In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00424-CR

TRACY LYNN MCGREW JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1
Montgomery County, Texas
Trial Cause No. 16-312959

MEMORANDUM OPINION

Tracy Lynn McGrew Jr. was charged by information with possession of marijuana in the amount of two ounces or less. Tex. Health & Safety Code Ann. § 481.121 (West 2017). McGrew filed a motion to suppress, and after a hearing, the trial court denied the motion. Thereafter, McGrew pleaded guilty to the offense charged. The trial court assessed punishment at confinement for three days and a

$500 fine. In a single issue, McGrew appeals the trial court's denial of his motion to suppress. We affirm.

Hearing on Motion to Suppress

McGrew filed a motion to suppress requesting the court to suppress evidence seized pursuant to the stop, detention, or arrest of McGrew or connected with the investigation of this case, including the controlled substance that was seized. The motion also requested that the court suppress the testimony of Montgomery County Sheriff's Deputy Vasquez or any other law enforcement officers connected with this case and to suppress evidence and testimony relating to McGrew's arrest. The motion argued that the stop of McGrew was unlawful and the evidence should be suppressed because the stop and ensuring arrest were based only on an "inarticulate hunch or speculative suspicion of wrongdoing[]" and not on evidence of a crime.

At the hearing on the motion to suppress, Deputy Erin Vasquez testified that she was on patrol in The Woodlands on March 20, 2016, and that the area had become "a larger focal point for burglaries and criminal mischief[] as well as thefts." Vasquez explained that, about 3:30 in the morning, before she stopped the defendant's car, she had been patrolling the parking lots of hotels, looking for cars that may have been broken into, and "checking for individuals inside the vehicles to see if they were rummaging in vehicles as well." Vasquez testified as follows:

> When I came through the parking lot I noticed a vehicle with its parking lights on backed into the parking stall. Typically people park into the parking stall, but this one was facing out of the parking stall. So it had backed in and the parking lights were on and there were several people in the vehicle. It's a[n] artificially lit area; however, certain areas are more lit than others.
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> . . . .
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> There [were] no other cars in the parking lot with [their] lights on.
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> . . . .
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> I observed the vehicle and when I looked into the vehicle I could see several people inside and they all started moving around kind of frantically. I continued down the path of the parking stall driveway and came around and made a left to go back toward that vehicle. At that time as I turned left I could observe the vehicle turn on the engine and turn the lights on and leave the area.
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> . . . .
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> I continued to follow the vehicle due to the fact that we've had so many break-ins throughout our hotels. I proceeded to follow the vehicle and I had not checked the remainder of the business parking lot and check to see if there were any broken in vehicles or anything like that. I proceeded to follow the vehicle and as I was following the vehicle, I checked to make sure the vehicle was not stolen, checked the license plate. As I'm doing this there are several people in the vehicle and they were all shifting around and one was like, kept looking back into -- at my patrol car and then started acting [as] if he was shifting around and moving stuff around in the backseat.

Vasquez explained that after she saw people shifting around in the car and looking backwards, she turned on her emergency lights and stopped the vehicle. According

to Vasquez, it is not usual for persons in vehicles to be constantly looking backward. Vasquez testified that she "made the stop initially as an investigative stop to make contact with the occupants due to the fact of the criminal activities throughout the area."

On cross-examination, Vasquez testified that the vehicle was parked in an unusual manner, but that she did not believe the individuals in the vehicle had committed a crime "at that time." Vasquez explained that the people had been inside the vehicle for an "ample time" and were unlikely to be "just getting into the vehicle and getting adjusted" prior to driving away. According to Vasquez, the "furtive movements" by the people in the vehicle indicated to her that "it was a suspicious vehicle[]" and she suspected that they had possibly committed a crime. Vasquez explained that, at the time, she did not know what crime they may have committed, but that the area had a recent history of vehicle burglaries, criminal mischief, and thefts. Vasquez testified that she did not stop the vehicle in the parking lot because there were five people in the vehicle, she was in the process of checking to see whether the vehicle was stolen, and she was by herself. According to Vasquez, she regarded the occupants of the vehicle as "suspicious persons[]" and suspects in a "possible crime." Vasquez explained that she finds it suspicious if a person in a vehicle looks backward on a continuing and shifting basis, and that in this instance,

someone in the vehicle was looking backward more than once. Vasquez described the persons in the vehicle as "nervous[]" and they were "shifting around in the vehicle."

