TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00333-CR
NO. 03-17-00334-CR

The State of Texas, Appellant

v.

Brandom Garrett, Appellee

FROM COUNTY COURT AT LAW NO. 1 OF COMAL COUNTY
NOS. 2015CR1742 & 2015CR1738
HONORABLE CHARLES A. STEPHENS, II, JUDGE PRESIDING

ORDER AND MEMORANDUM OPINION

PER CURIAM

Following a traffic stop, Brandom Garrett was charged with unlawfully carrying a firearm and with unlawful possession of less than two ounces of marijuana. *See* Tex. Penal Code § 46.02 (setting out elements of offense of unlawfully carrying weapon); Tex. Health & Safety Code § 481.121 (governing offense of possession of marijuana). After his arrest, Garrett filed a motion to suppress evidence obtained as a result of the traffic stop, and the county court at law granted the motion. Subsequently, the State appealed the county court at law's ruling and requested findings of fact and conclusions of law. *See* Tex. Code Crim. Proc. art. 44.01(a)(5) (allowing State to appeal trial court order granting motion to suppress). In response, the county court at law issued several findings of fact and conclusions of law regarding whether the traffic stop was supported by

reasonable suspicion. Because the findings and conclusions are ambiguous and do not address each dispositive issue, we abate and remand this case to allow the county court at law to prepare supplemental findings and conclusions.

BACKGROUND

As set out above, Garrett moved to suppress evidence obtained during a traffic stop. The traffic stop was initiated by Officer Jason Nolan, and he was the only witness during the suppression hearing. During the hearing, Officer Nolan testified that he initiated the traffic stop because Garrett was speeding and because Garrett was driving in the left lane without passing. *See* Tex. Transp. Code §§ 545.351, 544.011. Regarding the offense of speeding, Officer Nolan testified that when he saw Garrett's white truck, "it appeared to be driving over the posted speed limit[]" and that he was able to make that determination based on his training and experience. More particularly, Officer Nolan commented that with his training, he "can generally" estimate a car's speed "within 5-miles per hour." In addition, Officer Nolan related that he used his radar unit to verify that Garrett was speeding and that the unit's display showed that Garrett was driving 75 miles per hour in an area in which the speed limit was 70 miles per hour.

Moreover, Officer Nolan explained that he has received specialized training regarding the use of a radar unit for determining whether vehicles are speeding and that he uses a radar unit on a "daily" basis. Furthermore, Officer Nolan related that at the start and at the end of each of his shifts, he tests the radar unit to see if it is working properly by performing an "internal circuit test" and by performing a tuning-fork test on the machine that helps determine whether the unit's results accurately reveal the speed of a moving object. Regarding the tuning-fork test, Officer Nolan

explained that the manufacturer sends two tuning forks with each unit—one for 25 miles per hour and one for 40 miles per hour—to be used when calibrating the machine and agreed that using two different readings when calibrating the unit helps increase the unit's accuracy. Further, Officer Nolan recalled that he tested the radar unit on the day in question and that it was functioning normally. Moreover, Officer Nolan testified that the unit operates under "a doppler princip[le]" in which the unit "emits a signal and a lightweight frequency" that "reflects off of an object back to the antenna and back to the counting unit." In addition, Officer Nolan explained that the unit sends out a cone that is used for measuring speed, that the cone gets larger the farther that it travels, that the radar unit can take "in a lot of speeds," and that it was his "job as an observer to determine which vehicle" was being measured. In addition, Officer Nolan testified that he has been a police officer for more than thirteen years, that he has made more than 200 traffic stops for speeding, and that he believed that the radar results obtained in those cases were all accurate.

Regarding the other alleged traffic offense, Officer Nolan explained that approximately three quarters of a mile from where his car was stationed, there was a sign informing drivers that the left lane could only be used for passing. Additionally, Officer Nolan related that the sign was placed in a position so that individuals driving in the direction that Garrett was driving could see the sign. Further, Officer Nolan initially stated that he was not sure if someone using the entrance ramp immediately before the location at which he saw Garrett would necessarily see the posted sign, but Officer Nolan later testified that someone using that entrance ramp should be able to see the sign. In addition, Officer Nolan testified that he observed Garrett driving in the left-hand lane, that Garrett continued to drive in the left-hand lane for approximately one and a half miles before pulling over to the side of the road in response to Officer Nolan activating his emergency

lights, that Garrett was not trying to pass another vehicle, that there was a vehicle in the middle lane that was 50 meters behind Garrett's truck when Officer Nolan first saw the truck, that Garrett could have safely moved into the middle lane, and that Garrett "was in the left lane by himself not passing."

