Opinion issued May 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00967-CR

NO. 01-18-01095-CR

THE STATE OF TEXAS, Appellant

V.

AMIRALLI DODHIYA, Appellee

On Appeal from the County Court at Law No. 5
Fort Bend County, Texas
Trial Court Case Nos. 17-CCR-194048 and 17-CCR-194049

MEMORANDUM OPINION[1]

A DPS trooper watched Amiralli Dodhiya make a right turn in a manner the trooper described as a traffic offense, followed Dodhiya for about four minutes,

[1] Amiralli Dodhiya has moved for panel rehearing. We deny the motion. We withdraw the opinion of December 31, 2019 and issue this memorandum opinion in its stead.

and then pulled him over. The trooper arrested Dodhiya for driving while intoxicated.[2] Dodhiya moved to suppress evidence obtained after his traffic stop, arguing the trooper did not have reasonable suspicion or probable cause to conduct the traffic stop. Following a hearing, the trial court granted Dodhiya's suppression motion.

In two issues, the State contends the trial court erred by granting the motion to suppress. The State contends it was undisputed that Dodhiya committed a traffic offense in the trooper's presence and argues the traffic offense provided reasonable suspicion for the traffic stop. The State points to the trooper's testimony that he witnessed Dodhiya turn into the middle lane and that he had reasonable suspicion Dodhiya committed a traffic offense in doing so. The trooper's testimony was consistent with video evidence, and the trial court's findings indicate the court found the trooper credible. Therefore, the traffic stop was lawful, and the motion to suppress was without merit. Because the trial court erroneously focused on the trooper's subjective motivations and, in doing so, misapplied the law, we reverse.

The Traffic Offense and Stop

Department of Public Safety Trooper T. Cardenas was patrolling Highway 6 in Fort Bend County during an overnight shift. Just after 2:00 a.m., Cardenas saw a

[2] Dodhiya was charged with driving while intoxicated and resisting arrest, search, or transportation. *See* TEX. PENAL CODE § 49.04 (DWI); § 38.03 (resisting arrest, search, or transportation).

vehicle on West Airport Road approach the intersection with Highway 6 and turn right into the middle, southbound lane of Highway 6. According to Cardenas, the driver committed a traffic offense by turning into the middle lane because he made a "wide right turn" and did not stay "as closely as possible to the curb or edge of the roadway." *See* TEX. TRANSP. CODE § 545.101(a) ("To make a right turn at an intersection, an operator shall make both the approach and the turn as closely as practicable to the right-hand curb or edge of the roadway"). Cardenas's dashcam video was admitted into evidence. It showed the driver turn into the middle lane directly in front of Cardenas's vehicle, as Cardenas described. According to Cardenas, after the driver entered the middle lane, he "tried to straighten up" but "crossed over into the left [lane] a little bit" but then "came back over" into the middle lane again. Cardenas testified he saw the driver leave his lane "a few times" as he followed him.

Cardenas explained that he did not immediately stop the driver because he "wanted to see more of the driver's behavior." Cardenas followed the vehicle another mile and a half. During that time, the driver moved into the left lane, turned left, and then turned onto a street with a roundabout. Cardenas testified that the driver used appropriate turn signals and stayed in his lane through each of these maneuvers. Eventually, the driver turned into a residential subdivision, and Cardenas initiated the traffic stop. The stop occurred approximately four minutes

after the driver entered Highway 6 by turning into the middle lane. Dodhiya was the driver of the vehicle. Cardenas arrested Dodhiya for driving while intoxicated.

Reasonable Suspicion to Support a Traffic Stop

In two issues, the State contends the trial court erred in concluding the trooper lacked reasonable suspicion and in granting Dodhiya's motion to suppress.

I. Standard of review

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *Arguellez v. State*, 409 S.W.3d 657, 662 (Tex. Crim. App. 2013); *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We apply a bifurcated standard of review, giving almost total deference to a trial court's findings of historical fact and credibility determinations that are supported by the record, while reviewing questions of law de novo. *Delafuente v. State*, 414 S.W.3d 173, 177 (Tex. Crim. App. 2013); *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). We view the evidence in the light most favorable to the ruling and uphold the ruling if it is correct on any theory of law applicable to the case. *Absalon v. State*, 460 S.W.3d 158, 162 (Tex. Crim. App. 2015).

