In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00375-CR

CHAD ERIC MINER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 09-249280

MEMORANDUM OPINION

Chad Eric Miner pleaded guilty to driving while intoxicated. The trial court found Miner guilty, sentenced Miner to three days in jail, assessed a $1,000 fine and court costs, and suspended Miner's driver's license for ninety days. On appeal, Miner challenges the trial court's denial of his motion to suppress. We affirm the trial court's judgment.

Factual Background

At the suppression hearing, Texas State Trooper Travis Wroten testified that he saw a sport utility vehicle failing to maintain a single lane and driving on the shoulder of the road. Wroten testified that the driver was driving in the far right-hand lane and the

right wheels of the driver's vehicle slowly crossed about a tire's width over the fog line. Wroten did not believe that the driver activated his vehicle's blinker before crossing onto the shoulder. The vehicle's wheels then returned to the lane of travel. Wroten observed the vehicle for fifteen or twenty seconds before initiating a traffic stop. Wroten asked the driver if he knew why he had been stopped and the driver responded that he had been "swerving." Wroten testified that the stop occurred at night around 12:45 a.m. Wroten identified Miner as the driver.

Wroten testified that he did not see Miner swerve into oncoming traffic or see other drivers take evasive action as a result of Miner's driving, that Miner did not cause any traffic accidents, and that he did not see Miner cross the center stripe. Wroten testified that other motorists were on the road, which has seven lanes of travel, and that he saw guardrails and concrete barriers on the shoulder of the road, but he did not see any parked vehicles, cones, or barrels. He did not believe that other motorists were around when he saw Miner swerve. Wroten testified that for Miner to be a danger to other drivers, other vehicles would have to be within Miner's proximity. Wroten did not agree that Miner was not a danger to other drivers, but could not say whether Miner was a danger to other motorists at the time he drove on the shoulder. He did not know whether Miner did anything unsafe. Wroten testified that he had reasonable suspicion to stop Miner's vehicle because Miner violated the Transportation Code's traffic laws by failing to maintain a single lane and driving on the shoulder of the road.

Standard of Review

"We review a trial court's ruling on a motion to suppress under a bifurcated standard of review." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

> First, we afford almost total deference to a trial judge's determination of historical facts. 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. He is entitled to believe or disbelieve all or part of the witness's testimony -- even if that testimony is uncontroverted -- because he has the opportunity to observe the witness's demeanor and appearance.
>
> If the trial judge makes express findings of fact, we view the evidence in the light most favorable to his ruling and determine whether the evidence supports these factual findings. When findings of fact are not entered, we "must view the evidence 'in the light most favorable to the trial court's ruling' and 'assume the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record.'"
>
> Second, we review a trial court's application of the law of search and seizure to the facts *de novo*. We will sustain the trial court's ruling if that ruling is "reasonably supported by the record and is correct on any theory of law applicable to the case."

Id. at 447-48 (internal footnotes omitted).

Reasonable Suspicion

In one issue, Miner challenges the trial court's denial of his motion to suppress on grounds that Trooper Wroten lacked reasonable suspicion to conduct a traffic stop under either Texas Transportation Code section 545.058 or 545.060.

The stopping of an automobile by law enforcement amounts to a seizure within the meaning of the Fourth Amendment. *See Corbin v. State*, 85 S.W.3d 272, 276 (Tex. Crim. App. 2002). "A seizure based on reasonable suspicion or probable cause will generally

be reasonable." *Id.* Reasonable suspicion exists when an officer has "specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has engaged or is (or soon will be) engaging in criminal activity." *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001). "[A] traffic violation committed in an officer's presence authorizes an initial stop." *Armitage v. State*, 637 S.W.2d 936, 939 (Tex. Crim. App. 1982).

Section 545.058 of the Transportation Code provides that "[a]n operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only: (1) to stop, stand, or park; (2) to accelerate before entering the main traveled lane of traffic; (3) to decelerate before making a right turn; (4) to pass another vehicle that is slowing or stopped on the main traveled portion of the highway, disabled, or preparing to make a left turn; (5) to allow another vehicle traveling faster to pass; (6) as permitted or required by an official traffic-control device; or (7) to avoid a collision." Tex. Transp. Code Ann. § 545.058(a) (West 1999).

