**Opinion issued December 9, 2010**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-09-00560-CR**

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**KEITH GREGORY PELTIER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 23rd District Court**
**Brazoria County, Texas**
**Trial Court Case No. 57357**

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## MEMORANDUM OPINION

A jury convicted appellant, Keith Gregory Peltier, of the enhanced offense of operating a motor vehicle in a public place while intoxicated with two previous convictions for that offense. *See* TEX. PENAL CODE ANN. §§ 49.04(a), 49.09(b)(2)

(Vernon 2003 & Supp. 2010). After finding true the allegations in the enhancement paragraphs that Peltier had two previous convictions for felony offenses, the jury assessed punishment at seventy-five years' confinement. *See* Act of May 15, 2007, 80th Leg., R.S. ch. 340, § 4, 2007 Tex. Gen. Laws 627, 628 (former TEX. PENAL CODE § 12.42(d), since amended). Peltier presents two issues on appeal, complaining that the trial court erred by denying his motion to suppress evidence and that the evidence was factually insufficient to support his conviction. We affirm.

**Background**

Department of Public Safety Trooper J. Johnson testified that he was purchasing gasoline around 5:00 p.m. when he observed an individual he later identified as Peltier driving a vehicle and leaving the service station. Johnson's attention was drawn to the vehicle because Peltier stopped the vehicle and got out, leaving the driver's door open. Peltier then approached another man and began a conversation. Johnson found the situation unusual because the men were staring at him and Peltier returned to his vehicle on more than two occasions seemingly to retrieve something, but he returned empty-handed each time.

Peltier eventually drove out of the parking lot onto a street, but he then circled back to the service station parking lot. Peltier drove past Johnson to a section of the parking lot out of the trooper's view. Johnson next saw Peltier

walking into the service station's store, and he described Peltier as stumbling and staggering. Johnson followed Peltier into the store, said that he saw him stumble, and asked if he was okay. Peltier responded that he was fine and was not on any medication. Johnson testified that he smelled alcohol on Peltier's breath when he responded to questions.

Johnson then asked Peltier to step outside the store and asked when he had last consumed alcohol. Peltier said that he had consumed an alcoholic beverage first thing that morning. Johnson then conducted a horizontal-gaze-nystagmus test. Johnson testified that he detected nystagmus and that Peltier had difficulty following his instructions. On cross-examination, Johnson stated that he did not perform the horizontal-gaze-nystagmus test according to the specific standards set out by the National Highway Traffic Safety Administration (NHTSA), as he apparently performed 11 passes instead of 14.

Johnson then asked Peltier to get into his patrol car, and he drove to another part of the parking lot to conduct field-sobriety tests. Johnson administered a walk-and-turn test, and Peltier was unable to complete the test, both failing to count to nine while walking and failing to walk in a straight line. Johnson did not administer the walk-and-turn test because he was concerned that Peltier might fall. For the same reason, he did not ask Peltier to perform the one-leg stand. Johnson admitted that people who, like Peltier, are more than fifty pounds overweight may

have trouble with the walk-and-turn test, but he also took into consideration "that he was kind of incoherent, lethargic, . . . his clothes were wrinkled, his zipper was unzipped," as well as the odor of alcohol. Johnson also asked Peltier to recite the alphabet, which he was unable to do. Johnson stated at trial that the alphabet test is not a standard field-sobriety test recognized by NHTSA.

After administering these tests, Johnson concluded that Peltier was intoxicated and arrested him. Johnson read Peltier the statutory warnings before requesting a breath sample, to which Peltier replied, "Hell, no." The field sobriety test and Peltier's arrest were recorded on video and later played for the jury.

After being arrested, Peltier mentioned to Johnson that he had diabetes. Johnson admitted that he had experience with diabetics and that their diabetes may affect the field-sobriety tests. Nonetheless, it was Johnson's opinion that Peltier was intoxicated, because Johnson did not see Peltier take any medicine or insulin, or drink anything like orange juice, yet Peltier became progressively more alert. Peltier's condition was contrary to Johnson's experience with diabetics, which is that they get progressively worse without treatment.

At trial, Peltier presented only one defense witness, his father, who came to the service station to retrieve his son's vehicle after he was informed of his son's arrest. The father testified that he did not smell alcohol on his son's breath, though he never got close to him, and that his son "looked all right to me." He also stated

that his son has Type II diabetes, takes insulin in the morning and the evening, and appeared to have normal mental and physical faculties on the morning of the arrest.

Peltier moved to suppress evidence of the arrest and the contents of the videotape. At a pretrial suppression hearing, he argued that evidence pertaining to the arrest should be suppressed because the arrest was illegal. Peltier's counsel contended that Johnson's testimony provided no basis for reasonable suspicion or probable cause to initiate the temporary detention prior to conducting field-sobriety tests. The trial court denied the motion to suppress. Peltier was convicted and this appeal ensued.

