Opinion issued June 18, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00390-CR

DAVID ALLYN SWEAT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Case No. 16-CR-2171

O P I N I O N

A jury found appellant, David Allyn Sweat, guilty of the felony offense of driving while intoxicated ("DWI"), third offense,[1] and the trial court assessed appellant's punishment at confinement for three years. In two issues, appellant

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1 *See* TEX. PENAL CODE ANN. §§ 49.04(a), 49.09(b)(2).

contends that the evidence is legally insufficient to support his conviction and the trial court erred in denying his motion to suppress.

We affirm.

Background

At the beginning of trial, the following exchange took place in the jury's presence:

> [State]: Judge, before we call our first witness, by stipulation and agreement, State moves to admit State's Exhibit 1 and State's Exhibit 2, which are the two jurisdictional enhancements or priors that are required showing [appellant's] two previous DWI convictions.
>
> [Appellant's counsel]: No objection from the Defense.
>
> THE COURT: All right. By stipulation, State's Exhibit[s] 1 and 2 will be admitted.
>
> (State's Exhibit Nos. 1 and 2 admitted)
>
> [State]: Okay. Thank you, Judge. May we publish to the jury?
>
> THE COURT: You may briefly.
>
> [State]: Thank you. State's Exhibit 1 is from Cause No. 117783, State versus David Allyn Sweat. The judgment was entered in November—on November the 15th of 2001 and was—was out of the County Court at Law No. 1 in Brazoria County, Texas. State's Exhibit 2 is a judgment from Cause No. 180658, State versus David Allyn Sweat. The judgment

> was entered on May 25th, 2011, for—for the offense of DWI out of Brazoria County, Texas.

Galveston County Sheriff's Office Deputy J. Popovich testified that, in the early morning hours of August 11, 2016, he was on patrol in Bacliff in Galveston County, Texas when he noticed a truck traveling in the opposite direction at a high rate of speed. After Popovich saw the driver run a stop sign, he turned around his patrol car to follow the truck. The driver of the truck ran three more stop signs before Popovich pulled the truck over.

Deputy Popovich approached the truck and encountered appellant in the driver's seat. Popovich smelled the strong odor of alcoholic beverage coming from appellant and the truck's interior. He asked appellant for his driver's license and proof of insurance. Appellant fumbled with his wallet; he slurred his words and could not form a complete sentence. Popovich had trouble understanding appellant and noticed that appellant was struggling to keep his head upright.

When Deputy Popovich asked appellant how many drinks he had that night, appellant responded, "[t]oo much" and "a lot." Appellant had trouble stepping out of the truck, and he held onto the door with both hands to raise himself out of the driver's seat. Appellant refused to perform any field sobriety tests, explaining that "he couldn't pass."

Based on his observations, Deputy Popovich arrested appellant for the offense of DWI. He placed appellant in the back of his patrol car and read him the statutory warnings required before taking a breath or blood sample. Appellant did not consent to breath or blood testing, and Popovich secured a search warrant so that appellant's blood could be drawn.

During Deputy Popovich's testimony, the trial court admitted into evidence a copy of the "Search Warrant for Blood" obtained by Popovich. The warrant contains an order that a "physician, registered nurse, qualified technician or medical laboratory technician" take samples of blood from appellant "in the presence of a law enforcement officer and deliver them to the said law enforcement officer."

Deputy Popovich explained that he transported appellant to Mainland Medical Center in Texas City, Texas and gave the search warrant to Andrea Martin, a phlebotomist employed in the laboratory there. He observed the procedure that Martin used to draw the blood sample from appellant. Popovich provided Martin with the blood test kit for collection, which consisted of two vials for collecting appellant's blood, each containing anticoagulant powder to prevent the blood from clotting. Popovich testified that Martin cleaned appellant's arm with soap and water before inserting the needle into the cleaned site and collected appellant's blood in the vials.

