NUMBER 13-15-00417-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ERNESTO LERMA, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION ON REHEARING

Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion on Rehearing by Justice Garza

We issued our original memorandum opinion in this case on September 1, 2016. Appellee, the State of Texas, has filed a motion for rehearing. *See* TEX. R. APP. P. 49.1. We deny the motion for rehearing but withdraw our prior memorandum opinion and

judgment and substitute the following memorandum opinion and accompanying judgment in their place.

Appellant Ernesto Lerma pleaded guilty to possession of four grams or more but less than 200 grams of cocaine, a second-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a), (d) (West, Westlaw through 2015 R.S.). Prior to the plea, the trial court denied a motion to suppress evidence obtained as a result of a traffic stop. By one issue on appeal, Lerma contends the trial court erred in doing so. We reverse and remand.

I. BACKGROUND

The only witness to testify at the suppression hearing was police officer Javier Salinas Jr. Salinas stated that he became a certified police officer on August 9, 2013. On the evening of November 2, 2014, Salinas was patrolling in Corpus Christi when he pulled over a vehicle because the driver had failed to stop behind the stop line at a red light and had failed to use his turn signal at least 100 feet prior to the intersection. *See* TEX. TRANSP. CODE ANN. § 545.104(b) (West, Westlaw through 2015 R.S.) ("An operator intending to turn a vehicle right or left shall signal continuously for not less than the last 100 feet of movement of the vehicle before the turn."); *id*. § 554.007(d) (West, Westlaw through 2015 R.S.) ("An operator of a vehicle facing only a steady red signal shall stop at a clearly marked stop line.").

A video recording of the traffic stop was entered into evidence and played for the trial court. The recording shows that the vehicle, which appeared to be travelling at a normal rate of speed, had its turn signal activated approximately ten seconds prior to stopping for a red light. When the vehicle stopped, the front wheels were beyond the stop line but the rear wheels were behind the stop line. The vehicle stopped for approximately

four seconds and then turned right. Salinas pulled the vehicle over and asked the driver for his license and insurance information, whether there were any weapons in the car, where the occupants of the car were headed, and where they were coming from. He then asked Lerma, who was seated in the front passenger's seat, whether he had any identification. Lerma replied that he did not have any identification on him.

Salinas then moved to the passenger's side of the car and asked again if Lerma had any identification. At that point, the driver reached over Lerma to hand the officer his license and insurance information. Salinas briefly examined the insurance papers and returned them to the driver; however, Salinas retained the license so that he could later determine whether the driver had any outstanding warrants. Salinas then asked Lerma to step out of the vehicle. Lerma hesitated, and Salinas asked, "Is there a reason you don't want to come out or something?" Lerma then exited the car. Lerma stated that he had a pocket knife, and he gave it to the officer, who then placed it on the front passenger seat. Lerma then placed his hands on the car's roof as directed by Salinas, and Salinas patted him down. It appears from the video that Salinas found something in Lerma's pocket; he then asked Lerma "How many have you got on you?" The officer could then be heard saying "You're being a little—a little funny, man. You alright? Just chill out, okay?"

Salinas asked Lerma for his name and birthdate; Lerma replied that his name was "Bobby Diaz" and his birthdate was September 22, 1984.[1] Salinas then asked Lerma when he was last arrested, and Lerma replied "months ago." Salinas asked Lerma about the passenger in the back seat; Lerma replied that she was "his girl," referring to the

[1] According to the indictment, Lerma's actual date of birth is October 24, 1982.

driver. The officer remarked that the back seat passenger had a "baby in her hands." At that point, a second officer arrived at the scene.

Salinas again asked Lerma whether he had any weapons or anything else illegal on his person; Lerma stated that he did not. Salinas then asked: "You okay if I check your pockets to make sure you don't got nothing on you?" Lerma replied: "I'd rather you didn't." Salinas then asked again for Lerma's name, which he again gave as Bobby Diaz. Salinas then instructed Lerma to "chill out" and sit with the other officer on the curb. He then went back to his patrol unit and, after running the personal information given by Lerma, determined that Lerma did not match the physical description of "Bobby Diaz" that he had obtained from his computer.

