COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LUIS GONZALEZ,	§	
		No. 08-14-00203-CR
Appellant,	§	
		Appeal from the
v.	§	
		County Court at Law No. 1
THE STATE OF TEXAS,	§	
		of El Paso County, Texas
Appellee.	§	
		(TC# 20120C10382)
	§	

O P I N I O N

Luis Gonzalez filed two pretrial motions to suppress. The trial court denied one motion by written order. A year later, Appellant entered into a plea agreement and pled guilty to a Class A misdemeanor driving while intoxicated. The trial court sentenced Appellant to 180 days in jail, probated for twelve months. On appeal, Appellant contends the trial court erred in denying his motions to suppress because the deputies who detained him lacked reasonable suspicion and did not have valid consent to obtain his breath sample. We conclude the trial court did not abuse its discretion in denying Appellant's first motion to suppress because the deputies had reasonable suspicion to detain Appellant. We conclude Appellant has waived error as to his second motion because he failed to obtain a ruling from the trial court. For these reasons, we affirm.

PROCEDURAL SUMMARY

Appellant's first motion to suppress was entitled "Motion to Suppress Arrest, Test, Videotape, Statements." It primarily sought to suppress all evidence surrounding Appellant's field sobriety tests, in part on the ground that he was detained without reasonable suspicion. The second motion was entitled "Motion to Suppress Intoxilyzer." It sought to suppress Appellant's breath test and analysis, in part on the ground he did not consent to the test. At the conclusion of the suppression hearing, the court took the matter under advisement. It signed a written order denying the Motion to Suppress Arrest, Test, Videotape, Statements. The appellate record does not contain any ruling on the Motion to Suppress Intoxilyzer. The trial court made no oral or written findings of fact and conclusions of law. A year after the trial court signed its order, Appellant entered into a plea agreement and pled guilty. The trial court certified that Appellant had the right to appeal matters that were "raised by written motion filed and ruled on before trial, and not withdrawn or waived[.]"

FACTUAL SUMMARY

Around 2:30 a.m. on September 15, 2011, El Paso County Deputy Cesar Dominguez and his partner Juan Ordonez were dispatched to mile marker 47 on Interstate 10 in response to a third-party call reporting that a white passenger car, with Texas license plates starting with "CX5," was traveling at a slow rate of speed and swerving from lane to lane, indicating a possible intoxicated driver. About seven minutes later at mile marker 48, they found a white passenger car crashed into a mesquite bush 30 to 40 feet off the road way, with Texas license plates starting with "CX5."[1]

[1] At some point, Deputy Dominguez ran the vehicle's plate number and discovered it was a rental car that had been rented under Appellant's name.

The front end of the car was damaged. The vehicle itself was unoccupied, but Appellant was standing near the rear of the car. Another deputy sheriff, Deputy Taggart, was already at the scene.

Both Deputy Dominguez and Deputy Ordonez testified at the suppression hearing that they had a duty to investigate an accident scene upon finding a vehicle crashed off the roadway. Deputy Dominguez described his investigation as a "DWI investigation[.]" He asked Appellant his name, date of birth, and from where he was coming. Appellant told him he had come from the Dreams Cabaret in downtown El Paso where he had consumed two or three vodka drinks.[2] Deputy Dominguez suspected that Appellant had consumed alcohol and was intoxicated due to Appellant's strong odor of alcohol, his slurred speech, his lack of balance, and his red, bloodshot eyes.[3]

Deputy Dominguez asked Appellant to perform the standardized field sobriety tests. Appellant agreed. Appellant failed all of the tests, and Deputy Dominguez concluded Appellant was intoxicated. He advised Appellant of his *Miranda* rights, read him the DIC-24 and DIC-25 warnings,[4] and placed Appellant under arrest for DWI. Appellant was cooperative but at some unspecified point, indicated he wanted to leave scene, asking Dominguez "to give him a chance." Deputy Dominguez acknowledged on cross-examination that he had not seen Appellant driving

[2] Deputy Ordonez also testified that Appellant told him he was coming from a club.

[3] Deputy Ordonez also testified that Appellant smelled of alcohol and had slurred speech, but did not specify if he made these observations at the scene or later at the police station.

