Affirmed as Modified and Opinion Filed July 29, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00074-CR

RAYFORD HIGH, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 7
Dallas County, Texas
Trial Court Cause No. F-1257938-Y

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

Rayford High appeals the trial court's order of deferred adjudication for the offense of possession of cocaine in an amount of less than one gram. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a)–(b) (West 2010). After the trial court denied High's motion to suppress, High pleaded guilty to the offense. The trial court deferred High's adjudication of guilty, and placed him on two years of community supervision and assessed a $1,500 fine.

In three issues, High argues: (1) the trial court erred when it denied his motion to suppress; (2) the trial court erred when it made findings of fact and conclusions of law that (a) do not meet the requirements of *Cullen v. State*, 195 S.W.3d 696 (Tex. Crim. App. 2006) and (b) are not supported by the evidence; and (3) the order of deferred adjudication should be modified to reflect that the fine was probated.

We decide against High on his dispositive issues and conclude the trial court did not err when it denied High's motion to suppress. Also, we conclude the order of deferred adjudication should be modified to reflect that High's fine was probated. The trial court's order of deferred adjudication is affirmed as modified.

I. FACTUAL AND PROCEDURAL CONTEXT

On July 12, 2012, at approximately 5:45 p.m., Dallas Police officers Joseph Robeson and Evan Keefer were on patrol. Officer Robeson was driving the patrol car and Officer Keefer was the passenger. The officers saw a van run a stop sign, so they turned on the emergency over-head lights and conducted a traffic stop for the violation they had just observed. High was the driver and he stopped the van at the curb. Traffic was busy so, for officer safety, "High was asked to exit the van" and the stop was conducted on the sidewalk. When he looked inside the van, Officer Robeson observed, in plain view, a small blue zip lock baggie on the passenger-side floorboard and he called for someone to test it.

High was indicted for the offense of possession of cocaine in an amount of less than one gram. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a)–(b). Before trial, High filed a motion to suppress, arguing the evidence was illegally obtained. During the hearing, High claimed that the officers did not have reasonable suspicion to stop him for a traffic violation. The trial court denied the motion and, on High's request, made written findings of fact and conclusions of law. High filed a motion to reconsider the findings and conclusions, which the trial court denied.

Under a plea agreement, High pleaded guilty to the offense. The trial court deferred adjudication and placed High on two years of community supervision and assessed a $1,500 fine, which was probated.

II. MOTION TO SUPPRESS

In issues one and two, High argues the trial court erred when it denied his motion to suppress: (1) concluding there was reasonable suspicion to stop him; and (2) making findings of fact and conclusions of law that (a) do not meet the requirements of *Cullen* and (b) are not supported by the evidence. We construe High's argument to contend that the trial court abused its discretion when it made findings of fact that are not supported by the record and, as a result, the trial court's conclusions of law, applying the law to those unsupported facts was error.

A. Standard of Review—Motion to Suppress

An appellate court reviews a trial court's ruling on a motion to suppress evidence under a bifurcated standard. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013); *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013); *Lloyd v. State*, 453 S.W.3d 544, 546 (Tex. App.—Dallas 2014, pet. ref'd). An appellate court reviews a trial court's factual findings for an abuse of discretion and the trial court's application of the law to the facts de novo. *Turrubiate*, 399 S.W.3d at 150; *see Lloyd*, 453 S.W.3d at 546. "Whether the facts known to the officer at the time of the detention amount to reasonable suspicion is a mixed question of law that is reviewed de novo on appeal." *See Kerwick*, 393 S.W.3d at 273 (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding reasonable suspicion should be reviewed do novo, with deference to trial court's findings of historical facts)); *see also State v. Morales*, No. 13-12-00307-CR, 2013 WL 5676054, at *4 (Tex. App.—Corpus Christi Jan. 29, 2014, pet. ref'd) (mem. op., not designated for publication).

B. Trial Court's Findings of Fact

In the first part of issue two, High argues the trial court made: (1) findings of fact and conclusions of law that do not meet the requirements of *Cullen*; and (2) findings of fact that are not supported by the evidence adduced during the hearing on his motion to suppress. The State

responds that High has not shown the trial court violated *Cullen* because High complains about non-essential findings, rather than omitted findings that would be dispositive of the issues on appeal. Also, the State concedes that the record does not support the complained of finding of fact, but argues that finding is nonessential to and not dispositive of the trial court's determination that Officer Robeson had reasonable suspicion to stop High.

