Reversed and Remanded and Opinion filed January 4, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00573-CR

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THE STATE OF TEXAS, Appellant

V.

DAVID PENA, Appellee

On Appeal from the County Court at Law
Austin County, Texas
Trial Court Cause No. 20,742

O P I N I O N

The State appeals from the trial court's order suppressing certain evidence in connection with a driving-while-intoxicated prosecution. Because the trial court erred in suppressing the evidence on the grounds stated, we reverse the trial court's decision and remand the case for further proceedings consistent with this opinion.

Background

On April 20, 1999, appellee was charged by information in Austin County with driving while

intoxicated. *See* TEX. PEN. CODE ANN. § 49.04 (Vernon Supp. 2000). Appellee filed a suppression motion, alleging that his arrest was without probable cause or warrant and that the search of his vehicle was illegal in that it was conducted without probable cause or warrant. He further alleged he was not informed of his rights under article 15.17(a) of the Code of Criminal Procedure and that any statements he had made were the result of improper custodial interrogation. TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon Supp. 2000).

At the hearing on the motion, Sealy Police Office Hagen testified that at about 10:25 p.m. March 10, 1999, he saw a black truck traveling 54 miles per hour in a 35 mile-per-hour zone. He testified that he followed the truck for about three blocks, turned on his emergency lights, and that the truck stopped about a block after Hagen turned on his lights. Hagen asked the driver, appellee, for his driver's license and insurance. He then asked appellee to step to the rear of the truck. He testified that at that time he smelled alcohol. He asked appellee if he had had anything to drink that night. Hagen testified that appellee said, "a few beers." Hagen then asked appellee to perform four field sobriety tests, the stand and balance, the one-leg stand, the walk and turn, and the finger dexterity. After observing appellee during the tests, Hagen arrested appellee for driving for intoxicated. Hagen testified that at no time did he read appellee his *Miranda*[1] rights, although at the jail Hagen did read appellee the DIC-24 statutory warning. *See* TEX. TRANSP. CODE ANN. § 724.015 (Vernon 1999).

The trial court in its written order granted appellee's motion to "[s]uppress all evidence seized as a result of the above described arrest and search and any and all statements, either written or oral, made pursuant to or after the arrest."

When the court announced its decision from the bench, the following exchange occurred:

> THE COURT: Court grants the Motion to Suppress.
>
> [STATE]: Your Honor, just for clarification. There was the reasonable suspicion and then there was the field sobriety statements. Which — are we suppressing both?
>
> THE COURT: Yes, I am suppressing both for failure to mirandize. [sic]

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The trial court also entered findings of fact in which it found that (1) appellant was arrested March 10, 1999, for DWI by Hagen, (2) appellant was not arrested pursuant to a warrant, (3) appellant was not searched pursuant to a warrant, (4) appellant was not questioned pursuant to a warrant and (5) appellant "was never given his 'Miranda Warnings' by anyone from the time of initial government intervention through the time he was 'booked into' the Austin County Jail."

We take the court's decision to mean that because the officer failed to read appellee his rights under *Miranda*, the court suppressed both (1) the results of the field sobriety tests and (2) appellee's statement that he had had a few beers. We also construe the court's order as suppressing the sobriety test results on the additional ground that the initial stop and arrest were unlawful.

Discussion

We will deal first with the State's second point of error, in which it complains that the trial court abused its discretion by suppressing appellee's statements.

At a suppression hearing, the trial court is the sole trier of fact and the judge of credibility of a witness and the weight to be given a witness's testimony. *See State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). In reviewing the trial court's decision, we view the evidence in the light most favorable to the trial court's decision. *See id.* We apply an abuse of discretion standard for the factual components the trial court's decision and a de novo standard for the legal components of the decision. *See State v. Munoz*, 991 S.W.2d 818, 820-21 (Tex. Crim. App. 1999). Where the issue involves the credibility of a witness, we afford almost total deference to a trial court's determination of the historical facts that the record supports. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). We should give the same the same amount of deference to trial courts' rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *See id.* at 89. We review de novo "mixed questions of law and fact" not falling within this category. *See id.*

The Fifth Amendment protections apply to statements made by a defendant stemming from custodial interrogation. *See Miranda*, 384 U.S. at 444. Custodial interrogation means questioning

initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. *See id.* Texas law generally bars the use of an individual's statement resulting from custodial interrogation absent compliance with certain procedural safeguards. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1977 & Supp. 2000). Neither state law nor *Miranda* specifically exclude statements that do not stem from custodial interrogation. *See Miranda*, 384 U.S. at 444; art. 38.22 § 5 (Vernon 1977). Ordinarily, roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute custodial interrogation for purposes of the *Miranda* rule. *See Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); *State v. Stevens*, 958 S.W.2d 824, 829 (Tex. Crim. App. 1997).

