NO. 12-16-00292-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

RICKY DALE BRIMER, APPELLANT	***§***	***APPEAL FROM THE 159TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Ricky Dale Brimer appeals his conviction for possession of a controlled substance with intent to deliver. In one issue, he challenges the denial of his motion to suppress. We affirm.

BACKGROUND

The State charged Appellant with possession of a controlled substance with intent to deliver. According to the record, Sergeant Steven Holt with the Angelina County Sheriff's Office observed Appellant commit two traffic violations and conducted a traffic stop. When Holt smelled an odor of marijuana emitting from Appellant's vehicle, he sought and obtained Appellant's consent to search the vehicle. The search led to the discovery of narcotics.

Appellant filed a motion to suppress the evidence obtained as a result of the traffic stop and search, but the trial court denied the motion. Appellant subsequently pleaded "guilty" to possession of a controlled substance with intent to deliver and pleaded "true" to two enhancement allegations. The trial court sentenced Appellant to imprisonment for thirty years. This appeal followed.

MOTION TO SUPPRESS

In his sole issue, Appellant challenges the denial of his motion to suppress on grounds that (1) section 545.104 of the transportation code is unconstitutional, and (2) the traffic stop was conducted without reasonable suspicion.

Standard of Review and Applicable Law

We review a suppression ruling for an abuse of discretion under a bifurcated standard of review. ***Valtierra v. State***, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); ***State v. Dixon***, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). First, we afford almost total deference to a trial court's determination of historical facts. ***Valtierra***, 310 S.W.3d at 447. The trial court is the sole trier of fact and judge of the witnesses' credibility and the weight to give their testimony. ***Id***. The trial court may believe or disbelieve all or part of a witness's testimony. ***Id***. Second, we apply a de novo review to the trial court's application of law to the facts. ***Id***. We will sustain the trial court's ruling if it is reasonably supported by the record and correct on any legal theory. ***Id***. at 447-48.

Reasonable suspicion exists when an officer is aware of specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a person is, has been, or soon will be engaged in criminal activity. ***State v. Elias***, 339 S.W.3d 667, 674 (Tex. Crim. App. 2011). "This standard is an objective one that disregards the actual subjective intent or motive of the detaining officer and looks, instead, to whether there was an objective justification for the detention." ***Id***.

Facts

In his motion to suppress, Appellant argued that he was arrested without a lawful warrant, probable cause, or other lawful authority. He contended that the traffic stop was made without reasonable suspicion. He sought suppression of any statements or evidence obtained as a result of the stop and arrest. In a memorandum of law, Appellant argued that section 545.104 of the Texas Transportation Code is unconstitutional as applied.

At the suppression hearing, Sergeant Holt testified that he and a recruit were on patrol when he observed a driver, later identified as Appellant, commit two traffic violations, i.e., failure to signal a turn within one-hundred feet and making a wide right turn. Holt activated his vehicle's lights and initiated a traffic stop. During his initial contact with Appellant, Holt smelled an odor of marijuana emanating from Appellant's vehicle. Appellant complied when

Holt asked him to exit the vehicle. Appellant also gave consent when Holt requested to search the vehicle. Inside the vehicle, Holt found a "black-taped pill bottle" that contained methamphetamine and a "smoked marijuana roach." Holt advised Appellant of his ***Miranda*** rights, after which Appellant stated that he did not own the methamphetamine. Holt arrested Appellant, but issued no traffic citations.

Appellant testified that, as he approached the intersection, he initially planned to turn left, but changed his mind and turned right. When asked if he was in violation of the traffic law, Appellant stated, "Apparently. Yes, sir. I didn't know." He also acknowledged entering the inside lane when he turned, instead of the closest lane. He was unaware that doing so was a traffic violation, and explained that he entered the inside lane because he needed to turn left.

Preservation of Constitutional Challenge

We first address whether Appellant's constitutional argument is preserved for appellate review. On appeal, Appellant contends that:

> The law involving the use of turn signals approaching an intersection is unreasonable and unconstitutional. The citizens of Texas many times do not decide which direction they need to travel or intend to travel until they are within 100 feet which is a violation of the law. [Appellant] was unlawfully stopped because, although he signaled both turns, his first turn was not made before he was 100 feet of the intersection.

