Opinion issued July 27, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00608-CR

TAIRON JOSE MONJARAS, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Case No. 1614762

O P I N I O N

After the trial court denied his motion to suppress evidence, appellant, Tairon Jose Monjaras, with an agreed punishment recommendation from the State, pleaded guilty to the felony offense of possession of a firearm by a felon.[1] In accordance

[1] *See* TEX. PENAL CODE ANN. § 46.04(a), (e).

with the plea agreement, the trial court assessed his punishment at confinement for five years. In his sole issue, appellant contends that the trial court erred in denying his motion to suppress evidence.

We modify the trial court's judgment and affirm as modified.

Background

At the hearing on appellant's motion to suppress, Houston Police Department ("HPD") Officer J. Sallee testified that he was on duty, with his partner, on December 12, 2018. While on patrol around noon in a "high crime area," Sallee drove his patrol car into the La Plaza apartment complex on Glenmont Drive. The patrol car's emergency overhead lights and siren were not activated. The weather was warm, in the "[m]id sixties" and "[s]eventies." As Sallee drove slowly toward the back of the apartment complex, he saw appellant walking. Appellant had a backpack with him. Appellant did not make eye contact with Sallee as the patrol car drove by; instead, appellant "immediately looked down as . . . a child would . . . if [he was] doing something wrong." Appellant was "over dressed for th[e] temperature" outside. After the patrol car passed appellant, Sallee's partner saw appellant "immediately look[] up."

Because Officer Sallee wanted "to see where [appellant] was going or what was going on," he made a U-turn in the patrol car. Sallee still did not activate his patrol car's emergency overhead lights or siren. After the patrol car turned around,

Sallee expected to see appellant walking, but appellant was not in sight. Sallee believed that appellant had either "ducked off into an apartment" or run off.

While patrolling the other side of the apartment complex, Officer Sallee saw appellant again. Sallee did not activate his patrol car's emergency overhead lights or siren. Sallee stopped the patrol car, exited, and approached appellant to engage in a consensual encounter with him. Sallee requested information from appellant but did not demand information from appellant. Sallee did not exhibit his firearm, and appellant freely spoke to Sallee. Appellant understood what Sallee said to him. Appellant was "free to go," and if appellant "had just taken off running," Sallee would not have done anything.

Officer Sallee also testified that later, when he searched appellant, he found five .22 caliber bullets in appellant's backpack. And Sallee "felt [a] gun" in appellant's waistband when he searched appellant's person. Appellant immediately started fighting with Sallee after Sallee "felt the gun." Sallee believed that appellant was trying to get his firearm when he struggled with Sallee. Following the struggle, Sallee and his partner recovered a firearm from appellant that was "fully loaded."

HPD Officer C. Starks testified that while on duty on December 12, 2018, he rode, along with his partner, Officer Sallee, in a patrol car. While on patrol, Sallee and Starks went to the La Plaza apartment complex on Glenmont Drive. As they drove around the apartment complex, Starks saw appellant walking. When appellant

saw the law enforcement officers, he "lowered his head" and did not look at them, which was not a normal reaction. According to Starks, appellant was "not dressed appropriately." Although it was a "warm day," appellant was wearing a jacket and a hat; he was also carrying a backpack. After Sallee and Starks passed by appellant in the patrol car, appellant "raised his head." When the officers turned the patrol car around to drive back toward appellant, he was gone. Starks believed that appellant had "taken off running into the courtyard." Neither Sallee nor Starks activated the patrol car's emergency overhead lights and siren.

When they saw appellant again, Officer Sallee and Officer Starks made a stop to have a consensual encounter with appellant. The manner in which Sallee parked the patrol car gave appellant a clear path, and Starks testified that appellant was "free to leave." Starks did not exhibit his firearm; he "never grabbed it," "never removed it," and "never took it out of the holster." Starks stayed "back" as Sallee spoke to appellant. If appellant had "taken off run[ning]," Starks would have "watch[ed] him take off running." Starks noted that while Sallee spoke to appellant, another person flagged Starks down to report another incident unrelated to any interaction the officers were having with appellant.

According to Officer Starks, during the officers' interaction with appellant, Officer Sallee asked appellant if he could search him. And later, after appellant's struggle with Sallee, Sallee removed a firearm from appellant's person.

The trial court admitted into evidence, State's Exhibit 1, a copy of the HPD offense report.[2] A portion of the offense report, titled "Case Summary," states:

> Officer . . . Starks and Officer . . . Sallee were patrolling at La Plaza Apartments located at 5909 Glenmont on 12-12-18 in response to an increase in violent crime in the area. The officers noticed [appellant] walking inside of the complex. [Appellant] was heav[ily] dressed with a [b]ack[pack] and put his head down as the officers drove by. [Appellant] quickly walked into the courtyard and ran eastbound through the complex. The officers noticed [appellant] exited a breezeway and decided to question him regarding his suspicious activity. . . . Sallee asked [appellant] for his permission to search his person, including his pockets and [appellant] freely agreed to allow . . . Sallee to search him. . . . Sallee found several bullets in [appellant's] backpack during [the] search. . . . Sallee then searched [appellant's] body and touched a .22 caliber handgun concealed inside of [appellant's] pants. [Appellant] grabbed this gun and began to wrestle with [the] officers. [Appellant] grabbed this gun in an attempt to murder . . . Sallee and . . . Starks. The officers wrestled with [appellant] for approximately a minute until . . . Starks tasered him and he began to comply. . . . Sallee recovered a fully loaded . . . .22 caliber revolver from [appellant]. This [was] a firearm that [appellant] unlawfully possessed because of his felony conviction. . . . Sallee received abrasions to his forehead and hand during th[e] struggle.

