Affirmed and Memorandum Opinion filed March 4, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00079-CR

GEORGE WILLIAM STONE JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 400th District Court
Fort Bend County, Texas
Trial Court Cause No. 47106A

MEMORANDUM OPINION

Appellant, George William Stone Jr., was charged with felony driving while intoxicated (DWI). *See* Tex. Penal Code Ann. §§ 49.04, 49.09(b)(2) (Vernon 2003). Appellant pleaded guilty and was sentenced, pursuant to his plea agreement, to ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice, probated for four years, and assessed a $1,000 fine. In a single issue, appellant challenges the trial court's partial denial of his motion to suppress. The State cross-appeals, challenging the trial court's partial granting of appellant's motion to suppress. We affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

On April 15, 2007, at approximately 1:15 a.m., Department of Public Safety Troopers Edwin Lara and Devon Wile were dispatched to a single car accident. Upon reaching the accident, the troopers were informed by a wrecker truck driver at the scene that the driver of the vehicle, appellant, was walking down the street away from the accident. Trooper Lara approached appellant and began questioning him about whether he was the driver of the vehicle. Appellant denied driving until Trooper Lara was able to unlock the vehicle with appellant's keys. Appellant was arrested and charged with driving while intoxicated. A more detailed examination of the circumstances surrounding appellant's arrest will be discussed below in the analysis section.

DISCUSSION

Appellant contends the trial court erred in partially denying his motion to suppress. Specifically, he contends all statements made by him should have been suppressed because they were made without the benefit of *Miranda* warnings. The State argues the trial court erred by partially granting appellant's motion to suppress because *Miranda* warnings were not required until appellant was formally arrested. The issue here is at what point "custody" occurred for the purposes of reading appellant his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 442–57, 86 S. Ct. 1602, 1611–19, 16 L. Ed.2d 694 (1966).

I. Applicable Law

The Fifth Amendment to the United States Constitution commands that no person "shall be compelled in any criminal case to be a witness against himself [.]" U.S. CONST. amend. V. The warnings set out by the United States Supreme Court in *Miranda v. Arizona* were established to safeguard an uncounseled individual's constitutional privilege against self-incrimination during custodial interrogation. *Miranda*, 384 U.S. at 442–57, 86 S. Ct. at 1611–19. The Supreme Court has defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. at 444,

86 S. Ct. at 1612. Unwarned statements obtained as a result of custodial interrogation may not be used as evidence by the State in a criminal proceeding during its case in chief. *Herrera v. State*, 241 S.W.3d 520, 525 (Tex. Crim. App. 2007).

When considering "custody" for *Miranda* purposes, we apply a reasonable person standard. *Id*. A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. *Id*. (citing *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)). Our "custody" inquiry also includes an examination of all the objective circumstances surrounding the questioning. *Id*. (citing *Stansbury v. California*, 511 U.S. 318, 322–23, 325, 114 S. Ct. 1526, 1529–30, 128 L. Ed.2d 293 (1994)). The subjective belief of law enforcement officials about whether a person is a suspect does not factor into our "custody" determination unless an official's subjective belief was somehow conveyed to the person who was questioned. *Id*. at 525–26.

Article 38.22 of the Texas Code of Criminal Procedure governs the admissibility of statements made by a defendant during custodial interrogation in a criminal proceeding. Code Crim. Proc. Ann. art. 38.22 (Vernon 2005). The warnings provided in Section 2(a) of Article 38.22 are virtually identical to the *Miranda* warnings, with one exception—the warning that an accused "has the right to terminate the interview at any time" as set out in Section 2(a)(5) is not required by *Miranda*. *Herrera*, 241 S.W.3d at 526. As with the *Miranda* warnings, the warnings in Section 2(a) of Article 38.22 are required only when there is custodial interrogation. *Id*. Our construction of "custody" for purposes of Article 38.22 is consistent with the meaning of "custody" for purposes of *Miranda*. *Id*.

Article 38.22 does not preclude the admission of non-custodial statements. *Dowthitt*, 931 S.W.2d at 262. A person held for investigative detention is not in "custody." *See id*. at 255. An investigative detention is a detention of a person reasonably suspected of criminal activity to determine identity or maintain the status quo momentarily while obtaining more information. *See Terry v. Ohio*, 392 U.S. 1, 20–21, 88 S. Ct. 1868, 1879–80, 20 L. Ed.2d 889 (1968). The detention's scope must be temporary, lasting no

longer than necessary to effectuate its purpose, and must involve actual investigation and use the least intrusive means possible. *See Davis v. State*, 947 S.W.2d 240, 244–45 (Tex. Crim. App. 1997).

