Opinion issued May 12, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00200-CR

KRISTINE MARIE MURRELL, 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. 1973306

MEMORANDUM OPINION

Appellant, Kristine Marie Murrell, was charged with driving while intoxicated ("DWI") as a second offense, with a blood alcohol concentration of

0.15 or greater.[1] After the trial court denied her motion to suppress, she pleaded guilty and the trial court assessed her punishment at confinement for one year, probated for one year. In three issues on appeal, she argues that the trial court erred in denying her motion to suppress because the traffic stop was not supported by reasonable suspicion.

We affirm.

Background

Appellant was arrested and charged with DWI as a second offense and with a blood alcohol concentration of 0.15 or greater. She moved to suppress the evidence obtained incident to her traffic stop on the basis that her arrest by Deputy J. Simon "was made without any reasonable suspicion that [she] was engaged in criminal activity."

At the hearing on the motion to suppress, Deputy Simon testified regarding his arrest of appellant. He stated that he had been a peace officer with the Harris County Sheriff's Office for three years and was on patrol duty at the time he arrested appellant.

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[1] *See* TEX. PENAL CODE ANN. § 49.04(a) (Vernon Supp. 2015); *see also id.* § 49.04(d) ("If it is shown on the trial of an offense under this section that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, the offense is a Class A misdemeanor."); *id.* § 49.09(a) (providing for enhancement of DWI offense when it is shown at trial that person had previous DWI conviction).

Deputy Simon testified that he observed appellant driving on a public roadway at approximately 1:30 a.m. and that she was "changing speeds pretty frequently." He stated that although the speed limit on the road was forty miles per hour, appellant "would drop down to like 30 miles per hour, 25 sometimes, and then accelerate really quickly, travel a couple of feet really and then stop and slow down again." He testified that this was a "repeated pattern." Deputy Simon testified that there were no obstructions, obstacles, or traffic in the roadway that would have required appellant to accelerate and slow down to avoid.

Deputy Simon further testified that he had been trained to recognize signs of intoxicated drivers and that "erratic driving," including the "[i]nability to control your speed[,] is something that's typically indicative of an intoxicated driver." He also noticed that, after she turned onto Cypresswood Drive, appellant "made frequent lane changes, you know, signaling each time. And that in and of itself was, you know, also a signal, a sign, or clue of intoxicated driving." He testified that although appellant signaled with each lane change, "[i]t would really be as she was changing lanes, she would turn on her signal and change lanes." Deputy Simon stated that this "indicated—a lot of times when a person is intoxicated and they have difficulty controlling the vehicle, or they start to swerve, they'll turn on their signal light, go ahead and move into that lane that they were swerving into to mask the swerve rather than jerk the wheel hard and go back into the lane." He

again stated that there were no obstacles or other traffic on the roadway that appellant could have been trying to avoid with her repeated lane changes. Deputy Simon testified that, in his experience, unusual lane changes or drifting with or without signals is an indicator of intoxication.

Finally, Deputy Simon noted that he encountered appellant at 1:30 a.m. and that there were several bars and restaurants in the area. The trial court asked if "there was any thought in [his] mind that the driver might be in distress," and Deputy Simon responded, "At 1:30, Your Honor, the thought in my mind was she was intoxicated." He stated that he had "made many stops for DWI" and that he had seen behavior like appellant's—erratic acceleration and erratic lane changes—as being consistent with intoxicated driving in the past. Deputy Simon testified that, based on when the incident occurred, the location of the encounter, and the facts he observed, he formed the belief that appellant was possibly intoxicated and was thus committing the offense of DWI. Pursuant to that suspicion, he "effected a traffic stop" for the purposes of "[f]urther investigation" of the potential DWI offense.

On cross-examination, Deputy Simon acknowledged that appellant did not violate the speed limit or commit any other traffic offense and that no minimum speed was posted on the street where appellant was driving. He stated that it was appellant's repeated acceleration and deceleration that made him suspect she might

be intoxicated. Regarding the frequent lane changes, Deputy Simon stated that appellant signaled each time as she was changing lanes, so she did not commit a traffic violation in that respect. He also testified, "I didn't observe any weaving." He acknowledged that frequent lane changes were not illegal in and of themselves, but he observed her signaling as she made the lane changes which, in his experience, was an attempt to mask "swerved behavior." He also stated that it was a sign of intoxication according to the training he received, which was "why [he] ha[d] to make a stop and do an investigation."