Another portion of the offense report written by Officer Sallee states:

> I have made a prior arrest in this same area of Houston for violent gang related crimes while I was assigned to [the] gang division as a crime reduction unit. Officer Starks and I were in a fully marked police Tahoe

---

[2] *See Perez v. State*, 495 S,W.3d 374, 387 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (appellate court "consider[s] [the] evidence available to the trial court when it ruled on the motion to suppress"); *see also Adroin v. State*, No. 01-15-01062-CR, 2016 WL 7368101, at *2 (Tex. App.—Houston [1st Dist.] Dec. 15, 2016, no pet.) (mem. op., not designated for publication) (appellate courts limit their review of trial court's ruling on motion to suppress "to an examination of the evidence produced at the suppression hearing" unless parties relitigate suppression issue at trial on merits).

and were wearing [our HPD] issued uniforms with [body-worn cameras] activated. We entered the La Plaza apartment complex located at 5909 Glenmont Drive.

While [we] were patrolling through the parking lot[,] we passed by [appellant] who was walking east bound, down the southside of the apartment complex. Both Officer Starks and I noticed that [appellant] appeared to be nervous and stared at the ground and only looked up once we passed him. I continued driving a short distance and turned our patrol vehicle around.

We did not see [appellant] once we turned around for a short time and observed him walking down one of the breeze[ways]. Both Officer Starks and I activated our body[-]worn cameras . . . and I made first contact with [appellant].

I introduced myself and shook [appellant's] hand and began speaking with him. After a short conversation[,] I learned that [appellant] did not have any identification on his person. I have seen this many times with fugitives so they can lie about their identity. [Appellant] verbally consented for me to search him. The consent to search can be clearly heard and [seen] on my [body-worn camera]. [Appellant] continued not to make eye contact with me and had trembling hands.

I searched [appellant] once and then moved to his [backpack] where I located approx[imately] 5 unfired .22 caliber bullets. I recognized the bullets to be [for] a .22 caliber pistol [which] is a smaller firearm. I informed Officer Starks that I had found several bullets and told him it would be a smaller pistol that I could have missed. I began searching [appellant] again and felt a gun near his right[-]side groin area. Once [appellant] knew I had found the gun[,] he reached for it and began fighting [with the] officers. I maintained my right hand on the gun and wrapped my left arm around [appellant's] waist. . . . Starks, [appellant,] and I went to the ground after a short struggle on our feet. The entire time [appellant] was attempting to retrieve the gun. Some[how] [appellant] regained his feet and I followed with him by having my arms still wrapped around his waist. We took several steps and I took [appellant] back to the ground. I struck [appellant] several times with my left hand while I maintained my right hand on the gun. . . . Starks regained his feet and was able to deploy his [conducted

> energy device] striking [appellant] in his upper left shoulder. All while [Starks and I] gave verbal commands to [appellant]. [Appellant] still had his right hand under his body with his hand on the gun. I yelled at [appellant] and . . . Starks recharged the [conducted energy device]. This time [appellant] finally gave up and placed his hands behind his back. . . . I placed [appellant] into hand restraints and retrieved the gun from his waist band. I could see from the side of the revolver that it was loaded and placed it behind me. . . .

And a portion of the offense report written by Officer Starks states:

> We drove to the La P[laza] Apartments at 5909/5913 Glenmont and began to drive through the parking lot. There was some activity with a few people walking in the complex.
>
> We drove in southbound from Glenmont, drove to the back of the complex and turned to the west[.] [W]e drove to the west parking lot and turned northbound.
>
> I first saw [appellant] walking southbound on the sidewalk along the side of the apartments. It was a warm morning and [appellant] appeared to be overly dressed wearing what looked like multiple layers of clothing and a knit cap. He was also carrying a backpack. [Appellant] saw us and looked down toward the sidewalk and did not look our way when we passed. [Appellant] then looked forward and continued walking northbound as soon as we passed him.
>
> . . . .
>
> We made a U-turn and then drove back to the south side of the complex.
>
> [Appellant] was no where to be seen. He had obviously taken off running into the courtyard of the apartments. We lost sight of him.
>
> We continued driving eastbound and then turned northbound back toward the entrance that we had just drove through.
>
> Officer Sallee then saw [appellant] walking eastbound through a breezeway into the same parking lot that we were now in.

We decided to do a consensual interview with [appellant] due to his suspicious behavior.

Officer Sallee drove past the breezeway to the north of [appellant]. We stopped in a location that did not impede [appellant's] travel or walking path.

Officer Sallee exited the vehicle and approached [appellant] toward the rear of our truck. . . . Sallee identified himself and shook [appellant's] hand.

[Appellant] told Officer Sallee that he did not have any identification and verbally identified himself during this conversation. [Appellant] was visibly shaking during th[e] interview.

