Opinion issued January 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00136-CR

SANDRA ARROYO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law #2
Harris County, Texas
Trial Court Case No. 1606840

MEMORANDUM OPINION

After the trial court denied her motion to suppress evidence, appellant, Sandra Arroyo, with an agreed punishment recommendation from the State,

pleaded guilty to the offense of driving while intoxicated.[1] In accordance with the plea agreement, the trial court sentenced appellant to 180 days in jail, suspended the sentence, placed her on community supervision, and assessed a fine of $1,000. In two points of error, appellant contends that the trial court erred in denying her motion to suppress evidence because the arresting officer did not have reasonable suspicion to detain her.[2]

We affirm.

Background

In the trial court, appellant moved to suppress evidence of any "[b]reath-test, statements, acts, or refusal to cooperate or perform a field sobriety test at the scene of the [arrest] or at the officer's video room" on the ground that they were "the products of the illegal detention, arrest, and search."

At the trial court's hearing on appellant's motion, Texas Department of Public Safety Trooper T. Grillet testified that on June 14, 2009, at approximately 4:50 a.m., he was driving southbound on Highway 59 in Harris County, Texas. He saw a car traveling at approximately 55 miles per hour, ten miles below the posted speed limit, and "drift out of its lane." The car "went from the second inside lane to the inside lane and back" where "both left wheels went over the marked lane and

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1 *See* TEX. PENAL CODE ANN. § 49.04 (Vernon 2009).

2 *See* U.S. CONST. amend. IV; *see also* TEX. CONST. art. I, § 9.

then back into her lane and then back over that lane again." Grillet explained that although he saw the car "twice drift into the other lane," the car did not "completely change lanes, it just drifted over and [came] back." He noted that this "drifting" drew his attention to the car. Grillet then saw a second car, traveling directly behind the first car. He explained that he "was under the assumption" that the driver of the second car "was attempting to pass" the first car, but was unable to do so due to the fact that the first car was "drifting out of its lane and driving ten miles under the speed limit." Grillet opined that "it was unsafe" to pass "given the situation" and the way the first car was being driven. Grillet then drove his car to the left side of the second car, pulled in behind the first car, and activated his emergency lights, at which point the video camera on his car activated. After he initiated the traffic stop, he learned that appellant was the driver and sole occupant of the first car. The second car also stopped, and Grillet learned that appellant's boyfriend had been driving it.

Grillet explained that given his "twenty years experience," he was aware that there are a "significant amount of intoxicated drivers out" at 4:50 a.m. on a Sunday morning, and he "figured there was a possibility that [appellant] had been drinking and could possibly be intoxicated." However, he conceded that he had no evidence that appellant was coming from a bar or a party, and he did not see any cars "evading" or "swerve away" from appellant.

After receiving testimony from Trooper Grillet and hearing the argument of counsel, the trial court denied appellant's motion.

Standard of Review

In reviewing a trial court's ruling on a motion to suppress evidence, we apply a bifurcated standard of review. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We give almost total deference to the trial court's determinations on all fact questions and on application-of-law-to-fact questions[3] that turn on an evaluation of credibility and demeanor. *Johnson v. State*, 68 S.W.3d 644, 652 (Tex. Crim. App. 2002). We view the record and all reasonable inferences from the record in the light most favorable to the trial court's ruling and sustain the ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

Reasonable Suspicion

In two points of error, appellant argues that the trial court erred in denying her motion to suppress evidence because the State failed to prove that Trooper Grillet "had reasonable suspicion to make a warrantless stop of [appellant's] car

[3] Also referred to as "mixed questions of law and fact." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

under the Fourth Amendment of the United States Constitution and article 1, section 9 of the Texas Constitution."[4]

A "stop" by a law enforcement officer "amounts to a sufficient intrusion on an individual's privacy to implicate the Fourth Amendment's protections." *Carmouche*, 10 S.W.3d at 328. However, it is well-established that a law enforcement officer may stop and briefly detain a person suspected of criminal activity on less information than is constitutionally required for probable cause to arrest. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *Carmouche*, 10 S.W.3d at 328. In order to stop or briefly detain an individual, an officer must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. Instead, an officer must have "reasonable suspicion" that an individual is violating the law. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Reasonable suspicion exists when the officer has some minimal level of objective justification for making the stop, i.e., when the officer can "point to specific and articulable facts which, taken together

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[4] When an appellant does not separately brief state and federal constitutional claims, we assume she claims no greater protection under the state constitution than that provided by the federal constitution. *See Reed v. State*, 308 S.W.3d 417, 419 n.3 (Tex. App.—Fort Worth 2010, no pet.); *Varnes v. State*, 63 S.W.3d 824, 829 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Therefore, we will analyze appellant's claims solely under the Fourth Amendment of the United States Constitution, following guidelines set by the United States Supreme Court in interpreting the Fourth Amendment. *See State v. Guzman*, 959 S.W.2d 631, 633 (Tex. Crim. App. 1998).

with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880; *see also Alabama v. White*, 496 U.S. 325, 329–30, 110 S. Ct. 2412, 2416 (1990). We disregard the subjective belief of the officer in our reasonable suspicion analysis and consider the totality of the circumstances objectively. *Ford*, 158 S.W.3d at 492–93.

Appellant asserts that the State "failed to adduce sufficient specific, articulable facts to show she committed a traffic violation" and "failed to prove how the manner in which she drove gave rise to reasonable suspicion of driving while intoxicated." Appellant argues that no facts existed to show that her driving "impeded the normal and reasonable movement of traffic" or that her reduced speed caused the unsafe operation of her car because she "was not driving in the passing lane," she was only traveling ten miles an hour below the speed limit, there was no minimum speed limit, no other cars were backed up, her "boyfriend was not flashing his lights to signal he could not pass her," and "[h]er boyfriend drove back to the scene . . . and never complained about her impeding him."

