Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00719-CR

DEUK BOK CHA,
Appellant

v.

The **STATE** of Texas,
Appellee

From the County Court at Law No. 1, Bexar County, Texas
Trial Court No. CC575753
Honorable Helen Petry Stowe, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: March 17, 2021

AFFIRMED

Deuk Bok Cha appeals his conviction for misdemeanor driving while intoxicated ("DWI"). *See* TEX. PENAL CODE ANN. § 49.04. We affirm the trial court's judgment.

BACKGROUND

Shortly after midnight on June 6, 2018, San Antonio Police Officer Domingo Flores stopped the vehicle driven by Deuk Bok Cha after observing the vehicle swerving back and forth and crossing into the right-hand shoulder while traveling northbound on Highway 281. After noticing that Deuk Bok Cha's eyes were bloodshot and glassy and there was an odor of intoxicants

emanating from the vehicle, Officer Flores administered field sobriety tests and subsequently arrested Deuk Bok Cha for DWI. Deuk Bok Cha was charged by information with misdemeanor DWI. He pled not guilty and proceeded to a jury trial.

At trial, Officer Flores testified about the circumstances leading to the traffic stop, his personal observations of Deuk Bok Cha, and the results of the field sobriety tests. Forensic scientist Jim Thomas testified the lab analysis of a blood sample taken from Deuk Bok Cha showed he had a blood alcohol content (BAC) of 0.117, which was well over the legal limit of 0.08. In addition to the witnesses' testimony, the videos from Officer Flores' dash-cam and body-cam recordings of the stop, field investigation, and arrest were admitted into evidence. At the conclusion of trial, the jury found Deuk Bok Cha guilty of DWI as alleged in the information. The trial court sentenced him to 180 days in jail but suspended the sentence and placed him on community supervision for a period of fifteen months.

On appeal, Deuk Bok Cha raises four issues, asserting the trial court erred in (1) denying his motion to suppress the fruits of his warrantless arrest, (2) refusing to take judicial notice of a portion of the National Highway Transportation Safety Administration Manual, (3) overruling his chain of custody objection to the blood sample, and (4) overruling his objection that the search warrant for the blood draw was signed by a magistrate with a "vested interest."

MOTION TO SUPPRESS

In his first issue, Deuk Bok Cha argues his warrantless arrest was not supported by probable cause and the trial court therefore abused its discretion in denying his motion to suppress evidence obtained as a result of the arrest. In his brief and reply brief, Deuk Bok Cha raises federal constitutional arguments in support of his position that his warrantless arrest was invalid. However, the sole ground raised in his motion to suppress was a state statutory argument -- that his warrantless arrest violated Chapter 14 of the Texas Code of Criminal Procedure. *See* TEX.

CODE CRIM. PROC. ANN. arts. 14.01-.04 (listing the situations in which a police officer is authorized to make a warrantless arrest). Therefore, our appellate review of the trial court's denial of his motion to suppress is limited to the legality of his warrantless arrest under Chapter 14. *See* TEX. R. APP. P. 33.1(a); *see also State v. Steelman*, 93 S.W.3d 102, 106 (Tex. Crim. App. 2002).

Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard, reviewing fact-findings for an abuse of discretion and applications of law de novo. *State v. Ruiz*, 581 S.W.3d 782, 785 (Tex. Crim. App. 2019); *State v. Rodriguez*, 521 S.W.3d 1, 8 (Tex. Crim. App. 2017). In doing so, we afford almost total deference to the trial court's determination of historical facts, especially when it is based on assessment of a witness's credibility, as long as the fact-findings are supported by the record. *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We apply the same deferential standard when reviewing the court's ruling on mixed questions of law and fact where resolution of those issues turns on an evaluation of credibility. *Johnson*, 414 S.W.3d at 192. We review *de novo* the trial court's application of the law to the facts and its resolution of mixed questions of law and fact that do not depend upon credibility assessments. *Id.*; *Wade v. State*, 422 S.W.3d 661, 669 (Tex. Crim. App. 2013). Finally, we view the record in the light most favorable to the trial court's determination and will reverse its ruling only if it was arbitrary, unreasonable, or "outside the zone of reasonable disagreement." *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014). If the trial court fails to make explicit findings of fact, we assume it made implicit fact findings that support its ruling as long as those fact findings are supported by the record. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

