COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00277-CR

AUSTIN MITCHELL INGRUM — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 6 OF TARRANT COUNTY
TRIAL COURT NO. 1382857

MEMORANDUM OPINION[1]

After the trial court denied Appellant Austin Mitchell Ingrum's motion to suppress, he pled guilty to driving while intoxicated (DWI) with a breath alcohol concentration (BAC) of .15 or greater in exchange for ninety days' confinement in jail, probated, and a $500 fine. *See* Tex. Penal Code Ann. § 12.21 (West 2011), § 49.04(a), (d) (West Supp. 2016). Appellant retained his right to appeal the

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

denial of his motion to suppress and timely filed this appeal. In Appellant's sole issue, he contends that the trial court erred by denying his motion to suppress because the police did not have reasonable suspicion to detain him at the point that he claims the investigative detention occurred. Because we hold that the trial court did not err by denying Appellant's motion to suppress, we affirm the trial court's judgment.

Summary of Facts

On August 9, 2014, at approximately 3:30 a.m., Officer Joseph Campbell of the Colleyville Police Department was finishing a traffic stop in the parking lot of a small Colleyville strip mall containing a liquor store and a dry cleaning business. As Officer Campbell concluded the stop, he observed two vehicles at the intersection of John McCain Road and Colleyville Boulevard. Both vehicles' left turn signals were activated, but neither vehicle turned left onto Colleyville Boulevard. Instead, they drove straight through the intersection into the liquor store parking lot, one following the other. Officer Campbell thought it unusual that the two vehicles had entered that parking lot because both businesses were closed at that time and because both vehicles' left turn signals had been activated. Officer Campbell had, on prior occasions, made DWI arrests in situations where one car had been following the other to make sure the impaired driver arrived home safely. Based on the time of night and his experience, Officer Campbell believed impaired driving was a possibility in this case.

The second vehicle, a black Camaro, was driven by Appellant. As the Camaro slowly drove past Officer Campbell, who was in uniform and standing outside his marked patrol car in the parking lot, he looked at Appellant through the passenger-side window and noticed that Appellant appeared "disheveled," "out of it," "extremely lethargic," and "dazed" and that his eyes were almost closed. When Officer Campbell made eye contact, Appellant at first did not seem to notice him. However, Appellant's eyes widened immediately when he noticed Officer Campbell.

As the two vehicles continued through the parking lot, Officer Campbell returned to his patrol car and turned off his overhead lights. He then began to follow the vehicles in his patrol car. The vehicles made a U-turn and passed him very slowly. As the Camaro approached Officer Campbell's car on the left side—driver's side to driver's side but several feet away—Officer Campbell brought his car to a stop, stepped outside it, and approached Appellant's driver's door while asking in a loud voice through the open Camaro window, "Hey! Hey! Are y'all alright?"

Appellant responded that he was "all right." By this point, Officer Campbell was standing between his car and the Camaro at the Camaro's driver's side door. The other vehicle left the parking lot. The overhead lights on the patrol vehicle remained off, and Officer Campbell did not use any spotlight. He did not block Appellant's vehicle or hold up his hands to direct Appellant. While speaking with Appellant, Officer Campbell noticed that Appellant's eyes were

bloodshot and watery. Officer Campbell also noticed that Appellant's belt on his jeans was undone and hanging from the belt loops on both sides. When Appellant answered him, Officer Campbell could "clearly smell" the odor of an alcoholic beverage coming from the vehicle. When Officer Campbell spoke with Appellant, observed his red, watery eyes, and smelled the alcoholic odor, he believed that Appellant was possibly intoxicated and detained him.

Appellant was subsequently charged with DWI with a BAC of 0.15 or more. He filed a motion to suppress complaining that he and evidence had been seized without a warrant and without reasonable suspicion. At the hearing, the parties stipulated that there was no warrant. Appellant also clarified that his position was that there was no reasonable suspicion for the stop and that the stop occurred when Officer Campbell began talking to Appellant, not after Appellant responded.

After the trial court denied Appellant's motion to suppress, the trial court found that

- Officer Campbell had a voluntary encounter with Appellant before developing reasonable suspicion to stop him;
- Appellant voluntarily drove into the parking lot and voluntarily drove past Officer Campbell with his window down;
- Officer Campbell developed reasonable suspicion that Appellant was driving while intoxicated when, at around 3:35 a.m., Appellant's belt was undone; he was following another vehicle, going straight instead of left despite having his left turn signal on; and Officer Campbell smelled alcohol on his breath;
- Before Officer Campbell smelled alcohol on Appellant's breath, he would have been free to leave;

- Officer Campbell made no show of force when he stood in the parking lot and asked Appellant if he was okay;
- Officer Campbell did not use his flashlight or overhead lights when inquiring if Appellant was okay;
- Officer Campbell was in a parking lot, a public place, when he smelled alcohol coming from Appellant's breath as they spoke through Appellant's open window; and
- Appellant could have chosen not to answer Officer Campbell's question and to drive away.

