

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00065-CR

Elizabeth Ann Black, Appellant

v.

The State of Texas, Appellee

**FROM THE COUNTY COURT AT LAW NO. 5 OF TRAVIS COUNTY
NO. C1-CR-13-217530
HONORABLE NANCY WRIGHT HOHENGARTEN, JUDGE PRESIDING**

MEMORANDUM OPINION

Elizabeth Ann Black was charged with driving while intoxicated and driving while intoxicated with a blood-alcohol concentration of 0.15 or more. *See* Tex. Penal Code § 49.04 (specifying that person commits offense if person “is intoxicated while operating a motor vehicle in a public place,” that offense is class-B misdemeanor, and that offense is class-A misdemeanor if person has blood-alcohol concentration “of 0.15 or more at the time the analysis was performed”). Prior to trial, Black filed a motion to suppress urging that the traffic stop initiated by Officer Domingo Rodriguez was not supported by reasonable suspicion. After convening a hearing to address the motion, the trial court denied the motion to suppress. Following that ruling, Black and the State entered into a plea-bargain agreement in which the State agreed to dismiss the charge for driving while intoxicated with a blood-alcohol concentration of 0.15 or more in exchange for Black agreeing to enter a plea of no contest to the remaining driving-while-intoxicated charge. *See*

Tex. Code Crim. Proc. art. 27.02(5) (explaining that plea of nolo contendere has same legal effect as guilty plea). After accepting the plea-bargain agreement, the trial court found Black guilty and sentenced Black to eight days in jail. *See* Tex. Penal Code § 12.22 (listing permissible punishment range for class-B misdemeanor). In one issue on appeal, Black contends that the trial court erred by denying her motion to suppress because Officer Rodriguez’s stop was not supported by reasonable suspicion. We will affirm the trial court’s judgment of conviction.

BACKGROUND

During the suppression hearing, the only witness to testify was Officer Rodriguez, but the State also introduced into evidence a recording from Officer Rodriguez’s dashboard camera. In his testimony, Officer Rodriguez explained that he had received training related to performing traffic stops and regarding the scope of the Transportation Code. Further, he explained that on the night in question, he manned a barricade for the Austin City Limits music festival in Austin, Texas, that had been set up on “the northbound feeder road of MoPac.” In addition, he explained that before traffic could reach the barricade, there were barrels and traffic cones that had been set up to taper the roadway to one lane and to indicate that people could not proceed on the road towards the festival and instead had “to make the U-turn.” Regarding the barricade, he related that it had been set up “to block the road” and that his police car was parked behind the barricade with his “overhead emergency lights on” in a non-flashing setting. Further, he recalled that there was a mobile sign with “flashing indicators . . . saying that northbound was shut down for thru traffic” and that there was “a fixed sign” over the roadway behind the barricade displaying the following message: “Barton Springs Road to close through Zilker Park Friday 12 a.m. until Monday 3 a.m.”

Moreover, Officer Rodriguez explained that they had made a slight opening on the roadway to be used as a checkpoint “because around 2:00 in the morning,” buses, motor coaches, and eighteen wheelers started arriving that needed to have access to the festival grounds. When describing the checkpoint, he stated that he parked his car behind the barricade so that he “could check” the credentials of anyone attempting to enter and that “anyone that was coming through had to stop there to verify that they had the proper authority to go in.”

Regarding Black, Officer Rodriguez testified that around 3:00 a.m., he noticed Black’s car driving toward the checkpoint so quickly that he knew the vehicle “wasn’t going to stop at the checkpoint there, the barricade.” Further, he related that he yelled at the vehicle as it passed by; got into his car; “chased right after her”; placed his overhead lights in the flashing setting; “hit [his] siren intermittently, just to further alert [her] to stop”; and pulled her over. In addition, he recalled that if Black had not ultimately been arrested for driving while intoxicated, he would have issued her a citation “[f]or disregarding a barricade.”

In his testimony, Officer Rodriguez also explained that almost immediately after he drove after Black, another officer took his spot at the barricade and assumed the responsibility of verifying credentials before allowing anyone to drive onto the road and into the festival grounds. Further, he stated that three vehicles, including a motor coach and an eighteen wheeler, drove by Black’s car after he pulled her over but that those vehicles “had to have been allowed by the officer that was there, not because they were just going on their own.”¹

¹ The video shows a few vehicles driving on the road after Officer Rodriguez pulled Black over.

During his cross-examination, Officer Rodriguez discussed the opening in the barricade mentioned above and answered “I guess not” when asked if there was a barricade in the lane that Black drove on. Further, when describing how the other officer had taken his spot, he stated that the officer placed his car in the opening of the barricade and fully blocked the lane, and Officer Rodriguez admitted that there was no patrol car in the lane at the time that Black drove by him and agreed that the lane was open.