I had exited the vehicle and had neglected to inform the dispatcher of our location. I saw that [appellant] did not have identification. I then walked to the passenger door of our truck and advised the dispatcher of our location and obtained my portable fingerprinting device.

I was walking back around when [a] witness . . . walked up to me wanting to inform me of some type of incident that had occurred overnight.

I instructed her to step away and wait for me on the sidewalk of the apartments.

I heard Officer Sallee ask [appellant] if he could search his person and his pockets. I heard [appellant] freely say yes.

Officer Sallee then searched [appellant's] person and pockets and began to search his backpack while I was fingerprinting him.

Officer Sallee advised that there w[ere] bullets inside of the backpack. I saw these bullets. . . . Sallee then told me that they were .22 caliber bullets and that he wanted to search [appellant] again to make sure that he did not miss a pistol during the original search.

[Appellant] cl[e]nched his hands and stiffened up and then quickly reached for his waistband area.

> Officer Sallee then told me that [appellant] had a gun and we both began to struggle with [appellant].
>
> . . . .
>
> We struggled with [appellant] for several seconds. I had a grip on [appellant's] head and hands at one time and lost grip on them during the struggle.
>
> I ended back up on my feet at some time. [Appellant] and Officer Sallee both had their hands on [appellant's] gun and were struggling for several seconds. . . . .
>
> . . . .
>
> I then took out my issued conducted energy device . . . . I told Officer Sallee that I had my taser. The only open spot that I could deploy the conducted energy device [was] on the back of [appellant's] left shoulder.
>
> I activated the [conducted energy device] and I deployed the trigger until [appellant] stopped trying to pull his gun out to kill us. I released the trigger and [appellant] then began to reach back for his gun. I then re-activated the [conducted energy device] on the same cartridge until [appellant] said something to the effect [of] "I quit" and stopped resisting. I immediately stopped the [conducted energy device] when [appellant] stopped resisting. He was then handcuffed and compliant.
>
> . . . .
>
> Officer Sallee removed the pistol . . . .

The trial court also admitted into evidence, State's Exhibit 2, videotaped recordings from the body-worn cameras of Officer Sallee and Officer Starks on December 12, 2018. The videotaped recording of Sallee's body-worn camera shows Sallee driving his patrol car in an apartment complex. Sallee stops the patrol car and

states that he is going to initiate a consensual encounter. He exits the patrol car and says to appellant, "Good morning. How you doing, sir?" Sallee introduces himself to appellant and shakes appellant's hand. Appellant is wearing a jacket, a knit hat, and carrying a backpack over his shoulder. Sallee asks appellant if he lives in the apartment complex. After appellant responds that he does, Sallee asks appellant if he has any "ID." Officer Starks is shown on the videotaped recording standing off to the side near the back of the patrol car and away from Sallee and appellant. Appellant says that his identification is at his home. When Sallee asks appellant for his name, appellant offers to write his name down on Sallee's notepad. Sallee asks appellant "how[] [his] day [is] going," and Starks, while still standing off to the side, asks appellant if he "[is] a painter." Appellant answers the officers' questions. As appellant writes down his name for Sallee, Starks walks away from appellant and Sallee, and Starks is no longer visible on the videotaped recording.

Officer Sallee next asks appellant if he has "ever been arrested." Appellant responds, "Yeah . . . for assault, domestic violence." Sallee also asks appellant to write down his date of birth, which appellant does. While this is occurring, a woman approaches Officer Starks, who reappears on the videotaped recording and moves further away from Sallee and appellant to speak with the woman. Sallee asks appellant if he is nervous and states that appellant is "shaking." Appellant responds. After Starks is finished speaking with the woman, he walks back closer to appellant

and Sallee, but still stands off to the side a bit. Sallee asks appellant if he has "anything . . . illegal" on him, including any "weapons." Appellant shakes his head "no" in response to Sallee's question. Sallee then asks appellant if he can "search [him]," and appellant starts to empty his pockets. Sallee asks appellant to "hold on," and reminds appellant that he only asked appellant "a question." To clarify that Sallee is only asking appellant if Sallee can search him, Sallee and Starks ask appellant to stop taking items out of his pockets. Sallee then asks appellant again, "May I search you," and appellant responds, "Yeah."

To search appellant, Officer Sallee asks appellant to put his hands on the patrol car for the search. Appellant complies, and Sallee searches appellant's person. Appellant tells Sallee that he was coming "from work." Sallee then searches appellant's backpack, while Officer Starks stands to the side with appellant and fingerprints appellant. While searching appellant's backpack, Sallee finds bullets. Starks asks appellant if he "ha[s] a gun," and appellant says, "No," and that it is his "painter's backpack." Sallee goes over to appellant to search his person, telling Starks that the firearm would be "small." Sallee then says, "Yeah, he's got a gun, partner." On the videotaped recording sounds of a struggle can then be heard.

The videotaped recording of Officer Stark's body-worn camera shows Starks riding in the front-passenger seat of a patrol car as it drives through an apartment complex. The patrol car stops, and Starks states, "[F]or [a] consensual encounter."

Officer Sallee can he heard saying, "Good morning. How you doing, sir?" Starks exits the front-passenger side of the patrol car and walks around to the back of the car. He stands off to the side behind the patrol car.

