Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00390-CR

Rebecca Fayelayne **NELSON**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 216th Judicial District Court, Gillespie County, Texas
Trial Court No. 5543
Honorable N. Keith Williams, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: August 31, 2016

AFFIRMED

Appellant Rebecca Fayelayne Nelson was indicted for the offense of driving while intoxicated with a child passenger, alleged to have been committed on July 14, 2013. Following the trial court's denial of her motion to suppress, Nelson entered a plea of guilty and was sentenced to two years' confinement in the State Jail Facility, suspended and probated for a term of two years, and a $250.00 fine. On appeal, Nelson contends the trial court abused its discretion in denying the motion to suppress. We affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The motion to suppress was heard on March 26, 2015. The sole witness was Fredericksburg Police Department Sergeant Derek Seelig. Sergeant Seelig testified that on July 14, 2013, at approximately 8:01 pm, he responded to "a call in reference to an intoxicated female subject in a red Ford pickup truck at a convenience store gas station." When Sergeant Seelig arrived, Nelson was seated in the driver's seat of the Ford F-150 pickup, with the "vehicle's engine running." Also in the pickup truck was an eight-year-old child.

Sergeant Seelig described Nelson as exhibiting "slow, deliberate movements when obtaining her driver's license. Her eyes were glassy and watery." He also reported an odor of alcohol emanating from the pickup. Nelson told Sergeant Seelig "that she had driven to the store . . . to get lottery tickets and cigarettes." Nelson exited the pickup and Sergeant Seelig noted she "stagger[ed]." When Sergeant Seelig asked Nelson the amount of alcohol she had consumed, "[s]he initially told me a couple of drinks, and later clarified that to be two mixed drinks." Sergeant Seelig further explained that after attempting to conduct field sobriety tests, he placed Nelson under arrest for driving while intoxicated with a child passenger.

After Nelson was placed under arrest, Sergeant Seelig spoke with two witnesses. The gas station clerk advised Sergeant Seelig that he observed Nelson "drive up to the store front in her vehicle." The second witness was a customer in the gas station and the individual that placed the 911 call. The customer explained that he called 911 out of concern for the child after observing Nelson "walking around with difficulty in the store and slurring her words."

Sergeant Seelig further testified Nelson consented to provide a blood test and, at approximately 8:57 pm, Nelson's blood was drawn by hospital personnel at Hill Country Memorial Hospital. The State admitted two video/audio recordings, a copy of Nelson's DWI interview, and the written statement provided by the gas station customer.

During cross-examination, Sergeant Seelig acknowledged he never saw Nelson's vehicle move or Nelson drive the vehicle. Defense counsel questioned Sergeant Seelig extensively; he alleged the officer lacked proof that Nelson actually drove the pickup on the night in question or that Nelson had driven in an erratic manner. Additionally, defense counsel argued Sergeant Seelig lacked any information as to when Nelson arrived at the gas station or when she had consumed the alcohol. In support of his argument, defense counsel opined, "[a]ll you know [Sergeant Seelig] is that [Nelson] told you she drove up there. You have no reference of time." Finally, defense counsel posited the only offense that Sergeant Seelig actually observed was Nelson being intoxicated in a public place.

During the State's redirect examination, Sergeant Seelig reiterated that Nelson told him she had driven to the gas station prior to his placing her under arrest. The case was taken under advisement by the trial court.

On April 8, 2014, after reviewing the video-recordings and cases submitted by both parties, the trial court entered a written order denying Nelson's Motion to Suppress Blood Test and Statements. On August 27, 2014, the trial court entered its first amended findings of fact and conclusions of law. Specifically, the trial court found Sergeant Seelig observed Nelson exhibit signs of intoxication, was seated in the front seat of the vehicle, with the engine on, and that the pickup was "also occupied by an eight year old minor female." The trial court further found that Nelson "admitted to Officer Seelig that she had consumed alcohol;" "first told Officer Seelig that she had consumed a couple drinks, but ultimately admitted to consuming two mixed drinks;" and that "she had driven to the store to buy cigarettes and lottery tickets." Finally, the trial court found that Nelson "consented to the taking of her blood specimen" and that "Officer Seelig [was] a credible witness."

The trial court also entered the following conclusions of law:

1. Officer Seelig had enough articulable facts to create reasonable suspicion, based on the caller's information, his own personal observations, and the Defendant's admissions prior to arrest to detain the Defendant to investigate whether she was or had been driving while intoxicated with a child passenger.
2. The evidence presented showed, by clear and convincing evidence, that the Defendant freely and voluntarily consented to the taking of her blood specimen.
3. Based on the information from the witnesses, Officer Seelig's personal observations, and the Defendant's admissions prior to arrest, Officer Seelig had probable cause to arrest the Defendant for driving while intoxicated with a child passenger.
4. Officer Seelig arrested the Defendant for a felony offense committed in his presence or view pursuant to Texas Code of Criminal Procedure Art. 14.01.
5. The Defendant was also found to be in a suspicious place under circumstances which would reasonably show that the Defendant was guilty of some felony pursuant to Texas Code of Criminal Procedure Art. 14.03(a)(l).

MOTION TO SUPPRESS

A police officer may arrest a suspect without a warrant if the State shows the officer had probable cause and statutory authority to make the arrest. *Parker v. State*, 206 S.W.3d 593, 596 (Tex. Crim. App. 2006). Whether an officer has probable cause to arrest a suspect is based on the totality of the circumstances, within the officer's knowledge, at the time of the arrest. *Id.* Proof of probable cause requires evidence that would allow a prudent person to believe the suspect had committed or was committing an offense. *Id.*; *see also* TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (incorporating U.S. CONST. amend. IV; TEX. CONST. art. I, § 9).

