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**

MEMORANDUM OPINION

A jury convicted appellant Carlos Cano of the offense of possession of a controlled substance, methamphetamine, in an amount of four grams or more but less than 200 grams.[1] The district court rendered judgment on the verdict and sentenced Cano to 12 years' imprisonment. In three issues on appeal, Cano asserts that the district court abused its discretion in denying his motion to suppress. We will affirm the judgment of conviction.

BACKGROUND

During a traffic stop, Cano had consented to a search of his vehicle, and methamphetamine was found inside. Cano was subsequently charged with possession of a controlled substance. Prior to trial, Cano filed a motion to suppress the evidence obtained during the stop. The

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[1] *See* Tex. Health & Safety Code § 481.112(d).

issues at the suppression hearing were: (1) whether the initial traffic stop was supported by reasonable suspicion; (2) whether Cano had been subject to an illegal search or seizure following the stop so as to "taint" his subsequent consent to search the vehicle; and (3) whether Cano's consent, considering all the circumstances surrounding the stop, was voluntary. As we explain in more detail below, Cano had been frisked and placed in handcuffs during the stop, and Cano argued that these and other actions by the detaining officer were either illegal or at a minimum sufficiently "coercive" so as to render his consent invalid.

At the hearing on the motion to suppress, the district court considered testimony from Officer Russell Whitehair of the New Braunfels Police Department, who conducted the traffic stop and searched Cano's vehicle. Whitehair testified that he had stopped Cano because he had observed Cano commit multiple traffic violations and also suspected that Cano might have been driving while intoxicated. Whitehair further testified that he had frisked and handcuffed Cano during the stop out of concern for the officer's own safety. In addition to Whitehair's testimony, the district court also viewed a video recording of the stop, taken from Whitehair's patrol-car dash camera. Based on this evidence, which we discuss in more detail below, the district court denied the motion to suppress in relevant part.[2] The case proceeded to trial, Cano was found guilty of methamphetamine possession as charged, and the district court rendered judgment on the verdict and sentenced Cano to 12 years' imprisonment as noted above. This appeal followed.

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[2] The district court agreed to suppress certain statements that Cano had made during the stop, concluding that they were the product of improper custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436 (1966). However, the court concluded that Cano's consent to search the vehicle was nevertheless voluntary and was not preceded by any illegal conduct.

STANDARD OF REVIEW

We review a district court's evidentiary rulings for abuse of discretion.[3] We are to view the record "in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'"[4] "The prevailing party is afforded the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence."[5] And where, as here,[6] there are no written findings explaining the factual basis for the trial court's decision, we imply findings of fact that

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[3] *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)); *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

[4] *Story*, 445 S.W.3d at 732 (quoting *Dixon*, 206 S.W.3d at 590); *see Montgomery v. State*, 810 S.W.2d 372, 391-92 (Tex. Crim. App. 1991) (op. on reh'g).

[5] *State v. Weaver*, 349 S.W.3d 521, 525 (Tex. Crim. App. 2011) (citing *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011)).

[6] The district court did not make any findings of fact, nor did Cano request any. Throughout his brief, Cano characterizes several remarks made by the district court during the suppression hearing, particularly those in which the court expressed skepticism toward various aspects of Whitehair's testimony, as "findings." However, we are to construe a trial court's remarks during a suppression hearing as fact findings only when the record "indicates that the trial court intended for its findings/conclusions to be expressed via its oral pronouncements." *See State v. Groves*, 837 S.W.2d 103, 105 n.5 (Tex. Crim. App. 1992); *State v. Varley*, 501 S.W.3d 273, 277 (Tex. App.—Fort Worth 2016, pet. ref'd). There is no indication here that the district court intended for its remarks during the hearing to constitute formal fact findings. *Cf. Groves*, 837 S.W.2d at 105 n.5 (at conclusion of suppression hearing, prosecutor requested findings of fact and trial court indicated that it had already made its findings orally on the record, stating, "That's what I intended to do, and I believe that I did it. . . . I tried real hard to try to get the facts found and the conclusions made, and I think that I did that"; prosecutor agreed); *Hauer v. State*, 466 S.W.3d 886, 890 n.2 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (trial court recited findings on record and then asked counsel if it had "address[ed] everything you're going to need" on appeal; counsel answered, "As far as findings of facts and so forth? Yes, ma'am, thank you").

support the ruling so long as the evidence supports those implied findings.[7] "We will sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case."[8]

Additionally, when reviewing rulings on motions to suppress, "[t]he appellate court must apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historic facts and mixed questions of law and fact that rely upon the credibility of a witness, but applying a de novo standard of review to pure questions of law and mixed questions that do not depend on credibility determinations."[9]

ANALYSIS

Reasonable suspicion for traffic stop

In his first issue, Cano asserts that the district court abused its discretion in concluding that the traffic stop was supported by reasonable suspicion. According to Cano, Officer Whitehair did not have reasonable suspicion to believe that Cano had committed either a traffic violation or the offense of driving while intoxicated.

"A police officer has reasonable suspicion to detain if he has specific, articulable facts that, combined with rational inferences from those facts, would lead him reasonably to conclude that

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[7] *Meekins v. State*, 340 S.W.3d 454, 460 (Tex. Crim. App. 2011).

[8] *Dixon*, 206 S.W.3d at 590 (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)); *see Valtierra v. State*, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010).

[9] *Martinez v. State*, 348 S.W.3d 919, 922-23 (Tex. Crim. App. 2011) (citing *Guzman v. State*, 955 S.W.2d 85, 87-89 (Tex. Crim. App. 1997)).

the person detained is, has been, or soon will be engaged in criminal activity."[10] "This standard is an objective one that disregards the actual subjective intent of the arresting officer and looks, instead, to whether there was an objectively justifiable basis for the detention."[11] "It also looks to the totality of the circumstances; those circumstances may all seem innocent enough in isolation, but if they combine to reasonably suggest the imminence of criminal conduct, an investigative detention is justified."[12] "'[T]he relevant inquiry is not whether particular conduct is innocent or criminal, but the degree of suspicion that attaches to particular non-criminal acts.'"[13]

In making its determination of reasonable suspicion, the district court considered the following evidence. Officer Whitehair testified that on the night of December 7, 2012—"just a few minutes before midnight"—he observed a vehicle "pull[] out of the Motel 6" parking lot located along the frontage road near the intersection of State Highway 46 and I-35, go "across all three lanes of the frontage road to the inside lane of travel," and "then start[] traveling southbound" in the center lane. Whitehair testified that the vehicle did not activate its turn signal when moving from the inside lane to the center lane. Whitehair proceeded to follow the vehicle, which stopped at a red light at the intersection of State Highway 46 and I-35. Whitehair recounted that when the light turned green, the vehicle "proceeded through the intersection"—after which the center lane became the left, inside lane of traffic—and "continued to travel on that inside lane and crossed over the dotted white line

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[10] *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011).

