Opinion issued February 1, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00108-CR

ROBERT EARL BYRD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1578701

MEMORANDUM OPINION

After the trial court denied his motion to suppress evidence, appellant, Robert Earl Byrd, pleaded guilty to possession of phencyclidine ("PCP") weighing more than 4 and less than 200 grams and true to a single enhancement paragraph. *See* TEX. HEALTH & SAFETY CODE §§ 481.115(d), 481.102(8). In accordance with a plea

agreement between appellant and the State, the trial court assessed punishment at eight years' confinement. In his sole issue on appeal, appellant contends that the trial court erred in denying his motion to suppress evidence.

We affirm.

BACKGROUND

While monitoring calls at the Harris County Jail, Houston Police Department ("HPD") officers obtained information about a planned retaliatory gang shooting. According to the information, a man was going to pick up guns to be used in the shooting from a house in the 6700 block of Paris Street. Based on that information, HPD's Southeast Gang Task Force conducted surveillance of the house on Paris Street. At some point, surveillance officers saw appellant drive up to the house, stop for a short time, then drive away.

Officer E. Resendez and his partner were assigned as a "takedown unit," in the event the surveillance officers requested a traffic stop. After the surveillance officers saw appellant at the house on Paris Street, they notified Resendez and his partner that they had seen a Camaro stop and then depart the target house.

At the hearing on the motion to suppress, Resendez initially testified that, while parked further north and facing south on Paris Street, he saw appellant approach the intersection of Paris Street and Yellowstone Boulevard and turn left without signaling. However, after viewing a video from his body-worn camera

("BWC") again, Resendez corrected his testimony after the following exchange with defense counsel:

> (Defense Counsel): But what I'm trying to get at—ascertain is when you're on Paris, when you observe Mr. Byrd not using his turn signal, which direction were you traveling? North or southbound on Paris?
>
> * * * *
>
> (Defense Counsel): I'm still trying to ascertain, where you observed Mr. Byrd failing to use his turn signal at Paris and Yellowstone, were you traveling northbound or southbound on Paris?
>
> (Resendez): Like I said, reviewing the video all over again and you showing it multiple times, when I saw the infraction, we were going east on Cullen. I know I said I was on Paris, but reviewing the footage all over again kind of made it a little bit clearer. *We were going east at the time on Yellowstone*. I'm sorry. I'm not sure if I said Cullen. *We were going east on Yellowstone*. (Emphasis added).
>
> (Defense Counsel): Okay. No further questions.

After seeing appellant turn without signaling, Resendez activated his BWC. He and his partner followed appellant for a bit, checked appellant's plates, which were "clear," and then initiated a traffic stop. Appellant did not stop immediately, but "slow rolled" for approximately a minute. The officers believed that the "slow rolling" may have been an effort to stall for time while appellant attempted to hide contraband, look for a way to flee on foot, or obtain a weapon. When appellant finally stopped, the officers smelled marihuana as they approached his car. Appellant told them that "all he had was weed in the car." A search of appellant's

car and person revealed a clear bag of marihuana under the driver's seat and a bottle of phencyclidine ("PCP") in appellant's pants.

After watching the video and hearing testimony from Officer Resendez and appellant's private investigator, the trial court denied appellant's motion to suppress. Thereafter, in accordance with a plea agreement with the State, appellant pleaded guilty to the charged offense and true to a single enhancement paragraph, and the trial court assessed his punishment at eight years' confinement.

In relevant fact findings, the trial court found that "[w]hile Officer Resendez was observing the Defendant, the Defendant turned left onto a cross street without activating his car's turn signal." In relevant conclusions of law, the trial court held that "the Defendant violated both sections 545.106(a) and (b) when he wholly failed to activate or engage his turn signal before turning," and that "Officers had a reasonable suspicion and probable cause that offense had just been committed and were legally justified in stopping and detaining the Defendant for these violations."

Appellant filed this appeal challenging the denial of his motion to suppress.

MOTION TO SUPPRESS

In a single issue, appellant contends that "[t]he trial court erred in denying Mr. Byrd's motion to suppress because indisputable video evidence shows the testifying officer could not have seen the alleged [traffic] infraction, making the traffic stop unlawful."