Rachel Aubel, a forensic scientist at the Texas Department of Public Safety Crime Lab in Houston, testified that she analyzed appellant's blood sample to determine the blood-alcohol concentration ("BAC"). Aubel stated that appellant's BAC was 0.132 grams of alcohol per 100 milliliters of blood, which was about four times the legal limit of 0.080 grams of alcohol per 100 milliliters of blood.

Sufficiency of the Evidence

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction because "the State failed to prove that appellant is the same person identified" as having been convicted of the offense of DWI on "two previous occasions" as required under Texas Penal Code section 49.09(b). *See* TEX. PENAL CODE ANN. § 49.09(b)(2).

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable

inferences from the facts. *Williams*, 235 S.W.3d at 750. However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

A person commits the Class B misdemeanor offense of DWI if he operates a motor vehicle in a public place while intoxicated. TEX. PENAL CODE ANN. § 49.04(a), (b). If the person has twice been previously convicted of the offense of DWI, the third offense constitutes a third-degree felony. *Id*. § 49.09(b)(2). The State bears the burden of proving that a defendant has twice been convicted of the offense of DWI as a jurisdictional element of a third-degree felony offense of DWI. *Ross v. State*, 192 S.W.3d 819, 821 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). This showing requires proof that (1) two prior convictions exist and (2) the defendant is linked to those convictions. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007).

Appellant argues that the evidence is legally insufficient to support his conviction for the third-degree felony offense of DWI because State's Exhibits 1 and 2, the certified records of two prior judgments of conviction, are linked to him by name only and the State failed to adduce independent evidence showing that appellant was the person convicted of those offenses. A certified copy of a judgment of conviction alone seldom suffices to link a defendant to a prior conviction. *Beck*

v. State, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986); *Wilmer v. State*, 463 S.W.3d 194, 197 (Tex. App.—Amarillo 2015, no pet.).

The State responds that appellant and the State stipulated to State's Exhibits 1 and 2 as being appellant's two prior convictions for the offense of DWI and, as a result, appellant is precluded from challenging the sufficiency of the evidence on this issue.

A stipulation constitutes a judicial admission, removing the need for proof of the facts it addresses. *Martin v. State*, 200 S.W.3d 635, 639–41 (Tex. Crim. App. 2006); *Bryant v. State*, 187 S.W.3d 397, 402 (Tex. Crim. App. 2005). Unless a stipulation accompanies a guilty plea, a party may stipulate to facts without creating a writing or using specific words. *See, e.g.*, *Messer v. State*, 729 S.W.2d 694, 699 ("Stipulations, oral or written, in criminal cases where the plea of guilty is entered before the jury, do not have to comply with Article 1.15."); *Staggs v. State*, 314 S.W.3d 155, 159 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (written judicial confession required to support guilty plea tendered under Texas Code of Criminal Procedure article 1.15). Because a stipulation is a type of judicial admission, it must be a clear, deliberate, and unequivocal statement. *See Spradlin v. State*, 100 S.W.3d 372, 380 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

We consider whether a statement amounts to a judicial admission by examining it in context. *See Thomas v. State*, 408 S.W.3d 877, 885–86 (Tex. Crim.

App. 2013). The Court of Criminal Appeals in *Thomas*, in considering whether a statement of "no objection" forfeited an earlier-preserved error, explained that whether it did or not

> is context-dependent. By that we mean that an appellate court should not focus exclusively on the statement itself, in isolation, but should consider it in the context of the entirety of the record. If the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his "no objection" statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal, then the appellate court should not regard the claim as "waived," but should resolve it on the merits. On the other hand, if from the record as a whole the appellate court simply cannot tell whether an abandonment was intended or understood, then, consistent with prior case law, it should regard the "no objection" statement to be a waiver of the earlier-preserved error. Under the latter circumstances, the affirmative "no objection" statement will, by itself, serve as an unequivocal indication that a waiver was both intended and understood.