The videotaped recording shows Officer Sallee standing with appellant. Appellant is wearing a jacket, a knit hat, and carrying a backpack. Sallee asks appellant if he has any "ID." Appellant says, "No," and that he has it in his home. Sallee asks appellant if he can "get [appellant's] name," and appellant agrees. Sallee asks appellant how his "day [is] going," and appellant responds, "Good." Starks asks appellant if he "[is] a painter," and appellant responds, "Yeah." Appellant offers to write his name down on Sallee's notepad.

Officer Starks then walks away from appellant and Officer Sallee and back around the patrol car to open his front-passenger-side door. He gets a device out of the patrol car, and as he walks toward the back of the patrol car again, a woman approaches him. Starks greets the woman. The woman and Starks stand off to the side further away from Sallee and appellant. The woman speaks to Starks and he asks her to wait nearby on the sidewalk. Starks moves back toward where appellant and Sallee are standing, but still stays a bit to the side. Sallee asks appellant if he has "anything . . . illegal" on him, including any "weapons." In response, appellant shakes his head, "no." Sallee asks appellant, "May I search you?" And appellant starts removing items from his pockets. To clarify that Sallee is only asking if he

can search appellant, the officers ask appellant to stop taking items out of his pockets. Sallee asks appellant again, "May I search you?" And appellant says, "Yeah." To carry out his search, Sallee asks appellant to put his hands on the patrol car. Appellant complies, and Sallee searches appellant's person.

After searching appellant's person, Officer Sallee searches appellant's backpack. While this is occurring, Officer Starks asks appellant if he can "see [appellant's] hands" to fingerprint them. Appellant says, "Yeah." Starks asks appellant if he has "ever been arrested before," and appellant responds, "Yeah . . . for domestic violence." Sallee then informs Starks that he found bullets in appellant's backpack. Starks asks appellant if he "ha[s] a gun," and appellant says, "No" and that his backpack is his "painter's backpack." Sallee proceeds to search appellant's person again and tells Starks that the firearm would be "small." Sallee then says, "Yeah, he's got a gun, partner," and a struggle ensues between the officers and appellant.

After the suppression hearing, the trial court denied appellant's motion to suppress evidence.

Standard of Review

We apply a bifurcated standard to review a trial court's denial of a motion to suppress evidence. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We review the trial court's factual findings for an abuse of discretion and the

trial court's application of the law to the facts de novo. *Id.*; *see also State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008) ("[W]hether a given set of historical facts amount to a consensual police-citizen encounter or a detention under the Fourth Amendment is subject to de novo review because that is an issue of law[—]the application of legal principles to a specific set of facts." (emphasis omitted)). At a suppression hearing, the trial court is the sole 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, as here, a trial court does not make explicit findings of fact, we review the evidence in a light most favorable to the trial court's ruling, and we assume that the trial court made implied findings of fact that support its ruling as long as those findings are supported by the record. *Ramirez-Tamayo v. State*, 537 S.W.3d 29, 35–36 (Tex. Crim. App. 2017); *see also Walter v. State*, 28 S.W.3d 538, 540 (Tex. Crim. App. 2000). We give almost total deference to a trial court's implied findings, especially those based on an evaluation of witness credibility or demeanor. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We will sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.* at 447–48. This is so even if the trial court gives the wrong reason for its decision. *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App.

2003); *State v. Brabson*, 899 S.W.2d 741, 745–46 (Tex. App.—Dallas 1995) (stating, in context of reviewing trial court order granting motion to suppress, appellate court "cannot limit [its] review of the [trial] court's ruling to the ground upon which it relied" and it "must review the record to determine if there is any valid basis upon which to affirm the [trial] court's ruling"), *aff'd*, 976 S.W.2d 182 (Tex. Crim. App. 1998).

Motion to Suppress

In his sole issue, appellant argues that the trial court erred in denying his motion to suppress evidence because appellant "was detained and in custody from the very second the [law enforcement] officers pretended to have a 'consensual encounter' with him" and "[t]here was no reasonable suspicion for the [investigative] detention."

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. *Atkins v. State*, 882 S.W.2d 910, 912 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *see* U.S. CONST. amend. IV. Yet, not every encounter between law enforcement officers and citizens implicates constitutional protections. *Hunter v. State*, 955 S.W.2d 102, 104 (Tex. Crim. App. 1997). Interactions between law enforcement officers and citizens are often characterized as either consensual encounters, investigative detentions, or arrests. *State v. Woodard*, 341 S.W.3d 404, 410–11 (Tex. Crim. App. 2011); *Crain v. State*,

315 S.W.3d 43, 49 (Tex. Crim. App. 2010). Arrests require either a warrant or probable cause, while investigative detentions constitute brief seizures that are less intrusive than arrests and only require reasonable suspicion. *Derichsweiler v. State*, 348 S.W.3d 906, 914–17 (Tex. Crim. App. 2011); *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). Consensual encounters do not trigger any Fourth Amendment protections, so a law enforcement officer does not need probable cause or reasonable suspicion to initiate a consensual encounter. *Woodard*, 341 S.W.3d at 411 (noting "[l]aw enforcement [officer] is free to stop and question a fellow citizen; no justification is required for an officer to request information from a citizen" (internal footnotes omitted)); *State v. Velasquez*, 994 S.W.2d 676, 678–79 (Tex. Crim. App. 1999); *Gaines v. State*, 99 S.W.3d 660, 666 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