Salinas then asked Lerma where he was from and "When was the last time you smoked weed?" Lerma replied, "I don't know, a while ago." Salinas informed Lerma that "I can smell it all over you, man." Lerma then conceded that he had smoked synthetic marijuana and that he had some on his person. Salinas then began to search Lerma's pockets again. At that point, Lerma attempted to flee on foot. He was immediately captured and arrested. The officers recovered a bag of synthetic marijuana and a "Tupperware bowl" containing "17 crack cocaine rocks" from Lerma's pockets.

Salinas testified that, as soon has he gave the insurance papers back to the driver, he had determined that he would give the driver a warning rather than a citation. The trial court then asked:

> THE COURT: What you are telling the Court is that you were finished with—based on just looking at the driver's license and whatever insurance that he handed to you, that you were done with your investigation on the traffic stop?
>
> [Salinas]: For the actual reason why I pulled him over, not for the entirety of the stop, such as running his name and

> anything else that may have come up. But for the reason that he was stopped, yes.

Salinas stated that the driver was not free to leave at that point. Salinas noted that he needed to check the two passengers for outstanding warrants and that the backseat passenger had an unrestrained child on her lap.

Salinas testified that, as he started to interact with the driver, he could see Lerma "moving around on his feet a lot, trying to reach into his pocket. . . . He seemed to be moving more than—more than usual when somebody gets pulled over." Salinas stated that Lerma's "hands were shaking" and that he was moving his hands "between the seats" and "kind of seemed unsure of himself." Salinas stated that he asked Lerma to step out of the car because he did not have any identification; he wanted to separate Lerma from the other occupants of the car in order "to get a proper identification." Salinas testified that at this point, other than the traffic violation, he had no indication that any sort of crime was being committed, though he had "suspicions" because of Lerma's nervous behavior. He stated it is his normal procedure to frisk a person after they have been removed from a vehicle.

Salinas stated that, when he began to pat Lerma down, Lerma "seemed to be guarding his pocket areas, trying to reach into his pocket." As a result of the pat-down, Salinas "felt what was consistent with cigars and a bag or some sort of soft substance inside." Salinas explained that he "pa[tted] the outside of [Lerma's] clothing . . . touching the area of his pocket, to see if there is anything that feels heavy or hard or consistent with a weapon, or anything that may be illegal that we commonly come across." As to the "cigars" Salinas felt in Lerma's pocket, Salinas opined that "[t]he pack was consistent with what we commonly see used to rol[l] synthetic marijuana, things of that nature." At

that point, Salinas "believe[d Lerma] had some sort of narcotics or some sort of illegal substance."

According to Salinas, after Lerma was captured and subdued, Lerma stated "that he was a habitual offender, looking at 25 years to life. He had a lot of crack on him and more synthetic cannabis product and lied about his name and had a warrant."

On cross-examination, Salinas explained that, when he first patted down Lerma, he felt something in Lerma's pockets which could have been narcotics, but was not a weapon. The following colloquy occurred on cross-examination:

> Q. [Defense counsel] Okay. So you were—you pa[tt]ed him down, because that's your routine of what you normally do and because he was nervous and because you were looking for narcotics; is that fair to say?
>
> A. [Salinas] At that point, I felt—once I felt the substances that I felt, then it kind of switched me over. Once I did not feel anything heavy, such as a gun or knives, and I felt the substances, then I kind of switched over for, okay, maybe he was not so nervous from weapons, it was narcotics.
>
> Q. Okay. So, at that point, you are shifting from worrying about safety to worrying about him having illegal substances on his person.
>
> A. On his person, yes. I do not know what is inside the car where he was sitting.