At the hearing, an audio and video recording from Officer Nolan's dashboard camera was admitted into evidence and played for the county court at law. The recording shows Officer Nolan's patrol car on the side of the highway facing oncoming traffic. In addition, the recording shows a gap in traffic before a white truck appears. At the time that the truck appears, there is a vehicle in front of the truck in the far right lane, and there is a vehicle behind the truck in the middle lane that was several car lengths and several seconds behind the truck. The video depicts Officer Nolan catching up to the white truck after turning around. At that time, the white truck is still in the left lane, and there is a vehicle in the middle lane that is behind and close to the truck. Finally, the recording captures Officer Nolan initiating the traffic stop.

After considering the testimony and listening to the arguments by the parties, the county court at law granted the motion to suppress. Following that ruling, the State filed a request for findings of fact and conclusions of law. In addition, the State timely filed a notice of appeal but also requested that this Court abate and remand the case in order to allow the county court at law to issue findings of fact and conclusions of law supporting its suppression ruling. Consistent with that request, this Court remanded the case "to the trial court so that the trial court can state its 'essential' findings of fact and conclusions of law on the motion to suppress, as the trial court is required to do when requested by the losing party." *See State v. Garrett*, Nos. 03-17-00333—00334-CR, 2017 WL 3044379, at *1 (Tex. App.—Austin July 14, 2017, order) (mem. op., not designated for publication).

Once the case was remanded, the county court at law issued the following findings of fact and conclusions of law:

Findings of Fact

1. Trooper Nolan's [t]estimony at the suppression hearing was not credible, and it was not supported by the Trooper's in-car video. (State's Exhibit 5).

2. The Trooper's testimony regarding whether [Garrett] had seen the traffic control device was not credible, and was speculative at best.

3. Additionally, based upon the video (State's Exhibit 5) and traffic at the time, [Garrett]'s vehicle did not appear to be travel[]ing at a higher rate of speed than other traffic which passed the Trooper's position.

4. General traffic conditions at the time were moderate to heavy.

5. Trooper Nolan's testimony that his first observation of [Garrett]'s vehicle driving over the posted speed limit of 70 miles per hour was not credible in light of the video evidence presented. [Garrett]'s vehicle did not appear to be travel[]ing any faster or slower than any other vehicle travel[]ing in any lane, including the "passing lane" prior to [Garrett]'s vehicle. (State's Exhibit 5).

6. Trooper Nolan's testimony that [Garrett] was speeding was not credible as Trooper Nolan admitted that "I noticed that it appeared to be driving over the posted speed limit[]. Generally in that location most people are." (P.15, L.1-3).

7. [Garrett] was not traveling at a "high rate of speed."

8. When [Garrett]'s vehicle first comes into view on the video, it appears that [his] vehicle is passing another vehicle travel[]ing in the center lane, and continues to do so throughout the potion of the video prior to the Trooper turning onto the highway.

9. The Trooper did testify that the radar emits a cone, but did not testify that there was no possibility that the radar picked up the speed of another vehicle, and there were other vehicles in the area at the same time.

10. State's Exhibit 5—a copy of Trooper Nolan's dash-cam video—was admitted into evidence at the hearing, and it was a fair and accurate depiction of the events recorded (State's Ex. 5).

Additionally, the Court makes the following Conclusions of Law:

Conclusions of Law

1. When viewing the video, the officer did not have reasonable suspicion to make the stop because [Garrett]'s vehicle had been passing another vehicle and does not appear to be speeding.

2. There was no reasonable suspicion that [Garrett] had notice of the traffic control device.

3. The officer could not have reasonably believed that a violation was in progress. *Marrero v. State*, 03-14-00033-CR, 2016 WL 240908, at *3 (Tex. App.—Austin Jan. 14, 2016, no pet.) (not designated for publication).

4. There was not an objective justification for the detention. *Kirkland v. State*, 400 S.W.3d 625, 629 (Tex. App.—Beaumont 2013, pet. ref'd).

5. Although the underlying scientific principles of radar are indisputable and valid as a matter of law, the manner in which the instrument was used is not.

6. Trooper Nolan's belief that the "left lane for passing only" prohibition did not allow for travel[]ing in the far left lane to pass a vehicle in the far right lane was not reasonable.

7. Regarding the radar, the State failed to establish that the Trooper applied a valid technique and that it was correctly applied on the particular occasion in question. Maysonet v. State, 91 S.W.3d 365, 371 (Tex. App.—Texarkana 2002, pet. ref'd).