The trial court announced on the record that it agreed with appellant that if "this were just someone driving 20 miles per hour or 30 miles per hour below the speed limit, that would not give rise to sufficient cause to make a stop." However, the testimony at the hearing indicated that appellant had no traffic or other obstacles that accounted for "the variable speed and erratic acceleration that has been presented. And that could give a deputy with knowledge of DWI investigations sufficient cause to believe that something more sinister was afoot[.]" The trial court also noted Deputy Simon's testimony that there were bars and restaurants in the area and that he encountered appellant at 1:30 a.m. The trial court stated, "The behavior of changing the lanes even while signaling, apparently to the officer, appeared to be evasive behavior." The trial court stated,

> Given the totality of the circumstances, the time of day, the erratic driving behavior, the variable speeds without any justification or

> provocation, the fact that the deputy did not believe that this was a person in distress, but believed that this was a person who may be intoxicated, the evasive lane changes, I believe the . . . threshold [has] been met and that specific, articulable facts were put in the record by the State, and observed by the deputy, so as to justify a stop for the offense of driving while intoxicated.

The trial court denied appellant's motion to suppress and ordered "the State to draft findings of fact and conclusions of law consistent with this Court's ruling."

In the findings of fact and conclusions of law filed by the State and signed by the trial court, the trial court found the following facts:

> 7. Simon observed that the road conditions were good, visibility was clear, there was no traffic or obstacles near the defendant, and that the road was straight.
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> 8. Simon observed the defendant driving at variable and erratic speeds, generally dropping 10-15 miles per hour below the speed limit.
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> 9. Simon observed defendant turn onto Cypresswood Drive and drift within her lane.
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> 10. Simon observed the defendant change lanes frequently and signal each time just before drifting into the next lane.
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> 11. Simon observed the defendant continue to make evasive lane changes when he pulled his vehicle behind hers.
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> 12. Several establishments that sell alcoholic beverages are located near where the stop occurred.
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> 13. Simon testified that the time of the stop, approximately 1:30 AM, was significant as that is when people would often be leaving bars and restaurants after drinking.

The trial court also found that Deputy Simon was a credible witness with experience in law enforcement, DWI investigation, and observing intoxication. The trial court's written conclusion stated, "Because the defendant repeatedly accelerated and decelerated, drove 10-15 mph below the speed limit, made evasive lane changes, given the location, time and circumstances, based on his training and experience, Simon had a reasonable suspicion that the defendant may be driving while intoxicated." Thus, the trial court concluded that appellant was lawfully detained and that Deputy Simon was justified in conducting a traffic stop to further investigate his suspicion.

Following this ruling, appellant pleaded guilty to the DWI offense. The trial court certified her right to appeal its ruling on the motion to suppress. This appeal followed.

Motion to Suppress

In three issues on appeal, appellant argues that the trial court erred in denying her motion to suppress because the evidence was insufficient to indicate that Deputy Simon had reasonable suspicion to justify the traffic stop.

A. Standard of Review

We review a trial court's denial of a motion to suppress evidence under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We give almost total deference to a trial court's determination

of historical facts, especially if those determinations turn on witness credibility or demeanor, and we review de novo the trial court's application of the law to facts not based on an evaluation of credibility and demeanor. *Gonzales v. State*, 369 S.W.3d 851, 854 (Tex. Crim. App. 2012). At a suppression hearing, the trial court is the sole and exclusive trier of fact and judge of the witnesses' credibility, and it may choose to believe or disbelieve all or any part of the witnesses' testimony. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

When the trial court enters findings of fact, the appellate court considers all of the evidence in the record and "must determine whether the evidence supports those facts by viewing the evidence in favor of the trial court's ruling." *Castro v. State*, 373 S.W.3d 159, 164 (Tex. App.—San Antonio 2012, no pet.) (citing *Keehn v. State*, 279 S.W.3d 330, 334 (Tex. Crim. App. 2009)). Additionally, an appellate court must "uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case." *State v. Iduarte*, 268 S.W.3d 544, 548 (Tex. Crim. App. 2008).

