In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00074-CR

RUBEN GEOVANNY HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 354th District Court
Hunt County, Texas
Trial Court No. 30832

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

The Ford Expedition being driven by Ruben Geovanny Hernandez easterly on U.S. Interstate Highway 30 through Greenville, Texas, was stopped by Police Officer Robert Pemberton for failure to have a front license plate displayed. The ensuing series of questions, answers, observations, and discoveries led Pemberton to, first, issue Hernandez a warning, and, soon thereafter, ask Hernandez for consent to search the vehicle. The search resulted in the discovery of 992.80 ounces of cocaine hidden in the right rear quarter panel of the vehicle's passenger compartment. From Hernandez' conviction for possession of cocaine in an amount exceeding 400 grams[1] and sentence to fifteen years' imprisonment, he appeals complaining that his motion to suppress the drugs was incorrectly overruled and that he was improperly assessed attorney fees. We modify the judgment to strike the attorney fees and affirm the judgment, as modified, because (1) there was no error in admitting the drugs into evidence and (2) attorney fees should not have been assessed.

(1) There Was No Error in Admitting the Drugs into Evidence

When stopped by Pemberton, Hernandez, a resident of the Dallas area, said he and his passenger, Erika Gonzalez, were going to "Mempville" or Memphis, Tennessee, looking for a better job. However, Pemberton testified that Gonzalez later told him that they were going to Nashville. During the stop, Pemberton had a chance to glance into the vehicle's interior and noticed, despite their professed intent to travel to Tennessee, no luggage in the vehicle. A computer check of their driver's licenses did not reveal any outstanding warrants.

[1]*See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a), (f) (West 2010).

Hernandez eventually admitted that the vehicle was not insured. An additional computer check revealed that the vehicle had not been reported stolen, but it was not registered in the name of either the driver or passenger. Hernandez told Pemberton that Gonzalez had just bought the car yesterday, and though they did not have a title or bill of sale, Gonzalez said papers were at her home.

The events of the stop were recorded by Pemberton's dash camera, and the recording was admitted into evidence at both the trial and the suppression hearing. About fourteen minutes and twenty-eight seconds into the video recording[2], Pemberton responded to a question from Hernandez by saying that he was going to give Hernandez a warning, yet continued to question him. During this continued interrogation, Hernandez denied that he was being paid to drive the vehicle to Tennessee and denied that there were any illegal drugs in the vehicle. He said he was nervous because he was getting a ticket for not having insurance, and when he assured Pemberton that he would get the vehicle insured, Pemberton mentioned that Hernandez could get insurance over the telephone. Pemberton testified that he was suspicious that Hernandez might be trafficking drugs because Hernandez and Gonzalez gave conflicting destinations, there was no luggage for an overnight trip, $1,500.00 was quite cheap as a purchase price for this Expedition, and communications between Pemberton and Gonzales were relatively easy until the officer asked for permission to search, when they became quite difficult. The video recording also showed that Hernandez was content to let Pemberton believe that Gonzalez and Hernandez were married until

[2]We refer to the time elapsed on the dashboard camera video recording, however, we note that the first forty-five seconds of the video are merely Pemberton's patrol car catching up to Hernandez' vehicle and pulling him over.

later in the encounter when he told Pemberton that they just lived together. Other factors offered by Pemberton as adding to his suspicions were that the vehicle was reportedly purchased just the day before, the vehicle was not registered to either Hernandez or Gonzalez, there was no insurance information, Hernandez was nervous, there was nothing that personalized the car to either occupant, and in the ignition, there was just a single key with no key ring.

At the eighteen minute and fifteen second point, Pemberton again told Hernandez that he would give him a warning for the license plate and a ticket for not having insurance on the vehicle. Pemberton had Hernandez sign the electronic ticket machine and gave him the citations. During the suppression hearing, Pemberton testified that, when he gave Hernandez the citation, the original purpose of the stop was over, and he agreed that, after that point, he was "investigating a second potential criminal offense."

Hernandez then asked Pemberton if he could purchase insurance somewhere nearby, and Pemberton helpfully explained that, if Hernandez had insurance on another vehicle, he could call his insurance company and get this vehicle insured over the telephone, which Hernandez could use to get this citation dismissed.

About fifteen seconds after the insurance conversation ended, Pemberton asked Hernandez for consent to search the vehicle. After saying a quick "oh, yes," Hernandez displayed confusion as to the question, denying that drugs were in the car, saying, "I don't get it," and Pemberton spent the next forty seconds rephrasing the question, pointing from his eyes to the vehicle, and explaining that he wanted to look in the vehicle and search it. Hernandez gestured toward his vehicle and

said something that is unintelligible on the video recording of the stop. Pemberton believed that Hernandez had given consent.

