YEAR 2004 CASE SUMMARIES

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Detention of respondent after he signed a traffic citation was unauthorized; consent to search was involuntary [In re R.J.] (04-4-16).

On October 29, 2004, the Tyler Court of Appeals held that a police officer lacked authority to detain a juvenile respondent after the juvenile signed a traffic citation; further, respondent's consent to search his automobile was coerced when given after the officer said he was calling the canine squad for a sniff around.

04-4-16. In the Matter of R.J., UNPUBLISHED, No. 12-03-00380-CV, 2004 WL 2422954, 2004 Tex.App.Lexis ___ (Tex.App.-Tyler 10/29/04) Texas Juvenile Law (6th Ed. 2004).

Facts: Appellant R.J., a juvenile, appeals the denial of his motion to suppress. In two issues, he contends that the officer exceeded the scope of the traffic stop and that his consent to search was not voluntary.

During a routine traffic stop, Tyler Police Officer James Freeman ("Freeman") seized marijuana from a vehicle driven by R.J. Officer Michael Kieny ("Kieny") was with Freeman during the stop, and a passenger traveling in R.J.'s vehicle was also present. The State filed an Original Petition alleging that R.J. had possessed marijuana in the amount of two ounces or less. R.J. filed a motion to suppress, which was subsequently heard by the trial court.

At the hearing, Freeman testified that he observed a blue Dodge Dynasty traveling westbound on Gentry Parkway. He noticed that the registration was expired and that a paper dealer's registration tag appeared to be improperly completed. Freeman initiated a traffic stop and asked the driver, R.J., for his driver's license and insurance information. R.J. could not produce the insurance information for the vehicle. Freeman decided to issue R.J. a warning citation for the improperly-completed dealer's tag and for failure to produce proof of financial responsibility. Freeman wrote the citation and asked R.J. to step from the car and sign it. After R.J. complied, Freeman asked him if there was any contraband in the vehicle. R.J. replied that there was none. However, Freeman stated that R.J. was evasive, became nervous, and would not look directly at Freeman when he answered the question.

Freeman then asked for permission to search the vehicle. R.J. asked if the law required him to search the vehicle, and Freeman testified that he told R.J. he could deny the request. R.J. denied consent for the search. At that point, Freeman decided that, based on R.J.'s previous conduct, he would call out the canine officer to sniff around the vehicle. If the dog "hit" on any scent coming from the vehicle, they would have probable cause to search. After calling for the canine officer, Freeman explained this procedure to R.J. and asked R.J. whether there was any marijuana in the vehicle. R.J. told him there was a small amount in a compartment above the rear view mirror. The passenger in the vehicle admitted that some of the marijuana was his as well. The officers arrested both R.J. and his passenger.

The court denied R.J.'s motion to suppress. R.J. subsequently pleaded true to the charge and was placed on probation for a period of six months. This appeal followed. R.J. contends on appeal that (1) the officer lacked reasonable suspicion to detain him after the purpose of the traffic stop was completed and (2) his consent to the search of his vehicle was involuntary.

Held: Reversed and remanded.

Opinion Text: STANDARD OF REVIEW

We review the denial of a motion to suppress in a juvenile proceeding for an abuse of discretion. See In re R.J.H., 79 S.W .3d 1, 6 (Tex.2002); see also In re D.G., 96 S.W.3d 465, 467 (Tex.App.-Austin 2002, no pet.). In conducting our review, we use a bifurcated standard. See R.J.H., 79 S.W.3d at 6. We give almost total deference to the trial court's findings of historical fact that the record supports, especially when the court's fact findings are based on an evaluation of credibility and demeanor. In re L.M ., 993 S.W.2d 276, 286 (Tex.App.-Austin 1999, pet. denied). We afford the same amount of deference to the trial court's 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. Id. However, we review de novo "mixed questions of law and fact" where the resolution is not restricted to a resolution of credibility and demeanor. Id. In the case at hand, there is no dispute about the facts or credibility of witnesses. Therefore, we review de novo the trial court's determination of reasonable suspicion and voluntariness of consent.