The trial court denied the motion to suppress. Later, Lerma pleaded guilty to possession of cocaine, and the trial court found as true an enhancement paragraph alleging that Lerma had been twice previously convicted of felonies. He was sentenced to twenty-five years' imprisonment. *See* TEX. PENAL CODE ANN. § 12.42(d) (West, Westlaw through 2015 R.S.) (providing generally that, if it is shown on the trial of a felony offense other than a state jail felony that the defendant has previously been finally

convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment for any term of not more than 99 years or less than 25 years). This appeal followed.[2]

II. DISCUSSION

A. Standard of Review

In reviewing a trial court's ruling on a motion to suppress, we 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. *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011).

We review the trial court's decision for an abuse of discretion. *Id.* "We view the record in the light most favorable to the trial court's conclusion and reverse the judgment only if it is outside the zone of reasonable disagreement." *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). The trial court's ruling will be upheld if it "is reasonably supported by the record and is correct on any theory of law applicable to the case." *Id.* (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)). However, a trial court has no discretion in determining what the law is or applying the law to the facts. *State v. Kurtz*, 152 S.W.3d 72, 81 (Tex. Crim. App. 2004). Therefore, the question of whether a given set of historical facts gives rise to reasonable suspicion is reviewed de

[2] In our original memorandum opinion of September 1, 2016, we stated incorrectly that the State had not filed a brief in this matter. In fact, the State filed its brief on July 29, 2016, and we have fully considered the arguments made in the brief in our analysis herein.

novo. *Wade v. State*, 422 S.W.3d 661, 669 (Tex. Crim. App. 2013).

When, as here, no findings of fact or conclusions of law are filed, we assume the trial court made all findings in support of its ruling that are consistent with the record. *Carmouche v. State*, 10 S.W.3d 323, 327–28 (Tex. Crim. App. 2000); *cf. Vasquez v. State*, 411 S.W.3d 918, 920 (Tex. Crim. App. 2013) (holding that, when the issue in a motion to suppress is voluntariness of a confession, a trial court must file findings of fact and conclusions of law "whether or not the defendant objects to the absence of such omitted filing").

B. Applicable Law

The Fourth Amendment to the United States Constitution 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. "[E]vidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America" is inadmissible in a criminal case. TEX. CODE CRIM. PROC. ANN. art. 38.23 (West, Westlaw through 2015 R.S.).

In *Terry v. Ohio*, the United States Supreme Court held:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

392 U.S. 1, 30–31 (1968); *Carmouche*, 10 S.W.3d at 329 (Tex. Crim. App. 2000)

"A brief investigative *detention* is authorized once an officer has a reasonable suspicion to believe that an individual is involved in criminal activity. However, the 'exigencies' which permit the additional *search* are generated strictly by a concern for the safety of the officers." *Carmouche*, 10 S.W.3d at 329 (citing *Terry*, 392 U.S. at 25–26, 29 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer")); *see Wade*, 422 S.W.3d at 669 ("The purpose of a *Terry* frisk is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."). Therefore, "the additional intrusion that accompanies a *Terry* frisk is only justified where the officer can point to specific and articulable facts which reasonably lead him to conclude that the suspect might possess a weapon." *Carmouche*, 10 S.W.3d at 329 (citing *Terry*, 392 U.S. at 26–27; *Worthey v. State*, 805 S.W.2d 435, 438 (Tex. Crim. App. 1991)); *see Wade*, 422 S.W.3d at 669 ("[P]olice may not escalate a consensual encounter into a protective frisk without reasonable suspicion that the person (1) has committed, is committing, or is about to commit a criminal offense and (2) is armed and dangerous."). "The purpose of a limited search after [an] investigatory stop is not to discover evidence of a crime, but to allow the peace officer to pursue investigation without fear of violence." *Id*. (citing *Wood v. State*, 515 S.W.2d 300, 306 (Tex. Crim. App. 1974).

