

AFFIRM; and Opinion Filed November 29, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-01445-CR

**THOMAS BREYFOGLE, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the County Criminal Court No. 3
Dallas County, Texas
Trial Court Cause No. MB1631128-C**

MEMORANDUM OPINION

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

A jury found Thomas Breyfogle guilty of giving certain false or fictitious identifying information to a police officer while lawfully detained, *see* TEX. PENAL CODE ANN. § 38.02(b) (West 2016), and the trial court sentenced Breyfogle to thirty days confinement in the Dallas County Jail. In a single point of error, Breyfogle contends the trial court erred by failing to properly define the term “lawful detention” in the jury charge, rendering the instructions fundamentally erroneous. We affirm the trial court’s judgment.

Background

On June 19, 2016, Officer Thomas Berrettini of the Grand Prairie Police Department saw a white Ford Focus hatchback driven by Breyfogle change lanes with its turn signal on but no

illuminated taillights. Officer Berrettini knew the absence of functioning taillights was a violation of section 547.322 of the Texas Transportation Code,¹ and initiated a traffic stop.

Upon approaching the vehicle, Officer Berrettini recognized a barcode on the window indicating the car was a rental. In Officer Berrettini's experience, renters "don't recognize" headlight settings on new Ford vehicles. In their initial conversation, Officer Berrettini and Breyfogle discussed the rental vehicle, the new headlight settings, and the vehicle's non-illuminating taillights. Breyfogle appeared to be evasive and hesitant in his responses, and did not make eye contact with Officer Berrettini.

As part of the traffic stop, Officer Berrettini requested Breyfogle's driver's license. Breyfogle responded that he "was visiting," and did not have his Oregon driver's license with him because he left it in Oregon. In response to Officer Berrettini's repeated requests for identification, Breyfogle alternately falsely identified himself as "Tom Smith," "Thomas Smith," and "Thomas George Smith," and claimed his birthdate was November 24, 1972. Breyfogle provided the same false information to Officer Berrettini in writing. All computer checks of the information provided by Breyfogle yielded negative results. No one answered a telephone number provided by Breyfogle to reach a family member who could verify Breyfogle's identity. When asked what he was doing in Grand Prairie, Texas at 11:45 pm, Breyfogle changed his story several times.

Officer Berrettini warned Breyfogle that he believed Breyfogle was providing incorrect information, and if Officer Berrettini was unable to identify him, Breyfogle would be placed under arrest for failing to provide a driver's license and given a traffic citation for not having illuminated taillights. Breyfogle continued to insist the false information was correct, and Officer Berrettini placed Breyfogle under arrest. During a search incident to arrest, Officer

¹ TEX. TRANSP. CODE ANN. § 547.322 (Vernon 2011); *see also Montes v. State*, No. 08-13-00060-CR, 2015 WL 737988, at*2 (Tex. App.—El Paso Feb. 20, 2015, no pet.) (not designated for publication).

Berrettini found a wallet in Breyfogle's pocket containing a Texas driver's license identifying Breyfogle as "Thomas George Breyfogle" and indicating November 24, 1971 was his date of birth.

At trial, Breyfogle contested whether his detention was lawful, and the trial court instructed the jury as follows:

You are instructed that under our law, a peace officer may legally detain a suspect if he has reasonable suspicion to make said detention.

By the term "reasonable suspicion," as used herein, is meant where the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, that some activity out of the ordinary has occurred, and some suggestion to connect the defendant with the unusual activity and some indication that the activity is related to crime.

The law requires a vehicle to display to [sic] lighted tail lamps at nighttime or when light is insufficient or atmospheric conditions are unfavorable so that a person or vehicle on the highway is not clearly discernable at a distance of 1000 feet ahead.

Now, therefore, if you find and believe from the evidence beyond a reasonable doubt that . . . Breyfogle . . . [did] intentionally give a false or fictitious name or date of birth to T. Berrettini, whom defendant knew was a peace officer . . . who had lawfully detained said defendant, you will find the defendant guilty.

On appeal, Breyfogle complains for the first time Officer Berrettini exceeded his lawful right of detention; the court's jury instruction defining "legally detain" was incomplete, fundamentally erroneous, and caused egregious harm; and his conviction should be reversed and remanded for a new trial on the merits.

Standard of Review

Appellate review of alleged jury charge error is a two-pronged analysis. *See Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). First, we determine whether the jury charge contains error. Second, if there is error in the charge, we determine whether sufficient harm resulted to require a reversal of the conviction. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015); *Ngo*, 175 S.W.3d at 743–44.

