Affirmed and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01129-CR

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JOHN RENEE GUZMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 779,685

O P I N I O N

John Renee Guzman appeals his conviction by a jury for possession with the intent to deliver more than 200 but less than 400 grams of cocaine. Enhanced by two prior felony convictions, the trial court assessed his punishment at 28 years imprisonment. In two points of error, or issues, appellant contends (1) the trial court erred in denying his motion to suppress because the police did not have probable cause to stop his vehicle, and (2) the evidence is factually insufficient to justify the traffic stop of his vehicle. We affirm.

On April 4, 1998, police officers Merrill and Ford observed appellant driving a red Lincoln Navigator at a high rate of speed in a residential neighborhood. Merrill estimated appellant's speed at 35 miles per hour in a 30 miles-per-hour residential area. When appellant turned onto New York street, he almost ran into the ditch on the edge of the road. Merrill

followed appellant and observed him swerving from one edge of the road to the other. Merrill stopped appellant for driving at an unsafe speed and swerving. As Merrill and Ford approached appellant's car, both officers smelled the odor of burning marihuana coming from the Navigator. Appellant gave the officers written consent to search the Navigator. The officers searched appellant's car and found a partially burned marihuana cigar and a total of 273.4 grams of crack cocaine. As the officers were placing the narcotics in their police car, appellant stated, "[Y]ou got me. It's all my dope."

Six residents of the neighborhood testified that appellant was neither speeding nor weaving. James McDougal, a former traffic officer, testified that the street was not marked with a center lane, and that visual estimates of speed are difficult to make. McDougal testified that an officer could stop a car for driving at an unsafe speed. Once such a vehicle was stopped, McDougal opined that the smell of burning marihuana would give that officer probable cause to search the vehicle.

In his first point, appellant contends the trial court erred in overruling his motion to suppress the evidence because the police officers did not have probable cause to stop him for traffic violations. Appellant argues that the evidence is insufficient to justify the officers' stopping him for speeding and swerving. Appellant asserts his six witnesses all stated he was not speeding nor swerving. Appellant concludes that this testimony plus McDougal's opinion that visual estimates of speed of a moving car are not reliable, and McDougal's testimony that there was no center stripe on the street, establish that appellant was not violating any traffic law.

In testing the legality of searches following legitimate traffic stops, we review *de novo* the trial court's determinations of reasonable suspicion and probable cause. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex.Crim.App.1997) (citing *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). The amount of deference we afford to the trial court's ruling on probable cause often is determined by which judicial actor is in a better position to decide the issue. If the issue involves the credibility of witnesses, thereby making the evaluation of the witnesses' demeanor important, compelling reasons exist for upholding the trial court's decision. But if the issue is whether an officer had probable cause or

reasonable suspicion under the totality of the circumstances to seize or detain a suspect, the trial judge is not in an appreciably better position than the reviewing court to make that determination. *See Loserth v. State*, 963 S.W.2d 770, 773 n. 2 (Tex.Crim.App.1998); *Guzman*, 955 S.W.2d at 87.

Although we review the issue of reasonable suspicion *de novo*, the ruling on a motion to suppress lies within the sound discretion of the trial court. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App.1996). At the suppression hearing, the trial court observes the testimony and demeanor of the witnesses and is in a better position than the appellate court to judge the credibility of the witnesses. *See id.* (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App.1990)). Therefore, we do not engage in our own factual review. Instead, we view the evidence and all reasonable inferences therefrom in the light most favorable to the trial court's ruling and sustain the ruling if it is sufficiently supported by the evidence and is correct on any theory of law applicable to the case. *Id.*

Officer Merrill observed appellant turn right onto New York at a high rate of speed and almost run into the ditch on the side of the road. He observed appellant's car swerve from side to side as he proceeded down New York. These observations gave him reasonable suspicion to investigate for possible traffic violations. It is not necessary to show that appellant actually violated the traffic laws. It is sufficient to show that the officer reasonably believed that a traffic violation was in progress. *See Drago v. State*, 553 S.W.2d 375, 377 (Tex.Crim.App.1977); *Zervos v. State*, 15 S.W.3d 146, 150 (Tex.App.-Texarkana 2000, pet. filed); *Valencia v. State*, 820 S.W.2d 397, 400 (Tex.App.-Houston [14th Dist.] 1991, pet. ref'd). We hold that the officers had reasonable suspicion that a traffic violation was in progress authorizing them to make an investigative stop of appellant's vehicle. *Valencia*, 820 S.W.2d at 400.

While they were walking towards appellant's vehicle, the officers smelled marihuana emanating from his vehicle. This gave the officers probable cause to search appellant's vehicle. Probable cause exists when the facts and circumstances, within the knowledge of the officer, would lead a person of reasonable caution and prudence to believe that an instrumentality of a crime or evidence will be found. *Moulden v. State*, 576 S.W.2d 817, 819

(Tex.Crim.App.1978). The smell of burnt marihuana by a trained officer provides, in itself, probable cause to search a vehicle. *Id*. at 819-20. *See also Harrison v. State*, 7 S.W.3d 309, 311 (Tex.App.-Houston[1st Dist.] 1999, pet. ref'd). Therefore, the trial judge did not abuse its discretion in overruling appellant's motion to suppress. *Id*. We overrule appellant's point of error one.

In point two, appellant contends the evidence is factually insufficient to prove he committed the traffic offenses that led to his detention. He argues that the State failed to prove he was lawfully detained; therefore, he contends the jury should not have considered the evidence seized as a result of the unlawful detention that lead to his written consent.

Appellant does not challenge the legal sufficiency of the evidence. In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996). The court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. The appropriate remedy on reversal is a remand for a new trial. *Id.*

A factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex.Crim.App.1997). This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id*. The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Id.*

Appellant's six eye witnesses testified that appellant was not speeding and swerving. Officer Merrill testified that he observed appellant speeding and swerving which is why he initially stopped appellant. Appellant contends the jury's finding is contrary to the overwhelming weight and preponderance of the evidence and is manifestly wrong and unjust.

What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id.* at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id.* at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis*, 922 S.W.2d at 129. After reviewing the record, we conclude the jury's finding that appellant was speeding and swerving is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We find the evidence is factually sufficient to sustain appellant's conviction, and we overrule his point of error two.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed July 13, 2000.
Panel consists of Justices Robertson, Sears, and Cannon.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, and Bill Cannon sitting by assignment.