[11] *Id*.

[12] *Id*.

[13] *Id*. (quoting *Adams v. Williams*, 407 U.S. 143, 147 (1972)).

to its right once or twice while it was traveling down the frontage road." According to Whitehair, the "inside lane becomes an entrance ramp to get on Interstate 35 . . . and the inside lane of the frontage road has a very solid thick white painted line on it," which "indicates that you're not supposed to cross that line to get over onto that entrance ramp." Whitehair testified that the vehicle "waited until that solid white line was there and then crossed that line to get onto the entrance ramp." Whitehair continued, "That entrance ramp to get onto the southbound lanes of 35 then becomes an exit ramp for South Seguin Avenue or FM 725, the same roadway. The vehicle then stayed in the lane to exit at that exit. And as the vehicle was going down the exit ramp, I noticed it also crossed over the solid line on its right-hand side as well." At that point, Whitehair testified, he decided to initiate a traffic stop on the vehicle, "based on the traffic infractions [he] had observed." When asked to summarize what those infractions were, Whitehair testified, "Failing to maintain a single lane by crossing over the dotted line; not using a turn signal to change lanes; also crossing over the—or disregarding the official traffic control device by crossing over the solid white line to get onto the main lanes of I-35 South." Whitehair added that, when he considered the fact that it was near midnight on a Friday night in Comal County,[14] combined "with the weaving in the lane and the actions of the driver," he suspected that "it could have possibly been a possible DWI."[15]

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[14] Whitehair testified that the bars in New Braunfels and Comal County close at midnight on Friday nights.

[15] Cano asserts in his brief that Whitehair testified that he did not suspect that Cano was intoxicated. To the contrary, Whitehair testified that he had "a suspicion" of intoxication "but nothing confirmed." Although Whitehair also testified that he "was stopping [Cano] for the traffic infractions that [he] observed," he added that he was "going to give him a warning [for the traffic infractions] and investigate and see if [Cano] was impaired or not."

The video recording of the stop showed Cano's vehicle make a wide right turn onto the frontage road with its right-turn signal activated, although the vehicle appeared to pull out into the center lane of traffic (not the far-left lane) and remain in the center lane as it approached the intersection. After crossing the intersection, the vehicle appeared to drift to the right of its lane as it approached I-35, and its right tires appeared to cross or at least touch the broken white lines separating the lanes as the vehicle drifted. Additionally, consistent with Whitehair's testimony, the recording showed the vehicle cross the solid white line on the entrance ramp as the vehicle entered I-35. And, as the vehicle drove down the exit ramp of I-35, it can again be seen drifting to the right side of the lane with its right tires crossing the solid white "fog" line along the ramp.

The parties devote much of their briefing to arguing whether anything that Whitehair had observed actually constituted a traffic violation. The State asserts that the evidence supports findings by the district court that Whitehair had reasonable suspicion to believe that Cano had violated Transportation Code sections 545.101(a) (improper right turn at an intersection), 545.104 (failure to signal lane change), 544.004 (failure to comply with official traffic-control device), 545.060 (failure to drive within a single lane), and 545.058 (driving on an improved shoulder). Cano argues that the above provisions were either entirely inapplicable to Whitehair's observations or contained elements that Whitehair did not observe.[16] However, we need not determine whether

[16] For example, Cano asserts that Whitehair provided no testimony to support a finding that Cano's failure to maintain his lane was "unsafe," which this Court has previously held to be necessary to support a finding of reasonable suspicion to believe that a driver has violated section 545.060 of the Transportation Code. *See Hernandez v. State*, 983 S.W.2d 867, 870-72 (Tex. App.—Austin 1998, pet. ref'd). *But see Leming v. State*, 493 S.W.3d 552, 559 (Tex. Crim. App. 2016) (plurality opinion concluding that it is "an independent offense to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so, regardless of whether the deviation

Whitehair had reasonable suspicion to stop Cano for violating any particular traffic provision, because we conclude that the totality of the above circumstances supports the district court's conclusion that Whitehair had reasonable suspicion to believe that Cano had committed the offense of driving while intoxicated.

Whitehair testified that as a patrol officer he had received training and experience in identifying intoxicated drivers. Specifically, Whitehair testified that at the time of the stop, he had been a police officer for nine years and had several certifications, including an "Advanced Roadside Impaired Driving Enforcement certification." According to Whitehair, one of the indicators of intoxicated driving that he was trained to observe was failing to maintain a single lane of traffic. Whitehair also testified that in his experience, intoxicated driving is more likely to occur late at night and on weekends. As reflected in Whitehair's testimony and on the video recording of the stop, prior to initiating the stop in this case, Whitehair had observed the following near midnight on a Friday night: (1) a vehicle make a wide right turn out of a motel parking lot across two or three lanes of traffic onto the frontage road of I-35; (2) the vehicle drift to the right of its lane as it crossed an intersection and approached the entrance of I-35; (3) the vehicle's right tires cross or at least touch the broken white lines separating the lanes along the frontage road; (4) the vehicle cross the solid white line separating the entrance ramp from the main lanes of I-35 as it entered the freeway; (5) the

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from the marked lane is, under the particular circumstances, unsafe"). Additionally, Cano argues that: (1) he did not make an improper right turn at an "intersection," as that term is statutorily defined, *see* Tex. Transp. Code § 541.303(a); (2) he did not fail to signal a lane change; (3) crossing a solid white line to enter a freeway is "discouraged" but not illegal, according to the Texas Manual on Uniform Traffic Control Devices; and (4) as he exited I-35, he did not drive on an "improved shoulder," as that term is statutorily defined, *see id*. § 541.303(6), (15).

vehicle again drift to the right of its lane as it exited I-35; and (6) the vehicle's right tires cross or at least touch the fog line on the exit ramp. These facts and all reasonable inferences therefrom, when considered in their totality and in the light most favorable to the district court's ruling, support the district court's conclusion that Whitehair had reasonable suspicion to believe that Cano had committed the offense of driving while intoxicated.[17]

We overrule Cano's first issue.

