Reversed and Remanded and Majority and Concurring Opinions filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00361-CR

JACOB MATTHEW JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1 & Probate Court
Brazoria County, Texas
Trial Court Cause No. 224018

M A J O R I T Y O P I N I O N

Appellant Jacob Matthew Johnson appeals his conviction for possession of marijuana. In two issues, he challenges the trial court's denial of his motion to suppress evidence on the basis that it was obtained pursuant to an unlawful detention. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with possession of marijuana in an amount of two ounces or less, a Class B misdemeanor. *See* Tex. Health & Safety Code Ann. §481.121(b)(1). He filed a motion to suppress. At the suppression hearing, Officer Robert Cox of the Brazoria County Sherriff's Office was the only witness.

Officer Cox testified he was on patrol around midnight on August 28, 2016, when he noticed a "suspicious vehicle" in a park-and-ride parking lot (the "Parking Lot"). Officer Cox shined his spotlight twice across the vehicle, saw movement inside the vehicle, and could tell that that two people occupied it. The vehicle had no headlights or other lights turned on. Officer Cox stopped his marked patrol car within ten to fifteen yards of the vehicle and activated his overhead emergency lights. He cautiously approached the driver's side of the vehicle. When the vehicle's window came down and Officer Cox made contact with appellant, Officer Cox detected the odor of marijuana, and he noticed that appellant's shorts were unbuttoned and unzipped.

The State offered the video recording from Officer Cox's patrol car, but appellant objected that this exhibit was not relevant. The trial court sustained the objection and did not admit the exhibit into evidence. No other exhibit was admitted into evidence at the suppression hearing, so Officer Cox's testimony was the only evidence before the trial court for the motion to suppress.

The trial court signed an order denying appellant's motion to suppress in June 2017, and in August 2017, signed the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The charged offense that is the subject of this case occurred on or about August 28, 2016. R. at 13.

2. Sergeant Robert Cox testified that he was on routine patrol around 12 AM. R. at 13.

3. Sergeant Cox further testified that as part of his routine patrol, he regularly checks the park and ride located at the intersection of FM 2004 and FM 523. He regularly spotlights vehicles parked overnight in that park and ride to deter drug activity and burglaries. R. at 15-8.

4. The park and ride at the intersection of FM 2004 and FM 523 is a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness. Sergeant Cox testified that he had personally made several arrests in the months prior to this offense for such offenses in that park and ride. R. at 15-8.

5. While conducting his routine patrol on or about the day in question, Sergeant Cox spotted the defendant's vehicle parked in the park and ride and observed movement inside. Other vehicles were present in the park and ride and that defendant's vehicle was parked away from the other vehicles. R. at 18.

6. Sergeant Cox parked behind defendant's vehicle then turned on his overhead lights. R. at 20, 26.

7. Sergeant Cox did not block the defendant's vehicle from leaving when he parked behind it. R. at 21-2.

8. Sergeant Cox then approached defendant's vehicle. R. at 18, 20.

9. Once the defendant rolled down his window, Sergeant Cox observed the defendant's pants to be undone and detected the smell of marihuana. R. at 22.

10. A copy of Sergeant Cox's in-car video was offered but not admitted into evidence. R. at 28-9.

CONCLUSIONS OF LAW

1. Officers do not need reasonable suspicion to initiate a consensual encounter with a citizen. *State v. Woodard*[,] 341 S.W.3d 404 (Tex. Crim. App. 2011). Sergeant Cox's initial encounter with the defendant was a proper consensual encounter that later evolved into an investigative detention.

2. The sole fact that Sergeant Cox activat[ed] his overhead lights alone did not elevate the consensual encounter into an investigative detention[.] *State v. Garcia-Cantu*[,] 253 S.W.3d 236, 242-3 (Tex. Crim. App. 2008).

> 3. If the initial encounter was a detention, it was properly supported by reasonable suspicion of criminal activity as necessary to detain the defendant based on specific, articulable facts, namely: his presence in the park and ride, a high crime area, after the park and ride's normal operating hours. *Terry v. Ohio*[,] 391 U.S. 1 (1968); *Amorella v. State*[,] 554 S.W.2d 700 (Tex. Crim. App. 1981); *Bryant v. State*[,] 161 S.W.3d 758 (Tex. App.-2nd Dist. 2005)(no pet).

