Affirmed and Memorandum Opinion filed February 2, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00697-CR

RODERICK EARL ST. JULIAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1144226

MEMORANDUM OPINION

After the trial court denied his motion to suppress, appellant, Roderick Earl St. Julian, pleaded guilty to state-jail felony possession of a controlled substance and pleaded true to two prior state-jail felony convictions. In three issues, appellant argues the trial court erred by denying his motion to suppress and that he was denied due process because of prosecutorial vindictiveness. Because the dispositive issues are clearly settled in law, we issue this memorandum opinion and affirm. Tex. R. App. P. 47.4.

I. BACKGROUND

Officers Christopher L. Slater and Robert Teweleit of the Houston Police Department ("HPD") testified at the motion to suppress hearing. According to their testimony, on the evening of December 3, 2007, they were conducting a "zero tolerance" patrol for car burglaries near the 12800 block of the East Freeway in Houston.[1] The officers were specifically looking for activity they believed may signal the beginning of a motor-vehicle burglary.[2] Around 7:00 P.M., they were observing activity at a gas station. A convenience store and gas pumps were located in the front of the gas-station property, and a large parking lot and commercial-truck repair shop were located in the rear. An eighteen wheeler was parked in the rear along the fence line. At the time of the officers' observation, the repair shop was closed and there was no activity occurring. The officers described lighting in the back area as "dim" and "kind of dusky."

While observing the gas station, the officers saw a dark-colored vehicle in the parking lot traveling in reverse without activated headlights. The vehicle then "pulled . . . very swiftly around the side of an [eighteen wheeler.]" Such vehicle operation, coupled with the repair shop being closed and the eighteen wheeler unoccupied, caught the officers' attention as "the kind of activity [they] were looking for."

After watching for several "moments," the officers pulled behind the vehicle and activated their emergency lights and spotlight. Officer Slater testified appellant opened the driver door to his vehicle and exited, at which point Officer Slater exited his patrol car, drew his firearm, and commanded appellant to stop. Officer Teweleit, however, testified the officers exited their patrol car before appellant exited his vehicle. Nonetheless, neither officer ordered appellant to exit his vehicle. Officer Slater noticed items that he believed

[1] At the time of the suppression hearing, Officers Slater and Teweleit had been employed by HPD for fifteen years and twenty-two years respectively.

[2] Officer Slater described a "zero tolerance" patrol as "checking . . . businesses, strip centers, [and] offices . . . looking for people who are suspicious or any kind of suspicious activities[;] looking for people committing burglary of motor vehicles."

were a crack pipe and cocaine drop from appellant when he exited his vehicle. Appellant was arrested and another police unit arrived. While Officer Slater testified it is illegal to operate a vehicle without headlights, neither officer knew of any traffic code provision making it illegal for a person to drive a vehicle in reverse in a parking lot at night without using headlights.

Appellant's account of the events surrounding his arrest differed greatly. According to appellant, he was parked in the front part of the gas station when his friend Stephen Belle, a gas station employee, asked if he could sit in appellant's car during a work break. After Belle entered appellant's vehicle, appellant drove in reverse ten or fifteen feet and parked next to the eighteen wheeler. Appellant was sitting in his car eating and did not notice the officers until they approached his door. Appellant testified he was blocked by the police: one police car was parked on the side of his vehicle, the other was directly behind him, and the eighteen wheeler was in front of him. The police cars did not have their emergency lights activated. Four officers approached appellant's vehicle in an aggressive manner. Appellant believed he had no choice but to exit his vehicle after Officer Slater instructed him to do so.

Appellant filed a motion to suppress all evidence seized as result of his detention. Following a hearing, the trial court denied appellant's motion and entered findings of fact and conclusions of law. Pursuant to a plea agreement, appellant pleaded guilty to state-jail-felony possession of a controlled substance and true to two prior state-jail-felony convictions. The trial court assessed punishment at five years' confinement.

II. ANALYSIS

A. Motion to Suppress

In his first issue, appellant contends the trial court erred in finding he was not detained by Officers Slater and Teweleit when they pulled behind his vehicle. In his second issue, appellant contends his detention was illegal because the officers did not have reasonable suspicion.

