IN THE
TENTH COURT OF APPEALS

No. 10-19-00208-CR

DANIEL YBARRA GONZALES, JR.,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 85th District Court
Brazos County, Texas
Trial Court No. 17-02180-CRF-85

MEMORANDUM OPINION

Daniel Gonzales, Jr. appeals from a conviction for possession of a controlled substance less than one gram. TEX. HEALTH & SAFETY CODE §481.115(b). Gonzales complains that the trial court erred by denying his motion for continuance and by denying his motion to suppress evidence. Having found no reversible error, we affirm the judgment of the trial court.

MOTION FOR CONTINUANCE

In his first issue, Gonzales complains that the trial court abused its discretion by denying his motion for continuance. The final pretrial took place on the Tuesday before trial, at which time the parties announced ready for trial. On Thursday of that week, the State sent Gonzales's trial counsel a *Brady*[1] notice informing her of issues that were discovered the day before when the State interviewed its chemist about calibration issues that had arisen with the instrument used for testing the controlled substance the day that the substance seized from Gonzales was tested.[2] Trial counsel for Gonzales filed a motion for continuance the next day, which was heard immediately prior to jury selection several days later. In the motion, Gonzales sought additional time to get additional information from the testing laboratory for review by the expert that had just been hired by Gonzales's trial counsel to assist in investigating the alleged issues with the testing instrument. After hearing argument by Gonzales and the State, the trial court denied the motion for continuance.

Gonzales argues that the trial court's failure to grant his motion for continuance resulted in the inability to properly cross-examine the State's laboratory expert which negatively impacted his defense. The State argues that Gonzales's trial counsel had been in possession of the relevant records that showed the calibration issues for more than a year prior to trial and the State's *Brady* notice merely informed Gonzales of the

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] Both parties refer to the notice sent in the hearing before the trial court and in their briefing to this Court; however, the actual notice sent is not part of the record before us and the substance of the notice is not contested.

issues that had arisen but the documentation of which his trial counsel already had in her possession. Trial counsel for Gonzales had served the laboratory with an exhaustive subpoena duces tecum that included requests for calibration records and other information surrounding the instrument and the methodology used to conduct the testing on the substance that had been found in Gonzales's possession. It was not until the State provided its notice that Gonzales's trial counsel hired an expert to review the records and found that the records provided were alleged to be incomplete. The State argues that if Gonzales had hired an expert to review the records when they were received, the issues would have been shown from the records at that time.

We review the trial court's decision to deny the request for a continuance for an abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). In order to show reversible error predicated on the denial of a pretrial motion for continuance, a defendant must demonstrate both that the trial court erred in denying the motion and that the lack of a continuance harmed him. *Gonzales v. State*, 304 S.W.3d 838, 843 (Tex. Crim. App. 2010).

We do not view the trial court's decision to deny the motion for continuance as error. Gonzales's trial counsel had the records that served as the basis for the *Brady* notice from the State for more than a year prior to the jury trial but did not seek the appointment of an expert to assist with the evaluation of those records. Trial counsel for Gonzales did not explain why she did not seek the appointment of an expert to assist in her evaluation of the records until she received the *Brady* notice. There was

nothing to indicate that an expert could not have ascertained that additional information might be needed had trial counsel done so earlier.

In somewhat similar situations, the Court of Criminal Appeals has held that waiting until the first day of trial to request expert assistance did not warrant a continuance. *Gonzales*, 304 S.W.3d at 843; *Wright v. State*, 28 S.W.3d 526, 533 (Tex. Crim. App. 2000) (rejecting claim of prejudice by the denial of a continuance and noting, "[e]ven if [the appellant] could point to specific prejudice under this point of error, he would not now be allowed to profit from his own failure to act"). In *Gonzales*, the Court of Criminal Appeals recognized that a motion for continuance for the purpose of seeking expert assistance is "particularly within the discretion of the trial court." *Gonzales*, 304 S.W.3d at 844 (internal citations omitted). As in *Wright*, under these facts we cannot say that the trial court abused its discretion when Gonzales's inability to obtain the allegedly missing records was a result of his failure to act in a timely manner. Accordingly, we overrule Gonzales's first issue.

MOTION TO SUPPRESS

In his second issue, Gonzales complains that the trial court erred by denying his motion to suppress evidence that was found based on an illegal detention. Gonzales does not challenge the initial encounter with law enforcement. Rather, Gonzales argues that his detention by the law enforcement officer should have ended prior to the law enforcement officer asking for consent to search his vehicle, and therefore the search of

his vehicle which resulted in the discovery of the drugs for which he was convicted of possessing was unlawful.