Error properly preserved by objection requires reversal if the defendant suffered “some harm.” *Ngo*, 175 S.W.3d at 743. Error not preserved by objection must be “fundamental” to warrant reversal, causing such egregious harm that the defendant was “deprived of a fair and impartial trial.” *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015); *see also Ngo*, 175 S.W.3d at 743–44. “Egregious harm is a ‘high and difficult standard’ to meet,” *Villareal*, 453 S.W.3d at 433 (quoting *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013)), and “affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory.” *Id.* A determination of egregious harm “must be ‘borne out by the trial record.’” *Id.* (quoting *Reeves*, 420 S.W.3d at 816). The record must show the defendant suffered actual and not merely theoretical harm. *Id.* Factors considered in the harm analysis are: (1) the jury charge as a whole, (2) the state of the evidence, (3) the arguments of counsel, and (4) other relevant factors present in the record. *Id.* Absent evidence to the contrary, we presume the jury understood and followed the jury charge. *See Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996).

Analysis

In his only point of error, Breyfogle contends the trial court erred by insufficiently defining “legally detain” in the jury charge. Specifically, he argues that by not instructing the jury to find that the “officer’s subsequent actions were reasonably related in scope to the circumstances that caused the vehicle stop,” the element of lawful detention was not met, causing egregious harm and reversible error. The State responds the trial court’s definition was correct, the jury was properly instructed, and in any case, Breyfogle, who did not object to the charge, was not egregiously harmed.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures by governmental officials. U.S. CONST. amend. IV. A defendant asserting that police action violated the Fourth Amendment bears the burden of providing evidence to

rebut the presumption that law enforcement conduct was proper. *State v. Woodward*, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011). Evidence that a search or seizure was conducted without a warrant satisfies this burden. *Id.* The burden then shifts to the State to establish that the search or seizure nevertheless was reasonable under the applicable standard – either reasonable suspicion or probable cause. *Id.*

A traffic stop and corollary investigative detention must be reasonable under the totality of the circumstances. *See* U.S. CONST. amend. IV; TEX. CONST. art. I. § 9; *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013). A police officer may lawfully stop a vehicle if he has a reasonable basis for suspecting the motorist has committed a traffic violation. *Garcia v. State*, 827 S.W.2d 937, 944–45 (Tex. Crim. App. 1992); *State v. Gammill*, 442 S.W.3d 538, 540 (Tex. App.—Dallas 2014, pet. ref’d). Reasonable suspicion requires the officer to have “specific, articulable facts that reasonably lead to the conclusion the person detained is, has been, or soon will be engaged in criminal activity.” *Gammill*, 442 S.W.3d at 540. Routine traffic stops are more analogous to investigative detentions than custodial arrests, and are analyzed as “*Terry* stops.” *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). In determining the reasonableness of an investigative detention under *Terry*, we consider: (1) “whether the officer’s action was justified at its inception,” and (2) “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 19–20; *see also Davis v. State*, 947 S.W.2d 240, 242 (Tex. Crim. App. 1997). In this appeal, Breyfogle does not dispute the lawfulness of the stop, which was justified because Officer Berrettini observed the taillights on Breyfogle’s vehicle were not illuminated, in violation of the Texas Transportation Code. Therefore, we focus on *Terry*’s second prong.

Breyfogle contends the trial court’s charge was fundamentally erroneous because its definition of “legally detain” did not require the jury to find Officer Berrettini’s “subsequent actions were reasonably related in scope to the circumstances that caused the vehicle stop.”

Breyfogle, however, does not identify the “subsequent action” he complains of, and the record does not show any action by Officer Berrettini other than the initial traffic stop and attendant requests for identifying information. Breyfogle’s argument implicitly challenges the lawfulness of Officer Berrettini’s request for Breyfogle’s driver’s licence, name, and state of residence.

