NUMBER 13-17-00010-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JEFFREY HEAD, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the County Court of Bee County, Texas.

MEMORANDUM OPINION

Before Justices Contreras, Longoria, and Hinojosa
Memorandum Opinion by Justice Hinojosa

Appellant Jeffrey Head appeals from an order denying his motion to suppress because a police officer lacked reasonable suspicion to initiate a traffic stop. Following the denial, Head reserved his right to appeal the ruling and he entered an open plea of guilty to driving while intoxicated, a class-B misdemeanor. *See* TEX. PENAL CODE ANN. § 49.04(b) (West, Westlaw through 2017 1st C.S.). The trial court signed a judgment of

conviction and sentenced Head to 180 days' confinement in the county jail, but it suspended the sentence and placed Head on community supervision for one year. We reverse and remand.

I. Background

The only witness to testify at the suppression hearing was Jaime Catete, the Bee County Sheriff's deputy who arrested Head on a charge of driving while intoxicated. At the time of his encounter with Head, Catete had been a deputy for a month, and he admitted that he "didn't yet know what's going on."

At approximately 11:12 p.m. on March 10, 2014, Catete was on "roving patrol" in his sheriff's vehicle when a dispatch officer radioed that there had been "a call of a suspicious vehicle in the area on Viggo Road." As Catete recalled, the dispatcher relayed that there were "three or four vehicles parked by a mailbox with people walking around the mailbox, and they [sic] called in a suspicious person in a suspicious vehicle." Catete was not informed about any of the vehicles' make, model, or color, nor was he given any description of the individuals.

Approximately eight minutes after receiving the dispatch call, Catete arrived on Viggo Road, which he described as having three exits and being "pretty isolated, not much traffic, unless somebody lives there." After arriving on Viggo Road, Catete encountered a small pickup truck with a hard-shell camper over its bed driving in the opposite direction as Catete's patrol vehicle. Although the pickup truck was traveling the speed limit, had its headlights activated, was not violating any transportation code

provision, and there were no exigent circumstances, Catete initiated a traffic stop.

Based on the location, time, and the way the call came into the sheriff's department, Catete believed that the people surrounding the mailbox "were picking up undocumented persons out there and trying to transport them, possibly north." According to Catete, Bee County is an area for trafficking illegal aliens, and over the years, the sheriff's department has discovered smuggling activity throughout the county. However, Catete acknowledged that the area was not known for high-crime.

Catete testified that he initiated the traffic stop because of the phone call to the sheriff's department, Head's vehicle "was the only vehicle on the roadway," and his suspicion that the pickup may have been transporting undocumented persons due to its ability to secret them under the hard-shell camper in the pickup's bed. Catete's testimony regarding the number of vehicles on Viggo Road when he made the stop was inconsistent. Later, Catete acknowledged that there were other vehicles on Viggo Road, but one of the other vehicles may have been that of his supervisor. Catete also acknowledged that he did not see any other individuals in the area that would substantiate his concern that the "suspicious vehicles" were involved in the transportation of undocumented persons.

Upon encountering Head, Catete detected signs of intoxication but no signs of smuggling undocumented persons. Catete arrested Head on suspicion of driving while intoxicated. Head moved to suppress all evidence on the ground that Catete's stop was illegal. After hearing the aforementioned testimony and the arguments of counsel, the

trial court denied Head's motion to suppress. In written findings of fact, the trial court found:

> 1. On March 10, 2014 at 11:12 p.m. Bee County Sheriff's Deputy Catete responded to a report from 3540 Viggo Road in Bee County, Texas of a suspicious vehicle specifically three or four vehicles parked by a mailbox with people walking around the mailbox with no vehicle descriptions or descriptions of individuals provided.
>
> 2. Deputy Catete testified that Viggo Road was isolated and did not have much traffic normally.
>
> 3. Considering the nature of the call[,] Deputy Catele suspected that someone might be picking up undocumented persons and transporting them based on his training and experience.
>
> 4. Upon arrival in the area[,] Deputy Catete noticed a vehicle in the area of the referenced call at around 2500 or 3000 Viggo Road which was the only vehicle in sight and it was also leaving the area.
>
> 5. The Deputy initiated a stop of the vehicle[,] a small truck with a camper shell[,] because it was in the area and capable of transporting undocumented persons.
>
> 6. The Defendant was the driver and sole occupant of the truck.
>
> 7. Upon making contact with the Defendant driver Deputy Catete asked him to step out and proceed to the rear of the vehicle so he could interview him safely.
>
> 8. The Deputy then interviewed the Defendant to determine whether or not he was involved in any illegal activity on Viggo Road.
>
> 9. During the interview the Deputy detected signs of intoxication, conducted field sobriety tests, and subsequently placed the Defendant under arrest for the offense of driving while intoxicated.

