TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00485-CR

Carlos Cano, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR2014-138, HONORABLE GARY L. STEEL, JUDGE PRESIDING

CONCURRING OPINION

When the trial court announced that it was denying Carlos Cano's motion to suppress, the court stated, "I'm not happy with any of this, but I think the law allows it." That statement pretty much sums up my view of this case, as well. While I agree with most of the majority's analysis, I write separately because I disagree with this Court's conclusion that handcuffing Cano was reasonable in the context of an investigatory detention. But because I conclude that Officer Whitehair had probable cause to arrest Cano for failure to display a valid driver's license and that Cano's consent to search his vehicle was voluntary, I concur in the Court's decision to affirm the trial court's judgment of conviction.

"There are three distinct categories of interactions between police officers and citizens: (1) encounters, (2) investigative detentions, and (3) arrests." *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010); *see Shimko v. State*, No. 03-13-00403-CR, 2015 WL 7721962, at *2

(Tex. App.—Austin Nov. 25, 2015) (mem. op., not designated for publication), *aff'd*, No. PD-1639-15, 2017 WL 604065 (Tex. Crim. App. Feb. 15, 2017). "In determining which category an interaction falls into, courts look at the totality of the circumstances." *Crain*, 315 S.W.3d at 49. Ordinarily, handcuffing a person during an investigative detention such as a traffic stop is not proper, although handcuffing may be resorted to in certain circumstances. *See State v. Sheppard*, 271 S.W.3d 281, 289 (Tex. Crim. App. 2008) (noting that "handcuffing a person who has been temporarily detained is not ordinarily proper, but yet may be resorted to in special circumstances") (internal quotation marks omitted); *Martinez v. State*, 304 S.W.3d 642, 653 (Tex. App.—Amarillo 2010, pet. ref'd) ("Ordinarily handcuffing a suspect is more consistent with a full-blown arrest than it is with an investigatory detention . . . ."). Absent special circumstances, handcuffing a suspect elevates the interaction from an investigatory detention to an arrest. *See Martinez*, 304 S.W.3d at 653–54 (stating that "[i]n the absence of a reasonable safety concern or need to maintain the *status quo*, however, officers' use of force to secure a suspect has been held to constitute an arrest" and collecting cases); *Akins v. State*, 202 S.W.3d 879, 886 (Tex. App.—Fort Worth 2006, pet. ref'd) (collecting cases); *State v. Moore*, 25 S.W.3d 383, 387 (Tex. App.—Austin 2000, no pet.) ("We agree with the trial court that, on this record, the handcuffing transformed the detention into an arrest . . . .").

The evidence presented to the trial court showed that Cano pulled over in an illuminated parking lot. Cano opened the door and put out his left foot, and Officer Whitehair approached the vehicle. Officer Whitehair asked to see Cano's driver's license, and Cano said that he did not have it with him. Cano got out of the vehicle, and Officer Whitehair held Cano's hands up and frisked him. He asked Cano for permission to search Cano's pockets, and Cano assented.

Officer Whitehair did not discover any weapons or contraband on Cano. The engine of Cano's vehicle was off, and Officer Whitehair took Cano's car keys. Officer Whitehair, who was significantly larger than Cano, handcuffed Cano and told him that he was merely being detained. Officer Whitehair's stated reason for handcuffing Cano was because Cano appeared nervous, a reason that this Court has previously concluded does not justify handcuffing during an investigatory detention. *See Moore*, 25 S.W.3d at 387. Officer Whitehair then moved Cano to the rear of Cano's vehicle.

Eventually, a second officer arrived. This officer, who was also larger than Cano, asked, "So what's going on? We're just waiting here or what?" Officer Whitehair replied, "Yeah, I ran him, but I mean because . . . how he was acting and stuff." Cano remained in handcuffs. Officer Whitehair asked Cano if he had "any problem" with Officer Whitehair searching Cano's vehicle, and Cano said that he had "none whatsoever." After searching the vehicle, Officer Whitehair discovered the drugs that led to Cano's conviction for possession of a controlled substance.

I do not envy the challenging task police officers have in keeping our streets safe. Performing a traffic stop alone at midnight would doubtless be enough to put anyone on edge. But based on the record in this case, Cano, a much smaller man than Officer Whitehair, was confirmed to be unarmed, was unable to drive away (because Officer Whitehair had his car keys and was parked directly behind him), and was standing outside his vehicle in an illuminated area. Given these specific facts, I conclude that handcuffing Cano was unreasonable and improper in the context of an investigatory detention.[1] Therefore, handcuffing Cano elevated the interaction between Officer

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[1] Of course, keeping Cano handcuffed after the second officer arrived was even more unreasonable based on the record before us, because one officer could watch Cano while the other continued the investigation.

