**Affirmed and Memorandum Opinion filed July 21, 2016.**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-15-00106-CR**
**NO. 14-15-00147-CR**

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**JOE J. GRACIA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal the 177th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1434158**

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## M E M O R A N D U M  O P I N I O N

Appellant Joe J. Gracia challenges his conviction for possession of a controlled substance. *See* Tex. Health & Safety Code Ann. § 481.115(c) (Vernon 2010). Appellant pleaded guilty and the trial court assessed punishment at confinement for four years. Appellant contends on appeal that (1) the trial court

erred in denying his motion to suppress evidence; and (2) his guilty plea was involuntary because it resulted from trial counsel's ineffective assistance.

We affirm.

## BACKGROUND

Pasadena Police Officer Danny Slack stopped appellant's vehicle around midnight on July 7, 2014, after observing appellant driving without illuminating his taillights.[1] Officer Slack approached appellant's vehicle and informed appellant that he had stopped him because he was driving without taillights. Appellant presented Officer Slack with a Texas Identification Card. When Officer Slack asked appellant for his driver's license, appellant indicated he did not have one and the vehicle was a rental car. Officer Slack detected an odor of marijuana coming from appellant's vehicle. After determining that appellant did not have any warrants, he arrested appellant for driving without a driver's license.

Officer Slack frisked appellant after the arrest and found $520. Officer Slack then conducted a search of appellant's vehicle pursuant to department policy before releasing it for towing. During the search of appellant's vehicle, Officer Slack found three cell phones; $770 in the center console; approximately two grams of marijuana in the glove box; and a plastic bag containing 18 rocks of cocaine (approximately three grams) in the rim of a baseball hat sitting on the passenger seat.

Appellant was indicted for a third-degree felony offense of possession of a controlled substance. Appellant filed a motion to suppress on December 1, 2014. The trial court denied appellant's motion to suppress after a hearing. Appellant accepted a plea bargain agreement and pleaded guilty on January 26, 2015. The trial court assessed appellant's punishment at four years' confinement. Appellant

[1] Officer Stevens accompanied Officer Slack during the stop and arrest of appellant but did not testify at the motion to suppress hearing.

filed a timely appeal.

## ANALYSIS

### I. Motion to Suppress

Appellant argues in his first issue that his initial detention for driving without illuminated taillights was not supported by reasonable suspicion. Appellant also argues that "[n]othing Officer Slack did during the stop and detention of appellant . . . was reasonably related in scope to Appellant Gracia's taillight not being activated." According to appellant, Officer Slack detained him until he "was able to event [sic] a reason to conduct a fishing expedition" in appellant's vehicle. Appellant further argues that the "warrantless seizure of cocaine" in this case was "disguised as an impound inventory, incident to an invalid, warrantless arrest."

We review a trial court's ruling on a motion to suppress under a bifurcated standard. *Vasquez v. State*, 324 S.W.3d 912, 918 (Tex. App.—Houston [14th Dist.] 2010, pet ref'd) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). The trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented at a suppression hearing. *See Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex. Crim. App. 2007). We give almost total deference to the trial court's determination of historical facts, but we review *de novo* the court's application of the law to the facts. *See id*. at 25. We view the evidence presented on a motion to suppress in the light most favorable to the trial court's ruling. *Id*. at 24. In considering a trial court's ruling on a motion to suppress, the ruling must be upheld if it is reasonably supported by the record and can be upheld on any valid theory of law applicable to the case. *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002).

We first address appellant's contention that his initial detention for driving without illuminated taillights was improper because there was no reasonable

suspicion to stop his vehicle. Appellant argues that his taillights were working because they were on an automatic setting.

A police officer may make a warrantless stop on reasonable suspicion of a traffic violation. *See Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex. Crim. App. 2015). An officer has reasonable suspicion if he has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has been or soon will be engaged in criminal activity. *Id*. This standard is objective, and the court will take into account the totality of the circumstances to determine whether a reasonable suspicion existed for the stop. *See Wade v. State*, 422 S.W.3d 661, 668 (Tex. Crim. App. 2013). The burden is on the State to demonstrate the reasonableness of the investigatory stop. *Goudeau v. State*, 209 S.W.3d 713, 716 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005).