The trial court denied the motion to suppress without issuing findings of fact and conclusions of law. McGrew timely filed his notice of appeal.

Issue

In a single issue, Appellant argues that the trial court abused its discretion by denying his motion to suppress. According to Appellant, his detention was unlawful under the Fourth Amendment and Article I, section 9 of the Texas Constitution because any suspicions the detaining deputy had that McGrew was engaging in criminal activity were unreasonable. Appellant also argues that because the detaining deputy "was unable to link Appellant with any particular crime," the deputy's stop "was based upon [] inchoate and unparticularized suspicion[.]"

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, 447-48 (Tex. Crim. App. 2010). We review the trial court's factual findings for an abuse of discretion, but review the trial court's application of the law to the facts de novo. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). At a suppression hearing, the

trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony, and a trial court may choose to believe or to disbelieve all or any part of a witness's testimony. *Valtierra*, 310 S.W.3d at 447; *Wiede v. State*, 214 S.W.3d 17, 24-25 (Tex. Crim. App. 2007) (quoting *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999)); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

In reviewing a trial court's ruling, the appellate court does not engage in its own factual review. *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). We give almost total deference to the trial court's determination of historical facts, "especially if those are based on an assessment of credibility and demeanor." *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). We give the same deference to the trial court's conclusions with respect to mixed questions of law and fact that turn on credibility or demeanor. *State v. Ortiz*, 382 S.W.3d 367, 372 (Tex. Crim. App. 2012). We review purely legal questions de novo as well as mixed questions of law and fact that do not turn on credibility and demeanor. *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011); *Crain*, 315 S.W.3d at 48. We also review de novo "whether the totality of [the] circumstances is sufficient to support an officer's reasonable suspicion of criminal activity." *Crain*, 315 S.W.3d at 48-49.

In the absence of any findings of fact, either because none were requested or none were spontaneously made by the trial court, an appellate court must presume that the trial court implicitly resolved all issues of historical fact and witness credibility in the light most favorable to its ultimate ruling. *State v. Elias*, 339 S.W.3d 667, 674 (Tex. Crim. App. 2011) (citing *Ross*, 32 S.W.3d at 856); *see also Aguirre v. State*, 402 S.W.3d 664, 667 (Tex. Crim. App. 2013) (Cochran, J., concurring) ("in the absence of specific findings, an appellate court's hands are tied, giving it little choice but to 'view the evidence in the light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record[]'") (quoting *Ross*, 32 S.W.3d at 855). We afford the prevailing party the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013). We will uphold the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014); *Arguellez v. State*, 409 S.W.3d 657, 662-63 (Tex. Crim. App. 2013); *Ross*, 32 S.W.3d at 855.

Applicable Law

"An officer may make a warrantless traffic stop if the 'reasonable suspicion' standard is satisfied." *Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex. Crim. App. 2015). "[A]n officer is generally justified in briefly detaining an individual on less than probable cause for the purposes of investigating possibly-criminal behavior where the officer can 'point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). "Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity." *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). This is an objective standard that disregards the subjective intent of law enforcement and requires only some minimal level of justification for the stop. *Terry*, 392 U.S. at 21-22; *Wade v. State*, 422 S.W.3d 661, 668 (Tex. Crim. App. 2013); *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012); *Foster v. State*, 326 S.W.3d 609, 614 (Tex. Crim. App. 2010). However, law enforcement must have more than an inarticulable hunch or mere good-faith suspicion that a crime was in progress. *Crain*, 315 S.W.3d at 52 (quoting *Williams v. State*, 621 S.W.2d

609, 612 (Tex. Crim. App. 1981)). In deciding whether law enforcement had a reasonable suspicion, we examine the facts that were available to law enforcement at the time of the investigative detention. *Terry*, 392 U.S. at 21-22; *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997). This determination is made by considering the totality of the circumstances, giving the factfinder almost total deference to the determination of historical facts, and reviewing de novo the trial court's application of law to facts not turning on credibility. *Ford*, 158 S.W.3d at 492-93.

