COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JUAN TORRES REYES,	§	
	§	No. 08-18-00145-CR
Appellant,	§	
	§	Appeal from the
v.	§	
	§	County Court at Law No. 1
THE STATE OF TEXAS,	§	
	§	of El Paso County, Texas
Appellee.	§	
	§	(TC# 20160C00620)
	§	

O P I N I O N

Appellant Juan Torres Reyes appeals from his conviction for driving while intoxicated. In his sole issue on appeal, he urges that the trial court abused its discretion by denying his motion to suppress evidence obtained as a result of a traffic stop which he contends was made without reasonable suspicion. We affirm.

I. BACKGROUND

On the morning of January 10, 2016, at approximately 1:30 a.m., El Paso police officers Adam Himes and Isaac Ledesma observed Reyes' car driving in two lanes of a multi-lane street. Officer Himes described Reyes' action as "driving in the middle lane and the right lane directly over the white line." Officer Ledesma described it as "driving in between the second and third

lane, not choosing a lane for a good amount of distance." The officers testified at the suppression hearing, and the arrest report reflects, that the officers' reason for pulling Reyes over was "lane straddling." Neither officer testified concerning whether the movement of Reyes' vehicle was unsafe.

Upon stopping Reyes' vehicle, the officers noted that Reyes' breath had a strong smell of alcohol, his eyes were bloodshot, and his speech was slurred. Reyes told the officers he was coming from a nearby bar, where he had consumed two beers. Officer Ledesma administered field sobriety tests, which Reyes failed.

Reyes was arrested and charged with driving while intoxicated. He filed a motion to suppress based on his contention that the officers lacked reasonable suspicion to make a traffic stop. The court denied the motion and entered findings of fact reflecting the facts as recited above. The court also entered conclusions of law in which it stated that the traffic stop was based on reasonable suspicion and was, therefore, lawful.

Reyes ultimately entered a plea of guilty pursuant to a plea agreement. The trial court entered a judgment of conviction based on that plea agreement and certified Reyes' right to appeal.

II. DISCUSSION

In a single issue on appeal, Reyes argues that the trial court abused its discretion by denying his motion to suppress because the evidence does not support a reasonable suspicion that Reyes committed a violation of Section 545.060 of the Texas Transportation Code ("Section 545.060"). Specifically, Reyes contends that the evidence does not show that his failure to maintain a single lane was unsafe. *See* TEX. TRANSP. CODE ANN. § 545.060(a)(2).

A. Standard of Review

A trial court's ruling on a motion to suppress is reviewed for abuse of discretion. *Layton v. State*, 280 S.W.3d 235, 240 (Tex. Crim. App. 2009). In a case such as this, where the police make a warrantless stop, the State bears the burden of showing that the police had reasonable suspicion to justify that stop. *See Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007). "Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity." *Id.* (citing *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001)). Determining whether reasonable suspicion exists requires considering the totality of the circumstances, "giving almost total deference to the trial court's determination of historical facts and reviewing *de novo* the trial court's application of the law to facts not turning on credibility and demeanor." *Id.* (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)).

B. Transportation Code Section 545.060

The only basis offered by the State for the officers' stop of Reyes' vehicle was that the officers had a reasonable suspicion that Reyes violated Section 545.060 of the Texas Transportation Code. That section provides, in pertinent part:

> (a) An operator on a roadway divided into two or more clearly marked lanes for traffic:
>
> (1) shall drive as nearly as practical entirely within a single lane; and
>
> (2) may not move from the lane unless that movement can be made safely.

TEX. TRANSP. CODE ANN. § 545.060.

It is undisputed that the roadway on which Reyes was driving was divided into three clearly marked lanes for traffic. Reyes also does not dispute on appeal that he was not driving "as nearly

as practical entirely within a single lane[.]" *See id.* In any event, both police officers unequivocally testified that Reyes was straddling the line between two lanes, and it was within the trial court's discretion, as the sole judge of the weight and credibility of the evidence, to accept that testimony. *See State v. Mendoza*, 365 S.W.3d 666, 669 (Tex. Crim. App. 2012).