8. The issue is not the one of selective enforcement, but the totality of the circumstances, and when looking at the totality of the circumstances, Trooper Nolan did not have reasonable suspicion to make the stop.

DISCUSSION

As set out above, Officer Nolan explained that he initiated the traffic stop after allegedly observing Garrett driving over the speed limit and driving in the left lane without passing. Under the Transportation Code, an individual commits a traffic offense if he drives "at a speed

greater than is reasonable and prudent under the circumstances then existing." Tex. Transp. Code § 545.351(a). In addition, the Code provides that "[a] speed in excess of . . . 70 miles per hour on a highway numbered by this state or the United States" "is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful." *Id.* § 545.352(a)-(b). Furthermore, if an officer has reasonable suspicion to believe that an individual is speeding, the officer may "initiate a valid traffic stop." *Simmons v. State*, 100 S.W.3d 484, 490 (Tex. App.—Texarkana 2003, pet. ref'd).

In addition, the Transportation Code specifies that "[t]he operator of a vehicle or streetcar shall comply with an applicable official traffic-control device placed as provided by this subtitle," Tex. Transp. Code § 544.004(a), and that a lawfully placed sign is an "'[o]fficial traffic-control device,'" *id.* § 541.304(1). Moreover, the Transportation Code provides that the Texas Department of Transportation or another authority may place "a sign that directs slower traffic to travel in a lane other than the farthest left lane" "on a highway having more than one lane with vehicles traveling in the same direction." *Id.* § 544.011. "A violation of section 544.011 is a misdemeanor offense punishable by a fine of not less than $1 or more than $200." *Rogers v. State*, No. 05-09-00862-CR, 2010 WL 2598978, at *2 (Tex. App.—Dallas June 30, 2010, no pet.) (not designated for publication) (citing Tex. Transp. Code §§ 542.301, .401). Furthermore, courts have explained that if an officer has reasonable suspicion to believe that an individual is not driving in compliance with a sign directing motorists that the left lane is for passing only, then the officer may initiate a traffic stop of that individual. *See Green v. State*, 93 S.W.3d 541, 546 (Tex. App.—Texarkana 2002, pet. ref'd); *see also Rogers*, 2010 WL 2598978, at *3 (providing that officer had "probable cause to stop and detain" defendant for failing to comply with section 544.011).

When makings its ruling, the county court at law determined that Officer Nolan did not have reasonable suspicion to believe that Garrett committed either offense. *See Guerra v. State*, 432 S.W.3d 905, 911 (Tex. Crim. App. 2014) (providing that officer may initiate traffic stop if he has reasonable suspicion that crime is about to be committed or has been committed). In order for reasonable suspicion to exist, an actual violation does not need to have occurred; rather, it is only necessary that "the officer reasonably believed a violation was in progress." *Green*, 93 S.W.3d at 545. In other words, "for a peace officer to stop a motorist to investigate a traffic infraction, . . . 'proof of the actual commission of the offense is not a requisite.'" *Leming v. State*, 493 S.W.3d 552, 561 (Tex. Crim. App. 2016) (quoting *Drago v. State*, 553 S.W.2d 375, 377 (Tex. Crim. App. 1977)); *see Carmouche v. State*, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000) (noting that officer may briefly detain person for investigative purposes on less than probable cause where specific and articulable facts along with inferences from those facts reasonably warrant detention). Rather, reasonable suspicion "requires only 'some minimal level of objective justification' for the stop." *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012) (quoting *Foster v. State*, 326 S.W.3d 609, 614 (Tex. Crim. App. 2010)). Accordingly, "[a]t a suppression hearing, the State need not establish that a crime occurred prior to the investigatory stop." *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011).

"In assessing whether the intrusion was reasonable, an objective standard is utilized: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate." *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997); *see also Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App.

2001) (explaining that "[t]his standard is an objective one: there need only be an objective basis for the stop; the subjective intent of the officer conducting the stop is irrelevant"). Moreover, the assessment is made in light of the totality of the circumstances. *Woods v. State*, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997). "A suppression ruling includes two types of trial-judge rulings; historical factual findings, often based on credibility determinations (subject to abuse-of-discretion review), and ultimate legal rulings that determine whether reasonable suspicion or probable cause existed (subject to *de novo* review)." *State v. Mendoza*, 365 S.W.3d 666, 669 (Tex. Crim. App. 2012) (internal footnote omitted). "Occasionally, the trial judge may make explicit findings that she considers sufficient and dispositive of the historical facts, but the appellate court determines that those findings are either ambiguous or insufficient to resolve the legal issue." *Id.* at 670. If a trial court's findings are ambiguous regarding whether it believed a witness's testimony, the trial court should be given the opportunity "to clarify [its] factual findings and make an explicit credibility determination." *Id.* at 673.