Applicable Law

Texas law provides that a police officer may arrest a person without a warrant only if probable cause exists with respect to that individual and the arrest falls within one of the exceptions set forth in articles 14.01 through 14.04 of the Code of Criminal Procedure. *Torres v. State*, 182 S.W.3d 899, 901 (Tex. Crim. App. 2005); *see* TEX. CODE CRIM. PROC. ANN. arts. 14.01-.04 (listing the situations in which a police officer is authorized to make a warrantless arrest). Thus, a police officer must have both probable cause and statutory authority in order to make a valid warrantless arrest. *Parker v. State*, 206 S.W.3d 593, 596 (Tex. Crim. App. 2006). "To establish probable cause to arrest, the evidence must show that 'at that moment [of the arrest] the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense.'" *Id.* (quoting *Beverly v. State*, 792 S.W.2d 103, 105 (Tex. Crim. App. 1990)); *Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008). Such a reasonable belief must be founded on specific, articulable facts, not merely the officer's subjective opinion. *Ford v. State*, 158 S.W.3d 488, 493 (Tex. Crim. App. 2005). In determining whether probable cause existed, we examine the totality of the circumstances. *Id.* at 492–93.

One of the warrant exceptions listed in Chapter 14 is when a person commits an offense in the presence or within the view of a police officer. TEX. CODE CRIM. PROC. ANN. art. 14.01(b). "An offense is deemed to have occurred within the presence or view of an officer when any of his senses afford him an awareness of its occurrence." *Steelman*, 93 S.W.3d at 107. The information afforded to the officer by his senses must give the officer reason to believe that a particular individual committed the offense, not just that an offense was committed. *Id.*; *see also State v. Martinez*, 569 S.W.3d 621, 628 (Tex. Crim. App. 2019) (noting that probable cause for a

warrantless arrest under article 14.01(b) may be based on an officer's prior knowledge as well as his personal observations).

Suppression Hearing

At trial, when the State moved to admit Officer Flores's dash-cam and body-cam videos during his testimony, Deuk Bok Cha objected and urged his motion to suppress. The trial court conducted a suppression hearing outside the jury's presence. The evidence at the suppression hearing consisted of Officer Flores's testimony, the dash-cam and body-cam videos, and a photograph of a traffic sign.

Officer Flores, assigned to the DWI Unit, testified that on the night of June 6, 2018, he pulled his patrol vehicle over on the right-hand shoulder of Highway 281 North because he was having problems with his COBAN dash-cam system. As he worked on rebooting the dash-cam, he looked in his rear view mirror and noticed a vehicle "swerving back and forth" and crossing into the right-hand shoulder. Officer Flores could see the vehicle's headlights reflecting off the white line along the shoulder. Officer Flores reentered the highway and followed the vehicle until the driver exited Highway 281 at Bitters Road. When Officer Flores activated his overhead lights to notify the driver to pull over, Deuk Bok Cha stopped his vehicle in the middle of the turnaround lane. According to Officer Flores, his vehicle was in the lane of traffic and "essentially blocking the roadway" so that it was unsafe. Officer Flores used his PA system to instruct Deuk Bok Cha to continue driving and pull into a nearby parking lot.

When Officer Flores made contact with Deuk Bok Cha, he immediately noticed his eyes were "bloodshot" and "glassy" and there was an odor of intoxicants coming from inside the vehicle. Officer Flores testified those are "cues of intoxication." When Officer Flores asked Deuk Bok Cha whether he had consumed any alcohol, he admitted drinking two beers. Officer Flores

testified, "[b]ased off the driving facts, based off what I was observing, I asked him to step out of the vehicle so I could continue the investigation" by having him perform the field sobriety tests.

