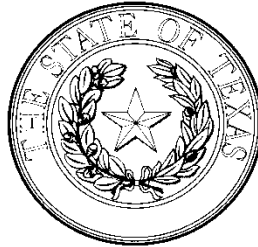


Opinion issued November 10, 2015



In The
Court of Appeals
For The
First District of Texas

NO. 01-14-00628-CR

MANUEL NAVA, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 14
Harris County, Texas
Trial Court Case No. 1919049

OPINION

The State charged Manuel Nava by information with Class A misdemeanor driving while intoxicated. TEX. PENAL CODE ANN. § 49.04 (West Supp. 2014). Before trial, Nava moved to suppress the evidence that the State acquired during his traffic stop and subsequent arrest, contending that the police officers lacked

reasonable suspicion to detain him. The trial court denied Nava's motion without a response from the State or hearing evidence. Nava then pleaded guilty in accord with a plea agreement with the State, and he received a suspended sentence of one year's confinement, conditioned on completion of 18 months of community supervision. In one issue, Nava challenges the trial court's denial of his motion to suppress, arguing that the State adduced no evidence that the stop was justified by the community caretaking exception or a reasonable suspicion that he engaged in reckless driving. We reverse and remand.

Background

Nava's unsworn memorandum filed in support of his motion to suppress contains the only account of the circumstances surrounding his arrest. According to the memorandum, a patrolling police officer, Officer Ferguson, saw a Ford F-150 truck exit a parking lot. Ferguson saw an unidentified man run after the truck as it pulled away. The man on foot then turned around and began walking back to the parking lot entrance. As the truck's passenger door opened, Officer Ferguson pulled the truck over. Officer Ferguson subsequently arrested Nava, who was driving the truck, for driving while intoxicated.

Nava moved to suppress evidence resulting from the stop on the basis that Officer Ferguson did not have reasonable suspicion to stop Mr. Nava's truck. Nava presented his motion to the trial court, and the trial court ruled:

THE COURT: This is your motion, [counsel]?

COUNSEL: Yes, sir.

THE COURT: I am going to rule based on the face of the motion. Your motion is denied.

[COUNSEL]: Can we get a hearing on that, Judge?

THE COURT: We just did.

[COUNSEL]: We didn't get – I want to put some stuff on – I want to get the officer on the record.

[THE COURT]: Well, I can rule either on the basis of your motion, on witness' affidavits, on testimony, or some combination. But your motion on its face establishes the basis for me denying your motion to suppress.

[COUNSEL]: Can I get finding[s] of fact and conclusion[s] as well?

THE COURT: They are contained in your motion.

[COUNSEL]: Is that all on the record, Judge?

THE COURT: Your motion is the record.

[COUNSEL]: But is this all on the record?

THE COURT REPORTER: Yeah.

THE COURT: Uh-huh.

[COUNSEL]: Well, can I call a witness?

THE COURT: No. No need. I've already ruled.

[COUNSEL]: Okay. Thank you, Judge.

THE COURT: Thanks.

Nava filed a notice of appeal. Nava then moved to abate his appeal requesting that we order the trial court to submit findings of fact and conclusions of law. We granted Nava's motion. Upon abatement, the trial court conducted a hearing at which the State read facts from the police officer's offense report into the record. The court then entered findings that the stop was justified either under the community caretaking exception or based upon a suspicion of reckless driving.

Discussion

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard. *See Ford v. State*, 158 S.W.3d 488, 493 (Tex. Crim. App. 2005). The trial court is the sole trier of fact and judge of the weight and credibility of the evidence and testimony. *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007). Accordingly, we defer to the trial court's determination of historical facts if the record supports them. *Ford*, 158 S.W.3d at 493. We review de novo the trial court's application of the law to those facts. *Id.* “[T]he prevailing party is entitled to ‘the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence.’” *State v. Castleberry*, 332 S.W.3d 460, 465 (Tex. Crim. App. 2011) (quoting *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008)). A trial court's ruling will be sustained if it is “reasonably

supported by the record and correct on any theory of law applicable to the case.” *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003) (citing *Willlover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002)).

B. Post-Abatement Hearing

As a preliminary matter, Nava contends that the trial court erred by hearing evidence at the post-abatement hearing while the case was on appeal. Nava contends that by allowing post-abatement evidence into the record, the trial court impermissibly altered the appellate record. The State agrees with Nava’s position. Nava moves to strike from the record the trial court’s findings based on the post-abatement evidence and the police report itself, which was never offered into evidence or made a part of the record. He further submits that without the evidence added to the record after abatement, there is no evidence in the record to support the trial court’s conclusion that the traffic stop was reasonable.

We concur with the State and with Nava that the trial court erred in adducing further evidence after we abated the case. A pending appeal suspends all proceedings in the trial court except those ordered by the Court of Appeals. *See* TEX. R. APP. P. 25.2(g) (“Once the record has been filed in the appellate court, all further proceedings in the trial court—except as provided otherwise by law or by these rules—will be suspended until the trial court receives the appellate-court mandate.”). When an appeal is abated, the trial court regains limited jurisdiction.