Here, the officer's credibility does not seem to be at issue. The trial court, in fact, based its findings on the uncontroverted testimony of the officer. Moreover, appellee on appeal acknowledges the officer was a credible witness. Therefore, the issue before us turns not on the credibility of the officer, but on the trial court's application of the law to the uncontroverted facts, which we review de novo.

The uncontroverted evidence shows that appellee was stopped for speeding and that after the officer asked appellee to step to the rear of the truck, the officer smelled alcohol. The officer then asked appellee if he had been drinking. We determine that the officer's question falls within the noncustodial questioning that occurs in a routine traffic stop as envisioned in *Berkemer*. Appellee's response was not excludible on grounds that he had not yet received his *Miranda* warnings. We uphold the State's second point of error.

In the State's first point of error, it complains the trial court abused its discretion by suppressing the results of the initial detention and subsequent arrest of appellee. From the record before us, it appears that the trial court suppressed the results of the field sobriety tests on *Miranda* grounds and perhaps on grounds that the original stop and arrest were unlawful. We will deal with both issues. On appeal, appellee seems to argue that the trial court may have suppressed the evidence on grounds that there was an unnecessarily long delay between the initial stop and the magistrate's warning required by article 15.17. The findings of fact and the court's pronouncement from the bench do not suggest the trial court based its

decision on this ground. Nor does the record support finding that there was an unnecessarily long delay between the initial stop and the magistrate's warning.

A law enforcement officer, even without probable cause, may in appropriate circumstances temporarily detain an individual for investigative purposes. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Garza v. State*, 771 S.W.2d 549, 558 (Tex. Crim. App. 1989). The officer must have specific articulable facts that, premised upon his experience and personal knowledge, when coupled with the logical inference from those facts, would warrant the intrusion on the detainee. *See Garza*, 711 S.W.2d at 558. The reasonableness of the detention will turn on the totality of the circumstances. *See Woods v.* State, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997).

A law enforcement officer is authorized, without warrant, to detain a motorist for speeding. *See Montgomery v. State*, 145 Tex. Crim. 606, 610, 170 S.W.2d 750, 753 (1943); *see also* TEX. TRANSP. CODE ANN. §§ 543.001 & 543.004 (Vernon 1999). After an officer stops an individual for a traffic offense, the officer must have additional facts constituting probable cause to arrest the individual for driving while intoxicated. *See Texas Dep't of Pub. Safety v. Rodriguez*, 953 S.W.2d 362, 364 (Tex. App.—Austin 1997, no pet.). An officer has probable cause when the facts and circumstances within an officer's personal knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that, more likely than not, a particular suspect has committed an offense. *See Hughes v. State*, 878 S.W.2d 142 (Tex. Crim. App.1992).

Here, the uncontroverted evidence shows that officer Hagen was entitled to stop appellee's truck after Hagen saw the truck speeding. After the officer asked appellee for his license and insurance form, appellee "fumbled through a lot" of items in the console before finding the papers. After the officer asked appellee to step to the back of the truck, the officer then smelled alcohol. At this point, the evidence shows, the officer asked appellee if appellee had been drinking. After appellee answered affirmatively, the officer asked appellee to perform the field sobriety tests. The officer took appellee into custody after observing his performance on the sobriety tests. The officer was entitled to stop appellee initially for speeding and to detain appellee temporarily. The information developed during the temporary detention

gave the officer probable cause to arrest appellee on DWI grounds. Neither the stop nor the arrest was unlawful. The stop and arrest being lawful, the trial court erred in suppressing the evidence developed as a result of the stop and arrest on those grounds.

The trial court may also have excluded the results of the field sobriety tests on *Miranda* grounds. The results of the field sobriety tests are not testimonial evidence that implicate *Miranda*. *See Pennsylvania v. Muniz*, 496 U.S. 582, 590-92 (1990); *Gassaway v. State*, 957 S.W.2d 48, 50-51 (Tex. Crim. App. 1997). The trial court erred in suppressing the results of the field sobriety tests on *Miranda* grounds. We uphold the State's first point of error.

Conclusion

Having upheld both of the State's points of error, we find the trial court erred in suppressing appellee's testimonial evidence on *Miranda* grounds and the evidence that resulted from the original stop and arrest on grounds that the initial stop and arrest were unlawful or on *Miranda* grounds. We reverse the trial court's order and remand the case for further proceedings.

PER CURIAM

Judgment rendered and Opinion filed January 4, 2001.
Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.
Do Not Publish — TEX. R. APP. P. 47.3(b).