[4] Form DIC–24 is the written statutory warning required when a peace officer requests a voluntary blood or breath specimen. *Linton v. State*, 275 S.W.3d 493, 495 n.3 (Tex.Crim.App. 2009). Form DIC-25 is the warning to the driver that a refusal to consent to give a sample will result in suspension of his driver's license. *See Tex. Dept. of Pub. Safety v. Henson*, No. 14-09-00010-CV, 2010 WL 1849289, at *4 (Tex.App. – Houston [14th Dist.] May 11, 2010, no pet.) (mem. op.).

the car and that neither driving at a low rate of speed nor DWI is a "ticketable offense." After the arrest, Appellant was transported to a police station where Deputy Ordonez performed a breathalyzer test.[5]

REASONABLE SUSPICION TO DETAIN

In his first issue, Appellant contends the trial court erred in denying his motion to suppress because the deputies did not possess a reasonable, articulable suspicion based on objective facts to detain him in the absence of a traffic violation or reasonable suspicion that Appellant was driving while intoxicated. We disagree.

Standard of Review

We review a trial court's denial of a motion to suppress under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex.Crim.App. 2013); *Valtierra v. State*, 310 S.W.3d 442, 447-48 (Tex.Crim.App. 2010). We review the trial court's factual findings for abuse of discretion, but review the trial court's application of law to the facts *de novo*. *Turrubiate*, 399 S.W.3d at 150; *Valtierra*, 310 S.W.3d at 447. Where, as here, the trial court does not issue findings of fact, findings that support the trial court's ruling are implied if the evidence, viewed in a light most favorable to the ruling, supports those findings. *Turrubiate*, 399 S.W.3d at 150; *State v. Kelly*, 204 S.W.3d 808, 818-19 (Tex.Crim.App. 2006). We give almost total deference to the trial court's implied findings, especially those based on an evaluation of witness credibility and demeanor. *Turrubiate*, 399 S.W.3d at 150; *Valtierra*, 310 S.W.3d at 447.

Analysis

[5] Appellant's vehicle was also searched at some point after his arrest, but only a bottle cap was found. Deputy Dominguez testified that Appellant consented to the search of his vehicle.

Under the Fourth Amendment, a warrantless detention that amounts to less than a full-blown custodial arrest must be justified by reasonable suspicion. *Leming v. State*, 493 S.W.3d 552, 562 (Tex.Crim.App. 2016) (citing *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex.Crim.App. 2011)). Reasonable suspicion exists if the officer has "specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity." *Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex.Crim.App. 2015) (quoting *Abney v. State*, 394 S.W.3d 542, 548 (Tex.Crim.App. 2013)). This standard is an objective one that disregards the actual subjective intent of the arresting officer and looks instead to whether there was an objectively justifiable basis for the detention. *Leming*, 493 S.W.3d at 562 (citing *Derichsweiler*, 348 S.W.3d at 914). It also looks to the totality of the circumstances, and while those circumstances may all seem innocent enough in isolation, if they combine to reasonably suggest the imminence of criminal conduct, an investigative detention is justified. *Id*. The question is not whether Appellant was guilty of a traffic offense, but whether the trooper had a reasonable suspicion that he was. *See Jaganathan*, 479 S.W.3d at 247. "A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Id*. at 248 (quoting *United States v. Arvizu*, 534 U.S. 266, 277, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002)). The reasonable suspicion standard "accepts the risk that officers may stop innocent people." *Id*. (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)). The mere possibility that an act is justified will not negate reasonable suspicion. *Id*.

Appellant argues that the deputies did not have reasonable suspicion to detain him because they did not possess sufficient articulable facts that he had committed a traffic violation. Law

enforcement officers, however, have the authority to investigate car accidents. *Alonzo v. State*, 251 S.W.3d 203, 208 (Tex.App. – Austin 2008, pet. ref'd); *Rodriguez v. State*, 191 S.W.3d 428, 444 (Tex.App. – Corpus Christi 2006, pet. ref'd); *Maxcey v. State*, 990 S.W.2d 900, 903 (Tex.App. – Houston [14th Dist.] 1999, no pet.); *see* TEX. TRANSP. CODE ANN. § 550.041(a) (West 2011). Once a peace officer is dispatched to an accident scene, he has a duty to investigate and determine if the accident caused injury or property damage over $1,000. *See* TEX. TRANSP. CODE ANN. § 550.062 (West 2011). This duty provides an independent basis to deem the investigation of the accident reasonable and supports the legality of an investigative detention at its inception. *See, e.g., Alonzo*, 251 S.W.3d at 208; *Rodriguez*, 191 S.W.3d at 444; *Maxcey*, 990 S.W.2d at 903. Here, Deputies Dominguez and Ordonez were dispatched to the scene and discovered a vehicle that had left the roadway and had crashed into a mesquite bush at least 30 to 40 feet off the roadway. The vehicle was damaged, and Appellant was standing nearby. As both deputies testified, they had a duty to investigate the accident scene.