II. Applicable law

The Fourth Amendment protects against unreasonable searches and seizures by government officials. U.S. CONST. amend. IV; *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). 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). A defendant satisfies this burden by establishing that a search or seizure occurred without a warrant. *Id.* Once the defendant has made this showing, the burden of proof shifts to the State, which is required to establish that the search or seizure was conducted pursuant to a warrant or was reasonable. *Id.* at 672–73; *Torres v. State*, 182 S.W.3d 899, 902 (Tex. Crim. App. 2005).

A law enforcement officer may lawfully stop a motorist when the officer has probable cause to believe the motorist has committed a traffic violation. *Walter v. State*, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000). An officer may also lawfully stop a motorist when, based on the totality of the circumstances, the officer has specific articulable facts that, combined with rational inferences from those facts, provide reasonable suspicion the person is, has been, or soon will be engaged in criminal activity. *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App.), *cert. denied*, 565 U.S. 840 (2011) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *see Jaganathan v. State*, 479 S.W.3d 244, 247 (Tex. Crim. App. 2015); *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013). The reasonable-suspicion standard requires only "some minimal level of objective justification" for the detention. *Foster v. State*, 326 S.W.3d 609, 613 (Tex. Crim. App. 2010).

The test for reasonable suspicion is an objective one that focuses solely on whether an objective basis exists for the detention; the officer's subjective intent is disregarded. *State v. Kerwick*, 393 S.W.3d 270, 274 (Tex. Crim. App. 2013); *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012). Whether the facts known to the officer amount to reasonable suspicion is a mixed question of law and fact subject to de novo review. *Hamal*, 390 S.W.3d at 306; *State v. Mendoza*, 365 S.W.3d 666, 669–70 (Tex. Crim. App. 2012).

If an officer has a reasonable basis for suspecting that a person has committed a traffic offense, the officer may legally initiate the traffic stop. *Jaganathan*, 479 S.W.3d at 247. There is no requirement that the driver actually be guilty of the traffic offense; it is sufficient that the officer had a reasonable suspicion the driver committed the traffic offense. *Id.*; *Cook v. State*, 63 S.W.3d 924, 929 n.5 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

Thus, at the suppression hearing, the State was not required to establish that Dodhiya committed a traffic offense; it was enough to elicit testimony from Trooper Cardenas to establish that reasonable suspicion existed that Dodhiya had committed a traffic offense. *Jaganathan*, 479 S.W.3d at 247; *see Milligan v. State*, No. 03-12-00485-CR, 2014 WL 3562714, at *3 (Tex. App.—Austin July 18, 2014, no pet.) (mem. op., not designated for publication) ("Reasonable suspicion may be

validly based on articulable facts that are ultimately shown to be inaccurate or false.").

III. The reasonable-suspicion standard was met

Trooper Cardenas testified he saw Dodhiya turn onto Highway 6 by entering the middle of three southbound lanes. He testified he had reasonable suspicion this action violated the Transportation Code because Dodhiya did not turn into the farthest right lane, closest to the curb. *See* TEX. TRANSP. CODE § 545.101(a).

At the conclusion of the suppression hearing, the trial judge's remarks make clear he found Trooper Cardenas credible. Additionally, the video evidence, which we have reviewed, shows a vehicle pull into the middle lane directly in front of Trooper Cardenas's vehicle, as Cardenas described.

It was not relevant to the trial court's reasonable-suspicion analysis whether Dodhiya actually committed a traffic offense; it was sufficient that Trooper Cardenas credibly testified to articulable facts to establish reasonable suspicion of a traffic offense. *Jaganathan*, 479 S.W.3d at 247. Cardenas did so.

IV. The trial court erred by misapplying the law when it overlaid the proper objective analysis with an evaluation of Trooper Cardenas's subjective reasoning

In its findings, the trial court inferred that Cardenas did not immediately pull Dodhiya over because Cardenas subjectively chose to give Dodhiya "the benefit of the doubt." The trial court inferred a subjective motivation to abandon one already-

established basis for a valid traffic stop (i.e., the illegal right turn) and to investigate, instead, a possible different offense (i.e., driving while intoxicated). The trial court's findings were stated as follows:

> It is the opinion and finding of this Court—Trooper Cardenas is an excellent trooper. He has good experience. He is doing his job in every way, in the right way. . . .
>
> [I]t is entirely appropriate for Trooper Cardenas to not make a stop of the initial vehicle when it makes its right turn. On that initial right turn, a trooper or police officer similarly situated can give someone *the benefit of the doubt* . . . . There are a lot of reasons to give a driver . . . the benefit of the doubt in making a right turn onto a highway, like Highway 6 . . . .
>
> And it's the finding of the Court that de facto this driver of this vehicle . . . was given the benefit of the doubt by not being stopped right away on his right turn. . . . I think Trooper Cardenas did the right thing. He followed this defendant, took his time, exercised his patience, exercised professionalism and actually investigated . . . whether or not there were articulable facts to support reasonable suspicion to engage in a temporary detention . . . of the driver of the vehicle. Under the facts of this case, . . . [the] entire driving pattern engaged in by the defendant demonstrated that there were no articulable facts to support reasonable suspicion to investigate the driver of this vehicle *for driving while intoxicated*. . . .
>
> So it's the opinion of this Court to grant the Motion to Suppress, and it's the opinion of this Court to encourage Trooper Cardenas to do exactly what he did, in every way, again, every time he sees somebody who he suspects he should stop.

(Emphasis added.)

The trial court found there was no reasonable suspicion of the offense of driving while intoxicated based on Cardenas's testimony, supported by video

evidence, that Dodhiya appropriately used his turn signals, maintained his lane, and did not otherwise display bad driving as Cardenas continued to follow him several minutes after the right turn into the center lane. But in doing so, the trial court erroneously allowed its analysis to veer from the objective view of the traffic-offense evidence into the subjective motivations of Cardenas in continuing to watch Dodhiya's driving pattern.

The caselaw is clear that reasonable-suspicion is an objective standard, and the officer's subjective intent or motive should be disregarded. *State v. Elias*, 339 S.W.3d 667, 674 (Tex. Crim. App. 2011); *Wiede*, 214 S.W.3d at 25; *State v. Houghton*, 384 S.W.3d 441, 447 n.4 (Tex. App.—Fort Worth 2012, no pet.). Once Trooper Cardenas credibly testified to articulable facts to establish a reasonable suspicion that Dodhiya made an illegal right turn, the State met its burden to permit the traffic stop. Whether Cardenas subjectively wondered if there might be a more significant offense underway, including a DWI, was not relevant to the objective analysis required. *See Elias*, 339 S.W.3d at 674.

We conclude the trial court misapplied the law when it extended its analysis to evaluate Trooper Cardenas's subjective motivation for following Dodhiya and permitted that subjective motivation to negate the objective reasonable suspicion

established by Cardenas's credible testimony and video evidence.[3] *See Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001) (concluding court of appeals erred in looking beyond sufficient evidence of objective reasonable suspicion to consider officer's subjective motivations); *cf. State v. Ysassi*, No. 04-17-00740-CR, 2018 WL 6624896, at *3 (Tex. App.—San Antonio Dec. 19, 2018, no pet.) (mem. op., not designated for publication) ("Because Sergeant Williams's observations of Ysassi's driving behavior constituted a traffic violation, he had reasonable suspicion to stop Ysassi regardless of his subjective intent.").

For the first time on appeal, Dodhiya raises an alternate basis for affirmance: that the officer waited so long to stop him that the entire episode became unreasonable and, as a result, negated reasonable suspicion. Dodhiya relies on a Texarkana Court of Appeals opinion and the Court of Criminal Appeals's subsequent affirmance to support his position. *See State v. Dixon*, 151 S.W.3d 271, 274 (Tex. App.—Texarkana 2004), *aff'd*, 206 S.W.3d 587 (Tex. Crim. App. 2006). According to Dodhiya, the holding in *Dixon* is that an officer must initiate a traffic

[3] In reaching this conclusion, we note the trial court's findings are distinguishable from those in *State v. Dixon*, 206 S.W.3d 587 (Tex. Crim. App. 2006). There, the trial court found an officer's explanation of an observed traffic violation as the basis for a traffic stop to not be credible. *Id.* at 590–91. Here, the findings do not indicate the trial court found Cardenas not credible. They indicate, instead, the trial court found Cardenas to be credible yet ruled to suppress the evidence based on a misapplication of the reasonable-suspicion standard.

stop within a reasonable amount of time and distance from the traffic offense for the reasonable-suspicion standard to be met.

