Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00785-CR

Daniel C. **SHEFFER**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 290th Judicial District Court, Bexar County, Texas
Trial Court No. 2016CR7564
Honorable Melisa Skinner, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 8, 2017

AFFIRMED

Daniel C. Sheffer was charged with possession of less than a gram of a controlled substance. Sheffer moved to suppress the evidence, arguing that the officer did not have reasonable suspicion to justify an investigative detention and a pat down search. The trial court denied the motion to suppress.

Sheffer pled no contest to the offense charged. The trial court accepted the plea and, after reviewing the evidence, found Sheffer guilty of the offense charged. The trial court sentenced

Sheffer to two years' confinement, suspended the sentence, and placed him on community supervision for two years.

On appeal, Sheffer argues the trial court erred in denying his motion to suppress because (1) the totality of the circumstances failed to show that the officer had reasonable suspicion to conduct an investigative detention and pat down search, and (2) any consent he gave to search was involuntary. We affirm.

STANDARD OF REVIEW

We review the trial court's denial of a motion to suppress under a bifurcated standard. *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016). We afford almost complete deference to the trial court's determination of historical facts, especially when those determinations are based on assessments of credibility and demeanor. *Id*. However, we review *de novo* whether the facts are sufficient to support an officer's reasonable suspicion of criminal activity. *Id*. When, as here, the trial court does not make express findings of fact, we review the evidence in the light most favorable to the trial court's ruling, and assume it made implicit findings that are supported by the record. *Id*. We sustain the trial court's ruling if it is correct under any applicable theory of law. *Id*.

THE EVIDENCE

Viewing the evidence presented at the suppression hearing in the light most favorable to the trial court's ruling, the evidence showed that two San Antonio police officers were on patrol at around 1:00 a.m. on October 12, 2015, when they saw two men standing in front of a car parked in a parking lot. The car's hood was open and the men appeared to be tampering with the car. The parking lot belonged to two businesses, a convenience store and car repair/body shop. The businesses were closed. The car was parked in the part of the parking lot where the car repair/body shop parked vehicles in need of repair or sale. The parking lot was located in an area known for burglaries, prostitution, and the use and sale of narcotics.

One of the officers exited the patrol car and walked up to the two men standing in front of the car with its hood open. The two men told the officer that their friend's car had broken down and they were trying to fix it. The men asked the officer if he had jumper cables. At this point, the officer noticed two people inside of the car: a woman sitting in the front passenger seat and a man, Sheffer, sitting in the driver's seat. When the woman and Sheffer noticed the officer, they began making "furtive movements." The officer approached the passenger side window of the car and asked the woman for her identification. As the woman looked through her purse for her identification, she told the officer that she was Sheffer's friend and that they were just driving around.

Sheffer exited the car. Sheffer told the officer that his car would not start and he had called his friends, indicating the other two men, to come help him. The officer asked the other two men where their car was and they said that they had been driving around with Sheffer. Sheffer seemed to realize that the stories they were telling the officer did not match and he became nervous. Additionally, the officer smelled the odor of marijuana coming from one of the men and saw that one of the men had blood shot and "glossy eyes" as if he was under the influence of intoxicants. The officer asked Sheffer for consent to search his person, but Sheffer refused consent.

At this point, the officer told Sheffer to stand in front of the police car and Sheffer complied. The officer asked Sheffer if he had any weapons on him and Sheffer said he did not. The officer started to conduct a pat down search of Sheffer for weapons. While patting down the left front pocket of Sheffer's jeans, the officer felt what appeared to be a lock blade knife and he told Sheffer. Sheffer confirmed that he did have a knife in his left front pocket and said that he had forgotten about it. The officer then patted down the right front pocket of Sheffer's jeans, where he felt a cell phone and a metal object behind it. Sheffer told the officer that his cell phone and keys were in his right front pocket. The officer asked Sheffer for consent to remove the items from his

right front pocket and Sheffer consented.[1] The officer removed all of the items from Sheffer's right front pocket. The items consisted of a cell phone, keys, and two clear plastic baggies that contained a crystal-like substance. Subsequent testing showed that the crystal-like substance was methamphetamine.

INVESTIGATIVE DETENTION AND PAT DOWN SEARCH

In his first issue, Sheffer argues the trial court erred in denying his motion to suppress because the officer did not have reasonable suspicion to detain him for investigation or justification to conduct a pat down search.

The Fourth Amendment's protections from unreasonable searches and seizures "extend to brief investigatory stops of persons" "that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968)); *Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010). For a law enforcement officer to conduct a lawful investigative stop, he must have reasonable suspicion. *Crain*, 315 S.W.3d at 52. Reasonable suspicion exists when the officer has specific, articulable facts which, when combined with rational inferences from those facts, would lead an officer to conclude that a particular person actually is, has been, or soon will be engaged in criminal activity. *Id.* The standard for reasonable suspicion is an objective one that disregards the subjective intent of the officer. *Furr*, 499 S.W.3d at 878. The standard requires only some minimal level of justification for the stop. *Wade v. State*, 422 S.W.3d 661, 675 (Tex. Crim. App. 2013). However, the officer must have more than an inarticulable hunch or mere good-faith suspicion that a crime is in progress. *Crain*, 315 S.W.3d at 52.

[1]To the extent that the record contains conflicting evidence about whether Sheffer gave consent, the standard of review requires us to assume that the trial court made an implicit finding that Sheffer consented to the officer removing the items from his right front pocket. *See Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016).