Also, additional information obtained while conducting the accident investigation, can justify further detention and investigation. *Alonzo*, 251 S.W.3d at 208-09. Here, upon approaching Appellant and inquiring into his identity and connection to the accident scene, Appellant disclosed he had come from a downtown club where he had been drinking, and Deputy Dominguez immediately suspected that Appellant was intoxicated due to Appellant's strong odor of alcohol, his slurred speech, has lack of balance, and his bloodshot eyes. These additional facts supported a reasonable suspicion that Appellant had been engaged in criminal activity—whether DWI or a lesser "ticketable" traffic violation—and further justified a detention of Appellant. The evidence shows that Appellant then consented to perform the standardized field sobriety tests, all

of which he failed, establishing probable cause for Appellant's arrest.

All of this assumes, of course, that Appellant was "detained" under the Fourth Amendment from the moment the deputies arrived at the scene and that it was not a consensual encounter. While Appellant presumes that his encounter with the sheriff deputies was a detention from its inception, we must sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Turrubiate,* 399 S.W.3d at 150; *Valtierra,* 310 S.W.3d at 447-48; *see also Leming,* 493 S.W.3d at 562. Whether an engagement with law enforcement is a consensual encounter and the point at which a consensual encounter evolves into a detention is a legal issue we review *de novo. See Wade v. State,* 422 S.W.3d 661, 668 (Tex.Crim.App. 2013). We conclude that consensual encounter is a theory of law applicable to the case and that the record reasonably supports a conclusion that Appellant's initial engagement with the deputies was a consensual encounter. This provides an alternative basis for affirmance.

Citizens and law enforcement "engage in three distinct types of interactions: (1) consensual encounters; (2) investigatory detentions; and (3) arrests." *State v. Woodard,* 341 S.W.3d 404, 410-11 (Tex.Crim.App. 2011) (citations omitted). Consensual interactions do not implicate Fourth Amendment protections. *Id.* at 411; *Wade,* 422 S.W.3d at 667. Law enforcement officers are free to approach citizens to ask for information or cooperation. *Wade,* 422 S.W.3d at 667. Consensual encounters "may be uncomfortable for a citizen, but they are not Fourth Amendment seizures." *Id.*

No bright-line rule governs when a consensual encounter becomes a detention. *Id.* The totality of the circumstances of the interaction determines whether a reasonable person would have felt free to ignore the law enforcement officer's request or to terminate the consensual encounter.

Id.; see United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) ("a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). If ignoring the request or terminating the encounter is an option, no Fourth Amendment seizure has occurred. *Wade*, 422 S.W.3d at 668. But if an officer through force or a show of authority succeeds in restraining a citizen's liberty, the encounter is no longer consensual and becomes a detention or arrest subject to Fourth Amendment scrutiny. *Id*.; *California v. Hodari D.*, 499 U.S. 621, 627-28, 111 S.Ct. 1547, 1551, 113 L.Ed.2d 690 (1991).

In a similar case, the Court of Criminal Appeals determined as a matter of law that the suspect was not detained until the standard field sobriety tests were performed, and that before that, the engagement between the officer and the suspect was a consensual encounter not subject to any Fourth Amendment protections. In *State v. Woodard*, officers were dispatched to the scene of a single-car accident based on information from an anonymous tipster. 341 S.W.3d at 407. In route, one of the officers was informed that the tipster had reported the driver was leaving the scene of the accident wearing a black T-shirt and jeans. *Id.* The officer spotted Woodard walking the sidewalk nearby the accident scene in clothes matching the description. *Id.* The officer did not observe Woodard violating any law, but stopped and asked him if he had been involved in the accident. *Id*. at 407-08. Woodard admitted he had been driving and was drunk and should not have been driving. *Id*. at 408. The officer detected the odor of alcohol and that Woodard's eyes were bloodshot, he was unsteady on his feet, and he staggered when he walked. *Id*. Meanwhile, the officer received information from the accident scene that alcoholic beverages had been discovered in the vehicle. *Id*. The officer asked Woodard to perform the standard field

sobriety tests, and based on his performance, the officer concluded Woodard was intoxicated and arrested him. *Id*. Woodard was later charged with misdemeanor DWI, and the trial court granted his motion to suppress in part on the ground the officer did not have reasonable suspicion to detain Woodard because he had not seen him operating a vehicle while intoxicated and did not articulate specific facts to support a reasonable suspicion that Woodard had committed a criminal offense before he detained Woodard. *Id*. at 409. The Court of Criminal Appeals concluded that the initial interaction between Woodard and the officer was merely a consensual encounter. *Id*. at 412. The Court determined that, even without any advance information about the accident and driver, the officer was free to stop, approach, and question Woodard. *Id*. at 413. The information the officer then obtained—Woodard's admission to involvement in the accident, his admission he was drunk and should not have been driving, and Woodard's smell of alcohol, staggering, and bloodshot eyes—"certainly provided [the officer] with reasonable suspicion to detain Woodard and administer the field sobriety tests." *Id*. at 414.

