In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00083-CV

TEXAS DEPARTMENT OF PUBLIC SAFETY, Appellant

V.

LOUIS LEROY KUHN, Appellee

On Appeal from the County Court at Law No. 2
Hays County, Texas
Trial Court No. 15-0348-C

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

Louis Leroy Kuhn was arrested for driving while intoxicated (DWI). As a result of Kuhn's refusal to provide a sample of his blood or breath, the Texas Department of Public Safety (the Department) suspended his driver's license for a period of 180 days. *See* TEX. TRANS. CODE ANN. § 724.035(a)(1) (West 2011). Kuhn timely requested an administrative hearing to challenge the suspension of his driver's license. *See* TEX. TRANS. CODE ANN. § 724.041 (West 2011).

At that hearing, the Department rested after it introduced the arresting officer's report, which the administrate law judge (the ALJ) admitted over Kuhn's objection. Arguing that the ALJ erred in overruling his objection to the admissibility of the arresting officer's report, Kuhn appealed the ALJ's decision to the County Court at Law No. 2 of Hays County, Texas (the trial court).[1] *See* TEX. TRANS. CODE ANN. § 524.041 (West 2013). The trial court agreed that portions of the officer's report were not admissible and entered [a judgment] reversing the ALJ's decision. The Department appeals. Because we determine that the trial court improperly reversed the ALJ's order, we reverse the trial court's judgment and render judgment affirming the ALJ's decision.

I. Factual and Procedural Background

Officer Christobal P. Flores was "stationary facing northbound on Ranch to Market (RM) 1826" at 1:56 a.m. when he "observed a silver Ford Expedition traveling southbound approaching [his] position at a high rate of speed over the posted speed limit of 45 mph."[2] The radar detector

[1]Originally appealed to the Third Court of Appeals in Austin, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We follow the precedent of the Third Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

[2]The factual background of this case is taken from Flores' report.

in Flores' patrol unit indicated that the vehicle was traveling at fifty-five miles per hour. Flores initiated a traffic stop and made contact with Kuhn. According to Flores, Kuhn smelled of alcohol and exhibited a "[b]lank confused state about his face," "blood-shot" eyes, dilated pupils, and mumbled speech. Kuhn admitted that he started drinking alcohol around 8:00 p.m. on the evening in question and stated that he drank approximately four drinks with dinner. After conducting field sobriety tests, Flores concluded that Kuhn was intoxicated, and placed him under arrest for DWI.

After reading the required statutory warnings, Flores asked Kuhn to provide a sample of his breath or blood. *See* TEX. TRANS. CODE ANN. § 724.015 (West 2011). Kuhn refused. As a result of this refusal, Kuhn's driver's license was automatically suspended. TEX. TRANSP. CODE ANN. § 724.035 (West 2015).

Kuhn requested a hearing to challenge the suspension of his driver's license. In a license-suspension proceeding, the ALJ is charged with determining whether: (1) reasonable suspicion or probable cause existed to stop the person; (2) probable cause existed to believe the person was operating a motor vehicle in a public place while intoxicated; (3) the person was placed under arrest by the officer and requested to submit to the taking of a blood or breath specimen; and (4) the person refused the officer's request to submit to the taking of a specimen. TEX. TRANS. CODE ANN. § 724.042 (West 2011). Before the ALJ, Kuhn challenged only whether there was reasonable suspicion to initiate a traffic stop.