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. *See 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; *see also Miller v. State*, 418 S.W.3d 692, 696 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (holding that if officer has reasonable basis for suspecting person has committed traffic offense, then officer legally may initiate traffic stop). To form a basis for establishing reasonable suspicion, "the likelihood of criminal activity need not rise to the level required for probable cause." *State v. Kerwick*, 393 S.W.3d 270, 273–74 (Tex. Crim. App. 2013). The reasonable-suspicion standard requires only "some minimal level of objective justification" for the stop. *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012) (quoting *Foster v. State*, 326 S.W.3d 609, 614 (Tex. Crim. App. 2010)).

The test for reasonable suspicion is an objective one that focuses solely on whether an objective basis exists for the detention and disregards the officer's subjective intent. *Kerwick*, 393 S.W.3d at 274; *Hamal*, 390 S.W.3d at 306. The reasonableness of a temporary detention is determined from the totality of the circumstances. *Delafuente v. State*, 414 S.W.3d 173, 177 (Tex. Crim. App. 2013). The State bears the burden to show that an officer had at least a reasonable suspicion the defendant either had committed an offense, or was about to do so,

before they made the warrantless stop. *See Derichsweiler v. State*, 348 S.W.3d 906, 913–14 (Tex. Crim. App. 2011) (citation omitted).

A person commits the offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place. *See* TEX. PENAL CODE ANN. § 49.04(a) (Vernon Supp. 2015).

B. Analysis

Appellant argues that Deputy Simon's traffic stop was not supported by reasonable suspicion. In her first issue, she argues that the trial court's findings that she was changing speeds frequently, was driving below the speed limit, and was in an area with "several" establishments that serve alcohol are conclusory findings that deserve no weight. In her second issue, appellant argues that the trial court's findings that appellant "was 'drifting,' that [Deputy] Simon was experienced in dealing with intoxicated persons, and that [Deputy] Simon testified that the time of the stop was when people would be leaving bars are unsupported by the record and deserve no weight." Finally, in her third issue, appellant argues that "the only evidence of intoxication was [appellant's] lane changes while signaling, which is insufficient to establish reasonable suspicion." We address these issues together.

Deputy Simon was the only witness at the suppression hearing. He testified that he observed appellant driving on a public roadway at approximately 1:30 a.m. and that she was "changing speeds pretty frequently." He testified that she

repeatedly accelerated and decelerated rapidly and that there were no obstructions or traffic that would account for those changes in speed. He likewise testified that she drove between ten and fifteen miles per hour below the speed limit. Finally, Deputy Simon testified that there were several bars and restaurants in the area where he encountered appellant. Deputy Simon's testimony was based on his experience and observations, and the trial court found that he was a credible witness. *See Gonzales*, 369 S.W.3d at 854 (courts give almost total deference to trial court's determination of historical facts, especially if those determinations turn on witness credibility or demeanor).

Given this record, we conclude that Deputy Simon's testimony at the suppression hearing supports the trial court's findings that appellant changed speeds frequently, was driving below the speed limit, and was in an area with "several" establishments that serve alcohol, and thus, the findings are not conclusory. *See Keehn*, 279 S.W.3d at 334 (holding that appellate court must consider all evidence in record, viewed in favor of trial court's fact findings, and determine whether it supports trial court's finding).

Regarding the trial court's finding that Deputy Simon was a credible witness with experience in law enforcement, DWI investigation, and observing intoxication, we observe that Deputy Simon's uncontroverted testimony was that he had been employed with the Harris County Sheriff's Office for three years at

the time of the hearing, that he had "made many stops for DWI" and had received training on the subject, and that he had worked as a security officer for the State Department for fifteen years prior to becoming a peace officer. We likewise observe that the trial court was the sole and exclusive trier of fact and judge of Deputy Simon's credibility. *See Maxwell*, 73 S.W.3d at 281. We conclude that the testimony at the suppression hearing supports the trial court's findings regarding Deputy Simon's experience. *See Keehn*, 279 S.W.3d at 334.

Regarding the trial court's finding that "Simon testified that the time of the stop, approximately 1:30 a.m., was significant as that is when people would often be leaving bars and restaurants after drinking," Deputy Simon testified that he stopped appellant at approximately 1:30 a.m. and that there were several bars and restaurants in the area where he encountered appellant. He testified that he believed appellant was intoxicated based on her erratic speed and lane changes, the time, and the location. When the trial court asked if "there was any thought in [his] mind that the driver might be in distress," Deputy Simon responded, "At 1:30, Your Honor, the thought in my mind was she was intoxicated." Thus, although he did not directly testify that the time was "significant," the finding here was a reasonable inference drawn from the facts articulated. *See Wade*, 422 S.W.3d at 668 ("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.") (emphasis added); *see also Iduarte*, 268 S.W.3d at 548 (stating appellate court must "uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case").