A trial judge is not required to make written findings of fact in a juvenile case. R.J.H., 79 S.W.3d at 7. Here, neither the State nor R.J. requested written findings. Absent findings of fact, we view the record in the light most favorable to the trial court's ruling. Id. We may infer all findings necessary to support the trial court's ruling and must defer to those findings. D.G., 96 S.W.3d at 467. We must sustain a ruling that is reasonably supported by the record and is correct on any theory of law applicable to the case. Id.

REASONABLENESS OF INVESTIGATIVE DETENTION

In his first issue, R.J. contends the trial court should have granted his motion to suppress because Freeman exceeded the permissible scope of the traffic stop. Consequently, his argument continues, his continued detention violated the Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution. The State argues that the motion to suppress was properly denied because R.J. was temporarily detained for the traffic stop when Freeman asked him if he had drugs in the car. In addition, the State contends that Freeman did not exceed the purpose of the stop.

Reasonable Suspicion Prior to Issuance of Warning Citation

When a traffic violation is committed within an officer's view, the officer may lawfully stop and detain a person for the violation. Walter v. State, 28 S.W.3d 538, 542 (Tex.Crim.App.2000); see also Tex. Trans. Code Ann. § 543.001 (Vernon 1999) ("Any peace officer may arrest without warrant a person found committing a violation of [Subtitle C. Rules of the Road]."). A routine traffic stop resembles an investigative detention. State v. Cardenas, 36 S.W.3d 243, 246 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd) (citations omitted). An investigative detention is a seizure. Francis v. State, 922 S.W.2d 176, 178 (Tex.Crim.App.1996). Therefore, a traffic stop must be reasonable under the United States and Texas Constitutions. See U.S. Const. amend. IV; Tex. Const. art. I, § 9.

To determine the reasonableness of an investigative detention, we apply the Terry test: (1) whether the officer's action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances that justified the initial interference. [FN1] Cardenas, 36 S.W.3d at 246 (citing Terry v.. Ohio, 392 U.S. 1, 19 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Thus, a traffic stop must last no longer than is necessary to carry out the purpose of the stop. Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983); Davis v. State, 947 S.W.2d 240, 245 (Tex.Crim.App.1997); see also Tex. Trans. Code Ann. § 543.005 (Vernon Supp.2004 2005) (officer shall promptly release person cited for traffic violation who signs promise to appear). Once the reason for the detention has been satisfied, the detention may not be used as a "fishing expedition for unrelated criminal activity." Davis, 947 S.W.2d at 245 (quoting Ohio v. Robinette, 519 U.S. 33, 41, 117 S.Ct. 417, 422, 136 L.Ed.2d 347 (1996) (Ginsberg, J., concurring)).

FN1. R.J. has raised both federal and state constitutional claims. The federal Terry standard also applies to determinations of reasonableness under Article I, § 9 of the Texas Constitution. Powell v. State, 5 S.W.3d 369, 375 n. 1 (Tex.App. Texarkana 1999, pet. ref'd) (citing Davis v. State, 829 S.W.2d 218 (Tex.Crim.App.1992)).

If, before concluding the initial investigation, the officer develops reasonable suspicion to believe another offense is being committed, further detention is justified. Powell, 5 S.W.3d 369, 377 (Tex.App.-Texarkana 1999, pet. ref'd). Specifically, the officer must have a reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detainee with the unusual activity, and some indication that the unusual activity is related to a crime. Id. at 376 (citing Davis, 947 S.W.2d at 244). Reasonable suspicion is determined based on the totality of the circumstances. Woods v. State, 956 S.W.2d 33, 38 (Tex.Crim.App.1997). Absent reasonable suspicion, the officer cannot continue the detention or questioning after the conclusion of the initial investigation. Cardenas, 36 S.W.3d at 246; Davis, 947 S.W.2d at 243. An investigative detention that is not based on reasonable suspicion violates the constitutional prohibitions against unreasonable seizures. Powell, 5 S.W.3d at 369 (citing Davis, 947 S.W.2d at 243).

Analysis

In the case at hand, the validity of the stop is undisputed. Consequently, the first prong of Terry is satisfied. However, R.J. complains that once Freeman decided to issue the warning citation, the purpose of the stop was completed and he should have been allowed to leave. This argument relates to the second prong of Terry. Therefore, we must decide whether, prior to the conclusion of the initial investigation, Freeman had reasonable suspicion that another offense was being committed. See Terry, 392 U.S. at 19 20, 88 S.Ct. at 1878; Powell, 5 S.W.3d at 377.

