TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00796-CR

Jose Fernandez-Madrid, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 368TH JUDICIAL DISTRICT NO. 14-1915-K368, HONORABLE RICK J. KENNON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

After the trial court denied his motion to suppress evidence, a jury found appellant Jose Fernandez-Madrid guilty of possession of a controlled substance, namely, cocaine, in an amount of 400 grams or more, with intent to deliver. *See* Tex. Health & Safety Code § 481.112(a), (f). The jury assessed punishment at 20 years' imprisonment, and the trial court rendered judgment consistent with the jury's verdicts. In three points of error, Fernandez-Madrid contends that the trial court abused its discretion in denying his motion to suppress. We will affirm the trial court's judgment of conviction.

BACKGROUND[1]

In October 2014, Deputy Jeramiah Ellison of the Williamson County Sheriff's Office noticed a truck that he believed was following too closely behind the vehicle in front of it. Deputy Ellison stopped the truck and spoke with its driver, Fernandez-Madrid. Fernandez-Madrid handed Deputy Ellison his driver's license but could not provide proof of insurance. Deputy Ellison ran information for Fernandez-Madrid and the vehicle through his computer system. The computer showed that: (1) the vehicle was insured; (2) Fernandez-Madrid had acquired title to the vehicle about a month before in Moody, Texas, and it had previously been titled in Eagle Pass, Texas; (3) the vehicle had crossed the Texas-Mexico border about 24 times since Fernandez-Madrid had acquired the title; and (4) Fernandez-Madrid did not have any outstanding warrants or criminal history.

Deputy Ellison had Fernandez-Madrid get out of the truck and stand by the patrol car. As Deputy Ellison filled out a warning form to give to Fernandez-Madrid, he questioned Fernandez-Madrid about his destination, his occupation, and similar matters. Fernandez-Madrid said that his family lived in Mexico and that he often went to Mexico to see them. Deputy Ellison then walked over to Fernandez-Madrid's truck to check that the registration stickers were valid, which they were.

When he returned from checking Fernandez-Madrid's registration stickers, Deputy Ellison began to ask Fernandez-Madrid whether he had any contraband in the truck. Fernandez-Madrid denied having any guns, large amounts of money, or drugs. However, when

[1] The facts recited in this opinion are taken from the testimony and other evidence presented at the suppression hearing.

specifically asked whether he had any heroin, Fernandez-Madrid shrugged his shoulders and said, "I don't know." When asked whether he had any marihuana, Fernandez-Madrid shrugged his shoulders and shook his head from side to side. Deputy Ellison then asked if he could search the truck, and Fernandez-Madrid said that he could.

After briefly looking in Fernandez-Madrid's truck, Deputy Ellison suggested that they move off the side of the highway and into the parking lot of a nearby restaurant. Fernandez-Madrid agreed. Deputy Ellison drove to the restaurant, and Fernandez-Madrid followed him in the truck. When they arrived at the restaurant, Deputy Ellison patted Fernandez-Madrid down and found that Fernandez-Madrid was carrying cash that was later determined to be about $3,000. While Deputy Ellison searched the truck, Trooper Donald Venable stood with Fernandez-Madrid. Deputy Ellison later testified that, while searching the vehicle at the restaurant, he saw signs that the truck's interior had been tampered with and believed that drugs may have been placed in hidden compartments.

Deputy Ellison told Fernandez-Madrid that they were going to go to a body shop to continue the search. Deputy Ellison asked Fernandez-Madrid if he would voluntarily go, and he said that he would. Fernandez-Madrid drove the truck to the shop. About a minute after Fernandez-Madrid arrived at the body shop, officers conducted an open-air dog sniff of the truck. The dog alerted to Fernandez-Madrid's truck.

After the dog alerted to the truck, officers began disassembling the vehicle. They found a small baggie of cocaine in the headliner behind the rear-view mirror. Officers also found packages of cocaine in hidden compartments totaling about nine kilograms. The officers placed

Fernandez-Madrid under arrest and read him his *Miranda* rights.[2] He was later convicted and sentenced, and this appeal followed.