Consent to search the vehicle

In his second issue, Cano argues that his consent to search the vehicle was "tainted" by what he contends were multiple constitutional violations that preceded his consent. In his third issue, Cano further argues that his consent was involuntary when considering all of the circumstances surrounding the stop.

"Under the Fourth and Fourteenth Amendments, a search conducted without a warrant based on probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'"[18] "One of those exceptions is a search conducted with the person's

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[17] *See Leming*, 493 S.W.3d at 562-65; *Foster v. State*, 326 S.W.3d 609, 614 (Tex. Crim. App. 2010); *Curtis v. State*, 238 S.W.3d 376, 380-81 (Tex. Crim. App. 2007); *Miller v. State*, 418 S.W.3d 692, 697-98 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *James v. State*, 102 S.W.3d 162, 172 (Tex. App.—Fort Worth 2003, pet. ref'd); *Gajewski v. State*, 944 S.W.2d 450, 452-53 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *see also Marrero v. State*, No. 03-14-00033-CR, 2016 Tex. App. LEXIS 352, at *12-14 (Tex. App.—Austin Jan. 14, 2016, no pet.) (mem. op., not designated for publication).

[18] *Meekins v. State*, 340 S.W.3d 454, 458 (Tex. Crim. App. 2011) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)).

voluntary consent."[19] "The validity of a consent to search is a question of fact to be determined from all the circumstances."[20] "Texas has long stated that the State must 'prove the voluntariness of a consent to search by clear and convincing evidence.'"[21] "A person's consent to search can be communicated to law enforcement in a variety of ways, including by words, action, or circumstantial evidence showing implied consent."[22] "But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force."[23] "The voluntariness of a person's consent is also a question of fact that is determined by analyzing all of the circumstances of a particular situation."[24] "The ultimate question is whether the person's '"will ha[s] been overborne and his capacity for self-determination critically impaired,"' such that his consent to search must have been involuntary."[25] "Factors to be considered in evaluating whether consent was voluntary include: whether the accused was advised of his constitutional rights, the length of the detention, whether the questioning was repetitive or prolonged, whether the accused was aware that he could decline to answer the questions, and what kind of psychological impact the

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[19] *Id.*

[20] *Id.*

[21] *Id.* at 459.

[22] *Id.* at 458.

[23] *Id.* at 458-59.

[24] *Id.* at 459 (citing *Schneckloth*, 412 U.S. at 233; *Gutierrez v. State*, 221 S.W.3d 680, 686 (Tex. Crim. App. 2007)).

[25] *Id.* (quoting *United States v. Watson*, 423 U.S. 411, 424 (1976) (quoting *Schneckloth*, 412 U.S. at 225)).

questioning had on the accused."[26] "Because issues of consent are necessarily fact intensive, a trial court's finding of voluntariness must be accepted on appeal unless it is clearly erroneous."[27]

Additionally, courts must also consider whether the consent was "tainted" by any prior police misconduct, such as an illegal search or seizure.[28] "If police obtain evidence as the result of a consensual search during an illegal seizure, a defendant may have the evidence suppressed unless the State proves that the causal relationship between the police misconduct and the defendant's consent is attenuated—that is, the illegal seizure did not taint the otherwise voluntary consent."[29] "Thus, before we determine whether appellant's consent was voluntary, we must first address his allegations of police misconduct."[30]

Evidence considered by the district court

Whitehair testified that after he had activated his overhead lights, Cano's vehicle "pulled into a parking lot for the New Braunfels Visitors Center and the CVS in that area." Whitehair "pulled up behind the vehicle" and "noticed that the driver's side door came open and the

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[26] *Tucker v. State*, 369 S.W.3d 179, 185 (Tex. Crim. App. 2012) (citing *Schneckloth*, 412 U.S. at 226-27).

[27] *Meekins*, 340 S.W.3d at 460.

[28] *See Brick v. State*, 738 S.W.2d 676, 680-81 (Tex. Crim. App. 1987); *Orosco v. State*, 394 S.W.3d 65, 70-71 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

[29] *Orosco*, 394 S.W.3d at 70-71 (citing *Brick*, 738 S.W.2d at 681; *Munera v. State*, 965 S.W.2d 523, 532 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd)).

[30] *Id*. at 71.

driver of the vehicle started to stick [his] leg out of the vehicle." When asked if this "sent up a red flag" for him, Whitehair testified that it did. He explained,

> [T]hat's an indicator to us for us to be even more aware of what the driver is doing because a lot of times—and I don't know any exact percentages. But from video training and everything that I have seen, it indicates that somebody could either be trying to get out of the vehicle to advance on me; do some type of harm to me; they're going to run; it may be that they're trying to get out of the vehicle so I won't see something in the vehicle; or that, you know, they don't want me near the vehicle so they will try and meet the officer away from their vehicle.

Whitehair then "approached the vehicle fairly quickly and started speaking with the driver of the vehicle at that time." Whitehair asked Cano for his driver's license. Whitehair testified that Cano "said he didn't have one on him." Whitehair then asked Cano "if he had a driver's license issued to him." Whitehair recounted, "At first he said no and then he later said, yes, he did have a license issued to him, that he just didn't have it on him. And so I asked him for his name and date of birth and checked the name and date of birth that he gave me through dispatch." Whitehair also observed that Cano "had turned the car off and taken the keys out and was holding them in his hands and I could see his hands were trembling. I also noticed his voice was—appeared to [be] trembling. It was very shaky. I noticed that he was just kind of jumpy, looking around and wouldn't sit still in the vehicle." Whitehair testified that in his experience, such behavior "indicates that a person is either very nervous or very scared," and that, "if somebody is either very nervous or very scared, [] a lot of times they will go into a fight or flight type response mode to where they will either try and fight their way out of it or try and run from it." When asked what he decided to do next, Whitehair testified,

> I had the driver get out of the vehicle. I checked the driver for any weapons and did a quick pat down on his body. I continued to talk to him the whole time and stuff and I could still feel him shaking a little bit while I was patting him down for weapons. And based on all of the actions that I was seeing, I decided to detain him in handcuffs at this time for my safety.