1. Standard of Review—Findings of Fact on Motion to Suppress

The trial court is the sole and exclusive trier of fact and judge of credibility of the witnesses and the evidence presented at a hearing on a motion to suppress. *See Delao v. State*, 235 S.W.3d 235, 238 (Tex. Crim. App. 2007); *Colvin v. State*, 467 S.W.3d 647, 657 (Tex. App.—Texarkana 2015, pet. ref'd). "When a trial court rules on a motion to suppress and makes explicit factual findings, an appellate court **must** determine whether the factual findings are supported by the record." *Kerwick*, 393 S.W.3d at 274 (emphasis added); *see Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013); *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013); *Miller v. State*, 393 S.W.3d 255, 263 (Tex. Crim. App. 2012);); *see also Morales*, 2013 WL 5676054, at *4. "Unless the trial court abused its discretion by making a finding not supported by the record, [an appellate court] will defer to the trial court's fact findings and not disturb the findings on appeal." *Gette v. State*, 209 S.W.3d 139, 142 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Cantu v. State*, 817 S.W.2d 74, 77 (Tex. Crim. App. 1991)). However, when findings of fact are inconsistent with conclusive evidence they may be disregarded as unsupported by the record, even when that record is viewed in a light most favorable to the trial court's ruling. *See Miller*, 393 S.W.3d at 263. A court of appeals may properly disregard portions of the trial court's findings of fact that are not supported by the record or are subjective. *See Kerwick*, 393 S.W.3d at 274 (noting court of appeals properly disregarded portion of finding of fact that officer "believed" because subjective beliefs not

relevant to determination of reasonable suspicion); *Miller*, 393 S.W.3d at 263–65 & n.20 (discussing findings of fact that are not supported by the record); *see also Morales*, 2013 WL 5676054, at *5 n.1 (disregarding trial court's fact finding because subjective). However, a court of appeals may not "venture[] beyond its role in ensuring that the trial [court's] findings were supported by the record." *Kerwick*, 393 S.W.3d at 274. That is, a court of appeals should not focus on "what it believe[s] the record and the trial [court's] findings should have contained" or in other words, "perceived [] record[] deficiencies[,] and the questions the record and the trial [court's] findings of fact leave unanswered." *Kerwick*, 393 S.W.3d at 274.

2. Applicable Law

On the request of the losing party on a motion to suppress evidence, the trial court shall state its essential findings. *See Cullen*, 195 S.W.3d at 699. Essential findings are those findings of fact and conclusions of law adequate to provide an appellate court with a basis on which to review the trial court's application of the law to the facts. *See Cullen*, 195 S.W.3d at 699. Findings are inadequate when they are so incomplete an appellate court is unable to make a legal determination regarding a dispositive issue. *See State v. Saenz*, 411 S.W.3d 488, 495 (Tex. Crim. App. 2013).

3. Application of the Law to the Facts

Although High complains the trial court's findings do not meet the requirements of *Cullen*, he does not allege the trial court failed to make any essential finding or conclusion on a dispositive issue as required by *Cullen*. Rather, he complains that one of the findings is not supported by the record. Accordingly, we conclude the trial court's findings and conclusions do not violate *Cullen* because they are not so incomplete that we are unable to make a determination regarding the dispositive issues. *See generally, Saenz*, 411 S.W.3d at 495.

Next, we address High's argument that the trial court made a finding of fact that is not supported by the evidence adduced during the hearing on his motion to suppress.[1] Specifically, High argues there is no evidence to support the trial court's finding of fact that "[High] committed the traffic violation of running a stop sign at east bound 4400 Dalton Ave. onto Southbound 2200 Ann Arbor Ave." High contends that "[n]o specific testimony in the record indicated that this occurred at the 4400 block of Dalton Avenue." The State appears to concede that the record from the suppression hearing does not support the street names or direction at the intersection where High committed the alleged traffic violation, but claims it was a nonessential finding. Also, the State notes that, although it was not introduced into evidence and the trial court was not asked to take judicial notice of the clerk's file, the affidavit in support of the officer's request for an arrest warrant, which is in the clerk's record, states "[High] ran a stop sign at E/B 4400 Dalton Ave to S/B Ann Arbor Ave Dallas, Dallas County, Texas."