In the course of a routine traffic stop, the detaining officer may request a driver's license, car registration, and insurance; use that information to conduct a computer check for outstanding arrest warrants; question the vehicle's occupants regarding their travel plans; and issue a citation. *Kothe v. State*, 152 S.W.3d 54, 64 n.36 (Tex. Crim. App.

2004) (citing *United States v. Zabalza*, 346 F.3d 1255, 1259 (10th Cir. 2003)); *Davis v. State*, 947 S.W.2d 240, 245 n.6 (Tex. Crim. App. 1997); *Caraway v. State*, 255 S.W.3d 302, 307–08 (Tex. App.—Eastland 2008, no pet.). If, during that investigation, an officer develops reasonable suspicion that another violation has occurred, the scope of the initial investigation expands to include the new offense. *Goudeau v. State*, 209 S.W.3d 713, 719 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Reasonable suspicion must be "founded on specific, articulable facts which, when combined with rational inferences from those facts, would lead the officer to conclude that a particular person actually is, has been, or soon will be engaged in criminal activity." *Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010) (citations omitted).

An investigative stop that is reasonable at its inception may violate the Fourth Amendment because of excessive intensity or scope. *Davis*, 947 S.W.2d at 243 (citing *Terry*, 392 U.S. at 18). 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*, 947 S.W.2d at 243. Moreover, when the reason for the stop has been satisfied, the stop must end and may not be used as a "fishing expedition for unrelated criminal activity." *Davis*, 947 S.W.2d at 243 (quoting *Robinette*, 519 U.S. at 41 (Ginsburg, J., concurring)). Once the officer concludes the investigation of the conduct that initiated the stop, continued detention of a person is permitted only if there is reasonable suspicion to believe that another offense has been or is being committed. *Id*. at 245.

C. Analysis

Lerma argues that the drug evidence should have been suppressed because: (1) there was no reasonable suspicion to support a "prolonged detention"; (2) the frisk was not lawful under *Terry* because there no reason for the officer to have believed that Lerma

was armed or dangerous; and (3) even if the frisk was lawful at its inception, it "exceeded the scope of *Terry*."

Lerma cites *St. George v. State* in arguing that the search was unreasonably prolonged. In that case, two officers pulled over a car for having an inoperative license plate light and requested identification from both the driver and front-seat passenger. 237 S.W.3d 720, 722 (Tex. Crim. App. 2007). The passenger gave his name as "John Michael St. George," but the officers learned that there was no driver's license record of anyone with that name. *Id*. One of the officers then issued a citation to the driver for the inoperative license plate light. *Id*. While that officer "was explaining the warning ticket to the driver," the other officer asked the passenger if his license was expired and the passenger replied that it was. *Id*. "After further inquiries," the officers learned that the passenger's true name was Jeffrey Michael St. George; and when they ran his correct name, they found that he had outstanding warrants, so they arrested him. *Id*. In a search incident to the arrest, the officers discovered marijuana in St. George's pocket. *Id*.

The Texas Court of Criminal Appeals concluded that the search was unreasonable because:

> At the time the driver was issued the warning citation, the deputies did not have specific articulable facts to believe that Appellant was involved in criminal activity, thus, the questioning of Appellant regarding his identity and checks for warrants, without separate reasonable suspicion, went beyond the scope of the stop and unreasonably prolonged its duration.

Id. at 726. The Court noted that, although the State claimed that St. George's misidentification and his "nervous behavior" provided reasonable suspicion to prolong the stop, the officers did not learn that it was a misidentification until after the citation was issued. *Id*. "Therefore, giving a false name when officers did not know it was false could not give them reasonable suspicion to investigate further" nor "was the fact that the

dispatcher found no record of the first name given by Appellant sufficient to raise suspicion of criminal activity." *Id*.

At the suppression hearing, the State argued that *St. George* is distinguishable from the instant case because here, the officers did not formally "conclude" the traffic stop, such as by issuing the driver a citation, before questioning Lerma. The State also noted that, according to Salinas, not only did Lerma appear nervous, but he was also "reaching for things in his pocket," and it turned out that he did have a knife in his possession.