In determining whether the totality of the circumstances, viewed objectively, provide a justifiable basis for the stop or detention, we consider the cumulative information known to the detaining officer at the time of the stop rather than whether the officer is "personally aware of every fact that objectively supports a reasonable suspicion to detain[.]" *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011). Individual 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.* at 914, 918; *see also Wade*, 422 S.W.3d at 670 (quoting *Crockett v. State*, 803 S.W.2d 308, 311 (Tex. Crim. App. 1991)) ("The facts that an officer relies on to raise suspicion that illegal conduct is afoot need not be criminal in themselves; 'they may include any facts which in some measure render the

likelihood of criminal conduct greater than it would otherwise be.'"). Unlike probable cause to justify an arrest, reasonable suspicion does not require a detaining officer to be able to pinpoint a particular crime or penal infraction. *Derichsweiler*, 348 S.W.3d at 916; *see also Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (conduct that is "ambiguous and susceptible of an innocent explanation[]" may nonetheless justify a detention where the totality of the circumstances indicates ongoing criminal activity).

Analysis

In this case, Deputy Vasquez testified that the stop occurred in the very early hours of the morning in an area where she knew there had been several burglaries of motor vehicles, criminal mischiefs, and thefts. Vasquez also explained that the defendant's vehicle was the only one in the parking lot with lights on, and there were numerous occupants in the vehicle. According to Vasquez, when she first observed the vehicle, it was just sitting in the parking lot, and the people in the vehicle did not appear to be in the process of arriving or leaving. Vasquez testified that, when the people in the vehicle noticed her, they started the vehicle and left the parking lot, and that as she was following them, she saw someone looking back multiple times and people inside the car began shifting around.

Considering the totality of the circumstances, we conclude that Deputy Vasquez testified to specific and articulable facts and rational inferences based on those facts related to her stop of McGrew's vehicle. Consequently, her testimony supports the stop. *See Carmouche*, 10 S.W.3d at 328. Vasquez's testimony that she did not suspect McGrew or the occupants of the vehicle of any specific crime does not render the stop unlawful because reasonable suspicion does not require a detaining officer to be able to identify a particular crime. *See Derichsweiler*, 348 S.W.3d at 916. Although time of day and the level of criminal activity were factors that contributed to Vasquez's decision to stop McGrew's vehicle, Vasquez also articulated other factors, including the conduct of the people in the vehicle, that underlay her suspicion and her decision to stop and detain. *See Crain*, 315 S.W.3d at 53 (time of day and level of criminal activity in an area are factors to consider in determining reasonable suspicion but neither is sufficient absent other circumstances); *Kelly v. State*, 331 S.W.3d 541, 549-50 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) ("A person's nervous behavior and furtive movements may constitute factors in determining reasonable suspicion.").

Appellant's brief argues that

> . . . it is not unusual to park a vehicle backed into a stall; and it is not unusual to park with one's parking lights on (hence, the term "parking lights"); it is not unusual to shift around and move items in a

> car; and it is not unusual, in conjunction with all of these actions, to look at a police officer who in turn is observing you.

Appellant has provided no record references or other authority for such assertions. *See* Tex. R. App. P. 38.1(i). Furthermore, the record reflects that Deputy Vasquez did regard it as unusual for a vehicle to be parked backwards, to be sitting with the parking lights on, and for occupants to shift around and look backwards at a following police officer.

Appellant's brief argues that Vasquez did not testify regarding her training and experience relevant to making a determination of reasonable suspicion. Because McGrew did not object to Vasquez's qualifications at the hearing, he has not preserved this issue for appeal. *See* Tex. R. App. P. 33.1. Moreover, Vasquez testified that she had been with the Montgomery County Sheriff's Office since May of 2012, she had been a patrol officer since December of 2013, and she was aware that the area where she encountered McGrew's vehicle had a recent history of burglaries, thefts, and criminal mischief.

In his reply brief, Appellant argues that nighttime activity at a hotel is not suspicious, that frantic movement is not sufficient to establish reasonable suspicion, and that there was no evidence that McGrew drove unreasonably or unlawfully, suggesting flight. It does not matter that some of the observed conduct could be construed as innocent. "[F]or purposes of a reasonable-suspicion analysis, it is

enough that the totality of the circumstances, viewed objectively and in the aggregate, suggests the realistic possibility of a criminal motive, however amorphous, that was about to be acted upon." *Derichsweiler*, 348 S.W.3d at 917.

Based on the evidence at the suppression hearing, we conclude that, considering the totality of the circumstances, the State met its burden to demonstrate at least a minimal level of objective justification to justify the initial stop. *See Hamal*, 390 S.W.3d at 306. Accordingly, we overrule Appellant's issue and affirm the trial court's order.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on September 14, 2017
Opinion Delivered October 4, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.