Lewis v. State, 711 S.W.2d 41, 43–44 (Tex. Crim. App. 1986). However, “[a] trial court is not authorized to conduct an evidentiary hearing [upon abatement] to develop a record of *new testimony* and *other evidence* that was not presented at trial, or developed on motion for new trial.” *Id.* at 43–44 (Tex. Crim. App. 1986) (emphasis in original) (holding that trial court “exceeded [its] authority under the mandate of abatement”). If such evidence is introduced, the appellate court may not consider it. *See id.* at 44.

We abated this case for the limited purpose of allowing the trial court to enter findings of fact and conclusions of law. *State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006). Because our abatement order did not provide for an evidentiary hearing, the trial court erred when it heard evidence not before the court when it decided Nava’s motion to suppress. Thus, we do not consider the evidence adduced at the hearing after abatement, or the findings based on that evidence.

C. Reasonable Suspicion to Detain and Burden of Proof

The Fourth Amendment guarantees a defendant’s right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV. Generally, this requires a police officer to obtain a warrant based on probable cause before detaining or searching a person. *See Maryland v. Dyson*, 527 U.S. 465, 466, 119 S. Ct. 2013, 2014 (1999); *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007).

However, neither a warrant nor probable cause is necessary if a search or seizure falls within one of the “specifically established and well delineated exceptions” to the warrant requirement. *Minnesota v. Dickerson*, 508 U.S. 366, 372, 113 S. Ct. 2130, 2135 (1993); *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). One such exception justifies searches and seizures by police officers in their community caretaking roles. *Cady v. Dombrowski*, 413 U.S. 433, 446–47, 93 S. Ct. 2523, 2530–31 (1973); *Wright v. State*, 7 S.W.3d 148, 152 (Tex. Crim. App. 1999).

Our determination of this appeal turns in part on who bore the burden of proof at the hearing. On a motion to suppress, the defendant bears the initial burden of producing some evidence that rebuts the presumption of proper police conduct. *Abney v. State*, 394 S.W.3d 542, 547 (Tex. Crim. App. 2013); *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009).

An allegation in the defendant’s motion that the defendant was arrested without a warrant is sufficient to meet this burden. *See Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002) (“By providing for a determination of the merits of such a motion on the motion itself, Art. 28.01, § 1(6), established the motion to suppress as the basis for an allegation of a Fourth Amendment violation.”). In this case, Nava specifically challenged that the officer lacked any reasonable suspicion to stop Nava. Once the defendant establishes the absence of a warrant, the burden

shifts to the State to prove the warrantless search in question was reasonable under the totality of the circumstances. *Amador*, 221 S.W.3d at 672–73. This burden may be satisfied by proving the existence of an exception to the warrant requirement. *See Gutierrez v. State*, 221 S.W.3d 680, 685 (Tex. Crim. App. 2007).

In this case, the State contends, and the trial court found, that Officer Ferguson had acted under the community caretaking exception or, alternatively, that the Nava’s actions gave Officer Ferguson a reasonable suspicion to believe he was engaging in reckless driving. We address these findings in turn.

1. Community Caretaking Exception

Nava observes that, after disregarding the post-abatement police report proffered into evidence, the record does not support the trial court’s finding that the stop was reasonable based on the community caretaking exception. The only description of the police encounter in the record is an unsworn summary from Nava’s memorandum in support of his motion to suppress:

“On September 16, 2013, Officer Ferguson was on patrolling [sic] the 2900 block of Shaver. Officer Ferguson saw a Ford F-150 truck exit a parking lot and merge onto Shaver. Officer Ferguson saw an unidentified male appear to run after the truck and [sic] as it drove north on Shaver. The male stopped running, turned around, and began walking back to the parking lot entrance. Right as the passenger door opened, Officer Ferguson initiated a traffic stop on the Ford F-150, which was being driven by the Defendant. Officer Ferguson states in his Offense Report he stopped the vehicle because he believed a disturbance was occurring and subsequently arrested the defendant for DWI.”

Under the community caretaking exception, “a police officer may stop and assist an individual whom a reasonable person—given the totality of the circumstances—would believe is in need of help.” *Wright*, 7 S.W.3d at 151. In *Wright v. State*, the Court of Criminal Appeals established four factors to determine whether an officer acted reasonably within the community caretaking function: (1) the nature and level of the distress exhibited by the individual; (2) the location of the individual; (3) whether or not the individual was alone and/or had access to assistance independent of that offered by the officer; and (4) to what extent the individual—if not assisted—presented a danger to himself or others. *Id.* at 152.

For a search or seizure to be reasonable, the officer must actually be motivated by a community caretaking purpose. *Corbin v. State*, 85 S.W.3d 272, 277 (Tex. Crim. App. 2002) (distinguishing *Whren v. United States*, 517 U.S. 806, 819, 116 S. Ct. 1769, 1777 (1996)). The trial court heard no evidence in this regard.