The dispute in this case is whether, having shown a violation of Section 545.060(a)(1)—that Reyes failed to maintain a single lane—the State was also required to show a violation of Section 545.060(a)(2)—that Reyes' movement from a single lane was unsafe. Reyes relies on the holding of the Austin Court of Appeals in *Hernandez v. State*, 983 S.W.2d 867 (Tex. App.—Austin 1998, pet ref'd), that "a violation of section 545.060 occurs only when a vehicle fails to stay within its lane *and* such movement is not safe or is not made safely." *Id.* at 871. The State, on the other hand, relies exclusively on the contrary holding of a plurality of the Texas Court of Criminal Appeals in *Leming v. State*, 493 S.W.3d 552 (Tex. Crim. App. 2016) (plurality op.). That plurality examined the reasoning of the *Hernandez* court, expressly rejected its interpretation of Section 545.060, and held instead that "it is an offense to change marked lanes when it is unsafe to do so; but it is also an independent offense to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so, regardless of whether the deviation from the marked lane is, under the particular circumstances, unsafe." *Id.* at 559-60.

Ordinarily, a holding of the Texas Court of Criminal Appeals would be dispositive, and our analysis would end here. However, because *Leming* is a plurality opinion, it is not binding authority. *See Baumgart v. State*, 512 S.W.3d 335, 342 n.42 (Tex. Crim. App. 2017); *Unkart v. State*, 400 S.W.3d 94, 100 (Tex. Crim. App. 2013). It may, however, be considered for its persuasive value. *See Unkart*, 400 S.W.3d at 101; *State v. Hardy*, 963 S.W.2d 516, 519 (Tex.

Crim. App. 1997).

This Court has previously held, in a handful of unpublished, pre-*Leming* opinions, that a violation of Section 545.060 requires a showing of both a failure to stay within a single lane and that movement from that lane was not safe or was not made safely. *See State v. Gendron*, No. 08-13-00119-CR, 2015 WL 632215, at *4 (Tex. App.—El Paso Feb. 11, 2015, pet. ref'd) (not designated for publication); *Lara v. State*, No. 08-07-00350-CR, 2009 WL 4922473, at *3 (Tex. App.—El Paso Dec. 22, 2009, no pet.) (not designated for publication); *Rodriguez v. State*, No. 08-04-00083-CR, 2005 WL 1315003, at *2 (Tex. App.—El Paso June 2, 2005, no pet.) (not designated for publication); *Galindo v. State*, No. 08-03-00236-CR, 2004 WL 1903404, at *2 (Tex. App.—El Paso Aug. 26, 2004, no pet.) (mem. op., not designated for publication); *Waltmon v. State*, No. 08-03-00317-CR, 2004 WL 1801793, at *4 (Tex. App.—El Paso Aug. 12, 2004, pet. ref'd) (not designated for publication); *Crain v. State*, No. 08-02-00103-CR, 2003 WL 1386942, at *2 (Tex. App.—El Paso Mar. 20, 2003, no pet.) (mem. op., not designated for publication).

We note, however, that none of our previous opinions contain an independent analysis of Section 545.060. Rather, each relied on the persuasive force of *Hernandez*.[1] And, second, because our prior opinions are unpublished, they lack precedential value. *See* TEX. R. APP. P. 47.7 (unpublished opinions in criminal cases have no precedential value).

This Court has only addressed, in a single published opinion, whether a violation of Section 545.060 requires a failure to comply with both parts of subsection (a). *See State v. Five Thousand Five Hundred Dollars in U.S. Currency*, 296 S.W.3d 696 (Tex. App.—El Paso 2009, no pet.).

[1] *Lara* relied on *State v. Cerny*, 28 S.W.3d 796 (Tex. App.—Corpus Christi 2000, no pet.), which, in turn, relied on *Hernandez*. *See Lara*, 2009 WL 4922473, at *3; *Cerny*, 28 S.W.3d at 800.

But even then, we did not engage in any substantive analysis of the statutory interpretation issue, but rather relied on *Hernandez*. The entirety of our discussion of the matter was as follows:

> Section 545.060 of the Texas Transportation Code requires a driver operating a vehicle on a roadway divided into two or more clearly marked lanes to drive as nearly as practical within a single lane. TEX. TRANSP. CODE ANN. § 545.060 (Vernon 1999). Further, the driver may not move from the lane unless the movement can be made safely. *Id*. Courts have held that a violation of Section 545.060 occurs only when a vehicle fails to stay within its lane and such movement is not safe or is not made safely. *See Hernandez v. State*, 983 S.W.2d 867, 871 (Tex. App.—Austin 1998, pet. ref'd). Citing *Hernandez*, Grazioso argues that the trial court's legal conclusion is correct because the State failed to offer any evidence that his movement was unsafe. We agree with Grazioso that the State did not offer any evidence indicating that Grazioso's movement out of his lane was unsafe. Thus, the State did not establish that an officer would reasonably believe that a violation of Section 545.060 had occurred.