We review the trial court's ruling on a motion to suppress under an abuse-of-discretion standard. *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Id.* We give almost total deference to a trial court's express or implied determination of historical facts and review de novo the court's application of the law of search and seizure to those facts. *Id.*

A warrantless traffic stop must be justified by reasonable suspicion. *State v. Nelson*, 228 S.W.3d 899, 902 (Tex. App.—Austin 2007, no pet.). In other words, the officer making the stop must possess specific, articulable facts that, taken together with rational inferences from those facts, lead him to conclude the person detained is, has been, or soon will be engaged in criminal activity. *Woods v. State*, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997); *Nelson*, 228 S.W.3d at 902. This objective standard disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stops exists. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). A reasonable-suspicion determination is made by considering the totality of the circumstances. *Id.* at 492–93. An officer's suspicion of an alleged traffic violation cannot be based on a mistaken understanding of traffic laws. *Goudeau v. State*, 209 S.W.3d 713, 716 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The burden to demonstrate reasonable suspicion is on the State. *See Nelson*, 228 S.W.3d at 902. We review questions of reasonable suspicion *de novo*. *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997).

In arguing his detention was unlawful, appellant relies on three cases. In *Comer v. State* and *Johnson v. State*, the Court of Criminal Appeals held that officers lacked a sufficient basis to detain individuals sitting in parked vehicles at night because the facts relied upon by the officers were "as consistent with innocent activity as they [were] with criminal activity." *Comer v. State*, 754 S.W.2d 656, 657–58 (Tex. Crim. App. 1986), *overruled by Woods*, 956 S.W.2d at 38; *Johnson v. State*, 658 S.W.2d 623, 625–27 (Tex. Crim. App. 1983), *overruled by Woods*, 956 S.W.2d at 38. These cases are not useful in

our analysis because the "as consistent with innocent activity as with criminal activity" standard has been expressly replaced by the "totality of the circumstances" standard. *See Woods*, 956 S.W.2d at 38. Appellant also relies on *Tunnell v. State*, in which the Court of Criminal Appeals held a sufficient basis for detention did not exist where the principal fact relied upon by the detaining officers was that individuals were in a parked vehicle in a well-lit parking lot early in the morning. 554 S.W.2d 697, 698–99 (Tex. Crim. App. 1977).

Here, the officers observed more than the behavior of individuals sitting in a parked car after nightfall. They believed appellant was acting suspiciously because, while on "zero tolerance" patrol for motor vehicle burglaries, they observed him drive in reverse without activated headlights into the rear parking lot by a closed repair shop and pull next to an unoccupied eighteen wheeler. While appellant focuses on the officers' inability to cite a traffic regulation he violated, these specific, articulable facts support a reasonable suspicion that appellant was engaging in some activity out of the ordinary that could be related to a crime—specifically, burglary of a motor vehicle. Accordingly, an objective basis supported the officers' reasonable suspicion to temporarily detain appellant.

The trial court denied appellant's motion to suppress because it found appellant was not detained at the time he dropped the cocaine and crack pipe. However, we sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). Here, the trial court's denial of appellant's motion to suppress can be upheld on the theory that appellant was detained before he dropped the cocaine and crack pipe, but the officers had reasonable suspicion for detaining him. This theory is supported by the undisputed evidence of the officers' observations, and the trial court expressly found the officers to be credible.

We sustain the trial court's denial of appellant's motion to suppress because the cocaine and crack pipe possessed by appellant were seized pursuant to a legal detention.

Thus, we need not consider appellant's first issue in which he contends the trial court erred in finding no detention occurred. We overrule appellant's first and second issues.

B. Prosecutorial Vindictiveness

In his third issue, appellant contends he was denied due process because of prosecutorial vindictiveness. Both appellant's and Stephen Belle's cases were assigned to the same trial court and prosecutor. According to appellant, Belle was granted a sentence reduction pursuant to section 12.44(a) of the Texas Penal Code. Appellant avers that the same prosecutor told him sentence reductions were not offered by the trial court. Appellant apparently contends the prosecutor vindictively misinformed him because appellant had been acquitted in a prior case in which the prosecutor participated.

According to the certificate of appealability, appellant has authority to appeal only "matters . . . raised by written motion filed and ruled on before trial . . . ." *See also* Tex. R. App. P. 25.2(a)(2)(A). Appellant expressed in a supplement to his motion to suppress that the prosecutor told him a sentence reduction under section 12.44(a) was not available, despite the fact that Belle received a reduction. Nevertheless, appellant did not make any argument relative to prosecutorial vindictiveness or due process in his motion, and the trial court never ruled on any such issues. Accordingly, we lack jurisdiction to consider appellant's third issue. *See Crocker v. State*, 260 S.W.3d 589, 592 (Tex. App.—Tyler 2008, no pet.).

We affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.

Do Not Publish — Tex. R. App. P. 47.2(b).