NO. 12-17-00176-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

THE STATE OF TEXAS, APPELLANT	***§***	***APPEAL FROM THE***
V.	***§***	***COUNTY COURT AT LAW NO. 2***
VIRGINIA SOUTH, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

The State of Texas appeals from the granting of a motion to suppress filed by Virginia Pate South, Appellee. In one issue, the State contends the trial court erred by finding the traffic stop was invalid. We reverse and remand.

BACKGROUND

Appellee was charged by information with driving while intoxicated, second. Prior to trial, Appellee filed a motion to suppress arguing that the initial stop of her vehicle was made without probable cause or reasonable suspicion and that all subsequent events, including her arrest, were illegal.

Officer Braylon Barnes was the only witness at the hearing on the motion to suppress. Officer Barnes testified that he was on duty as a Tyler patrol officer on the morning of August 3, 2016. At around 12:20 a.m., he observed a vehicle veering out of its lane on Broadway Avenue in Tyler. Barnes thought the driver may be intoxicated, but he pulled up next to her to first determine whether she was otherwise distracted. Barnes testified that Appellee had both hands on the wheel, was not distracted, and should not have been swerving. He further stated that Appellee appeared confused because she used her right turn signal before turning left. Barnes also testified that, even though Appellee may have been in her lane when she approached another

vehicle, he believed Appellee's driving to be unsafe to other vehicles on the road. He initiated a traffic stop based on her failure to maintain a single lane. Barnes's testimony was supported by his dash cam video recording. The trial court granted the motion to suppress, and the State appealed.

MOTION TO SUPPRESS

In its sole issue, the State challenges the trial court's decision to grant Appellee's motion to suppress. According to the State, a police officer may legitimately stop a vehicle for the traffic offense of failing to maintain a single lane of travel without regard to whether or not that failure was also unsafe.

Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. ***Hubert v. State***, 312 S.W.3d 554, 559 (Tex. Crim. App. 2010); ***Carmouche v. State***, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). A trial court's decision to grant or deny a motion to suppress is generally reviewed under an abuse of discretion standard. ***Shepherd v. State***, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). We give almost total deference to a trial court's determination of historical facts, especially if those determinations turn on witness credibility or demeanor, and we review de novo the trial court's application of the law to facts not based on an evaluation of credibility and demeanor. ***Neal v. State***, 256 S.W.3d 264, 281 (Tex. Crim. App. 2008). When ruling on a motion to suppress evidence, the trial court is the exclusive trier of fact and judge of the witnesses' credibility. *See* ***Maxwell v. State***, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). Accordingly, a trial court may choose to believe or disbelieve all or any part of a witness's testimony. *See* ***State v. Ross***, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). Moreover, if the trial judge makes express findings of fact, we view the evidence in the light most favorable to the trial judge's ruling and determine whether the evidence supports those factual findings. ***Valtierra v. State***, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). When there is not an express finding on an issue, we infer implicit findings of fact that support the trial court's ruling as long as those findings are supported by the record. *See* ***id***.

The prevailing party is entitled to "the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence." ***State v. Castleberry***, 332 S.W.3d 460, 465 (Tex. Crim. App. 2011). We review the trial court's legal conclusions de novo and

uphold the ruling so long as it is supported by the record and correct under any legal theory applicable to the case. ***State v. Iduarte***, 268 S.W.3d 544, 548 (Tex. Crim. App. 2008); ***Banda v. State***, 317 S.W.3d 903, 907–08 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Applicable Law

To suppress evidence because of an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct. ***Amador v. State***, 221 S.W.3d 666, 672 (Tex. Crim. App. 2007); *see* ***Young v. State***, 283 S.W.3d 854, 872 (Tex. Crim. App. 2009). A defendant can satisfy this burden by establishing that a search or seizure occurred without a warrant. ***Amador***, 221 S.W.3d at 672.

The burden then shifts to the State to establish that the seizure was reasonable. ***Id.*** at 672–73; ***Torres v. State***, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005); ***Ford v. State,*** 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). An objective standard is used when determining if the officer had a reasonable suspicion. ***Derichsweiler v. State***, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011). This standard is whether the officer has "specific, articulable facts that, combined with rational inferences from those facts, would lead him to conclude that the person detained is, has been, or soon will be engaged in criminal activity." ***Id.*** This test also includes the totality of the circumstances. ***Id.***

A police officer may stop and detain a motorist who commits a traffic violation within the officer's view. *See* ***Whren v. United States***, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996); ***Garcia v. State***, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992). In addition, an officer may conduct a temporary detention if the officer has reasonable suspicion to believe that a person is violating the law. *See* ***Ford***, 158 S.W.3d at 492. Reasonable suspicion is dependent upon both the content of the information possessed by the police and its degree of reliability. *See* ***Alabama v. White***, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416–17, 110 L. Ed. 2d 301 (1990); ***Walter v. State***, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000).

