COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00041-CR

ANDREW STEPHEN CHAPMAN — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 9 OF TARRANT COUNTY
TRIAL COURT NO. 1411937

MEMORANDUM OPINION[1]

Appellant Andrew Stephen Chapman appeals the trial court's denial of his motion to suppress after the trial court convicted him of driving while intoxicated (DWI), enhanced by an allegation that his blood alcohol concentration (BAC) was .15 or more, upon his plea of guilty. The trial court sentenced him to pay a $1,500 fine and to serve 120 days in jail, probated for eighteen months. In two

[1]*See* Tex. R. App. P. 47.4.

issues, Appellant contends that the trial court erred by denying his motion to suppress. We agree. Because the State failed to sustain its burden to justify the lawfulness of the seizure of Appellant, the trial court erred by denying his motion to suppress. We therefore reverse the trial court's judgment and remand this case to the trial court for proceedings consistent with this opinion.

I. Facts

The State called a single witness, DWI-unit member Officer Jennifer Russell, to testify at the hearing on the motion to suppress. Officer Russell was dispatched to a Sonic drive-in on University Drive in Fort Worth. Two other officers, Officer Ritchie and Officer Ramirez, were already at the Sonic, had Appellant in custody, and had performed a preliminary investigation, maintaining the scene so Officer Russell could continue the investigation when she arrived. The record is clear that no warrant had issued for either a search or a seizure of Appellant.

Officer Russell testified that she had received a dispatch at 11:31 p.m. and that the information she had been given was that "[a]n employee had called in stating that there was a male that had—wouldn't leave. They barricaded him in." When she arrived, she saw "[a] group of family members and employees on one side of the Sonic and then [Appellant's car] on the other side with the [detaining officers]." Although Appellant was still inside his car with the engine running, the detaining officers had used their patrol units to block him in. Both officers had trained their spotlights on him. The record does not reflect how long the

detaining officers had held Appellant in custody. Neither Officer Ritchie nor Officer Ramirez testified why they had detained Appellant. Nor did any other person testify why Appellant had been detained originally. No one testified that Appellant was the person who had refused to leave the premises or that he was the person who was referred to by the dispatcher.

Officer Russell testified that she observed that Appellant appeared intoxicated and that she had "pulled [Appellant] out of the car." She asked him to perform field sobriety tests. Appellant complied, and Officer Russell arrested him for DWI. After Appellant's arrest, Officer Russell requested and obtained a search warrant for his blood. The resulting lab analysis indicated a BAC of .206. Officer Russell testified that she did not observe Appellant commit a traffic violation but did see him commit a non-traffic violation: "trespassing on a closed business that he was already told to leave." Appellant points out that the State offered no evidence to demonstrate how and when Officer Russell reached that conclusion. The record is silent as to who told Appellant to leave, when they did so, how and when Officer Russell learned of it, and when the business closed.

II. The State's Cross-Points

In its three cross-points, the State argues that Appellant waived all rights of appeal and that this court therefore lacks jurisdiction of this appeal; that the certification of the right of appeal is defective; and that the record does not reflect that the trial court gave Appellant permission to appeal. Appellant's timely notice

of appeal vested this court with jurisdiction.[2] The issues are whether Appellant validly waived his right to appeal the denial of his motion to suppress and whether the trial court nonetheless granted Appellant permission to appeal.[3] In light of the State's three cross-points and Appellant's motion to abate, we abated this case for the trial court to file an amended certification reflecting that it had given Appellant permission to appeal (if that were the case) or, alternatively, if the trial court had not given Appellant permission to appeal, we directed the trial court to conduct a hearing and make essential findings to aid us in determining whether Appellant intentionally, knowingly, and voluntarily waived his rights to appeal. The trial court filed an amended certification reflecting that it had given Appellant permission to appeal in this plea-bargained case. Whether the waiver was valid is therefore moot. Accordingly, we overrule the State's three cross-points.

III. Motion to Suppress

A. Standard of Review

We review a trial court's ruling on a motion to suppress evidence under a bifurcated standard of review.[4] We give almost total deference to a trial court's rulings on questions of historical fact and application-of-law-to-fact questions that

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[2] *See Stansberry v. State*, 239 S.W.3d 260, 264 (Tex. Crim. App. 2007).

[3] *See id.* at n.9.