Whitehair and Cano to an arrest. *See Martinez*, 304 S.W.3d at 653; *Akins*, 202 S.W.3d at 886; *Moore*, 25 S.W.3d at 387. The fact that Officer Whitehair specifically told Cano that he was not under arrest is not dispositive and does not persuade me otherwise. *See Amores v. State*, 816 S.W.2d 407, 412 (Tex. Crim. App. 1991) (noting that "the officer's opinion is not the controlling factor"); *Hoag v. State*, 728 S.W.2d 375, 378 (Tex. Crim. App. 1987) ("We acknowledge that the question of whether a person is under arrest is not to be determined solely by the opinion of the arresting officer."). My conclusion that the interaction was elevated to the level of an arrest does not, however, end the inquiry.

The next question is whether Officer Whitehair had probable cause to make the arrest.[2] I believe that he did. Before Officer Whitehair handcuffed Cano, he asked Cano for his driver's license. Cano said that he did not have it with him. When Officer Whitehair asked if Cano had a license, Cano replied, "No, uh, yes I do, but I don't have it on me."

Failure to display a valid driver's license upon a peace officer's request is a crime. *See* Tex. Transp. Code § 521.025(a)(2) ("A person required to hold a [driver's license] shall . . . display the license on the demand of a magistrate, court officer, or peace officer."); .025(c) ("A person who violates this section commits an offense. An offense under this subsection is a misdemeanor punishable by a fine. . . ."). And a police officer may arrest a person without a warrant for violating traffic laws. *See* Tex. Code Crim. Proc. art. 14.01(b) ("A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."); *Obregon v. State*, No. 01-06-00467-CR, 2007 WL 2264512, at *3 (Tex. App.—Houston [1st Dist.] Aug. 9, 2007,

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[2] It is undisputed that Officer Whitehair did not have a warrant to arrest Cano.

no pet.) (mem. op., not designated for publication) (noting that officer can arrest person for violating traffic laws); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *State v. Gray*, 158 S.W.3d 465, 469 (Tex. Crim. App. 2005) ("[A]n arrest for a minor traffic offense is not an unreasonable seizure under the Fourth Amendment."). Therefore, Officer Whitehair had probable cause to arrest Cano.

Moreover, as the majority points out, an officer may handcuff an individual to effectuate an arrest. *See Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 740 (11th Cir. 2010) ("A law enforcement officer's right to arrest necessarily carries with it the ability to use some force in making the arrest. For even minor offenses, permissible force includes physical restraint, use of handcuffs, and pushing into walls.") (citation omitted); *Fisher v. City of Las Cruces*, 584 F.3d 888, 896 (10th Cir. 2009) (stating that "in nearly every situation where an arrest is authorized, or police reasonably believe public safety requires physical restraint, handcuffing is appropriate"); *Rogers v. Owings*, No. 09-10-00587-CV, 2011 WL 1842756, at *7 (Tex. App.—Beaumont May 12, 2011, no pet.) (mem. op., not designated for publication) (noting that officers may use force in arrest for minor offenses and quoting *City of Huntsville*). Therefore, because Officer Whitehair had probable cause to arrest Cano for failure to display a driver's license, Officer Whitehair did not violate the law by handcuffing Cano.

Because Officer Whitehair elevated an investigative detention to an arrest when he handcuffed Cano under the circumstances in this record, he should have given Cano *Miranda*

