AFFIRM; and Opinion Filed January 3, 2018.

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-17-00182-CR

CHRISTOPHER LOWELL EMERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court No. 6
Dallas County, Texas
Trial Court Cause No. MB14-49199-G

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Schenck

Appellant Christopher Lowell Emerson was charged with driving while intoxicated, after being stopped for speeding. He filed a motion to suppress, contesting the legality of the stop. A hearing was held by the trial court, and the motion was denied. Appellant then pleaded guilty pursuant to a plea agreement. In a single issue, appellant asserts the trial court erred in denying his motion to suppress because his traffic stop was unlawful. Because the evidence supports the trial court's finding of reasonable suspicion to detain appellant, we affirm his conviction. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

State Trooper Mykal Golden stopped appellant for speeding in the early morning hours of March 9, 2014. Golden saw appellant exceeding the posted 65-mile-per-hour speed limit on the Dallas North Tollway and verified through the use of a radar, which he had been trained to use,

that appellant was speeding. After stopping appellant, Golden detected the odor of alcohol on appellant's breath. Appellant refused to do field sobriety tests, and Golden arrested him for driving while intoxicated.

Appellant filed a motion to suppress requesting that the trial court suppress all evidence seized or obtained from what appellant claims to have been an unlawful detention and unjustified search. The trial court denied appellant's motion. Thereafter, appellant entered into a plea agreement, and the trial court entered judgment on the negotiated plea and certified appellant's right to appeal its ruling on 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 (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, 62–63 (Tex. Crim. App. 2004) (holding questions involving legal principles and the application of law to established facts are reviewed *de novo*). If the trial court's determination is correct on any theory of law applicable to the case, we will uphold the determination. *See Charmouche v. State*, 10 S.W.3d 323, 327–28 (Tex. Crim. App. 2000).

DISCUSSION

The State stipulated that 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)).

Articulable facts must amount to more than a mere hunch, suspicion, or good-faith suspicion that a crime was in progress. *Williams v. State*, 621 S.W.2d 609, 612 (Tex. Crim. App. 1981). The facts must show unusual activity, some evidence that connects the detainee to the unusual activity, and some indication that the unusual activity is related to crime. *Derichsweiler v. State*, 348 S.W.3d 906, 916 (Tex. Crim. App. 2011). The likelihood of criminal activity need not rise to the level required for probable cause or even a preponderance of the evidence. *Paul v. State*, No. 05-12-01079-CR, No. 05-12-01080-CR, 2014 WL 1118130, at *2 (Tex. App.—Dallas Mar. 20, 2014, no pet.) (citing *State v. Kerwick*, 393 S.W.3d 270, 273–74 (Tex. Crim. App. 2013)).

Trooper Golden testified he detained appellant for speeding. Under the transportation code, an operator may not drive at a speed greater than is reasonable and prudent under the circumstances then existing. TEX. TRANSP. CODE ANN. § 545.351(a) (West 2011).

Appellant contends the State failed to meet its burden of proving the initial detention was lawful because the evidence presented in response to appellant's motion to suppress contained no specific, articulable facts as to (1) the speed at which he was allegedly driving, (2) the maximum

speed limit applicable at his location at the time of the alleged speeding, and (3) how his alleged act of speeding had been unreasonable or imprudent under the circumstances.

As to appellant's contention that the State failed to establish appellant was traveling at a speed that was not reasonable and prudent under circumstances then existing, Golden testified that appellant exceeded the posted speed limit. Driving at a speed in excess of the speed limit is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful. *Id.* § 545.352(a) (West Supp. 2017). Prima facie evidence is defined as evidence "[s]ufficient to establish a fact . . . unless disproved or rebutted." *Prima Facie*, Black's Law Dictionary (10th ed. 2014). Thus, the State presented prima facie proof appellant was traveling at a speed that was not reasonable and prudent, and that proof was not rebutted.

Appellant relies on *Ford v. State,* 158 S.W.3d 488 (Tex. Crim. App. 2005) in arguing the trial court erred in denying his motion because the State failed to establish his speed at the time of detention. Appellant's reliance on *Ford* is misplaced. In that case, Trooper Peavy temporarily detained Ford for an alleged traffic violation and, in the course of that temporary detention, discovered contraband in Ford's vehicle. Ford, who was later indicted for possession of the contraband, filed a motion to suppress, arguing that Peavy did not have reasonable suspicion to justify the temporary detention. At the suppression hearing, the only evidence presented concerning the reasonableness of the temporary detention was Peavy's testimony that he stopped Ford's vehicle because it was "following too close behind" the vehicle in front of it. The trial court denied the motion to suppress, and the court of appeals upheld that denial. The court of criminal appeals reversed, holding that Peavy's testimony was nothing more than "a conclusory statement that Ford [had] violate[d] a traffic law" and was, therefore, insufficient to reasonably support a finding of reasonable suspicion. *Id.* at 493–94. In the instant case, in contrast, the record contains

abundant non-conclusory evidence, discussed below, supporting a finding of reasonable suspicion of a traffic violation. Thus, *Ford* is distinguishable on its facts.