Courts look to the totality of the circumstances to determine whether an interaction between a citizen and a law enforcement officer is a consensual encounter. *Woodard*, 341 S.W.3d at 411. There is no "bright-line rule" governing when an encounter is consensual and when it becomes an investigative detention. *Id.*

An encounter is a consensual question-and-answer interaction between a citizen and a law enforcement officer in a public place that does not require reasonable suspicion and does not implicate a citizen's constitutional rights. *See*

Florida v. Royer, 460 U.S. 491, 497–98 (1983); *State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002); *see also Crain*, 315 S.W.3d at 49 ("An encounter takes place when an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers."). An encounter is usually a friendly exchange of pleasantries or mutually useful information. *Gaines*, 99 S.W.3d at 666. The encounter should be considered consensual as "long as a reasonable person would feel free to disregard the [law enforcement officer] and go about his business." *Hunter*, 955 S.W.2d at 104 (internal quotations omitted). In *Hunter*, the Texas Court of Criminal Appeals explained that an "officer's asking questions and requesting consent to search do not alone render an encounter a detention." *Id.* at 106. Only when an officer conveys a message that compliance is required does a consensual encounter become an investigative detention. *Id.*

A law enforcement officer's behavior is especially important in determining whether an interaction is a consensual encounter. *Woodard*, 341 S.W.3d at 411; *see also State v. Castleberry*, 332 S.W.3d 460, 467 (Tex. Crim. App. 2011) ("The time, place, and surrounding circumstances must be taken into account, but the officer's conduct is the most important factor in determining whether a police-citizen interaction is a consensual encounter or a Fourth Amendment seizure."). Circumstances that can indicate a seizure, rather than a consensual encounter, include "the threatening presence of several [law enforcement] officers, the display

of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). When an interaction starts out as a consensual encounter, physical force, or a show of authority by an officer generally indicates that the interaction has escalated into an encounter that is no longer consensual. *Woodard*, 341 S.W.3d at 411.

Officer Sallee, along with Officer Starks, around noon on December 12, 2018, drove a patrol car through the La Plaza apartment complex, without activating the patrol car's emergency overhead lights and siren. When they encountered appellant for a second time in the apartment complex, Sallee stopped the patrol car and greeted appellant, saying, "Good morning. How you doing, sir?" The patrol car was not parked in a position that would have impeded appellant's "travel or walking path"; appellant still had a clear path. Upon exiting the patrol car, Sallee introduced himself to appellant and shook appellant's hand. Starks also exited the front-passenger side of the patrol car and stood off to the side near the back of the patrol car while Sallee spoke to appellant. Neither Sallee nor Sparks exhibited a firearm, and appellant freely spoke to Sallee.

Officer Sallee asked appellant where he lived and if he had any "ID." Appellant responded that his identification was at his home. When Sallee asked appellant for his name, appellant offered to write his name down on Sallee's notepad.

Sallee asked appellant "how[] [his] day [was] going," and Starks, while standing off to the side, asked appellant if he "[was] a painter." Appellant freely answered the officers' questions.

As appellant wrote down his name for Officer Sallee, Officer Starks walked away from the area where appellant and Sallee were standing and returned to the front-passenger side of the patrol car to grab a mobile fingerprinting device. Starks was then approached by a woman, and he moved further away from appellant and Sallee to speak to her. When Starks was done speaking to the woman, he asked her to wait on the nearby sidewalk, and he walked back closer to appellant and Sallee, but still stood off to the side a bit.

Officer Sallee next asked appellant if he had "ever been arrested," and appellant responded, "Yeah . . . for assault, domestic violence." Sallee also asked appellant to write down his date of birth, which appellant did. Sallee then asked appellant if he had "anything . . . illegal" on him, including any "weapons." Appellant shook his head "no" in response. Sallee asked appellant if he could "search [him,]" and appellant started to empty his pockets. Sallee asked appellant to "hold on" and reminded appellant that he only asked appellant "a question." To clarify that Sallee only wanted to know if he could search appellant, Sallee and

Officer Starks asked appellant to stop taking items out of his pockets. Sallee then asked appellant again, "May I search you," and appellant responded, "Yeah."[3]

To search appellant, Officer Sallee asked appellant to put his hands on the patrol car for the search. Appellant complied, and Sallee searched appellant's person. Appellant told Sallee that he was coming "from work." Sallee next searched appellant's backpack, while Officer Starks stood to the side with appellant. Starks asked appellant if he could "see [appellant's] hands" to fingerprint them, and appellant responded, "Yeah."

In appellant's backpack, Officer Sallee found bullets. Officer Starks asked appellant if he "ha[d] a gun," and appellant replied, "No." Sallee then searched appellant's person again, telling Starks that the firearm would be "small." When Sallee announced, "Yeah, he's got a gun, partner," a struggle between the officers and appellant over the firearm ensued. During the officers' struggle with appellant, Starks used his conducted energy device.

