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

CONCURRING OPINION

Appellant argues the trial court erred in denying his motion to suppress because (1) the interaction between Officer Cox and Appellant was not a consensual

encounter, and (2) Officer Cox lacked reasonable suspicion to lawfully detain him. I concur in the majority's disposition of Appellant's issues, but disagree with certain portions of the majority's analysis.

I. Governing Law

There are three distinct categories of interactions between police officers and citizens: (1) encounters, (2) investigative detentions, and (3) arrests. *Johnson v. State*, 414 S.W.3d 184, 191 (Tex. Crim. App. 2013). In determining which category an interaction falls into, courts look at the totality of the circumstances. *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010). An encounter is a consensual interaction which the citizen is free to terminate at any time. *Id*. Unlike an investigative detention and an arrest, an encounter is not considered a seizure triggering Fourth Amendment protection. *Id*. "An encounter takes place when an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers." *Id.*

Conversely, an investigative detention occurs when a person yields to a police officer's show of authority under a reasonable belief that he is not free to leave. *Id*. In considering police contacts with citizens seated in parked cars, the Court of Criminal Appeals provided examples that "will likely convert" encounters into Fourth Amendment seizures: "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*." *See State v. Garcia-Cantu*, 253 S.W.3d 236, 243 (Tex. Crim. App. 2008) (emphasis added) (quoting 4 Wayne R. LaFave, *Search and Seizure* § 9.4(a), at 427 (4th ed. 2004)) (footnotes omitted).

Nonetheless, the court reiterated that each citizen-police encounter must be factually evaluated on its own terms because there are no *per se* or bright-line rules

in determining whether a police-citizen interaction is an encounter or an investigatory detention. *See id*. When a court is conducting its determination of whether an interaction constituted an encounter or a detention, it focuses on whether the police officer conveyed a message that compliance with the officer's request was required. *Crain*, 315 S.W.3d at 49.

Because the Fourth Amendment to the United States Constitution protects a citizen from unreasonable searches and seizures at the hands of government officials, reasonable suspicion must support investigative detentions. *Id*. at 52. Reasonable suspicion exists if a police officer "has specific, articulable facts that, combined with rational inferences from those facts," reasonably lead to the conclusion that the person detained is, has been, or will soon be engaged in criminal activity. *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011).

This standard is an objective one that disregards the actual subjective intent of the police officer and looks to whether there was an objectively justifiable basis for the detention. *Id*. This standard looks to the totality of the circumstances. *Id*. It considers not whether particular conduct is innocent or criminal, but instead the degree of suspicion that attaches to particular noncriminal acts. *Id*. Although circumstances may all seem innocent enough in isolation, if they combine to reasonably suggest criminal conduct is imminent, an investigative detention is justified. *Id*.

Further, 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); *see also Derichsweiler*, 348 S.W.3d at 916. It is only necessary for the information to be sufficiently detailed and reliable to "suggest that *something* of an apparently criminal nature is brewing" or afoot. *Derichsweiler*, 348 S.W.3d at 916-17 (emphasis in original). "However, although it may be a 'close

call,' the information must amount to more than a mere hunch or intuition." *Johnson*, 444 S.W.3d at 214 (citing *Derichsweiler*, 348 S.W.3d at 916-17). 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*.'" *Derichsweiler*, 348 S.W.3d at 916 (emphasis in original) (quoting *Meeks v. State*, 653 S.W.2d 6, 12 (Tex. Crim. App. 1983), *abrogated by Holcomb v. State*, 745 S.W.2d 903 (Tex. Crim. App. 1988)).

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. *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*. If the defendant satisfies the initial burden, the burden then shifts to the State to establish that the detention was nonetheless reasonable because it was supported by reasonable suspicion. *See id*. The State meets this burden by presenting specific facts known to the police officer at the moment of the detention. *See id*.

In this case, Appellant argues he was unlawfully detained when Officer Cox activated the police car's overhead lights and therefore Officer Cox's initial encounter with Appellant was not a consensual encounter. I agree.

