In this case, because there was insufficient corroboration of the bare-bones allegation, we cannot hold that the tip at issue could provide the basis for reasonable suspicion. The tip in this case tended only to identify the individuals being accused, and the officers did not confirm enough facts that would allow them to reasonably suspect that Appellant was, in fact, using drugs. Further, the circumstances of the high crime location² and of Appellant looking over his shoulder while walking away³ are insufficient by themselves to provide the basis for the detention and, here, do not combine with the tip to constitute a basis for reasonable suspicion.

Because the circumstances preceding Appellant's detention, even when viewed in the light most favorable to the trial court's ruling, do not justify a reasonable suspicion that Appellant was involved in criminal conduct, the officer's detainment was unlawful. We, therefore, do not get to the question of whether the officers had an objectively reasonable belief that Appellant was armed and presently dangerous.

²*See Crain v. State*, 315 S.W.3d 43, 53 (Tex. Crim. App. 2010) ("Neither time of day nor level of criminal activity in an area are suspicious in and of themselves; the two are merely factors to be considered in making a determination of reasonable suspicion.")

³We agree with the conclusion of the court of appeals that this act is not sufficiently distinguishable from that which an innocent person would have engaged in. *Furr*, 2015 Tex. App. Lexis 526, at *19 (citing *Wade*, 422 S.W.3d at 670).

CONCLUSION

Neither the anonymous tip, the location, nor Appellant's looking over his shoulder are sufficient, alone or in combination, to constitute reasonable suspicion. Therefore, the stop and frisk was unlawful and the heroin that was found as a result of that frisk should have been suppressed. For these reasons, the court of appeals erred in upholding the trial court's denial of the motion to suppress. We reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings consistent with this opinion.