NUMBER 13-15-00146-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

CESARIO RAMON JR., Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 112th District Court of Sutton County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Garza, and Longoria
Memorandum Opinion by Justice Rodriguez

Appellant Cesario Ramon Jr. was convicted of possession of methamphetamine in an amount of one gram or more but less than four grams, a felony of the third degree. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(c) (West, Westlaw through 2015 R.S.). The drugs were hidden under the step of Ramon's truck and were discovered during a traffic stop. Ramon pleaded guilty and was sentenced to three years' imprisonment, but

reserved his right to appeal the denial of his motion to suppress the methamphetamine, which we review here. By his first two issues, Ramon contends that the investigating officer, Dustin Henderson: (1) acted without—or beyond the scope of—reasonable suspicion in his investigatory detention; and (2) was without probable cause in arresting Ramon because Henderson mistakenly and unreasonably believed that Ramon was a felon in possession of a firearm. By his third issue, Ramon argues that the trial court erred in denying his motion to suppress. We affirm.[1]

I. BACKGROUND

Officer Henderson stopped Ramon's truck for failing to have his license plate illuminated and visible at a distance of fifty feet. *See* TEX. TRANSP. CODE ANN. § 547.322(f) (West, Westlaw through 2015 R.S.). Prior to his time in the police department, Henderson had served as Ramon's probation officer, though it is not clear that the men recognized their prior connection during the encounter. Henderson had been a police officer for twelve months at the time.

When Henderson stopped Ramon, Henderson approached Ramon's vehicle and stuck his head into the open window. A dashboard camera captured the traffic stop on video. Within the first two minutes of the stop—twenty seconds into their conversation—Ramon volunteered that he was on probation and that he was anxious to go meet his probation officer for a curfew check. Henderson asked Ramon to step out and stand behind the vehicle, where the two men briefly discussed the license plate lighting. Upon

[1] This case is before the Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.). Because this is a transfer case, we apply the precedent of the San Antonio Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

inspecting the vehicle, Henderson discovered that the license plate lighting was, in fact, working. From that point forward, Henderson did not ask any questions pertaining to the traffic violation. Henderson asked about Ramon's probation, which Ramon explained was for possession of methamphetamine. In response to Henderson's questioning, Ramon admitted he had a .22 rifle in the truck and gave Henderson permission to retrieve it. Henderson frisked Ramon, removed items from his pockets, searched his hat for needles and razor blades, and then retrieved the rifle from the truck. Henderson testified that Ramon appeared to be very nervous, with his hands shaking.

Henderson then went to check Ramon's driver's license data and criminal history and to confirm that the rifle was not stolen or involved in any crimes. The history of the rifle came back clean. Ramon's criminal history showed a guilty plea for possession of a controlled substance, which resulted in a "probated" sentence of five years. However, the history noted "Disposition: Deferred." Ramon told officers at the scene that he had deferred adjudication status—a form of probation or community supervision. *See*, *e.g.*, *Ex parte Spicuzza*, 903 S.W.2d 381, 385 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) ("[T]he Texas Legislature recently replaced references to 'probation' in the Code of Criminal Procedure with the term 'community supervision.'"). Ramon told officers that as a result of his deferred status, his probation officer had told him he had a right to carry the gun. On the dash-cam video, DPS Dispatch in Ozona, Texas could be heard discussing Ramon's "deferred probation" with Henderson. Likewise, one of the officers at the scene can be heard explaining deferred status to Henderson, though not confirming that Ramon did in fact have deferred status. Ramon's probation officer arrived on the scene, but told

Henderson that she could not remember whether Ramon had deferred status.

After these conversations, Henderson still appeared to be uncertain regarding Ramon's status. He called an assistant district attorney. Based on his discussion with the district attorney, Henderson soon concluded that Ramon had initially been placed on deferred adjudication, but was then later adjudicated and convicted. Henderson concluded that Ramon was thus a convicted felon in possession of a firearm. However, Ramon did in fact have deferred adjudication-probation status and had not been convicted. *See State v. Juvrud*, 187 S.W.3d 492, 495 (Tex. Crim. App. 2006) (holding that under deferred adjudication, "the initial grant of community supervision is not deemed a conviction" for general purposes); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5 (West, Westlaw through 2015 R.S.). Ramon was thus entitled to carry a firearm because he was not a convicted felon within the meaning of the Texas Penal Code's prohibition of a felon in possession of a firearm. *See* TEX. PENAL CODE ANN. § 46.04(a) (West, Westlaw through 2015 R.S.); *Cuellar v. State*, 70 S.W.3d 815, 820 (Tex. Crim. App. 2002).

