Opinion issued October 6, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00504-CR

MICHAEL PAUL EVERITT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Harris County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Case No. 1655755

MEMORANDUM OPINION

A jury convicted appellant Michael Paul Everitt of driving while intoxicated. *See* TEX. PENAL CODE ANN. § 49.04(a) (West 2011). The court assessed a $2,000 fine and sentenced him to 180 days in jail. The court suspended the jail sentence

and placed him on community supervision for 2 years. Everitt asserts three issues on appeal, two relating to failed motions to suppress evidence and one relating to expert testimony. We affirm the judgment.

Background

At approximately 2:30 a.m. on January 22, 2010, Houston Police Department Officer A. Richberg was driving his patrol car eastward on Interstate 610 when he noticed a Yamaha R6 motorcycle in front of him speeding and weaving lanes without signaling. Officer Richberg accelerated to 90 miles per hour to catch up with the motorcycle. Everitt, the motorcyclist, slowed to 60 miles per hour on the northbound ramp to Highway 288, and he then reaccelerated to 80 miles per hour while tailgating another HPD vehicle. Concerned for the safety of the motorist and other vehicles on the road, Officer Richberg pulled Everitt to the side of the freeway. Richberg testified at trial that the initial infractions motivating the stop were reckless driving and expired license plates.

After pulling the motorcycle over, Officer Richberg noticed several signs that Everitt might be intoxicated. The smell of alcohol emanated from his helmet, Everitt had difficulty maintaining his balance, and he made multiple failed attempts to engage his motorcycle's kickstand. In addition, Everitt had difficulty understanding questions, slurred his words, and had bloodshot eyes. Officer Richberg suspected intoxication, and he requested that Everitt perform various

field sobriety tests, which Everitt refused. Richberg spent at least 25 minutes questioning Everitt. Everitt admitted to having something to drink at 5:00 p.m. the day before. Officer Richberg called fellow HPD Officer B. Taylor, who had more experience in administering field sobriety tests. Richberg thought that she might better persuade Everitt to consent.

Officer Taylor arrived at the scene by 3:30 a.m., approximately 10 minutes after receiving Richberg's request for her assistance. She smelled alcohol on Everitt's breath and noticed that he could not stand without swaying, slurred his words, and had glassy eyes. Everitt repeatedly asked questions of Officer Taylor that she considered "inappropriate," such as how long she had been working for HPD, and he told Taylor personal information about his wife. Officer Taylor ultimately arrested Everitt for driving while intoxicated and put him into the back of her patrol car where the smell of alcohol became "[a]lmost overwhelming."

At approximately 3:45 a.m., Officer Taylor brought Everitt to the "Intox Room" at the police station where an HPD sobriety test administrator asked him to perform multiple sobriety tests. While being video-recorded, Everitt submitted to the first sobriety test requested of him, the Rhomberg test, in which the subject is asked to close his eyes, tilt his head back, and estimate when 30 seconds have passed. Based upon Everitt's swaying while undergoing the test, the HPD test administrator judged him to be impaired.

Everitt refused two other sobriety tests. Officer Taylor and the test administrator asked whether Everitt had any injuries, and he responded that he had taken "hydrocodeine . . . earlier today maybe" due to a back injury. Expert testimony at trial established that "hydrocodeine" is a common misnomer for hydrocodone, or Vicodin. Within two minutes of the reference to Everitt's hydrocodone use and back injury, the test administrator read Everitt his rights.

Analysis

I. Length of detention

Everitt argues in his first issue that the trial court erred when it denied his motion to suppress all the evidence arising from his arrest. Though he concedes that the stop by Officer Richberg was valid, Everitt contends that his pre-arrest detention on the side of the road lasted unreasonably long and thus violated the Fourth Amendment to the U.S. Constitution.