The record shows that during the hearing on High's motion to suppress, on direct examination by the State, Officer Robeson testified about the location of the traffic violation as follows:

Prosecutor: On what street did you stop [High]?

Robeson: I would have to look at the report; I don't remember right off hand.

Prosecutor: Does Ann Arbor sound familiar?

Robeson: Yes.

Prosecutor: 2200 block of Ann Arbor?

Robeson: Yes.

Prosecutor: In Dallas County?

[1] The trial court's findings and conclusions are a three-page narrative. The particular findings and conclusions are not separately identified as findings or conclusions and are not numbered. Accordingly, throughout this opinion, we identify the findings and conclusions, quoting them to the extent necessary, in order to consider the points raised by the parties.

Robeson: Yes.

Prosecutor: State of Texas?

Robeson: Yes.

Also, during cross-examination, Officer Robeson testified:

Prosecutor: You're aware that actually the area, the Ann Arbor/Dalton area is, in fact, a residential neighborhood?

Robeson: Okay.

We conclude that the portion of the finding that refers to the direction of the intersection and the specific block number on Dalton Avenue is not supported by the record. Accordingly, we disregard the portion of the challenged trial court's finding that states "at east bound 4400 Dalton Ave. onto Southbound 2200 Ann Arbor Ave." *See Miller*, 393 S.W.3d at 263. However, we also conclude the unsupported portion of that finding is not essential to or dispositive of the trial court's ruling on High's motion to suppress.

The first part of issue two is decided in High's favor.

C. Trial Court's Conclusions of Law

In issue one and the second part of issue two, High contends that the trial court erred when it concluded that: (1) "the failure to stop at a stop sign is a violation of [Texas] Transportation Code [section] 544.010"; (2) "Officer Robeson was justified in stopping [High's] vehicle because he had articulable reasons to believe that the traffic violation had occurred"; and (3) "the initial detention of [High] was lawful." He claims that Officer Robeson did not provide specific articulable facts setting out the elements of the traffic offense giving rise to reasonable suspicion. In particular, he contends that there is no evidence to support the alleged violation of section 544.010 of the Texas Transportation Code because there was no testimony that he failed to stop at an inappropriate place. The State responds that Officer Robeson testified he saw High

run a stop sign in his van, which was a reasonable basis for suspecting that High had committed a traffic offense, justifying the stop.

1. Standard of Review—Conclusions of Law on Motion to Suppress

After reviewing whether the evidence supports the trial court's findings, an appellate court must then undertake a de novo review when considering whether the findings of fact support the legal conclusions of the trial court. *See Abney*, 394 S.W.3d at 548; *see also Morales*, 2013 WL 5676054, at *4. An appellate court reviews the trial court's legal ruling on a motion to suppress de novo, unless its specific fact findings that are supported by the record are also dispositive of the legal ruling. *See Abney*, 394 S.W.3d at 548; *Kelly*, 204 S.W.3d at 818–19. An appellate court 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, even if the trial court gave the wrong reason for its ruling. *See State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007).

2. Applicable Law—Reasonable Suspicion

A police officer may make a warrantless stop on reasonable suspicion of a traffic violation. *See Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex. Crim. App. 2016). The reasonable suspicion standard requires only "some minimal level of objective justification" for the stop and disregards an officer's actual subjective intent. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012).

A police officer has reasonable suspicion if he has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to believe that the person detained is, has been, or soon will be engaged in criminal activity. *See Jaganathan*, 479 S.W.3d at 247; *Wade v. State*, 422 S.W.3d 661, 668 (Tex. Crim. App. 2013); *Abney*, 394 S.W.3d at 548. These articulable facts must amount to more than a mere hunch or suspicion. *See Abney*, 394 S.W.3d at 548. However, the State does not have to establish with absolute certainty that a crime

occurred. *See Abney*, 394 S.W.3d at 548. Similarly, the State does not have to prove every element of a specific offense or show that a traffic offense was actually committed, but only that the officer reasonably believed a violation was in progress. *See Tex. Dep't of Pub. Safety v. Fisher*, 56 S.W.3d 159, 163 (Tex. App.—Dallas 2001, no pet.); *Tex. Dep't Pub. Safety v. Axt*, 292 S.W.3d 736, 739 (Tex. App.—Fort Worth 2009, no pet.). Rather, the State just has to carry its burden of proving that, under the totality of the circumstances, the seizure was reasonable. *See Abney*, 394 S.W.3d at 548. The State bears the burden of showing an officer had at least a reasonable suspicion the defendant either had committed an offense or was about to do so before it made the warrantless stop. *See Derichsweiler v. State*, 348 S.W.3d 906, 913–14 (Tex. Crim. App. 2011).