After backup officers arrived, Pemberton searched the vehicle and noticed that an area in the front console of the vehicle appeared to have been altered. He opened the altered portion of the console and noticed a "trap," described as a void or open space, that had been recently cut into the area. A drug dog positively alerted on the vehicle. Hernandez and Gonzalez were detained, and a subsequent search of the vehicle revealed the large quantity of cocaine.

The trial court denied Hernandez' motion to suppress without giving a specific reason and without findings of fact and conclusions of law. After his motion to suppress was denied, the case proceeded to a jury trial, where Gonzalez testified for the State against Hernandez. Pemberton's trial testimony was substantively the same as his testimony from the suppression hearing.

Hernandez argues that the trial court erred in denying his motion to suppress because the officer detained him "for longer than was necessary to complete the purpose of the traffic stop." We review the trial court's decision to deny appellant's motion to suppress evidence by applying a bifurcated standard of review. *Graves v. State*, 307 S.W.3d 483, 489 (Tex. App.—Texarkana 2010, pet. ref'd); *Rogers v. State*, 291 S.W.3d 148, 151 (Tex. App.—Texarkana 2009, pet. ref'd). Since the trial court tries the facts and judges witness credibility at a suppression hearing, we defer almost totally to that court's determination of facts if supported by the record. *State v. Ross*, 32 S.W.3d 853, 856–57 (Tex. Crim. App. 2000); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We also defer to a trial court's ruling on questions of the application of law to fact, also known as mixed questions of law

and fact, if the resolution of those questions turns on an evaluation of credibility and demeanor. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

We review de novo the trial court's application of the law and determination of questions not turning on credibility. *Graves*, 307 S.W.3d at 489; *Carmouche*, 10 S.W.3d at 332; *Guzman*, 955 S.W.2d at 89. Since all evidence is viewed in the light most favorable to the trial court's ruling, we are obligated to uphold the denial of appellant's motion to suppress if it was supported by the record and was correct under any theory of law applicable to the case. *Carmouche*, 10 S.W.3d at 328; *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). In determining whether a trial court's decision is supported by the record, we generally consider only evidence from the suppression hearing rather than evidence introduced later at trial. *Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996).

Police officers may stop and detain a person if they reasonably suspect that a traffic violation is in progress or has been committed. *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992). A traffic stop is a detention and must be reasonable under the United States and Texas Constitutions. *See Davis v. State*, 947 S.W.2d 240, 245 (Tex. Crim. App. 1997); *Caraway v. State*, 255 S.W.3d 302, 307 (Tex. App.—Eastland 2008, no pet.). To be reasonable, a traffic stop must be temporary and last no longer than necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983); *Davis*, 947 S.W.2d at 245. Reasonableness is measured in objective terms by examining the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Spight v. State*, 76 S.W.3d 761, 765 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

An investigative stop that is reasonable at its inception may violate the Fourth Amendment because of excessive intensity or scope. *Davis*, 947 S.W.2d at 243 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

In the course of a routine traffic stop, the detaining officer may request a driver's license or identification, car registration, and insurance information; may use that information to conduct a computer check for outstanding arrest warrants; may question the vehicle's occupants regarding their travel plans; and may issue a citation. *Kothe v. State*, 152 S.W.3d 54, 63 n.36 (Tex. Crim. App. 2004); *Caraway*, 255 S.W.3d at 307; *Davis*, 947 S.W.2d at 245 n.6. If, during that investigation, an officer develops reasonable suspicion that another violation has occurred, the scope of the initial investigation can expand to include the new offense. *Goudeau v. State*, 209 S.W.3d 713, 719 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Reasonable suspicion must be based on specific, articulable facts which, when combined with rational inferences from those facts, would lead the officer to conclude that a particular person actually is, has been, or soon will be engaged in criminal activity. *Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010).

When the reason for the stop has been satisfied, the stop must end and may not be prolonged to conduct a "fishing expedition for unrelated criminal activity." *Davis*, 947 S.W.2d at 243 (quoting *Robinette*, 519 U.S. at 41 (Ginsburg, J., concurring)). Once the officer concludes the investigation of the conduct that triggered the stop, continued detention of a person is permitted only if there is reasonable suspicion to believe that another offense has been or is being committed. *Id*. at 245. Nevertheless, "[t]here is . . . no constitutional stopwatch on traffic stops. Instead, the relevant question in assessing whether a detention extends beyond a reasonable duration is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel

their suspicions quickly.'" *Haas v. State*, 172 S.W.3d 42, 51–52 (Tex. App.—Waco 2005, pet. ref'd) (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985)); *Kothe*, 152 S.W.3d at 64–65 ("The Supreme Court has expressly rejected placing a rigid time limitation on *Terry* investigative detentions.").