In this case, the county court at law stated that Officer Nolan's testimony was not credible, but that assessment was included in the sentence referencing the recording from Officer Nolan's patrol car. Accordingly, the statement could be a global statement that none of Officer Nolan's testimony was credible or could have been in reference to the portions of Officer Nolan's testimony that described events depicted on the recording. Because the recording does not indicate whether Officer Nolan used a radar unit to measure Garrett's speed or whether the unit indicated that Garrett was speeding, it is not entirely clear that the county court at law made a credibility determination regarding Officer's Nolan's testimony addressing his use of a radar unit,

addressing the steps he took to ensure a valid result, and addressing whether the unit indicated that Garrett was speeding.

Moreover, the conclusions that the county court at law did make regarding the radar unit seem to presuppose that Officer Nolan did in fact use a radar unit and that the unit revealed that Garrett's speed was in excess of the legal limit. *See Warren v. State*, No. 05-08-01431-CR, 2009 WL 3467013, at *2, *4 (Tex. App.—Dallas Oct. 29, 2009, no pet.) (not designated for publication) (noting that radar results showing that defendant was driving five miles over speed limit "constituted prima facie evidence that the speed of appellant's vehicle was unsafe and imprudent, thus giving [officer] reasonable suspicion to believe appellant was violating the speeding statute"); *Chavez v. State*, No. 08-05-00371-CR, 2006 WL 2516974, at *2 (Tex. App.—El Paso Aug. 31, 2006, pet. ref'd) (not designated for publication) (concluding that officer "had articulable facts that [defendant] had committed a traffic violation" when "radar unit indicated [defendant] was driving sixty-two miles per hour in a forty-five mile per hour zone"); *Perales v. State*, 117 S.W.3d 434, 438 (Tex. App.—Corpus Christi 2003, pet. ref'd) (deciding that reasonable suspicion or probable cause justified traffic stop where officer testified that car appeared to be speeding and "that radar confirmed appellant was traveling at sixty-nine miles-per-hour" in portion of highway with "sixty miles-per-hour speed limit"); *Maysonet*, 91 S.W.3d at 372 (determining that reasonable suspicion was present where "radar reading provided" officer "with a factual basis to determine that" defendant "was speeding"); *Elliott v. State*, No. 03-00-00676-CR, 2001 WL 1231904, at *2 (Tex. App.—Austin Oct. 11, 2001, no pet.) (not designated for publication) (determining that officer had reasonable suspicion to initiate traffic stop, in part, because officer used radar to determine speed at which vehicle was being driven).

Furthermore, although the county court at law concluded that "the State failed to establish that" Officer Nolan "applied a valid technique" when ostensibly using the radar unit and that the technique "was correctly applied on the particular occasion in question," the county court at law made no historical findings supporting those conclusions. *See Chavez*, 2006 WL 2516974, at *2 (observing that "even if the radar reading is ultimately shown to be inaccurate or false at the time of the stop," officer can still have "developed a reasonable suspicion [that an individual] was speeding"); *see also Simpson v. State*, No. 07-07-00310-CR, 2008 WL 4367960, at *2, *3 (Tex. App.—Amarillo Sept. 25, 2008, no pet.) (mem. op., not designated for publication) (noting that "an officer's testimony that he had been both trained to operate a radar and test for its accuracy is a sufficient predicate to support admission of radar evidence" and determining that reasonable suspicion existed where officer testified that radar showed that defendant was traveling fourteen "miles per hour over the posted speed limit," that officer had been trained to use radar, and that officer calibrated radar "for accuracy at the beginning of his shift"); *Mills v. State*, 99 S.W.3d 200, 202-03 (Tex. App.—Fort Worth 2002, pet. ref'd) (determining that second and third prongs regarding admissibility of scientific evidence were satisfied by testimony pertaining to use of radar where officer testified that he received training on use of radar, that he used radar unit "[s]everal times," that radar unit sends out waves to estimate speed of objects, that radar unit was working properly at time in question, that officer calibrated unit at beginning of each shift using tuning forks, and that officer calibrated unit more than once during his shift). *But see Ochoa v. State*, 994 S.W.2d 283, 285 (Tex. App.—El Paso 1999, no pet.) (concluding that testimony that officer had "been certified to use hand-held radar," that he "calibrated and tested his radar instrument on the

day" in question, and that radar units "detect speed by emitting a microwave" that "returns to the gun" was insufficient to be admitted where officer could not "explain the calculation the gun makes" or "the theory underlying the calculation").

