In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00377-CR

ANTHONY MICHAEL CLARY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 15-08-08160-CR

MEMORANDUM OPINION

After the trial court denied Anthony Michael Clary's motion to suppress, he pleaded guilty to the crime of driving while intoxicated, a third-degree felony.[1] Based on his plea, the trial court sentenced Clary to serve ten years in prison. Clary

[1] Clary's indictment alleges that Clary had previously been convicted on two prior occasions of driving while intoxicated before the State indicted him on the current charge. *See* Tex. Penal Code Ann. §§ 49.04, 49.09(b)(2) (West Supp. 2017).

appeals his conviction, and in his appeal, he asks us to reverse the trial court's ruling denying his motion to suppress. We affirm.

Background

In August 2015, Bailey Guillory called 911 and reported seeing a man at a drive-through restaurant in a white SUV in line in front of her yelling at the employee taking orders and yelling at a girl in the parking lot. Bailey reported that she heard the girl who was standing next to a parked car in the parking lot tell the man in the white SUV that the police were on their way. Bailey also told the dispatcher that she did not know if the man who was driving the white SUV was drunk. Bailey reported to the dispatcher that when the white SUV passed the drive-through's speaker, "the man was still yelling at [the girl standing next to the car in the parking lot], and he just seemed a little irate so I figured he was drunk or something and I just wanted to make sure." Bailey gave the dispatcher her name. Shortly after the white SUV turned onto the street in front of the drive-through, a City of Conroe Police Officer pulled behind the SUV and stopped it by signaling the driver with the patrol car's emergency lights.

The State introduced the audio-recording of Bailey's 911 call and the video-recording captured by the camera that was on-board the patrol car during the hearing the trial court conducted on Clary's request to suppress the evidence that police

discovered following the stop. Sergeant Judd Russell, the City of Conroe police officer who stopped the white SUV, was the sole witness who testified during the hearing. When Sergeant Russell approached Clary's white SUV, he told Clary that someone had reported having seen a person driving a white SUV who was yelling at a girl in the parking lot. Clary responded, and told Sergeant Russell that a man who was near the car had started the argument with him. When Sergeant Russell asked Clary whether he had been drinking that evening, Clary told Sergeant Russell that he had two drinks earlier that day. At Sergeant Russell's request, Clary performed several field sobriety tests. Clary can be seen in the video-recording attempting the various field sobriety tests. After completing the field sobriety tests, Sergeant Russell arrested Clary and charged him with driving while intoxicated.

Approximately eight months after the stop, a grand jury indicted Clary for driving while intoxicated (DWI). *See* Tex. Penal Code Ann. § 49.04 (West Supp. 2017). The indictment included counts enhancing the penalties that apply to DWIs, and it alleges that in 1998 and 2008, Clary was convicted on two prior DWIs. Subsequently, Clary asked the trial court to suppress the evidence from the stop conducted by Sergeant Russell on the basis that Bailey's 911 call failed to establish reasonable suspicion to justify the decision Sergeant Russell made to stop Clary's

SUV.[2] During the hearing on Clary's request, Clary argued that Bailey's 911 call regarding the disturbance that Bailey saw failed to give the police reasonable suspicion to believe that he had committed a crime or that a crime would soon occur.

During the hearing on Clary's request to suppress, Sergeant Russell testified that Clary was stopped on a Sunday evening around 11:00 p.m. Sergeant Russell explained that before he stopped Clary, he understood that a man in a parking lot had been seen "screaming at a female, said something about fighting, and the female said the police were on the way." Sergeant Russell indicated that the notes from the