At the administrative hearing, Kuhn objected to evidence of "speeding based on radar, any recitation of radar[,] and any recitation of a number based on any reported radar" on the ground that the proper scientific foundation had not been laid. Kuhn was very clear in the administrative

hearing that his objection was not to the entirety of Flores' report, but only to "anything scientific . . . regarding the radar." In response to Kuhn's objection, the State agreed to exclude evidence obtained by the radar detector. In closing, although he did not object to Flores' conclusion that he was speeding, Kuhn pointed out that there was no evidence to establish that Flores had any training in visually gauging the speed of a vehicle travelling in the opposite direction at night. Therefore, he argued that Flores' decision that he was speeding amounted to nothing more than a conclusory allegation.[3]

In spite of the State's concession to exclude evidence obtained by the radar detector, the ALJ overruled Kuhn's objection and admitted Flores' report. Based on the report, the ALJ determined that Flores had reasonable suspicion to stop Kuhn because he "observed Defendant driving at a speed greater than the posted speed limit, which the officer confirmed with radar was 55 miles per hour in a 45 mile per hour zone." Kuhn appealed this decision to the trial court.

In front of the trial court, Kuhn again argued that evidence obtained from Flores' use of the radar detector was inadmissible. He further stated that, had the ALJ properly excluded that evidence, the only evidence to support Flores' reasonable suspicion was the statement that Kuhn was "coming from the opposite direction over the posted speed limit." Because "there was absolutely nothing by the officer with regards to his training and experience," Kuhn argued that Flores' statement amounted to nothing more than a hunch and, thus, was insufficient to establish

[3]Kuhn noted that the Department had brought forth no evidence suggesting that Flores had "some sort of training and experience pacing vehicles."

reasonable suspicion to initiate the traffic stop. The trial court agreed and reversed the ALJ's decision.

II. Standard of Review

In effect, we must determine whether the trial court's reversal of the ALJ's determination was warranted; in application, we review an administrative order sustaining a license suspension to determine if it is supported by substantial evidence under Section 2001.174 of the Texas Government Code. *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999) (citing TEX. GOV'T CODE ANN. § 2001.174 (West 2008)); *Tex. Dep't of Pub. Safety v. Sissac*, No. 03-14-00319-CV, 2015 WL 1967851, at *2 (Tex. App.—Austin Apr. 30, 2015, pet. denied) (mem. op.). Section 2001.174 requires reversal or remand if Kuhn's substantial rights

> have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (A) in violation of a constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;
> (D) affected by other error of law;
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

TEX. GOV'T CODE ANN. § 2001.174(2).

"The determination of whether substantial evidence supports an administrative decision is a question of law that we review de novo without deference to the trial court's ruling." *Sissac*, 2015 WL 1967851, at *3. '"The issue for the reviewing court is not whether the agency's decision was correct, but only whether some reasonable basis exists in the record to support that decision.'"

Id. (quoting *Mireles*, 9 S.W.3d at 131). "We must presume that substantial evidence supports the administrative 'findings, inferences, conclusions, and decisions,' and the burden is on [Kuhn], as the party contesting the administrative decision, 'to prove otherwise.'" *Id.* (quoting *Tex. Health Facilities Comm'n v. Charter Med.-Dallas Inc.*, 665 S.W.2d 446, 453 (Tex. 1984)). "If there is more than a scintilla of evidence supporting the administrative findings, this Court must affirm 'even if the evidence preponderates against' the agency's decision." *Id.* (quoting *Mireles*, 9 S.W.3d at 131).

III. Analysis

This case requires us to determine whether Flores had reasonable suspicion to stop Kuhn. "Interactions between law enforcement and citizens can be characterized as consensual encounters, investigative detentions, or arrests." *Id.* at *4 (citing *State v. Woodard*, 341 S.W.3d 404, 411 (Tex. Crim. App. 2011)). "Law enforcement must have legal justification to conduct arrests and investigative detentions, as these are seizures that implicate Fourth Amendment rights." *Id.* Investigative detentions, such as this traffic stop, "are brief seizures that are less intrusive than arrests." *Id.* (citing *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011) (citing *Alabama v. White*, 496 U.S. 325, 330 (1990)). "They require only reasonable suspicion, which 'exists when the officer has specific articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a particular person has, or soon will be, engaged in criminal activity.'" *Id.* (quoting *Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008)).