II. The use of overhead emergency lights constituted a seizure.

"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." *Garcia-Cantu*, 253 S.W.3d at 244 (citing *United States v. Steele,* 782 F. Supp. 1301, 1309 (S.D. Ind. 1992)). Appellant's counsel secured the following description of the overhead lights at the hearing: "[S]o if you turned on your overhead lights, it

would be like a normal police car pulling somebody over if you got a traffic ticket. Right? I mean, that's what your vehicle looked like?" Officer Cox replied: "Yes, sir."

Despite citing *Garcia-Cantu*, the trial court erroneously concluded that the officer's use of overhead emergency lights under these facts did not constitute a seizure. *See Garcia-Cantu*, 253 S.W.3d at 245 n.43 ("[t]he use of 'blue flashers' or police emergency lights are frequently held sufficient to constitute a detention or seizure of a citizen, either in a parked or moving car.").[1]

"Overhead emergency lights are synonymous with an instruction to stop." *Hughes v. State*, 337 S.W.3d 297, 301 (Tex. App.—Texarkana, no pet.); *see also*

[1] (Citing *Hammons v. State*, 940 S.W.2d 424, 427-28 (Ark. 1997) (defendant sitting in parked automobile was seized when police activated blue light; light was display of authority that would indicate to a reasonable person he was not free to leave); *People v. Bailey*, 222 Cal. Rptr. 235, 236-37 (Cal. Ct. App. 1985) (officer pulled in behind parked car and activated emergency lights; defendant seized as reasonable person would not have felt free to leave); *State v. Donahue*, 742 A.2d 775, 779-80 (Conn. 1999) (defendant was seized when officer pulled up behind parked vehicle and activated red, yellow, and blue flashing lights); *Hrezo v. State*, 780 So. 2d 194, 195 (Fla. Dist. Ct. App. 2001) (when a police officer turns the emergency and takedown lights on behind a lawfully parked vehicle, a reasonable person in that vehicle would expect to be stopped if he or she drove away); *Lawson v. State*, 707 A.2d 947, 949-50 (Md. Ct. Spec. App. 1998) (the activation of the emergency lights was a show of authority that constituted a seizure because it communicated to a reasonable person in the parked car that there was an intent to intrude upon the defendant's freedom to move away); *State v. Walp*, 672 P.2d 374, 375 (Or. Ct. App. 1983) (use of emergency lights after defendant had voluntarily stopped was sufficient show of authority and reasonable person would not have felt free to leave); *State v. Gonzalez*, 52 S.W.3d 90, 97 (Tenn. Crim. App. 2000) (a police officer clearly initiates a seizure by turning on his blue lights behind a parked vehicle because the lights convey the message that the occupants are not free to leave); *State v. Burgess*, 657 A.2d 202, 203 (Vt. 1995) (even if officer subjectively intends to activate his blue lights for safety reasons, the use of the lights on the defendant served as a restraint to prevent his departure from the pull-off area of the road); *Wallace v. Commonwealth*, 528 S.E.2d 739, 741-42 (Va. Ct. App. 2000) (driver of parked vehicle seized because a reasonable person with a police cruiser parked behind him with its emergency lights flashing would not have felt free to leave); and *State v. Stroud*, 634 P.2d 316, 318-19 (Wash. Ct. App. 1981) ("the officers' attempt to summon the occupants of the parked car with both their emergency lights and high beam headlights constituted a show of authority sufficient to convey to any reasonable person that voluntary departure from the scene was not a realistic alternative" and, had driver attempted to leave after being so signaled, he could arguably have been charged with misdemeanor)).

Klare v. State, 76 S.W.3d 68, 73 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (citing *Hernandez v. State*, 963 S.W.2d 921 (Tex. App.—San Antonio 1998, pet. ref'd) (activating emergency lights would cause a reasonable person to believe he is not free to leave)). This commonsensical interpretation of emergency lights as a signal of legitimate state-sponsored authority has been followed by the Court of Criminal Appeals,[2] this court,[3] the First Court of Appeals,[4] and other intermediate appellate courts.[5]

Reasonable people who are approached by a police vehicle with flashing overhead blue lights are expected to stay where they are and comply with officers' instructions. An unambiguous and universally accepted expression of governmental authority to "stop" (and thus not move or leave) is not a signal that means whatever

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[2] *Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010) (officer's use of "his patrol car's overhead lights in the appellant's direction, coupled with his request-that-sounded-like-an-order . . . caused the appellant to yield to [the officer's] show of authority — a reasonable person in appellant's shoes would not have felt free to leave or decline the officer's requests").

