



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

THE STATE OF TEXAS,	§	No. 08-12-00268-CR
	§	
Appellant,	§	Appeal from
	§	
v.	§	Criminal District Court No. 1
	§	
ARMANDO PRIETO, JR.,	§	of El Paso County, Texas
	§	
Appellee.	§	(TC # 20120D01012)
	§	

OPINION

This case returns to us from the Texas Court of Criminal Appeals. On initial review, we affirmed the trial court which had granted Prieto's motion to suppress the evidence derived from his arrest without considering evidence from a DVD video recording that captured Prieto's entire arrest on video. *See State v. Prieto*, No. 08-12-00268-CR, 2014 WL 2447711, at *1-3 (Tex.App.--El Paso May 30, 2014, pet. granted)(not designated for publication). The Court of Criminal Appeals vacated the judgment and remanded the case to us to consider the video in the context of the parties' arguments. *State v. Prieto*, No. PD-1115-14, 2014 WL 6478236, at *1 (Tex.Crim.App. Nov. 19, 2014)(not designated for publication). Having done so, we agree with the State and reverse the judgment of the trial court.

FACTUAL SUMMARY

Following a traffic stop in February of 2012, El Paso Police Department Officer Jose Alvarez arrested Prieto for driving while intoxicated and possession of cocaine. According to the officer, the basis for the traffic stop was Prieto's (1) failure to use a turn a signal before making (2) an abrupt and unsafe lane change. *See* TEX.TRANSP.CODE ANN. § 545.104(a)(West 2011). Once Alvarez stopped Prieto, he observed what he considered to be signs that Prieto was intoxicated. After administering a series of standardized field sobriety tests, Alvarez placed Prieto under arrest for driving while intoxicated. Incident to this arrest, Officer Alvarez searched Prieto's person and discovered cocaine.

Officer Alvarez booked Prieto into jail and administered a breath test, which showed Prieto had a blood alcohol concentration of 0.011. In the arrest report, however, the officer mistakenly indicated that Prieto's test result was 0.11. The State dropped the DWI charge and Prieto was ultimately indicted for possession of a controlled substance, to wit: cocaine, weighing one gram or more but less than four grams. The State does not rely on the DWI arrest as a justification for the search, but instead argues that Officer Alvarez had lawful authority to arrest Prieto for the traffic violations he committed. An otherwise valid search incident to arrest will be upheld as long as there was probable cause to arrest the defendant for some offense, even if it was not the actual reason the officer arrested the defendant. *State v. Morales*, 322 S.W.3d 297, 300 (Tex.App.--Dallas 2010, no pet.); *see also Williams v. State*, 726 S.W.2d 99, 100-01 (Tex.Crim.App. 1986)(holding proper a search of defendant's person because officer possessed probable cause to arrest defendant on previously observed parking violation).

Prieto filed a motion to suppress, alleging that there was no basis for the traffic stop. At the suppression hearing, the State called Officer Alvarez as its only witness and played the video

he recorded during the stop. Both sides relied upon the video during the officer's testimony but it was never formally offered or admitted into evidence. Officer Alvarez testified that on February 15, 2012, he was proceeding southbound on Kansas Street in El Paso, Texas. Kansas Street has three one-way lanes and Officer Alvarez was traveling in the far left lane. The video indicated that Alvarez was traveling at speeds as high as 54 miles per hour. As he approached the intersection of San Antonio Street and Kansas Street, he observed Prieto's vehicle also proceeding southbound on Kansas Street in the middle lane. As the officer drew closer, he observed Prieto make an unsafe lane change, abruptly entering into his lane and almost striking his patrol unit. Prieto did not use his turn signal to indicate his intention to change lanes. Because he observed these two traffic violations, Officer Alvarez activated his overhead lights and initiated a traffic stop.

