

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00208-CR

JOSUE SOLORZANO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Montgomery County, Texas
Trial Cause No. 08-238569

MEMORANDUM OPINION

A jury convicted Josue Solorzano of driving while intoxicated, a class B misdemeanor. *See* TEX. PEN. CODE ANN. § 49.04 (Vernon 2003). In a single issue, Solorzano appeals and contends that the trial court erred in denying his motion to suppress oral and recorded statements that he made before being advised of his *Miranda* rights.¹ We affirm the trial court's judgment.

¹*See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Background

While driving, Solorzano hit and damaged a fence at a business in Montgomery County. Tierni Adamick, a Deputy with the Montgomery County Sheriff's Department, was off-duty when Solorzano hit the fence, but she was working part-time as a security officer for the business that owned the damaged property.

Shortly after the accident occurred, the business's owner requested that Deputy Adamick go to the accident scene with him. Deputy Adamick, driven to the scene by the owner in the owner's car, approached Solorzano upon arriving at the scene. Deputy Adamick, dressed in full uniform, identified herself as a peace officer. Deputy Adamick testified at trial that she did not believe Solorzano was "acting normal[,] " and that he had "rapid movements[,] " was "[s]currying back and forth[,] " "[t]alking repetitively[,] " and "talking with a thick tongue." According to Deputy Adamick, Solorzano and his friend at that point appeared to be attempting to free the car involved in the accident from the fence so they could leave. Because she believed that Solorzano, based on his behavior, was under the influence of something, Deputy Adamick asked Solorzano if he had a medical condition or if he was taking any medications. Solorzano told her that he had an anxiety problem and that he took medication for it. Deputy Adamick then informed Solorzano that he was not free to leave, and she explained that he needed to wait for the on-duty officer that she had requested to come to the scene. Deputy Adamick testified that she requested the assistance of an on-duty officer because the accident had caused

damage to the business's property. She also explained that while waiting for the officer, she engaged Solorzano in conversation in an effort to calm him. Deputy Adamick also testified that she did not advise Solorzano of his rights. When the Texas Department of Public Safety trooper arrived, Deputy Adamick informed Trooper Perkins that she had "detained" Solorzano while awaiting his arrival.

At trial, Trooper Perkins testified that he saw the wrecked car and that Solorzano was standing nearby. When Solorzano spoke to him, he "immediately" smelled a "strong odor of alcoholic beverage" on Solorzano's breath. Initially, Solorzano told Trooper Perkins that he had his last drink approximately fourteen hours before the accident. Solorzano took a breath test, which tested positive. Trooper Perkins then conducted standardized field sobriety tests, which Solorzano failed. According to Trooper Perkins, after Solorzano performed the field sobriety tests, Trooper Perkins concluded that Solorzano was intoxicated based on the totality of the circumstances. At that point, he arrested Solorzano and advised him of his rights. A videotape containing Trooper Perkins's investigation of the accident scene was offered by the State and then admitted into evidence as an exhibit.

Solorzano testified at trial. He claimed that he had consumed only two or three beers the night before the accident, and he testified that at the time of the accident he was not intoxicated. Additionally, Solorzano testified that after talking with Deputy Adamick, he felt he was not free to leave. He also testified that Deputy Adamick had "threatened to

put [him] in the back of her car.” Solorzano denied that he intended to leave the scene of the accident; instead, he explained that he wanted to move his car to assess the damages from the accident. Solorzano attributed his poor performance on the field sobriety tests and his behavior at the scene to nervousness.

During trial, and just prior to Trooper Perkins’ testimony, Solorzano moved to suppress “any audio or any statements made by [Solorzano] from the time that he was told by Deputy Adamick that he was not free to leave until he was actually read his *Miranda* warnings[.]” The trial court denied Solorzano’s motion and Solorzano appealed.

Standard of Review

We review a trial court’s ruling on a motion to suppress evidence for abuse of discretion, using a bifurcated standard. *See Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex. Crim. App. 1997). We give “almost total deference” to a trial court’s findings of historical facts that are supported by the record and to mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Id.* at 89. We review de novo a trial court’s determination of the law and its application of law to the facts that do not turn upon an evaluation of credibility and demeanor. *Id.* With respect to a trial court’s ruling on a motion to suppress, the trial judge ““is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony.”” *Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex. Crim. App. 2007) (quoting *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999)). If a trial court has not made a finding on a relevant fact, we

imply the finding that supports the trial court's ruling, so long as it finds some support in the record. *State v. Kelly*, 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006); *see also Moran v. State*, 213 S.W.3d 917, 922 (Tex. Crim. App. 2007). We will uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

Applicable Law

Generally, a videotape depicting a driver performing field sobriety tests is not subject to suppression. The Fifth Amendment applies only to incriminating evidence that is testimonial in nature. *Williams v. State*, 116 S.W.3d 788, 791 (Tex. Crim. App. 2003). To be testimonial, the communication “must itself, explicitly or implicitly, relate a factual assertion or disclose information.” *Id.* (quoting *Doe v. U.S.*, 487 U.S. 201, 210, 101 L.Ed.2d 184, 108 S.Ct. 2341 (1988)). The Court of Criminal Appeals has held that field sobriety tests are not testimonial with respect to implicating *Miranda*² because they yield physical evidence of a suspect's mental and physical faculties. *See Gassaway v. State*, 957 S.W.2d 48, 51 (Tex. Crim. App. 1997) (holding that because field sobriety tests do not create “an express or implied assertion of fact or belief[,]” they are not testimonial and their admission does not violate the privilege against self-incrimination); *see also Arthur v. State*, 216 S.W.3d 50, 54-55 (Tex. App.–Fort Worth 2007, no pet.)