As several other intermediate appellate courts have noted, it is questionable that *Dixon* stands for the legal proposition Dodhiya advocates. *See Anderson v. State*, No. 02-18-00198-CR, 2019 WL 2429405, at *9 (Tex. App.—Fort Worth June 6, 2019, no pet.) (mem. op., not designated for publication) (noting that *Dixon* Court held "that the dispositive issue" was "not the delay between the purported traffic offense and the officer's traffic stop," but, instead, "the trial court's determination that no traffic offense was in fact committed"); *Villarreal v. State*, No. 04-15-00290-CR, 2016 WL 4376630, at *4 n.1 (Tex. App.—San Antonio Aug. 17, 2016, no pet.) (mem. op., not designated for publication) ("We also note that the Court of Criminal Appeals held that the dispositive issue in *Dixon* was not the delay between the purported traffic offense and the officer's traffic stop, but rather was the trial court's determination that no traffic offense was in fact committed."); *Carey v. State*, No. 05–08–01300–CR, 2010 WL 610924, at *2 (Tex. App.—Dallas Feb. 23, 2010, no pet.) (mem. op., not designated for publication) (stating that appellant's reliance on *Dixon* was misplaced because "*Dixon* did not turn on the officer's delay between 'the amount of time or the distance between the traffic offense and the traffic stop.' Rather, the trial court did not believe that *Dixon* committed a traffic offense"); *Castillo v. State*, No. 04-06-

00392-CR, 2007 WL 1752170, at *2 (Tex. App.—San Antonio June 20, 2007, no pet.) (mem. op., not designated for publication) (in analyzing *Dixon*, stating that "in affirming and holding that the record supported the trial court's conclusion that the traffic stop was not valid, the Court of Criminal Appeals stated that the relevant issue was not whether the time lapse rendered the stop unreasonable"); *cf. United State v. Zuniga*, 860 F.3d 276, 281–82 (5th Cir. 2017).[4]

But, even assuming Dodhiya's citation to *Dixon* provides authority for his position, there are several reasons we must conclude that Dodhiya's new argument, raised for the first time on appeal, will not support affirmance of an otherwise erroneous ruling.

First, Dodhiya's argument, at least in part, calls on this Court to defer to the trial court's determinations, including those that might be inferred. But there can be no deference on this issue because whether facts are sufficient to give rise to reasonable suspicion is a question of law reviewed de novo. *See Madden v. State*, 242 S.W.3d 504, 517 (Tex. Crim. App. 2007) ("We review the legal question of whether the totality of circumstances is sufficient to support an officer's reasonable

[4] Dodhiya's argument derives from a view of the traffic offense as having become stale. And there is Fourth Amendment caselaw about police relying on stale information. But the concept of staleness is not equivalent among the various applications of Fourth Amendment law. The analysis required in determining whether an informant's tip has become stale, for example, is not identical to what would be required in the context of a police officer's observing a traffic violation—a violation that was recorded on video to be played to the factfinder—and then stopping the driver less than two miles later. *See discussion in United States v. Copeland*, 321 F.3d 582, 594–95 (6th Cir. 2003).

suspicion *de novo*."); *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001) (noting de novo review of whether "facts are sufficient to give rise to reasonable suspicion"); *cf. Moreno v. State*, No. 01-03-01033-CR, 2004 WL 2307416, at *2 (Tex. App.—Houston [1st Dist.] Oct. 14, 2004, no pet.) (mem. op., not designated for publication) (following *Garcia*).

Second, reasonableness is evaluated in light of the totality of circumstances, which means on the particular facts of the case on appeal. *See Icke v. State*, 36 S.W.3d 913, 915 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (citing *Loesch v. State*, 958 S.W.2d 830, 832 (Tex. Crim. App. 1997) (en banc)); *cf. Rincon v. State*, No. 01-07-01072-CR, 2008 WL 5102448, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2008, no pet.) (mem. op., not designated for publication). And, when a party seeks to uphold a ruling based on a new legal theory that requires a factual evaluation, the issue must have been raised in the trial court in such a manner that the appellant was fairly called upon to present evidence on the issue to qualify as a theory of law applicable to the case. *See State v. Copeland*, 501 S.W.3d 610, 612–13 (Tex. Crim. App. 2016); *State v. Esparza*, 413 S.W.3d 81, 90 (Tex. Crim. App. 2013); *see also Carter v. State*, No. 13-17-00202-CR, 2018 WL 1633488, at *2 n.1 (Tex. App.—Corpus Christi April 5, 2018, pet. ref'd) (mem. op., not designated for publication); *State v. Duncan*, No. 05-13-01176-CR, 2014 WL 2937175, at *3

(Tex. App.—Dallas June 26, 2014, no pet.) (mem. op., not designated for publication).