The evidence in this case supports the trial court's finding that Officer Slack had reasonable suspicion to stop appellant for a traffic violation. Officer Slack testified that he stopped appellant because he observed appellant driving without illuminated taillights approximately 15 to 20 feet in front of him as appellant was driving through an intersection. A person traveling on a public roadway without illuminated taillights violates the Texas Transportation Code. *See* Tex. Transp. Code Ann. § 547.322 (Vernon 2011). Officer Slack's personal observation of appellant driving without his vehicle's taillights illuminated provided objective, articulable facts supporting a reasonable suspicion to stop appellant for a traffic violation. *See Castro v. State*, 227 S.W.3d 737, 742 (Tex. Crim. App. 2007) (officer's observation of illegal lane change provided sufficient objective, articulable facts to support finding of reasonable suspicion that driver committed

traffic violation by failing to signal his lane change).

Although appellant testified that his taillights were on an automatic setting and worked before the stop and several days after the stop, it was within the trial court's discretion to believe Officer Slack's testimony and disbelieve appellant's testimony. *See Wiede*, 214 S.W.3d at 24-25. The trial court evaluated the credibility of the witnesses, testimony, and evidence provided at the suppression hearing and believed Office Slack's account of the stop. *See id.*

Appellant also argues that Officer Slack improperly questioned and detained him until Officer Slack "was able to event [sic] a reason to conduct a fishing expedition" in appellant's vehicle.

A routine traffic stop is a detention and must be reasonable. *Kelly v. State*, 331 S.W.3d 541, 549 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Asking questions during a valid traffic stop is not a separate detention. *Id.* at 550; *Levi v. State*, 147 S.W.3d 541, 544 (Tex. App.—Waco 2004, pet. ref'd). During a traffic stop, police officers may request to see a driver's license and vehicle registration, and may conduct a computer check of that information. *Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004). After the computer check is completed, and the officer learns that the driver has a valid license and no outstanding warrants and that the vehicle is not stolen, the traffic stop investigation is fully resolved. *See id*. at 63-64. There are no rigid time limitations on these detentions. *See id*. at 64.

Once the reason for the stop has been satisfied, the stop may not be used as a "fishing expedition for unrelated criminal activity." *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997); *Kelly*, 331 S.W.3d at 549. An officer may not lawfully detain a driver once an investigation of a traffic violation is concluded unless there is reasonable suspicion to believe another offense has been or is being committed. *Kelly*, 331 S.W.3d at 549; *see Davis*, 947 S.W.2d at 245. If an officer

develops reasonable suspicion that another violation has occurred, the scope of the initial investigation expands to include the new offense. *Goudeau*, 209 S.W.3d at 719; *see Sims v. State*, 98 S.W.3d 292, 295-97 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

Officer Slack identified himself and informed appellant that he stopped him for driving without his taillights illuminated. Appellant presented Officer Slack with a Texas Identification Card. Officer Slack requested appellant's driver's license and asked appellant where he was traveling to and from, which is standard procedure. *See Kelly*, 331 S.W.3d at 550; *State v. Cardenas*, 36 S.W.3d 243, 246 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (an officer may ask about a driver's destination and purpose of travel during a valid detention).

After appellant told Officer Slack that he did not have a driver's license, Officer Slack reasonably concluded that appellant was violating the Texas Transportation Code by driving without a driver's license. *See* Tex. Transp. Code Ann. § 521.021 (Vernon 2013) (a person driving a motor vehicle must hold a driver's license), § 521.025 (Vernon 2013) (a person driving a motor vehicle must have in his possession a current driver's license and display it when asked to by a police officer; a person who violates this section commits a criminal offense). Officer Slack therefore had probable cause to arrest appellant. *See Dew v. State*, 214 S.W.3d 459, 462 (Tex. App.—Eastland 2005, no pet.) ("Because appellant committed a misdemeanor by driving without a driver's license, [the police officer] had probable cause to arrest."). Additionally, appellant does not dispute that he was driving without a driver's license and that Officer Slack had probable cause to arrest him for driving without a driver's license.

