AFFIRM; and Opinion Filed May 6, 2016.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00974-CR

MCCLAIN EDWARD GLICKMAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Collin County, Texas
Trial Court Cause No. 002-87183-2014

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and Schenck
Opinion by Justice Schenck

We withdraw our opinion of March 18, 2016 and substitute this opinion in its place. Appellant McClain Edward Glickman appeals the trial court's order denying his motion to suppress evidence in his driving while intoxicated (DWI) case. In two issues, appellant argues the trial court misinterpreted and misapplied the law and the evidence does not support appellant's detention. Because the trial court did not misapply the law and the evidence supports a finding of reasonable suspicion to detain appellant, we affirm the trial court's order denying appellant's motion. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Appellant was charged with DWI and with having previously been convicted of DWI. Prior to entering a plea of guilty, appellant moved to suppress all evidence obtained as a result of the traffic stop, alleging Officer Delia Rangel did not have reasonable suspicion to detain him.

At the hearing on appellant's motion, the State called Officer Rangel to testify. She was the sole witness to testify at the hearing. She testified that on December 1, 2013, at approximately 11:00 p.m., she was dispatched to northbound Central Expressway, west of Bethany Road, in response to a 911 call reporting a Nissan Maxima traveling north on Central Expressway was speeding and swerving. Officer Rangel testified there were few cars on the road at that time and only one silver Nissan Maxima. She identified appellant as the driver of that vehicle. Officer Rangel stated she saw the vehicle driving on the improved shoulder for no apparent reason. The vehicle then swerved into the right lane, then into the center lane, and then back to the right lane all without signaling. Officer Rangel concluded appellant had committed the traffic offenses of driving on an improved shoulder and changing lanes without signaling. In addition to Officer Rangel's testimony, the State offered a copy of the 911 call and the police vehicle's in-car video of the stop. The trial court admitted the recordings into evidence and they were published at the hearing.

After hearing the testimony of Officer Rangel and viewing the video of the traffic stop, the trial court noted the video shows that at the hour of 22:35:03 all four tires of appellant's car were on the improved shoulder and that nine seconds later the car swerved into the center lane. The trial court found none of the seven approved purposes for driving on an improved shoulder were present when appellant operated his vehicle on the improved shoulder. The trial court concluded appellant violated Texas Transportation Code section 545.058 and such violation provided justification for the stop and detention. Accordingly, the trial court denied appellant's motion to suppress.

Standard of Review

We review a trial court's ruling on a motion to suppress for abuse of discretion. *See Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999). The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000) (en banc). Thus, we afford almost total deference to a trial court's determination of historical facts supported by the record which are based upon evaluation of credibility and demeanor of the witnesses. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (en banc). Consequently, the findings of fact of the trial court, which find support in the record, and the rational inferences drawn from the supported facts, are entitled to deference on appeal. *See Manzi v. State*, 88 S.W.3d 240, 243 (Tex. Crim. App. 2002). However, the legal conclusion drawn from those facts is reviewed *de novo. See Kothe v. State*, 152 S.W.3d 54, 62 (Tex. Crim. App. 2004) (holding questions involving legal principles and the application of law to established facts are reviewed *de novo*).

Discussion

In this case, the State stipulated appellant was arrested without a warrant. Therefore, the State had the burden to prove that the initial detention was legal. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005) (citing *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002) (en banc).

An officer conducts a lawful temporary detention when he or she has reasonable suspicion to believe that an individual is violating the law. *Id.* (citing *Balentine v. State*, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002). 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 actually is, has been, or soon will be engaged in criminal activity. *Id.* (citing *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001).

Officer Rangel testified she observed appellant's vehicle cross over onto the improved shoulder on the solid white line. This according to the officer was the traffic offense of driving on the improved shoulder. TEX. TRANSP. CODE ANN. § 545.058 (West 2011). Driving on an improved shoulder is not permitted unless it is necessary and may be done safely, but only for one of the following purposes:

> (1) to stop, stand, or park;
>
> (2) to accelerate before entering the main travelled lane of traffic;
>
> (3) to decelerate before making a right turn;
>
> (4) to pass another vehicle that is slowing or stopped on the main traveled portion of the highway, disabled, or preparing to make a left turn;
>
> (5) to allow another vehicle traveling faster to pass;
>
> (6) as permitted or required by an official traffic-control device; or
>
> (7) to avoid a collision.