We find that *St. George* is analogous to the instant case. Having observed the driver of the vehicle violate a traffic law,[3] Salinas was entitled to stop the vehicle, request certain information from the driver such as a driver's license, insurance and car registration, and to conduct a computer check on that information to determine whether the license is valid, whether the driver had any outstanding warrants, and whether the car is stolen. *See Kothe*, 152 S.W.3d at 64. However, although "[o]fficers have the right to conduct an investigation of a driver following a traffic violation," they "do not have authority to investigate a passenger without reasonable suspicion." *St. George*, 237 S.W.3d at 725.

Here, Lerma advised Salinas that he did not have any identification. Salinas testified that, at the time he was questioning the driver, Lerma was "moving around on his feet a lot, trying to reach into his pocket." Salinas then asked Lerma to step out of the car and advised Lerma that he was going to pat him down for safety purposes. At that point,

[3] The video recording appears to show that the vehicle clearly activated its turn signal for at least 100 feet of movement before the intersection, but that it failed to stop completely before the stop line. *See* TEX. TRANSP. CODE ANN. §§ 545.104(b), 554.007(d) (West, Westlaw through 2015 R.S.).

Lerma said that he had a pocket knife and he gave the knife to Salinas. Salinas then proceeded with the pat-down. Salinas testified: "[W]hen I began to pat him down, I felt what was consistent with cigars and a bag or some sort of soft substance inside."

Therefore, at the time Salinas advised Lerma that he was going to perform the initial pat-down, he had knowledge of the following specific, articulable facts: (1) Lerma was a passenger in a vehicle that had just been stopped for two minor traffic infractions; (2) Lerma was "moving around on his feet a lot, trying to reach into his pocket," and was reaching in between the seats of the car; and (3) Lerma had no identification on him. These facts, when combined with rational inferences therefrom, could not reasonably lead to the conclusion that Lerma possessed a weapon so as to justify a *Terry* frisk. *See Carmouche*, 10 S.W.3d at 329; *see also Garza v. State*, No. 13-12-00240-CR, 2013 WL 3378325, at *10 (Tex. App.–Corpus Christi July 3, 2013, pet. ref'd) (mem. op., not designated for publication) (concluding that the officer did not articulate any specific facts that would lead a person to reasonably conclude that the act of "reaching" forward in the car during a traffic stop indicates that a person has a weapon or contraband). Nor could these facts have led the officer to conclude that Lerma "actually is, has been, or soon will be engaged in criminal activity," so as to justify prolongation of the stop. *See Crain*, 315 S.W.3d at 52; *see also Netherly v. State*, No. 13-14-00374-CR, 2016 WL 3225093, at *2 (Tex. App.—Corpus Christi June 9, 2016, pet. filed) (holding that officer's testimony that defendant "reached for something" in his truck after being pulled over and exiting the vehicle, and that defendant was wearing a fanny pack, was insufficient to establish reasonable suspicion that criminal activity was afoot).

As in *St. George*, although Lerma gave false identifying information, there was no way for Salinas to have known that the information was false at the time he performed

the initial pat-down. Moreover, though the State contends that *St. George* is distinguishable because the investigation of the traffic stop had not concluded at the time Lerma was questioned, Salinas testified that he had already completed his investigation as to "the reason that [the driver] was stopped" at the time of the pat-down. Because the initial pat-down of Lerma was not supported by reasonable suspicion, there was no basis to have continued the traffic stop beyond the point where Salinas had concluded his "investigation of the conduct that initiated the stop." *Davis*, 947 S.W.2d at 243. Accordingly, the trial court erred in denying the motion to suppress.

III. CONCLUSION

We reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion.

DORI CONTRERAS GARZA,
Justice

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

Delivered and filed the
15th day of September, 2016.