Officer Flores stated the field sobriety tests consist of the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg stand test. Officer Flores testified he was trained in the administration of each of the tests according to the guidelines set forth by the National Highway Transportation Safety Administration (NHTSA) and he administered each test in accordance with his training. With respect to the HGN test, Officer Flores explained that nystagmus is the involuntary jerking of the eye which becomes visible when alcohol or other nervous system depressant is introduced into the body. In conducting the HGN test, Officer Flores held a pen, i.e., the stimulus, slightly above eye level and 12 to 14 inches away. The first time he administered the HGN, Deuk Bok Cha did not follow instructions – he did not follow the pen, instead staring at Officer Flores or over his shoulder. On the second attempt, Officer Flores observed three clues in each eye for a total of all six clues of intoxication on the HGN test. When Deuk Bok Cha performed the walk-and-turn test, he "did well." But, he did not touch heel-to-toe, turned the wrong direction, and stopped during the test, resulting in three out of eight clues of intoxication. Finally, on the one-leg stand test, he swayed and thus exhibited one clue out of four possible clues. Based on his observations of Deuk Bok Cha's vehicle swerving, his bloodshot, glassy eyes and the smell of alcohol during the traffic stop, as well as the clues of intoxication exhibited during the tests, Officer Flores formed the opinion that Deuk Bok Cha was intoxicated and that he had probable cause to arrest him for DWI. Deuk Bok Cha declined to give a breath sample. After he was arrested and transported to the city detention center, Officer Flores obtained a search warrant for a blood draw and observed a nurse draw the blood sample from Deuk Bok Cha.

On cross-examination, defense counsel asked Officer Flores to confirm there was no traffic behind them when Deuk Bok Cha stopped in the middle of the turnaround lane. Officer Flores conceded there were no vehicles behind them at that moment, but added that any vehicle approaching from behind "would have rammed them." When asked, Officer Flores agreed that Deuk Bok Cha properly turned on his hazard lights when he stopped in the turnaround lane. Defense counsel showed Officer Flores a photograph of a traffic sign stating "Do Not Cross Double White Line" located at the turnaround lane, and suggested the sign was the reason Deuk Bok Cha stopped in the turnaround lane. Officer Flores stated he was not familiar with that particular sign, but agreed it would be a traffic violation to cross a double white line.

In addition to Officer Flores's testimony, the trial court watched the dash-cam video showing Deuk Bok Cha's moving vehicle and the body-cam video showing the traffic stop, the performance of the field sobriety tests, and the arrest. At the conclusion of the hearing, the trial court found Officer Flores had probable cause to arrest Deuk Bok Cha for DWI based on the totality of the circumstances which consisted of Officer Flores's "very credible" testimony, "the driving facts" he observed and as reflected on the dash-cam video, Bok Cha's admission to drinking and the odor of alcohol inside the vehicle, and the intoxication clues the officer observed on the field sobriety tests. Based on these findings and conclusions of law, the trial court denied the motion to suppress.

Analysis

Deuk Bok Cha contends the evidence does not establish probable cause for his DWI arrest because the video shows he performed well on the field sobriety tests and had not lost any of his mental or physical faculties, in contrast to the officer's testimony that he observed multiple clues of intoxication on the tests. The dash-cam and body-cam videos show the events from a single fixed perspective and do not capture every part of Deuk Bok Cha's body as he performs the tests.