Whitehair added, "I did not search his pockets at that time. I did not physically go inside his pockets. All I did was an exterior pat down. I just basically kind of rubbed his pockets, waistline, shirt." Whitehair testified that he explained to Cano that "he was not under arrest. He was only being detained at that time." When asked why he had detained Cano, Whitehair testified, "[F]or [] the actions that I was seeing and the fact that I was there by myself. I explained to him that I was detaining him for my safety." Whitehair testified that after he had placed Cano in handcuffs, he asked Cano for consent to search his pockets, "which he did give."[31] Upon searching Cano, Whitehair found "some keys" and "a large amount of money in [Cano's] pockets." Whitehair further testified that as he continued speaking with Cano, another officer arrived at the scene. Shortly thereafter, Whitehair explained, he asked Cano for consent to search the vehicle, which Cano provided.

On the video recording of the stop, after the activation of Whitehair's patrol lights, Cano's vehicle can be seen exiting I-35 and immediately pulling into the CVS parking lot along the frontage road. Although the store appeared to be closed at the time and its parking lot empty, the lights around the exterior of the building were still on, providing some illumination in the parking lot. Cano parked in a space away from the building and Whitehair parked behind him. Shortly

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[31] Contrary to Whitehair's testimony, the video recording of the stop reflects that Whitehair asked for and received consent to search Cano's pockets prior to placing Cano in handcuffs.

thereafter, Cano opened the driver's side door and placed his left leg outside the vehicle. At the same time, Whitehair walked toward the vehicle and began to converse with Cano, explaining to him that he had been stopped for "weaving" in his lane. Cano claimed that he had been texting his wife while driving. Whitehair asked Cano why he was coming from the Motel 6. Cano told Whitehair that he and his wife were staying there. Whitehair asked for Cano's driver's license and Cano told him that he did not have it with him. Whitehair then asked if he had a driver's license issued to him. Cano answered, "No, uh, yes I do, but I don't have it on me." Whitehair then asked for Cano's name and date of birth. Cano identified himself as "Juan Martin Cano" and started to provide his date of birth as "eleven four" before pausing and stating it as "four twenty-four sixty-six."

Whitehair next asked Cano to exit the vehicle, and Cano complied. As Cano exited the vehicle, Whitehair immediately grabbed Cano's arms, turned him toward the car, placed Cano's hands above his head, and performed a pat-down search of Cano with one hand as he continued to hold Cano's hands above his head with his other hand, standing directly behind Cano as he did so. While Whitehair was holding Cano's arms, he asked Cano if he had any weapons on him. Cano told him that he did not. As Whitehair was frisking Cano, he told him, "You're just acting a little nervous and stuff like that for me . . . . Your hands are shaking really bad." After completing the pat-down, Whitehair asked Cano, "Do you have anything in your pockets I need to know about?" Cano answered, "Money." As he continued holding Cano's hands above his head, Whitehair then asked Cano, "Is it all right if I search your pockets?" Cano answered in the affirmative but informed Whitehair that his keys were still in his hands. Whitehair took the keys from Cano's hands and proceeded to search Cano's pockets with one hand as he continued to hold Cano's hands above his

head with another hand. During the search, Whitehair asked Cano, "Do you have anything else in the car that I need to know about?" Cano replied, "No sir." As the search continued, Whitehair asked Cano, "Okay, anything else on you? Nothing in the car?" Cano replied that there was not. Whitehair then asked if Cano's driver's license was suspended. Cano told him that it was not.

After completing the pocket search, Whitehair guided Cano's arms behind his back and placed him in handcuffs, telling Cano as he did so, "Just for my safety, you're not under arrest, I'm only going to detain you, okay? Just because I'm out here by myself." Whitehair added, "I just want to make sure you're not intoxicated or anything like that. You don't seem to be intoxicated." Whitehair then instructed Cano to stand against the back of the car, walked him closer to the car, and then turned Cano around so that Cano was facing Whitehair. Whitehair asked Cano if he had any warrants because "you seem to be acting really nervous." Cano told Whitehair that he did not but added that he was "just kind of scared" because he did not know why he had been stopped. Whitehair explained to Cano that he had "crossed over the line" on the frontage road and on I-35.

Whitehair then contacted dispatch and reported the name and date of birth that Cano had provided. As Whitehair continued speaking with Cano, Cano can be seen leaning back against the car, occasionally crossing one leg over the other. During the conversation, Whitehair asked Cano how much money he had in his pocket. Cano can be heard telling him, "About 700 or 800 dollars." Cano added that he was on disability for hepatitis C, cirrhosis, and diabetes and also suffered from anxiety, for which he had been prescribed Xanax and other medications. Also during the conversation, Whitehair placed Cano's keys back into Cano's pocket.

Shortly thereafter, the second officer arrived at the scene, approached Cano, and briefly questioned him. The officer then moved to the passenger side of Cano's vehicle, looked inside the windows with what appeared to be a flashlight, and then approached Cano again, standing to Cano's left side as Whitehair continued standing to Cano's right side. Whitehair then resumed questioning Cano, asking him if he had any open wounds and if he "used to do narcotics or something." Cano admitted that he had used cocaine when he was young but claimed that he no longer used drugs. Cano then informed Whitehair that someone was waiting on him. Whitehair replied, "That's fine. Like I said, I detained you because you were shaking. You were acting extremely nervous." Cano replied, "Well, I was texting and I see the [patrol-car] lights and think 'oh shit.'"

The second officer then asked Whitehair, "So what's going on? We're just waiting here or what?" Whitehair told the other officer, "Yeah, I ran him, but I mean because . . . ." At that point, Whitehair shook his hand back and forth and added, ". . . how he was acting and stuff." Then, the second officer walked toward the passenger side of Cano's car with his flashlight as Whitehair asked Cano if he had "anything in the car" and if he had "any problem" with Whitehair searching the vehicle. Although a portion of Cano's response is inaudible, he can be seen shaking his head and heard telling Whitehair, "No [inaudible] none whatsoever." Whitehair immediately replied, "Not at all? Okay." Whitehair then directed Cano away from the vehicle and toward his patrol car and asked the second officer to watch Cano as Whitehair proceeded to search the vehicle. Cano remained in handcuffs during the search and was not read his *Miranda* warnings until approximately ten minutes later, after Whitehair had discovered what he believed to be narcotics in the vehicle.