Section 545.151(a)(1) of the Texas Transportation Code states, in part, "An operator approaching an intersection [] shall stop, yield, and grant immediate use of the intersection [] in obedience to an official traffic-control device, including a stop sign." *See* TEX. TRANSP. CODE ANN. § 545.151(a)(1) (West 2011). Section 544.010 of the Texas Transportation Code describes where an operator is required to stop, stating, in part:

> (a) Unless directed to proceed by a police officer or traffic-control signal, the operator of a vehicle or streetcar approaching an intersection with a stop sign shall stop as provided by Subsection (c).
>
> . . . .
>
> (c) An operator required to stop by this section shall stop before entering the crosswalk on the near side of the intersection. In the absence of a crosswalk, the operator shall stop at a clearly marked stop line. In the absence of a stop line, the operator shall stop at the place nearest the intersecting roadway where the operator has a view of approaching traffic on the intersecting roadway.

TEX. TRANSP. CODE ANN. § 544.010(a), (c) (West 2011).

3. Application of the Law to the Facts

First, High contends that the trial court erred when it concluded that "the failure to stop at a stop sign is a violation of [Texas] Transportation Code [section] 544.010." However, the trial

court's conclusion is merely a summary of the law that sets out where an operator is required to stop when approaching a stop sign. *See* TEX. TRANSP. CODE ANN. § 544.010; *see also* TEX. TRANSP. CODE ANN. § 545.151(a)(1). Accordingly, we conclude the trial court did not err when it reached this conclusion.

Second, High contends that the trial court erred when it concluded that "Officer Robeson was justified in stopping [High's] vehicle because he had articulable reasons to believe that the traffic violation had occurred" and "the initial detention of [High] was lawful." He argues there were no articulable reasons to support these conclusions because there was no testimony as to the specific intersection where the alleged traffic violation occurred, whether there were traffic lines at that intersection, or that he failed to stop at the stop sign or stopped at an inappropriate place. High claims that in *Ford*, the Texas Court of Criminal Appeals held that the officer must "set out the elements of the offense and provide testimony for each element of the offense for the [trial] court to determine if the stop was reasonable." We disagree.

In *Ford*, the defendant was pulled over for violating a traffic law by following another car too closely. *See Ford*, 158 S.W.3d 488, 491 (Tex. Crim. App. 2005). The officer did not give a basis for his opinion, such as the approximate distance between the cars, the speed at which they were traveling, the conditions of the road, traffic conditions, or whether the driver would have been able to safely stop if necessary. *See Castro v. State*, 227 S.W.3d 737, 742 (Tex. Crim. App. 2007) (discussing *Ford*, 158 S.W.3d at 493). The Texas Court of Criminal Appeals held that mere opinions are ineffective substitutes for specific, articulable facts in a reasonable-suspicion analysis and found a complete absence of objective factual support in the record. *See Ford*, 158 S.W.3d at 493–94.

However, the *Ford* case is not the Texas Court of Criminal Appeals's final word on this issue. In *Castro*, the Texas Court of Criminal Appeals examined its opinion in *Ford* and noted

that reasonable suspicion can be established by objective facts or subjective opinions. *See Castro*, 227 S.W.3d at 742. In the case of subjective opinions, appellate courts should follow the holding in *Ford*, requiring that the officer give specific articulable observations to support his opinion. *See Castro*, 227 S.W.3d at 742. Opinions are not an effective substitute for specific, articulable facts in a reasonable-suspicion analysis when the nature of the offense requires an officer to make a subjective determination. *See Castro*, 227 S.W.3d at 742. However, in cases involving offenses such as failure to signal a lane change, a court can determine whether an officer's determination that a driver committed a traffic violation was objectively reasonable without being presented with a detailed account of the officer's observations. *See Castro*, 227 S.W.3d at 742. As articulated by the Texas Court of Criminal Appeals in *Castro*, in *Ford* it did not require that the officer "set out the elements of the offense and provide testimony for each element of the offense for the [trial] court to determine if the stop was reasonable" as High contends. *See Castro*, 227 S.W.3d at 741–43; *see also Fisher*, 56 S.W.3d at 163 (State does not have to show traffic offense actually committed).