## Discussion

### I. Motion to suppress

In his first issue, Peltier contends that the trial court abused its discretion in denying his pretrial motion to suppress the videorecording of the field-sobriety tests and arrest. Peltier argues that the motion should have been granted because Johnson did not have reasonable suspicion to detain him, and therefore the subsequent arrest was unlawful.

#### a. Standard of review

A trial court's ruling on a motion to suppress is reviewed by an abuse-of-discretion standard. *Balentine v. State*, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002). In reviewing a trial court's ruling on a motion to suppress evidence

and its determination of the reasonableness of either a temporary investigative detention or an arrest, the appellate court uses a bifurcated standard of review. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). We must give "almost total deference to a trial court's determination of the historical facts that the record supports especially when the trial court's fact findings are based on an evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). This "deferential standard of review in *Guzman* applies to a trial court's determination of historical facts when that determination is based on a videotape recording admitted into evidence at a suppression hearing." *Montanez v. State*, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006).

We also afford the same level of deference to a trial court's ruling on "application of law to fact questions," or "mixed questions of law and fact," if the resolution of those questions turns on an evaluation of credibility and demeanor. *Id.* at 106 (citing *Guzman*, 955 S.W.2d at 89). We review de novo "mixed questions of law and fact" that do not depend upon credibility and demeanor. *Montanez*, 195 S.W.3d at 106 (citing *Guzman*, 955 S.W.2d at 89). A trial court's assessment of when a detainment takes place is a mixed question of law and fact that does not depend upon credibility and demeanor. *Hunter v. State*, 955 S.W.2d 102, 105 n.4 (Tex. Crim. App. 1997). Therefore, we review this question de novo. *Id.*

**b. Reasonable suspicion**

When a police officer has stopped a defendant without a warrant and without the defendant's consent, the State has the burden at a suppression hearing of proving the officer had reasonable suspicion to believe the individual was violating the law. *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007); *Amador*, 221 S.W.3d at 672–73; *Russell v. State*, 717 S.W.2d 7, 9–10 (Tex. Crim. App. 1986). An officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks evidence rising to the level of probable cause. *Ornelas v. United States*, 517 U.S. 690, 693, 116 S. Ct. 1657, 1660 (1996); *Terry v. Ohio*, 392 U.S. 1, 27–30, 88 S. Ct. 1868, 1883–84 (1968); *Castro*, 227 S.W.3d at 741; *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001); *Woods v. State*, 956 S.W.2d 33, 35 (Tex. Crim. App. 1997); *Citizen v. State*, 39 S.W.3d 367, 370 (Tex. App.—Houston [1st Dist.] 2001, no pet.). This standard is an objective one. There need only be an objective basis for the stop; the subjective intent of the officer conducting the stop is irrelevant. *Garcia*, 43 S.W.3d at 530. The reasonable-suspicion determination is made by considering the totality of the circumstances. *Id.*

### i. Questioning within the store

Peltier argues that the trial court abused its discretion by denying his motion to suppress the videorecording as evidence because it resulted from an unlawful detention. Peltier contends that Johnson's persistent questioning of him within the store constituted a detention and that the State produced insufficient facts to support a reasonable suspicion for the detention.

We first determine de novo when Johnson detained Peltier. *See Hunter*, 955 S.W.2d at 105 n.4. Peltier contends that he was detained in the service station's store after Johnson approached him and asked him if he was okay. Peltier responded he was not sick, and Johnson then said that he saw him stumble and asked if he was on any medication. We conclude that Johnson's questioning of Peltier in the store did not constitute a detention. "A police officer's asking questions . . . do[es] not alone render an encounter a detention. *Only if the officer conveyed a message that compliance was required* has a consensual encounter become a detention." *Hunter*, 955 S.W.2d at 106 (emphasis in original). Nothing in the record indicates that Peltier was required to answer the questions nor did Peltier produce any evidence at trial to suggest that his answers were nonconsensual. *See Johnson v. State*, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995) ("[E]ncounters are consensual so long as a reasonable person would feel free 'to disregard the police and go about his business.'" (quoting *California v. Hodari*

*D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 1552 (1991)). Thus, we conclude that Johnson detained Peltier when he asked him to step outside the service station's store.

**ii. Detention outside the store**

When considering whether Johnson had reasonable suspicion to detain Peltier, we must examine the totality of the circumstances. *Garcia*, 43 S.W.3d at 530. Peltier relies upon *Foster v. State*, 297 S.W.3d 386 (Tex. App.—Austin 2009, pet. granted), to support his claim that the cumulative facts presented by the State were not sufficient to support a reasonable suspicion to detain him. In *Foster*, officers detained a driver after observing his truck make lurching motions. *Id.* at 389. Because "the lurching movements were not unreasonably dangerous, reckless, or even inexplicable," the court held that, without other facts, the detaining officers could not have reasonably concluded that the defendant was driving while intoxicated. *Id.* at 393.

Unlike *Foster*, in which the lurching of the defendant's car was the only articulable fact presented to support a reasonable suspicion of driving while intoxicated, the State produced multiple articulable facts to support Johnson's reasonable suspicion that Peltier had been driving while intoxicated. Johnson testified that he observed Peltier driving, he saw Peltier stumbling in the parking lot, and he smelled alcohol on Peltier's breath when they conversed in the store.