Standard of Review

A trial court's ruling on a motion to suppress is subject to review on appeal for abuse of discretion. *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). "In reviewing a trial court's ruling on a motion to suppress, appellate courts must view all of the evidence in the light most favorable to the trial court's ruling." *State v. Garcia–Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008). We use a bifurcated standard of review in assessing the trial court's ruling. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007).

We afford almost total deference to the trial court's determination of historical facts supported by the record, especially when the fact findings are based on credibility and demeanor. *State v. Martinez*, 570 S.W.3d 278, 281 (Tex. Crim. App. 2019); *Ex parte Estrada*, 573 S.W.3d 884, 891 (Tex. App.—Houston [1st Dist.] 2019, no pet.). And, we afford the same deference to the trial court's rulings on application of law to fact questions if resolving those ultimate questions turns on evaluating credibility and demeanor. *Sandifer v. State*, 233 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). "[B]ut[,] we review de novo application-of-law-to-fact questions that do not turn on credibility and demeanor." *McCulley v. State*, 352 S.W.3d 107, 117 (Tex. App.—Fort Worth 2011, pet. ref'd) (citing *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007)). The trial court may choose to believe or

disbelieve any or all of a witness's testimony. *Ramirez v. State*, 44 S.W.3d 107, 109 (Tex. App.—Austin 2001, no pet.).

We cannot ignore indisputable video evidence, *see State v. Duran*, 396 S.W.3d 563, 570–71 (Tex. Crim. App. 2013), but deference to the trial court is appropriate when video evidence does "not indisputably refute the trial court's finding." *State v. Gobert*, 275 S.W.3d 888, 892 n.13 (Tex. Crim. App. 2009). "[W]hen evidence is conclusive, such as . . . 'indisputable visual evidence,' then any trial-court findings inconsistent with that conclusive evidence may be disregarded as unsupported by the record, even when that record is viewed in a light most favorable to the trial court's ruling." *Miller v. State*, 393 S.W.3d 255, 263 (Tex. Crim. App. 2012) (quoting *Tucker v. State*, 369 S.W.3d 179, 187 (Tex. Crim. App. 2012) (Alcala, J., concurring)).

Applicable Law

The Fourth Amendment protects against unreasonable searches and seizures by government officials. U.S. CONST. amend. IV; *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). To suppress evidence because of an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct. *Amador v. State*, 221 S.W.3d 666, 672 (Tex. Crim. App. 2007). A defendant satisfies this burden by establishing that a search or seizure occurred without a warrant. *Id.* Once the defendant has made