On the video, Officer Rodriguez’s car is seen behind one barricade and is faced toward the opening between the barricades described by Officer Rodriguez above. Moreover, Black’s car is seen driving through the opening, and Officer Rodriguez quickly follows her and pulls her over after activating his emergency lights and his siren. Finally, the video shows that Officer Rodriguez returned to his previous post after another officer arrived to question Black, that another officer had parked his patrol car in the opening in the barricade, and that even though the barricade did not fully traverse the entire length of the lane that Black was driving on, the barricade extended into a significant portion of that lane.

After viewing the video and hearing the arguments of the parties, the trial court denied the motion to suppress.

GOVERNING LAW AND STANDARD OF REVIEW

An officer may initiate a traffic stop if he has reasonable suspicion that a crime is about to be committed or has been committed. *See Guerra v. State*, 432 S.W.3d 905, 911 (Tex. Crim. App. 2014). In order for reasonable suspicion to exist, an actual violation does not need to have occurred; rather, it is only necessary that “the officer reasonably believed a violation was

in progress.” *Green v. State*, 93 S.W.3d 541, 545 (Tex. App.—Texarkana 2002, pet. ref’d); *see Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000) (noting that officer may briefly detain person for investigative purposes on less than probable cause where specific and articulable facts along with inferences from those facts reasonably warrant detention). “In assessing whether the intrusion was reasonable, an objective standard is utilized: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate.” *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997); *see also Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001) (explaining that “[t]his standard is an objective one: there need only be an objective basis for the stop; the subjective intent of the officer conducting the stop is irrelevant”). Moreover, the assessment is made in light of the totality of the circumstances. *Woods v. State*, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997). Provided that the traffic stop is based on reasonable suspicion, then the detention “does not violate Texas law.” *Guerra*, 432 S.W.3d at 911.

The offense forming the basis for the stop is governed by section 472.022 of the Transportation Code. *See* Tex. Transp. Code § 472.022. That section provides that “[a] person commits an offense if” he “drives around a barricade.” *See id.* § 472.022(a). Further, the section defines a barricade as “an obstruction” that is “placed on or across a road, street, or highway of this state by the [Department of Transportation], a political subdivision of this state, or a contractor or subcontractor constructing or repairing the road, street, or highway under authorization of the department or a political subdivision of this state” and that is “placed to prevent the passage of motor vehicles over the road, street, or highway during construction, repair, or dangerous conditions.” *Id.* § 472.022(e)(1).

Appellate courts review a trial court’s ruling on a motion to suppress for an abuse of discretion. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013). Under that standard, the record is “viewed in the light most favorable to the trial court’s determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or ‘outside the zone of reasonable disagreement.’” *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (quoting *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)); *see also State v. Robinson*, 334 S.W.3d 776, 778 (Tex. Crim. App. 2011) (noting that appellate courts “view the evidence in the light most favorable to the” trial court’s ruling). Moreover, appellate courts apply “a bifurcated standard, giving almost total deference to the historical facts found by the trial court and analyzing *de novo* the trial court’s application of the law.” *State v. Cuong Phu Le*, 463 S.W.3d 872, 876 (Tex. Crim. App. 2015); *see Arguellez*, 409 S.W.3d at 662 (explaining that appellate courts afford “almost complete deference . . . to [a trial court’s] determination of historical facts, especially if those are based on an assessment of credibility and demeanor”). “The same deference is afforded the trial court with respect to its rulings on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an evaluation of credibility and demeanor.” *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). “When the trial court does not file findings of fact concerning its ruling on a motion to suppress, we assume that the court made implicit findings that support its ruling, provided that those implied findings are supported by the record.” *Ex parte Moore*, 395 S.W.3d 152, 158 (Tex. Crim. App. 2013). In addition, a trial court’s ruling on the motion will be upheld if it is correct under any theory of law applicable to the case regardless of whether the trial court based its ruling on that theory. *Story*, 445 S.W.3d at 732.

DISCUSSION

In her sole issue on appeal, Black urges that the trial court erred by denying her motion to suppress because Officer Rodriguez did not have reasonable suspicion “to justify stopping [her] vehicle.” Specifically, Black contends that Officer Rodriguez did not have “the requisite reasonable suspicion to detain” her because she “committed no traffic offense.”

When presenting her argument on appeal, Black insists that she could not have violated the statutory provision because the testimony established that there was no barricade in her lane of traffic. Accordingly, Black contends that all she did was pass a barricade that had been placed in a parallel lane of traffic, which she urges does not violate the Transportation Code because she did not drive “around” a barricade. *See State v. Chacon*, 273 S.W.3d 375, 379 (Tex. App.—San Antonio 2008, no pet.) (explaining that courts “construe statutes as written and, when possible, ascertain the legislative intent from language used within the statute”). Further, Black contends that the evidence presented during the hearing established that the barriers that were placed on the roadway at issue did not qualify as barricades as that term is used in the statute because they were set up as part of a music festival, which she contends is not an activity falling into any of the categories of “construction, repair, or dangerous condition” required by the statute, and that Officer Rodriguez did not provide testimony indicating that the barriers were set up for the reasons identified by the statute. *See* Tex. Transp. Code § 472.022(e)(1). Finally, Black urges that the statutory offense at issue provides that the barricade must be installed by the Department of Transportation, “a political subdivision, or a contractor or subcontractor,” *see id.*, and again urges

that the State failed to produce evidence establishing that the signs and barricades “were placed there by any of the entities listed in the statutes.”²