Despite Deuk Bok Cha's arguments to the contrary, the videos do not contradict Officer Flores's testimony that Deuk Bok Cha exhibited the clues of intoxication he identified.[1] We must defer to the trial court's assessment of the credibility of the evidence and to the court's implied fact findings that are supported by the record. *Ross*, 32 S.W.3d at 855. Further, the field sobriety test results are to be viewed along with the totality of the other circumstances in determining probable cause to arrest.[2]

Deuk Bok Cha also asserts Officer Flores did not properly administer the HGN test in accordance with the NHTSA guidelines and suggests the HGN results (6 out of 6 possible clues) should therefore be disregarded. In support, Deuk Bok Cha cites Officer Flores's testimony that he held the stimulus (the pen) "12 to 14 inches away" from his eyes during the test. Deuk Bok Cha argues that because the NHTSA Manual states the stimulus should be held "12 to 15 inches away," Officer Flores's testimony shows he did not comply with the guideline. The HGN portion of the NHTSA Manual was not admitted at the suppression hearing. However, the trial court stated that, assuming the Manual requires a range of 12 to 15 inches, Officer Flores's testimony that he held the HGN stimulus "12 to 14 inches away" shows his administration of the test fell *within* the 12 to 15-inch range stated in the Manual. Thus, the administration of Deuk Bok Cha's HGN test was not shown to be in violation of the HGN guidelines.

[1] In his reply brief, Deuk Bok Cha asserts that portions of Officer Flores's testimony were contradicted by statements in his police report and urges this court to review the report. Defense counsel had an opportunity at the suppression hearing to impeach Officer Flores with any inconsistent statements in his report. The police report is not in the record.

[2] Deuk Bok Cha raises a new appellate argument in his reply brief, asserting that he was subjected to custodial interrogation without receiving a *Miranda* warning. An appellant may not raise a new issue in a reply brief. TEX. R. APP. P. 38.3 (appellant's reply brief may address arguments raised in appellee's brief); *Lopez v. Montemayor*, 131 S.W.3d 54, 61 (Tex. App.—San Antonio 2003, pet. denied) ("A reply brief is not intended to allow an appellant to raise new issues."). Further, Deuk Bok Cha did not object that he was subjected to custodial interrogation in the trial court; therefore, the issue was not preserved for appellate review. *See* TEX. R. APP. P. 33.1(a).

Finally, Deuk Bok Cha asserts that stopping his vehicle in the middle of the turnaround lane was not a sign of intoxication but rather indicated he was complying with the traffic sign stating "Do Not Cross Double White Line." A photograph of the traffic sign was admitted at the suppression hearing. The trial court acts as the sole judge of the credibility and weight to be given to evidence introduced at a suppression hearing. *Story*, 445 S.W.3d at 732; *Johnson*, 414 S.W.3d at 192. In its role as factfinder, the trial court could reasonably infer that Bok Cha's decision to stop his vehicle in the middle of a traffic lane showed a loss of mental faculties due to intoxication and reject the inference suggested by defense counsel that he was merely complying with the traffic sign.

We conclude that based on the totality of the circumstances, which consisted of Deuk Bok Cha's vehicle swerving on to the shoulder and later stopping in a lane of traffic, his admission that he consumed alcohol, his bloodshot and glassy eyes, the odor of alcohol in the vehicle, and the clues of intoxication exhibited on the field sobriety tests, there was a sufficient basis for the trial court to determine that Officer Flores had probable cause to arrest Deuk Bok Cha for committing a DWI offense in his presence or view under article 14.01(b). Therefore, we hold the trial court did not abuse its discretion in denying Deuk Bok Cha's motion to suppress.

JUDICIAL NOTICE

In his second issue, Deuk Bok Cha argues the trial court erred by refusing to take judicial notice of a paragraph in the NHTSA Manual stating the HGN stimulus should be held "12 to 15 inches" away from the defendant's eyes. On appeal, he contends the trial court was required to take judicial notice of the paragraph because he "supplied the necessary information," i.e., a copy of the page from the 2006-2009 edition of the Manual. *See* TEX. R. EVID. 201(c)(2) (the court must take judicial notice if a party requests it and the court is supplied with the necessary information).