Id. at 703.

We are faced, then, with the following situation concerning the central issue in this appeal: (1) the bulk of our prior opinions on the issue are not binding precedent because they are unpublished; (2) our one published opinion on the subject lacks independent analysis of the issue; and (3) the plurality opinion in *Leming* (the only case from the Texas Court of Criminal Appeals addressing the issue) is not binding precedent and has generated uncertainty among the courts of appeals, *see United States v. Neal*, No. SA-16-CR-491-XR, 2018 WL 9786082, at *2 (W.D. Tex. Aug. 27, 2018), *aff'd*, 777 F. App'x 776 (5th Cir. 2019) (noting that "Texas caselaw post-*Lemire* [sic][2] is murky"). Given these circumstances, we believe it appropriate at this time to conduct an independent examination and interpretation of Section 545.060 to determine whether the Legislature intended a violation of either subsection (a)(1) or (a)(2) to constitute a separately

[2] The context of this statement demonstrates that the court was referring to *Leming*. "*Lemire*" is clearly a typographical error. *See Neal*, 2018 WL 9786082, at *2.

actionable offense, *see Leming*, 493 S.W.3d at 559, or whether it intended to create only one offense—"moving out of a marked lane when it is not safe to do so." *Hernandez*, 983 S.W.2d at 871.

C. The language and context of Section 545.060

Statutory construction requires that courts give effect to the plain meaning of a statute's text unless it is ambiguous or "the plain meaning leads to absurd results that the legislature could not have possibly intended." *Franklin v. State*, 579 S.W.3d 382, 386 (Tex. Crim. App. 2019); *see Wagner v. State*, 539 S.W.3d 298, 306 (Tex. Crim. App. 2018). The words and phrases used must be read in context and construed according to the rules of grammar and usage. *Franklin*, 579 S.W.3d at 386; *Wagner*, 539 S.W.3d at 306. In addition, "[a] statute must be read as a whole in determining the meaning of particular provisions, and it is presumed that the entire statute is intended to be effective." *Franklin*, 579 S.W.3d at 386.

The plain language of Section 545.060 states that a driver "(1) *shall* drive as nearly as practical entirely within a single lane; *and* (2) *may not* move from the lane unless that movement can be made safely." TEX. TRANSP. CODE ANN. § 545.060(a) (emphasis added). This plain language demonstrates that it contains both a requirement ("shall drive") and a prohibition ("may not move"). In other words, "do this" and "do not do that." The use of the conjunction "and" thus instructs that drivers are to heed both the requirement and the prohibition. This construction gives effect to each of the words and phrases used in the statute. *See Franklin*, 579 S.W.3d at 386; *Wagner*, 539 S.W.3d at 306.

But Section 545.060, in isolation, does not define a criminal offense. Indeed, nothing in Section 545.060 provides that a failure to comply constitutes a criminal offense, regardless of

whether the failure relates to both or only one of its components. To define the *offense* requires reading Section 545.060 in its context and, specifically, in reference to Transportation Code Section 542.301 ("Section 542.301"). *See* TEX. TRANSP. CODE ANN. § 542.301; *Franklin*, 579 S.W.3d at 386 (statutory language must be read in context); *Wagner*, 539 S.W.3d at 306 (same).

Section 542.301 provides that "[a] person *commits an offense* if the person performs an act prohibited *or* fails to perform an act required by this subtitle." TEX. TRANSP. CODE ANN. § 542.301 (emphasis added). Section 542.301 and Section 545.060 are both contained in subtitle C of title 7 of the Transportation Code. Consequently, when reading both provisions in context of the whole subsection, a person commits an offense if he "performs an act prohibited [by Section 545.060] *or* fails to perform an act required by [Section 545.060]." *See id.*

As noted above, Section 545.060 contains both a requirement and a prohibition. And, in further applying the plain language of Section 542.301, a failure to comply with either of Section 545.060's provisions—whether an act prohibited or one that is required—constitutes an offense under the Transportation Code. Indeed, the plurality in *Leming* recognized that Section 542.301 is "the actual penal provision of the Transportation Code, by which it constitutes an offense either to fail to perform an act that is required ('shall drive as nearly as practical entirely within a single lane') or to perform an act that is prohibited ('shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety')." *Leming*, 493 S.W.3d at 557.