Legality of police actions

Cano first contends that his constitutional rights were violated during the stop so as to "taint" his consent to search the vehicle. Specifically, Cano asserts that: (1) Whitehair did not have reason to believe that Cano was armed and dangerous so as to justify Whitehair's frisking of Cano as he exited the vehicle; (2) Cano did not voluntarily consent to the search of his pockets; (3) Whitehair did not have reason to fear for his safety or believe that Cano was a flight risk so as to justify placing Cano in handcuffs; and (4) Whitehair illegally prolonged the traffic stop beyond the time required to effectuate the purpose of the stop.[32] We will address each contention in turn.

Frisk

"An officer is justified in engaging in a protective frisk if he reasonably suspects that the person who he has lawfully detained is presently armed and dangerous."[33] "The police need not be absolutely certain that the individual is armed."[34] "The test is simply whether a reasonably prudent person under the circumstances would be warranted in believing that his safety or that of others was in danger."[35] "The intrusion must be based on specific articulable facts which, in the light

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[32] Cano also asserts that the traffic stop itself was illegal from its inception, but as we have already explained when discussing Cano's first issue, the district court would not have abused its discretion in concluding that the stop was supported by reasonable suspicion that Cano had committed the offense of driving while intoxicated.

[33] *Furr v. State*, 499 S.W.3d 872, 878 (Tex. Crim. App. 2016) (citing *Wade v. State*, 422 S.W.3d 661, 669 (Tex. Crim. App. 2013)).

[34] *Id*. (citing *O'Hara v. State*, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000)).

[35] *Id*.

of the officer's experience and general knowledge, together with rational inferences from those facts, would reasonably warrant the intrusion."[36]

Here, Whitehair testified that after Cano had parked his vehicle, he "noticed that the driver's side door came open and the driver of the vehicle started to stick their leg out of the vehicle." According to Whitehair, based on his training and experience, this "indicates that somebody could either be trying to get out of the vehicle to advance on me" or "do some type of harm to me." Whitehair agreed with the prosecutor's characterization of Cano's behavior as a "red flag." Whitehair also testified that, while talking to Cano, he noticed that Cano had "turned the car off and taken the keys out and was holding them in his hands and I could see his hands were trembling. I also noticed his voice was—appeared to the trembling. It was very shaky. I noticed that he was just kind of jumpy, looking around and wouldn't sit still in the vehicle." According to Whitehair, this behavior "indicates that a person is either very nervous or very scared." Whitehair added, "And through my training and experience I've determined—or we've learned that if somebody is either very nervous or very scared, that a lot of times they will go into a fight or flight type response mode to where they will either try and fight their way out of it or try and run from it." The district court would not have erred in concluding that Cano's behavior following the stop constituted "specific, articulable facts which, in the light of the officer's experience and general knowledge, together with rational inferences from those facts, would reasonably warrant" Whitehair in believing that his safety was in danger so as to justify frisking Cano.[37]

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[36] *Id*. (citing *Anderson v. State*, 701 S.W.2d 868, 873 (Tex. Crim. App. 1985)).

[37] *See, e.g.*, *Furr*, 499 S.W.3d at 881; *O'Hara*, 27 S.W.3d at 553-54; *Carmouche v. State*, 10 S.W.3d 323, 329-30 (Tex. Crim. App. 2000); *Spillman v. State*, 824 S.W.2d 806, 808-11 (Tex.

Pocket search

Cano also asserts that Whitehair's search of his pockets following the frisk was impermissible. According to Cano, the record does not support a finding by the district court that he voluntarily consented to the search.

The video recording of the stop reflects that Whitehair, as he was holding Cano's hands above his head, asked Cano, "Do you have anything in your pockets that I need to know about?" Cano responded, "Money." Whitehair then asked Cano, "Is it all right if I search your pockets?" Cano replied, "Yes," and he also informed Whitehair that he was holding his car keys in his hands. Whitehair took Cano's car keys from him and then proceeded to search Cano's pockets. On the above evidence, we cannot conclude that the district court's finding of voluntariness was "clearly erroneous." Although it is true that Whitehair asked for consent while he was physically restraining Cano and failed to advise Cano that he had a right to refuse consent, the district court would not have clearly erred in concluding that no other factors suggesting coercion were present. The district court could have reasonably found that Cano was a 46-year-old adult who had shown no signs in his earlier conversation with Whitehair that he was mentally impaired or otherwise incapable of providing consent; that the length of the detention prior to Cano providing consent was brief; that Cano gave consent almost immediately after Whitehair asked for consent; that Cano unequivocally answered, "Yes," in response to Whitehair's request for consent; that Cano cooperated

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App.—Austin 1992, pet. ref'd); *see also Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (observing that "roadside encounters between police and suspects are especially hazardous"); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (recognizing "the inordinate risk confronting an officer as he approaches a person seated in an automobile").

with Whitehair's requests by informing him that he had money in his pockets and also by volunteering information prior to the search that his car keys were in his hands; and that nothing in the manner in which Whitehair requested consent was threatening or coercive so as to suggest that Cano's "will ha[d] been overborne and his capacity for self-determination critically impaired."[38] Viewing the totality of the circumstances in the light most favorable to the district court's ruling, we cannot conclude that the district court clearly erred in finding that Cano voluntarily consented to a search of his pockets.[39]

Handcuffing

Cano next asserts that Whitehair's decision to handcuff Cano was unreasonable under the circumstances. When conducting a traffic stop, "officers may use such force as is reasonably necessary to effect the goal of the stop: investigation, maintenance of the status quo, or officer safety."[40] "[H]andcuffing a person who has been temporarily detained 'is not ordinarily proper, but yet may be resorted to in special circumstances, such as when necessary to thwart the suspect's attempt "to frustrate further inquiry."'"[41] Courts must consider "the reasonableness of the intrusion

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[38] *Meekins*, 340 S.W.3d at 459.

[39] *See id*. at 465; *Hutchins v. State*, 475 S.W.3d 496, 498-501 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *Uriel-Ramirez v. State*, 385 S.W.3d 687, 693-94 (Tex. App.—El Paso 2012, no pet.).

