Opinion filed June 30, 2017

In The

Eleventh Court of Appeals

No. 11-15-00326-CR

CHARLES ROSS TURNER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 35th District Court
Brown County, Texas
Trial Court Cause No. CR22949

M E M O R A N D U M O P I N I O N

The jury convicted Charles Ross Turner of the offense of possession of a controlled substance[1] in a drug-free zone.[2] The trial court found the State's enhancement allegations[3] to be "true," assessed punishment at confinement for thirty

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[1]*See* TEX. HEALTH & SAFETY CODE ANN. § 481.115 (West 2017).

[2]*See id.* § 481.134.

[3]*See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016).

years, and sentenced Appellant. In a single issue on appeal, Appellant argues that the trial court violated his Fourth Amendment right to be free from unreasonable searches when it failed to suppress evidence collected by police in an illegal "pat down" search. We affirm.

I. *Evidence at Trial*

Terry Sliter, a deputy with the Brown County Sheriff's Department, stopped a vehicle because the license plate was not properly illuminated. The traffic stop occurred within 1,000 feet of a local high school, and Appellant was a passenger in the stopped vehicle. Deputy Sliter approached the vehicle and spoke with the driver, who remained calm and collected. In contrast, Deputy Sliter observed that Appellant could not sit still in his seat. Appellant moved his arms, jerked back and forth, and smiled repeatedly at Deputy Sliter, which raised the deputy's suspicions. Based on his prior experiences as a peace officer and because of Appellant's erratic behavior, Deputy Sliter thought that Appellant had recently consumed methamphetamine.

Because of Appellant's strange behavior, Deputy Sliter asked the driver for her permission to search the vehicle; the driver consented to the search. However, Appellant did not want to leave the vehicle and repeatedly asked Deputy Sliter if he was under arrest. Eventually, Appellant complied with Deputy Sliter's request and exited the vehicle. When asked if he had any weapons, Appellant told Deputy Sliter that he did not possess any weapons, and he refused to consent to a pat-down search. After Appellant exited the vehicle, he immediately sat down on the ground but sat on his hands. Deputy Sliter called for backup and attempted to explain to Appellant why he needed to search Appellant for weapons. Appellant refused Deputy Sliter's command to stand up and continued to ask whether he was under arrest. Appellant also hesitated when asked if he had any narcotics in his possession. When Deputy Sliter's backup arrived, the officers explained to Appellant that they would pat him down, assisted him to his feet, and placed his hands on the side of the vehicle.

During the pat-down search, Appellant informed the officers that he had a pipe in his pocket. Deputy Sliter reached into Appellant's left front pants pocket and removed the glass pipe. Deputy Sliter recognized the glass pipe as one that is commonly used to smoke methamphetamine; he also noticed white residue in the pipe. Appellant also informed Deputy Sliter that he possessed a small amount of marihuana, which Deputy Sliter seized. Deputy Sliter then placed Appellant under arrest for possession of marihuana until the white residue could be tested. Later, lab tests confirmed that the pipe contained trace amounts of methamphetamine.

At trial, Appellant objected and moved to suppress the glass pipe and drug evidence because he argued that the pat-down search violated his rights under the Fourth Amendment. The trial court overruled his objections and admitted the evidence.

II. *Standard of Review*

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We must affirm the trial court's ruling if it is correct under any theory of law applicable to the case. *State v. Copeland*, 501 S.W.3d 610, 612–13 (Tex. Crim. App. 2016); *Romero v. State*, 800 S.W.2d 539, 543–44 (Tex. Crim. App. 1990). We give great deference to the trial court's findings of historical facts if the record supports the findings. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Because the trial court is the exclusive factfinder, the appellate court reviews the evidence in the light most favorable to the trial court's ruling. *Carmouche*, 10 S.W.3d at 328. We also give deference to the trial court's rulings on mixed questions of law and fact when those rulings turn on an evaluation of credibility and demeanor. *Guzman*, 955 S.W.2d at 89. Where such rulings do not turn on an evaluation of credibility and demeanor, we review the trial court's actions de novo. *Id.*