Here, the evidence from the suppression hearing showed that Officer Sallee and Officer Starks approached appellant in a public place, in the middle of the day, to ask him questions, and appellant willingly listened and voluntarily answered the

---

[3] Appellant does not assert on appeal that he did not consent to Officer Sallee's search of his person and backpack. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Carmouche v. State*, 10 S.W.3d 323, 331 (Tex. Crim. App. 2000) ("Consent to search is one of the well-established exceptions to the constitutional requirements of both a warrant and probable cause.").

officers' questions. *See Crain*, 315 S.W.3d at 49; *see also Castleberry*, 332 S.W.3d at 468 (explaining "[b]ecause an officer is just as free as anyone to question, and request identification from, a fellow citizen, [the law enforcement officer's] conduct show[ed] that the interaction was a consensual encounter"; noting interaction between officer and defendant took place in "well[-]lit" area with "quite a bit" of foot traffic (internal quotations omitted)); *Garcia-Cantu*, 253 S.W.3d at 245 n.42 ("It is a reasonable inference that the objectively reasonable person would feel freer to terminate or ignore a police encounter in the middle of the day in a public place where other people are nearby . . . ."); *Rankin v. State*, 617 S.W.3d 169, 179 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd) ("During a consensual encounter, an officer may initiate contact with a person without having an objective level of suspicion, question the person, and ask for identification . . . ."); *Johnson v. State*, No. 01-10-00134-CR, 2011 WL 5428969, at *7–8 (Tex. App.—Houston [1st Dist.] Nov. 10, 2011, pet. ref'd) (mem. op., not designated for publication) (interaction constituted consensual encounter when only two law enforcement officers approached defendant in public place in early evening).

Officer Sallee and Officer Starks did not activate their patrol car's emergency overhead lights and siren when they stopped to talk to appellant, and they did not block appellant's path with their patrol car. *See Jordan v. State*, 394 S.W.3d 58, 63 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (holding interaction was

consensual encounter when law enforcement officers did not activate emergency overhead lights and did not block defendant's path); *see also Singleton v. State*, No. 12-19-00167-CR, 2020 WL 5406253, at *6–9 (Tex. App.—Tyler Sept. 9, 2020, pet. ref'd) (mem. op., not designated for publication) (interaction between law enforcement officer and defendant was consensual encounter when officer did not "use any police lights or sirens" and did not block defendant with his patrol car); *State v. Murphy*, No. 2-06-267-CR, 2007 WL 2405120, at *2 (Tex. App.—Fort Worth Aug. 23, 2007, no pet.) (mem. op., not designated for publication) (in holding law enforcement officer's interaction with defendant was consensual encounter, explaining no evidence existed that officer displayed his firearm, physically threatened defendant, used harsh language or touch, activated emergency overhead lights, or prevented defendant from leaving); *cf. Johnson v. State*, 414 S.W.3d 184, 193–94 (Tex. Crim. App. 2013) (circumstances indicating investigative detention could include blocking of defendant's car by law enforcement officers which required defendant to maneuver around patrol car to drive away). Sallee and Starks did not exhibit their firearms or use the conducted energy device until after Sallee found appellant's firearm during his search and appellant began fighting the officers for his firearm. *See United States v. Drayton*, 536 U.S. 194, 205 (2002) (holding "presence of a holstered firearm . . . [was] unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon"); *Lewis v. State*, 412

S.W.3d 794, 800 (Tex. App.—Amarillo 2013, no pet.) ("The encounter between [the law enforcement officer] and [defendant] was consensual. [The officer] did not display any weapons or use any force to obtain [defendant]'s compliance."); *Jordan*, 394 S.W.3d at 63 (holding interaction was consensual encounter when officers did not draw their firearms); *see also Gipson v. State*, No. 02-12-00410-CR, 2013 WL 2248246, at *3–4 (Tex. App.—Fort Worth May 23, 2013, no pet.) (mem. op., not designated for publication) (holding law enforcement officer's interaction was consensual encounter when officers did not activate emergency overhead lights, did not exhibit firearms as they approached defendant, identified themselves, asked defendant what she was doing, and did not indicate that she was not free to leave or that requested information might be compelled); *cf. Mendenhall*, 446 U.S. at 554 (circumstances that might indicate seizure would be display of firearm by law enforcement officer). Sallee touched appellant to shake his hand when Sallee introduced himself and again when he searched appellant—a search performed with appellant's consent. *See Hunter*, 955 S.W.2d at 106 (law enforcement officer's request for consent to search does not alone render encounter investigative detention); *Roy v. State*, 55 S.W.3d 153, 155–56 (Tex. App.—Corpus Christi–Edinburg 2001) (holding interaction between law enforcement officer and defendant was consensual encounter when officer greeted defendant, began walking with him, and asked for his identification), *pet. dism'd, improvidently granted*, 90 S.W.3d 720

(Tex. Crim. App. 2002); *see also Klein v. State*, Nos. 14-18-00575-CR, 14-18-00576-CR, 2020 WL 103664, at *1, *3–4 (Tex. App.—Houston [14th Dist.] Jan. 9, 2020, pet. ref'd) (mem. op., not designated for publication) (holding interaction between law enforcement officer and defendant was consensual encounter when officer approached defendant, introduced himself, and engaged "in a friendly, conversational manner" (internal quotations omitted)); *Phillips v. State*, No. 02-12-00521-CR, 2014 WL 584886, at *3 (Tex. App.—Fort Worth Feb. 13, 2014, no pet.) (mem. op., not designated for publication) (holding interaction between law enforcement officers and defendant was consensual encounter when officer did not "physically touch [defendant] before he consented to a search of his person").