[40] *Rhodes v. State*, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997); *Koch v. State*, 484 S.W.3d 482, 489 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Bartlett v. State*, 249 S.W.3d 658, 669 (Tex. App.—Austin 2008, pet. ref'd).

[41] *State v. Sheppard*, 271 S.W.3d 281, 289 (Tex. Crim. App. 2008) (quoting 4 Wayne R. LeFave, Search and Seizure, § 9.2(d), at 311-13 (4th ed. 2004)).

under all the facts."[42] "Factors that may be considered in this inquiry include the degree of force employed, the nature of the crime under investigation, the degree of suspicion, the location of the detention, the time of day, the reaction of the suspect, and whether the officer actually conducts an investigation."[43] "[C]ommon sense and ordinary human experience must govern over rigid criteria."[44] "'Reasonableness' must be judged from the perspective of a reasonable officer at the scene, rather than with the advantage of hindsight."[45] "Furthermore, allowances must be made for the fact that officers must often make quick decisions under tense, uncertain and rapidly changing circumstances."[46] "Consequently, there may be circumstances in an investigative detention that reasonably justify an officer handcuffing a suspect, placing a suspect in a police car, or transporting the suspect to another location for questioning."[47]

In this case, the evidence presented at the suppression hearing supports implied findings by the district court that when Whitehair initiated the traffic stop, he was alone, it was approximately midnight, and Cano had pulled into an empty parking lot that was only partially illuminated. Also, as discussed above, after parking, Cano had opened his driver's side door and had placed his leg out of the vehicle. Whitehair testified that this behavior, in addition to being an

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[42] *Bartlett*, 249 S.W.3d at 669 (citing *State v. Moore*, 25 S.W.3d 383, 386 (Tex. App.—Austin 2000, no pet.)).

[43] *Id*.

[44] *Rhodes*, 945 S.W.2d at 118.

[45] *Id*.

[46] *Id*.

[47] *Bartlett*, 249 S.W.3d at 669 (internal citations omitted).

indicator that a suspect was possibly dangerous, could also be an indicator that a suspect was "going to run; it may be that they're trying to get out of the vehicle so I won't see something in the vehicle; or that, you know, they don't want me near the vehicle so they will try and meet the officer away from their vehicle." Additionally, Whitehair testified that Cano was acting nervous when he initiated contact with him and that Cano was "sweating profusely" and "just kind of jumpy, looking around and wouldn't sit still in the vehicle." This indicated to Whitehair that Cano might have been going into a "fight or flight type response mode to where [he] will either try and fight [his] way out of it or try and run from it." Whitehair further testified that he "could still feel [Cano] shaking a little bit while I was patting him down for weapons." Whitehair concluded, "And based on all of the actions that I was seeing, I decided to detain him in handcuffs at this time for my safety." These circumstances, when viewed in the light most favorable to the suppression ruling, support a conclusion by the district court that Whitehair was justified in handcuffing Cano, either because of officer-safety concerns or because Whitehair reasonably believed, based on Cano's earlier behavior, that Cano posed a flight risk.[48]

Nevertheless, Cano argues that Whitehair's beliefs that Cano presented a flight risk or a threat to officer safety were objectively unreasonable because, at the time Whitehair handcuffed

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[48] *See Sheppard*, 271 S.W.3d at 289-91; *Rhodes*, 945 S.W.2d at 117-18; *Mays v. State*, 726 S.W.2d 937, 943-44 (Tex. Crim. App. 1986); *Chambers v. State*, 397 S.W.3d 777, 782 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *Castro v. State*, 373 S.W.3d 159, 164-65 (Tex. App.—San Antonio 2012, no pet.); *Spight v. State*, 76 S.W.3d 761, 769-70 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Zayas v. State*, 972 S.W.2d 779, 790-91 (Tex. App.—Corpus Christi 1998, pet. ref'd); *see also United States v. Sanders*, 994 F.2d 200, 208 (5th Cir. 1993); *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982); *United States v. Purry*, 545 F.2d 217, 220 (D.C. Cir. 1976).

Cano, Whitehair had already frisked Cano, searched his pockets, and determined that Cano did not possess any weapons on his person. Also, Whitehair testified that he had taken possession of Cano's car keys and thus, Cano contends, he would not have been able to drive away at that time. However, the fact that Whitehair did not discover a weapon on Cano's person does not conclusively establish that Cano did not present a danger to Whitehair. Nor does the fact that Whitehair had possession of Cano's car keys conclusively establish that Cano posed no flight risk during the stop. Whitehair testified that at the time he handcuffed Cano, he knew nothing about the man, including his identity, because Cano did not have his driver's license on him at the time. As Whitehair explained,

> I'm there by myself, I don't want to leave him—I don't know if he's a professional boxer, a professional mixed martial arts person or something because that's very big nowadays. Somebody like that could easily kick my butt because I don't do that. And so due to the fact that I'm there by myself, I didn't want him to—to have those capabilities, again as you stated because I've never met him before, and leave myself vulnerable for that type of attack or him running or something else. So, yes, I decided to detain him.

Also, as reflected in Whitehair's testimony and the video recording of the stop, Cano had opened his car door and placed his leg out of the vehicle shortly after parking, which would support an implied finding by the district court that Cano had contemplated fleeing on foot. Also, the video recording of the stop reflects that Whitehair appeared to be heavier than Cano, which would support an implied finding by the district court that if Cano had decided to run away, Whitehair might have had difficulty in chasing him. Thus, the district court would not have erred in concluding that Whitehair's decision to handcuff Cano was reasonable in light of the possible flight risk that Cano presented under the circumstances.

Nor would the district court have erred in concluding that it was reasonable for Whitehair to keep Cano in handcuffs even after the second officer had arrived. As Whitehair explained, his investigation into Cano's identity was still ongoing at that time: "[N]ot knowing him, not knowing his background, not having his return at this time, I didn't—he didn't have any type of ID on him to support who he was. So I don't even know if he's the person that I'm dealing with, which ended up being the case. And so I didn't want to take any chances." Whitehair added, "He was already detained. I was not going to uncuff him until I finished my investigation." The district court would not have erred in concluding that this decision was reasonable under the circumstances.