Likewise, we conclude Deputy Dominguez was free to approach and question Appellant about the accident, and that Appellant's initial engagement with the deputies was a consensual encounter. In that brief time, Deputy Dominguez was quickly presented with several facts—Appellant's admission he had come from a downtown club where he had been drinking, Appellant's strong odor of alcohol, his slurred speech and lack of balance, and his bloodshot eyes—all of which provided Office Dominguez with reasonable suspicion to detain Woodard and administer the field sobriety tests.

Appellant argues, however, that Deputy Taggart was already at the scene when Deputies Dominguez and Ordonez arrived, and that the State failed to have Deputy Taggart testify as to his

prior interactions with Appellant. Although it is not clear from his brief, Appellant appears to be arguing the State had the burden to show Deputy Taggart had not already detained Appellant before the other testifying deputies arrived. The Court of Criminal Appeals made clear in *Woodard*, however, that the defendant has the initial burden to rebut the presumption of proper conduct by law enforcement by establishing that he was detained without a warrant, before the burden shifts to the State to establish reasonable suspicion to detain and probable cause to arrest. *Id.* at 412-13. Thus, Appellant, not the State, had the burden to show Deputy Taggart's interaction with him, if any, rose to the level of a detention entitled to Fourth Amendment protection.

At the suppression hearing, Appellant testified only that he was arrested on September 15 or 16 and that no warrant was issued against him. When the trial court asked Appellant, "Was your seizure based upon a warrant," Appellant answered only: "No, sir, it wasn't." Appellant failed to testify to any facts surrounding his engagement with Deputy Taggart to show that the encounter amounted to a "seizure" under the Fourth Amendment. While Appellant's testimony was sufficient evidence to show that no warrant was issued, it was not evidence that Appellant's engagement with Deputy Taggart rose to the level of a seizure. Only facts, not a legal conclusion, would suffice.[6] *Shanklin v. State*, 190 S.W.3d 154, 176 (Tex.App. – Houston [1st Dist.] 2005, pet. dism'd) ("Trial courts may not consider the legal conclusions of witnesses on ultimate questions of law as competent evidence; such questions are matters to be decided by the courts themselves on the basis of the facts presented in the evidence."); s*ee Whitehead v. State*, 556 S.W.2d 802, 806 (Tex.Crim.App. 1977) (an admission of a legal conclusion is not necessarily an

[6] While Deputy Dominguez testified that at some unspecified point, Appellant indicated he wanted to leave the scene, there is no evidence whether this occurred before or after he administered the field sobriety tests or whether Deputy Dominguez, by his actions or words spoken either before or after Appellant's request, indicated that Appellant was not free to leave.

admission of the underlying facts because legal conclusion must be determined from facts); *Univ. of Texas v. Poindexter,* 306 S.W.3d 798, 810 (Tex.App. – Austin 2009, no pet.) (explaining that legal conclusions do not constitute probative evidence).

In sum, we conclude there was reasonable suspicion to detain Appellant and that the trial court did not abuse its discretion in denying Appellant's Motion to Suppress Arrest, Test, Videotape, Statements. Issue One is overruled.

Waiver

In his second issue, Appellant contends the trial court erred in denying his Motion to Suppress Intoxilyzer because the State failed to prove he consented to a breath test or that he received the required warnings. The State contends Appellant failed to obtain a ruling from the trial court on his Motion to Suppress Intoxilyzer and therefore failed to preserve his complaint for our review. We agree with the State.

A defendant must obtain an adverse ruling from the trial court on a motion to suppress to preserve error. TEX. R. APP. P. 33.1(a)(2); *Bollinger v. State*, 224 S.W.3d 768, 778 (Tex.App. – Eastland 2007, pet. ref'd) (defendant who failed to obtain ruling on three pretrial motions to suppress failed to preserve error); *see Rios v. State,* No. 08-12-00089-CR, 2014 WL 2466100, at *2 (Tex.App. – El Paso May 30, 2014, no pet.) (not designated for publication) ("Failure to obtain an adverse ruling on a motion to suppress evidence waives error."). While the trial court expressly denied Appellant's Motion to Suppress Arrest, Test, Videotape, Statements by written order following the suppression hearing, the record before us does not contain any oral or written ruling on Appellant's Motion to Suppress Intoxilyzer.