Further, Officer Sallee and Officer Starks never indicated to appellant that he was not free to leave, and their language and tone of voice while talking with appellant did not indicate that compliance with their requests was required or might be compelled. *See Florida v. Bostick*, 501 U.S. 429, 434–35 (1991) (in consensual encounter law enforcement officers may ask individual general questions or ask to see and examine individual's identification, so long as officers do not indicate that compliance is required); *Jordan*, 394 S.W.3d at 61 ("If it was an option to ignore the request or terminate the interaction, then a Fourth Amendment seizure has not occurred." (internal quotations omitted)); *see also Jesmain v. State*, No.

02-19-00204-CR, 2021 WL 1323418, at *3–5 (Tex. App.—Fort Worth Apr. 8, 2021, no pet.) (mem. op., not designated for publication) (reviewing law enforcement officer's tone of voice from videotaped recording of body-worn camera; noting officer's tone was not loud or authoritative, officer did not shout or use threatening language, and instead, inquired about defendant's well-being and referred to him as "bud" (internal quotations omitted)); *Johnson*, 2011 WL 5428969, at *7–8 (interaction was consensual encounter where law enforcement officer spoke in polite tone and without raising his voice); *cf. Mendenhall*, 446 U.S. at 554 (circumstances that might indicate seizure would be "the use of language or tone of voice indicating that compliance with the [law enforcement] officer's request might be compelled"); *Johnson*, 414 S.W.3d at 193–94 (circumstances indicating investigative detention could include use of loud authoritative voice by law enforcement officer when speaking to defendant). For much of the interaction with appellant, Starks stood off to the side away from the area where appellant and Sallee were interacting, and at a certain point during the interaction, Starks walked away completely. *See Johnson*, 2011 WL 5428969, at *7–8 (interaction constituted consensual encounter when only two law enforcement officers approached defendant and officer that did not speak to defendant did not engage in any threatening behavior); *cf. Mendenhall*, 446 U.S. at 554 (circumstances indicating investigative detention could include threatening presence of several law enforcement officers).

Although Officer Sallee, during his interaction with appellant, asked appellant for consent to search him, this did not turn the consensual encounter into an investigative detention. *See Florida*, 501 U.S. at 437 ("[N]o seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search . . . [,] so long as the officers do not convey a message that compliance with their requests is required."); *Hunter*, 955 S.W.2d at 106; *see also State v. Anderson*, No. 11-11-00301-CR 2012 WL 3063895, at *1–3 (Tex. App.—Eastland July 26, 2012, pet. ref'd) (mem. op., not designated for publication) (interaction between law enforcement officer and defendant was consensual encounter even when officer asked defendant to empty his pockets and defendant complied); *Jordan*, 394 S.W.3d at 61 ("If it was an option to ignore the request or terminate the interaction, then a Fourth Amendment seizure has not occurred." (internal quotations omitted)). And the fact that Officer Starks, during the interaction, asked appellant if he could "see [appellant's] hands" to fingerprint them, which appellant agreed to do, also did not turn the consensual encounter into an investigative detention. *See Jordan*, 394 S.W.3d at 61 ("If it was an option to ignore the request or terminate the interaction, then a Fourth Amendment seizure has not occurred." (internal quotations omitted)). Notably, a citizen's acquiescence to a law enforcement officer's request does not transform a consensual encounter into an investigative detention or seizure, even if the officer does not communicate to the

citizen that the request may be ignored. *Jordan*, 394 S.W.3d at 61; *see also Woodard*, 341 S.W.3d at 411.

Further, we disagree with our dissenting colleague's conclusion that the interaction between Officer Sallee, Officer Starks, and appellant became an investigative detention when Officer Sallee asked appellant if he could search him and appellant began emptying his pockets.

During his interaction with appellant, Officer Sallee asked appellant if he could "search [him]," and appellant responded by starting to empty his pockets. Sallee then asked appellant to "hold on" and reminded appellant that he only asked appellant "a question." To clarify that Sallee only wanted to know if he could search appellant, Sallee and Officer Starks asked appellant to stop taking items out of his pockets. Although Starks moved closer to appellant, as he asked appellant to stop removing items from his pockets, he did not touch appellant, and the movement by Starks and the officers' request to stop removing items from his pockets, did not turn the consensual encounter into an investigative detention. *See, e.g.*, *Phillips*, 2014 WL 584886, at *1, *3 (interaction between law enforcement officers and defendant was consensual encounter even when two officers approached defendant and asked him to remove his hands from his pockets); *Amaya v. State*, No. 08-11-00265-CR, 2013 WL 5593110, at *7 (Tex. App.—El Paso Oct. 9, 2013, no pet.) (mem. op., not designated for publication) (interaction between law enforcement officer and