In the alternative, even if the record did not support a conclusion by the district court that Whitehair's decision to handcuff Cano was reasonable pursuant to an investigative detention, there was undisputed evidence presented that Cano did not have his driver's license with him at the time of the stop, which is an arrestable offense.[49] Accordingly, the district court would not have erred in concluding that Whitehair had probable cause to arrest Cano for committing that offense.[50] When an officer has probable cause to arrest a person, he is constitutionally permitted to handcuff

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[49] *See* Tex. Transp. Code §§ 521.025, 543.001; *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *Snyder v. State*, 629 S.W.2d 930, 934 (Tex. Crim. App. 1982); *Dew v. State*, 214 S.W.3d 459, 462 (Tex. App.—Eastland 2005, no pet.); *Elizondo-Vasquez v. State*, No. 03-12-00774-CR, 2014 Tex. App. LEXIS 9174, at *7-8 (Tex. App.—Austin Aug. 20, 2014, pet. ref'd) (mem. op., not designated for publication).

[50] *See* Tex. Code Crim. Proc. art. 14.01(b); *State v. Gray*, 158 S.W.3d 465, 469 (Tex. Crim. App. 2005); *State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999); *Garcia v. State*, 218 S.W.3d 756, 760 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see also United States v. Beltran*, 752 F.3d 671, 678-79 (7th Cir. 2014).

that person to effectuate the arrest.[51] Moreover, it does not matter whether Whitehair intended to arrest or merely detain Cano at the time he handcuffed him: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[52] Here, the district court would not have erred in concluding that Whitehair's decision to handcuff Cano was justified by Cano's admission that he did not have his driver's license with him, which provided Whitehair with probable cause to arrest Cano for committing that offense.[53]

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[51] *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Fisher v. City of Las Cruces*, 584 F.3d 888, 896 (10th Cir. 2009).

[52] *Scott v. United States*, 436 U.S. 128, 138 (1978); *Williams v. State*, 726 S.W.2d 99, 101 (Tex. Crim. App. 1986); *see Garcia v. State*, 827 S.W.2d 937, 942 (Tex. Crim. App. 1992); *see also Whren v. United States*, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent."); *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) ("[W]here police officers are objectively doing what they are legally authorized to do . . . the results of their investigations are not to be called in question on the basis of any subjective intent with which they acted.").

[53] We note that the district court also would not have erred in similarly concluding that, because Whitehair had probable cause to arrest Cano, his actions in frisking Cano and searching his pockets were justified as part of a search incident to arrest. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969); *Gray*, 158 S.W.3d at 470; *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003); *Williams*, 726 S.W.2d at 100-01; *Branch v. State*, 335 S.W.3d 893, 901 (Tex. App.—Austin 2011, pet. ref'd); *Hart v. State*, 235 S.W.3d 858, 862 (Tex. App.—Eastland 2007, pet. dism'd).

Cano asserts in his reply brief that a search incident to arrest is permissible only when the individual has been placed under "formal" arrest or when the arrest follows "quickly on the heels of the search." However, the Court of Criminal Appeals has held that "[i]t is irrelevant that the arrest occurs immediately before or after the search, as long as sufficient probable cause exists for the officer to arrest before the search." *Ballard*, 987 S.W.2d at 892. Additionally, "the time at which an officer announces arrest is not the critical issue; rather it is whether sufficient probable cause for arrest existed before the search." *Id*. at 893. Here, Whitehair had probable cause to arrest Cano at the moment Cano informed Whitehair that he did not have his driver's license on him, which

Extension of stop

Finally, Cano asserts that the stop was unreasonably prolonged beyond the time required to effectuate the purpose of the stop. According to Cano, after Whitehair had initiated the traffic stop and failed to find any further evidence that Cano was intoxicated, the only remaining offense for Whitehair to investigate was Cano's failure to carry his driver's license. In Cano's view, Whitehair did not "diligently pursue the suspicion justifying his detention" for that offense.

The general rule is that "an investigative stop can last no longer than necessary to effect the purpose of the stop."[54] "In other words, if a driver is stopped on suspicion of driving while intoxicated, once the police officer determines that the driver is not impaired, he should be promptly released."[55] "However, there is an additional component to a routine traffic stop—the license and warrants check."[56] "On a routine traffic stop, police officers may request certain information from a driver, such as a driver's license and car registration, and may conduct a computer check on that information."[57] "It is only after this computer check is completed, and the officer knows that this

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occurred prior to the search. Also, this Court has held that "the search incident to arrest can precede the arrest" so long as the formal arrest occurs "within the same encounter." *Wiede v. State*, 157 S.W.3d 87, 96 (Tex. App.—Austin 2005, pet. ref'd); *see also Stoner v. California*, 376 U.S. 483, 486 (1964) ("But a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest."). Here, it is undisputed that the search and arrest both occurred during the traffic stop.

[54] *Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

[55] *Id*. (citing *Davis v. State*, 947 S.W.2d 240, 245 (Tex. Crim. App. 1997)).

[56] *Id*.

[57] *Id*.; *see also Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) ("Beyond determining whether to issue a traffic ticket, an officer's mission [during a traffic stop] includes

driver has a currently valid license, no outstanding warrants, and the car is not stolen, that the traffic-stop investigation is fully resolved."[58] "It is at this point that the detention must end and the driver must be permitted to leave."[59]

In this case, Cano contends that the traffic stop was illegally extended by three minutes as a result of Whitehair "frisking, searching, questioning, and handcuffing" Cano prior to calling dispatch to verify Cano's identity and license information. However, as the Court of Criminal Appeals has explained, "the Supreme Court has expressly rejected placing any rigid time limitations on *Terry* stops; instead, the issue is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'"[60] "Further, neither the Fourth Amendment nor the Supreme Court dictate that an officer making a *Terry* traffic stop must investigate the situation in a particular order."[61] "A traffic stop may involve both an investigation into the specific suspected criminal

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'ordinary inquiries incident to [the traffic] stop.' Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." (internal citations omitted)).

[58] *Kothe*, 152 S.W.3d at 63-64.

[59] *Id*. at 64.

[60] *Id*. (citing *United States v. Sharpe*, 470 U.S. 675, 685-86 (1985)).