Id. We follow *Thomas* here to determine whether appellant intended to stipulate to his two prior convictions for the offense of DWI by responding with "no objection" to the State's description of State's Exhibits 1 and 2 as "the two jurisdictional enhancements . . . showing [appellant's] two previous DWI convictions."

Appellant posits that the trial court's use of the term "by stipulation" refers to an agreement about the admissibility of the exhibits, not his admission to the prior convictions themselves. We reject this proposed interpretation as unreasonable because it suggests that neither the trial court nor the attorneys involved understood the meaning and import of "stipulation" as a legal term of art.

Appellant also points to the trial court's charge to the jury, which contains the following application paragraph:

> [I]f you find from the evidence beyond a reasonable doubt that, prior to the commission of the aforesaid offense by [appellant], on the 15th day of November, AD., 2001 in cause number 117783, in the County Court at Law No.1 of Brazoria County, Texas, [appellant] was convicted of an offense relating to the operating of a motor vehicle while intoxicated on the 25th day of May, AD., 2011, in cause number 180658 in the County Court at Law No. 1 of Brazoria County, Texas, [appellant] was convicted of an offense relating to the operating of a motor vehicle while intoxicated; then you will find [appellant] guilty of the felony offense of Driving While Intoxicated as alleged in the indictment.

This instruction asks the jury to make findings concerning the facts of appellant's prior offenses of DWI without requiring the jury to find that appellant, and not another person, committed them. It does not support appellant's position.[2]

Moreover, under circumstances remarkably similar to those presented here, the Eastland Court of Appeals held that a defendant "acquiesced in the State's representation that he stipulated to the identity issue in connection with the prior conviction when neither he nor defense counsel corrected or objected to the [State's] statements." *See Corrales v. State*, No. 11-13-00180-CR, 2015 WL 3938100, at *3

[2] To avoid any potential misunderstanding, the parties should present the trial court with a written stipulation, signed by a defendant and defense counsel, that contains the information necessary to prove the defendant's two prior convictions for the offense of DWI. *See Bryant v. State*, 187 S.W.3d 397, 405 (Tex. Crim. App. 2005) (Cochran, J., concurring). But the record here suffices to show that appellant stipulated that the two prior convictions for the offense of DWI documented by State's Exhibits 1 and 2 belonged to him.

(Tex. App.—Eastland June 25, 2015, no pet.) (mem. op., not designated for publication). Like the defendant in *Corrales*, appellant stipulated to his two prior convictions for the offense of DWI and thus "waived his right to put the [State] to its proof on that element." *Bryant*, 187 S.W.3d at 402 & n.19 (internal quotations omitted); *see Corrales*, 2015 WL 3938100 at *3.

Based on the foregoing, viewing all of the evidence in the light most favorable to the jury's verdict, we conclude that the evidence is sufficient for a rational fact finder to have found beyond a reasonable doubt that appellant "is the same person identified" as having been convicted of the offense of DWI on "two previous occasions." Thus, we hold that the evidence is legally sufficient to support appellant's conviction.

We overrule appellant's first issue.

Motion to Suppress

In his second issue, appellant argues that the trial court erred in denying his motion to suppress the evidence of his "blood draw" and BAC because no evidence shows that Martin, the phlebotomist, had the qualifications, skills, and experience necessary to perform the blood draw or that the procedure she used was reasonable.