Consensual Encounter or Detention?

In his sole issue, Appellant contends that Officer Campbell detained him when he yelled, "Hey! Hey! Are you alright?" and that the officer lacked reasonable suspicion at that point. Appellant does not argue that the officer lacked reasonable suspicion later in their interaction.

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

For Fourth Amendment purposes, the interactions between police officers and citizens can be classified as:

> (1) consensual encounters that do not implicate the Fourth Amendment; (2) investigative detentions that are Fourth Amendment seizures of limited scope and duration that must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures, that are reasonable only if supported by probable cause.

Furr v. State, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016) (citing *Wade v. State*, 422 S.W.3d 661, 667 (Tex. Crim. App. 2013)); *State v. Woodard*, 341 S.W.3d 404, 410–11 (Tex. Crim. App. 2011). The police are free to stop a person and ask questions, and that person is free to terminate a consensual encounter even when the officer does not tell him so. *Woodard*, 341 S.W.3d at 411. But when an officer through force or a show of authority restrains the person's liberty, the encounter has progressed from a consensual encounter to a Fourth Amendment seizure, whether it is a detention or arrest. *Id.*

In deciding whether an interaction is just a consensual encounter or is instead a detention, courts look at the totality of the circumstances, including the time and place, but the officer's conduct is the most significant circumstance. *Id.* "[C]ircumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). Absent

that sort of evidence, "otherwise offensive conduct" of the police toward a person is not a seizure. *Woodard*, 341 S.W.3d at 413 & n.56 (citing *Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877). The test is "whether a reasonable person in the defendant's shoes would have felt free to ignore" an officer's question or end the encounter. *Id.* at 411. Since deciding whether a given set of facts amounts to a consensual encounter or a seizure under the Fourth Amendment involves applying law to facts, we review the issue de novo. *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008).

Here, at about 3:30 a.m., Officer Campbell observed Appellant following another car straight across the intersection and into the parking lot of closed businesses despite both cars signaling that they would turn left. Officer Campbell saw that Appellant appeared dazed and "out of it." When Officer Campbell spoke to Appellant from the parking lot, the officer did not use his lights or siren, pull a weapon, or enlist backup, nor did he touch Appellant or block his exit. *See Woodard*, 341 S.W.3d at 413 & n.56 (citing *Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877); *accord Johnson v. State*, No. 01-10-00134-CR, 2011 WL 5428969, at *1, *7–8 (Tex. App.—Houston [1st Dist.] Nov. 10, 2011, pet. ref'd) (mem. op., not designated for publication) (holding that when two officers approached Johnson's car but left him room to drive away, knocked on his window, and politely asked him about the odor of marihuana when he rolled the window down, the encounter was consensual). *But see Johnson v. State*, 414 S.W.3d 184, 193 (Tex. Crim. App. 2013) (concluding that the officer's shining

a bright spotlight on a person sitting in a parked vehicle, partially blocking in that vehicle, speaking in a "loud authoritative voice," inquiring "what's going on," and demanding to see identification amounted to a detention). We conclude that a reasonable person in Appellant's shoes would have felt free to drive away, just as the vehicle Appellant had followed into the parking lot did. Accordingly, we hold that even though Officer Campbell yelled, "Hey! Hey! Are y'all all right?" as he was walking up to Appellant's driver's-side door from several feet away, the encounter was consensual. *See Johnson*, 414 S.W.3d at 193 (stating that none of the listed circumstances—the officer's shining a bright spotlight on a person sitting in a parked vehicle, partially blocking in that vehicle, speaking in a "loud authoritative voice," inquiring "what's going on," and demanding to see identification—"individually would necessarily lead to an inescapable conclusion that the person was detained").

As Officer Campbell narrowed the distance between himself and Appellant, he saw that Appellant's eyes were bloodshot and watery and that his belt was unfastened. When Appellant answered Officer Campbell's question, the officer smelled the odor of alcohol, which gave him reasonable suspicion to lawfully detain Appellant and continue the investigation. *See Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005) ("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."). Accordingly, we overrule Appellant's sole issue.

Conclusion

Having overruled Appellant's sole issue, we affirm the trial court's judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and PITTMAN, JJ.

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

DELIVERED: February 23, 2017