[61] *Id*. at 65.

activity and a routine check of the driver's license and car registration."[62] "Only if a license check 'unduly prolongs' the detention is the officer's action unreasonable under the circumstances."[63]

Moreover, although "'[c]omputerized license and registration checks are an efficient means to investigate the status of a driver and his auto, [] they need not be pursued to the exclusion of, or in particular sequence with, other efficient means.'"[64] "Some lines of police questioning before the initiation of a computer check are often reasonable, as they may enable swift resolution of the stop."[65] "Fourth Amendment 'reasonableness' does not require a 'single, formulaic approach' to a traffic stop investigation, nor does it require rigid adherence to 'the least intrusive means' of investigation defined by Monday-morning reviewing courts."[66]

In this case, for reasons that we have already discussed, the district court would not have erred in concluding that the frisking and handcuffing of Cano were reasonably necessary to promote officer safety, which is a constitutionally permissible reason to prolong a detention.[67] And the district court also would not have erred in concluding that the consensual search of Cano's pockets, as well as the brief questioning of Cano that immediately preceded Whitehair's call to dispatch, were reasonable measures undertaken by Whitehair to diligently pursue his ongoing

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[62] *Id*.

[63] *Id*.

[64] *Id*. at 66 (quoting *United States v. Brigham*, 382 F.3d 500, 511 (5th Cir. 2004)).

[65] *Brigham*, 382 F.3d at 511.

[66] *Kothe*, 152 S.W.3d at 66.

[67] *See Rodriguez*, 135 S. Ct. at 1616; *Arizona v. Johnson*, 555 U.S. 323, 330-34 (2009).

investigations into determining Cano's identity and whether Cano had a driver's license on him, and to "quickly dispel" any remaining suspicion that Whitehair might have had regarding whether Cano had been driving while intoxicated.[68] On this record, we cannot conclude that the district court erred in determining that the approximately three minutes that elapsed during the time that Whitehair frisked, searched, handcuffed, and questioned Cano, prior to calling dispatch, unduly prolonged the detention so as to render it objectively unreasonable under the circumstances.

Voluntariness of consent

Having concluded that Cano's consent to search his vehicle was not preceded by any constitutional violations, we may now consider the voluntariness of Cano's consent. As with the previously considered issue of the validity of Cano's consent to search his pockets, the validity of Cano's consent to search his vehicle "is a question of fact to be determined from all the circumstances,"[69] with the "ultimate question" being whether Cano's """will [was] overborne and his capacity for self-determination critically impaired,"' such that his consent to search must have

[68] *See Kothe*, 152 S.W.3d at 66; *Cagle v. State*, 509 S.W.3d 617, 623 (Tex. App.—Texarkana 2016, no pet.); *Belcher v. State*, 244 S.W.3d 531, 539 (Tex. App.—Fort Worth 2007, no pet.); *Hartman v. State*, 144 S.W.3d 568, 572-74 (Tex. App.—Austin 2004, no pet.); *see also Brigham*, 382 F.3d at 511 ("There is, however, no constitutional stopwatch on traffic stops. Instead, the relevant question in assessing whether a detention extends beyond a reasonable duration is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.'" (quoting *Sharpe*, 470 U.S. at 686)).

[69] *Meekins*, 340 S.W.3d at 458.

been involuntary."[70] Again, because of the fact-intensive nature of the inquiry, "a trial court's finding of voluntariness must be accepted on appeal unless it is clearly erroneous."[71]

Here, Cano points to several circumstances surrounding the traffic stop that could support a finding that his consent was involuntary, including that he was handcuffed at the time he gave consent, that Whitehair failed to advise Cano that he could refuse consent, that an officer was standing on either side of Cano when consent was requested, and that Whitehair had repeatedly asked Cano questions concerning the vehicle during the stop. However, as the State observes, there is other evidence in the record that supports a finding of voluntariness, including the following: (1) prior to consenting to the search, Cano had engaged in an extended conversation with Whitehair, during which he could be seen on the video recording of the stop leaning back against his car and casually crossing one leg over the other; (2) also during this conversation, Cano could be heard joking and laughing with Whitehair and volunteering information concerning his personal life; (3) after the second officer arrived, Cano could be seen maintaining his casual posture, nodding to the other officer, and asking him, "How you doing?"; (4) although both officers were present at the time Cano gave consent, only Whitehair had requested consent to search the vehicle; (5) the second officer did not interact extensively with Cano so as to suggest that he was working in tandem with Whitehair to extract consent from Cano; (6) at the time Whitehair requested consent, neither officer was touching Cano, drawing his weapon, or otherwise employing or threatening to employ any use of force against Cano; (7) although Cano was handcuffed at the time at the time he gave consent,

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[70] *Id*. at 459 (quoting *United States v. Watson*, 423 U.S. 411, 424 (1976) (quoting *Schneckloth*, 412 U.S. at 225)).

[71] *Id*. at 460.

Whitehair had earlier told him that he was not under arrest and that the handcuffs were being used only to ensure Whitehair's safety; (8) although Whitehair had asked Cano multiple questions regarding the vehicle, he asked for consent to search the vehicle only once; (9) although Whitehair did not inform Cano that he could refuse consent, neither did he express or imply that consent was required or promise anything in exchange for Cano's consent; (10) as reflected on the video recording of the stop, when Whitehair asked Cano if he had "any problem" with him searching the vehicle, Cano shook his head and stated, "No, [inaudible] none whatsoever"; and (11) Cano did not object or otherwise attempt to rescind his consent when Whitehair next stated, "Not at all? Okay," and instead immediately stepped away from his vehicle and complied with the other officer's request to stand near Whitehair's patrol vehicle as Whitehair proceeded to search Cano's vehicle. Viewing the totality of the above circumstances in the light most favorable to the district court's ruling, we cannot conclude that the district court clearly erred in finding that Cano voluntarily consented to a search of his vehicle.[72]

We overrule Cano's second and third issues.

CONCLUSION

We affirm the judgment of the district court.

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[72] *See id*. at 463-65; *Hutchins*, 475 S.W.3d at 500-01; *Uriel-Ramirez*, 385 S.W.3d at 693; *LeFlar v. State*, 2 S.W.3d 571, 574-76 (Tex. App.—Eastland 1999, no pet.); *see also Fernandez-Madrid v. State*, No. 03-15-00796-CR, 2017 Tex. App. LEXIS 1704, at *7-12 (Tex. App.—Austin Mar. 1, 2017, no pet.) (mem. op., not designated for publication) (similarly upholding lower court's finding of voluntary consent to search vehicle during traffic stop).

Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Field
Concurring Opinion by Justice Field

Affirmed

Filed: August 24, 2017

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