STANDARD OF REVIEW

We review a trial court's ruling on a motion to suppress for an abuse of discretion using a bifurcated standard. *Goodwin v. State*, 376 S.W.3d 259, 266 (Tex. App.—Austin 2012, pet. ref'd). In doing so, we view the evidence in the light most favorable to the trial court's ruling. *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013). Moreover, when, as here, the trial court does not enter findings of fact, we "assume the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010) (internal quotation marks omitted). In a suppression hearing, the trial court is "is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony." *Wiede v. State*, 214 S.W.3d 17, 24–25 (Tex. Crim. App. 2007) (internal quotation marks omitted). We also give almost total deference to rulings on application of the law to questions of fact and to mixed questions of law and fact, if resolution of those questions depends on an assessment of credibility and demeanor of witnesses. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013). We review de novo pure questions of law and mixed questions of law and fact that do not depend on evaluating credibility and demeanor. *Fienen v.*

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[2] Deputy Ellison recorded a video, with audio, of the entire interaction with Fernandez-Madrid from the initiation of the traffic stop until after the discovery of the cocaine and Fernandez-Madrid's arrest. This video, along with a video recorded by Trooper Venable, was admitted at the hearing on the motion to suppress, and the court stated that it would review the videos after the hearing. This Court has also reviewed the videos, which are in all material ways consistent with Deputy Ellison's testimony given at the hearing.

State, 390 S.W.3d 328, 335 (Tex. Crim. App. 2012); *see Valtierra*, 310 S.W.3d at 447 ("[W]e review a trial court's application of the law of search and seizure to the facts *de novo*.").

DISCUSSION

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *State v. Villarreal*, 475 S.W.3d 784, 795 (Tex. Crim. App. 2014) (citing *Riley v. California*, 134 S. Ct. 2473, 2482 (2014)). The United States Supreme Court has held that a search is reasonable only if it is conducted pursuant to a warrant or if it falls within a recognized exception to the warrant requirement. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) ("Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception.").

If a defendant seeks to suppress evidence on the ground that it was collected in violation of the Fourth Amendment, the defendant bears an initial burden to overcome the presumption of proper police conduct. *See Amador v. State*, 221 S.W.3d 666, 672 (Tex. Crim. App. 2007); *Roop v. State*, 484 S.W.3d 594, 598 (Tex. App.—Austin 2016, pet. ref'd). If the defendant meets this burden by establishing that the search or seizure occurred without a warrant, the burden shifts to the State to prove that the search or seizure was reasonable under the totality of the circumstances. *See Amador*, 221 S.W.3d at 672–73; *Roop*, 484 S.W.3d at 598.

"A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). " Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address

the traffic violation that warranted the stop and attend to related safety concerns." *Id.* (citations omitted). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* However, during a traffic stop, police may make inquiries related to public safety, including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at 1615. "Furthermore, if during a valid detention, 'the officer develops reasonable suspicion that the detainee is engaged in criminal activity, prolonged or continued detention is justified.'" *Hoyt v. State*, No. 03-15-00228-CR, 2016 WL 4272104, at *2 (Tex. App.—Austin Aug. 12, 2016, no pet.) (mem. op., not designated for publication) (quoting *Haas v. State*, 172 S.W.3d 42, 52 (Tex. App.—Waco 2005, pet. ref'd)); *see Martinez v. State*, 500 S.W.3d 456, 468 (Tex. App.—Beaumont 2016, pet. ref'd); *Richardson v. State*, 402 S.W.3d 272, 277 (Tex. App.—Fort Worth 2013, pet. ref'd) ("Additional facts and information discovered by an officer during a lawful detention may form the basis for a reasonable suspicion that another offense has been or is being committed."); *see also State v. Woodard*, 341 S.W.3d 404, 414 (Tex. Crim. App. 2011) (determining that information known to officer gave him reasonable suspicion to detain suspect and administer field-sobriety tests).

Voluntary Consent

In his first point of error, Fernandez-Madrid contends that the trial court abused its discretion in denying his motion to suppress because his consent to search was given involuntarily. Fernandez-Madrid further contends that no reasonable suspicion existed to prolong his detention once the purpose of the stop was concluded.