Discussion

The State argues that the trial court abused its discretion in granting the motion to suppress because Appellee committed a traffic violation by failing to stay within a single lane in violation of section 545.060(a) of the Texas Transportation Code. Appellee contends that her failure to stay within a single lane was not unsafe and, therefore, not a traffic violation.

An operator on a roadway divided into two or more clearly marked lanes for traffic shall drive as nearly as practical entirely within a single lane and may not move from the lane unless that movement can me made safely. TEX. TRANSP. CODE ANN. § 545.060(a) (West 2011). A person commits an offense if the person performs an act prohibited or fails to perform an act required by statute. ***Id***. § 542.301(a) (West 2011). The Texas Court of Criminal Appeals recently discussed the applicability of section 545.060(a), specifically, "[m]ust the driver *both* fail to perform the act required by the statute (maintain a single lane as far as is practical) *and* perform the act prohibited in the statute (do not change lanes without checking to assure the maneuver can be accomplished safely) before it may be said that he has committed an offense?" ***Leming v. State***, 493 S.W.3d 552, 557 (Tex. Crim. App. 2016). Similar to this case, ***Leming*** involved the stop of a vehicle after an officer observed it "drifting in its lane." ***Id.*** at 554. The officer testified that the driver almost hit the curb twice. ***Id.*** Additionally, a video of the officer following the driver was available for the court to review. ***Id.***

The court of criminal appeals concluded that the Texas Transportation Code's requirement to "drive as nearly as practical entirely within a single lane" does not require an element of "unsafety" in order for a traffic offense to occur. ***Id.*** at 556-61. The court explained that "the Legislature intended a violation of either the requirement to maintain a single lane or the independent prohibition against changing lanes when conditions are not safe to do so constitute separately actionable offenses." ***Id.*** at 559. Therefore, it is an offense to change marked lanes when it is unsafe to do so. ***Id.*** And it is an independent offense to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so, regardless of whether the deviation from the marked lane is unsafe. ***Id.*** at 559-60. The court stated that:

> Section 545.060 requires that an operator maintain a single marked lane of traffic except when it may be "sensible"—where "good judgment" under the circumstances may permit him—to deviate. Failing to stay entirely within a single lane is not an offense if it is prudent to deviate to some degree to avoid colliding with an unexpected fallen branch or a cyclist who has strayed from his bike lane. But indiscriminate and purposeless swerving is its own actionable offense under Section 545.060, regardless of whether the particular circumstances permit such deviation to occur without endangering anyone. We find no intolerable vagueness in this discrete requirement.

Id. at 560-61.

Appellee argues that ***Leming*** is not binding law because it is a plurality opinion. ***Leming***'s second section, "Failure to Maintain a Single Lane," is, in fact, a plurality opinion and,

therefore, not binding authority. *See* ***Unkart v. State***, 400 S.W.3d 94, 100 (Tex. Crim. App. 2013). But a fractured decision may constitute binding authority if, and to the extent that, a majority holding can be ascertained from the various opinions in the case. ***Id.*** Even if the rationales seem disparate, if a majority of the judges agree on a particular narrow ground for or rule of decision, then that ground or rule may be viewed as the holding of the court. ***Id.*** at 100-01. Additionally, even though not considered binding authority, we may look to the ***Leming*** opinion for its persuasive value. *See* ***State v. Hardy***, 963 S.W.2d 516, 519 (Tex. Crim. App. 1997); *see also* ***Unkart***, 400 S.W.3d at 100.

In doing so, we note that the facts of this case are similar to those in ***Leming***. In ***Leming***, the officer testified that the appellant's "tires were on the stripes[,]" but the officer's video did not clearly show that appellant's vehicle entered the next lane. ***Leming***, 493 S.W.3d at 561. The court stated that the officer "knew from personal observation that Appellant had several times at least come very close to entering the adjacent lane—even if he could not quite tell whether Appellant had actually entered it—and he knew that [a citizen] had also observed the Jeep to be 'swerving' even before [the officer] arrived on the scene." ***Id***. The court held that "[t]his was sufficient information to justify a temporary detention to investigate whether Appellant had actually failed at some point to remain in his dedicated lane of traffic as far it was practical to do so under the circumstances." ***Id***. "It matters not whether that failure was unsafe." ***Id***.