We apply a bifurcated standard to review a trial court's denial of a motion to suppress evidence. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We review the trial court's factual findings for an abuse of discretion, but we

review the trial court's application of the law to the facts de novo. *Id.* At a suppression hearing, the trial court is the sole trier of fact and judge of a witness's credibility, and it may choose to believe or disbelieve all or any part of the witness's testimony. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). When, as here, a trial court does not make explicit findings of fact, we review the evidence in a light most favorable to the trial court's ruling. *Walter v. State*, 28 S.W.3d 538, 540 (Tex. Crim. App. 2000). We give almost total deference to a trial court's implied findings, especially those based on an evaluation of witness credibility or demeanor. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We will sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.* at 447–48 & n.19.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV; *State v. Villarreal*, 475 S.W.3d 784, 795 (Tex. Crim. App. 2015). A blood draw conducted at the direction of a law enforcement officer constitutes a search and seizure under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767–68 (1966); *State v. Johnston*, 336 S.W.3d 649, 657–58 (Tex. Crim. App. 2011); *see* U.S. CONST. amend. IV. In *Schmerber*, the United States Supreme Court set forth a two-part analysis for determining the legality of a blood draw: (1) whether the law enforcement officer was justified in requiring the

defendant to submit to a blood test and (2) whether the law enforcement officer employed reasonable means and procedures in taking the defendant's blood. 384 U.S. at 768; *see also Johnston*, 336 S.W.3d at 658. The Court of Criminal Appeals has stated that "means and procedures" under the second prong contains two separate inquiries: (1) whether the test chosen (the means) was reasonable and (2) whether the test was performed in a reasonable manner. *Johnston*, 336 S.W.3d at 658.

Based on *Schmerber* and *Johnston*, then, a defendant seeking suppression of a blood draw as an unreasonable search and seizure in violation of the Fourth Amendment must prove that (1) a law enforcement officer was not justified in requiring the defendant to submit to a blood test, (2) drawing the defendant's blood was an unreasonable method to determine the defendant's intoxication level, or (3) the procedure used for the blood draw was unreasonable. *See Schmerber*, 384 U.S. at 768; *Johnston*, 336 S.W.3d at 658. Appellant's challenge to the qualifications of Martin—the phlebotomist that performed the blood draw in this case—implicates the third prong.

In his brief, appellant concedes that a qualified phlebotomist may satisfy Fourth Amendment standard for the reasonableness of the procedure used to take the defendant's blood. He asserts, however, that the mere title of "phlebotomist" is not enough to meet the State's burden; the State also must provide additional proof of

the phlebotomist's qualifications.[3] But a defendant who alleges a Fourth Amendment violation—not the State—has the burden of producing evidence that rebuts the presumption of proper conduct by law enforcement officers. *See State v. Robinson*, 334 S.W.3d 776, 778–79 (Tex. Crim. App. 2011).

Appellant has not challenged the search warrant's validity, so the presumption of proper law enforcement conduct applies. Here, Deputy Popovich secured a search warrant so that appellant's blood could be drawn, and a copy of the "Search Warrant For Blood" was admitted into evidence. Because appellant did not produce evidence that Martin—the phlebotomist who drew his blood—was not qualified, the State had no burden to adduce additional proof on that issue. *See id*.; *see also id*. at 781 (Cochran, J., concurring) (explaining presumption of proper procedures and conduct makes sense because person who draws blood in hospital, "in the vast majority of cases," is likely to be qualified to do so).

Deputy Popovich's testimony further shows that the blood draw was conducted in a reasonable manner. Nothing in the record suggests that Martin could not perform the requirements of her job or that the blood draw procedure she used

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[3] A phlebotomist is "a person with special training in the practice of drawing blood." MOSBY'S MEDICAL DICTIONARY 1333 (6th ed. 2002); *see also Krause v. State*, 405 S.W.3d 82, 85 (Tex. Crim. App. 2013) (noting intermediate courts of appeals' conclusion that phlebotomists are "qualified technicians" within meaning of Texas Transportation Code section 724.017, which applies to mandatory blood draws in absence of warrant).

did not comply with standard medical procedure or the accepted standard of care. *See Siddiq v. State*, 502 S.W.3d 387, 401–02 (Tex. App.—Fort Worth 2016, no pet.). Thus, we hold that the trial court did not err in denying appellant's motion to suppress.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.

Publish. TEX. R. APP. P. 47.2(b).