At a bench trial in May 2018, appellant entered a plea of "guilty." The trial court found appellant guilty and assessed his punishment at three days' confinement in jail with a three-day credit and a $500 fine. Appellant filed a timely appeal.

II. ISSUES AND ANALYSIS

Appellant argues under his first issue that the interaction between Officer Cox and appellant was a seizure rather than a consensual encounter. Under his second issue, appellant asserts that Officer Cox lacked reasonable suspicion to lawfully detain him.

In reviewing a trial court's ruling on a motion to suppress, we apply an abuse-of-discretion standard, and we overturn the trial court's ruling only if it falls outside the zone of reasonable disagreement. *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011). We apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historical 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. *Id*. at 922–23. In a motion-to-suppress hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Baird v. State*, 398 S.W.3d 220, 226 (Tex. Crim. App. 2013). Thus, the trial court may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted. *Id*.

When a trial court makes written findings of fact, as it did in this case, we

examine the record in the light most favorable to the ruling and uphold those fact findings so long as the record supports them. *Id*. We then determine *de novo* the legal significance of the facts as found by the trial court. *Id*. We will sustain the trial court's ruling if the record reasonably supports that ruling and is correct on any theory of law applicable to the case. *Valtierra v. State*, 310 S.W.3d 442, 447–48 (Tex. Crim. App. 2010).

A. Does the record support the trial court's determination that no investigative detention occurred before the car window was lowered?

Under his first issue appellant asserts a Fourth Amendment seizure had occurred before the car window was lowered. The law recognizes three distinct types of police/citizen interactions: (1) consensual encounters that do not implicate the Fourth Amendment; (2) investigative detentions that are Fourth Amendment seizures of limited scope and duration that must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures, that are reasonable only if supported by probable cause. *Wade v. State*, 422 S.W.3d 661, 667 (Tex. Crim. App. 2013). Police officers are as free as any other citizen to approach citizens to ask for information or cooperation. *Id*. These consensual encounters may be uncomfortable for a citizen, but they are not Fourth Amendment seizures. *Id*.

No bright-line rule governs when a consensual encounter becomes a detention. *Id*. Courts must take into account the totality of the circumstances of the interaction to decide whether a reasonable person would have felt free to ignore the police officer's request or terminate the consensual encounter. *Id*. Under the Fourth Amendment caselaw, courts presume that a reasonable person has considerable fortitude. *Id*. at 667, n.19. The law views an encounter as a consensual interaction and, as such, the citizen may terminate the encounter at any time. *Id*. at 667–68. If

ignoring the request or terminating the encounter is an option, then no Fourth Amendment seizure has occurred. *Id*. at 668. But, if an officer through force or a show of authority sufficiently conveys the message that the citizen is not free to leave or to ignore the officer's request, the encounter is no longer consensual; it is a Fourth Amendment detention or arrest, subject to Fourth Amendment scrutiny. *Id*. The question of whether the particular facts show that a consensual encounter has evolved into a detention is a legal issue that we review *de novo*. *Id*.

In considering police contacts with citizens seated in parked cars, the Court of Criminal Appeals has stated that the following approach "is useful when examining police contacts with citizens in parked cars":

> The mere approach and questioning of [citizens seated in parked cars] does not constitute a seizure. The result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so. Likewise, the encounter becomes a seizure if the officer orders the suspect to "freeze" or to get out of the car. So too, other police action which one would not expect if the encounter was between two private citizens—boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, or use of flashing lights as a show of authority—will likely convert the event into a Fourth Amendment seizure.

State v. Garcia-Cantu, 253 S.W.3d 236, 243 (Tex. Crim. App. 2008) (quoting 4 Wayne R. LaFave, *Search and Seizure* § 9.4(a), at 433–35 (4th ed. 2004)) (footnotes omitted).