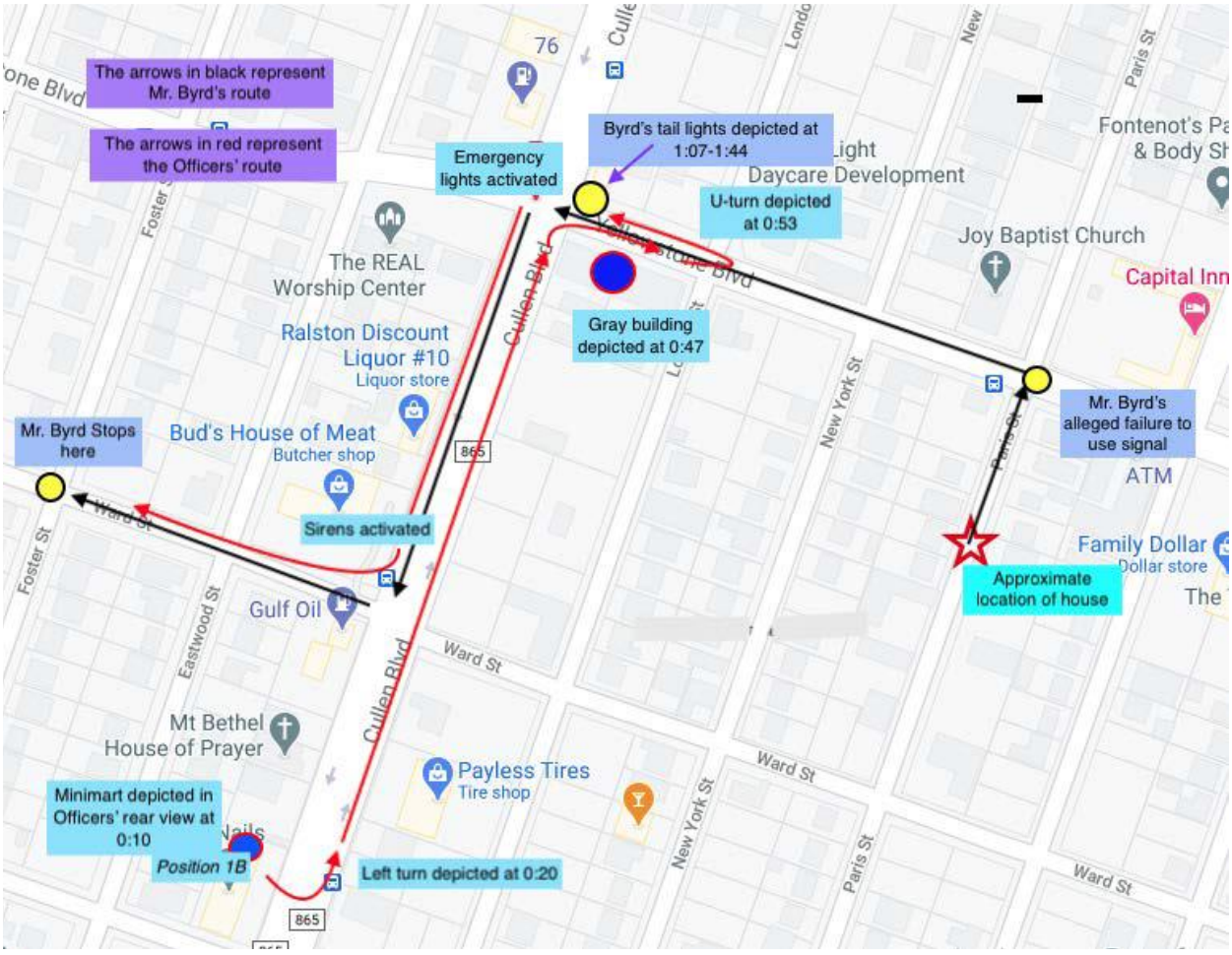
this showing, the burden of proof shifts to the State, which is required to establish that the search or seizure was conducted pursuant to a warrant or was reasonable. *Id.* at 672–73; *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005). A law enforcement officer may lawfully stop a motorist when the officer has probable cause to believe the motorist has committed a traffic violation. *Walter v. State*, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000). An officer may also stop a motorist if the officer has a reasonable basis for suspecting that a person has committed a traffic offense. *See Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex. Crim. App. 2015). There is no requirement that the driver be guilty of the traffic offense; it is sufficient that the officer had a reasonable suspicion the driver committed the traffic offense. *See id.*; *Cook v. State*, 63 S.W.3d 924, 929 n.5 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). It is an offense to change lanes without signaling an intent to turn. *See* TEX. TRANSP. CODE §§ 545.104(a), 542.301(a). "An operator intending to turn a vehicle right or left shall signal continuously for not less than the last 100 feet of movement of the vehicle before the turn. TEX. TRANSP. CODE § 545.104(b).

Analysis

Appellant contends that "[i]ndisputable video footage [from Resendez's BWC] shows that the officers were not physically able to view a traffic infraction committed by Mr. Byrd[,] and that "[b]ecause the officers could not have seen a

traffic infraction, no reasonable suspicion existed to justify the stop of Mr. Byrd's car and any evidence recovered during that illegal search must be suppressed."

In support of his contentions, appellant's brief includes the following map, which summarizes his version of the BWC video admitted at trial, along with relevant time stamps:



Timestamps for Map B are as follows:

- (SX-1 at 0:10-0:19) – AM Mini-Mart sign depicted in rear view mirror.
- (SX-1 at 0:20-0:23) – officers make a left onto Cullen Boulevard.
- (SX-1 at 0:24-0:46) – officers travel northbound on Cullen Boulevard.