An officer conducting a traffic stop has the right to ask for a driver’s license, insurance papers and identification, run a computer check on the information provided by the defendant, and check for outstanding warrants. *Rodriguez v. United States*, 135 S. Ct. 1609, 1611 (2015) (“Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.”); *see also Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004). The officer also may ask about the driver’s travel plans. *Id.* at 64 n. 36.² Mere questioning is neither a search nor a seizure. *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).³

The traffic stop investigation is fully resolved only after police determine the driver has a valid license and no outstanding warrants, and the car is not stolen. *Kothe*, 152 S.W.3d at 63–64. Upon concluding the investigation of the conduct that initiated the traffic stop, continued detention is permissible if the officer has reasonable suspicion to believe another offense has been or is being committed. *See St. George v. State*, 197 S.W.3d 806, 817 (Tex. App.—Fort Worth 2006), *aff’d*, 237 S.W.3d 720, 721 (Tex. Crim. App. 2007). Officer Berrettini’s request for Breyfogle’s identifying information was not a “subsequent event” as Breyfogle suggests.

² *See also Salinas v. State*, No. 05-11-00048-CR, 2012 WL 3553498, at *3 (Tex. App.—Dallas Aug. 20, 2012, no pet.); *Williams v. State*, No. 05-02-00320-CR, 2003 WL 22020783, at *3 (Tex. App.—Dallas Aug. 28, 2003, no pet.) (not designated for publication) (during valid detention, officer may ask about driver’s destination and purpose of travel).

³ *See also Williams*, 2003 WL 22020783, at *3.

Rather, it was part and parcel of the lawful detention resulting from Breyfogle's violation of section 547.322 of the Texas Transportation Code. *See Kothe*, 152 S.W.3d at 63; TEX. TRANSP. CODE ANN. § 547.322.

Under section 38.02(b)(2) of the Texas Penal Code, it is an offense for a lawfully detained person to give a false or fictitious name, residence address, or date of birth to an officer.⁴ During the course of Officer Berrettini's lawful traffic stop, Breyfogle violated section 38.02 by providing a false name, state of residence, and date of birth to Officer Berrettini no fewer than seven times, and untruthfully stating he did not have his driver's license with him. When Officer Berrettini's multiple computer checks returned negative results under the false information and Officer Berrettini warned Breyfogle he would be placed under arrest if he did not provide valid identifying information, Breyfogle continued to insist that the false information was correct.

In this case, Officer Berrettini's investigation of Breyfogle's traffic violation was never concluded, because Breyfogle never provided a driver's license, correct name, birthdate, or state of residence that allowed Officer Berrettini to identify Breyfogle. The initial investigation was ongoing, and Officer Berrettini properly continued to detain Breyfogle because he had reasonable suspicion, based on "specific, articulable facts," *Gammill*, 442 S.W.3d at 540, that Breyfogle was committing another offense – giving a false name, date of birth and residence. *Overshown v. State*, 329 S.W.3d 201, 209 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (concluding that appellant was lawfully detained at the inception of the stop when he provided false information to the officer).

On appeal, Breyfogle does not challenge the lawfulness of the traffic stop, the scope or length of the detention, that his vehicle did not have illuminated headlights, or that he provided

⁴ *See* TEX. PENAL CODE ANN. §38.02(b)(2) (West 2016).

false and fictitious identifying information to Officer Breyfogle during the course of the traffic stop. Breyfogle only contends the trial court should have instructed the jury he was “legally detained” if the jury found the “officer’s subsequent actions were reasonably related in scope to the circumstances that caused the vehicle stop.” The trial record does not show, and Breyfogle does not identify, any “subsequent action” by Officer Berrettini separate and apart from the traffic stop investigation, which was proper and lawful.

The trial court’s charge properly instructed the jurors to find Breyfogle guilty if they found beyond a reasonable doubt that Breyfogle provided false or fictitious information to an officer who had lawfully detained him. *See* TEX. PENAL CODE ANN. § 38.02(b)(2). The trial court’s definition of “legally detain” was correct as to the issues and evidence raised at trial, and posed no risk that the jurors would arbitrarily apply their own definition, or misunderstand the evidence and issues before them. *See Middleton v. State*, 125 S.W.3d 450, 454 (Tex. Crim. App. 2003) (concluding that the trial court did not err in omitting a definition of “probable cause” in a case in which the sole factual dispute was whether appellant stopped at a stop sign).

The trial court’s definition of “legally detain” in the jury charge was not in error. Accordingly, we resolve Breyfogle’s issue against him, and affirm the judgment of the trial court.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

THOMAS BREYFOGLE, Appellant

No. 05-16-01445-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court

No. 3, Dallas County, Texas

Trial Court Cause No. MB1631128-C.

Opinion delivered by Justice Fillmore.

Justices Bridges and Stoddart participating.

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

Judgment entered this 29th day of November, 2017.