In this case, at the hearing on the motion to suppress, Officer Barnes testified that he was on patrol on August 3, 2016, when he noticed a vehicle veering out of its lane on Broadway Avenue in Tyler. He stated that he believed the driver may have been intoxicated but "wanted to make sure they weren't distracted because a lot of people . . . may be texting, looking down, and swerve a little bit." He pulled up next to the vehicle and observed that Appellee had both hands on the wheel and did not appear to be distracted, but was still swerving. In his opinion, Appellee should not have been swerving. Barnes further testified that Appellee appeared confused because she used her right turn signal when turning left. Barnes also believed that Appellee was being unsafe:

> [Appellee's Counsel]: Now, failing to maintain a single lane, what does that require?
> [Officer Barnes]: Requires you to leave your lane and be unsafe at the same time.
> [Appellee's Counsel]: Did you see any unsafeness going on in that video?

> [Officer Barnes]: Yes. She was riding the line, which is outside her lane. There was a vehicle next to her. If she hit that vehicle, that wouldn't have been safe. She put that vehicle in danger. She had no control how far her vehicle veered. That seems unsafe to me.

Barnes admitted that Appellee was not on the line at the exact moment she passed a vehicle in an intersection. Barnes's testimony dash cam video also clearly shows that Appellee's vehicle swerved within its lane. At the suppression hearing, Appellee conceded that she failed to maintain a single lane. However, she argued that her driving was not inherently unsafe to other vehicles, and therefore, not a traffic violation.

For a peace officer to stop a motorist to investigate a traffic infraction, as is the case with any investigative stop, "proof of the actual commission of the offense is not a requisite." ***Drago v. State***, 553 S.W.2d 375, 377 (Tex. Crim. App. 1977); ***Valencia v. State***, 820 S.W.2d 397, 400 (Tex. App.–Houston [14th Dist.] 1991, pet. ref'd); ***Joubert v. State***, 129 S.W.3d 686, 688 (Tex. App.–Waco 2004, no pet.); ***Johnson v. State***, 365 S.W.3d 484, 489 (Tex. App.–Tyler 2012, no pet.). This principle applies to the offense of failing to maintain a single lane as it does any other traffic infraction. *See* ***Leming***, 493 S.W.3d at 561; *see* ***Powell v. State***, 5 S.W.3d 369, 376–77 (Tex. App.–Texarkana 1999, pet. ref'd) (applying ***Drago*** in the context of section 545.060 of the Transportation Code). As in ***Leming***, Barnes knew, from personal observation, that Appellee had several times at least come very close to entering the adjacent lane. This was sufficient information to justify a temporary detention to investigate whether Appellee had actually failed at some point to remain in her dedicated lane of traffic as far as it was practical to do so under the circumstances. *See* ***Leming***, 493 S.W.3d at 561. Furthermore, Barnes's uncontroverted testimony shows his concern that Appellee would collide with another vehicle on the road. Therefore, he believed Appellee's behavior was unsafe. *See* TEX. TRANSP. CODE ANN. § 545.060(a). As an officer, Barnes is tasked with the duty to protect the general welfare and safety of the public and individuals on the highway. *See* ***McDonald v. State***, 759 S.W.2d 784, 785 (Tex. App.—Fort Worth 1988, no pet.); *see also* TEX. CODE CRIM. PROC. ANN. art. 2.13(a) (West Supp. 2017) ("It is the duty of every peace officer to preserve the peace within the officer's jurisdiction. To effect this purpose, the officer shall use all lawful means[]").

Accordingly, in light of ***Leming***, we conclude that the trial court abused its discretion in granting the motion to suppress. *See* ***Shepherd***, 273 S.W.3d at 684. We sustain Appellee's sole issue.

DISPOSITION

Having sustained the State's sole issue, we ***reverse*** the trial court's order granting Appellee's motion to suppress and ***remand*** the cause to the trial court for further proceedings consistent with this opinion.

JAMES T. WORTHEN
Chief Justice

Opinion delivered January 31, 2018.
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

JANUARY 31, 2018

NO. 12-17-00176-CR

THE STATE OF TEXAS,
Appellant
V.
VIRGINIA SOUTH,
Appellee

Appeal from the County Court at Law No. 2
of Smith County, Texas (Tr.Ct.No. 002-82490-16)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the order of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the order granting Appellee's motion to suppress be **reversed** and the cause **remanded** to the trial court **for further proceedings** in accordance with the opinion of this court; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.