[2] The record filed in Clary's appeal does not include a copy of his motion to suppress. After the clerk filed the clerk's record, we requested that the record be supplemented by the clerk to include a copy of Clary's motion to suppress. Subsequently, the clerk certified that Clary's motion to suppress was "not available to be included as part of the Clerk's Record [in Clary's case], as it is not contained in the case file or (E-Filed in Odyssey)." Nevertheless, the State had not claimed that Clary did not have a written motion before the trial court during the hearing that the court conducted on Clary's request to suppress the evidence that the police gathered when they stopped Clary in August 2015. And, at the conclusion of the hearing, the trial court pronounced: "Motion to Suppress is denied." The record includes the trial court's certification that gave Clary the right to appeal matters "raised by written motion filed and rule[d] on before trial[.]" Since the grounds of Clary's request to suppress are apparent from the arguments that he presented in the hearing that resulted in the denial of his request, and because neither party to the appeal delivered a copy of Clary's written motion to us so that a copy of the motion could be included in the record, we have chosen to decide Clary's appeal without the benefit of his written motion. *See* Tex. R. App. P. 2 (allowing the Rules of Appellate procedure to be suspended in a particular case to expedite a decision); Tex. R. App. P. 34.5(e) (providing that the parties may by stipulation supplement the clerk's record if the records have been lost or destroyed).

911 call were displayed in his patrol car on a screen. The notes indicated that the 911 caller said that she did not know if the man driving the SUV was intoxicated or not. According to Sergeant Russell, in his experience, people coming from bars that are in that area of town frequently go to the drive-through restaurant after they have been drinking. Sergeant Russell indicated that he had been to that particular drive-through many times on previous occasions in response to DWI-related offenses. He agreed that he did not stop Clary for violating any traffic laws, that he did not personally witness Clary yelling or confronting anyone, and that before he decided to stop Clary, he had no reason to believe that Clary had been at a bar. According to Sergeant Russell, he suspected the person driving the white SUV had either committed the crime of disorderly conduct or the crime of family violence from the information he was given about the reported disturbance that occurred in the area around the drive-through.

At the conclusion of the hearing, the trial court denied the request that Clary made to suppress the evidence from the stop. Neither party asked the trial court to provide findings to support its ruling. Subsequently, Clary agreed to plead guilty to the charge that he committed a third-degree felony DWI. *Id.* Under the terms of Clary's plea agreement with the State, the trial court assessed a sentence of ten years in prison, but it then suspended Clary's sentence and placed him on probation for six

years. Under the terms of the trial court's probation order, the trial court required that Clary spend ten days in county jail and pay a $1,000.00 fine.

Standard of Review

We use a bifurcated standard in reviewing a trial court's ruling on a motion to suppress. *Amador v. State,* 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) (citing *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). Under that standard, we are required to give almost total deference to the trial court's findings of historical facts, and to also give the trial court almost total deference with respect to its resolution of any mixed questions of law and fact if its resolution of such questions turned on the evaluation of the credibility and demeanor of the witnesses who testified in the suppression hearing. *Id.* In contrast, we use a de novo standard to review mixed questions of law and fact where the trial court's resolution did not depend upon the credibility or demeanor of the witnesses who testified in the suppression hearing. *Id.* (citing *Montanez v. State,* 195 S.W.3d 101, 107 (Tex. Crim. App. 2006)); *Guzman,* 955 S.W.2d at 89. In Clary's case, because the parties did not ask that the trial court provide them with written findings, we "impl[y] the necessary fact findings that would support the trial court's ruling if the evidence (viewed in the light most favorable to the trial court's ruling) supports these implied fact findings."

State v. Kelly, 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006); *accord State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

Analysis

In a single appellate issue, Clary argues that Sergeant Russell did not have reasonable suspicion to justify his decision to stop Clary's SUV after it left the restaurant. According to Clary, Bailey's report about Clary yelling in the parking lot of the drive-through is an insufficient basis to support the trial court's determination that reasonable suspicion existed to justify Sergeant Russell's decision to stop Clary's SUV. Clary argues that the police were aware from Bailey's report that whatever occurred in the parking lot of the drive-through had ended before Sergeant Russell stopped him because Bailey reported that she saw the people who had been standing near the car drive off before he left the drive-through. Clary suggests that Bailey's comments suggesting that he might be drunk were not based on specific articulable facts such that Sergeant Russell could form a reasonable suspicion that Clary was driving while intoxicated. Clary concludes that Sergeant Russell did not have information that was sufficient to provide him with a reasonable suspicion that Clary had engaged in or was about to engage in criminal activity.