At the hearing, Golden testified to the facts that led him to perform the investigative detention. His in-car video was also entered into evidence. Trooper Golden testified he detained appellant for speeding on the North Dallas Tollway. His testimony included a description of how he was trained in estimating a vehicle's speed and the use of radar equipment. The State asked Trooper Golden questions intended to establish reasonable suspicion for stopping appellant. To that end, Golden testified that while patrolling the North Dallas Tollway, and driving at the speed limit, he observed appellant's vehicle approaching from behind at a rate of speed higher than that at which he was traveling. He then used his radar equipment and found that appellant's vehicle was traveling 70 miles an hour in a 65-mile-per-hour speed zone. He noticed that as appellant's vehicle neared his vehicle it slowed down. He changed lanes and reduced his speed to approximately 40 miles per hour to allow the vehicle pass, but it did not. He found this behavior suspicious so he pulled on to the shoulder and stopped. After appellant's vehicle passed his car, Golden re-entered the roadway and followed appellant's vehicle. He observed appellant was speeding, and clocked his speed at 77 miles per hour.

We note that an officer's visual estimates of speed can suffice to establish reasonable suspicion to conduct a traffic stop. *See Hesskew v. Texas Dept. of Public Safety*, 144 S.W.3d 189, 191 (Tex. App.—Tyler 2004, no pet.). Golden testified as to the speed he was travelling and about how he observed appellant traveling above the speed limit.

As to Golden's testimony concerning his use of the radar equipment, appellant contends that his cross-examination of Golden discredited this testimony. On direct examination, Golden testified that he is radar certified. He checks the radar at the beginning and end of his shifts and at the end of every stop, he does an internal circuitry check to make sure it's working properly.

On the night in question, he tested the radar system and it was operating properly. The circuitry check showed the internal calibration was operating properly. He testified that the speedometer was operating properly. During cross-examination, appellant's defense counsel questioned Golden at length about the radar equipment on his patrol car, maintenance of the car, his training and knowledge of radar equipment, and transportation code provisions in general, in an attempt to impeach Golden on the articulated facts for his detention of appellant. The trial court rejected appellant's credibility argument and found Golden provided credible testimony and was qualified to operate the radar equipment.

Moreover, even if the radar reading is ultimately shown to be inaccurate or false, when an officer relies on radar to conduct a traffic stop, he has developed reasonable suspicion that a defendant was speeding. *Icke v. State,* 36 S.W.3d 913, 916 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). Furthermore, Golden could have stopped appellant for speeding without the use of the radar. *Id.* at 915. The State did not have to prove the actual speed that appellant was traveling, just that he was exceeding the speed limit. *See e.g., McAllister v. State*, No. 04-96-00295-CR, 1997 WL 31165, at *2 (Tex. App.—San Antonio Jan. 29, 1997, no pet.). Appellant's reliance on transportation code section 543.010's requirement that the State prove the exact speed is misplaced because appellant was not cited for speeding. TEX. TRANSP. CODE ANN. § 543.010 (West 2011) (specifications of speeding charge). We conclude the State provided specific, articulable facts to support the trial court's finding that appellant was speeding at the time of detention.

As to appellant's contention that the State failed to prove the maximum speed limit at the location of his detention, Golden testified that the speed limit was 65 miles per hour. After the State closed, appellant testified about the speed limits on the North Dallas Tollway, and photographs he had taken of a speed sign located near his detention that was partially obscured by tree branches and leaves. Appellant's reliance on the partial obstruction of the sign and

transportation code section 544.004(b), which prohibits enforcement of compliance with a traffic-control device if the device is not sufficiently legible, as bases to argue the State failed to establish the speed limit is misplaced. Section 544.004(b) applies to traffic-control devices, not speed signs. *Id.* 544.004(b). Appellant has cited no case in which an officer could not form a reasonable suspicion that a driver was speeding because of a partially obscured speed-limit sign. Moreover, appellant acknowledged that he travels on the North Dallas Tollway frequently and that the speed limits range from 65 miles per hour to 70 and that the speed limit changes from 65 miles per hour to 70 further north from where he was traveling when he was stopped. Accordingly, the trial court did not abuse its discretion if finding appellant was travelling at 77 miles per hour in a 65 mile an hour speed zone when Golden activated his lights and pulled him over.

In considering the totality of circumstances and in viewing the evidence in the light most favorable to the trial court's ruling, we conclude the traffic stop initiated by Golden was based on a reasonable suspicion that appellant had committed a traffic violation. *See e.g., Loesch v. State*, 958 S.W.2d 830, 832 (Tex. Crim. App. 1997). Accordingly, the trial court did not abuse its discretion in overruling appellant's motion to suppress. We overrule appellant's sole issue.

CONCLUSION

We conclude the evidence supports a finding that Golden had a reasonable suspicion that appellant had committed a traffic violation when he detained him. Accordingly, we affirm the trial court's order denying appellant's motion to suppress and affirm appellant's conviction for driving while intoxicated.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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TEX. R. APP. P. 47

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHRISTOPHER LOWELL EMERSON, Appellant

No. 05-17-00182-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court No. 6, Dallas County, Texas
Trial Court Cause No. MB14-49199-G.
Opinion delivered by Justice Schenck.
Justices Lang and Evans participating.

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

Judgment entered this 3rd day of January, 2018.