Based on his mistaken conclusion that Ramon was a convicted felon in possession, Henderson approached Ramon to ask for permission to search the truck approximately twenty minutes into the stop. Henderson testified that he considered Ramon to be under arrest at this point and believed that he had probable cause to arrest Ramon, but had not told Ramon he was under arrest. He asked Ramon if he could search the vehicle, and Ramon responded, "Go ahead." After clarifying and confirming Ramon's consent, Henderson asked another officer to handcuff Ramon. Henderson then commenced the search.

During the search, an officer discovered a chewing tobacco can attached, using magnets, to the bottom of the truck's driver-side step. Inside the can were multiple crystals of methamphetamine. The officers arrested Ramon for possession of a controlled substance and felon in possession of a firearm. However, the felon-in-possession charge was dropped because Ramon was not then a convicted felon.

Before trial, Ramon moved to suppress the methamphetamine. He contended that this evidence was the product of an illegal search. At the suppression hearing, the trial court heard testimony from Ramon, Henderson, and Ramon's probation officer. The trial court also reviewed the dash-cam video of the incident. Following the hearing, the trial court denied the motion to suppress and entered findings of fact and conclusions of law. Ramon conditionally pleaded guilty, subject to an appeal of the denial of his motion to suppress, which we now consider.

II. STANDARD OF REVIEW

We review a trial court's denial of a motion to suppress under a bifurcated standard of review. *Valtierra v. State,* 310 S.W.3d 442, 447–48 (Tex. Crim. App. 2010). We review the trial court's factual findings for an abuse of discretion. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We review de novo those mixed questions of law and fact that do not depend upon credibility and demeanor. *Gonzales v. State*, 369 S.W.3d 851, 854 (Tex. Crim. App. 2012); *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). Likewise, we review purely legal questions de novo. *Turrubiate*, 399 S.W.3d at 150; *Gonzales*, 369 S.W.3d at 854.

Thus, in deciding whether Ramon's continued detention was "reasonable" under

the specific circumstances, we view the trial court's factual findings in the light most favorable to his ruling, but we decide the issue of "reasonableness" de novo as a question of Fourth Amendment law under Supreme Court precedent. *Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004); *see State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). We will 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. *Turrubiate*, 399 S.W.3d at 150.

III. REASONABLE SUSPICION

Following its suppression ruling, the trial court entered findings of fact that "the rear license plate of defendant's vehicle was not properly illuminated" from a distance of fifty feet. Ramon does not dispute the trial court's conclusion that Henderson was thereby justified in making the initial traffic stop. *See* TEX. TRANSP. CODE ANN. § 547.322(f).

Instead, by his first issue, Ramon complains that Henderson immediately abandoned any investigation of the traffic stop and began a general investigation, without reasonable suspicion, as to whether Ramon was involved in any other form of criminal activity. We follow a two-prong process with regard to reasonable suspicion under *Terry v. Ohio*. 392 U.S. 1, 21–22 (1968); *see Kothe*, 152 S.W.3d at 63. We first ask whether the officer's action was justified by reasonable suspicion at its inception. *Kothe*, 152 S.W.3d at 63. We next ask whether the officer's actions were reasonably related in scope to the basis of reasonable suspicion. *See id.* As we understand Ramon's first issue, he contests Henderson's actions under both prongs of *Terry*. He contends that Henderson's decision to abandon the traffic stop and conduct a generalized investigation

violated the second prong of *Terry* because it was not reasonably related in scope to any reasonable suspicion from the rear-light violation. Ramon also contends that, by the time Henderson began his generalized investigation, any reasonable suspicion from the rear-light violation had ended. Ramon argues that Henderson thus violated the first prong of *Terry* because his actions were not justified by any *new* reasonable suspicion of a different crime other than a rear-light violation.

By his second issue, Ramon complains of Henderson's mistaken belief that Ramon was a convicted felon in possession of a firearm. This mistaken belief led Henderson to extend the traffic stop, arrest Ramon, and ask Ramon for permission to search the vehicle. Ramon argues that Henderson's mistake was not a reasonable one and that the actions taken based on that belief were therefore illegal.

A. Applicable Law

The Fourth Amendment requires a warrantless detention to be justified by reasonable suspicion. *Derichsweiler v. State*, 348 S.W.3d 906, 914–15 (Tex. Crim. App. 2011). A police officer has reasonable suspicion if he can point to specific, articulable facts that, when combined with rational inferences from those facts, would lead him reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity. *Id.* (citing *United States v. Sokolow,* 490 U.S. 1, 7 (1989)). 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. *Id.*; *see Terry*, 392 U.S. at 21–22.