Here, immediately after Pemberton ticketed Hernandez, Hernandez asked him if he could purchase insurance somewhere nearby, and, in answering Hernandez' question, Pemberton spent the next thirty-five seconds explaining how Hernandez could quickly obtain insurance over the telephone and possibly get his no-insurance citation dismissed. Fifteen seconds later, Pemberton asked Hernandez for consent to search the vehicle, and Hernandez initially said, "Oh, yes." When Hernandez showed confusion, Pemberton explained the question in different ways and at some length, and again, purportedly, Hernandez granted consent. The vehicle was then searched, and the drugs were found.

Hernandez argues that the stop ended when Pemberton gave him the citations and that Pemberton lacked probable cause to prolong his detention beyond that point, be it for further questioning or to search his vehicle.[3] The State contends that "the search of Appellant's vehicle was not based on probable cause, but on Appellant's consent."

The grant of the consent to search is one of the well-established exceptions to the constitutional requirements of both a warrant and probable cause. *Schneckloth v. Bustamonte*, 412

[3]Hernandez cites *Ramirez-Tamayo* in support of his argument that Pemberton lacked facts on which to base probable cause. *Ramirez-Tamayo v. State*, 501 S.W.3d 788 (Tex. App.—Amarillo 2016, pet. granted). However, the facts of *Ramirez-Tamayo* are distinguishable from those of the present case because the defendant in *Ramirez-Tamayo* did not consent to the search at issue, and the decision turned on whether the officer had sufficient facts to support probable cause. *Id.* at 793–94.

U.S. 218, 219 (1973); *Carmouche*, 10 S.W.3d at 331. It was not unreasonable per se for Pemberton to ask for consent to search the vehicle after the purpose of the stop was completed. *See James v. State*, 102 S.W.3d 162, 173 (Tex. App.—Fort Worth 2003, pet. ref'd); *Leach v. State*, 35 S.W.3d 232, 235 (Tex. App.—Austin 2000, no pet.). While Pemberton's request for consent came after the purpose of the stop had been accomplished, the request came mere seconds after answering Hernandez' insurance question and was therefore not unreasonable under the circumstances. *See Levi v. State*, 147 S.W.3d 541, 544 (Tex. App.—Waco 2004, pet. ref'd) (not unreasonable to ask for consent to search after telling defendant he was free to go). There is also no evidence that Pemberton's request conveyed a message that compliance was required. *See id.*; *Leach*, 35 S.W.3d at 235; *see Simpson v. State*, 29 S.W.3d 324, 328 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The reasonableness of the brief delay between the completion of the stop's original purpose and the consent is buttressed by evidence supporting a finding of reasonable suspicion to confirm or clear the suspicion with further inquiry. *See Davis*, 947 S.W.2d at 245.

The dashboard camera recording and the testimony during the suppression hearing, when viewed in the light most favorable to the trial court's decision, support trial court findings that Hernandez consented to the search and that reasonable suspicion of further criminal activity had been developed by the time the original purpose of the stop had been fulfilled. *See Ross*, 32 S.W.3d at 856–57 (court of appeals must defer to trial court's factual findings if supported by the record and affirm decision if correct on any grounds). Here, there is no evidence that the request was unreasonable, no evidence that the request conveyed a message that compliance was required, and

no argument that consent was involuntary or otherwise invalid. Therefore, the trial court did not abuse its discretion in denying Hernandez' motion to suppress, and we overrule this point of error.

(2) Attorney Fees Should Not Have Been Assessed

The trial court assessed $3,690.00 in attorney fees against Hernandez in this cause. Attorney fees cannot be assessed against an indigent defendant unless there is proof and a finding that he is no longer indigent. *Cates v. State*, 402 S.W.3d 250 (Tex. Crim. App. 2013); *Mayer v. State*, 309 S.W.3d 552 (Tex. Crim. App. 2010). In this case, there is no such evidence or finding. The trial court thus erred by assessing attorney fees against Hernandez. The proper remedy is to modify the judgment and remove the fee award. *Cates*, 402 S.W.3d at 252; *Martin v. State*, 405 S.W.3d 944, 947 (Tex. App.—Texarkana 2013, no pet.).

Accordingly, we modify the judgment of the trial court by deleting the assessment against Hernandez for the costs of his court-appointed attorney.

As modified, the judgment is affirmed.

Josh R. Morriss, III
Chief Justice

Date Submitted: January 17, 2017
Date Decided: March 29, 2017

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