[3] *See Lewis v. State*, No. 14-03-01185-CR, 2005 WL 1552648, at *1 (Tex. App.—Houston [14th Dist.] July 5, 2005, pet. struck) (mem. op., not designated for publication) ("officers turned on their emergency lights to pull him over for a traffic violation"); *Hamilton v. State*, No. 14-03-01052-CR, 2005 WL 549546, at *1 (Tex. App.—Houston [14th Dist.] Mar. 10, 2005, pet. ref'd) (mem. op., not designated for publication) (the officer "activated his emergency lights to signal appellant to pull over for impeding traffic"); and *Hunter v. State*, No. 14-01-00400-CR, 2002 WL 517196, at *1 (Tex. App.—Houston [14th Dist.] Apr. 4, 2002, no pet.) (not designated for publication) ("the officers activated their emergency lights, signaling appellant to pull over").

[4] *Fenn v. State*, No. 01-10-00383-CR, 2011 WL 2651914, at *1 (Tex. App.—Houston [1st Dist.] July 7, 2011, pet. ref'd) (mem. op., not designated for publication) (the officer "activated his emergency lights to pull appellant over"); *Smith v. State*, Nos. 01-00-01311-CR, 01-00-01312-CR, 2002 WL 123345, at *1 (Tex. App.—Houston [1st Dist.] Jan. 31, 2002, no pet.) (not designated for publication) (same); *Johnson v. State*, No. 01-98-00930-CR, 2001 WL 722828, at *1 (Tex. App.—Houston [1st Dist.] June 28, 2001, pet. ref'd) (not designated for publication) (the officer "activated his patrol car's emergency lights, indicating to appellant to pull over"); and *Hilliard v. State*, Nos. 01-91-00799-CR, 01-91-00800-CR, 1992 WL 347951, at *1 (Tex. App.—Houston [1st Dist.] Nov. 25, 1992, pet. ref'd) (not designated for publication) (same).

[5] *Larry v. State*, No. 12-13-00072-CR, 2014 WL 2521593, at *1 (Tex. App.—Tyler May 30, 2014, no pet.) (mem. op., not designated for publication) and *Hudson v. State*, 247 S.W.3d 780, 785 (Tex. App.—Amarillo 2008, no pet.) (finding police officer illegally detained a pedestrian at approximately 3:50 a.m. after he activated his emergency lights and "called to him").

an arresting officer subjectively says it is intended to mean; doing otherwise would signal to the People that they need neither stop nor obey when such lights are utilized because they can now mean something other than "stop". *See Garcia-Cantu*, 253 S.W.3d at 243 ("It is the display of official authority and the implication that this authority cannot be ignored, avoided, or terminated, that results in a Fourth Amendment seizure. At bottom, the issue is whether the surroundings and the words or actions of the officer and his associates communicate the message of 'We Who Must Be Obeyed.'").

Further, I cannot agree with the majority's statement that "Though a patrol car's overhead emergency lights tell people to 'stop,' the message is not always in the seizure context." Flashing overhead blue lights are unequivocally an instruction to "stop" and thus an instruction to not leave. When a person is instructed by police to not leave, he is seized. A reasonable person would not feel free to leave when a police officer pulls up behind him with flashing overhead blue lights which are synonymous with an instruction to "stop". There is no consensual interaction when a person is instructed to stop; instead, a seizure occurs. The question then becomes whether the seizure was lawful under the circumstances of the case. Here it was not.