Under the Fourth Amendment, a police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion, supported

by articulable facts, to believe that a person the officer detained was or soon would be involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 29 (1968); *Woods v. State*, 956 S.W.2d 33, 35 (Tex. Crim. App. 1997). In determining whether reasonable suspicion exists to justify a *Terry* stop, courts consider not only the information known to the officer who conducted the stop, but they also consider "'the cumulative information known to the cooperating officers at the time of the stop[.]'" *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011) (citing *Hoag v. State*, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987)).

In this case, the information that Bailey provided to police came from a known source, as she gave the dispatcher her name. When a citizen who provides the police with information identifies herself by name, the individual can be held accountable for the accuracy and veracity of the information that she reported. *Derichsweiler*, 348 S.W.3d at 914-15. Consequently, both the police and the trial court were entitled to treat the information that Bailey provided to them as reliable. *See id.*

When deciding whether information provided by a known citizen-informant gave police sufficient information to reasonably believe that a crime had occurred, courts determine "whether the information that the known citizen-informant provide[d], viewed through the prism of the detaining officer's particular level of knowledge and experience, objectively supports a reasonable suspicion to believe

that criminal activity is afoot." *Id.* at 915. An objective standard is used in determining whether a police officer developed a reasonable suspicion sufficient to justify the officer's further investigation into an alleged criminal activity. *Terry*, 392 U.S. at 21-22; *Hernandez v. State*, 983 S.W.2d 867, 869 (Tex. App.—Austin 1998, pet. ref'd) (citing *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997)). In reviewing an officer's decision to continue an investigation, courts evaluate whether the facts available to the officer would "'warrant a man of reasonable caution in the belief' that the action taken was appropriate[.]" *Terry*, 392 U.S. at 21-22 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

In Clary's case, Sergeant Russell testified during the hearing that he suspected that Clary had engaged in disorderly conduct. By statute, two of the ways that a person may commit disorderly conduct are by making "unreasonable noise in a public place" or by "fight[ing] with another in a public place[.]" Tex. Penal Code Ann. § 42.01(a)(5), (6) (West 2011). Sergeant Russell formed his impression based on Bailey's report that she saw Clary yelling, cursing, and threatening to fight with another individual who was in the parking lot of a drive-through restaurant. Bailey's report was reasonably viewed by both Sergeant Russell and the trial court as reliable, since Bailey was a known citizen-informant who could be held accountable for the information that she provided to the police. *See Mitchell v. State*, 187 S.W.3d 113,

117 (Tex. App.—Waco 2006, pet. ref'd); *Pipkin v. State,* 114 S.W.3d 649, 655 (Tex. App.—Fort Worth 2003, no pet.).

Disorderly conduct, although a misdemeanor, is a crime that police may choose to investigate by executing a *Terry* stop. *See Ste-Marie v. State*, 32 S.W.3d 446, 449 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (concluding that the stop of the defendant's car was justified where a witness told the officer that she heard the defendant curse at her daughter when the defendant drove by the witness's house). As the sole judge of the credibility and weight to give the evidence that was admitted in the hearing on Clary's motion to suppress, the trial court possessed the discretion to accept or to reject Sergeant Russell's testimony that Bailey's report caused him to suspect that Clary had engaged in disorderly conduct. *See Ross*, 32 S.W.3d at 855 (noting that the trial judge acts as the trier of fact in a suppression hearing).

Given the totality of the circumstances shown by the testimony regarding the events that led to Clary's stop, we conclude that the trial court could reasonably conclude that Sergeant Russell detained Clary after receiving information from a reliable source that Clary made unreasonable noise in a public place. *See* Tex. Penal Code Ann. § 42.01(a)(5).

We overrule Clary's sole issue. The trial court's judgment is affirmed.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on September 11, 2017
Opinion Delivered January 31, 2018
Do Not Publish

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