One exception to the Fourth Amendment's warrant requirement "applies when the search was obtained through voluntary consent." *Nanny v. State*, No. 03-16-00196-CR, 2016 WL 7046818, at *6 (Tex. App.—Austin Nov. 30, 2016, no pet. h.) (mem. op., not designated for publication) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990); *Limon v. State*, 340 S.W.3d 753, 756 (Tex. Crim. App. 2011)). The validity of the consent is a fact question that is determined by considering the totality of the circumstances. *See Ohio v. Robinette*, 519 U.S. 33, 40 (1996); *State v. Weaver*, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011); *Nanny*, 2016 WL 7046818, at *7. The State must prove that the consent was voluntary by clear and convincing evidence. *See Weaver*, 349 S.W.3d at 526; *Valtierra*, 310 S.W.3d at 448; *Nanny*, 2016 WL 7046818, at *7. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Although courts have proposed lists of factors that a trial court may consider when determining whether consent to search was voluntary, *see Meekins v. State*, 340 S.W.3d 454, 463 n.44 (Tex. Crim. App. 2011), these lists are not exclusive, and a trial court "must look at the totality of the circumstances surrounding the statement of consent" and may therefore consider "any . . . factor deemed relevant." *Reasor v. State*, 12 S.W.3d 813, 818 (Tex. Crim. App. 2000).

At the suppression hearing, Deputy Ellison testified that he learned the following facts during the traffic stop:

- Fernandez-Madrid was driving on I-35. Deputy Ellison testified that "[I-]35 is a huge corridor for drugs."

- Fernandez-Madrid had received title to the truck about a month before in Moody, Texas.

- The truck had previously been titled in Eagle Pass, Texas. Deputy Ellison testified that Eagle Pass is "a pretty big hub for methamphetamine and cocaine."

- The truck had crossed the Texas-Mexico border about 24 times in the month since Fernandez-Madrid had acquired title.

Based on these facts, which Fernandez-Madrid has not contested, we conclude that Deputy Ellison had reasonable suspicion to briefly continue the traffic stop for the limited purpose of asking Fernandez-Madrid whether he had drugs or other contraband in the truck. *See Hanlon v. State*, No. 11-14-00234-CR, 2016 WL 5340257, at *3 (Tex. App.—Eastland Sept. 15, 2016, no pet.) (mem. op., not designated for publication) (considering evidence that suspect was traveling on known drug corridor as factor in determining that officer had reasonable suspicion for search); *Agnew v. State*, No. 12-13-00181-CR, 2015 WL 84726, at *5 (Tex. App.—Tyler Jan. 7, 2015, pet. ref'd) (mem. op. on reh'g, not designated for publication) (considering evidence that suspect was traveling on known drug corridor as factor in determining that officer had reasonable suspicion to continue detention); *Clatt v. State*, No. 07-07-0130-CR, 2008 WL 4397490, at *1 (Tex. App.—Amarillo Sept. 29, 2008, no pet.) (mem. op., not designated for publication) (same).

Deputy Ellison testified, and the video of the traffic stop confirms, that Fernandez-Madrid shrugged his shoulders and said, "I don't know," when asked whether there was any heroin in the vehicle. Deputy Ellison also testified that Fernandez-Madrid "became very nervous" and that "his body language changed" when asked about drugs. Specifically, Deputy Ellison testified that Fernandez-Madrid "began sweating real big from his forehead," his "carotid artery . . .

started bulging rapidly," and "[h]is arms started shaking real bad." "Although nervousness alone is not sufficient to establish reasonable suspicion for an investigative detention, it can do so in combination with other factors." *Hamal v. State*, 390 S.W.3d 302, 308 (Tex. Crim. App. 2012) (footnote omitted). We conclude, based on this record, that Deputy Ellison had reasonable suspicion to briefly prolong the detention for the limited purpose of asking Fernandez-Madrid for consent to search the vehicle.[3]

The video shows that Deputy Ellison obtained Fernandez-Madrid's consent to search the truck within about a minute of the time he began questioning Fernandez-Madrid about contraband. Fernandez-Madrid argues that his consent was not voluntarily given because (1) he was not free to leave while Deputy Ellison ran computer checks of his license and insurance, (2) he was not aware that he could refuse Deputy Ellison's request to search, (3) he believed that Deputy Ellison