Finally, the trial court found, in part, that "Simon observed defendant turn onto Cypresswood Drive and drift within her lane" and that "Simon observed the defendant change lanes frequently and signal each time just before drifting into the next lane." Deputy Simon testified that he observed appellant make "frequent lane changes, you know, signaling each time. And that in and of itself was, you know, also a signal, a sign, or clue of intoxicated driving." He testified that although appellant signaled with each lane change, "[i]t would really be as she was changing lanes, she would turn on her signal and change lanes." Deputy Simon observed that "a lot of times when a person is intoxicated and they have difficulty controlling the vehicle, or they start to swerve, they'll turn on their signal light, go ahead and move into that lane that they were swerving into to mask the swerve rather than jerk the wheel hard and go back into the lane." He again stated that there were no obstacles or other traffic on the roadway that appellant could have been trying to avoid with her repeated lane changes. Deputy Simon testified that, in his

experience, unusual lane changes or drifting with or without signals are indicators of intoxication.

Thus, although it is true, as appellant argues, that the trial court's finding that "Simon observed defendant . . . drift within her lane" is not based on evidence presented at the suppression hearing, the accompanying finding that "Simon observed the defendant change lanes frequently and signal each time just before drifting into the next lane" is supported by Deputy Simon's testimony at the suppression hearing. That finding, in conjunction with the findings regarding her erratic acceleration and deceleration, the time, and the location, constituted specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that appellant was driving while intoxicated. *See Wade*, 422 S.W.3d at 668; *see also Iduarte*, 268 S.W.3d at 548 (stating appellate court must "uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case").

Accordingly, given the evidence discussed above, we conclude that the evidence was sufficient to support the conclusion that Deputy Simon had a reasonable suspicion that appellant was committing DWI. Deputy Simon—the only witness at the suppression hearing—testified that appellant, while driving on a public roadway, was making erratic changes in speed and was making erratic lane changes that seemed to be a way to "mask [a] swerve," and that those facts, when

combined with the time and location, led him to believe that appellant was intoxicated. *See Curtis v. State*, 238 S.W.3d 376, 381 (Tex. Crim. App. 2007) (holding that it was appropriate for appellate court to consider lateness of hour, officer's training and experience in detecting intoxicated drivers, and rational inferences from facts articulated by officers, in addition to officer testimony that defendant was driving erratically, to support reasonable suspicion to conduct investigative stop); *Gajewski v. State*, 944 S.W.2d 450, 453 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (concluding that officer's testimony that defendant was driving in erratic manner could establish reasonable suspicion even through driver might not have committed traffic offense).

Contrary to appellant's argument, it is not necessary that appellant violate a traffic law in order to create a reasonable suspicion that she was driving while intoxicated, nor is it necessary that any one observation by Deputy Simon clearly indicate that she was intoxicated. Rather, we are required to examine the totality of the circumstances in determining whether the temporary detention was reasonable. *See Delafuente*, 414 S.W.3d at 177; *see also Woods v. State*, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997) ("[T]here may be instances when a person's conduct viewed in a vacuum appears purely innocent, yet when viewed in light of the totality of the circumstances, those actions give rise to reasonable suspicion.").

Deputy Simon's testimony set out specific, articulable facts—such as erratic changes in speed, suspicious lane changes, time, and location—that, when combined with rational inferences from those facts, would lead him to reasonably conclude that appellant was driving while intoxicated. *See Wade*, 422 S.W.3d at 668; *see also* TEX. PENAL CODE ANN. § 49.04(a) (providing that person commits offense of driving while intoxicated if she is intoxicated while operating motor vehicle in public place); *Kerwick*, 393 S.W.3d at 273–74 (holding that to form basis for establishing reasonable suspicion, "the likelihood of criminal activity need not rise to the level required for probable cause"); *Hamal*, 390 S.W.3d at 306 (holding that reasonable-suspicion standard requires only "some minimal level of objective justification" for investigative stop). Accordingly, we conclude that the trial court did not err in denying appellant's motion to suppress. *See Wade*, 422 S.W.3d at 668.

We overrule appellant's issues on appeal.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.

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