"This standard is an objective one that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists." *Tex. Dep't of Pub. Safety v. McHugh*, No. 03-13-00261-CV, 2014 WL 5420407, at *3 (Tex. App.—Austin Oct. 24, 2014, no pet.) (mem. op.) (citing *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005)). "We consider the totality of the circumstances when making a reasonable-suspicion determination." *Id*. at *3. "The burden is on the Department to demonstrate the reasonableness of the stop." *Id.* at *4 (citing *Tex. Dep't of Pub. Safety v. Chang*, 994 S.W.2d 875, 877 (Tex. App.–Austin 1999, no pet.)).[4] "If the officer has a reasonable basis for suspecting a person has committed a traffic offense, the officer may legally initiate a traffic stop." *Id.* (citing *McVickers v. State*, 874 S.W.2d 662, 664 (Tex. Crim. App. 1993), *abrogated on other grounds by Granados v. State*, 85 S.W.3d 217, 227–30 (Tex. Crim. App. 2002); *Chang*, 994 S.W.2d at 877). "The Department is not required to show that a traffic offense was actually committed, but only that the officer reasonably believed a violation was in progress." *Id.*

The Department does not argue that the trial court erred in finding that evidence obtained from the radar detector should have been excluded. Instead, it argues that Flores' observation that Kuhn was travelling at a "high rate of speed over the posted speed limit of 45 mph" provided Flores with reasonable suspicion to initiate the traffic stop. We agree.

[4]Notwithstanding our previous statement identifying the standard of review in appeals of administrative rulings, the State bears the burden at the administrative hearing of establishing that the traffic stop was reasonable. If the ALJ finds the stop was reasonable, then we presume the ALJ's ruling is supported by substantial evidence. Thus, on appeal of the ALJ's decision finding the stop was reasonable, the driver has the burden of overcoming that presumption by proving that the ALJ's decision was not supported by substantial evidence.

Flores' report clarified that he concluded that Kuhn was speeding prior to activating the radar device to confirm his suspicion. Kuhn did not object to Flores' visual observation that he was speeding. Thus, Flores' observation that Kuhn appeared to be speeding constituted reasonable suspicion to initiate the traffic stop, even when considering Kuhn's argument regarding the absence of evidence of specialized training in pacing vehicles on the roadway. *See Tex. Dep't of Pub. Safety v. Narvaez*, No. 13-14-00114-CV, 2014 WL 5410758, at *3 (Tex. App.—Corpus Christi Oct. 23, 2014, no pet.) (mem. op.) (citing *Dillard v. State*, 550 S.W.2d 45, 53 (Tex. Crim. App. 1977) (op. on reh'g) (holding that the officer had reasonable suspicion to believe the defendant was speeding based on the officer's testimony that the defendant "seemed to be traveling at an exceptionally high rate of speed, for that particular intersection")); *Hesskew v. Tex. Dep't of Pub. Safety*, 144 S.W.3d 189, 191 (Tex. App.—Tyler 2004, no pet.); *Ike v. State*, 36 S.W.3d 913, 915 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd); *Ochoa v. State*, 994 S.W.2d 283, 285 (Tex. App.—El Paso 1999, no pet.).[5]

Under the substantial evidence standard, we hold that a reasonable basis supported the ALJ's finding that Flores had a reasonable belief that Kuhn was speeding. Because more than a scintilla of evidence supported the ALJ's decision, the trial court was required to affirm it. Thus, the trial court's reversal of the ALJ's decision was erroneous. Accordingly, we sustain the Department's point of error.

[5]Kuhn could have called Flores to explain the basis of his conclusion that he was speeding, but failed to do so. *See Stagg v. Tex. Dep't of Pub. Safety*, 81 S.W.3d 441, 444 (Tex. App.—Austin 2002, no pet.).

IV. Conclusion

We reverse the trial court's judgment and render judgment affirming the ALJ's decision.

Ralph K. Burgess
Justice

Date Submitted: February 3, 2016
Date Decided: March 22, 2016