On cross-examination, Prieto questioned Officer Alvarez concerning his driving prior to the traffic stop. Alvarez testified that he was responding to an unrelated call where an officer needed assistance nearby. Prieto inquired as to whether Officer Alvarez had switched lanes, from the far left lane to the middle lane, to get behind Prieto's vehicle. Officer Alvarez denied doing so, but acknowledged that he never cited Prieto for the two traffic violations he witnessed.

The trial court granted Prieto's motion to suppress and entered findings of fact and conclusions of law. Among other things, the trial court found that Officer Alvarez's testimony lacked credibility and that Prieto's lane change was reasonable because he had no time to timely signal his lane change under the circumstances created by Officer Alvarez's reckless driving immediately prior to the stop. The trial court concluded that Officer Alvarez had no legal basis to stop Prieto and no probable cause to arrest him, and it suppressed all evidence in the case.

The State timely filed its notice of appeal. Its sole issue was whether the trial court

abused its discretion in granting the motion to suppress. We affirmed. *State v. Prieto*, No. 08-12-00268-CR, 2014 WL 2447711, at *1 (Tex.App.--El Paso May 30, 2014, pet. granted)(not designated for publication). The State then petitioned for discretionary review, contending that we should have considered the video of the traffic stop even though it was not formally admitted into evidence because it was contained in the appellate record and treated as though it had been admitted. *State v. Prieto*, No. PD-1115-14, 2014 WL 6478236, at *1 (Tex.Crim.App. Nov. 19, 2014)(not designated for publication); *Cornish v. State*, 848 S.W.2d 144 (Tex.Crim.App. 1993). The Court of Criminal Appeals agreed, explaining that even though the video was offered but never admitted, it was our duty to request the video from the trial court clerk. *Id.*; see also TEX.R.APP.P. 34.6(g)(2)(“the appellate court may direct the trial court clerk to send it any original exhibit). It vacated the judgment and remanded the case for proceedings consistent with its opinion. *Id.*

MOTION TO SUPPRESS

In reviewing a trial court’s ruling on a motion to suppress evidence, we apply a bifurcated standard of review, giving “almost total deference to [the] trial court’s determination of historic facts” and reviewing *de novo* the court’s application of the law of search and seizure to those facts. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex.Crim.App. 2000), citing *Guzman v. State*, 955 S.W.2d 85, 88-89 (Tex.Crim.App. 1997). This deferential standard applies regardless of whether the facts were gleaned from witness testimony or videotaped recordings introduced into evidence during the suppression hearing. See *Montanez v. State*, 195 S.W.3d 101, 109 (Tex.Crim.App. 2006)(applying *Guzman*’s deferential standard of review to trial court’s determination of historical facts when determination is based upon videotape recordings). If the issue involves the credibility of a witness such that the demeanor of the witness is important,

then greater deference will be given to the trial court's ruling on that issue. *Guzman*, 955 S.W.2d at 87. In a motion to suppress hearing, the trial court is the sole trier of fact as to the credibility of the witnesses and the weight to be given to their testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex.Crim.App. 2000). Accordingly, the trial court may believe or disbelieve all or any part of a witness's testimony even if that testimony is not controverted. *Id.* We will uphold the trial court's ruling on a motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case. *Id.* at 856.

Where, as here, the trial court makes findings of fact, we must determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports the fact findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex.Crim.App. 2006). We then review the trial court's legal ruling *de novo* unless the fact findings that are supported by the record are also dispositive of the legal ruling. *Id.* We must uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case. *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex.Crim.App. 2003).