- (SX-1 at 0:46) – officers make right turn onto Yellowstone Boulevard.
- (SX-1 at 0:47 – 0:53) – Gray building at Cullen Boulevard and Yellowstone Boulevard seen through Officer Resendez's passenger side window.
- (SX-1 at 0:53 – 1:05) – officers make a U-turn at London Street, after passing the end of the building.
- (SX-1 at 1:07 – 1:44) – officers sit behind Byrd at the Cullen Boulevard/ Yellowstone Boulevard intersection.
- (SX-1 at 1:50) – officers follow Byrd left onto Cullen Boulevard.
- (SX-1 at 1:59) – body camera audio turns on and officers activate their emergency lights.
- (SX-1 at 2:17) – officers activate their sirens.

Based on this summary of Resendez's BWC video, appellant contends that "Officer Resendez could not have seen Mr. Byrd make a traffic infraction at the intersection of Paris and Yellowstone, as he testified to, because his unit was not located on Paris Street, but was on stand-by at 6830 Cullen Blvd., near the intersection of Cullen and Ward, at the time of the alleged infraction." Specifically, appellant claims that "the beginning of the body camera footage captures a visually distinctive sign in the patrol vehicle's rear-view mirror placing Officer Resendez at the AM Mini-Mart at 6830 Cullen" at the time he saw the offense and activated his BWC.

The State points out that the BWC video starts, not when Resendez activated his BWC, but approximately one minute before.[1] The State argues that, when

[1] Resendez explained that, once he activates his BWC, "the video goes back a minute[,]" so that "it's going to show video a minute prior to activating your camera."

properly accounting for this delay, Resendez was at 6830 Cullen Boulevard one minute *before* he saw the traffic offense. The State further argues that the video actually corroborates Resendez's testimony that, at the time he saw the offense, he was traveling east on Yellowstone Boulevard. In fact, one minute into the video, Resendez is traveling east on Yellowstone Boulevard toward the Paris Street intersection where the offense occurred. Resendez then makes a u-turn near the Yellowstone Boulevard/London Street intersection and follows appellant down Yellowstone Boulevard to the Yellowstone Boulevard/Cullen Boulevard intersection, left onto Cullen Boulevard, and then right onto Ward Street, where appellant is stopped.

Even appellant's version of the events places Resendez on Yellowstone Boulevard heading east toward Paris Street when appellant turned onto Yellowstone Boulevard from Paris Street without signaling. Nothing in the record, even the BWC video, conclusively establishes that Resendez could not see the Paris Street/Yellowstone Boulevard intersection while traveling east toward that intersection.[2]

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[2] We note that the BWC is located on Resendez's chest and does not reflect what was visible had the camera been at his eye level. As other courts have observed, "[R]arely will videotape evidence actually be 'indisputable.'" *State v. Tabares*, No. 08-17-00175-CR, 2019 WL 2315004, at *6 (Tex. App.—El Paso May 22, 2019, no pet.) (mem. op., not designated for publication) (quoting *Tucker v. State*, 369 S.W.3d 179, 187 n.1 (Tex. Crim. App. 2012) (Alcala, J., concurring)). Video evidence may lack clarity "because of lighting, angle, focus of the camera, or

Because Resendez's BWC video is not "indisputable evidence" that appellant did not commit a traffic violation, the trial court did not abuse its discretion by denying appellant's motion to suppress evidence. *See Allison v. State*, No. 01-19-00909-CR, 2021 WL 3775600, at *5 (Tex. App.—Houston [1st Dist.] Aug. 26, 2021, no pet.) (mem. op., not designated for publication) (upholding trial court's denial of motion to suppress because officer's dashcam video was not "indisputable evidence" that defendant did not commit traffic offense); *Walker v. State*, No. 12-15-00128-CR, 2016 WL 3950950, at *2 (Tex. App.—Tyler July 20, 2016, no pet.) (mem. op., not designated for publication) ("Because the video does not conclusively disprove [the officer's] testimony . . . [the trial court] did not abuse its discretion in denying Appellant's motion to suppress.").

Accordingly, we overrule appellant's sole issue.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Kelly and Landau.

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distance from the object being recorded." *Id.* (citing *Tucker*, 369 S.W.3d at 187 n.1 (Alcala, J., concurring)).