A. Standard of Review

An appellate court reviews a trial court's ruling on a motion to suppress on a bifurcated standard of review; we "'afford almost total deference to a trial court's determination of the historical facts that the record supports.'" *Montanez v. State*, 195 S.W.3d 101, 106 (Tex. Crim.

App. 2006) (quoting *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). The trial court's application of the law is reviewed de novo. *See Derichsweiler v. State*, 348 S.W.3d 906, 913 (Tex. Crim. App. 2011); *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); *see also Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). Because a trial court has the distinct advantage of first-hand observations of a witness's demeanor during testimony on a motion to suppress, we defer to the trial court's determination of "credibility of the witnesses and the weight to be given their testimony." *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000) (en banc); *accord Valtierra*, 310 S.W.3d at 447; *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). We will sustain "the trial court's ruling if it is reasonably supported by the record and correct on any theory of law applicable to the case." *Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002).

B. Nelson's Arguments

Nelson contends Sergeant Seelig did not possess reasonable suspicion of criminal activity to justify arresting Nelson for driving while intoxicated with a child passenger. More specifically, Nelson asserts the evidence is insufficient to support a finding that she was *operating* a motor vehicle.

C. Evidence Required to Prove "Operating" a Motor Vehicle

The Texas Penal Code provides that a person commits the offense of driving while intoxicated when the person "is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04(a) (West Supp. 2015). The Code does not define the term "operating." *See id.* § 49.01 (West 2011) (definitions); *see also Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012); *Barton v. State*, 882 S.W.2d 456, 459 (Tex. App.—Dallas 1994, no pet.).

In *Denton v. State*, the Court of Criminal Appeals held that operation of a motor vehicle requires proof based on "the totality of the circumstances [demonstrating] that the defendant took action to affect the functioning of [the defendant's] vehicle in a manner that would enable the vehicle's use." 911 S.W.2d 388, 390 (Tex. Crim. App. 1995) (en banc); *accord White v. State*, 412 S.W.3d 125, 128 (Tex. App.—Eastland 2013, no pet.). Proof of a defendant's intoxication while operating a motor vehicle requires a temporal link, supported by direct or circumstantial evidence, between the defendant's intoxication and the defendant's driving. *See Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010). Moreover, "'while driving does involve operation, operation does not necessarily involve driving.'" *White*, 412 S.W.3d at 129 (quoting *Denton*, 911 S.W.2d at 389).

"Because 'operating a motor vehicle' is defined so broadly, any action that is more than mere preparation toward operating the vehicle would necessarily be an 'action to affect the functioning of [the] vehicle in a manner that would enable the vehicle's use.'" *Strong v. State*, 87 S.W.3d 206, 216 (Tex. App.—Dallas 2002, pet. ref'd) (quoting *Barton*, 882 S.W.2d at 459); *see also Dornbusch v. State*, 262 S.W.3d 432, 436–37 (Tex. App.—Fort Worth 2008, no pet.) (concluding persons asleep or unconscious were found to be operating their motor vehicle when the vehicle in a parking lot with its headlights on, engine running, and music playing loudly); *Hearne v. State*, 80 S.W.3d 677, 680 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (concluding asleep defendant, in parked vehicle, with the engine running, on the roadway, was operating vehicle); *Barton*, 882 S.W.2d at 459 (holding defendant was operating vehicle when car was stopped on a roadway with its engine idling, transmission in neutral, one foot on break and one on the clutch).

D. Analysis

Based on the totality of the circumstances, we must determine whether Nelson took action to affect the functioning of her vehicle in a manner that would enable the pickup's use. *See Denton*, 911 S.W.2d at 390. We defer to the trial court's findings of fact as follows: Nelson was found in the driver's seat of the pickup, the pickup was occupied by a child, with the keys in the ignition, and the engine turned on and idling. *See Menjivar v. State*, No. 2-09-331-CR, 2010 WL 3433919, at *5 (Tex. App.—Fort Worth Aug. 31, 2010, no pet.) (mem. op., not designated for publication) (finding operation of vehicle when defendant told officer that he had been driving and defendant was sitting in the vehicle behind the steering wheel, with the keys in the ignition, and the vehicle turned on). Additionally, Nelson acknowledged consuming alcohol and driving the pickup to the store to purchase cigarettes and lottery tickets, *see White*, 412 S.W.3d at 129 (looking at defendant's admission to officer that he was "operating the vehicle"); *Youens v. State*, 988 S.W.2d 404, 408 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (considering defendant's acknowledgment of driving as evidence of operating the vehicle); and Sergeant Seelig observed several signs of intoxication, including glassy eyes, slurred speech, smelling of alcohol, and staggering as Nelson walked. The record includes both direct and circumstantial evidence to support Sergeant Seelig's reasonable suspicion that Nelson was intoxicated while operating her pickup. *See* TEX. PENAL CODE ANN. § 49.04(a); *Kuciamba*, 310 S.W.3d at 462.

CONCLUSION

Viewing the entire record, in the light most favorable to the trial court's findings, together with reasonable inferences therefrom, we conclude the evidence is legally sufficient to support the

trial court's findings that Nelson was intoxicated while operating a motor vehicle. *See Dornbusch*, 262 S.W.3d at 438. Accordingly, we affirm the judgment of the trial court.

Patricia O. Alvarez, Justice

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