Assuming without deciding that the trial court erred in declining to take judicial notice, the record shows there was no harm. After the verbal request for judicial notice was denied, defense counsel asked Officer Flores to read the pertinent paragraph, which he did by reciting, "[i]t should be held about 12 to 15 inches in front of the eyes for ease of focus." When asked whether the Manual requires strict compliance with the stated guidelines, Officer Flores testified the beginning of the Manual states a "slight deviation" in how a test is administered does not invalidate the test. Officer Flores opined that his use of a 12 to 14 inch range was in compliance with the Manual's stated range of 12 to 15 inches. Therefore, the evidence concerning the prescribed 12 to 15 inch range for the HGN stimulus was before the jury, and no harm arose from the trial court's failure to take judicial notice. *See* TEX. R. EVID. 201(f) ("In a criminal case, the court must instruct the jury that it may or may not accept the [judicially] noticed fact as conclusive."); TEX. R. APP. P. 44.2(b) (non-constitutional error that does not affect a defendant's substantive rights is harmless). We therefore overrule Deuk Bok Cha's second issue.[3]

SEARCH WARRANT FOR BLOOD DRAW

In his fourth issue, Deuk Bok Cha challenges the issuance of the search warrant for a blood specimen. The issue heading in his brief states his challenge is based on the same magistrate having notarized the officer's affidavit and issued the search warrant. That appellate issue matches Deuk Bok Cha's objection at trial and was thus preserved for review. However, the substance of the brief's argument under Issue No. 4 discusses a different issue – that the officer's affidavit is conclusory and lacks sufficient detail to support a finding of probable cause for the warrant under the Fourth Amendment. Because Deuk Bok Cha did not object or move to suppress the blood

[3] We may not consider the new issue raised in Deuk Bok Cha's reply brief asserting he was denied his constitutional right to present a defense. *See* TEX. R. APP. P. 38.3; *Lopez*, 131 S.W.3d at 61.

draw evidence on that ground in the trial court, his complaint regarding the affidavit's specificity was not preserved for appellate review. *See* TEX. R. APP. P. 33.1(a).

As to the preserved issue concerning the magistrate, Officer Flores testified he prepared an affidavit to obtain a search warrant for a blood draw, took an oath before the magistrate, and then signed the affidavit in the magistrate's presence. The magistrate subsequently signed the search warrant based on the probable cause stated in the affidavit. In response to Deuk Bok Cha's objection that "signing" both the affidavit and the search warrant showed the magistrate had "a vested interest," the trial court disagreed that "there is a problem with the magistrate having accepted . . . that affidavit and then based upon the information within that affidavit, then signing off on the search warrant," noting it is "the usual practice in many jurisdictions." The trial court overruled the objection to the warrant but allowed defense counsel to further cross-examine the officer about the process of obtaining the warrant. On appeal, Deuk Bok Cha cites no legal authority to support his assertion that a single magistrate performing both functions creates a conflict of interest or "a vested interest in the outcome" or otherwise invalidates the search warrant. Further, the affidavit and search warrant containing the magistrate's signatures are not in the record before us. We therefore overrule Deuk Bok Cha's issue challenging the search warrant based on a "vested interest" by the magistrate.

ADMISSION OF BLOOD ALCOHOL CONTENT EVIDENCE

In his third issue, Deuk Bok Cha asserts the trial court abused its discretion in overruling his objection to the chain of custody of the blood specimen and admitting the lab report showing his blood alcohol content. We review a trial court's ruling on an authentication or identification issue for an abuse of discretion. *Fowler v. State*, 544 S.W.3d 844, 848 (Tex. Crim. App. 2018); *Watson v. State*, 421 S.W.3d 186, 189-90 (Tex. App.—San Antonio 2013, pet. ref'd). We will

uphold a trial court's admission of evidence so long as its decision is within the zone of reasonable disagreement. *Fowler*, 544 S.W.3d at 848; *Watson*, 421 S.W.3d at 190.