As an initial matter, we note that many of Black’s arguments are premised on the idea that the State failed to prove an actual violation by not presenting evidence establishing each and every element of the offense of disregarding a barricade. However, the State was not required to prove “with absolute certainty that a crime occurred.” *See Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013). On the contrary, the State was only required to prove that Officer Rodriguez

² In addition to listing and describing the offense of driving around a barricade, the statute also specifies that a person commits an offense if he “disobeys the instructions, signals, warnings, or markings of a warning sign.” *See* Tex. Transp. Code § 472.022(a). Further, the statute explains that a “[w]arning sign” means a signal, marking, or device placed on a barricade or on a road, street, or highway during construction, repair, or dangerous conditions by the department, a political subdivision of this state, or a contractor or subcontractor to warn or regulate motor vehicular traffic.” *Id.* § 472.022(e)(3). In her brief, Black contends that the testimony from Officer Rodriguez regarding the temporary sign stating that northbound traffic was shut down and regarding the fixed sign stating that the roadway would be closed for several days did not establish that Officer Rodriguez had reasonable suspicion to believe that Black violated the statute by disobeying either of the signs because the State failed to establish that all of the elements of that offense had been met and because the signs would not have put a reasonable person on notice that the roadway at issue was in fact closed on the morning that Black was pulled over. Similarly, in her brief, Black notes that section 544.004 of the Transportation Code requires an “operator of a vehicle . . . [to] comply with an applicable official traffic-control device placed” on the roadway unless an exception applies, *id.* § 544.044(a), but asserts that the barricades and the signs discussed above did not qualify as traffic-control devices because they were not placed in the proper position as required by that provision, by the Texas Manual on Uniform Traffic Control Devices, and by the City of Austin Transportation Criteria Manual. However, given our ultimate resolution that the trial court did not abuse its discretion by determining that Officer Rodriguez had reasonable suspicion to conclude that Black had violated the Transportation Code by driving around a barricade, we need not consider whether the officer had reasonable suspicion to conclude that Black had committed one of these other traffic violations as well. *Cf. Bracken v. State*, 282 S.W.3d 94, 98 (Tex. App.—Fort Worth 2009, pet. ref’d) (noting that court did not have to reach defendant’s arguments that officer did not have reasonable suspicion to stop defendant for violating one provision of Transportation Code because it had previously determined that officers had reasonable suspicion to believe that defendant violated another provision of Code).

“reasonably believed a violation was in progress.” *See Green*, 93 S.W.3d at 545. As discussed previously, Officer Rodriguez testified that he believed that Black had committed a traffic offense of disregarding a barricade. Viewing the evidence in the light most favorable to the trial court’s ruling, Officer Rodriguez’s belief was supported by his testimony establishing that cones and barrels were set up on the roadway before the barricades in order to guide traffic away from the road and to force traffic to perform a U-turn away from the closed roadway, that there was a sign stating that the road was closed to through traffic, that there was a fixed sign further up the roadway stating that the roadway was to be closed for several days, that barricades had been placed across the roadway in conjunction with the police in order to prevent or limit unauthorized traffic on the roadway due to a music festival taking place in the area, that there were several patrol cars stationed at the barricade with their overhead lights on, and that a small opening in the barricades had been created to establish a checkpoint in which the police could view the credentials of drivers to see if they had been authorized to travel to the festival grounds. Moreover, that conclusion was also supported by Officer Rodriguez’s testimony relating that he observed Black drive through the small opening without stopping and by the portions of the video recording showing Black drive past the barrier and showing that although the barricade did not extend all the way across the lane that Black was driving in, the barricade did extend well into that lane.

In light of the preceding, we must conclude that the trial court did not abuse its discretion by concluding that Officer Rodriguez had reasonable suspicion to believe that Black had committed a traffic violation by driving around a barricade and to initiate a traffic stop. *See id.*; *see also Bullock v. State*, 426 S.W.3d 226, 229 (Tex. App.—Houston [1st Dist.] 2012, no pet.)

(stating that “[a] law enforcement officer may lawfully stop and detain a motorist who commits a traffic violation”); *Bracken v. State*, 282 S.W.3d 94, 98 (Tex. App.—Fort Worth 2009, pet. ref’d) (explaining that violation of provision of Transportation Code creates reasonable suspicion justifying stop).

For these reasons, we overrule Black’s sole issue on appeal.

CONCLUSION

Having overruled Black’s sole issue on appeal, we affirm the trial court’s judgment of conviction.

David Puryear, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

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