Opinion issued June 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00469-CR

ESAU MARTINEZ MUNOZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Case No. 1618592

DISSENTING OPINION

While I agree that section 545.060 of the Transportation Code requires both a showing that a driver failed to maintain a lane and that the driver did so unsafely, I do not agree that the State met its burden to show reasonable suspicion here. For that reason, I would reverse the denial of the motion to suppress.

When a law enforcement officer stops a defendant without a warrant and without the defendant's consent, the State has the burden of proving the reasonableness of the stop. *State v. Cortez*, 543 S.W.3d 198, 204 (Tex. Crim. App. 2018). To meet its burden, the State may rely on officer testimony providing specific, articulable facts that support reasonable suspicion. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Whether those facts rise to the level of reasonable suspicion is a question of law. *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001). It is these two aspects of the legal analysis where I part ways with the majority.

First, the standard of review. Because the trial court made no fact findings, we imply the necessary fact findings that would support the trial court's ruling if the evidence supports it. *State v. Kelly*, 204 S.W.3d 808, 819 (Tex. Crim. App. 2006). Then though, we review the trial court's legal rulings de novo. *Id*. A determination of reasonable suspicion is a legal ruling. *Id*. The inquiry is legal, not factual, and not entitled to the deference we afford credibility determinations. *See Mills v. State*, 296 S.W.3d 843, 845 (Tex. App.—Austin 2009, pet. ref'd) ("Whether reasonable suspicion is present is a question of law for the trial court when there is no dispute concerning the existence of the underlying historical facts from which that determination is made."); *see also Doyle v. State*, 265 S.W.3d 28, 33 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (where the facts underlying the decision to stop

are undisputed, the legal effect of those underlying facts is a purely legal question). Deference to an officer's testimony about the factual circumstances of a stop does not shield the legal question of reasonable suspicion from de novo review.

Second, the State did not meet its burden because Deputy Stanley did not present "specific and articulable facts" to justify reasonable suspicion that criminal activity was afoot. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968). Taking Deputy Stanley's factual testimony as true, as we must, there is still not enough to constitute reasonable suspicion of a traffic violation. Deputy Stanley testified that Munoz came to his attention on a four-lane roadway, with two lanes northbound, two lanes southbound, and a turn lane in the middle. Traffic was somewhere between "light and medium." There were several cars on the road. Munoz was driving a truck in the far right northbound lane. Munoz was weaving within his lane. As he continued, Munoz's tires touched the striped white line, and crossed slightly, if at all. Deputy Stanley followed him for six to eight minutes. The dash cam activated when Deputy Stanley turned his emergency lights on and showed that Munoz's truck was "straddling the center stripe line" between two northbound lanes with one set of tires in one lane and one set of tires in the other lane for two to three seconds. There was other traffic heading the opposite direction, with a lane and a turning lane between them and Munoz's truck. The deputy did not testify that there was traffic near Munoz

or that his driving was otherwise unsafe. Instead, the deputy justified the traffic stop by positing that Munoz's driving might cause a problem in the future.

> Q. And why did you believe that to be unsafe?
>
> A. I've seen where people – whether there's vehicles or not because they end up leaving the roadway and striking something for whatever reason that might be.

The reason Deputy Stanley said Munoz's driving was unsafe was because he might have, in the future, driven off the road or hit something. Deputy Stanley did not provide specific, articulable facts that, when combined with rational inferences from those facts, would objectively show that Munoz moved unsafely between lanes. Deputy Stanley did not testify that anyone was within a lane of Munoz. He did not testify that anyone had to use evasive maneuvers to avoid Munoz's truck. He did not testify that Munoz was speeding or swerving, or that there were any conditions on the road, such as nearby pedestrians or road construction, that made drifting between lanes unsafe. Deputy Stanley provided no articulable facts to support a reasonable conclusion that Munoz's driving was unsafe, but this is what the statute requires. *See Martinez v. State*, 29 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd); *State v. Bernard*, 503 S.W.3d 685, 690 (Tex. App.—Houston [14th Dist.] 2016), *pet. granted*, *judgment vacated on other grounds*, 512 S.W.3d 351 (Tex. Crim. App. 2017).

Other cases have required more than just moving briefly into another lane, such as a high rate of speed, heavy traffic, or crossing into oncoming traffic, to qualify as unsafe driving while changing lanes. *State v. Cerny*, 28 S.W.3d 796, 800–01 (Tex. App.—Corpus Christi 2000, no pet.); *Hernandez v. State*, 983 S.W.2d 867, 870–71 (Tex. App.—Austin 1998, pet. ref'd); *State v. Tarvin*, 972 S.W.2d 910, 912 (Tex. App.—Waco 1998, pet. ref'd); *Gajewski v. State*, 944 S.W.2d 450, 453 (Tex. App.—Houston [14th Dist.] 1997, no pet.). Indeed, as the Court of Criminal Appeals has remarked, "Driving is an exercise in controlled weaving. It is difficult enough to keep a straight path on the many dips, rises, and other undulations built into our roadways." *Cortez*, 543 S.W.3d at 206. All lane changes, completed or abandoned, involve a vehicle straddling two lanes of traffic momentarily.

This is not a case that turns on officer credibility. It is not a case in which the officer says the driver left his lane and the driver denies it. There is video evidence of Munoz's driving. What this officer's testimony added—and what the majority incorrectly defers to in the name of credibility—is the officer's subjective belief that this behavior was unsafe because Munoz could drive off the road in the future and hit something. *See Eichler v. State*, 117 S.W.3d 897, 899 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (rejecting reasonable suspicion based on officer testimony that motorist's swerve into neighboring lane was unsafe because "[n]ext time he goes all the way over and hits the concrete median."). This is not a proper application of

deference to credibility determinations. Allowing a police officer's speculation "to suffice in specific facts' stead eviscerates *Terry*'s reasonable suspicion protection." *Ford*, 158 S.W.3d at 493. Put differently, this misplaced deference is "removing the 'reasonable' from reasonable suspicion." *Id*.

As the United States Supreme Court has reasoned, the officer's good faith "is not enough. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, house, papers, and effects,' only in the discretion of the police." *Terry*, 392 U.S. at 23 (further citation omitted).

The officer's subjective belief cannot support a reasonable suspicion finding: reasonable suspicion is an objective test that ignores an officer's subjective belief. *Ford*, 158 S.W.3d at 492. Further, speculation about what might occur in the future amounts to no more than a hunch. *See Glass v. State*, 681 S.W.2d 599, 601 (Tex. Crim. App. 1984). And an officer's mere hunch about what constitutes a traffic offense will not support reasonable suspicion finding any more than a subjective belief can. *See, e.g., Abney v. State*, 394 S.W.3d 542, 550 (Tex. Crim. App. 2013).

The deputy did not provide specific, articulable facts that would support reasonable suspicion that criminal activity was afoot. Thus, he lacked reasonable suspicion to stop Munoz's vehicle. *See, e.g., id.; Cortez*, 543 S.W.3d at 201–09; *see also United States v. Raney*, 633 F.3d 385, 390 (5th Cir. 2011) ("If the alleged traffic

violation forming the basis of the stop was not a violation of state law, there is no objective basis for justifying the stop."). Viewing the totality of the circumstances, without other indicators of criminal activity, the failure to maintain a lane without it being unsafe cannot justify the traffic stop. Therefore, I respectfully dissent.

Sarah Beth Landau
Justice

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

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