²*See Miranda*, 384 U.S. at 444.

(“[N]o Texas law requires that a suspect be warned . . . before the administration of a field sobriety test.”).

Miranda warnings are necessary when a person has been subjected to a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Generally, article 38.22 of the Texas Code of Criminal Procedure regulates the use of statements that have resulted from custodial interrogations and it contains procedures that safeguard defendants’ constitutional rights. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2005); *Arthur*, 216 S.W.3d at 56.

Custodial interrogation is questioning initiated by law enforcement officers after a person is taken into custody or after the person being questioned is otherwise deprived of his freedom of action in any significant way. *Miranda*, 384 U.S. at 444. *See Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). A person is in custody if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. A person held for an investigative detention is not in custody. *Id.* 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 Balentine v. State*, 71 S.W.3d 763, 771 (Tex. Crim. App. 2002) (citing *Rhodes v. State*, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997)). Generally, persons temporarily detained pursuant to traffic stops to investigate drunken driving are not, during the investigation following the stop,

considered as having been taken into custody for purposes of *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 440, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

The Court of Criminal Appeals has noted that a person may be considered as having been taken into custody when a law enforcement officer tells the suspect he cannot leave. *Dowthitt*, 931 S.W.2d at 252-55. Even in this situation, however, the Court of Criminal Appeals has further explained that the restrictions upon the person's freedom of movement must rise "to the degree associated with an arrest as opposed to an investigative detention." *Id.* at 255; *see also State v. Stevenson*, 958 S.W.2d 824, 828-29 (Tex. Crim. App. 1997).

Analysis

Our review of Solorzano's issue, in which he contends he was placed in custody by Deputy Adamick, revolves around whether Deputy Adamick restricted Solorzano's freedom of movement "to the degree associated with an arrest as opposed to an investigative detention." *Dowthitt*, 931 S.W.2d at 255.

To maintain the status quo, Deputy Adamick explained that she instructed Solorzano to remain at the scene until the trooper arrived so that an accident investigation could be completed. *See Balentine*, 71 S.W.3d at 771 (maintaining status quo does not transform an investigative detention into an arrest). Deputy Adamick's testimony about her intended purpose in asking Solorzano to stay is some evidence that supports the trial court's ruling that she had not formed a subjective intent to place Solorzano under arrest.

Moreover, Deputy Adamick did not place Solorzano in handcuffs, nor did she place him in the back of a vehicle. During her encounter with Solorzano, Deputy Adamick did not perform field sobriety tests or tell him that she believed that he was intoxicated. Additionally, Deputy Adamick never stated that she thought Solorzano had been drinking. Approximately thirty minutes after Deputy Adamick first encountered Solorzano, Trooper Perkins arrived. Deputy Adamick informed Trooper Perkins that she had detained Solorzano, and she then left.

After reviewing the circumstances of Solorzano's encounter with Deputy Adamick, we conclude that the trial court could have reasonably determined that Solorzano's freedom of movement was not restricted to the degree associated with an arrest. The trial court could have viewed Deputy Adamick's encounter as having the characteristics typically associated with an investigatory detention. Based on the testimony regarding the circumstances of Solorzano's encounter with Deputy Adamick, we find the trial court did not abuse its discretion in ruling that Solorzano was never in Deputy Adamick's custody for purposes of *Miranda*.

Based on his theory that he was in custody when Deputy Adamick told him he could not leave, Solorzano also challenges the trial court's admission of statements that he made while interacting with Trooper Perkins. But, as we have explained, it was reasonable for the trial court to conclude that Solorzano was not in custody when Deputy Adamick instructed Solorzano to stay at the scene. Additionally, a law enforcement

officer's ordinary investigation that follows a traffic stop, which typically involves questioning the driver and field sobriety testing, is generally not so intrusive as to elevate the investigative detention to a custodial interrogation. *See Stevenson*, 958 S.W.2d at 828.

Article 38.22 of the Code of Criminal Procedure applies only to custodial statements, and for the reasons we have explained, the trial court could reasonably determine that Solorzano was not in custody when he gave oral and recorded statements later admitted by the trial court as evidence. *See TEX. CODE CRIM. PROC. ANN. art. 38.22.* Therefore, we conclude that the trial court did not abuse its discretion by admitting Solorzano's statements or in denying Solorzano's motion to suppress. Accordingly, we overrule Solorzano's sole issue and affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on June 28, 2010
Opinion Delivered August 4, 2010
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.