Thus, Appellant maintains that section 545.104(b) of the transportation code is unconstitutional as applied to him and "other undecided drivers who may not decide which way they intend to travel until they reach an intersection."

Appellant's constitutional complaint was not raised in his motion to suppress or at the suppression hearing. At the hearing, Appellant sought and obtained the trial court's permission to file a brief on the "legal issues raised in this case." Appellant subsequently filed a memorandum of law, in which he challenged the constitutionality of section 545.104(b).

Arguments made in a memorandum of law are sufficient to preserve error when the record affirmatively demonstrates that the trial court was presented with an opportunity to act on the arguments. ***Taylor v. State***, 863 S.W.2d 737, 738 & n.1 (Tex. Crim. App. 1993). In such a case, the ruling on the motion to suppress constitutes a ruling on the arguments in the memorandum, absent some indication that the trial court refused to consider them. ***Id***. at 738. In ***Taylor***, defense counsel presented the trial court with a memorandum of law that raised new

legal theories. ***Id***. at 737. When denying the suppression motion, the trial court acknowledged that he had reviewed the memorandum. ***Id***. The court of criminal appeals held that the appellant's constitutional complaints were preserved for appeal, but noted that the issue might be different had the record "not affirmatively shown that the trial court had reviewed the memorandum, or had reflected either that he had treated the memorandum as untimely or that the State had raised some objection to its consideration[.]" ***Id***. at 738 & n.1.

In this case, the record does not affirmatively demonstrate that the memorandum was either called to the trial court's attention or considered by the trial court. In the order on Appellant's motion to suppress, the trial court stated that the "motion to suppress was heard/considered by the Court[,]" including the "evidence and law applicable to the case[.]" Neither the order nor the record indicates that the trial court reviewed the arguments raised in Appellant's memorandum of law. Accordingly, we conclude that Appellant's memorandum of law was insufficient to preserve error under the facts of this case. *See* ***id***.; *see also* ***Nevelow v. State***, No. 14-10-00332-CR, 2011 WL 2899377, at *4 (Tex. App.—Houston [14th Dist.] July 21, 2011, pet. ref'd) (mem. op., not designated for publication) (declining to conclude that memorandum of law preserved constitutional complaints when nothing in record indicated that memorandum was brought to trial court's attention or was otherwise reviewed by court).

Reasonable Suspicion

At the suppression hearing, the trial court heard Sergeant Holt's testimony that he stopped Appellant's vehicle after observing him commit two traffic violations. Regarding the first violation, Holt testified that, although Appellant used his signal before turning right, he failed to signal within one-hundred feet of the turn. The transportation code provides that, when intending to turn left or right, a driver "shall signal continuously for not less than the last 100 feet of movement of the vehicle before the turn." TEX. TRANSP. CODE ANN. § 545.104(b) (West 2011). From an objective viewpoint, Holt's observation that Appellant failed to use his turn signal within the last one hundred feet of the intersection is sufficient to support a reasonable suspicion that a traffic offense had occurred. *See* ***Elias***, 339 S.W.3d at 675 (officer's testimony supported reasonable suspicion that traffic infraction occurred when he saw driver turn without signaling within the last one hundred feet of intersection). This is all the State was required to prove in order to show reasonable suspicion for the traffic stop. *See* ***Johnson v. State***, 365 S.W.3d 484, 489 (Tex. App.—Tyler 2012, no pet.) ("It is not necessary to show that the person

detained actually violated a traffic regulation[]"). Thus, we need not address Appellant's contention that there was "no second violation of the law" when he made a wide turn. *See* TEX. R. APP. P. 47.1.

Accordingly, as the sole trier of fact and judge of the witnesses' credibility, the trial court was entitled to find that Holt could reasonably conclude that Appellant committed a traffic offense. *See* ***Elias***, 339 S.W.3d at 675; *see also* ***Valtierra***, 310 S.W.3d at 447. Thus, the trial court did not abuse its discretion by denying Appellant's motion to suppress. *See* ***Elias***, 339 S.W.3d at 675; *see also* ***Valtierra***, 310 S.W.3d at 447; ***Dixon***, 206 S.W.3d at 590. We overrule Appellant's sole issue.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered June 21, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 21, 2017

NO. 12-16-00292-CR

RICKY DALE BRIMER,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 159th District Court
of Angelina County, Texas (Tr.Ct.No. 2016-0214)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.