III. The seizure was unlawful.

A. The time of day is not itself suspicious.

Despite acknowledging that the park-and-ride was open 24 hours a day, Officer Cox testified he was suspicious because Appellant's vehicle was there after normal operating hours. "Time of day is a factor that a court may take into consideration when determining whether an officer's suspicion was reasonable; however, time of day is not suspicious in and of itself." *Klare*, 76 S.W.3d at 73-74.[6]

[6] (Citing (*inter alia*) *United States v. Cortez*, 449 U.S. 411, 420-21 (1981) (pointing out that time of day may be a legitimate, yet marginal consideration, in a reasonable suspicion

Officer Cox's suspicion was even less warranted in this case because the park-and-ride was always open. *Id.* (citing *United States v. Nicholas*, 104 F.3d 368 (10th Cir. 1996)) (pointing out that time of day has little relevance when defendant's car was parked at an establishment that was open for business twenty-four hours a day).

The Court of Criminal Appeals addressed a similar fact pattern in *Tunnell v. State*, 554 S.W.2d 697 (Tex. Crim. App. 1977). There, the arresting officer saw three men in a parked car with its lights turned off in a parking lot at 2:16 a.m.; despite knowing that a local business was open 24 hours a day, the officer thought the activity was suspicious. *Id*. at 697-98. The officer turned his car around, saw defendant's car leave the parking lot, and stopped it despite admitting that defendant "committed no traffic violations, engaged in no criminal activity, made no furtive gestures, and took no evasive action." *Id*. at 698. The Court of Criminal Appeals concluded "that the officer's investigative action was unreasonable and thus in violation of the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution." *Id.* at 699; *see also Klare*, 76 S.W.3d at 75 ("A lawful stop must be based on more than a vehicle's suspicious location or time of day."); *Collins v. State*, No. 14-06-00889-CR, 2007 WL 3287879, at *4 (Tex. App.—Houston [14th Dist.] Nov. 6, 2007, no pet.) (mem. op., not designated for publication) ("[C]ertainly, simply sitting in a parked car at 2:35 a.m. is not sufficient."). Here, there is no evidence the arresting officer saw anything more than

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analysis); *Brown v. Tex*., 443 U.S. 47, 53 (1979) (concluding that nighttime activity is not per se sufficient to create reasonable suspicion of criminal activity); *United States v. Jimenez-Medina*, 173 F.3d 752, 756 (9th Cir. 1999) (finding factors of time of day, along with four other factors, insufficient to support inference of reasonable suspicion); *Scott v. State*, 549 S.W.2d 170, 172-73 (Tex. Crim. App. 1976) (finding that time of day 1:30 a.m., even with other factors such as a high crime area and reports of hubcap thefts in the past, was insufficient to support reasonable suspicion); and *Gamble v. State*, 8 S.W.3d 452, 453-54 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (invalidating a search when a detention was based on a history of drug sales in the area, frequent calls for police assistance to the area, and time of day, *i.e.*, 3:00 a.m.)).

Appellant and a companion sitting in a parked car in a parking lot that was open for business 24 hours a day. Therefore, the officer failed to satisfy the reasonable suspicion standard because the information available to him did no more than support an "inarticulate hunch or intuition."[7]