In reviewing the 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). While we give almost total deference to the trial court's determinations of historical facts, we review the application of the law of search and seizure de novo. *Id.* We must sustain the trial court's ruling if it is reasonably supported by the record evidence and is correct under any theory of law applicable to the case. *State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000). A trial

court's ruling on the admissibility of evidence is reviewed for an abuse of discretion, that is, whether the court's ruling was within the zone of reasonable disagreement. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003); *Thomas v. State*, 336 S.W.3d 703, 711 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

The reasonableness of the length of an investigative detention for Fourth Amendment purposes depends upon the diligence of the police to confirm or dispel its suspicion of criminal culpability, and upon whether the police reasonably declined to pursue an alternative means of accomplishing its law-enforcement objective. *United States v. Sharpe*, 470 U.S. 675, 686–87, 105 S. Ct. 1568, 1575–76 (1985); *see also Smith v. State*, 945 S.W.2d 343, 346 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). In conducting its analysis, the court should consider the circumstances of the "developing situation" and "should not indulge in unrealistic second-guessing." *Sharpe*, 470 U.S. at 686, 105 S. Ct. at 1575. In *Sharpe*, the United States Supreme Court found that no unreasonably long detention had taken place when the duration was exacerbated by the suspect's own "evasive actions." *Id.* at 688, 105 S. Ct. at 1576; *see also United States v. Montoya de Hernandez*, 473 U.S. 531, 544, 105 S. Ct. 3304, 3112 (1985) (holding that a criminal suspect's 16-hour "long, uncomfortable, indeed, humiliating" detention by federal border agents was not unreasonable since she authored the circumstances of her own

detention); *Smith*, 945 S.W.2d at 347 (finding that suspect's detention was not unreasonably long when its length was "attributable almost entirely" to him).

The police in this case did not detain Everitt for an unreasonably long period. Upon stopping Everitt, Officer Richberg undertook several time-consuming tasks lasting at least 25 minutes, including routine requests such as asking for Everitt's license, asking Everitt questions relating to his recent drinking, requesting Everitt to submit to various sobriety tests, explaining what those tests entailed, and eventually calling on Officer Taylor to come assist him. Richberg's decision to call for Taylor added to Everitt's detention time but was not unreasonable, since she had more experience in DWI investigations than he did. Although there was conflicting testimony at trial concerning the amount of time that Officer Taylor took in getting to the scene, there is nothing in the record to indicate that she procrastinated, or that upon her arrival she conducted herself in a less than diligent manner. When there is no evidence that the police failed to diligently pursue an investigation while conducting a valid stop, a court should find that the length of the detention was reasonable. *See Kothe v. State*, 152 S.W.3d 54, 66 (Tex. Crim. App. 2004) (holding that length of investigative detention was reasonable when record showed neither lack of diligence nor improper motive by police).

Moreover, Everitt cannot complain about an unreasonably lengthy detention because much of the temporal excess, if any, was caused by Everitt himself. Officer Richberg testified that he had to repeat questions multiple times until Everitt would appear to understand. When Everitt did respond to questions, he would, according to Richberg, "dodge" them by not answering directly. According to Officer Taylor, Everitt spent approximately 10 minutes asking her impertinent questions and bringing up his own personal matters. Since Everitt's confused and evasive interaction with police likely contributed to the length of his pre-arrest detention, he cannot use those self-created delays as a basis for his motion to suppress. *See Smith*, 945 S.W.2d at 347.

Everitt argues that no legitimate law enforcement interest was served by calling Officer Taylor, who took perhaps as long as 30 minutes to arrive at the scene, because all that she ultimately did was make the same observations as Richberg regarding Everitt's intoxication. He correctly argues that a prolonged investigative detention must be justified by a legitimate law enforcement interest. *E.g.*, *Belcher v. State*, 244 S.W.3d 531, 539 (Tex. App.—Fort Worth 2007, no pet.); *Hartman v. State*, 144 S.W.3d 568, 572 (Tex. App.—Austin 2004, no pet.). A legitimate law enforcement interest is served, however, when a junior police officer calls on a more senior colleague to assist in a DWI investigation to draw on the senior colleague's greater experience, even when it lengthens the detention

time. *Cf. Belcher*, 244 S.W.3d at 541 ("Legitimate law enforcement purposes include a delay to permit the arrival of a DWI enforcement officer so that the supervisory officer initiating the stop can return to duty, a delay for the arrival of a video camera so that the DWI investigation and the field sobriety tests can be taped in accordance with department procedures, and a delay for the arrival of a rookie officer who needs training."). Thus, the evidence relied upon by Everitt does not show that Officer Richberg had any illegitimate purpose in making the call to Officer Taylor.