[4] *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

turn on an evaluation of credibility and demeanor, but we review de novo application-of-law-to-fact questions that do not turn on credibility and demeanor.[5]

The Fourth Amendment protects against unreasonable searches and seizures by government officials.[6] To suppress evidence because of an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct.[7] A defendant satisfies this burden by establishing that a search or seizure occurred without a warrant.[8] After the defendant has made this showing, the burden of proof shifts to the State, which is then required to establish that the search or seizure was conducted pursuant to a warrant or was reasonable.[9]

Once it is established that the search or seizure was conducted without a warrant and the burden of proof shifts to the State, whether the defendant attempted to refute the existence of sufficient suspicion is irrelevant to the reasonable-suspicion analysis. The defendant has no obligation to challenge

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[5]*Amador*, 221 S.W.3d at 673; *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005); *Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002).

[6]U.S. Const. amend. IV; *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007).

[7]*Amador*, 221 S.W.3d at 672; *see Young v. State*, 283 S.W.3d 854, 872 (Tex. Crim. App.), *cert. denied*, 558 U.S. 1093 (2009).

[8]*Amador*, 221 S.W.3d at 672.

[9]*Id.* at 672–73; *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005).

whether the detaining officer had specific facts to warrant the detention. The State bears the burden of establishing the reasonableness of the warrantless detention.[10]

A detention, as opposed to an arrest, may be justified on less than probable cause if a person is reasonably suspected of criminal activity based on specific, articulable facts.[11] An officer conducts a lawful temporary detention when he or she has reasonable suspicion to believe that an individual is violating the law.[12] Reasonable suspicion exists when, based on the totality of the circumstances, 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 is, has been, or soon will be engaged in criminal activity.[13]

Because the trial court did not make explicit findings of fact in this case, we imply 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

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[10]*Ford*, 158 S.W.3d at 492 (citing *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002)).

[11]*Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000).

[12]*Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010); *Ford*, 158 S.W.3d at 492.

[13]*Ford*, 158 S.W.3d at 492.

those findings.[14] We then review the trial court's legal ruling de novo unless the implied fact findings supported by the record are also dispositive of the legal ruling.[15]

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 even if the trial court gave the wrong reason for its ruling.[16]

B. Analysis

Appellant was seized by Officers Ritchie and Ramirez. They did not testify. We cannot, and do not, know from the record what information, if any, they had when they arrived at the Sonic, the source of any information they may have had, or what they observed when they arrived at the Sonic that made them believe they could lawfully detain Appellant, nor do we know how long those officers had held Appellant in custody before Officer Russell arrived on the scene. We know what information was provided to Officer Russell by the dispatcher, and we know what Officer Russell observed when she arrived at the Sonic, but it is the original warrantless detention, as well as the subsequent

[14] *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008); *see Wiede*, 214 S.W.3d at 25.

[15] *State v. Kelly*, 204 S.W.3d 808, 819 (Tex. Crim. App. 2006).

[16] *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003), *cert. denied*, 541 U.S. 974 (2004).

formal arrest, that the State bore the burden to justify. The Texas Court of Criminal Appeals has held that

> [p]robable cause for a warrantless arrest requires that the officer have a reasonable belief that, based on facts and circumstances within the officer's personal knowledge, or of which the officer has reasonably trustworthy information, an offense has been committed.[17]

The fruits of Appellant's detention by Officers Ritchie and Ramirez were Officer Russell's observation of Appellant in his car and performing the field sobriety tests as well as the BAC results. The law is well established that "the fruits of a search do not justify the initial stop or arrest."[18] The lawfulness of Appellant's custodial detention turns on the observations and facts within the personal knowledge of Officers Ritchie and Ramirez. We have no idea what those observations and facts, if any, were. Although we may speculate about the officers' knowledge and observations, we may not base our decision on speculation, but, rather, we may rely only on facts firmly founded in the record.[19] Accordingly, we hold that the State failed to sustain its burden to justify the warrantless seizure of Appellant before Officer Russell's arrival at the Sonic. The

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[17] *Torres*, 182 S.W.3d at 902 (citation omitted).

[18] *Faulk v. State*, 574 S.W.2d 764, 767 (Tex. Crim. App. [Panel Op.] 1978).

[19] *See, e.g.*, *Turrubiate v. State*, 399 S.W.3d 147, 150–51 (Tex. Crim. App. 2013); *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013); *McFatridge v. State*, 309 S.W.3d 1, 8 (Tex. Crim. App. 2010) ("Appellate review is limited to only what is contained in the record."); *Ford*, 158 S.W.3d at 493–94; *O'Hara v. State*, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000).

trial court therefore erred by denying Appellant's motion to suppress. Consequently, we sustain Appellant's two issues on appeal.

IV. Conclusion

Because we have sustained Appellant's two issues, we reverse the trial court's judgment and remand this case to the trial court for a new trial consistent with this opinion.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

PANEL: DAUPHINOT, WALKER, and MEIER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: December 15, 2016