In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00208-CR

GERARDO RICO, JR., APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 320th District Court
Potter County, Texas
Trial Court No. 79817-D, Honorable Pamela Sirmon, Presiding

February 18, 2022

ORDER OF ABATEMENT AND REMAND

Before QUINN, C.J., and PARKER and DOSS, JJ.

Pending before the Court is the State's appeal from an order granting a motion to suppress evidence filed by Gerardo Rico Jr. The State indicted Rico for possessing, with intent to deliver, between four and 200 grams of methamphetamine. The substance was discovered after officers were called to a local convenience store to have someone "trespassed" from it.[1] The person had already left by the time the officers arrived.

[1] The factual scenario we describe was obtained from the trial court's written recitations within its findings of fact and conclusions of law. They are not necessarily findings of historical fact, though.

Nevertheless, the individual walked across the street to a neighboring Goodwill parking lot. The store clerk described her as a "Hispanic female with a buzz haircut, dark shirt and blue jeans." With that information, officers left the store, headed across the street, and encountered one female and two males in the Goodwill parking lot. As they approached, one of the males, Rico, mounted his bicycle in preparation to leave. The officers stopped him, obtained his identity, checked it through police records, and discovered that he had an outstanding arrest warrant. His arrest ensued, during which the methamphetamine was discovered on his person. According to the trial court, "[t]he officers had not observed any violations of the law." Nor did Rico "match the description given by the store clerk for the individual they wanted trespassed." This resulted in the aforementioned motion being filed and granted by the trial court.

The state proffers two issues for our review. The first concerns whether the trial court applied the wrong legal standard in determining that the stop was unlawful. The second involves the attenuation doctrine. We remand for additional findings.

Standard of Review

In appeals such as this, we 1) accept that the trial court is the sole trier of fact and witness credibility, *Martinez v. State,* 620 S.W.3d 734, 740 (Tex. Crim. App. 2021); 2) afford almost total deference to the trial judge's factual findings if they are supported by the record, *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011); 3) view the evidence in the light most favorable to that ruling, *Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007); 4) draw all reasonable inferences from that evidence in favor of the decision, *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008); and 5) sustain the ruling if reasonably supported by the record and correct on any theory of

law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). However, no deference is afforded the trial court's application of the law to facts; we consider that de novo. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). Additionally, whether the particular circumstances arise to the level of reasonable suspicion or probable cause is a mixed question of law. *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013) ("Whether the facts known to the officer at the time of the detention amount to reasonable suspicion is a mixed question of law that is reviewed *de novo* on appeal.").

Wrong Standard

Among the trial court's conclusions of law is one declaring that the officers had neither a warrant nor probable cause justifying Rico's detention. Yet, neither are necessary, according to the State. Instead, the officers need only have had reasonable suspicion to believe crime was afoot to detain him. Thus, the trial court allegedly applied the wrong legal standard in assessing the legitimacy of the stop, but the detention was nevertheless justified due to the presence of reasonable suspicion. Therein lies the problem.

Admittedly, the existence of reasonable suspicion suffices to justify a temporary detention. Moreover, one or more of the officers at the scene of Rico's arrest testified to having reasonable suspicion to detain him while investigating the reported trespass at the convenience store. That an officer having reasonable suspicion that crime is afoot may temporarily detain a person to obtain his identity and maintain the status quo while investigating is beyond doubt. *Gurrola v. State*, 877 S.W.2d 300, 302 (Tex. Crim. App. 1994) (so holding); *Wilson v. State*, No. 03-15-00510-CR, 2016 Tex. App. LEXIS 3740

*10–11 (Tex. App.—Austin Apr. 13, 2016 no pet.) (mem. op.) (the same). Such suspicion exists when he has specific, articulable facts that, when combined with rational inferences therefrom, would lead him to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity. *Ramirez-Tamayo v. State*, 537 S.W.3d 29, 36 (Tex. Crim. App. 2017). And, as we all know, reasonable suspicion is a less demanding standard than probable cause. *Johnson v. State*, 622 S.W.3d 378, 388 (Tex. Crim. App. 2021). Our Court of Criminal Appeals characterizes it as "a relatively low hurdle," *id.*, cleared by sufficiently detailed information "suggest[ing] that ***something*** of an apparently criminal nature is brewing." *Derichsweiler v. State*, 348 S.W.3d 906, 917 (Tex. Crim. App. 2011).

The totality of the circumstances are determinative. They include any facts which "in some measure render the likelihood of criminal conduct greater than it would otherwise be." *Wade v. State*, 422 S.W.3d 661, 670 (Tex. Crim. App. 2013) (quoting *Crockett v. State*, 803 S.W.2d 308 (Tex. Crim. App. 1991)). Finally, and most importantly, because "[c]ircumstances short of probable cause may justify temporary detention for purposes of investigation," *Garza v. State*, 771 S.W.2d 549, 558 (Tex. Crim. App. 1989), it matters not whether probable cause existed to justify a detention if reasonable suspicion otherwise did.

We say all this because the trial court's resolution of Rico's complaint focused on probable cause while reasonable suspicion was also in play. Indeed, both parties invite us to consider that theory in disposing of the appeal. Yet, it, like the existence of probable cause, is inherently fact-based; again, the totality of the circumstances control.

The trial court's findings of fact and conclusions of law expressly say nothing about reasonable suspicion. Though we may be able to read into them some measure of applicability to the theory, it actually would be surmise on our part to suggest that the trial court considered it while issuing its findings and conclusions. Furthermore, many of the items listed under the heading of fact findings are not findings of controlling historical fact. Instead, they are mere reiteration of what one witness or another said. Merely reciting evidence offers minimal assistance when witnesses contradict each other. It leaves us wondering about what version of the story the trial court deemed accurate. The same is no less true regarding whom the trial court deemed credible. Credibility findings in a milieu of conflicting testimony not only provide foundation to the trial court's decision but also influence the deference we must afford findings of historical fact.

These all are considerations our Court of Criminal Appeals touched upon in *State v. Mendoza*, 365 S.W.3d 666 (Tex. Crim. App. 2012). Their importance led it to provide us a path in arriving at an accurate and just disposition of the appeal. It recognized that "[o]ccasionally, the trial judge may make explicit findings that she considers sufficient and dispositive of the historical facts, but [which] the appellate court determines . . . are either ambiguous or insufficient to resolve the legal issue." *Id.* at 670. When that occurs, "the more prudent course would be to remand the case to the trial judge to make findings of fact with greater specificity . . . to resolve the legal question." *Id.* We do that here.

The appeal is abated and the cause is remanded to the trial court. We direct it to execute additional written findings of ultimate historical fact and conclusions of law it considered determinative of the legal theories raised by the litigants in addressing Rico's

motion to suppress.[2] *See State v. Elias*, 339 S.W.3d 667, 676 (Tex. Crim. App. 2011) (noting the trial court's duty encompasses the "obligation to make findings and conclusions that [are] adequate and complete, covering every potentially dispositive issue that might reasonably be said to have arisen in the course of the suppression proceedings"). They must also include findings regarding the credibility of the witnesses and evidence. The trial court shall cause its additional findings and conclusions to be included in a supplemental clerk's record and filed with the Clerk of this Court on or before 5:00 p.m. March 21, 2022. Should further time be needed to complete this, same must be requested before March 21, 2022.

It is so ordered.

Per Curiam

[2] *Mendoza* and its progeny offer guidance as to the tenor of the requisite findings and conclusions.