TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00109-CR

Chelsea Elizabeth Podowski, Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 5 OF TRAVIS COUNTY
NO. C-1-CR-14-205047,
HONORABLE NANCY WRIGHT HOHENGARTEN, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Chelsea Podowski was convicted of the offense of driving while intoxicated. *See* Tex. Penal Code § 49.04. In a single point of error, Podowski challenges the trial court's denial of her motion to suppress breath-test evidence on the basis that it was obtained without her voluntary consent. We will affirm the judgment.

BACKGROUND

At the suppression hearing, the trial court heard evidence that Officer Kyle Jennings of the Austin Police Department stopped Podowski for traffic violations. Officer Scott Marler was dispatched to the scene to investigate intoxication. After conducting standardized field sobriety tests, Officer Marler arrested Podowski for driving while intoxicated. He read her the required DIC-24 warning form, which contains the statutory warnings regarding the consequences of refusing to

provide a breath specimen, including suspension of one's driver's license. The following exchange then occurred between Officer Marler and Podowski:

Officer:	I am now requesting a specimen of your breath
Podowski:	[Laughs] Uh, you're requesting a specimen of my breath?
Officer:	Correct.
Podowski:	Okay. Alright. Uh, what are the consequences if I don't? I'm sorry, I know that you just read that all to me, but it was very, like, not . . . [indistinguishable].
Officer:	It extends the amount of time in which your license is suspended.
Podowski:	Oh, okay. Uh, in which case is my license not going to be suspended at all?
Officer:	None.
Podowski:	Oh, okay.
Officer:	So I am asking for a sample of your breath. Are you willing to give a sample of your breath? It's a yes or a no.
Podowski:	Yes. I'm willing to do that.

Podowski provided a breath specimen, which revealed a blood alcohol content well above the legal limit.

Podowski filed a motion to suppress that evidence, arguing that she gave her consent involuntarily. After a hearing, the trial court denied her motion, she entered a plea of no contest, and

the trial court found her guilty and sentenced her to 180 days' incarceration probated for 15 months.[1] Podowski appeals from that judgment.

DISCUSSION

Podowski contends that Officer Marler's response of "None" to her question, "[I]n which case is my license not going to be suspended at all?" constituted an incorrect statement of law and rendered her consent to provide a breath specimen involuntary.

I. Standard of review and applicable law

When reviewing a trial court's ruling on a motion to suppress evidence, we give almost total deference to a trial court's determination of facts that are supported by the record, especially when those findings are based on an evaluation of credibility and demeanor. *Fienen v. State*, 390 S.W.3d 328, 335 (Tex. Crim. App. 2012). We review de novo questions of law and mixed questions of law and fact that do not turn on credibility and demeanor. *Id.*

A person's consent to provide a breath specimen must be free and voluntary. *Id.* at 333. The State must prove voluntary consent by clear and convincing evidence. *Id.* Whether consent was voluntary is a question of fact. *Id.* We will uphold the trial court's finding of voluntariness unless it is clearly erroneous. *Id.* at 335.

Consent must not be the result of physical or psychological pressures applied by law enforcement. *Id.* at 333. The question is whether the "person's will has been overborne and his capacity for self-determination critically impaired such that his consent to search must have been

[1] The trial court also assessed a $2000 fine, $1900 of which was probated for 15 months.

involuntary." *Id.* (internal quotation marks omitted). In determining whether consent was voluntarily given, the fact finder must consider the totality of the circumstances of the police-citizen interaction from the viewpoint of the objectively reasonable person. *Id.* The fact finder must consider all of the evidence presented. *Id.* Accordingly, "no one statement or action should automatically amount to coercion such that consent is involuntary—it must be considered in the totality." *Id.*

II. Application

In the present case, the trial court determined that Officer Marler's response to Podowski's question regarding suspension of her license did not render her consent involuntary. The court concluded that the response "does not deem her breath test compliance involuntary because it would not lead a reasonable person under these circumstances to believe that compliance with a breath test would lead to a more favorable result." In other words, the court concluded that the officer's misstatement did not induce or coerce Podowski into consenting to provide a breath specimen because his response did not overstate the adverse consequences of refusal or understate the adverse consequences of compliance. The record supports that conclusion.