[7] *See Derichsweiler*, 348 S.W.3d at 917; *see also Shaffer v. State*, 562 S.W.2d 853, 854-55 (Tex. Crim. App. [Panel Op.]1978) (reversing denial of motion to suppress based on a traffic stop at 3:00 a.m. where all businesses were closed, there was no traffic, and there were no pedestrians because the arresting officer "had suspicion but not an articulable fact"); *Fatemi v. State*, 558 S.W.2d 463, 466 (Tex. Crim. App. 1977) ("At the time Officer Villegas approached appellant's car, he knew the following: appellant's car had been parked, with the parking lights on, partially off the side of the road adjacent to a park and across the street from houses and apartments; after Villegas circled the block, the car had been moved; the car was seen a few moments later in the same general vicinity. There is nothing in the record to indicate appellant had committed any traffic violation, that the area in question was a high crime area, or that there was anything unusual about the car's description. The record does not show Officer Villegas had specific and articulable facts such as to justify the temporary detention of appellant's automobile."); *Scott*, 549 S.W.2d at 172-73 (reversing denial of a motion to suppress where arresting officer saw no traffic violation at 1:30 a.m., received no relevant police dispatch, knew there were thefts in the area, and believed the area was "high crime"); *Faulkner v. State*, 549 S.W.2d 1, 2 (Tex. Crim. App. 1976) ("The inarticulate hunch, suspicion, or good faith of the officer in suspecting the car to be stolen was insufficient to constitute probable cause for an arrest, or even a temporary detention."); *Hernandez v. State*, 376 S.W.3d 863, 870 (Tex. App.—Fort Worth 2012, no pet.) (reversing the denial of a motion to suppress where arresting officer found appellant in a poorly lit and empty strip mall parking lot "sometime after 2:00 a.m. . . . with its headlights on, left turn signal flashing, and driver's side door open"; "curiosity or 'wondering about maybe a possible break-in' amount[ed] to nothing more than an inchoate and general suspicion or hunch") (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968) and *Woods v. State*, 956 S.W.2d 33, 35 (Tex. Crim. App. 1997)); and *Jones v. State*, 926 S.W.2d 386, 389 (Tex. App.—Fort Worth 1996, pet. ref'd) (reversing denial of a motion to suppress where officer stopped appellant because he drove out from behind a clump of trees in an unlit public park without a curfew at 10:25 p.m.); *but see Smith v. State*, 813 S.W.2d 599, 602 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) ("Here, appellant was observed sitting in an automobile parked on a dark and isolated road. The encounter occurred in the early morning hours in a high crime area known for the recovery of numerous stolen vehicles, many of which were of the same make and model as the one observed. The automobile's engine and lights were turned off. A second individual was doing something under the hood. Under the hood the officers observed the presence of two batteries and an unusual array of non-factory wiring. Based upon these facts, the officers were suspicious that the appellant and his companion were stripping a stolen vehicle. Because we find these specific articulable facts sufficient to constitute reasonable suspicion, we hold that the investigative stop of appellant was justified."). *Cf. Hinson v. State*, 547 S.W.2d 277, 279 (Tex. Crim. App. 1977) ("Although there had been thefts committed at the airport, there was not even a hint of suspicion that the appellant was involved in these activities.").

B. The park-and-ride was not a high crime area.

The trial court also erred when it concluded that three to four service calls over the course of several months to a business that is open 24 hours a day constitutes a "high crime area" capable of contributing to the reasonable suspicion calculus based on presence therein alone. The United States Supreme Court has held that whether a stop occurs in a "high crime area" is "among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 144, 147-48 (1972)). However, the protections afforded by the United States and Texas Constitutions are not abrogated simply because an officer subjectively believes an area is properly designated as "high crime". *See Gurrola v. State*, 877 S.W.2d 300, 303 (Tex. Crim. App. 1994) (en banc) (high-crime reputation of the area where the detainees were seen cannot serve as the basis for an investigative stop) (citing *Amorella v. State,* 554 S.W.2d 700, 701 (Tex. Crim. App. 1977)); *see also Malik v. State*, No. 14-92-01293-CR, 1996 WL 65639, at *3 (Tex. App.—Houston [14th Dist.] Feb. 15, 1996) (mem. op., not designated for publication) ("As a matter of law, the mere description of an area as a high crime area is insufficient to support a reasonable and articulable suspicion to justify an investigatory stop.") (citing *Comer v. State*, 754 S.W.2d 656, 658 (Tex. Crim. App. 1986) and *Benton v. State*, 576 S.W.2d 374, 377 (Tex. Crim. App. [Panel Op.] 1978)), *vacated on other grounds*, 953 S.W.2d 234 (Tex. Crim. App. 1997).

Here, the trial court made written findings of fact that the area in question was a "high crime area" and we are obliged to uphold this finding if it is supported by the record. *Baird v. State*, 398 S.W.3d 220, 226 (Tex. Crim. App. 2013). Here, the record contains no evidence which supports a finding that the park-and-ride was a "high crime area"; we should therefore hold the trial court's finding was erroneous.