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[3] Texas courts have held that an officer may inquire about contraband and ask for consent to search a vehicle during or after a traffic stop even without reasonable suspicion that an additional crime has been committed. *See Chatmon v. State*, No. 01-16-00331-CR, 2016 WL 6754595, at *2 (Tex. App.—Houston [1st Dist.] Nov. 15, 2016, pet. filed) (mem. op., not designated for publication) (stating that "[a]n officer may request consent to search a vehicle during or after a completed traffic stop"); *In re R.S.W.*, No. 03-04-00570-CV, 2006 WL 565928, at *5 (Tex. App.—Austin Mar. 9, 2006, no pet.) (mem. op.) ("Once the purpose of a stop has been effectuated, the officer may ask the suspect if he possesses illegal contraband and solicit voluntary consent to search."); *Levi v. State*, 147 S.W.3d 541, 544 (Tex. App.—Waco 2004, pet. ref'd) ("[A] police officer may request consent to search a vehicle after the purpose of the traffic stop has been accomplished as long as it is reasonable under the circumstances and the officer has not conveyed a message that compliance with the officer's request is required."); *Leach v. State*, 35 S.W.3d 232, 235 (Tex. App.—Austin 2000, no pet.) ("A detention may last no longer than is necessary to effectuate the purpose of the stop. When a police officer simply requests permission to search a vehicle, however, that does not amount to an unlawful seizure under the federal constitution."). Whether this line of cases remains good law after *Rodriguez* is unclear. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1615–16 (2015) (holding that officers may not conduct investigation unrelated to traffic safety if investigation prolongs traffic stop, even if prolongation is *de minimis*). However, we need not decide the question, because we have concluded that Deputy Ellison had reasonable suspicion to ask about contraband and for permission to search the vehicle.

would physically harm him if he did not consent, (4) Deputy Ellison did not tell him that he had a right to refuse the search, and (5) Spanish was his first language and he did not understand English well. However, based on the video and on Deputy Ellison's testimony, which the trial court was at liberty to believe, *see Wiede*, 214 S.W.3d at 24–25, we conclude that the record supports the trial court's implicit finding that the State met its burden to prove by clear and convincing evidence that Fernandez-Madrid's consent was voluntary. The video shows that Deputy Ellison did not threaten any force against Fernandez-Madrid. The video further shows that Fernandez-Madrid carried on the conversation in English throughout the investigation and had only minor communication difficulties. While Fernandez-Madrid testified at the suppression hearing, through an interpreter, that he did not understand everything that Deputy Ellison asked him, the trial court could have given his testimony less weight than the video and Deputy Ellison's testimony. *See id.* Finally, the video shows that Deputy Ellison asked Fernandez-Madrid more than once whether he could search the vehicle, and Fernandez-Madrid consistently agreed that he could.

In summary, we conclude that Deputy Ellison had reasonable suspicion to ask Fernandez-Madrid whether there was contraband in the truck, that Fernandez-Madrid's responses gave Deputy Ellison reasonable suspicion to ask for consent to search the vehicle, and that the record supports the trial court's implicit finding that Fernandez-Madrid's consent was voluntary. Accordingly, we overrule Fernandez-Madrid's first point of error.

Scope of Consent

In his second point of error, Fernandez-Madrid contends that, even if his consent was voluntary, "the search of Appellant's truck exceeded the scope of any consent given." That is,

Fernandez-Madrid argues that he could not have anticipated that he would be asked to move to a second and third location and have his vehicle disassembled when he allegedly gave consent to a roadside search. However, we conclude that the record supports the trial court's implicit finding that Fernandez-Madrid consented to each change in location. The video shows that Deputy Ellison made a very brief search of the truck after obtaining Fernandez-Madrid's consent but almost immediately asked Fernandez-Madrid if they could relocate to the restaurant parking lot for safety reasons. Fernandez-Madrid agreed to go to the restaurant, drove his truck there, and never indicated in any way that he was unwilling to go or that Deputy Ellison no longer had consent to search his vehicle.

While at the restaurant parking lot, Deputy Ellison, according to his testimony, saw signs that the interior of the truck had been tampered with and smelled a bonding agent used in patching vehicles.[4] Deputy Ellison testified that these observations, in combination with the facts described above and with the large amount of money that he found on Fernandez-Madrid while patting him down,[5] led him to believe that drugs had been hidden in a secret compartment in Fernandez-Madrid's truck. The video shows that Deputy Ellison asked Fernandez-Madrid if he would agree to go to a body shop to continue the search, and Fernandez-Madrid responded that he would. Deputy Ellison specifically asked Fernandez-Madrid if he would go voluntarily, and Fernandez-Madrid agreed that he would. Therefore, we conclude that the record supports the trial court's implicit finding that Fernandez-Madrid voluntarily consented to go to the body shop for the search to continue.

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[4] The video shows that, after Fernandez-Madrid got into his truck to drive to the body shop, Deputy Ellison told Trooper Venable that he had found evidence of hidden compartments.

