Affirmed and Opinion filed July 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01202-CR
NO. 14-99-01203-CR

MICHAEL STEVEN MENN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Brazoria County, Texas
Trial Court Cause Nos. 104,165S and 104,251S

O P I N I O N

In two informations the State charged Michael Steven Menn (appellant), with possession of marihuana and driving while intoxicated. After the trial court denied appellant's motion to suppress, he pled guilty to the charges. The trial court assessed a $600 fine and 180 days of confinement in the Brazoria County Jail for the offense of driving while intoxicated, and suspended appellant's drivers' license for 180 days and assessed a $500 fine for possession of marihuana.

In trial court cause number 104,165S appellant was charged with operating a motor

vehicle in a public place while intoxicated. Appellant did not file a motion to suppress in that proceeding. In trial court cause number 104,251S, appellant was charged with intentionally and knowingly possessing two ounces or less of marihuana. Appellant did file a motion to suppress arrest in cause number 104,251S. Thus, we must construe appellant's sole point of error, that the court erred in overruling appellant's motion to suppress, as applying only to the marihuana seized as a result of the stop, and not to the determination appellant was driving while intoxicated. Any complaints about the DWI conviction are waived. We affirm both judgments.

FACTUAL BACKGROUND

At approximately 2:45 a.m. on May 8, 1999, a Brazoria County Sheriff, Shawn Zak, using radar recorded appellant's vehicle traveling at the rate of fifty-six miles per hour in a forty mile per hour zone. Zak testified that while he was driving, he noticed a vehicle traveling at a high rate of speed approaching from the rear of his vehicle. Zak testified that he stopped at an intersection stop sign, and at that time his rearward facing radar unit indicated that the vehicle behind him was traveling sixteen miles over the speed limit. Zak turned right at the intersection, turned around, parked on the side of the road, and turned his lights off. Zak testified that he turned right so that he could position himself behind the speeding car; however, at the time he was unsure whether the vehicle would continue straight after the stop sign or turn. Appellant reached the intersection, turned right, and passed the parked police officer. Zak turned on his overhead emergency lights, turned around, and pulled appellant over. Officer Zak testified that the traffic was light at the time and that no other vehicles were in the vicinity. The trial court held a hearing on appellant's motion to suppress, and at the conclusion of the hearing, denied the motion. Appellant brings this appeal.

In his sole point of error, appellant contends that the trial court erred in denying his motion to suppress the items seized as a result of his arrest following the traffic stop because the stop was illegal. Specifically, appellant asserts that Officer Zak did not have probable cause to stop his vehicle, because there was no way for Officer Zak to determine appellant's

vehicle was the same vehicle he observed speeding.

Standard of Review

At a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). Ordinarily, we view the evidence in the light most favorable to the trial court's ruling and afford almost total deference to its findings if they are supported by the record, especially when the trial court's fact findings are based upon an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We afford the same amount of deference to the trial court's rulings on "mixed questions of law and fact," if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Id*. However, when the resolution of the suppression issue does not turn upon an evaluation of credibility or demeanor, we review *de novo* the trial court's determination of the applicable law, as well as its application of the law to the facts. *Id*.

Probable Cause

Appellant contends that when Officer Zak made a right turn and then parked his vehicle in a location from which he could not possibly tell whether the vehicle that arrived at the intersection was the same vehicle he previously observed and determined was speeding, he had no probable cause to stop appellant. Further, appellant asserts that it was 2:45 in the morning and as such, Zak could not have truthfully testified that he was able to identify the make or model of the vehicle speeding behind him. Therefore, Zak did not show adequate grounds for the initial traffic stop.

Officer Zak testified that he observed a vehicle approaching him from behind at high speed, he stopped at a stop sign,and using radar, determined the vehicle was traveling fifty-six miles per hour in a forty mile per hour zone. Moreover, Zak testified that the traffic was light and that no other vehicles were in the vicinity. It is well settled that a traffic violation committed in an officer's presence provides probable cause for an arrest. TEX. CODE CRIM.

PROC. ANN. art. 14.01(b) (Vernon 1977);[1] *Howard v. State*, 932 S.W.2d 216, 218 (Tex. App.—Tyler 1996, pet. ref'd) (holding officer's testimony that violation of a statute has occurred is sufficient to show probable cause to make an arrest without a warrant). Consequently, since Officer Zak's radar demonstrated appellant was exceeding the posted speed limit for the road on which he was driving, Officer Zak had probable cause to stop appellant.[2]

Moreover, once a police officer makes a bona fide stop or arrest for a traffic offense, he can make an additional arrest for any other offense unexpectedly discovered while investigating or questioning the motorist. *Attwood v. State*, 509 S.W.2d 342, 344 (Tex. Crim. App. 1974).

Here, the trial court was able to weigh the credibility of Officer Zak. He testified to his observation of a speeding vehicle and his ability to continually view this same vehicle. The trial court weighed Officer Zak's testimony against appellant's photographs, depicting heavy foliage, which appellant contends prohibited Officer Zak from clearly identifying appellant's vehicle as the same vehicle previously determined to be speeding. The trial court, however, is the sole fact finder at a hearing on a motion to suppress, and as such he may choose to believe or disbelieve any or all of the witnesses' testimony. *Taylor v. State*, 604 S.W.2d 175, 177 (Tex. Crim. App. 1980). Affording almost total deference to the trial court's implied finding Officer Zak stopped the same car he determined to be speeding based on the witnesses'

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[1] Article 14.01 of the Code of Criminal Procedure states:

> (a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.
> (b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

[2] Apparently appellant's counsel agrees with this conclusion as to the existence of probable cause to stop appellant. During the suppression hearing appellant's counsel, following Officer Zak's testimony regarding the clocking of appellant's speed by radar, stated the following:

> "Your Honor, at this time this might exceed the scope of this particular hearing. We are dealing with the probable cause to stop. *I think they have established this* and now we are going into the actual arrest itself." (emphasis added)

credibility and demeanor, as we must, we hold the trial court correctly found the officer had probable cause to stop appellant for violating the applicable speed limit in the area.

We overrule appellant's sole point of error, and affirm the judgements of the trial court in cause numbers 104,165S and 104,251S.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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