Opinion issued October 6, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01139-CR

MOHAMMAD ZIBAFAR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law #11
Harris County, Texas
Trial Court Case No. 1690851

MEMORANDUM OPINION

After the trial court denied his motion to suppress evidence, appellant, Mohammad Zibafar, 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 one year in jail, suspended the sentence, placed him on community supervision for two years, and assessed a fine of $100. In two issues, appellant contends that the trial court erred in denying his motion to suppress evidence on the ground that the arresting officer did not have reasonable suspicion to detain him.[2]

Background

At the hearing on appellant's motion to suppress evidence, La Porte Police Department ("LPPD") Officer B. Boles testified that on April 3, 2010, he, based on an anonymous telephone call made for emergency assistance, was dispatched to find a car that was driving recklessly and "swerving in his lane" on highway 146. The caller followed the car up until Boles, in his patrol car, made contact with the car. Boles then matched appellant's car to the description given by the anonymous caller, and he followed appellant's car into the parking lot of a Burger King restaurant. As appellant "circled [his car] around the building," Boles saw the car "nearly strike the drive-through menu," back up, and then enter the drive-through lane. He explained that it "looked like [appellant] had misjudged the drive-through lane and had to bring his vehicle to an immediate stop before striking the sign."

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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.

Boles noted that "the action of the vehicle corroborated the caller's information," and he decided to "make contact" with appellant. After appellant "pulled [his car] up" to the cashier's window, Boles parked his patrol car parallel to appellant's car and approached appellant. Boles did not activate the siren or emergency lights of his patrol car. As Boles approached appellant's car, appellant "looked directly" at him, "reached up to the center console [in his car], . . . took a white Styrofoam cup, and poured the contents of that cup into the passenger side floorboard." When Boles got closer, he detected the "odor of what appeared to be an alcoholic beverage" coming from the car. Boles then asked appellant what he poured onto the floorboard, and appellant replied, "I don't know what you're talking about." Boles then had appellant exit the drive-through lane and park his car in order to speak with him.

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

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

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). However, the trial court is the sole and exclusive trier of fact and judge of the witnesses' credibility. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). Accordingly, the trial court may choose to believe or to disbelieve all or any part of the witnesses' testimony. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). When, as here, the parties do not request, and the trial court does not make, findings of fact and conclusions of law, we view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record. *Id.*

Encounter

In his first issue, appellant argues that the trial court erred in concluding that Officer Boles's initial approach of his car did not constitute a seizure of him because he was not free to leave and was thereby detained by Boles. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9.

The Fourth Amendment of the United States Constitution and article I, section 9 of the Texas Constitution protect against unreasonable searches and

seizures. *Atkins v. State*, 882 S.W.2d 910, 912 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). However, not every encounter between police officers and citizens implicates constitutional protections. *Hunter v. State*, 955 S.W.2d 102, 104 (Tex. Crim. App. 1997) (citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991)). Generally, there are three distinct categories of interactions between police officers and citizens: encounters, investigative detentions, and arrests. *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010); *State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002). In determining which category an interaction falls into, courts look at the totality of the circumstances. *Crain*, 315 S.W.3d at 49.

The State asserts that Officer Boles engaged appellant in a consensual encounter by approaching him to request his identification and ask whether he had anything illegal in his possession. Appellant asserts that under the circumstances, a reasonable person would not have felt free to disregard Boles's actions.

An encounter is a consensual question-and-answer interaction between a citizen and a police officer in a public place that does not require reasonable suspicion and does not implicate constitutional rights. *See Florida v. Royer*, 460 U.S. 491, 497–98, 103 S. Ct. 1319, 1323–24 (1983); *Perez*, 85 S.W.3d at 819. An encounter is usually a friendly exchange of pleasantries or mutually useful information. *Gaines v. State*, 99 S.W.3d 660, 666 (Tex. App.—Houston [14th

Dist.] 2003, no pet.). The encounter should be considered consensual as "long as a reasonable person would feel free 'to disregard the police and go about his business.'" *Hunter*, 955 S.W.2d at 104 (quoting *Bostick*, 501 U.S. at 434, 111 S. Ct. at 2386). In *Hunter*, the Texas Court of Criminal Appeals explained that "[a] police officer's asking questions and requesting consent to search do not alone render an encounter a detention." 955 S.W.2d at 106. Only when an officer conveys a message that compliance is required does a consensual encounter become a detention. *Id*.

An investigative detention occurs when an individual is encountered by a police officer, yields to the officer's display of authority, and is temporarily detained for purposes of an investigation. *Johnson v. State*, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995). A person yields to an officer's display of authority when a reasonable person would not feel free to continue walking or otherwise terminate the encounter. *Bostick*, 501 U.S. at 436, 111 S. Ct. at 2387; *State v. Velasquez*, 994 S.W.2d 676, 679 (Tex. Crim. App. 1999); *Johnson*, 912 S.W.2d at 234–35. An investigative detention is constitutionally permissible if, under the totality of the circumstances, an officer has reasonable suspicion supported by articulable facts that the person detained is, has been, or soon will be engaged in criminal activity.[4]

[4] Texas courts follow the federal *Terry* standard with respect to temporary investigative detentions, and the Texas Court of Criminal Appeals has found no reason to employ a more stringent standard under the Texas Constitution with

Terry v. Ohio, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 1880 (1968); *Ford v. State*, 158 S.W.3d 488, 492–93 (Tex. Crim. App. 2005).