Id.

Appellant's first issue has two sub-parts. In the first sub-part, appellant argues the trial court's statement during the hearing that the statute at issue contains a three-part test and applies if driving on an improved shoulder is necessary, done in a safe manner, and done for one of the seven enumerated reasons, establishes it misinterpreted and misapplied the law. Appellant cites *Lothrop v. State* for the proposition that the concept of being necessary is not a free-standing requirement, but rather is tied to one of the seven enumerated purposes. 372 S.W.3d 187, 190 (Tex. Crim. App. 2012). In *Lothrop v. State*, the Texas Court of Criminal Appeals stated the offense of illegally driving on an improved shoulder can be proved in one of two ways: either driving on the improved shoulder was not a necessary part of achieving one of the seven approved purposes, or driving on the improved shoulder could not have been done safely. *Id.* at 191. Thus, if an officer sees a driver driving on an improved shoulder, and it appears that driving on the improved shoulder was necessary to achieving one of the seven approved

purposes, and it is done safely, that officer does not have reasonable suspicion that an offense occurred. *Id.* In this case, the trial court found none of the enumerated purposes in section 545.058 existed at the time appellant drove his vehicle on an improved shoulder. Thus, an analysis of necessity did not come into play and the trial court did not misapply the law. We overrule the first sub-part of appellant's first issue.

In the second sub-part, appellant argues the trial court in effect placed a burden on appellant to explain what motivated him to drive his vehicle on the shoulder. Appellant cites to no authority that reflects the driver's motivation is a consideration when determining whether a detention is legal and we have found none. The Fourth Amendment inquiry is focused on whether the arresting officer made an objectively reasonable traffic stop, not the driver's intention or explanation for seemingly unlawful behavior. *Crittenden v. State*, 899 S.W.2d 668, 671 (Tex. Crim. App. 1995). To make an investigative stop, the officer must possess a reasonable suspicion based on specific, articulable facts that, in light of the officer's experience and general knowledge, would lead the officer to reasonably conclude the person detained actually is, has been, or soon will be engaged in criminal activity. *Garcia*, 43 S.W.3d at 530. Thus, there was no impermissible shifting of burdens in this case. We overrule the second sub-part of appellant's first issue.

In his second issue, appellant argues the evidence established Officer Rangel's vehicle traveled at a speed that allowed her to overtake appellant's vehicle and therefore it was a vehicle traveling faster that would justify appellant driving onto the improved shoulder to let her vehicle pass. In support of this argument, appellant contends the light emanating from the headlights of Officer Rangel's patrol car alerted appellant the vehicle behind him was closing the gap between the vehicles and justified his decision to turn his vehicle onto the improved shoulder of the highway. Nevertheless, appellant's argument and the record do not support the conclusion that

the trial court abused its discretion in finding the officer was justified in stopping and detaining appellant. The video recording shows appellant did not pull over to let Officer Rangel pass, rather he drove onto the shoulder for approximately 9 seconds and then moved into the right lane, then the center lane, and then back to the right lane. During that time, Officer Rangel did not pass appellant's vehicle. Thus, the evidence before the trial court does not compel the conclusion that appellant was pulling over to permit Officer Rangel to pass when he drove on the shoulder and the trial court did not err in denying appellant's motion to suppress. We overrule appellant's second issue.

CONCLUSION

We conclude the evidence supports a finding that Officer Rangel had a reasonable suspicion that appellant had committed a traffic violation when she detained him. Accordingly, we affirm the trial court's order denying appellant's motion to suppress.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47

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JUDGMENT

MCCLAIN EDWARD GLICKMAN, Appellant

No. 05-15-00974-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2, Collin County, Texas
Trial Court Cause No. 002-87183-2014.
Opinion delivered by Justice Schenck. Justices Fillmore, and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 6th day of May, 2016.