Hernandez, on the other hand, contains no mention at all of Section 542.301. *See Hernandez*, 983 S.W.2d at 867-72. The *Hernandez* court instead relied on the language and structure of a predecessor statute to simply conclude that "a violation of section 545.060 occurs only when a vehicle fails to stay within its lane *and* such movement is not safe or is not made

safely." *Hernandez*, 983 S.W.3d at 871 (discussing Act of June 5, 1947, 50th Leg., R.S., ch. 421, § 60, 1947 Tex. Gen. Laws 967, 978 (TEX. REV. CIV. STAT. ANN. art. 6701d, § 60(a), repealed and recodified at TEX. TRANSP. CODE ANN. § 545.060(a)). The *Hernandez* court then relied on *Atkinson v. State*, 848 S.W.2d 813 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd), which purports to delineate the elements of an offense under that prior statute,[3] to bolster its conclusion. *Hernandez*, 983 S.W.3d at 871. But, *Atkinson*, like *Hernandez*, failed to take into account the language of the statute that actually defines the criminal offense. *See Atkinson*, 848 S.W.2d at 813-15.

Proper statutory construction requires that statutory language be considered in context. *See Franklin*, 579 S.W.3d at 386; *Wagner*, 539 S.W.3d at 306. Failure to interpret Section 545.060 in conjunction with Section 542.301 renders the analysis set out in *Hernandez* incomplete and unpersuasive. We are, instead, persuaded by our own examination of the language of, and interplay between, Sections 542.301 and 545.060, as well as that conducted by the *Leming* plurality. Consistent with *Leming*, we therefore conclude that "a violation of either the requirement to maintain a single lane or the independent prohibition against changing lanes when conditions are not safe to do so constitute separately actionable offenses." *Leming*, 493 S.W.3d at 559.

D. Application of Section 545.060

Reyes' contention that the trial court abused its discretion by denying his motion to suppress is based solely on the premise that Section 545.060 requires a showing that he both failed

[3] As pointed out by the *Leming* plurality, *Atkinson*'s identification of the elements of the offense is erroneous because it omits the requirement that a driver "drive as nearly as practical entirely within a single lane[.]" *Leming*, 493 S.W.3d at 557.

to maintain a single lane and changed lanes when it was unsafe to do so. Our holding that an offense occurs under Section 545.060 by violating the requirement to maintain a single lane, regardless of a showing that the movement is unsafe, is fatal to that contention.

Both Officer Himes and Officer Ledesma testified that they saw Reyes' car straddling two lanes of the roadway. And even more specifically, Officer Ledesma testified that he observed Reyes "not choosing a lane for a good amount of distance." This testimony is sufficient to establish reasonable suspicion that Reyes violated Section 545.060(a)(1). It is therefore sufficient to support the trial court's denial of Reyes' motion to suppress.

E. Reasonable suspicion of driving while intoxicated

Reyes also argues that his traffic stop was illegal because the officers did not have a reasonable suspicion that he was driving while intoxicated. This argument appears to stem from the trial court's statement that the officers had "an objectively reasonable basis to suspect a possible intoxicated driver[.]" But the context of that statement demonstrates that the court was not viewing this as a justification for the initial traffic stop. The court's conclusion of law, stated in its entirety, reads: "The initial detention presented facts leading [the officers] to an objectively reasonable basis to suspect a possible intoxicated driver; therefore, the defendant was then held longer once the possible 'DWI' offense became the principal focus of this further investigative detention." The court was clearly addressing the officers' justification for further detaining Reyes after the initial stop, not their justification for the stop, itself.

In addition, the State did not argue in the trial court, nor does it assert on appeal, that the initial traffic stop may be upheld based on reasonable suspicion of driving while intoxicated. And it is this initial stop, not Reyes' subsequent detention to perform field sobriety tests or his eventual

arrest for driving while intoxicated, that Reyes asserts as error in this appeal. Whether the officers had a reasonable suspicion that Reyes was driving while intoxicated at the time they decided to pull him over is simply a non-issue.

In any event, our holding that the officers had a reasonable suspicion that Reyes violated Section 545.060 is dispositive of Reyes' challenge to the trial court's denial of his motion to suppress. The State was not required to establish, and we need not determine, whether the officers also had alternate grounds for that stop.

Reyes' sole issue on appeal is overruled.

III. CONCLUSION

The trial court did not abuse its discretion by denying Reyes' motion to suppress. The judgment of conviction is affirmed.

GINA M. PALAFOX, Justice

June 18, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

(Publish)