In some cases, sufficient information is in the record and a legal theory that was never raised in the trial court will qualify as a theory of law applicable to the case. *See, e.g.*, *Alaniz v. State*, No. 11-12-00352-CR, 2015 WL 4249274, at *5 (Tex. App.—Eastland July 9, 2015, pet. ref'd) (mem. op., not designated for publication) (analyzing statement under Rule of Evidence 803(24) for first time on appeal). In other instances, the factual record is inadequately developed on the issue for the theory to be applicable to the case and it is unjust to affirm an otherwise erroneous judgment on a ground that the opposing party had no notice of or opportunity to develop favorable, relevant facts. *See, e.g.*, *Duncan*, 2014 WL 2937175, at *3 (refusing to consider argument raised for first time on appeal regarding legality of "detention incident to the search" because it "was not an issue either party or the trial court addressed below," the appellee "never presented any evidence with respect to his detention, search, or arrest," and "the State was never called upon to show that Duncan's detention was lawful because appellee limited his challenge to the issue of whether there was probable cause for the search warrant of the premises.").

Here, Dodhiya never argued to the trial court that the State could not meet the reasonable-suspicion standard because of an excessive delay. Dodhiya did not

cite to *Dixon* or any other case for that proposition or argue it generally. Nor did any party question the officer about what would be a historically common amount of time to follow a driver before initiating a stop or what has been his own practice in that regard. These facts were not adduced to evaluate the reasonableness of the length of time this officer followed Dodhiya before initiating the traffic stop. Instead, the questioning of the officer fell within two categories: (1) confirming he had seen a violation when Dodhiya turned into a middle lane and (2) questioning whether there was any evidence of a failure to maintain a lane or bad driving as Dodhiya was followed. No questioning, and thus no factual development, centered on the reasonableness of the distance or time the officer followed Dodhiya. The State was not called upon to present facts in support of a theory of reasonableness on that issue. Therefore, the record is not adequately developed to rule on the issue for the first time on appeal.

Third, our review of federal cases addressing the duration between observing a traffic offense and initiating a traffic stop would not support Dodhiya's position, without more evidence. Our research located several cases in which an officer followed a driver for a mile or more and the detention was not held to be unlawful. *See, e.g.*, *United States v. Smith*, No. CR408-208, 2008 WL 5332117, at *1 (S.D. Ga.), *report and recommendation adopted with unrelated modification*, 2008 WL 5332085 (S.D. Ga. Dec. 19, 2008) (holding traffic stop not unlawful in context of

officer observing a vehicle with a broken right taillight turning into a complex and parking, and then observing three people get out of the vehicle and chat with another person for five minutes, and then observing all four people get back into the vehicle and driving away, and, at that point, initiating the traffic stop); *Copeland*, 321 F.3d at 594–95 (when an officer observed a parking violation and followed the driver for a mile before initiating traffic stop, holding that detention was reasonable); *United States v. Cline*, 349 F.3d 1276, 1285 (10th Cir. 2003) (traffic stop lawful even though officers had other motives for stopping defendant and officers did not stop him until more than a mile after the traffic violation); *United States v. Scopo*, 19 F.3d 777, 781–82 (2d Cir. 1994) (concluding that police's action in waiting 2.2 miles to initiate traffic stop did not make stop unlawful); *cf. Zuniga*, 860 F.3d at 282 (rejecting argument that traffic offense had become "stale" after 15 minute delay between time of offense and traffic stop after considering events in interim).

Here, the officer followed Dodhiya for one and one-half miles and neither party adduced evidence about what is a typical amount of time to follow a driver after observation of a traffic violation or what factors influenced the relevant actions. We reject Dodhiya's newly raised argument that delay negates reasonable suspicion. We do so, first, because the new argument is not a theory of law applicable to the case, and, second, because the totality of the evidence adduced

without more would not support a finding that a delay of one and one-half miles is unreasonable.

Conclusion

We reverse and remand for additional proceedings.

Sarah Beth Landau
Justice

Panel consists of Justices Lloyd, Goodman, and Landau.

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