STANDARD OF REVIEW

We apply a bifurcated standard of review to a trial court's ruling on a motion to suppress. *Ramirez-Tamayo v. State*, 537 S.W.3d 29, 35 (Tex. Crim. App. 2017). We afford almost complete deference to the trial court's determination of historical facts, especially when those determinations are based on assessments of credibility and demeanor. *Furr v. State*, 499 S.W.3d 872, 877 (Tex. Crim. App. 2016) (*citing Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010)). On the other hand, we apply a *de novo* standard of review to the application of the law to the facts as found by the trial court, including whether a particular set of facts is sufficient to give rise to reasonable suspicion. *Id*. When findings of fact are not entered, as here, we "must view the evidence 'in the light most favorable to the trial court's ruling' and 'assume that the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record.'" *Harrison v. State*, 205 S.W.3d 549, 552 (Tex. Crim. App. 2006) (*quoting State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000)).

The Fourth Amendment prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). In such cases, "the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity

'may be afoot.'" *Id.* (*quoting Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). A seizure justified only by a traffic violation becomes unlawful if prolonged beyond the time reasonably required to conduct the traffic stop. *Rodriguez v. United States*, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2016). In the circumstance of a traffic stop, continuing a brief investigatory detention beyond the time necessary to conduct that traffic stop requires reasonable suspicion of criminal activity apart from the traffic violation. *See id.* at 1616. Similarly, there must be reasonable suspicion of criminal activity apart from the violation for an officer to continue the brief investigatory detention if the time reasonably required to conduct the investigation has ended.

Reasonable suspicion to detain a person exists when a police officer has "specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity." *Furr*, 499 S.W.3d at 878. This is "an objective standard that disregards the actual subjective intent of the arresting officer and looks, instead, to whether there was an objectively justifiable basis for the detention." *Wade v. State*, 422 S.W.3d 661, 668 (Tex. Crim. App. 2013). In assessing whether reasonable suspicion exists, a reviewing court may take into account an officer's ability to "draw on [his] own experience and specialized training to make inferences from and deductions about the cumulative information available to [him] that 'might well elude an untrained person.'" *Arvizu*, 534 U.S. at 273 (*quoting United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)).

When assessing the existence of reasonable suspicion, a reviewing court must look to the totality of the circumstances to see whether the detaining officer had a particularized and objective basis for suspecting legal wrongdoing. *Arvizu*, 534 U.S. at 273. Although the individual circumstances may seem innocent enough in isolation, if they combine to reasonably suggest the imminence of criminal conduct, an investigative detention is justified. *Wade*, 422 S.W.3d at 668. "It is enough to satisfy the lesser standard of reasonable suspicion that the information is sufficiently detailed and reliable—i.e., it supports more than an inarticulate hunch or intuition—to suggest that something of an apparently criminal nature is brewing." *Derichsweiler v. State*, 348 S.W.3d 906, 917 (Tex. Crim. App. 2011). "The relevant inquiry is not whether particular conduct is innocent or criminal, but the degree of suspicion that attaches to particular non-criminal acts." *Derichsweiler*, 348 S.W.3d at 914. "A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Leming v. State*, 493 S.W.3d 552, 565 (Tex. Crim. App. 2016).

BACKGROUND FACTS

Gonzales was spotted by law enforcement at approximately 2:30 a.m. in his vehicle in a park that had a sign that stated that the park was closed at that time. An officer approached Gonzales's vehicle and saw him furtively moving something around inside the vehicle by the driver's side door pocket. The officer initiated contact with Gonzales and shined his flashlight into the vehicle, where he observed a TV and a lot of clothes in the back seat. The officer observed that Gonzales was not wearing pants in

the vehicle. His pants were on the passenger seat of the vehicle. The officer asked Gonzales if he knew he was unlawfully in the park due to the curfew, and Gonzales told the officer that he knew that the park was closed. Gonzales told the officer that he had a disagreement with his girlfriend and was traveling from her home where he had removed his belongings to go to his home. However, the park was not on a route that would lead to Gonzales's home.

The officer asked Gonzales for identification and Gonzales gave him an ID card. The officer contacted dispatch to verify identity and to check for outstanding warrants. The officer began filling out a field identification card which would be used by law enforcement to track contacts of a suspicious nature at a later time. The officer advised Gonzales that he was not filling out a ticket at that time for violating the curfew. The officer then asked Gonzales if he had anything illegal in his vehicle, which Gonzales responded that he did not. The officer then asked and was given permission to search the vehicle. A baggie which was later shown to contain methamphetamine residue was found in the door pocket of the driver's side door.

The park where Gonzales stopped was known for drugs and for being a place where burglaries were planned in the surrounding neighborhood. The officer testified in the suppression hearing that Gonzales's behavior when he approached, lack of pants, dubious answer to the reason for Gonzales being in the park when it was not on the way to his residence, potential stolen TV on the back seat, taken with the late hour and the reputation of criminal activity in the park, led the officer to ask Gonzales for

permission to search his vehicle after he completed the field identification card. This permission was requested and received less than six minutes after contact was initiated with Gonzales.

Using the standards set forth above, we find that these facts were sufficient for the trial court to have determined that the officer had reasonable suspicion to detain Gonzales and therefore, the trial court did not err by denying Gonzales's motion to suppress evidence. We overrule issue two.

CONCLUSION

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 26, 2020
Do not publish
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