Texas Rule of Evidence 901 governs the authentication and identification requirements for the admissibility of evidence. TEX. R. EVID. 901. The rule requires the proponent to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a); *Fowler*, 544 S.W.3d at 848. When an item has been in the care of multiple people, the authentication requirement may be satisfied by showing a chain of custody. *Druery v. State*, 225 S.W.3d 491, 503 (Tex. Crim. App. 2007); *see also Watson*, 421 S.W.3d at 190. The chain of custody is sufficiently authenticated when the proponent establishes "the beginning and the end of the chain of custody, particularly when the chain ends at a laboratory." *Watson*, 421 S.W.3d at 190; *Mitchell v. State*, 419 S.W.3d 655, 659 (Tex. App.—San Antonio 2013, pet. ref'd). The links in the chain of custody may be established through circumstantial evidence. *Watson*, 421 S.W.3d at 190; *Mitchell*, 419 S.W.3d at 660. Absent any evidence of tampering, "an objection that the State has failed to establish the proper chain of custody goes to the weight of the evidence rather than its admissibility." *Bird v. State*, 692 S.W.2d 65, 70 (Tex. Crim. App. 1985); *Mitchell*, 419 S.W.3d at 660. "In a jury trial, it is the jury's role ultimately to determine whether an item of evidence is indeed what its proponent claims; the trial court need only make the preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic." *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015).

Here, the State provided evidence showing the beginning and the end of the chain of custody of the blood specimen. Officer Flores testified that he personally observed the nurse draw Deuk Bok Cha's blood sample at the city detention center on June 6, 2018. He watched the nurse seal the individual blood vials and write identifying information, place them in "little plastic

containers that protects [sic] them," and place the containers inside a box which was then sealed. Officer Flores testified he then took the blood sample box and placed it in the refrigerator in the San Antonio Police Department's property room, which is an area restricted to police officers.

Jim Thomas, a forensic scientist with the Department of Public Safety laboratory in Austin, testified that Deuk Bok Cha's blood mailer kit was received at the laboratory on June 19, 2018. The blood sample arrived in a "blood mailer kit," which is a cardboard box with containers inside for the tubes of blood submitted for blood alcohol analysis. When the kit was received, it was assigned a unique laboratory case number and the evidence itself was marked with a bar code so it could be tracked within the lab. The submission form within the blood kit stated the name of the suspect, the date and time of the offense, who collected the blood and what time it was collected. The submission form inside Bok Cha's blood kit showed it came from the San Antonio Police Department. Thomas verified the blood had not been tampered with by confirming that the blood kit box was sealed when he received it and that the two blood vials inside were also sealed. The labels used to seal the tubes showed the samples were obtained from Deuk Bok Cha. Thomas performed the testing on the blood sample on July 6, 2018 and prepared a lab report showing Deuk Bok Cha's blood alcohol content was 0.117 grams of alcohol per 100 milliliters of blood. The report was admitted as State Exhibit No. 5.

The State sufficiently established the beginning and end of the chain of custody of the blood specimen taken from Deuk Bok Cha. While the nurse who drew the blood did not testify,[4] Officer Flores testified to his personal observations of the procedure she used to draw the blood and the steps she took to identify, seal, and package the blood samples. Thomas testified that Deuk

[4] In his brief, Deuk Bok Cha asserts he was denied the right to confrontation when the officer, instead of the nurse, testified about the blood draw procedure he witnessed. This issue was not preserved by objection in the trial court. TEX. R. APP. P. 33.1(a).

Bok Cha's blood sample kit was received at the lab in a sealed condition with no signs that the blood vials had been tampered with. Thomas did the testing and wrote the lab report. We conclude the evidence was sufficient for the trial court to conclude that the laboratory report was authenticated as based on the blood drawn from Deuk Bok Cha. *See Watson*, 421 S.W.3d at 190; TEX. R. EVID. 901(a). We therefore overrule Deuk Bok Cha's third issue.

CONCLUSION

Based on the foregoing reasons, we affirm the trial court's judgment.

Liza A. Rodriguez, Justice

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