The trial court also made the following legal conclusions:

> 1. The arrest of the Defendant was a warrantless arrest.

2. Bee County is an area where transporting of undocumented persons occurs.

3. It was reasonable for Deputy Catete to suspect possible smuggling of undocumented persons given the nature of the call, multiple vehicles and persons, time and location of the reported activity.

4. It was reasonable to make an investigatory stop on the only vehicle that was located in the area in question and also capable of transporting people.

5. That the detention resulted in an arrest for driving while intoxicated rather than transporting undocumented aliens does not invalidate the legitimacy of the stop.

Head timely appealed the trial court's denial of his motion to suppress. The State has not filed an appellee's brief.

II. Discussion

A. Standard of Review

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion under a bifurcated standard. *Lopez v. State*, 512 S.W.3d 416, 419 (Tex. App.—Corpus Christi 2016, no pet.). When the trial court makes express findings of fact in a suppression hearing, we afford almost total deference to those findings as long as they are supported by the record. *State v. Granville*, 423 S.W.3d 399, 404 (Tex. Crim. App. 2014). We apply the same standard when reviewing the trial judge's application of law to questions of fact when resolution of those questions depends on an assessment of credibility and demeanor. *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013). We apply a de novo standard of review to pure questions of law and to mixed questions of law and fact that do not depend on the evaluation of credibility and

demeanor. *Id.* Whether the facts of the case, once determined, give rise to reasonable suspicion of criminal activity is a mixed question of law and fact to be reviewed de novo. *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012).

B. Applicable Law

The United States Constitution and the Texas Constitution secure to the individual freedom from all unreasonable searches and seizures. U.S. CONST. amend. VI; TEX. CONST. art. I, § 9. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *see Garza v. State*, 771 S.W.2d 549, 558 (Tex. Crim. App. 1989) (stopping an automobile and detaining its occupants for an investigation is considered a "seizure"). An investigative detention occurs when a police officer detains a person reasonably suspected of criminal activity to determine his identity or momentarily maintain the status quo while seeking additional information. *Hoag v. State*, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987).

Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person is, has been, or soon will be engaged in a criminal activity. *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007). The acts or circumstances need not be criminal themselves to create reasonable suspicion, "if they combine to reasonably suggest the imminence of criminal conduct." *Ramirez–Tamayo v. State*, 537 S.W.3d 29, 36 (Tex. Crim. App. 2017). However, the facts must show

unusual activity, some evidence that connects the detainee to the unusual activity, and some indication that the unusual activity is related to criminal conduct. *Derichsweiler v. State*, 348 S.W.3d 906, 916 (Tex. Crim. App. 2011). Further, "it is not a sine qua non of reasonable suspicion that a detaining officer be able to pinpoint a particular penal infraction." *Id.*

Thus, we examine the totality of circumstances to determine whether Head's detention and the subsequent investigation were reasonable and justified. *See Curtis v. State*, 238 S.W.3d 376, 380 (Tex. Crim. App. 2007); *Castro*, 227 S.W.3d at 741. This analysis includes the police officers' training and experience. *State v. Alderete*, 314 S.W.3d 469, 473 (Tex. App.—El Paso 2010, pet. ref'd) ("[W]hen innocent facts, meaningless to the untrained, are used by trained law-enforcement officers, those facts, combined with permissible deductions therefrom, may form a legitimate basis for suspicion of criminal activity.").

The detaining officer need not be personally aware of every fact that objectively supports a reasonable suspicion to detain; rather, the cumulative information known to the cooperating officers at the time of the stop is to be considered in determining whether reasonable suspicion exists. *Derichsweiler*, 348 S.W.3d at 914. A police dispatcher is ordinarily regarded as a "cooperating officer" for purposes of making this determination. *Id.* Finally, information provided to police from a citizen-informant who identifies himself or herself and may be held to account for the accuracy and veracity of his or her report may be regarded as reliable. *Id.* at 914–15; *see Martinez v. State*, 348 S.W.3d 919, 923

(Tex. Crim. App. 2011) (citing *Brother v. State*, 166 S.W.3d 255, 257 (Tex. Crim. App. 2005)). In such a scenario, the only question is whether the information that the known citizen-informant provides, viewed through the prism of the detaining officer's particular level of knowledge and experience, objectively supports a reasonable suspicion that criminal activity is afoot. *Derichsweiler*, 348 S.W.3d at 915. To be sufficient, the activity should "suggest that something of an apparently criminal nature is brewing." *Id.* at 917.