Courts must factually evaluate citizen/police encounters on a case-by-case basis, each on its own terms; there are no *per se* rules. *See Garcia-Cantu*, 253 S.W.3d at 243. This test is necessarily imprecise, because it is designed to assess

the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. *Id*. at 243–44. What constitutes a restraint on liberty prompting a reasonable person to conclude that he is not free to leave or to ignore the officer's request will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs. *Id*. at 244. The officer's conduct is the primary focus, but time, place, and attendant circumstances matter as well. *Id*. A court must step into the shoes of the defendant and determine from a common, objective perspective whether the defendant would have felt free to leave or to ignore the officer's request. *Id*.

Officer Cox described his actions on the night of the arrest, testifying to the following facts:

- He was conducting a routine patrol around midnight when he checked the Parking Lot and saw a vehicle parked there.
- He shined his spotlight across the Parking Lot and twice across the vehicle.
- He saw movement and two people inside the vehicle.
- The vehicle had no headlights or other lights turned on, and no other vehicles were near it.
- He stopped his marked patrol car within ten to fifteen yards of the other vehicle, and he did not block the other vehicle in a way that prevented it from exiting the Parking Lot.
- He activated his overhead emergency lights so that it looked like "a normal police car pulling somebody over [to give the person] a traffic ticket."
- Activating the patrol car's overhead emergency lights turned on the patrol car's audio and video system.
- Officer Cox cautiously approached the driver's side of the vehicle.
- When the vehicle's window came down and he made contact with appellant, Officer Cox detected the odor of marijuana, and he noticed that appellant's shorts were unbuttoned and unzipped.

The Court of Criminal Appeals has noted that fact patterns involving a police officer's use of a patrol car's overhead emergency lights are frequently held sufficient to constitute an investigative detention of a citizen, whether in a parked car or a moving car. *See Garcia-Cantu*, 253 S.W.3d at 245 n. 43. Still, courts must consider the circumstances. Though a patrol car's overhead emergency lights tell people to "stop," the message is not always in a seizure context. For example, sometimes, after pulling over on the side of a roadway at night, a police officer might activate the overhead emergency lights for safety purposes, to avoid getting hit by passing cars or causing an accident. So, while flashing overhead emergency lights signal "stop," context matters.

In this context, Officer Cox's patrol car was in a parking lot around midnight with no cars in the area other than the car that Officer Cox was examining. After shining a spotlight into that car twice, Officer Cox stopped his marked patrol car within ten to fifteen yards of the other vehicle, turned on his overhead emergency lights, and approached the vehicle. In this context, Officer Cox's use of the overhead emergency lights weighs in favor of concluding that a reasonable person would not have felt free to leave the Parking Lot or to ignore a request by Officer Cox to lower the car window. *See id.* at 243, 245 n. 43. Nonetheless, this fact does not mandate that conclusion, and we still must look to the totality of the circumstances of the interaction. *See id.* at 243–45; *Wade*, 422 S.W.3d at 667. After examining all of the circumstances of the interaction in a light most favorable to the trial court's ruling, the evidence at the suppression hearing demonstrates that Officer Cox, through a show of authority, sufficiently conveyed the message that appellant was not free to leave the Parking Lot or to ignore a request to lower the car window. *See Wade*, 422 S.W.3d at 668; *Garza v. State*, 771 S.W.2d 549, 557–58 (Tex. Crim. App. 1989); *Klare v. State*, 76 S.W.3d 68, 73 (Tex. App.—Houston [14th Dist.] 2002, pet ref'd).

Therefore, we conclude that an investigative detention and seizure had occurred before the car window was lowered. *See Garza*, 771 S.W.2d at 557–58; *Klare*, 76 S.W.3d at 73.

B. Does the record support the trial court's determination that at the time of the seizure, Officer Cox had reasonable suspicion to warrant an investigative detention?

Appellant contends in his second issue that the trial court erroneously denied his motion to suppress because Officer Cox lacked reasonable suspicion to detain him. Reasonable suspicion of criminal activity permits a temporary seizure for questioning that is limited to the reason for the seizure. *Wade*, 422 S.W.3d at 668. A police officer has reasonable suspicion for a detention if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead the officer reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity. *Id*. This standard is an objective one that calls for the court to disregard the actual subjective intent of the arresting officer and look, instead, to whether an objectively justifiable basis for the detention existed. *Id*.