It is well-established that an officer may lawfully stop an individual for a traffic violation. *Walter v. State*, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000). In Texas, "an operator on a roadway divided into two or more clearly marked lanes for traffic [] shall drive as nearly as practical entirely within a single lane[] and may not move from the lane unless that movement can be made safely." *See* TEX.

TRANSP. CODE ANN. § 545.060(a) (Vernon 2003). Furthermore, an "operator may not drive so slowly as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with the law." TEX. TRANSP. CODE ANN. § 545.363(a) (Vernon 2003).

In support of her argument that Trooper Grillet's observations did not create reasonable suspicion to stop or detain her for traveling below the speed limit, appellant relies on two cases: *Tex. Dep't of Public Safety v. Gonzales*, 276 S.W.3d 88 (Tex. App.—San Antonio 2008, no pet.) and *Richardson v. State*, 39 S.W.3d 634 (Tex. App.—Amarillo 2000, no pet.). In *Gonzales*, the court held that the officer had no reasonable suspicion to stop the defendant. 276 S.W.3d at 95. The officer could not recall the traffic conditions, gave no testimony that the defendant's drifting[5] or low speed was unsafe, and offered only a conclusory statement that the defendant was "impeding traffic" by traveling below the speed limit. *Id.* at 94. The officer testified that there was no other basis for stopping the defendant aside from the fact that the defendant was traveling below the speed limit. *Id.* The officer did not state that he suspected the defendant was intoxicated nor did he provide any testimony that the defendant's driving was unsafe. *Id.* In

[5] As appellant points out in her brief, the court noted that the police report, which was admitted into evidence, stated that the officer also observed the defendant drifting within his lane of travel. *Tex. Dep't of Public Safety v. Gonzales*, 276 S.W.3d 88, 94 (Tex. App.—San Antonio 2008, no pet.). The officer, however, explained that the only reason for the stop was due to the defendant driving below the speed limit. *Id.*

Richardson, the court held that the officer did not have a reasonable suspicion to stop the defendant when the officer mistakenly believed the driver was traveling twenty miles below the speed limit. 39 S.W.3d at 638. The officer noted that there were no cars behind the defendant waiting to pass and that the only reason for the stop was because the defendant was traveling below the speed limit and impeding traffic. *Id*. Here, in contrast, Trooper Grillet expressly stated that appellant's driving below the speed limit and weaving in and out of her lane made it "unsafe" for another car to pass and that he believed she might be intoxicated.

Appellant further asserts that "failure to maintain a single lane of traffic alone" does not justify an investigative stop. *See Fowler v. State*, 266 S.W.3d 498 (Tex. App.—Fort Worth 2008, pet. ref'd) (holding no reasonable suspicion for stop based on defendant crossing into adjacent lane when officer expressly stated that the movement of the car was not unsafe or dangerous); *State v. Huddleston*, 164 S.W.3d 711, 713–14 (Tex. App.—Austin 2005, no pet.) (reasoning that officer's observations of car drifting "twice to the right side of the roadway and cross[ing] over the white shoulder stripe, or fog line" did not create reasonable suspicion); *Hernandez v. State*, 983 S.W.2d 867, 868–70 (Tex. App.—Austin 1998, pet. ref'd) (holding that the State did not show reasonable suspicion based only on officer's observation that defendant's car "drifted slightly across a lane marker a single time"); *State v. Tarvin*, 972 S.W.2d 910, 911–12 (Tex. App.—Waco 1998, pet.

ref'd) (finding no reasonable suspicion for detention when defendant's tires crossed "the solid white line at the right-hand side of the road on two or three occasions").

Here, as in the above cases, Trooper Grillet stopped appellant after observing her car drift across the lane marker into the next lane. However, in considering the totality of the circumstances, Grillet also based his reasonable suspicion on appellant driving her car ten miles per hour below the speed limit, the fact that it was 4:50 a.m. on a Sunday morning, a time at which more individuals drive intoxicated, and it appeared the car behind appellant was attempting to pass, but could not do so because appellant's driving was "unsafe." *See Reed v. State*, 308 S.W.3d 417, 421 (Tex. App.—Fort Worth 2010, no pet.) (finding that officer's testimony that he stopped defendant because of her driving violations and because he had suspected that she might be intoxicated based on the time of day, area of the city, and his experience with intoxicated drivers exhibiting similar characteristics of driving supported a reasonable suspicion that the defendant was driving while intoxicated); *see also Curtis v. State*, 238 S.W.3d 376, 380–81 (Tex. Crim. App. 2007) (applying totality of circumstances test and concluding that rational inference could be made that driver was intoxicated based on driver's weaving, time of day, and officer's experience); *Moreno v. State*, No. 01-03-02033-CR, 2004 WL 2307416, *3 (Tex. App.—Houston [1st Dist.] Oct. 14, 2004, no pet.)

(mem. op.) (concluding that officer's testimony of low speed, in-lane weaving, and failure to maintain single lane raised sufficient facts to justify stop based on reasonable suspicion that appellant was intoxicated); *McQuarters v. State*, 58 S.W.3d 250, 255 (Tex. App.—Fort Worth 2001, pet. ref'd) (concluding that officer's testimony that defendant was driving at slow speed in left lane and crossed over center line raised sufficient facts to justify stop based on reasonable suspicion that defendant was intoxicated).

We conclude that Trooper Grillet's observations of appellant's driving were sufficient to justify the stop of appellant based on a reasonable suspicion that she had committed a traffic violation or was driving while intoxicated. Accordingly, we hold that the trial court did not abuse its discretion in denying appellant's motion to suppress evidence.

We overrule appellant's first and second point of error.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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