III. *Analysis*

On appeal, Appellant argues that the seizure of his glass pipe and the residue found inside the pipe, during a pat-down search of his person by Deputy Sliter, violated his rights guaranteed by the Fourth Amendment of the United States Constitution; Article I, section 9 of the Texas Constitution; and Article 38.23 of the Texas Code of Criminal Procedure.[4] The Fourth Amendment prohibits unreasonable searches and seizures. *O'Hara v. State*, 27 S.W.3d 548, 550 (Tex. Crim. App. 2000). Searches conducted without a warrant are unreasonable per se, subject to a few well-defined exceptions. *Id.* A police officer carrying out a warrantless search must be able "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

If an officer has reason to believe that an individual is armed and dangerous, then the officer may conduct a "pat-down" search for his own safety or the safety of others to determine whether the individual is armed. *O'Hara*, 27 S.W.3d at 550. An officer need not be absolutely certain that an individual is armed before conducting a pat-down search. *Id.* at 550–51. Instead a Fourth Amendment evaluation should consider the officer's actions in light of the facts and circumstances confronting him at the time, not the officer's subjective state of mind at the time. *Id.* at 551. Thus, the standard is whether a reasonably prudent person would justifiably believe that his safety or the safety of others was in danger. *Id.*

Every police encounter carries a risk, but roadside traffic stops are particularly dangerous for officers. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983);

[4]Texas courts have consistently interpreted a defendant's rights under Article I, section 9 of the Texas Constitution as commensurate with the rights accorded by the Fourth Amendment of the United States Constitution. *See Sargent v. State*, 56 S.W.3d 720, 723 n.2 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Therefore, we evaluate Appellant's claims under the rubric of the Fourth Amendment.

Pennslyvania v. Mimms, 434 U.S. 106, 110 (1977); *Terry*, 392 U.S. at 10. In this case, Deputy Sliter was engaged in a potentially dangerous traffic stop with two people, one of which, Appellant, acted nervously and erratically. Deputy Sliter suspected that Appellant was under the influence of methamphetamine. In addition, when asked to do so, Appellant did not initially exit the vehicle. Instead, he refused and asked if he was under arrest; then, once he exited the vehicle, he sat on the ground on his hands. He also continued to ask if he was under arrest. When asked if he had any weapons, Appellant responded no, but when asked about narcotics in his possession, Appellant hesitated before he answered no. Deputy Sliter called for backup and waited for assistance to arrive before he conducted a pat-down search of Appellant. In light of Deputy Sliter's experience as a peace officer and based on these observations, Deputy Sliter outlined specific and articulable facts that objectively and reasonably justified his concern for his safety and others, which justified his pat-down search of Appellant for weapons.

Appellant argues that the decision in *Ybarra v. Illinois* supported suppression of the pipe. *See Ybarra v. Illinois*, 444 U.S. 85, 91–93 (1979). In *Ybarra*, police officers who executed a search warrant at a bar decided to pat down every person in the establishment, and during the pat-down of Ybarra, who was a patron in the bar, officers discovered heroin on his person. *Id.* at 88–89. The *Ybarra* Court held that the state did not articulate any facts that would support a reasonable and justifiable suspicion to pat down Ybarra for weapons. *Id.* at 92–93. In contrast to the facts in *Ybarra*, Appellant acted erratically, displayed evidence of intoxication, and initially refused to exit the vehicle after the driver had given permission for police to conduct a search. In addition, Appellant's behavior after he exited the vehicle, including sitting on his hands and refusing a pat-down search, led Deputy Sliter to suspect that Appellant had used methamphetamine and could be armed. Taken together, these facts would lead a reasonably prudent person to justifiably believe that his safety or

the safety of others was in danger. *See O'Hara*, 27 S.W.3d at 551; *see also Griffin v. State*, 215 S.W.3d 403, 409–10 (Tex. Crim. App. 2006). Accordingly, Deputy Sliter had reasonable and justifiable facts to support a pat-down search for weapons. After a review of the record, we hold that the trial court did not abuse its discretion when it admitted the evidence of the glass pipe as well as the drugs found within it. We overrule Appellant's single issue on appeal.

IV. *Conclusion*

We affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

June 30, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.