

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00553-CR

The State of Texas, Appellant

v.

Philip Dubord, Appellee

**FROM THE COUNTY COURT AT LAW NO. 3 OF TRAVIS COUNTY
NO. C-1-CR-12-204755, HONORABLE MICHAEL J. MCCORMICK, JUDGE PRESIDING**

MEMORANDUM OPINION

The State of Texas appeals from the trial court's order granting Philip Dubord's motion to suppress evidence gathered after a traffic stop. *See* Tex. Code Crim. Proc. art. 44.01(a)(5). The State contends that the trial court abused its discretion by granting the motion. We will affirm the trial court's order.

BACKGROUND

Austin Police Department Officer Adam Johnson, the only witness at the hearing on Dubord's motion to suppress, testified that he saw Dubord make two lane changes on a city street without signaling and, given the late hour and location near downtown Austin, thought Dubord might be intoxicated. Officer Johnson testified that he followed Dubord onto a freeway and measured the speed of Dubord's vehicle at 72 miles per hour in a 65 mile-per-hour zone. Officer Johnson said that Dubord's vehicle drifted across the lane lines several more times, the last of

which involved moving into a lane occupied by another vehicle. Officer Johnson said he then stopped Dubord.

The trial court granted Dubord's motion to suppress and made the following findings of fact and conclusion of law:

After a hearing on Defendant's motion the court makes the following findings of fact:

1. In the early morning hours of 3-23-12 Officer Johnson observed the Defendant traveling west in the 1600 block of West Sixth Street.
2. The Defendant moved across two lanes of traffic and headed onto MoPac Boulevard, and Officer Johnson followed.
3. Officer Johnson testified he followed the Defendant for approximately six more miles before stopping him, testifying that the defendant crossed from his lane of travel on more than one occasion.

CONCLUSION OF LAW

Defendant argues his stop and arrest were without probable cause.

The fact the officer waited six miles to stop the defendant diminishes the credibility of his claim that he stopped the defendant for lane change violations on Sixth Street.

Determining that the trial court's findings did not allow this Court to properly assess the suppression issue, we remanded the cause for further findings and conclusions. *State v. Dubord*, No. 03-15-00553-CR, 2016 Tex. App. LEXIS 2163 (Tex. App.—Austin Mar. 2, 2016, no pet.) (mem. op. & order, not designated for publication) (per curiam). The trial court subsequently signed an order with its additional findings and conclusion, stating:

Having listened to Officer Johnson's recitation of the sequence of following Mr. Dubord for over ten (10) minutes for more than six (6) miles allegedly observing multiple traffic violations with multiple opportunities to enforce the traffic laws, Officer Johnson was adamant in declaring that he "religiously engages his dash mounted video camera" to record the events.

Since no such video has been produced after timely request from defense counsel, this Court is concerned that either [sic] Officer Johnson may have been mistaken.

THEREFORE, this Court makes these additional Findings of Fact and Conclusions of Law:

Findings of Fact

1. Officer Johnson's testimony, absent the missing video tape, is insufficiently credible for the Court to believe that any traffic violations occurred.

Conclusion of Law

The stop and arrest of Mr. Dubord was without objective probable cause.

It is **THEREFORE ORDERED, ADJUDGED AND DECREED** that all evidence seized as a result of this arrest is hereby suppressed and declared inadmissible in any future proceeding in this case.

A few months later, the State notified this Court that it had located the missing dash-cam video behind other footage that Officer Johnson had turned in for an unrelated stop. However, as noted in the trial court's findings, that video was missing and was not provided to the court at the hearing on the motion to suppress.

DISCUSSION

We review a trial court's ruling on a motion to suppress for an abuse of discretion, with almost complete deference being given to its determination of historical facts, especially if those are based on an assessment of a witness's credibility and demeanor. *Arguelles v. State*,

409 S.W.3d 657, 662 (Tex. Crim. App. 2013). We afford the same deference to the trial court's rulings on application of the law to questions of fact and to mixed questions of law and fact, if the resolution of those questions depends on an evaluation of a witness's credibility and demeanor, *id.*, but we analyze de novo the trial court's application of the law. *State v. Le*, 463 S.W.3d 872, 876 (Tex. Crim. App. 2015). We view the record in the light most favorable to the trial court's ruling, and reverse the ruling only if it is outside the zone of reasonable disagreement. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.*

Here, the trial court specifically found that the testimony from Officer Johnson, the only witness at the hearing, was "insufficiently credible for the court to believe that any traffic violations occurred." *See State v. Duran*, 396 S.W.3d 563, 572 (Tex. Crim. App. 2013) (concluding that trial judge was entitled to disbelieve officer's testimony that he stopped defendant after seeing traffic violation); *State v. Nash*, 55 S.W.3d 110, 114 (Tex. App.—Austin 2001, no pet.) (deferring to findings indicating that district court disbelieved officers' testimony about reason for traffic stop); *see also* 41 George E. Dix & John M. Schmolesky, Texas Practice Series: Criminal Practice and Procedure § 18:70 (3d ed. 2011) (recognizing that even when trial judge is addressing situation in which law enforcement action at issue is supported only by uncontroverted testimony introduced by State, judge may disbelieve all or part of that testimony). Based on the trial court's rejection of Officer Johnson's testimony, it concluded that "the stop and arrest of Mr. Dubord was without objective probable cause."

We may not presume error if there is a viable legal theory supporting the trial court's ruling. *Nash*, 55 S.W.3d at 114. The only legal theory that supports the trial court's ruling is that

it did not believe Officer Johnson's testimony. *See id.* We must defer to that ruling because it turned on an evaluation of the credibility of a witness. *Id.*; *see also Arguellez*, 409 S.W.3d at 662; *Duran*, 396 S.W.3d at 573 (stating that issue of reasonable suspicion or probable cause to stop defendant turned on factual finding of whether officer saw defendant's traffic violation before initiating his detention, and that finding depended entirely on trial judge's assessment of officer's credibility).

We conclude that the order granting suppression of the evidence, considered with due deference to the trial court's factual finding on Officer Johnson's credibility, was not outside the zone of reasonable disagreement and did not constitute an abuse of discretion. *See Arguellez*, 409 S.W.3d at 662; *Dixon*, 206 S.W.3d at 590. Accordingly, we overrule the State's sole appellate issue.

CONCLUSION

We affirm the district court's order.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: June 8, 2017

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