Given the totality of circumstances surrounding Everitt's detention, we hold that it did not last for an unreasonably long time. *See Belcher*, 244 S.W.3d at 534, 542 (finding that "totality of circumstances" pointed to no unreasonable delay when first officer investigating DWI waited 27 minutes for second officer to arrive). Therefore, we find that the trial court did not abuse its discretion by denying Everitt's motion to suppress evidence.

We overrule appellant's first issue.

II. Unconstitutionally elicited statement

In his second issue, Everitt argues that HPD elicited his statement about having used hydrocodone without first advising him of his rights, in violation of the U.S. Constitution and the Code of Criminal Procedure. He contends that the trial court therefore should have sustained his motion to suppress that statement.

As we already stated regarding Everitt's first issue, in reviewing a denial of a motion to suppress evidence, we defer to the trial court's determinations of historical facts while we review the application of the law de novo. *Carmouche*, 10 S.W.3d at 327. A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Moses*, 105 S.W.3d at 627; *Thomas*, 336 S.W.3d at 711.

Under *Miranda*, a criminal suspect in police custody must be advised about his right against self-incrimination prior to the start of interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467–69, 86 S. Ct. 1602, 1624–25 (1966). The Code of Criminal Procedure similarly requires that, for a recorded oral statement elicited during custodial interrogation to be admitted at trial, certain statutory warnings must first be given. TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a) (West 2005). Questions reasonably likely to elicit an incriminating response constitute interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1690 (1980). Questions normally attendant to arrest and custody are not interrogation, nor are requests to perform non-testimonial tests or tasks. *Id.* at 301, 100 S. Ct. at 1689–90; *Jones v. State*, 795 S.W.2d 171, 176 (Tex. Crim. App. 1990). Visual and aural recording of a subject performing sobriety tests "is merely another example of the collection of physical evidence" by police. *Jones*, 795 S.W.2d at 175.

It is undisputed that Everitt's admission was made while in police custody and during attempted sobriety tests under videorecording, but before he received the statutory warnings of Article 38.22 of the Code of Criminal Procedure. Thus, the question presented is whether an interrogation had begun when Everitt admitted using hydrocodone. Officer Taylor escorted Everitt to the "Intox Room" where an HPD civilian agent was waiting to perform sobriety tests. The crucial excerpt of his videotaped interaction between Everitt, the HPD agent, and Officer Taylor shows the following exchange:

Agent: You understand those instructions?

Everitt: Yeah, I just don't think I can do that.

Agent: You don't think you can do it. You don't want to try to do it? Okay.

Taylor: Do you have any knee injuries or anything?

Everitt: It's just that, uh, my back is hurting and I'm just not very good –

Taylor: It's the lower back?

Everitt: Yes. It's just –

Agent: You know what injury? You do?

Everitt: I'm taking hydrocodeine for my, my back. It's from –

Agent: Oh, okay. When's the last time you took that?

Everitt: It's about, what, earlier today maybe.

Agent: You know about what time?

Everitt: No.

Agent: No.

Taylor: Is it like a bulging disk or –

Everitt: It's just on my lower back. I don't really know if it's a disk or not. It's just, it hurts.

The medical condition of someone performing a sobriety test may affect the validity of that test. Thus, the HPD agent and Officer Taylor asked Everitt questions attendant to a non-testimonial sobriety test that they sought to administer. Everitt responded with more information than the questions about the existence of injuries would normally elicit. There is no evidence that the agents intended to elicit an incriminating response about Everitt's prescription drug use or otherwise. Therefore, an interrogation had not yet begun.

When a criminal suspect volunteers incriminating information before interrogation, as Everitt did, Article 38.22 does not prevent using that statement against him at trial regardless of whether he has been given the required warnings. *See East v. State*, 702 S.W.2d 606, 613–14 (Tex. Crim. App. 1985) (holding that Article 38.22 allowed admission of custodial suspect's incriminating statement despite lack of *Miranda* warning because surrounding circumstances showed no interrogation). We conclude that Everitt gave his statement about having used hydrocodone prior to the beginning of interrogation. Accordingly, the trial court

properly denied Everitt's motion to suppress the recorded statement about his hydrocodone use.

We overrule appellant's second issue.