A detention may last no longer than is necessary to effectuate the purpose of the

stop. *Florida v. Royer*, 460 U.S. 491, 499 (1983); *see Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997). "The propriety of the stop's duration is judged by assessing whether the police diligently pursued a means of investigation that was likely to dispel or confirm their suspicions quickly." *Davis*, 947 S.W.2d at 245; *see also Laney v. State*, 117 S.W.3d 854, 858 (Tex. Crim. App. 2003) (quoting *Terry*, 392 U.S. at 25–26) ("[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'"). Reasonable suspicion is not a carte blanche for a prolonged detention and investigation. *Matthews v. State*, 431 S.W.3d 596, 603 (Tex. Crim. App. 2014). An officer must act to confirm or dispel his suspicions quickly. *Id.* But the temporary detention may continue for a reasonable period of time until the officers have confirmed or dispelled their original suspicion of criminal activity. *Id.*

During a stop for a traffic violation, officers may request identification, proof of insurance, and vehicle registration; check on outstanding warrants; verify that the vehicle is not stolen; and ask about the driver's destination and the trip's purpose. *See Kothe,* 152 S.W.3d at 63; *Estrada v. State*, 30 S.W.3d 599, 603 (Tex. App.—Austin 2000, pet. ref'd); *Mohmed v. State*, 977 S.W.2d 624, 628 (Tex. App.—Fort Worth 1998, pet. ref'd). To permit these inquiries to be made with greater safety, a police officer may ask the driver of the stopped car to step out of the vehicle and onto the side of the road. *Estrada*, 30 S.W.3d at 603.

When the reason for the stop has been satisfied, the stop may not be used as a "fishing expedition for unrelated criminal activity." *Davis*, 947 S.W.2d at 242–43 (quoting *Ohio v. Robinette*, 519 U.S. 33, 41 (1996) (Ginsberg, J., concurring)). Nevertheless, if

during the course of a valid investigative detention, the officer develops a reasonable suspicion that the detainee was engaged in or soon would engage in unrelated criminal activity, a continued detention is justified. *Graves v. State*, 307 S.W.3d 483, 490 (Tex. App.—Texarkana 2010, pet. ref'd); *see Freeman v. State*, 62 S.W.3d 883, 888 (Tex. App.—Texarkana 2001, pet. ref'd).

B. Analysis

Here, Henderson apparently abandoned his initial inquiry into the traffic violation within minutes of the stop. After a few preliminary questions, he did not request Ramon's insurance information or ask any further questions germane to a traffic offense. However, by the time Henderson concluded this preliminary inquiry, he had learned that Ramon was on probation and in possession of a firearm. When "examining the totality of the circumstances" for articulable facts that support reasonable suspicion, a detainee's probation status is itself "a salient circumstance." *See United States v. Knights*, 534 U.S. 112, 118 (2001). Moreover, in an analogous case where a probationer admitted to his probation officer that he had a "machine gun in his backpack," the San Antonio Court of Appeals found that this "was sufficient to provide reasonable suspicion." *See Townes v. State*, 293 S.W.3d 227, 231 (Tex. App.—San Antonio 2009, no pet.). Finally, the trial court here found that Ramon was extremely nervous, to the point that Henderson believed Ramon may be having medical problems. This finding is supported by Henderson's testimony that Ramon was "shaking tremendously." While nervousness is not sufficient to establish reasonable suspicion on its own, it is at least slightly probative in the *Terry* calculus. *See Wade v. State*, 422 S.W.3d 661, 670–71 (Tex. Crim. App. 2013).

Considering the totality of the circumstances—including Ramon's probation status, possession of a firearm, and nervousness—we conclude an officer in Henderson's position could have extended the traffic stop based on a reasonable suspicion that Ramon was committing the offense of a felon in possession of a firearm. *See* TEX. PENAL CODE ANN. § 46.04; *Graves*, 307 S.W.3d at 490; *Freeman*, 62 S.W.3d at 888.

Ramon objects to Henderson's questions regarding his probation and whether he had possession of weapons or narcotics. However, Henderson asked these questions in response to information that Ramon himself had volunteered in the early moments of the exchange. An officer is entitled to rely on all of the information obtained during the course of his contact with the citizen in developing the articulable facts which would justify a continued investigatory detention. *Mohmed*, 977 S.W.2d at 628.