Police conduct may transform a non-custodial interrogation into a custodial interrogation. *See Dowthitt*, 931 S.W.2d at 255–57. We examine each progressive level of intrusion to determine its reasonableness under the circumstances based on the information known to the officer at the time. *Francis v. State*, 896 S.W.2d 406, 411 (Tex. App.—Houston [1st Dist.] 1995), *pet. dism'd improvidently granted*, 922 S.W.2d 176 (Tex. Crim. App. 1996). In *Dowthitt*, custody was inferred in an unusual circumstance when: (1) a very long time period elapsed during which interrogation occurred, (2) the police exercise control over the defendant, and (3) the defendant's admission to being present at the scene of the crime manifested probable cause. *Dowthitt*, 931 S.W.2d at 257. In *Berkemer v. McCarty*, the U.S. Supreme Court stated that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation," and whether the treatment by the police can be fairly "characterized as the functional equivalent of a formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 441–42, 104 S. Ct. 3138, 82 L. Ed.2d 317 (1984).

II. Standard of Review

In a motion to suppress hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). Accordingly, the judge may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted. *Id.* This is so because it is the trial court that observes firsthand the demeanor and appearance of a witness, as opposed to an appellate court which can only read an impersonal record. *Id.* In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's interpretation of historical facts. *See Hypolite v. State*, 985 S.W.2d 181, 185 (Tex. App.—San Antonio 1998, no pet.) (citing *Guzman v. State*, 955 S.W.2d 85, 87–88 (Tex. Crim. App. 1997)). However, when the record shows

uncontroverted events and includes a videotape, we review de novo how the trial court applied the law to the undisputed facts. *Herrera v. State*, 194 S.W.3d 656, 658 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); *see also Mayes v. State*, 8 S.W.3d 354, 358 (Tex. App.—Amarillo 1999, no pet.) (applying de novo review to trial court's ruling on motion to suppress because the credibility and demeanor were not an issue when facts surrounding interrogation were videotaped and uncontroverted).

III. Analysis

A. Facts

The trial court filed findings of fact and conclusions of law after ruling on appellant's motion to suppress. In its sixth conclusion of law, the trial court determined "[t]hat all statements made by the defendant after he admitted that the vehicle belonged to him and that he had been driving it that night when the collision occurred . . . . and before he was read his Miranda warnings are not admissible." From this we can conclude the trial court determined custody occurred when appellant admitted the vehicle belonged to him and that he had been driving it. *See Herrera*, 241 S.W.3d at 525. In his brief, appellant contends custody occurred when Trooper Lara asked appellant to step in front of his patrol vehicle. The State argues custody occurred when appellant was formally arrested.

During the hearing on the motion to suppress, Trooper Lara testified that he was dispatched to single car accident at approximately 1:15 a.m. When he arrived at the location of the accident, he observed a Mazda vehicle, which had collided with a fire hydrant and been abandoned by its driver. A wrecker truck driver informed Trooper Lara that appellant had been driving the Mazda and that he was walking down the street away from the collision. After receiving this information, Trooper Lara approached appellant, presumably to determine whether appellant had been driving. A video recording of Trooper Lara and appellant's encounter reveals the following chain of events. Trooper Lara asked appellant whether he had been driving and appellant responded negatively. Despite appellant's denial, Trooper Lara asked appellant to step in front of his patrol

vehicle.[1]

Once in front of the patrol vehicle, Trooper Lara requested appellant remove his hands from his pockets and appellant complied. Next, Trooper Lara asked appellant for his driver's license and appellant willingly handed it over. Trooper Lara kept appellant's driver's license in his possession. Trooper Lara again inquired into whether appellant had been driving and appellant said no. Trooper Lara informed appellant he detected a strong odor of alcohol emanating from his person and asked whether he had been drinking. Appellant said he had consumed six beers and a bottle of wine.[2] Trooper Wile escorted appellant down the street to the wrecked vehicle. Trooper Wile placed his hand on appellant's arm because appellant was having trouble walking. Trooper Lara followed the two in his patrol vehicle. Once they reached the Mazda, appellant confirmed the Mazda was not his. He also said that if they ran its license plate numbers, the Mazda would not come back under his name. While the Troopers examined the vehicle, appellant stood alone on the side of the road completely unrestrained. Trooper Lara returned to appellant and asked him whether he had any keys in his pocket. Appellant handed over his keys, one of which was to a Mazda vehicle. When Trooper Lara pushed the remote lock button on the Mazda key the abandoned Mazda flashed its lights and became unlocked. At that point, appellant admitted the Mazda was his and that he had been driving.[3]

After appellant admitted to driving the vehicle, Trooper Lara brought him back in front of the patrol vehicle and continued questioning appellant about the events that had taken place that night. Appellant admitted to consuming alcohol and driving his vehicle. Additionally, Trooper Wile located a neighbor who witnessed the vehicle wreck and

[1] In his brief, it is at this point appellant contends a custodial interrogation occurred. During oral argument, appellant argued custody occurred minutes later when Trooper Wile walked appellant to the wrecked vehicle.