Specifically, the trial court heard evidence that Officer Cox had patrolled the

area for about ten years and had made three to four service calls to that area over the course of several months. First, there is no evidence that anyone committed a crime during those service calls; instead, the reasonable inference is only that someone called the police for some unidentified form of assistance. Second, there is no evidence anyone was arrested during those service calls. Third, if it was a high crime area, Officer Cox's ten years patrolling it should have yielded additional testimony establishing that fact. Fourth, three to four service calls over the course of several months to an establishment that is perpetually open does not constitute a "high crime area"; concluding otherwise would obliterate the significance of the Supreme Court's test, effectively convert every neighborhood in every sizable Texas city to a high crime area, and undermine the reasonableness component of Fourth Amendment jurisprudence. *See Klare*, 76 S.W.3d at 75 ("reasonable suspicion cannot be based solely on [the officer's] knowledge that burglaries have previously occurred at that locale.") (citing *Brown v. Texas*, 443 U.S. 47 (1979) (reversing a conviction when officers stopped and searched the defendants only after viewing them in an area notorious for drug trafficking, and the officers were unable to articulate any basis for their conclusion that the defendants "looked suspicious")).

The Court of Criminal Appeals' holding in *Ceniceros v. State* is instructive in this regard. 551 S.W.2d 50, 55 (Tex. Crim. App. 1977). There, the arresting officer saw four men standing on a sidewalk in an area that had "a number of recent burglaries"; the court reversed the denial of defendant's motion to suppress and carefully explained its reasoning.

> The only facts the officer had at the initiation of his investigation were (1) a number of recent burglaries in the area and (2) four men standing together on a sidewalk at an intersection at 10:20 in the morning . . . . If such a suspicion were a reasonable inference from standing on a street corner in this neighborhood, all citizens passing through victimized neighborhoods would be

> suspects, and pedestrian checkpoints could be set up to monitor their comings and goings. Practices of this kind are repugnant to a free society. If victimization by crime becomes the justification for indiscriminate intrusion by the state, then we forfeit the security of our persons and privacy from invasion by the police on a hope of future security from the criminal, and ultimately find ourselves the displaced refugees in a raging war on crime.

Without more, two people parked in a place where they had the right to be cannot give rise to constitutionally sufficient suspicion, particularly where there is no competent evidence that the area in question is "high crime". *Compare Benton*, 576 S.W.2d at 374 (reversing the denial of a motion to suppress when officer conducted a traffic stop at 4:45 a.m. in an area that had "perhaps three recent burglaries in that area" that had "'usually' taken place between three and five in the morning") *with Thompson v. State*, 533 S.W.2d 825, 826 (Tex. Crim. App. 1976) (characterizing an area as "high crime" where "many prowlers had been recently reported.") and *Burton v. State*, No. 14-08-00445-CR, 2009 WL 838271, at *1 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (mem. op., not designated for publication) (characterizing an area as "high crime" where (1) "[m]any of the motels in the area . . . experienced 'a lot of prostitution . . . stolen vehicles . . . [and] drug activity'", (2) the motel in question "had been the scene of multiple arrests"; and (3) the arresting officers had purportedly "made between fifty and one-hundred arrests" at that hotel in the preceding eight months). *Cf. Garcia-Cantu*, 253 S.W.3d at 239 (reversing appellate court's reversal of a trial court's granting of a motion to suppress; although the officer testified that it was a "high crime" area for drugs and prostitution, "he did not dispute that there had been only two drug arrests in the prior six months and no prostitution arrests in that area.").

IV. Conclusion

In contrast to the majority, I would conclude that approaching a person with flashing overhead emergency lights is synonymous with an instruction to stop and not leave and thus constitutes a detention rather than merely an encounter. The investigative detention in this case was unsupported by reasonable suspicion and was therefore unlawful. The Fourth Amendment requires more than inarticulate suspicion or a hunch. The arresting officer here relied upon the time of day and the area where Appellant was located; that is not enough, particularly where the facts do not support reasonable suspicion based upon either circumstance (or even the combination of both circumstances). *See Klare*, 76 S.W.3d at 75 ("Although relevant to our analysis, both time of day and the level of criminal activity in the area are facts which focus on the suspect's surroundings rather than on the suspect himself. Consequently, courts generally require an additional fact or facts particular to the suspect's behavior to justify a suspicion of criminal activity.") (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). Therefore, I concur.

/s/ Meagan Hassan

Meagan Hassan
Justice

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

Publish — Tex. R. App. P. 47.2(b).