C. Analysis Regarding Reasonable Suspicion

None of the three broad categories of evidence proffered by the State support a conclusion that Catete maintained a reasonable suspicion as envisioned by the federal and state constitutions.

First, we assume the trial court's conclusion that the smuggling of undocumented persons is prevalent throughout Bee County is a factual finding based on Catete's testimony that over the years the sheriff's department has discovered smuggling activity throughout Bee County. Even if the prevalence of smuggling activity in Bee County were a specific and articulable fact, the inference that Head was engaged in such activity because his pickup was capable of carrying other individuals underneath the hard-shell camper cannot be inferred. *Cf. Castro*, 227 S.W.3d at 741; *see also Gurrola v. State*, 877 S.W.2d 300, 303 (Tex. Crim. App. 1994) (en banc) (providing that the high-crime reputation of the area where detainees were seen may not serve as the sole basis for an investigative stop).

Second, the anonymous caller's inability to identify any of the vehicles' make,

model, or color, combined with the caller's inability to describe any of the individuals indicates that the tip is not the type of evidence upon which reasonable suspicion may be based. *See Martinez*, 348 S.W.3d at 924 (holding anonymous tip that provided no identification to dispatch, was not shown to have maintained contact with dispatch, did not follow suspect vehicle, was not present at scene before the stop, and arrived at scene and provided officer with identifying information only after the stop, was not sufficient, stating "the reasonableness of official suspicion must be measured by what the officers knew before they conducted their search; reasonable suspicion cannot be obtained retroactively" (citations omitted)).

Third, Head's travel in a vehicle capable of carrying passengers on an empty and presumably rural roadway is, like the legal conclusion regarding all of Bee County, unspecific and inarticulable. *See Castro*, 227 S.W.3d at 741.

Applying the appropriate standard of review and giving almost total deference to the trial court's factual determinations where appropriate, we hold that Head has demonstrated that the trial court erred by denying his motion to suppress. The record, viewed in the light most favorable to the trial court's ruling, does not reflect sufficient specific, articulable facts that when combined with rational inferences from those facts, would have led Catete to reasonably conclude that Head was, had been, or soon would be engaged in criminal activity. *See id.*

D. Harm Analysis

Having found error, we must conduct a harm analysis to determine whether the

error calls for reversal of judgment. TEX. R. APP. P. 44.2. Under rule 44.2(a), we evaluate the entire record in a neutral, impartial, and even-handed manner, not in the light most favorable to the prosecution and must reverse a judgment of conviction and remand for a new trial unless we determine beyond a reasonable doubt that the error did not contribute to Appellant's conviction or punishment. *Id.*; *Alford v. State*, 22 S.W.3d 669, 673 (Tex. App.—Fort Worth 2000, pet. ref'd). Constitutional error may, however, be held harmless if there is "overwhelming" untainted evidence to support the conviction. *Harrington v. California*, 395 U.S. 250, 254 (1969). In our analysis, we must consider the source and nature of the error and its probable collateral implications, as well as whether declaring it harmless would be likely to encourage the State to repeat it with impunity. *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989). We do not focus on the propriety of the outcome, but calculate as much as possible the probable impact of the error on the conviction in light of the existence of other evidence. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000).

Head was convicted of driving while intoxicated, a class-B misdemeanor. TEX. PENAL CODE ANN. § 49.04(b). A person commits an offense under section 49.04 if the person is intoxicated while operating a motor vehicle in a public place. *Id.* § 49.04(a). Without Catete interviewing Head after a stop that was not supported by reasonable suspicion, Catete would not have detected signs of intoxication nor would he have conducted field sobriety tests on Head. Therefore, the State had no untainted evidence of an essential element of the offense charged. Because Head's plea of guilty was

conditional upon the correctness of the trial court's ruling on his motion to suppress, we cannot say beyond a reasonable doubt that the trial court's error made no contribution to Head's conviction.

Finding Head was harmed by the trial court's error, we sustain his sole issue.

III. Conclusion

The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

LETICIA HINOJOSA
Justice

Do not publish.
Tex. R. App. P. 47.2(b).

Delivered and filed the
7th day of June, 2018.