# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-19-00030-CR

Joseph Lee **GORE**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 198th Judicial District Court, Kerr County, Texas
Trial Court No. B17-658
Honorable Rex Emerson, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: October 2, 2019

AFFIRMED

Joseph Lee Gore appeals his conviction for driving while intoxicated. His sole issue is that the trial court erred by denying his motion to suppress evidence obtained during a traffic stop. We affirm the trial court's judgment.

### BACKGROUND

At approximately 11:00 p.m. on a Thursday night, police officers executed a search warrant in a residential area in Kerrville and specifically, Kerrville police officers Travis Griffin and

Jaiman Yarbrough secured the perimeter. Officers Griffin and Yarbrough were informed a silver or gray sportscar had left the premises immediately before other officers executed the warrant.

The officers heard a car's engine and music a block away. As the car approached them, the driver rolled up the windows and turned down the music. The car matched the general description of the car that reportedly left the premises where the search warrant was executed. Officer Griffin got in his patrol car and stopped the car. Gore was the driver.

Gore was charged with driving while intoxicated. He moved to suppress evidence obtained from the traffic stop, arguing the stop was illegal. At the suppression hearing, Officers Griffin and Yarbrough testified. Officer Griffin stated he stopped Gore's car "[b]ased on the excessive noise and the vehicle matching a general description of the vehicle reportedly leaving the residence that we raided." Officer Griffin testified he believed Gore also violated a municipal ordinance, which was the only law discussed at the suppression hearing. Officer Yarbrough testified to similar facts.

The trial court denied Gore's motion to suppress and made findings of fact and conclusions of law. Pursuant to a plea bargain, Gore pled guilty to the offense. The trial court entered a judgment of conviction and imposed Gore's sentence, and Gore timely appealed.

## STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress under a bifurcated standard. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We review a trial court's conclusions of law de novo. *Id.* at 328. We afford a trial court's fact findings almost total deference if they are supported by the record, especially when they are based on the evaluation of witness credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). "The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). When the trial court makes express findings of fact, we view the evidence in a light most favorable to the ruling

and determine whether the evidence supports the findings. *Id.*; *see Rodriguez v. State*, 968 S.W.2d 554, 558 n.8 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

**REASONABLE SUSPICION**

Gore argues Officer Griffin stopped his car in violation of his Fourth Amendment rights, and the trial court erred in concluding otherwise. Under the Fourth Amendment, a police officer may stop a car and detain the driver if the officer has reasonable suspicion for the stop. *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011). "A police officer has reasonable suspicion to detain if he has specific, articulable facts that, combined with rational inferences from those facts, would lead him reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity." *Id.* "This standard is an objective one that disregards the actual subjective intent of the arresting officer and looks, instead, to whether there was an objectively justifiable basis for the detention." *Id.*

The reason an officer gives for the traffic stop constitutes the officer's subjective state of mind, which "need not provide the legal justification for an objectively valid action." *King v. State*, No. 14-02-01247-CR, 2003 WL 21664664, at *2 (Tex. App.—Houston [14th Dist.] July 17, 2003, pet. ref'd) (mem. op., not designated for publication) (citing *Williams v. State*, 726 S.W.2d 99, 100–01 (Tex. Crim. App. 1986)). If an officer observes an operator of a motor vehicle commit a traffic offense, the officer has "an objective basis to stop [the] car regardless of the subjective motive he expressed for making the stop." *Id.*

The State argues Officer Griffin had reasonable suspicion to stop Gore's car because, as Officer Griffin testified, there was excessive noise coming from Gore's car.[1] At the suppression

[1] The parties also dispute whether there is reasonable suspicion based on Gore's car matching a description of a car associated with a residence subject to a search warrant. Because we hold there is reasonable suspicion based on the excessive noise from the car, we need not address this issue. *See* TEX. R. APP. P. 47.1.

hearing, Officer Griffin testified Gore's conduct violated a municipal noise ordinance. In his appellant's brief, Gore argues there was no reasonable suspicion to stop him for violating the ordinance, and the ordinance is unconstitutionally void for vagueness. In response, the State argues Officer Griffin's testimony about the excessive noise shows Officer Griffin had reasonable suspicion to detain Gore for violating a Texas Penal Code provision prohibiting disorderly conduct. In his reply, Gore contends that, because the State raises this argument for the first time on appeal, upholding the trial court's decision "on this basis would work a manifest injustice" because he did not have an opportunity to develop the record as to the Penal Code provision. He also argues Officer Griffin's testimony does not establish reasonable suspicion to stop him under the Penal Code provision. Gore does not argue the Penal Code provision is unconstitutionally void for vagueness.

**A. Manifest Injustice**

Generally, courts of appeals must affirm a trial court's ruling if the ruling is correct on any theory of law applicable to the case. *State v. Esparza*, 413 S.W.3d 81, 83 (Tex. Crim. App. 2013). However, courts should not follow this rule when the appellant has not had the opportunity to develop a complete factual record with respect to the alternative legal theory and doing so would be manifestly unjust to the appellant. *Id.* at 90. Courts are presented with such a situation when an alternative legal theory "turns upon the production of predicate facts by the appellant that he was never fairly called upon to adduce during the course of the proceedings below." *Id.* For example, in *Esparza*, a defendant moved to suppress breathalyzer results on the ground that the evidence was illegally obtained. *Id.* at 86–90. The Court of Criminal Appeals held the motion did not give the State an opportunity to produce evidence of predicate facts showing the admissibility of the evidence under Rule 702, which would have required evidence of predicate facts showing the scientific reliability of the breathalyzer results. *Id.*

Gore asserts allowing the State to rely on the disorderly conduct provision of the Penal Code for the first time on appeal would work a manifest injustice in this case. We disagree. The disorderly conduct provision of the Penal Code provides:

> A person commits an offense if he intentionally or knowingly . . . makes unreasonable noise . . . in or near a private residence that he has no right to occupy.