[2] In his brief appellant argues this statement should have been suppressed, during oral argument appellant conceded that this evidence was admissible.

[3] It is at this point that the trial court found custody occurred. The trial court suppressed all statements made after this point.

identified appellant as the person she saw getting out of the vehicle. Trooper Lara asked appellant if he would take a field sobriety test and appellant refused. Trooper Lara then told appellant he was under arrest for driving while intoxicated. Appellant was handcuffed and placed in the patrol vehicle.

B. Application

Trooper Lara's initial encounter with appellant, inquiring into whether appellant was the driver of the vehicle, must be classified as an investigative detention. *See Thomas v. State*, 297 S.W.3d 458, 461 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (stating a police officer may stop and briefly detain a person for investigatory purposes if the officer has a reasonable suspicion supported by articulable facts that the person detained is, has been, or soon will be engaged in criminal activity). Trooper Lara had reasonable suspicion appellant may have been the driver of the wrecked Mazda because of the statements the wrecker truck driver made to him and the fact that appellant was the only person on the street at 1:15 a.m. *See id*. at 461–62. When Trooper Lara approached appellant on the street, it was solely to determine whether he was the driver. Trooper Lara did not have probable cause to arrest appellant for DWI or public intoxication. *See Baldwin v. State*, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009). Trooper Lara did not know whether appellant had driven the vehicle and he did not know appellant was intoxicated. It was not until he confronted appellant in front of the patrol vehicle that he may have developed reasonable suspicion that appellant was intoxicated.[4] Furthermore, it was not until appellant admitted that he had been drinking that Trooper Lara had probable cause to arrest appellant for public intoxication. Regardless, Trooper Lara did not objectively manifest intent to arrest appellant for public intoxication. *See Herrera*, 241 S.W.3d at 525–26. Nothing indicates appellant believed he would be arrested for public intoxication, the objective evidence shows he was more concerned with denying he had been driving a vehicle. *See Dowthitt*, 931 S.W.2d at 254 (stating one of the factors

[4] Trooper Lara testified that he smelled a strong odor of alcohol coming from appellant's person, he noticed that appellant's eyes were bloodshot, and that appellant was slurring his words.

relevant to determining custody is the subjective belief of the defendant as objectively manifested). Therefore, whether or not Trooper Lara had probable cause to arrest appellant for public intoxication does not influence our determination of when custody occurred.[5] *See id*. at 255 (stating probable cause does not automatically establish custody, rather custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest). The objective circumstances indicate neither Trooper Lara nor appellant believed an arrest for public intoxication would take place that night.

The trial court found that a custodial interrogation took place when appellant admitted to driving the vehicle. We agree. After appellant admitted to driving and wrecking the vehicle, Trooper Lara asked appellant to step back towards the patrol vehicle and began questioning him again. Trooper Lara asked appellant where he was going, how much he had to drink, what he had to eat that day, how much sleep he had gotten, and whether he would submit to a field sobriety test. These questions objectively indicate Trooper Lara was commencing a formal DWI investigation. *See Dowthitt*, 931 S.W.2d at 254 (stating one of the factors relevant to determining custody is the focus of the investigation). After appellant admitted to drinking and driving, Trooper Lara should have advised appellant of his rights under *Miranda* and article 38.22 of the Code of Criminal Procedure. Because Trooper Lara failed to do so, appellant's statements after admitting to driving the vehicle were properly suppressed by the trial court.[6]

Accordingly, we overrule appellant's sole issue. Additionally, we overrule the State's cross-appeal.

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[5] Appellant argues that because Trooper Lara had probable cause to arrest appellant for public intoxication this was a custodial interrogation.

[6] Furthermore, as we have concluded the trial court properly suppressed appellant's statements, we overrule the State's cross-appeal. For the reasons above, the trial court properly found custody occurred after appellant admitted to driving. All statements following this admission were properly suppressed because they were made without the benefit of *Miranda*. By the time appellant was formally arrested he should have already been warned of his *Miranda* rights.

CONCLUSION

Having overruled appellant's sole issue and the State's cross-appeal, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.
Do Not Publish— TEX. R. APP. P. 47.2(b).