When combined with rational inferences, these facts could reasonably have led Johnson to suspect that Peltier had been driving while intoxicated. Giving the deference we must to the trial court's determination of the historical facts, we conclude Johnson had reasonable suspicion to detain Peltier for further questioning. *See Guzman v. State*, 955 S.W.2d at 89.

We hold that the State met its burden at the suppression hearing of proving that Trooper Johnson had reasonable suspicion to believe that Peltier was violating the law. *See Castro*, 227 S.W.3d at 741. Accordingly, we overrule Peltier's first issue.

## II. Factual sufficiency of the evidence

In his second issue, Peltier contends the evidence is factually insufficient to show that he was intoxicated.

### a. Standard of review

Due process requires a court reviewing the sufficiency of evidence to support a criminal conviction to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Our state-law standard for reviewing the factual sufficiency of the evidence mirrors the standard required by the United States Constitution. *See Brooks v. State*, No. PD-0210-09, 2010 WL

3894613, at *14 (plurality op.), *22 (Cochran, J., concurring) (Tex. Crim. App. Oct. 6, 2010).

**b. Analysis**

The indictment alleged that Peltier committed the enhanced offense of operating a motor vehicle in a public place while intoxicated with two previous convictions for that offense. *See* TEX. PENAL CODE ANN. §§ 49.04(a), 49.09(b)(2) (Vernon 2003 & Supp. 2010). Accordingly, the State had to prove that Peltier was intoxicated while operating a motor vehicle in a public place. *See* TEX. PENAL CODE ANN. § 49.04(a) (Vernon 2003). "Intoxicated" is defined as "not having the normal use of mental or physical faculties by reason of the introduction of alcohol . . . into the body." TEX. PENAL CODE ANN. § 49.01(2)(A) (Vernon 2003).

Peltier does not dispute that he operated a motor vehicle in a public place. His argument on appeal focuses on the fact that Johnson did not specifically testify that he lacked the normal use of his mental or physical faculties. To further support his claim that the evidence presented by the State was factually insufficient to support his conviction, Peltier also relies upon the following: Johnson observed Peltier drive and converse with another person without any specific indication of intoxication, Johnson did not perform the horizontal-gaze-nystagmus test according to the specific NHTSA standards, Johnson did not consider Peltier's diabetes as a factor that could have affected his ability to properly conduct the

field-sobriety tests, and Petlier's father testified that he did not smell alcohol on his son's breath and that his son "looked all right."

While the record does reflect that Johnson did not specifically testify that Peltier did not have the normal use of his mental or physical faculties, Johnson did testify that Peltier was intoxicated due to the introduction of alcohol. The testimony of a law-enforcement officer that an individual is intoxicated is probative evidence of intoxication. *Henderson v. State*, 29 S.W.3d 616, 622 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (citing *Gruber v. State*, 812 S.W.2d 368, 370 (Tex. App.—Corpus Christi 1991, pet. ref'd). There is no requirement that the State elicit specific testimony that a defendant "did not have the normal use of his [or her] mental or physical faculties" in order to prove intoxication. *See Rodriguez v. State*, 31 S.W.3d 359, 361 (Tex. App.—San Antonio 2000, pet. ref'd) (rejecting similar argument and allowing proof of intoxication based on officer's statement defendant was intoxicated based on field-sobriety tests).

The jury, in its fact-finding role, heard testimony from Johnson that he observed Peltier stumble in the store and smelled alcohol on his breath, that he failed the field-sobriety tests, and that he was observed to be "kind of incoherent, lethargic . . . his clothes were wrinkled, [and] his zipper was unzipped." The jury viewed the video of the field-sobriety tests. The jury also heard testimony that Peltier refused to offer a breath sample, which may be considered by the

fact-finder as evidence of intoxication. *See Scott v. State*, 914 S.W.2d 628, 630 (Tex. App.—Texarkana 1995, no pet.) (citing *Finley v. State*, 809 S.W.2d 909, 913 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd); *see also* TEX. TRANSP. CODE ANN. § 724.061 (Vernon 1999) ("A person's refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person's trial."). Finally, Johnson testified that he did not see Peltier take any medicine or insulin, or drink anything like orange juice, yet Peltier became progressively more alert rather than worse, contrary to how a person with diabetes typically would react.

While Peltier's counsel vigorously cross-examined Johnson on his testimony, including the administration of field-sobriety tests, we cannot say that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, including that Peltier lacked the normal use of his mental or physical faculties by reason of the introduction of alcohol into his body. Considering all of the evidence in the light most favorable to the prosecution, the jury could have found that Peltier committed the enhanced offense of operating a motor vehicle in a public place while intoxicated with two previous convictions for that offense.

We overrule Peltier's second issue.

## Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Mirabal.*

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* The Honorable Margaret Garner Mirabal, Senior Justice, Court of Appeals for the First District of Texas, sitting by assignment.