In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00227-CR

DAMIEND LAVAR SULLIVAN, APPELLANT

V.

STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 70,432-E, Honorable Douglas R. Woodburn, Presiding

August 16, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Damiend Lavar Sullivan (appellant) appeals, through three issues, his conviction for possessing a controlled substance. The first involves the denial of his motion to suppress evidence. The second and third concern the State's proof of the enhancement allegations and an inaccurate judgment, respectively. We modify the judgment and affirm it as modified.

Background

An officer testified that he stopped appellant after witnessing him commit a traffic violation. The violation consisted of appellant's failing to stop at the designated stop line appearing before a crosswalk at an intersection. According to the officer, the front tires of appellant's car encroached upon the stop line which resulted in the front end of the vehicle protruding into the crosswalk. Upon the officer detaining and walking up to appellant's car, he smelled a faint odor of marijuana. So too did he see what appeared to be a partially smoked marijuana cigarette in the vehicle's ashtray. Appellant admitted to having smoked the controlled substance earlier. He also disclosed that a pipe lay in his lap after the officer asked appellant to exit the car. A search of the vehicle ensued, resulting in the discovery of the contraband for which appellant was prosecuted and convicted.

Issue One – Motion to Suppress Overruled

Appellant initially contends that the "trial court erred in denying [his] Motion to Suppress because the objective evidence demonstrates [that the officer] did not have an objectively reasonable basis for believing appellant committed a traffic offense." "A fair reading of the record [allegedly] demonstrates [that the officer] did not possess sufficient knowledge of the offense he claimed to be investigating when he stopped appellant's vehicle." So, the officer "could not have formed a 'reasonable' suspicion that appellant had been, was, or was about to be engaged in criminal activity." We overrule the issue.

The standard of review obligates us to defer to the trial court's interpretation of historical fact. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). That

means we must defer to its resolution of both factual and credibility issues. *Id.* And, the duty to afford such deference results in our affirmance of the trial court's decision here.

Appellant questions the legitimacy of the original stop. Though he could not recall the particular section number of the traffic statute violated by appellant, the officer nevertheless attested appellant failed to stop at the designated point at the intersection. The designated point was the white line preceding the crosswalk. The front edge of appellant's tires touched the line while portions of the car protruded into the crosswalk north of the line.

Statute provides that a vehicle approaching an intersection "with a stop sign shall stop . . . before entering the crosswalk on the near side of the intersection."[1] TEX. TRANSP. CODE ANN. § 544.010(a), (c) (West 2011). "In the absence of a crosswalk, the operator shall stop at a clearly marked stop line." *Id.* at § 544.010(c). Here, evidence revealed that appellant halted his vehicle slightly on the stop line. That resulted in a portion of the car protruding into the crosswalk, which in turn afforded a reasonable officer witnessing the circumstances reasonable suspicion to believe appellant violated § 544.010(c) of the Transportation Code. Having such suspicion enabled the officer to lawfully detain appellant. *See Haines v. State*, No. 04-16-00410-CR, 2017 Tex. App. LEXIS 3673, at *4–5 (Tex. App.—San Antonio Apr. 26, 2017, no pet.) (mem. op., not designated for publication) (holding that, because the evidence showed appellant failed to stop before entering the crosswalk, the officer had reasonable suspicion to believe that Haines violated § 544.010(c) of the Transportation Code). It may well be that the officer did not know the actual section number of the statute violated or that his

[1] We do not address whether a stoplight at an intersection falls within the category of a "stop sign" for no one raised the matter.

testimony was contradictory at times. Those matters tended to affect his credibility, which was a matter for the trial court to weigh. Having implicitly accepted the officer's version of events revealing a breach of § 544.010(c), the trial court's resolution of the matter is entitled to both deference and affirmance.

Issue Two – Enhancement

Appellant next contends that the evidence is insufficient to support the jury's finding of true to the enhancement paragraphs. We overrule the issue.

The first subpart of the argument involves appellant's Wichita County, Texas conviction back in 2008 for possessing a controlled substance. Though initially convicted and sentenced in 2006, he was granted probation. Thereafter, the State successfully moved to revoke that probation, which resulted in the 2008 judgment. "Because there is no evidence that appellant did not appeal the [2008] judgment . . . , the record has not made a prima facie showing that the conviction was final," according to appellant. We disagree.

In *Davy v. State*, Nos. 07-16-00262-CR, 07-16-00263-CR, 2017 Tex. App. LEXIS 4122 (Tex. App.—Amarillo May 5, 2017, pet. filed), we addressed the same contention raised here. There, we held that (1) a conviction is final on the date sentence is imposed, absent a notice of appeal; (2) introduction of the prior judgment and sentence is prima facie proof of a prior conviction; and (3) once the State offers such prima facie proof of the conviction, the latter is presumed final unless the record shows otherwise or the defendant presents evidence to the contrary. *See id.* at *7–8. As appellant acknowledges in his brief, the record contains the 2008 judgment illustrating appellant's sentence after having his probation revoked. That is prima facie evidence of finality per

Davy. Similarly acknowledged by appellant is the absence of any evidence of an appeal from that edict. So, sufficient evidence appears of record illustrating the finality of the 2008 Wichita County conviction.

The second subpart of appellant's argument deals with sequencing. That is, he believes the "evidence is . . . insufficient to support the jury's finding regarding the sequencing of convictions for purposes of enhancing appellant's range of punishment to that of a habitual offender under section 12.42(d)." The argument is based upon the assumption that a hypothetically correct jury charge would somehow require the jury to find that a 1998 felony conviction used for enhancement purposes occurred after the aforementioned 2008 Wichita County felony conviction. Appellant suggests that, because the 1998 conviction could not occur after the 2008 conviction, the jury's finding that both allegations were true lacked evidentiary support. We again disagree

Statute provides that:

> if it is shown on the trial of a felony offense . . . that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years.

TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016). Furthermore, a hypothetically correct punishment charge, *see Young v. State*, 14 S.W.3d 748, 750 (Tex. Crim. App. 2000) (requiring that the sufficiency of the evidence underlying a finding of true to an enhancement allegation to be measured against a hypothetically correct jury charge), would aver that the oldest conviction alleged for enhancement purposes was final before the more recent one. *Derichsweiler v. State*, 359 S.W.3d 342, 350 (Tex. App.—

Fort Worth 2012, pet. ref'd) (wherein the indictment alleged that a 1998 conviction occurred after one finalized in 2003 and stating that "[t]he hypothetically correct punishment charge would have alleged that the 1998 conviction was final before Derichsweiler committed the 2003 offense").

So, in determining whether the elements of § 12.42(d) were established here, the hypothetical punishment charge would have averred that the 1998 conviction became final before the 2008 conviction, not vice versa as suggested by appellant. And, in so reading the hypothetically correct charge on punishment, we cannot but find sufficient evidence appearing of record to prove the elements of § 12.42(d) beyond reasonable doubt.

Issue Three – Inaccurate Judgment

In his final issue, appellant contends that (1) the final judgment inaccurately reflects that he pled "guilty" to the indictment and (2) the edict should be reformed to correct the mistake. The State agrees. Accordingly, we sustain the issue and will reform the judgment to accurately reflect the record. *See Ramirez v. State*, 336 S.W.3d 846, 852 (Tex. App.—Amarillo 2011, pet. ref'd) (stating that an appellate court "has the power to modify the judgment of the court below to make the record speak the truth when we have the necessary information to do so").

The judgment of the trial court is reformed to express that appellant pled "Not Guilty" to the "Plea to the Offense." As reformed, the judgment is affirmed.

Brian Quinn
Chief Justice

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