Ramon next contends that the trial court erred in denying suppression because Henderson's decision to arrest Ramon and seek consent to search his vehicle was motivated by an erroneous conclusion: that Ramon was committing the offense of a felon in possession of a firearm. *See* TEX. PENAL CODE ANN. § 46.04. It is true that Ramon was on deferred adjudication status at the time of his arrest. Under deferred adjudication, "the initial grant of community supervision is not deemed a conviction" for general purposes. *Juvrud*, 187 S.W.3d at 495; *see also Yazdchi v. State*, 428 S.W.3d 831, 838 (Tex. Crim. App. 2014). The statute which prohibits a felon's possession of a firearm, penal code section 46.04(a), "requires a felony conviction as an element of the offense." *Cuellar*, 70 S.W.3d at 820; *see* TEX. PENAL CODE ANN. § 46.04. Here, Ramon had no predicate felony conviction to trigger the offense of a felon in possession. Thus,

we agree that Henderson was mistaken in arresting Ramon based on suspicion of this offense.

But an officer's justification to investigate is not necessarily destroyed because the officer is acting based on a mistaken view of the situation, so long as the mistake is reasonable. "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading to their conclusions of probability." *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990).

Here, there is ample evidence from which to conclude that Henderson's mistake of fact was a reasonable one. The trial court, as the ultimate judge of credibility, entered several factual findings pertinent to this question:

> 9. Trooper Henderson testified that he returned to his marked patrol vehicle to conduct a routine computer check of defendant's driver's license, criminal history background and to confirm the rifle was not stolen.
>
> 10. Trooper Henderson testified that the criminal history report was confusing. The report indicated that defendant was on a deferred adjudication status; however, it also indicated that defendant had been sentenced to five years incarceration, probated for five years. . . .
>
> 11. Trooper Henderson attempted to confirm the status of defendant's conviction by talking with defendant's current probation officer, Wendy Archibeque, who had arrived at the scene of the traffic stop. Mrs. Archibeque was unable to recall if defendant was on an adjudicated probation or deferred adjudication. Henderson advised that he then called an assistant district attorney for the 112th district and explained the criminal history report. Henderson testified that the assistant district attorney, although not familiar with this defendant, agreed with the trooper that the specific information included in the report stating that defendant was sentenced to five years in prison, probated for five years indicated that the defendant had been convicted of the offense. A copy of the conflicting entries from the criminal history print-out was

admitted into evidence without objection.

12. Trooper Henderson testified that he returned to the defendant and noticed that defendant was sweating profusely. Trooper Henderson stated that he had determined that he would arrest defendant for being a felon in possession of a firearm, but did not inform defendant of that decision before asking the defendant for permission to search his vehicle. Henderson testified that the defendant gave him consent to search his truck.

Based on these findings of historical fact, which are supported by the record and which we review with great deference, *see Turrubiate*, 399 S.W.3d at 150, we cannot conclude that Henderson's mistake of fact was unreasonable. According to the trial court, Henderson faced genuine uncertainty after examining Ramon's criminal history during the process of an ongoing investigation. He tried to verify Ramon's status as a felon by consulting his local dispatch, his fellow officers, and even Ramon's own probation officer—to no avail. Henderson next contacted a district attorney and relied in good faith on the district attorney's interpretation, which was only later revealed to be erroneous. *Cf. Corea v. State*, 52 S.W.3d 311, 317 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (finding error where law enforcement failed to "inquir[e] into ambiguous circumstances" affecting the validity of a search before it was conducted). Henderson then sought and obtained Ramon's consent to perform the search, believing that he had probable cause to arrest Ramon as a felon in possession. He was

> quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

See Hill v. California, 401 U.S. 797, 803–04 (1971). We conclude that neither the

detention nor the search to which it led were illegal under the measure of the Fourth Amendment. We overrule Ramon's first two issues.

IV. SUPPRESSION

By his third issue, Ramon contends that various physical evidence must also be suppressed as the fruit of the poisonous tree. However, the predicate for this exclusionary argument is a poisonous tree: illegal police action. *See Mazuca v. State*, 375 S.W.3d 294, 306 (Tex. Crim. App. 2012). Having concluded that the search in this case was not illegal, we need not consider Ramon's exclusion argument. *See* TEX. R. APP. P. 47.1. Ramon's third issue is overruled.

V. CONCLUSION

We affirm the trial court's denial of Ramon's motion to suppress.

NELDA V. RODRIGUEZ
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
16th day of June, 2016.