III. Admissibility of admission of use of medication

Everitt argues in his third and last issue that the trial court improperly admitted his video-recorded admission of hydrocodone use because the State failed to lay a proper foundation for its relevance. *See Layton v. State*, 280 S.W.3d 235, 241–42 (Tex. Crim. App. 2009) (holding that State failed to show relevance of DWI defendant's admission about taking Xanax and Valium because no expert testimony had been offered on dosage, timing of ingestion, or half-life of drugs).

The State called HPD Officer LaSalle as an expert witness to testify about the intoxicating effects of hydrocodone and alcohol use. Prior to admitting Officer LaSalle's testimony, the court held a hearing on his qualifications and probable testimony outside the jury's presence. *See Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (establishing that when admissibility of expert testimony is contested, expert testimony must be vetted by court outside jury's presence using three-prong test). Officer LaSalle testified at that hearing that he has been certified as a Drug Recognition Expert and that he could relate how hydrocodone and alcohol impair the body. Officer LaSalle further stated that as part of his training, he had learned how to perform field sobriety tests that isolate the source of a

person's impairment, that is, whether a person was impaired by alcohol alone, a drug alone, or a combination of drugs and alcohol. He then testified that he could identify "any possible general indicators" of intoxication from alcohol or hydrocodone by watching a videorecording of a person perform sobriety tests, but he did not say whether this was in fact a valid technique for recognizing intoxication by various drugs. Officer LaSalle later testified to the jury that based on viewing the videotape of Everitt in the "Intox Room," he "obviously showed several mental and physical impairment signs as a result of the ingestion of a drug like hydrocodone."

Everitt argues that the trial court erroneously admitted his statement about using hydrocodone because the State had failed to show the relevance of that statement based upon a reliable expert opinion showing the connection between his hydrocodone use and his intoxication at the time he was driving. Essentially, Everitt insists that Officer LaSalle needed to perform a battery of field sobriety tests to reliably identify hydrocodone intoxication, and that merely watching the video gave LaSalle insufficient information to allow him to form a sound opinion about Everitt's hydrocodone intoxication.

Everitt has not properly preserved this issue for appeal. As a general prerequisite to presenting an issue for appellate review, the record must show that a timely objection was made to the trial court, and that the trial court ruled on the

objection. TEX. R. APP. P. 33.1; *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991) ("[I]f, on appeal, a defendant claims the trial judge erred in admitting evidence offered by the State, this error must have been preserved by a proper objection and a ruling on that objection."). The motion to suppress Everitt's statement about his hydrocodone use asserted that "without competent expert testimony, any statements he made with respect to his use of hydrocodeine [sic] are irrelevant." Everitt re-urged this point during the *Kelly* hearing on the admissibility of Officer LaSalle's testimony, arguing that LaSalle's own testimony did not establish that he could form a reliable opinion.

However, Everitt obtained no ruling on the admissibility of LaSalle's opinions based on his review of the videorecording. Rather, the trial court merely ruled that Everitt's admission of hydrocodone use was relevant, not unfairly prejudicial, and therefore admissible. This ruling was expressly based upon evidence supporting LaSalle's assumption that the drug had been taken within two and a half hours before Everitt's detention and LaSalle's unchallenged opinion that the effects of hydrocodone last from six to eight hours and, combined with alcohol consumption, would cause slow mental and physical reactions while driving a motorcycle. The trial court never ruled on the reliability of LaSalle's analysis based on reviewing the videorecording or the admissibility of his opinions based on that analysis.

Once Officer LaSalle was called to testify before the jury, Everitt did not object to any opinion elicited by the State. Thus, Everitt failed to preserve any issue for our review about particular opinions expressed by Officer LaSalle.

We overrule appellant's third issue.

Conclusion

Finally, we note that the trial court's judgment does not accurately comport with the record in that it shows the case number as "165575501010," whereas the information and all other documents filed in the trial court show the case number as "1655755." "[A]n appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source." *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (citing *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd)); *accord Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("An appellate court has the power to correct and reform a trial judgment to make the record speak the truth when it has the necessary data and information to do so . . . ."); *see also* TEX. R. APP. P. 43.2(b). The record supports modification of the judgment to show the correct case number, and accordingly, the trial court's judgment is modified to reflect the correct case number of 1655755.

We affirm the judgment as modified.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).