When the motion to suppress is based upon an alleged Fourth Amendment violation, the initial burden of producing evidence that rebuts the presumption of proper police conduct falls on the defendant. *Ford v. State*, 158 S.W.3d 488, 492 (Tex.Crim.App. 2005). This burden may be met by establishing that a search or seizure occurred without a warrant. *Id.* After the defendant makes this showing, the burden of proof shifts to the State to establish that the search or seizure was conducted pursuant to a warrant or was reasonable. *Id.*

In this instance, a traffic stop is justified when the officer has reasonable suspicion to believe that a traffic violation has occurred. *See Goudeau v. State*, 209 S.W.3d 713, 715-16 (Tex.App.--Houston [14th Dist.] 2006, no pet.); *Walter v. State*, 28 S.W.3d 538, 542

(Tex.Crim.App. 2000)(the decision to stop an automobile is reasonable when an officer has probable cause to believe that a traffic violation has occurred); *see also Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). The State bears the burden of demonstrating the reasonableness of the stop. *Goudeau*, 209 S.W.3d at 716. The State satisfies its burden upon a showing of an objective basis for the stop. *See Garcia v. State*, 43 S.W.3d 527, 530 (Tex.Crim.App. 2001). Violation of a traffic law in an officer's presence is sufficient authority for an initial stop. *Garcia v. State*, 827 S.W.2d 937, 944 (Tex.Crim.App. 1992)(a law enforcement officer may lawfully stop a motorist who commits a traffic violation); *Armitage v. State*, 637 S.W.2d 936, 939 (Tex.Crim.App. 1982); *State v. Selph*, No. 09-14-00234-CR, 2014 WL 7183791, at *3 (Tex.App.--Beaumont Dec. 17, 2014, no pet.)(not designated for publication)(a traffic violation committed in an officer's presence provides probable cause and authorizes an initial stop and detention); *see also* TEX.CODE CRIM.PROC.ANN. art. 14.01(b)(West 2015)("A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.")

The Texas Transportation Code provides that "[a]n operator shall use the signal authorized by Section 545.106 to indicate an intention to turn, change lanes, or start from a parked position." TEX.TRANSP.CODE ANN. § 545.104(a). The single witness at the suppression hearing was Officer Alvarez, who testified that he first noticed Prieto's car at the intersection of San Antonio Street and Kansas Street. He observed Prieto commit two traffic violations without using a turn signal. Upon witnessing these two violations, Officer Alvarez immediately initiated a traffic stop. The video evidence supports this testimony. Consequently, he was authorized to conduct a traffic stop. *Selph*, 2014 WL 7183791, at *3 (officer's traffic stop was valid where he observed driver fail to signal his intention to change lanes before he began to change lanes);

Darter v. State, No. 08-11-00022-CR, 2012 WL 1943761, at *3 (Tex.App.--El Paso May 30, 2012, pet. ref'd)(not designated for publication)(officer had probable cause to believe that driver violated Section 545.104(a) where he observed the driver fail to use his turn signal before he changed lanes); *Coleman v. State*, 188 S.W.3d 708, 716 (Tex.App.--Tyler 2005, pet. ref'd).

In the findings of fact and conclusions of law, the trial court focused its attention on Officer Alvarez's driving, concluding that he caused Prieto to change lanes without using his turn signal. Therefore, instead of making the determination of whether Officer Alvarez had reasonable suspicion to conduct a traffic stop of Prieto, it sought to decide an issue that was not yet before it, namely, whether Prieto was guilty of the traffic violations. *Burkett v. State*, No. 10-13-00309-CR, 2014 WL 3556663, at *2 (Tex.App.--Waco Jul. 17, 2014, no pet.)(not designated for publication); *State v. Hanath*, No. 01-08-00452-CR, 2010 WL 3833919, at *6 (Tex.App.--Houston [1st Dist.] Sept. 30, 2010, no pet.)(not designated for publication). In doing so, the trial court misapplied the law to the facts. *State v. Ballard*, 987 S.W.2d 889, 893 (Tex.Crim.App. 1999); *State v. Zeno*, 44 S.W.3d 709, 713 (Tex.App.--Beaumont 2001, pet. ref'd). Because the indisputable visual evidence establishes that Officer Alvarez's traffic stop of Prieto was proper, the trial court erred in its application of law to the facts, and abused its discretion in granting Prieto's motion to suppress. The State's sole issue is sustained. We reverse the trial court's judgment granting Prieto's motion to suppress.

January 17, 2018

ANN CRAWFORD McCLURE, Chief Justice

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

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