warnings. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Ramos v. State*, 245 S.W.3d 410, 418 (Tex. Crim. App. 2008). The trial court reached this same conclusion and questioned whether the lack of *Miranda* warnings rendered Cano's later consent to search his vehicle involuntary, stating, "I think he was in custody when he gave consent. You show me a case where you cannot give consent while you're in custody without a Miranda, he walks." Presumably, the trial court never found such a case—and neither have I. To the contrary, the case law shows that an officer may ask a suspect for consent to search, and a suspect may give valid consent, even when the suspect is in custody and has not been given *Miranda* warnings. *See Rayford v. State*, 125 S.W.3d 521, 528 (Tex. Crim. App. 2003) ("Contrary to appellant's claims, we know of no authority that requires informing a suspect of his rights under *Miranda* before obtaining a consent to search, and appellant points to none. While the failure to inform a suspect that evidence found can be used against him may be one factor to consider, it would not automatically render his consent involuntary."); *see also United States v. Stevens*, 487 F.3d 232, 242 (5th Cir. 2007) ("The failure of officials to give *Miranda* warnings before asking for consent does not prohibit the use of a defendant's in-custody statements granting consent to a search."); *Haden v. State*, No. 06-16-00141-CR, 2017 WL 2178897, at *6 (Tex. App.—Texarkana May 18, 2017, pet. filed) (mem. op., not designated for publication) ("Brownlee's request to search the contents of the cell phone did not constitute an interrogation in a *Miranda* context, and Haden's consent to allow the search of that cell phone was not an incriminating statement. Accordingly, there was no violation of Haden's constitutional rights and, thus, the trial court did not err when it allowed into evidence the contents of Haden's cell phone.") (citation omitted); *Savedra v. State*, No. 13-15-00089-CR, 2015 WL 6375876, at *5 (Tex. App.—Corpus Christi

Oct. 22, 2015, no pet.) (mem. op., not designated for publication) ("There is no authority that requires a suspect be read his *Miranda* rights before consenting to a search."); *Davis v. State*, No. 14-07-00616-CR, 2008 WL 5059104, at *4 (Tex. App.—Houston [14th Dist.] Dec. 2, 2008, no pet.) (mem. op., not designated for publication) ("On appeal, appellant complains that he was never given *Miranda* warnings or similar statutory warnings before being asked to consent to the search. However, we know of no authority that requires a suspect be informed of his *Miranda* rights before obtaining a consent to search."); *Marks v. State*, No. 05-07-00458—00459-CR, 2008 WL 2058226, at *3 (Tex. App.—Dallas May 15, 2008, pet. ref'd) (not designated for publication) ("We are unaware of any authority, and appellant fails to point us to any, that *requires* the police to inform a suspect of his *Miranda* rights before obtaining a consent to search."); *Jones v. State*, 7 S.W.3d 172, 175 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) ("Appellant's act of signing the consent form was not, in and of itself, an incriminating statement . . . . We hold that the actions of the police in asking appellant for consent to search does not constitute re-interrogation under *Miranda*.").

Therefore, Cano's consent to search his vehicle was not rendered involuntary by the fact that he was in custody and had not received *Miranda* warnings. Furthermore, for the reasons discussed by the majority, which need not be repeated here, I conclude that Cano's consent was voluntary. Voluntary consent is a valid exception to the Fourth Amendment's warrant requirement. *See Montanez v. State*, 195 S.W.3d 101, 105 (Tex. Crim. App. 2006) ("Voluntary consent to search is a well-established exception to the warrant and probable cause requirements of the Fourth Amendment to the United States Constitution."); *State v. Hill*, 484 S.W.3d 587, 589 (Tex. App.—Austin 2016, pet. ref'd) ("Voluntary consent to search is an established exception

to the warrant requirement."). Therefore, I would hold that Officer Whitehair did not perform an illegal seizure.

The majority concludes that Officer Whitehair's handcuffing of Cano was appropriate in the context of an investigative detention. While I disagree with that conclusion, more troubling is the majority's alternative reasoning—that Officer Whitehair *could have* arrested Cano (as I discuss above) and that he was therefore justified in handcuffing Cano even though he *did not* arrest Cano. In my view, the majority's reasoning blurs the distinction between the three types of police-citizen interactions: consensual encounter, investigative detention, and arrest. *See Crain*, 315 S.W.3d at 49 (noting that there are "three distinct categories of interactions between police officers and citizens"). The majority's analysis allows the State to have its cake and eat it too. That is, an officer can claim to be conducting an investigative detention and expressly disavow that the suspect is under arrest, allowing the officer to dispense with *Miranda* warnings and other protections afforded people in custody. At the same time, however, the officer can claim that he *could have* arrested the suspect, allowing the officer to use an amount of force ordinarily only permissible when effecting a formal arrest. I have written separately primarily to point out this dangerous blurring of distinct interactions that require different levels of suspicion and involve specific, separate constitutional requirements.

I would hold that Officer Whitehair effectively placed Cano under arrest when he handcuffed him, that Officer Whitehair had probable cause to arrest Cano, that Officer Whitehair impermissibly omitted *Miranda* warnings, and that Cano's consent was nevertheless voluntary. Because the majority reaches the same result through different analysis, I concur in the Court's judgment.

Scott K. Field, Justice

Before Justices Puryear, Pemberton, and Field

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