Nor does the record reveal an implicit ruling by the trial court. Under certain

circumstances, a trial court may implicitly rule on a motion to suppress. *See Montanez v. State*, 195 S.W.3d 101, 104-05 (Tex.Crim.App. 2006); *see also* TEX. R. APP. P. 33.1(a)(2)(A) (trial court may rule expressly or implicitly). In *Montanez*, the defendant filed one pretrial motion to suppress, and the record did not contain a formal ruling on the defendant's motion. *Id*. at 103. The record of the suppression hearing showed, however, that the trial court had clearly stated its intent to rule on the motion the next day, which was corroborated by the trial court's certification of the defendant's right to appeal and the trial court's docket sheet stating "appeal preserved as to issues presented." *Id*. at 105. The Court of Criminal Appeals considered these as indicators of the trial court's intent and concluded the trial court's actions "unquestionably" indicated that the trial court made an adverse ruling on defendant's motion to suppress. *Id*. 104-05.

But, while the present case shares some of the same indicators as *Montanez*, those indicators do not unquestionably indicate that the trial court denied Appellant's Motion to Suppress Intoxilyzer, because Appellant filed two separate motions to suppress, and one of those motions was expressly ruled on by the trial court. For instance, as the court did in *Montanez*, the trial court here stated at the end of the suppression hearing that it was taking "[t]he matter . . . under advisement." But the trial court's use of the singular, "[t]he matter," takes on importance in this case because it indicates the trial court intended to rule on only one motion—the Motion to Suppress Arrest, Test, Videotape, Statements—which was the only motion the trial court expressly denied by written order following the hearing. This intent is corroborated by the record of the suppression hearing. During the hearing, the trial court expressly referred only to the Motion to Suppress Arrest, Test, Videotape, Statements, indicating the trial court believed it was considering only that one motion. Appellant never clarified to the court he was seeking a ruling on both his

motions to suppress, and neither the trial court nor the parties made any explicit reference to the Motion to Suppress Intoxilyzer during the hearing, other than defense counsel's single, belated reference in rebuttal at the very end of the hearing that he had forgotten "my motion to suppress the breath test[.]" Also, as in *Montanez,* after Appellant had entered into a plea agreement and pled guilty, the trial certified that Appellant had the right to appeal matters "raised by written motion filed and ruled on before trial, and not withdrawn or waived[.]" In *Montanez,* the trial court's certification took on significance of its intent because there was no reason to certify the appeal unless the trial court had adversely ruled on the defendant's singular motion to suppress. In contrast, the trial court here could have logically certified the case for appeal based only on its express ruling denying Appellant's Motion to Suppress Arrest, Test, Videotape, Statements. Also, in light of two motions to suppress being filed, the certification's limitation of appeal to matters "ruled on before trial" takes on significance not present in *Montanez*. In this regard, that a defendant pleads guilty is not dispositive whether the court ruled adversely on a motion to suppress since "a defendant can abandon a motion to suppress before entering a guilty plea." *Montanez,* 195 S.W.3d at 105. While the record in this case does not disclose an express abandonment, Appellant allowed a year to pass between the trial court's express denial of his Motion to Suppress Arrest, Test, Videotape, Statements and his guilty plea without obtaining a ruling on his Motion to Suppress Intoxilyzer, thereby implying that Appellant had abandoned his Motion to Suppress Intoxilyzer before his plea of guilty. Finally, one indicator in *Montanez* is not present here. There is no docket entry in this case indicating Appellant had preserved for appeal all issues "presented."

In sum, the trial court did not expressly rule on Appellant's Motion to Suppress Intoxilyzer,

and we do not find in the record any actions of the trial court that unquestionably indicate that the trial court intended to make an adverse ruling on that motion. Because Appellant failed to obtain an adverse ruling and the record does not show the trial court implicitly made an adverse ruling, we conclude Appellant has not preserved the issues raised in his Motion to Suppress Intoxilyzer for our review. *See Villarreal v. State*, No. 13-10-00605-CR, 2011 WL 6303252, at *4 (Tex.App. – Corpus Christi-Edinburg Dec. 15, 2011, pet. ref'd) (mem. op., not designated for publication) (holding that appellant waived error when the record did not contain any express rulings, or actions by the trial court unquestionably indicating implicit rulings, on his three separate motions to suppress). We overrule Appellant's second issue, and affirm the judgment of the trial court below.

ANN CRAWFORD McCLURE, Chief Justice

June 7, 2017

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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