In applying the standard courts also look to the totality of the circumstances; individual circumstances may seem innocent enough in isolation, but if they combine in a way that reasonably would suggest the imminence of criminal conduct, the law will deem an investigative detention justified. *Id*. The facts need not point to a particular and distinctively identifiable criminal offense. *Johnson v. State*, 444 S.W.3d 209, 214 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). "It is enough to satisfy the standard of reasonable suspicion that the information is sufficiently detailed and reliable—*i.e.*, it supports more than an inarticulate hunch or intuition—to suggest that something of an apparently criminal nature is brewing." *Wade*, 422 S.W.3d at 668. To support a reasonable suspicion, "articulable facts must show 'that

some activity out of the ordinary has occurred, some suggestion to connect the detainee to the unusual activity, and *some indication that the unusual activity is related to crime*.'" *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011) (emphasis added). As with the question of whether a consensual encounter has become a Fourth Amendment detention, we review *de novo* the question of whether a certain set of historical facts gives rise to reasonable suspicion. *Id*. at 669. When a defendant asserts an unlawful detention under the Fourth Amendment, the defendant bears the burden of producing evidence to rebut the presumption of proper conduct by law enforcement officers. *See State v. Woodard*, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011). A defendant can satisfy this burden with evidence that the detention occurred without a warrant. *See id*. In today's case the State stipulated that there was no warrant, so the State had the burden to show reasonable suspicion. *See id*.

The trial court found that the Parking Lot was a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness. According to the trial court, Officer Cox testified that he had made several arrests for these types of offenses in the months before the charged offense. Officer Cox did not testify that he personally had made several arrests in the Parking Lot for these types of offenses in that time period. Instead, Officer Cox testified that in the months around the time of the charged offense, he had gone to that Parking Lot three of four times "[f]or calls of service." He did not identify the nature of the service calls, nor did he say whether he made an arrest during any of these calls. Officer Cox did not testify that he made any arrests at the Parking Lot for burglary of a motor vehicle, a drug crime, or public lewdness. Officer Cox did testify that he had patrolled the area including the Parking Lot for at least ten years and that there were burglaries of motor vehicles, drug crimes, and public lewdness in the Parking Lot. Officer Cox never specified how

many of these criminal offenses had occurred there. He testified that he had responded to calls to the Parking Lot on "[s]everal occasions," but he did not state the reason for these calls or whether he made any arrests as a result of these calls. Officer Cox also stated that over ten years he had "been out there . . . a lot," but he did not state whether he was there as part of his patrol duties or whether he had been called there as a result of possible criminal activity. Again, Officer Cox did not state that he made any arrests during the times that he went to the Parking Lot. Nor did he testify that the Parking Lot was a high crime area. Officer Cox also testified that he has had to make some calls for service to the Parking Lot for criminal activity. He did not state how many times he made these calls or for what criminal activity.

After examining the record in the light most favorable to the trial court's ruling, we conclude that the record does not support the trial court's findings that the Parking Lot is a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness and that Officer Cox testified he had made several arrests for these types of offenses in the months prior to the charged offense; so, we disregard these findings. *See Baird v. State*, 398 S.W.3d 220, 226 (Tex. Crim. App. 2013); *Miller v. State*, 393 S.W.3d 255, 263–64 (Tex. Crim. App. 2012).

Officer Cox testified as follows:

- He had patrolled this area for more than ten years.
- There were burglaries of motor vehicles, drug crimes, and public lewdness in that Parking Lot.
- He was familiar with the Parking Lot, had "been out there . . . a lot."
- In the months around the time of the charged offense, Officer Cox had gone to that Parking Lot three of four times "[f]or calls of service."
- He testified that he had responded to calls to that Parking Lot on "[s]everal occasions."

- Officer Cox has had to make some calls for service to the Parking Lot for criminal activity.
- The Parking Lot was open and was a 24-hour park-and-ride parking lot.
- People mainly use the Parking Lot during the daytime, but some people park there and walk to a nearby bar that does not have a big parking lot.
- It is out of the ordinary for somebody to be in a parked car in the Parking Lot after midnight with no other vehicle there to pick them up.
- Officer Cox was conducting a routine patrol around midnight when he checked this Parking Lot.
- Officer Cox saw a vehicle parked in the Parking Lot.
- Officer Cox shined his spotlight across the Parking Lot and twice across the vehicle.
- Officer Cox saw movement in the vehicle and could tell it was occupied by two people.
- The vehicle had no headlights or other lights turned on, and no other vehicles were near it.