Moreover, as discussed earlier, the county court at law's credibility determination regarding Officer Nolan made in its first finding seems to have been linked to what was depicted on the recording, and nothing on the recording pertains to the existence of a sign instructing motorists to only use the left lane for passing or to the location of that sign. Additionally, when the county court at law described in its findings as "not credible" Officer Nolan's testimony regarding whether Garrett saw a traffic sign instructing drivers that the left lane was for passing only, it did not specify whether it disbelieved Officer Nolan's testimony regarding the presence of a sign and regarding whether the sign was located where Officer Nolan described. *See Rogers*, 2010 WL 2598978, at *3 (determining that testimony from officer that "the section of the highway on which [defendant] was stopped had clearly posted signs indicating the left lane was for passing only"; that officer observed defendant "driving in the left lane for approximately five miles, even when he was not passing other vehicles"; and that defendant "had an opportunity to move back into the right lane" was sufficient to establish reasonable suspicion that defendant "had violated the traffic law"); *Mouton v. State*, 101 S.W.3d 686, 689 (Tex. App.—Texarkana 2003, no pet.) (concluding that testimony from police officer that officer "followed [defendant] for at least a mile before stopping him for traveling in the left lane while not passing" and that "there are signs reading 'left lane for passing only' a few miles before the location where he stopped" defendant "would establish" that defendant "violated Article 544.011 of the Texas Transportation Code, thereby providing" police officer "specific, articulable facts that would reasonably lead [police officer] to believe [defendant] had violated the traffic law").

Furthermore, the county court at law made no determination regarding whether the sign would be visible to someone driving on the highway or entering the highway through the entrance ramp that was closest to Officer Nolan's patrol car. Moreover, although the county court at law found that Garrett "appear[ed]" to be passing another car in the middle lane, the county court made no determination regarding the distance between Garrett's vehicle and the car in the middle lane, regarding whether Garrett could have safely changed lanes, and regarding the distance that Garrett drove in the far left lane.[1]

In light of the preceding, we abate and remand this case to the county court at law to allow it the opportunity to make "additional, specific findings of fact with respect to" the dispositive issues in this case pertaining to whether Officer Nolan had reasonable suspicion to believe that Garrett had committed the traffic offense of speeding based on the results of the radar unit or the offense of driving in the left lane without passing. *See State v. Elias*, 339 S.W.3d 667, 676 (Tex. Crim. App. 2011); *see also State v. Adams*, 454 S.W.3d 38, 47 (Tex. App.—San Antonio 2014, no pet.) (concluding that trial court's findings and conclusions fell "short of" addressing every potentially dispositive issue, that appellate court could not determine whether legal conclusions "were in error"

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[1] Although we need not decide the matter at this preliminary stage, we note in light of the fact that this case is being remanded that some of the county court at law's determinations would seem to be inconsistent with the reasonable-suspicion standard. For example, the county court at law found that reasonable suspicion was not present, in part, because Officer Nolan "did not testify that there was *no possibility* that the radar picked up the speed of another vehicle." (Emphasis added). Reasonable suspicion does not require certitude that an offense occurred and instead only requires that the investigating officer reasonably believe that "a violation was in progress." *See Green v. State*, 93 S.W.3d 541, 545 (Tex. App.—Texarkana 2002, pet. ref'd); *see also Warren v. State*, No. 05-08-01431-CR, 2009 WL 3467013, at *3 (Tex. App.—Dallas Oct. 29, 2009, no pet.) (not designated for publication) (noting that State was not "required to prove beyond a reasonable doubt that appellant was speeding in order to show [officer] had reasonable suspicion to stop appellant's vehicle").

without further findings, and that requested "findings constitute essential findings and are necessary" to resolve appeal). These additional findings should include credibility determinations regarding Officer Nolan's testimony concerning his use and care of the radar unit, concerning the results obtained from the radar unit, concerning the speed limit on the road at issue, and concerning the existence and location of a traffic sign instructing motorists to use the left lane for passing purposes only. On remand, the county court at law should feel free to revisit its suppression ruling if it decides when making the supplemental determinations that reasonable suspicion was present when Officer Nolan initiated the traffic stop. A supplemental clerk's record containing the county court at law's new findings of fact and conclusions of law is ordered to be filed with this Court by July 10, 2018. This appeal will be reinstated after the supplemental clerk's record is filed.

It is so ordered June 7, 2018.

Before Justices Puryear, Pemberton, and Bourland

Abated and Remanded

Filed: June 7, 2018

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