TEX. PENAL CODE § 42.01(a)(5). The municipal noise ordinance provides:

> No person or vehicle shall emit excessive or unusual noise on the streets of the city. Except as authorized or required by law or by an action of the city council consistent with law, no vehicle shall be equipped with a noisemaker.

City of Kerrville, Texas, Code of Ordinances, Part II, ch. 102, § 102-3 (2019).

> *Excessive or unusual noise* means any noise caused by a motor vehicle which is in excess of the noise made by the average vehicle of that make and model in good mechanical condition. Any noise made by any person, devices or mechanisms, either in or on a vehicle which is in excess of audible warning necessary for safe operation of the vehicle.

*Id.* § 102-1. Gore does not identify what facts relevant to the Penal Code provision he was unable to develop. The basic relevant facts for both the municipal noise ordinance and the Penal Code provision are the same: the amount and level of noise and the time and place the noise is made. And, although only the municipal ordinance was mentioned at the hearing, the specific basis Officer Griffin provided was the amount of noise Gore made with his car at nighttime in a residential area, which could supply reasonable suspicion under either the municipal noise ordinance or the disorderly conduct provision of the Penal Code.

Any differences between the disorderly conduct provision of the Penal Code and the municipal noise ordinance do not appear to "turn[] upon the production of predicate facts by the appellant that he was never fairly called upon to adduce during the course of the proceedings below." *See Esparza*, 413 S.W.3d at 90. On this record, we cannot say Gore was deprived of an opportunity to develop a factual predicate relevant to the unreasonable noise coming from his car.

We hold the record does not support Gore's contention that it would be manifestly unjust for us to consider reasonable suspicion under the disorderly conduct provision of the Penal Code. *See id.* We will therefore proceed to analyze whether Officer Griffin had reasonable suspicion to stop Gore's car due to its excessive noise under the disorderly conduct provision of the Penal Code.[2]

**B. Disorderly Conduct under the Penal Code**

Gore argues the evidence does not establish Officer Griffin had reasonable suspicion to stop his car for violating the disorderly conduct provision of the Penal Code. Officer Griffin testified he heard noise coming from a car at approximately 11:00 o'clock at night in a residential area, from which he inferred "most folks are either down for the night or getting ready to do so." He also testified there was no other ambient noise that was "anything comparable to what [he] heard coming from the vehicle." Officer Yarbrough testified he also determined the noise coming from Gore's car was excessive because the area in which the car was traveling was residential and it was 11:00 o'clock at night. This evidence supports the trial court's findings of fact, and Gore does not argue otherwise.

Gore argues the officers' testimony is too vague, and they merely reiterate the disorderly conduct standard of "unreasonable" noise. The record does not support Gore's characterization of the officers' testimony. Furthermore, other courts have held an officer had reasonable suspicion to stop a car when a driver or his car made loud noises at nighttime in a residential area. *See, e.g.*, *Treto v. State*, No. 14-14-00369-CR, 2015 WL 3631779, at *3 (Tex. App.—Houston [14th Dist.] June 11, 2015, no pet.) (mem. op., not designated for publication) (holding officers had reasonable

[2] We note the trial court's conclusions of law are limited to the municipal ordinance. Even when a trial court makes written findings of fact and conclusions of law, we must "uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case." *State v. Iduarte*, 268 S.W.3d 544, 548 (Tex. Crim. App. 2008). Gore also does not argue or cite to authority holding a theory of law must be included in the conclusions of law to be considered "applicable to the case." *See* TEX. R. APP. P. 38.1(i). Furthermore, the trial court's findings of fact are supported by the evidence and those facts establish Officer Griffin had reasonable suspicion.

suspicion when officer heard appellant yelling from over 100 feet away after midnight in a residential area and his car made sounds "loud enough to have awakened people sleeping in the vicinity"); *Rogers v. State*, No. 02-06-00345-CR, 2008 WL 3540247, at *2 (Tex. App.—Fort Worth Aug. 14, 2008, pet. ref'd) (mem. op., not designated for publication) (same, when officer "testified that appellant was honking her horn repeatedly for up to fifteen seconds at a time at 2:30 in the morning" and use of horn was due to anger, not safety reasons).[3] Here, there are specific, articulable facts that, combined with rational inferences from those facts, would lead Officer Griffin reasonably to conclude that Gore was or had been engaged in criminal activity under the disorderly conduct provision of the Penal Code. *See* TEX. PENAL CODE § 42.01(a)(5); *Derichsweiler*, 348 S.W.3d at 914. We therefore hold the trial court properly denied Gore's motion to suppress.

## CONCLUSION

We affirm the trial court's judgment of conviction.

Luz Elena D. Chapa, Justice

DO NOT PUBLISH

[3] *Cf. Rodgers v. State*, 500 S.W.3d 682, 684 (Tex. App.—Fort Worth 2016, no pet.) (holding there was reasonable suspicion of disorderly conduct when driver yelled obscenities out of car at another driver, even though officer gave a different legal reason for stop).