defendant was consensual encounter even when officer asked defendant "to keep his hands out of his pocket"); *see also Ingrum v. State*, No. 02-16-00277-CR, 2017 WL 710701, at *3 (Tex. App.—Fort Worth Feb. 23, 2017, pet. ref'd) (mem. op., not designated for publication) (interaction between law enforcement officer and defendant was consensual encounter even though officer walked up to defendant); *Kennedy v. State*, No. 10-13-00163-CR, 2014 WL 3973944, at *7–8 (Tex. App.—Waco Aug. 14, 2014, pet. ref'd) (mem. op., not designated for publication) (holding interaction between law enforcement officers and defendant was consensual encounter where officers "stood close" to defendant and asked him questions); *Johnson*, 2011 WL 5428969, at *7–8 (interaction constituted consensual encounter when only two law enforcement officers approached defendant). Neither Sallee nor Starks exhibited a firearm, spoke in a harsh or loud tone, or indicated to appellant that he could not leave. Instead, both officers were trying to help appellant understand what Sallee meant when he asked appellant for his consent to search him.

We also note that to search appellant, Sallee asked appellant to put his hands on the patrol car for the search. This request by Sallee did not turn the consensual encounter into an investigative detention. *See Garcia-Cantu*, 253 S.W.3d at 243 (law enforcement officers are free as any other citizen to approach citizens and ask for their cooperation); *Jordan*, 394 S.W.3d at 61 (citizen's acquiescence to law enforcement officer's request does not transform consensual encounter into

investigative detention or seizure, even if officer does not communicate to citizen that request may be ignored); *see also Anderson*, 2012 WL 3063895, at *1–3 (consensual encounter did not become investigative detention even when law enforcement officer asked defendant to empty his pockets); *Johnson*, 2011 WL 5428969, at *7–8 (interaction constituted consensual encounter when only two law enforcement officers approached defendant in public place in early evening); *Johnson v. State*, No. 8-99-00020-CR, 2000 WL 1060641, at *1–2 (Tex. App.—El Paso Aug. 3, 2000, no pet.) (not designated for publication) (interaction between law enforcement officer and defendant was consensual encounter even when officer asked defendant to empty her pockets and she did so); *cf. Castleberry*, 332 S.W.3d at 466 ("An encounter is no longer consensual when an officer, through physical force or a showing of authority, has restrained a citizen's liberty."). Contrary to our dissenting colleague's conclusion, we cannot say that any of the above discussed occurrences turned the officers' consensual encounter with appellant into an investigative detention.

Finally, to the extent that appellant relies on the events that occurred before Officer Sallee and Officer Starks approached him to assert that the officers' interaction with him was nonconsensual, and thus, an investigatory detention, this reliance is misplaced. The subjective beliefs or motives of Sallee and Starks when they approached appellant are not relevant to the determination of whether their

interaction with appellant was a consensual encounter or an investigative detention. A law enforcement officer may stop and question a fellow citizen even without justification. *Woodard*, 341 S.W.3d at 411. The inquiry as to whether an interaction is a consensual encounter or an investigative detention is an objective one. *See Furr v. State*, 499 S.W.3d 872, 878 (Tex. Crim. App. 2016); *Castleberry*, 332 S.W.3d at 467.

Viewing evidence in the light most favorable to the trial court's ruling, we conclude that the interaction between Officer Sallee and Officer Starks was a consensual encounter.[4] Thus, we hold that the trial court did not err in denying appellant's motion to suppress evidence.

We overrule appellant's sole issue.

Modification of Judgment

The trial court's written judgment does not accurately comport with the record in this case in that it, under the heading of "special finding[] or order[]," states: "APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED." Here, the record reflects that the trial court certified appellant's right to appeal in this case. *See* TEX. R. APP. P. 25.2(d). When there is a conflict between a trial court's certification of a defendant's right of appeal and a written judgment concerning a

[4] We need not address appellant's argument that "[n]o reasonable suspicion existed." *See* TEX. R. APP. P. 47.1.

defendant's right to appeal, the certification controls, especially when the remainder of the record supports the statement in the certification. *See Grice v. State*, 162 S.W.3d 641, 645 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); *see also Khan v. State*, No. 01-18-00327-CR, 2019 WL 346861, at *7 (Tex. App.—Houston [1st Dist.] Jan. 29, 2019, pet. ref'd) (mem. op., not designated for publication).

"[A]ppellate court[s] ha[ve] the power to correct and reform a trial court judgment 'to make the record speak the truth when [they] ha[ve] the necessary data and information to do so, or make any appropriate order as the law and nature of the case may require.'" *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (quoting *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet ref'd)). Although neither party addresses the inconsistency between the trial court's written judgment and the record, we, based on our review, conclude that the portion of the judgment regarding appellant's right to appeal does not accurately comport with the record in this case. *See Asberry*, 813 S.W.2d at 529–30 (authority to correct incorrect judgment not dependent upon request of any party).

Thus, we modify the trial court's judgment to strike the "special finding[] or order[]" of "APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED." *See* TEX. R. APP. P. 43.2(b); *see, e.g.*, *Khan*, 2019 WL 346861, at *7.

Conclusion

We affirm the judgment of the trial court as modified.

Julie Countiss
Justice

Panel consists of Justices Kelly, Goodman, and Countiss.

Goodman, J., dissenting.

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