Appellant next contends that the trial court should have suppressed the evidence found during Officer Slack's inventory search of appellant's vehicle after

his arrest because Officer Slack performed a "warrantless seizure of cocaine."

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV. A warrantless search of property is presumptively unreasonable, subject to specifically defined and well-established exceptions. *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). An inventory search of an automobile pursuant to a lawful impoundment is such an exception and does not implicate the policies underlying the warrant requirement. *Jackson v. State*, 468 S.W.3d 189, 194-95 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see also Colorado v. Bertine*, 479 U.S. 367, 371 (1987); *Moskey v. State*, 333 S.W.3d 696, 700 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Inventory searches protect (1) the vehicle owner's property while the vehicle is in police custody, (2) the police against claims or disputes over lost or stolen property, and (3) the police from possible danger. *Jackson*, 468 S.W.3d at 195; *Moskey*, 333 S.W.3d at 700; *Richards v. State*, 150 S.W.3d 762, 771 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (en banc) (citing *Colorado*, 479 U.S. at 372).

A lawful inventory search requires a lawful impoundment. *Jackson*, 468 S.W.3d at 195. Police officers may impound a vehicle and inventory its contents when the driver is removed from the vehicle and arrested, and no other alternatives are available to ensure the protection of the vehicle other than impoundment. *Harris v. State*, 468 S.W.3d 248, 255 (Tex. App.—Texarkana 2015, no pet.). It is the State's burden to prove that impoundment was reasonable. *Id.* The State need not prove that the impoundment and subsequent inventory was the least intrusive means of securing the vehicle, nor must the State prove that the officer independently investigated possible alternatives to impoundment. *Moskey*, 333 S.W.3d at 700.

Texas courts generally have found impoundment to be reasonable when the driver was alone at the time of arrest or when passengers could not show they were

licensed drivers. *Harris*, 468 S.W.3d at 255; *see Stephen v. State*, 677 S.W.2d 42, 43-44 (Tex. Crim. App. 1984) (passenger unable to produce identification or driver's license); *Yaws v. State*, 38 S.W.3d 720, 725 (Tex. App.—Texarkana 2001, pet. ref'd) (inventory search valid where driver was alone and said that wife could pick up the vehicle in 15 minutes). Courts have not required police to contact a relative or friend of an accused to take possession of the vehicle. *See Jackson* 468 S.W.3d at 198; *Yaws*, 38 S.W.3d at 725.

Police may secure the vehicle and inventory its contents when impounding a vehicle. *Harris*, 468 S.W.3d at 256. An inventory search must be conducted in good faith and pursuant to reasonable standardized police procedure. *Moskey*, 333 S.W.3d at 700. The inventory must not be a pretext or a ruse to generally explore or rummage through the vehicle. *Harris*, 468 S.W.3d at 256. The State must establish that the inventory search was lawful. *Id*. The State may satisfy its burden regarding the propriety of an inventory search through a police officer's testimony that (1) an inventory policy existed, and (2) that policy was followed. *Id*.

Officer Slack pulled appellant's car over around midnight, and appellant stopped his car near a business establishment where a large number of thefts previously had occurred. Appellant was alone in the car and no other person was on the scene to take custody of the car; therefore, impoundment was reasonable to secure protection of appellant's car. Officer Slack also testified that the Pasadena Police Department had a policy to inventory vehicles prior to impoundment and he conducted an inventory according to that policy. Appellant does not dispute the propriety of the impoundment nor the existence of a standardized police procedure. We conclude that the trial court acted within its discretion when it denied appellant's motion to suppress.

Accordingly, we overrule appellant's first issue.

## II. Ineffective Assistance of Counsel Claim

Appellant contends in his second issue that his guilty plea was involuntary because it resulted from trial counsel's ineffective assistance. Appellant contends that he "was unaware that the motion to suppress, which was denied, was dispositive, because [his] trial counsel neglected to inform [him] of the same," and that he "was forced to plead guilty when the motion to suppress was denied."

A defendant claiming ineffective assistance of counsel must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Failure to satisfy either prong defeats an ineffective assistance claim. *Strickland*, 466 U.S. at 697.