In response, the State discusses the four *Wright* factors, and relying upon Nava’s memorandum, contends that the trial court reasonably could have concluded from the unsworn legal brief alone that the officer acted reasonably in stopping Nava. It cites *Doiron v. State* as an example of a case with similar facts in which the court found that the police officer had acted reasonably. *Doiron v.*

State, 283 S.W.3d 71, 75 (Tex. App.—Beaumont 2009, no pet.). In *Doiron*, however, the officer testified that he pulled the defendant over out of concern for the defendant’s welfare. *Id.* The record in the present case contains no affidavit or other evidence of the basis for Officer Ferguson’s stop. While it may be that it would have been reasonable for the officer to stop Nava in his community caretaking function, without evidentiary support, there is no basis to conclude that the officer intervened for this reason and not for ordinary investigative purposes.

The State also cites *Cantu v. State*, in which we upheld a trial court’s disposition of the defendant’s motion to suppress without conducting an evidentiary hearing. No. 01-88-01029-CR, 1989 WL 40718 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (not designated for publication). Like *Doiron*, *Cantu* is distinguishable from the present case because the trial court denied the defendant’s motion based on both the motion to suppress and affidavits introduced before it. *Id.* at *1. Here, because the trial court decided Nava’s motion without affidavits, testimony, or other evidence, the memo in support of the motion to suppress, without more, is insufficient to meet the State’s burden to show that the community caretaking exception applies. *See id.*; *see also Bishop*, 85 S.W. 3d at 821; *Rodriguez v. State*, 844 S.W.2d 744, 745 (Tex. Crim. App. 1992) (considering motion to suppress together with attached affidavit to determine motion’s merits).

2. Reckless Driving

Nava next contends that the evidence does not support the trial court's finding that Officer Ferguson reasonably suspected that Nava committed the offense of reckless driving. The court found Nava's act of opening the door of his truck while exiting a parking lot "reckless per se." We note, however, that the unsworn legal memorandum, which contained the only description of events before the trial court at the motion to suppress, does not state that Nava opened the passenger door, or whether he was alone in the truck. It also does not state that the truck was moving when the passenger door opened.

A person commits the offense of reckless driving if the person drives a vehicle in willful or wanton disregard for the safety of persons or property. TEX. TRANSP. CODE ANN. § 545.401 (West 2011). As applied to reckless driving, willful and wanton disregard means deliberate and conscious indifference to the safety of others. *Dixon v. State*, 358 S.W.3d 250, 257 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

A police officer may temporarily detain a person for investigative purposes if the officer reasonably suspects that the detained person is connected with a crime. *Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 1880 (1968); *Wade v. State*, 422 S.W.3d 661, 668–69 (Tex. Crim. App. 2013). "A police officer has reasonable suspicion for a detention if he has specific, articulable facts that, when

combined with rational inferences from those facts, would lead him to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity.” *Wade*, 422 S.W.3d at 668; *accord Terry*, 392 U.S. at 21–22, 88 S. Ct. at 1880. The reasonableness of a traffic stop undertaken for investigative purposes is not determined by the actual motivations of individual officers. *Whren*, 517 U.S. at 813, 116 S. Ct. at 1774.

The trial court heard no evidence and was presented with no sworn affidavits. Thus, the circumstances surrounding the open door (for example, whether the truck was stopped or moving and the speed at which it was moving), as well as the officer’s account of the events, are absent from the record. The record is silent as to the circumstances that would allow the trial court to determine whether the officer reasonably suspected that Nava’s actions manifested a deliberate and conscious indifference to the safety of others. Because neither side proffered affidavits, and the trial court denied Nava’s request for a hearing, the record contains no evidentiary support for the State to meet its burden to overcome the allegation that the officer lacked reasonable suspicion to stop Nava.

Accordingly, we hold that the trial court erred by denying Nava’s motion to suppress based on the record before it.

3. Harm Analysis

Having concluded that error exists in the record, we perform the harm analysis required by Rule 44.2(a) of the Rules of Appellate Procedure. *See* TEX. R. APP. P. 44.2.

When the defendant is denied the right to present a defense, the State gains leverage in plea bargaining that it would otherwise lack. *See Holmes v. State*, 323 S.W.3d 163, 173–74 (Tex. Crim. App. 2009); *McKenna v. State*, 780 S.W.2d 797, 799–800 (Tex. Crim. App. 1989); *Kraft v. State*, 762 S.W.2d 612, 614–15 (Tex. Crim. App. 1988). Thus, if we cannot say that a trial court’s failure to allow a defendant to present a defense did not contribute to the defendant’s guilty plea, we must reverse. *See Holmes*, 323 S.W.3d at 173–74 (citing *McKenna*, 780 S.W.2d at 799).

Nava pleaded guilty immediately after the trial court denied his motion. A successful motion to suppress the fruits of the traffic stop could have excluded the evidence admitted against Nava. Because we cannot conclude beyond a reasonable doubt that the denial of Nava’s motion to suppress did not cause him to plead guilty, the trial court’s error was not harmless.

Conclusion

We reverse the judgment of the trial court and remand the case to the trial court for further proceedings consistent with this opinion.

Jane Bland
Justice

Panel consists of CHIEF Justice Radack and Justices Bland and Huddle.

Publish. *See* TEX. R. APP. P. 47.2(b).