The record shows that Officer Robeson testified he saw High's van "run a stop sign." *See* TEX. TRANSP. CODE ANN. § 545.151(a)(1) (operator approaching intersection shall stop in obedience to stop sign). As the Texas Court of Criminal Appeals noted in *Castro*, following too closely, speeding, and being intoxicated, can be examples of subjective determinations, but the failure to signal a lane change is not. *See Castro*, 227 S.W.3d at 742.

Similarly, we conclude that the determination of whether a driver fails to stop at a stop sign or "r[an] the stop sign" is a simple one. *See Castro*, 227 S.W.3d at 742 (discussing failure to signal a lane change). There are only two possibilities: (1) the trial court believed Officer Robeson's testimony that he saw High "run a stop sign" or fail to stop at the stop sign; or (2) the trial judge did not believe Officer Robeson saw High fail to stop at the stop sign. *See Castro*,

227 S.W.3d at 742. In its written findings of fact, the trial court found, and the record supports, that "[High] committed the traffic violation of running a stop sign" and "[h]aving observed the traffic violation, the officers engaged the emergency over-head lights in order to conduct a traffic stop." The State was not required to show that High actually committed the traffic violation of section 545.151(a)(1) of the Texas Transportation Code by establishing how he failed to comply with the requirement to stop under section 544.010. *See Fisher*, 56 S.W.3d at 163; *Axt*, 292 S.W.3d at, 739. The State only had to show that facts supported a reasonable suspicion that a violation was in progress or had been committed. Accordingly, we conclude the trial court did not err when it concluded: (1) "the failure to stop at a stop sign is a violation of [Texas] Transportation Code [section] 544.010"; (2) "Officer Robeson was justified in stopping [High's] vehicle because he had articulable reasons to believe that the traffic violation had occurred"; and (3) "the initial detention of [High] was lawful."

Issue one and the first part of issue two are decided against High.

D. Conclusions on Motion to Suppress

We conclude that a portion of the challenged finding of fact stating, "[High] committed the traffic violation of running a stop sign at east bound 4400 Dalton Ave. onto Southbound 2200 Ann Arbor Ave." is not supported by the testimony during the hearing on High's motion to suppress and disregard the unsupported portion of that finding, which states "at east bound 4400 Dalton Ave. onto Southbound 2200 Ann Arbor Ave." *See Miller*, 393 S.W.3d at 263. However, we also conclude the unsupported portion of that finding is not essential to or dispositive of the trial court's ruling on High's motion to suppress. In addition, we conclude the trial court's conclusions of law are supported by the record and correct under a theory of law applicable to the case. As a result, we conclude the trial court did not err when it denied High's motion to suppress.

Issue one and two are decided against High.

III. MODIFICATION OF ORDER

In issue three, High argues the order of deferred adjudication should be modified to reflect that the fine was probated. The State agrees with High that the order deferring adjudication should be modified to correctly reflect that his fine was probated.

The trial court's order of deferred adjudication states that High was assessed a fine in the amount of $1,500, but does not state the fine was probated. However, the record shows that during the sentencing hearing, the trial court stated, "Ordered to pay a fine of $1,500. That is probated." Also, the docket sheet reflects that the fine of $1,500 was probated. An appellate court has the authority to modify an incorrect judgment to make the record speak the truth when it has the necessary information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we conclude the trial court's judgment should be modified to reflect that High's fine was probated.

Issue three is decided in favor of High.

IV. CONCLUSION

The trial court did not err when it denied High's motion to suppress. Also, the order of deferred adjudication should be modified to reflect that High's fine was probated.

The trial court's order of deferred adjudication is affirmed as modified.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RAYFORD HIGH, Appellant

No. 05-15-00074-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 7, Dallas County, Texas
Trial Court Cause No. F-1257938-Y.
Opinion delivered by Justice Lang. Justices Brown and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The trial court's judgment is modified to reflect that appellant's fine was probated.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of July, 2016.