In deciding whether an officer had reasonable suspicion, we examine the facts that were available to the officer at the time of the investigative detention. *Id*. at 52-53. We evaluate the totality of the circumstances. *Wade*, 422 S.W.3d at 668. "[I]ndividual circumstances may seem innocent enough in isolation, but if they combine to reasonably suggest the imminence of criminal conduct, an investigative detention is justified." *Id*. "It is enough to satisfy the lesser standard of reasonable suspicion that the information is sufficiently detailed and reliable—*i.e.*, it supports more than a mere inarticulate hunch or intuition—to suggest that *something* of an apparently criminal nature is brewing." *Derichsweiler v. State*, 348 S.W.3d 906, 916 (Tex. Crim. App. 2011) (emphasis in original).

Furthermore, to engage in a lawful protective pat down search or frisk, an officer must reasonably suspect that the person he has lawfully detained is presently armed and dangerous. *Furr*, 499 S.W.3d at 878. The officer need not be absolutely certain that the detainee is armed. *Id*. "The test is simply whether a reasonably prudent person under the circumstances would be warranted in believing that his safety or that of others was in danger." *Id*. "The intrusion must be based on specific articulable facts which, in light of the officer's experience and general knowledge, together with rational inferences from those facts, would reasonably warrant the intrusion." *Id*.

Sheffer argues his case is controlled by *Brodnex v. State*, 455 S.W.3d 432, 438 (Tex. Crim. App. 2016), a case in which the Texas Court of Criminal Appeals held that the facts apparent to the detaining officer did not provide reasonable suspicion for an investigative detention. In *Brodnex*, the detaining officer observed a man (Brodnex) and a woman leaving a hotel on foot at around 2:00 a.m. in an area known for narcotics activity. *Id*. at 434. The officer approached the couple, asked them their names and what they were doing, and placed Brodnex in handcuffs. *Id*. The officer then asked Brodnex, "Didn't you just get picked up?" to which Brodnex replied, "Hell

no." *Id*. The officer then conducted a pat down search and found a plastic cigar tube on Brodnex's waistband, which contained cocaine. *Id*. The Texas Court of Criminal Appeals concluded that the limited facts apparent to the officer did not amount to reasonable suspicion and, therefore, the investigative detention of Brodnex was unlawful and the cocaine should have been suppressed. *Id*. at 438.

We conclude that *Brodnex* is distinguishable from the present case. In *Brodnex*, the only specific, articulable facts known to the officer were (1) the time of day, (2) the area's known narcotic activity, and (3) the officer's belief, based on what other officers had told him, that the appellant was a known criminal. *Id*. at 437-38. In the present case, the officer had substantially more information available to him than the officer in *Brodnex*. Here, the officer observed two men who appeared to be tampering with a car in the parking lot of a car repair/body shop. The car was parked in a parking space next to cars that were in need of repair. The nearby businesses, a car repair/body shop and a convenience store, were closed. It was about 1:00 a.m. The area was known for criminal activity, including burglaries. When the officer approached the men and the car, he saw two more individuals in the car, a man and a woman. The officer saw the man and the woman make "furtive movements" in the car. The officer questioned all four individuals about why they were in the parking lot and how they got there. The individuals provided inconsistent answers to these questions. The officer noticed that these inconsistencies seemed to make Sheffer nervous. Additionally, even though Sheffer and the men claimed that the car had broken down, the car was backed into a parking space between two other cars. Given the totality of the circumstances, we conclude that the officer had sufficient, articulable facts to believe that some criminal activity was afoot. We, therefore, conclude that the investigative detention of Sheffer was lawful.

We next consider whether the officer was justified in patting down Sheffer for weapons. The evidence showed that two officers encountered four individuals in a parking lot at about 1:00

a.m. The nearby businesses were closed. Two of the men appeared to be tampering with the car. The area was known for criminal activity, including burglaries and the use and sale of narcotics. Additionally, the individuals told the officer inconsistent stories about why they were in the parking lot and how they got there. Given all of the circumstances presented in this case, a reasonably prudent officer would have been warranted in believing that his safety or the safety of others was in danger. *See Furr*, 499 S.W.3d at 878; *O'Hara v. State*, 27 S.W.3d 548, 553-54 (Tex. Crim. App. 2000). We, therefore, conclude that the pat down search of Sheffer for weapons was lawful.

We overrule Sheffer's first issue.

VOLUNTARINESS OF CONSENT

In his second issue, Sheffer argues that the trial court erred in denying his motion to suppress because the consent he gave to search his right pocket was involuntary. However, Sheffer failed to make this argument in his motion to suppress or at the suppression hearing. We, therefore, conclude that Sheffer's second issue is not preserved for our review. *See Swain v. State*, 181 S.W.3d 359, 365 (Tex. Crim. App. 2005) (concluding global statements in the appellant's motion to suppress were not sufficiently specific to preserve the arguments made on appeal); *Rothstein v. State*, 267 S.W.3d 366, 373-74 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (concluding the appellant failed to preserve error when his argument on appeal did not comport with any objection made in the motion to suppress or at the suppression hearing); TEX. R. APP. P. 33.1(a).

We overrule Sheffer's second issue.

CONCLUSION

The judgment of the trial court is affirmed.

Karen Angelini, Justice

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