In a case similar to the instant case, a police officer received a dispatch based on a call for emergency assistance regarding a reckless driver. *Banda v. State*, 317 S.W.3d 903, 906 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The caller then followed the reckless driver until he stopped his car in a neighborhood. *Id*. The officer then approached a group of people and asked who had been driving the car in question. *Id.* at 907. The defendant told the officer that he had been driving, and the officer, after noticing the defendant's glassy eyes, administered a field sobriety test and arrested him for the offense of driving while intoxicated. *Id.* The court concluded that the initial interaction constituted a consensual encounter as the record indicated no use of authority, a threatening presence, a display of a weapon, or the activation of a siren or emergency lights by the officer that would have caused the defendant to feel that he could not refuse the officer's initial questioning. *Id.* at 909.

Here, after receiving an anonymous tip regarding a reckless driver, Officer Boles saw appellant nearly strike the drive-through menu at the Burger King restaurant. Boles then parked his patrol car parallel to appellant's car, exited his patrol car, and approached appellant. Boles did not activate his patrol car's siren

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respect to such detentions. *Davis v. State*, 829 S.W.2d 218, 219 (Tex. Crim. App. 1992).

or emergency lights, did not use coercive language to assert authority, and did not display his firearm or other police equipment in a fashion that would lead appellant to believe that he was not free to leave the drive-through lane. *See id*. at 909–10; *cf. State v. Garcia-Cantu*, 253 S.W.3d 236, 249–50 (Tex. Crim. App. 2008) (holding that officer's use of spotlight, positioning of officer's car behind defendant's, use of flashlight, and officer's coercive language would leave a reasonable person to believe that he would not be free to leave). Instead, appellant poured the contents of a Styrofoam cup out onto the floorboard of his car as he watched Officer Boles approach him. Accordingly, we hold that the trial court did not abuse its discretion in concluding that the initial contact between appellant and Officer Boles was an encounter. *See Johnson*, 912 S.W.2d at 235.

We overrule appellant's first issue.

Reasonable Suspicion

In his second issue, appellant argues that the trial court erred in denying his motion to suppress evidence because the State failed to prove that Officer Boles had reasonable suspicion to detain him. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9.

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*, 392 U.S. at 21, 88 S. Ct. at 1880; *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 initiating the detention, i.e., when the officer can "point to specific and articulable facts which, taken together 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.

Reasonable suspicion need not arise from the officer's personal observations, but can arise from the gathering of information from other people who witness specific events. *Garcia v. State*, 296 S.W.3d 180, 185 (Tex. App.—Houston [14th Dist.] 2009, no pet.). When gauging the reliability of citizen-tips, the reliability of the information is judged by the description of the wrongdoing

and whether the event was witnessed firsthand. *Id.* An officer generally cannot rely only upon a police broadcast of an anonymous telephone call to establish probable cause or reasonable suspicion. *Davis v. State*, 989 S.W.2d 859, 862–63 (Tex. App.—Austin 1999, pet. ref'd). However, an anonymous tip, corroborated by the officer's personal observations, may be sufficient to give an officer reasonable suspicion to detain an individual. *Garcia*, 296 S.W.3d at 185 (concluding that informant who provided detailed description of defendant's car and swerving to police dispatcher along with officer's observation of defendant's car swerving between lanes was sufficient to support finding of reasonable suspicion).

The Texas Court of Criminal Appeals has rejected the argument that because an officer did not personally witness any erratic driving, there was no basis for a reasonable suspicion to detain. *Brother v. State*, 166 S.W.3d 255, 256 (Tex. Crim. App. 2005). In *Brother*, a citizen reported to a police dispatcher that he saw a car speeding, tailgating, and weaving through traffic. *Id.* at 256. The citizen then followed the car, and, while remaining on the telephone call with the dispatcher, provided a detailed description of the car and its location. *Id.* at 256–57. The court concluded that "the factual basis for stopping a vehicle need not arise from the officer's personal observation, but may be supplied by information acquired from another person." *Id.* at 257. The court further noted that "to require officers who

are apprised of detailed facts from citizen-eyewitnesses to observe suspects and wait until additional suspicious acts are committed . . . would be foolish and contrary to the balance of interests struck in *Terry* and its progeny." *Id.* at 259.

Here, Officer Boles received a dispatch in regard to the anonymous caller's description of appellant's car as swerving in a fashion that caused concern. The caller then provided a detailed and accurate description of the car and its location, allowing Boles to properly identify the car in question. Furthermore, the caller followed the appellant's car until Boles arrived on the scene. Boles then saw appellant nearly run into the drive-through menu at the Burger King restaurant and drive on the wrong side of the drive-through lane. When he initially approached appellant's car, Boles saw appellant pour liquid out of a Styrofoam cup onto the floorboard of his car. When he reached appellant's car, Boles detected an odor of alcohol in the car. We conclude that Officer Boles's observations of appellant's actions in the drive-through lane, coupled with the information obtained from the anonymous caller, were sufficient to give Boles reasonable suspicion that appellant had been driving while intoxicated. Accordingly, we hold that the trial court did not err in denying appellant's motion to suppress evidence.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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