In *Klare v. State*, this court determined that a police officer lacked reasonable suspicion to stop the truck the defendant was driving based on the following articulable facts: (1) it was 2:30 a.m.; (2) while driving on a highway, the officer saw a truck parked behind a shopping center; (3) the businesses in the shopping center were closed; (4) there had been burglaries at the shopping center in the past, though the police officer did not say how recent or how many; (5) the officer turned into the parking lot shortly afterwards and discovered that the truck was gone; (6) the officer then turned onto an adjoining road and within fifteen to twenty seconds came upon a truck that he believed to be the same as the one at the shopping center; and (7) the officer wanted to identify the truck. 76 S.W.3d 68, 71 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Our court noted that a given locale's being well-known for criminal activity does not by itself justify a detention but is among the various factors that may be taken into account. *Id*. at 74. Although relevant to our analysis, both

time of day and the level of criminal activity in the area are facts that go to the suspect's surroundings rather than the suspect himself. *Id*. at 75. Consequently, courts generally require something else particular to the suspect's behavior to justify a suspicion of criminal activity. *Id*. The *Klare* court stated that the police officer did not have any prior knowledge of the appellant in that case or witness any suspicious or unlawful activity. *Id*. at 77. The *Klare* court concluded that the record did not support a finding that the police officer had reasonable suspicion to detain appellant and that the trial court erred in denying appellant's motion to suppress. *See id*.

Under the applicable standard of review, examining the record in the light most favorable to the trial court's ruling, we conclude that the record does not reasonably support the trial court's determination that Officer Cox had reasonable suspicion to detain appellant. *See Gurrola v. State*, 877 S.W.2d 300, 302–05 (Tex. Crim. App. 1994); *Klare*, 76 S.W.3d at 73–77. Even under the deferential standard of review, we conclude that Officer Cox lacked specific, articulable facts that, when combined with rational inferences from those facts, would lead him reasonably to conclude that appellant was, had been, or soon would be engaged in criminal activity. *See Gurrola*, 877 S.W.2d at 302–05; *Klare*, 76 S.W.3d at 73–77. Therefore, the trial court erred in denying appellant's motion to suppress.

C. Is the trial court's error in denying the motion to suppress reversible?

Having determined that the trial court erred in denying appellant's motion to suppress, we now consider whether this error is reversible. *See* Tex. R. App. P. 44.2. The error violated appellant's federal constitutional rights. *Torres v. State*, 182 S.W.3d 899, 901, 903 (Tex. Crim. App. 2005). The Court of Criminal Appeals has stated that appellate courts are not to speculate as to an appellant's reasons for

entering a "guilty" plea or as to whether appellant would have done so if the motion to suppress had been granted. *See McKenna v. State*, 780 S.W.2d 797, 799–800 (Tex. Crim. App. 1989); *Paulea v. State*, 278 S.W.3d 861, 867 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). As long as the evidence that should have been suppressed "would in *any* measure inculpate the accused," we must presume that the trial court's denial of appellant's motion to suppress influenced appellant's decision to plead "guilty" and is reversible error. *See McKenna*, 780 S.W.2d at 799–800; *Paulea*, 278 S.W.3d at 867. Because the evidence seized, namely the marijuana that appellant was charged with possessing, was inculpatory, we presume the trial court's erroneous denial of appellant's motion to suppress influenced appellant's decision to plead "guilty." *See Paulea*, 278 S.W.3d at 867. Therefore, the error is reversible.

III. CONCLUSION

When Officer Cox activated his emergency overhead lights and left his patrol car to make contact with appellant's vehicle, an investigative detention occurred and no reasonable suspicion supported that detention. The trial court abused its discretion in denying appellant's motion to suppress. Having found this error reversible, we sustain appellant's two issues, reverse the trial court's judgment, and remand for further proceedings consistent with this opinion.

/s/ *Kem Thompson Frost*
Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan (Hassan, J., concurring).

Publish — Tex. R. App. P. 47.2(b).