[5] On appeal, Fernandez-Madrid has not challenged the legality of the pat-down search.

Fernandez-Madrid argues that, in any event, his alleged consent could not have been understood to extend to the disassembly of his vehicle. However, the video shows that, about a minute after Fernandez-Madrid's arrival at the body shop, a K-9 unit was led around the truck, and Deputy Ellison testified that the dog alerted to Fernandez-Madrid's vehicle. A sniff of the exterior of a vehicle by a trained drug-detection dog during a lawful traffic stop is not a search within the meaning of the Fourth Amendment. *See Illinois v. Caballes*, 543 U.S. 405, 409 (2005); *Branch v. State*, 335 S.W.3d 893, 900 (Tex. App.—Austin 2011, pet. ref'd). Further, it is well established that a positive alert on a vehicle by a trained drug-detection dog, standing alone, may provide officers with probable cause to search the vehicle without a warrant. *See Rivers v. State*, No. 03-11-00536-CR, 2013 WL 1787179, at *2 (Tex. App.—Austin Apr. 19, 2013, no pet.) (mem. op., not designated for publication); *Branch*, 335 S.W.3d at 901; *Parker v. State*, 297 S.W.3d 803, 812 (Tex. App.—Eastland 2009, pet. ref'd); *Haas*, 172 S.W.3d at 54; *see also Florida v. Harris*, 133 S. Ct. 1050, 1058 (2013) (concluding that police had probable cause to search defendant's truck when trained drug dog alerted). Of course, a defendant may always challenge a vehicle search for lack of probable cause based on the surrounding circumstances, and in doing so, challenge the reliability of the drug-detection dog. *See Harris*, 133 S. Ct. 1050, 1057–58 (noting that defendant must have opportunity to challenge evidence of drug-detection dog's reliability). But Fernandez-Madrid never challenged the qualifications of the dog or handler in this case.

Therefore, we conclude that the record supports the trial court's implicit finding that Fernandez-Madrid voluntarily consented to the initial roadside search, the search at the restaurant parking lot, and the relocation to the body shop. Once at the body shop, the open-air sniff was

conducted without delay, and the dog's alert gave the officers probable cause to disassemble the truck to search for hidden compartments (especially when considered in combination with the other evidence of illicit activity). Accordingly, we overrule Fernandez-Madrid's second point of error.

Invasive, Extended Detention

In his third point of error, Fernandez-Madrid contends that "by not employing a K-9 search earlier, Detective Ellison failed to use the least intrusive means available to verify or dispel his suspicion that Appellant was engaged in criminal activity," and that "the invasive, extended nature of his detention, absent probable cause, was unreasonable and a violation of his Fourth Amendment constitutional right of protection from unlawful search and seizure." However, as discussed above, we have determined that Deputy Ellison discovered facts during the initial traffic stop that gave him reasonable suspicion to continue the detention by asking Fernandez-Madrid whether there was contraband in the truck. *See Hoyt*, 2016 WL 4272104, at *2 (noting that prolonged detention is justified if officer develops reasonable suspicion). Brief questioning about contraband led to Fernandez-Madrid giving his consent for Deputy Ellison to search the vehicle. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) ("It is well established that a search is reasonable when the subject consents . . . ."). Fernandez-Madrid gave this consent about seven or eight minutes after Deputy Ellison initiated the traffic stop. Moreover, Fernandez-Madrid consented to each additional phase of the investigation (i.e., the move to the restaurant parking lot and the move to the body shop) up until the time of the open-air dog sniff, which occurred only about a minute after Fernandez-Madrid arrived at the body shop.

It was not until Deputy Ellison searched the vehicle at the restaurant that he discovered signs that the vehicle had been tampered with and might have hidden compartments. After making this discovery, the investigation was promptly moved to the body shop, where the dog sniff occurred without delay. Therefore, we cannot conclude that there was any unconstitutionally prolonged delay in carrying out the search that Fernandez-Madrid originally consented to and reaffirmed his consent to at each step in the investigation's development. Accordingly, we overrule Fernandez-Madrid's third point of error.

CONCLUSION

Having overruled each of Fernandez-Madrid's points of error, we hold that the trial court did not abuse its discretion in denying Fernandez-Madrid's motion to suppress. Accordingly, we affirm the trial court's judgment of conviction.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: March 1, 2017

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