Miner argues that reasonable suspicion is absent in this case because the evidence does not show that he was driving in an unsafe manner and does not negate any of the seven exemptions permitted by section 545.058(a). Miner relies on *Ford v. State*, 158 S.W.3d 488 (Tex. Crim. App. 2005) for the proposition that Trooper Wroten's testimony

is conclusory and does not provide specific, articulable facts to support reasonable suspicion. In *Ford*, the Court of Criminal Appeals explained:

> When a trial court is not presented with such facts, the detention cannot be "subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." And "when such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." Allowing a police officer's opinion to suffice in specific facts' stead eviscerates *Terry*'s reasonable suspicion protection. If this Court were to hold as the dissent suggests, we would be removing the "reasonable" from reasonable suspicion. Therefore, we adhere to the principle that specific, articulable facts are required to provide a basis for finding reasonable suspicion. Mere opinions are ineffective substitutes for specific, articulable facts in a reasonable-suspicion analysis.

Ford, 158 S.W.3d at 493 (internal footnotes omitted).

In *State v. Dietiker*, No. 10-10-00277-CR, 2011 Tex. App. LEXIS 239 (Tex. App.—Waco Jan. 12, 2011, no pet.) (not yet released for publication), the Waco Court addressed "whether the State met its burden of proof to establish reasonable suspicion of a violation of section 545.058(a)." *Dietiker*, 2011 Tex. App. LEXIS 239, at *7. The tires on the passenger side of Dietiker's vehicle briefly crossed over the "fog line," *i.e.*, the white line that separates the right lane of traffic from the shoulder of an improved road. *Id*. at *5. The officer testified that he stopped Dietiker based on this one incursion over the fog line for three or four seconds, that it was late at night and windy, and that it was difficult for him to see if there was a pedestrian or other vehicle on the road. *Id*. The road was two lanes wide in each direction. *Id*. "There was no evidence relating to necessity or any of the seven permitted reasons for driving on an improved shoulder." *Id*.

at *5-6. The officer testified that he did not see Dietiker drive unsafely. *Id*. at *9. The Waco Court stated:

> [W]ithout evidence of necessity or the statutory exemptions, the State met its burden and was not required to negate necessity or the statutory exemptions in order to establish reasonable suspicion. This is because necessity, safety, and the statutory exemptions are more in the nature of defenses rather than exceptions. Therefore, there was reasonable suspicion for the officer to believe that a violation of Section 545.058(a) was transpiring. We find that the trial court's decision to grant the motion to suppress based on lack of reasonable suspicion for the initial stop was erroneous pursuant to Section 545.058(a) of the Transportation Code.

Id.

In this case, the record demonstrates that it was nighttime, other vehicles were on the road, guardrails and cement barriers were on the shoulder of the road, the road contained seven lanes of travel, Miner's right tire crossed over the fog line, and Trooper Wroten stopped Miner for driving on the shoulder, *i.e.*, crossing over the fog line. Wroten did not testify that Miner was driving unsafely, nor does the record contain evidence regarding necessity or the seven exemptions permitted by section 545.058(a). However, the State was not required to negate either necessity or section 545.058's statutory exemptions. *See Dietiker*, 2011 Tex. App. LEXIS 239, at *9. Based on the evidence presented at the hearing on Miner's motion to suppress, the trial court could reasonably conclude that the State had satisfied its burden of showing that Wroten had reasonable suspicion to believe that Miner was engaging in or was about to engage in a violation of section 545.058(a) of the Transportation Code. *See id*. We need not address

whether Wroten had reasonable suspicion to initiate a traffic stop pursuant to section 545.060 of the Transportation Code. *See* Tex. R. App. P. 47.1.

We conclude that the trial court properly denied Miner's motion to suppress. We overrule Miner's sole issue and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on May 19, 2011
Opinion Delivered June 1, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Kreger, JJ.