The record supports the trial court's finding that, although Officer Marler's response may have incorrectly suggested that Podowski's license would be suspended regardless of whether she refused or consented to provide a breath specimen, the evidence did not demonstrate that any such misinformation overbore her will and critically impaired her capacity for self-determination so as to render her consent involuntary. *See id.* at 333. In fact, according to the DIC-24 statutory warnings, which Officer Marler read to Podowski during the stop, compliance does carry a more

favorable result in terms of license suspension: refusal results in a 180-day minimum suspension, whereas compliance results in either a 90-day minimum suspension if the test reveals a blood alcohol concentration over the legal limit (and, implicitly, no suspension if it does not). Therefore, the trial court could have reasonably inferred that the officer's misstatement had the effect of overstating the potential adverse consequences of compliance, thereby rendering it *less* likely that Podowski would decide to comply. *See, e.g., Franco v. State*, 82 S.W.3d 425, 428 (Tex. App.—Austin 2002, pet. ref'd) (finding no coercion where officer's misstatement of law actually understated the consequences of refusal); *Cook v. State*, No. 05-14-00483-CR, 2015 WL 3563105, at *3 (Tex. App.—Dallas June 9, 2015, pet. ref'd) (mem. op., not designated for publication) (same); *Bice v. State*, No. 13-12-00154-CR, 2013 WL 123709, at *4 (Tex. App.—Corpus Christi Jan. 10, 2013, pet. ref'd) (mem. op., not designated for publication) (same).

In support of her argument that Officer Marler's response rendered her consent involuntary, Podowski cites language by the court of criminal appeals in *Fienen v. State* that "law-enforcement officers may not misrepresent the law." 390 S.W.3d at 336. But the *Fienen* court did not hold that an officer's misrepresentation of the law necessarily renders consent involuntary. To the contrary, it held that "no one statement or action should automatically amount to coercion such that consent is involuntary—it must be considered in the totality" of the circumstances. *Id.* at 333. The court explained that "allowing any statement by itself to control a voluntariness analysis contradicts the basic rule that voluntariness is to be determined based upon a case-specific consideration of all of the evidence." *Id.* at 335-36 (concluding that extra-statutory warnings were

"not coercive when the surrounding circumstances are considered");[2] *see also Bice*, 2013 WL 123709, at *4 (holding officer's single incorrect statement of law regarding consequences of refusal did not render consent involuntary in light of totality of circumstances); *Worku v. State*, No. 14-13-00047-CR, 2014 WL 1330278, at *8 (Tex. App.—Houston [14th Dist.] Apr. 3, 2014, no pet.) (mem. op., not designated for publication) (same). The record shows that the officer's response here, while perhaps technically inaccurate, would not have overborne Podowski's will in deciding whether to consent to the breath test. *See Fienen*, 390 S.W.3d at 333.

The record also reflects other circumstances surrounding the exchange that the parties do not dispute that support the trial court's conclusion that Officer Marler's conduct did not render Podowski's consent involuntary: Officer Marler responded with the comment at issue only in response to questioning by Podowski. *See id.* at 336. He did not go out of his way to prolong the exchange. *See id.* He did not use threats or any type of force to procure her consent to provide the breath specimen. *See id.* These are precisely the types of circumstantial considerations that the *Fienen* court concluded support a finding of voluntary consent. *See id.*

Podowski also argues that Officer Marler "failed to inform P[o]dowski orally" of the consequences of refusal to provide a specimen, citing the trial court's comment at the hearing that the officer read the statutory warning "way too fast." But the trial court's written findings of fact and conclusions of law contain no such finding nor a finding that the officer's reading of the warning

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[2] Indeed, in so holding, the court overruled *Erdman v. State*, 861 S.W.2d 890, 893 (Tex. Crim. App. 1993), which had held that an officer's conveyance of extra-statutory information to a defendant and lack of evidence showing that that information "had *no* bearing on his decision to consent" rendered his consent involuntary. *Fienen v. State*, 390 S.W.3d 328, 334-35 (Tex. Crim. App. 2012).

constituted a failure to provide the warning. Rather, the trial court concluded that Podowski's "confusion regarding the DIC-24 is not result of coercion but rather her own impairment" due to intoxication. We conclude that the record supports those findings and conclusions.

Finally, Podowski cites her own testimony that Officer Marler's response led her to believe that she "didn't really have a choice" to refuse the breath test. However, a defendant's subjective belief regarding the voluntariness of her consent is not dispositive. Rather, in determining whether consent was voluntarily given, the fact finder considers the totality of the circumstances of the police-citizen interaction from the viewpoint of the objectively reasonable person. *Id.* at 333. We conclude that the record supports the trial court's determination that Officer Marler's response would have not coerced a reasonable person to provide a breath specimen.

We conclude, based on the totality of the circumstances surrounding Podowski's and Officer Marler's interaction, that the trial court's finding that Podowski voluntarily consented to provide a breath specimen was not clearly erroneous. *See id*. at 335. Accordingly, we overrule Podowski's sole issue.

CONCLUSION

We affirm the judgment of the trial court.

Cindy Olson Bourland, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: February 24, 2017

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