The two-part *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). A guilty plea resulting from ineffective assistance of counsel is not knowing and voluntary. *Ex parte Niswanger*, 335 S.W.3d 611, 614-15 (Tex. Crim. App. 2011), *abrogated in part on other grounds by Cornwell v. State*, 471 S.W.3d 458 (Tex. Crim. App. 2015). In the context of a claim that the defendant's plea is involuntary due to ineffectiveness, the defendant must show that (1) counsel's advice was outside the range of competency demanded of attorneys in criminal cases, and (2) but for counsel's erroneous advice, the defendant would not have pleaded guilty and instead would have insisted on going to trial. *Hill*, 474 U.S. at 58-59; *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997).

We consider the totality of the circumstances in determining whether counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). A defendant must overcome the presumption that trial counsel's actions fell within the wide range of reasonable and professional assistance. *See Garza v.*

*State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813; *see also Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) ("Direct appeal is usually an inadequate vehicle for raising [an ineffective assistance] claim because the record is generally undeveloped."). If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been grounded in legitimate trial strategy, then we will defer to counsel's decisions and deny relief on an ineffective assistance claim. *Garza*, 213 S.W.3d at 348.

Appellant claims that, "[b]ut for the erroneous advice of [trial counsel] and/or the lack of advice, [he] would not have plead[ed] guilty." Appellant relies on his own affidavit and one from trial counsel to support his ineffective assistance claim. Both were attached to his motion for new trial.[2]

Appellant stated in his affidavit: "I was not aware that the Motion to Suppress would be the end of my case or that I would be going to prison, because [trial counsel] did not explain that to me. I believed that if the Motion to Suppress was denied, I would have the opportunity to proceed to trial." Appellant also contends that, when he realized what was happening and told trial counsel that he "did not want to sign the paperwork," that trial counsel "said she was sorry, but [appellant's] case was over and [he] had no choice, other than to sign the

[2] It is unclear from the record whether a hearing was held on appellant's motion for new trial, and therefore whether the affidavits can be considered as evidence. *See Lamb v. State*, 680 S.W.2d 11, 13 (Tex. Crim. App. 1984) (motions for new trial are not self-proving and must be supported by affidavits offered into evidence); *Burrus v. State*, 266 S.W.3d 107, 112 (Tex. App.—Fort Worth 2008, no pet.) (an affidavit attached to the motion is merely a pleading and is not evidence itself; to constitute evidence, the affidavit must be introduced as evidence at the hearing on the motion). Even if the affidavits are considered, appellant has not satisfied his burden under *Strickland*.

paperwork." There is no other evidence in the record supporting these allegations. If a hearing was conducted on appellant's motion for new trial, no transcript of that hearing was included with the record on appeal.

Contrary to appellant's statements in his affidavit, his signed and initialed admonishments suggest otherwise — appellant acknowledged that he fully understood the consequences of his plea, that he had fully consulted with his attorney prior to entering his plea, and that he received effective and competent representation. Based on the limited record before us, we cannot say that appellant's affidavit has established that trial counsel was ineffective.

Appellant also contends that trial counsel admitted ineffectiveness in her affidavit. Trial counsel's affidavit stated that she had been having issues with her back that necessitated narcotic medication; her cousin and aunt had died from cancer during the month of the hearing on the motion to suppress; her mother had a mild heart attack; and trial counsel also had been experiencing cardiac episodes. Trial counsel contended that these circumstances, "might have affected [her] ability to properly represent [appellant]."

Contrary to appellant's assertions, trial counsel did not aver that she was ineffective; she stated only that certain life events "might have affected [her] ability" to provide effective representation. Trial counsel's affidavit does not establish how she might have been ineffective; it does not state that she incorrectly advised appellant regarding the effect of an unsuccessful motion to suppress or that she misrepresented appellant's continuing ability to proceed to trial rather than plead guilty.

Considering the record before us, including the two affidavits, appellant has not demonstrated that trial counsel's performance was deficient or that his guilty plea was the result of erroneous advice. Accordingly, appellant has failed to satisfy the first *Strickland* prong. We overrule appellant's second issue.

## CONCLUSION

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.
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