Freeman testified that the basis for the stop was the improperly-completed dealer's tag. The record reveals, and the State

acknowledges in its brief, that at the time Freeman asked R.J. about the presence of contraband, Freeman had written the warning citation and R.J. had signed it. Therefore, Freeman's investigation of the traffic offense, and thus the purpose of the traffic stop, had been completed at the time Freeman asked R.J. about contraband. See McQuarters v. State, 58 S.W.3d 250, 257 (Tex.App.-Fort Worth 2001, pet. ref'd) (issuance of warnings for traffic violations concluded purpose of original stop).

Freeman's testimony at the suppression hearing does not indicate that he developed reasonable suspicion prior to the issuance of the warning citation. To the contrary, when asked on direct examination about his reason for asking R.J. about the presence of contraband, Freeman replied, "I generally ask everybody I pull over. You never know sometimes. Some say yes and you never know what you're going to get." The only facts Freeman articulated to justify R.J.'s continued detention were that R.J. (1) was evasive in answering the question, (2) became nervous, and (3) did not look directly at Freeman when he answered. This testimony relates only to any reasonable suspicion Freeman may have developed after the citation was issued. Therefore, based on the record before us, we conclude that Freeman's continued detention of R.J. was not supported by any reasonable suspicion developed by Freeman before the purpose of the traffic stop was completed. See St. George v. State, Nos. 02-03-00421-22-CR, 2004 WL 1944779, at *6 (Tex.App.-Fort Worth Aug. 31, 2004, no pet.) (reasonable suspicion developed after purpose of traffic stop completed insufficient to justify continued detention). However, our inquiry does not end here.

Reasonable Suspicion After Denial of Consent to Search

The United States Supreme Court has held that after completing the purpose of a traffic stop, an officer's continued detention of a driver and a request to search the detainee's car was reasonable where consent was given, even though no circumstances were noted that would have constituted reasonable suspicion of any criminal activity. United States v. Robinette, 519 U.S. 33, 36, 117 S.Ct. 417, 420-21, 136 L.Ed.2d 347 (1996); see also James v. State, 102 S.W.3d 162, 173 (Tex.App.-Fort Worth 2003, pet. ref'd) (not unreasonable per se to request consent to search after a traffic stop). An officer may request consent to search a vehicle after the purpose of the traffic stop has been accomplished as long as it is reasonable under the circumstances and the officer has not conveyed a message that compliance with the officer's request is required. Leach v. State, 35 S.W.3d 232, 235-36 (Tex.App.-Austin 2000, no pet.). If consent is refused, then the officer must have reasonable suspicion that some criminal activity exists to continue the detention. Simpson v. State, 29 S.W.3d 324, 328 (Tex.App. Houston [14th Dist.] 2000, pet. ref'd).

To establish reasonable suspicion, an officer must be able to articulate something more than an inchoate and unparticularized suspicion or hunch. See United States v. Sokolow, 490 U.S. 1, 7, S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (quoting Terry, 392 U.S. at 30). However, the fact that an officer does not have in mind the reasons that justify the action does not invalidate the action as long as the circumstances justify it. Robinette, 519 U.S. at 36, 117 S.Ct. at 420-21. The determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. See Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000).

Analysis

In the instant case, Freeman described the following exchange that occurred between Freeman and R.J. after R.J. signed the warning citation:

PROSECUTOR: Q. So you had [R.J.] step out of the vehicle. Did you have any other communication with [R.J.] at that point?
OFFICER: A. I asked [R.J.] if there was any contraband in the vehicle, guns, knives, drugs, anything of that nature. And he was evasive in his answering of the question. Becoming very nervous. He could not look at me directly when he answered the questions.
....
PROSECUTOR: Q. Did he at first deny that right to search or an opportunity to search the vehicle?
OFFICER: A. Yes, he did.
PROSECUTOR: Q. Okay. What was the next step that you went through after he denied your request to search the vehicle?
OFFICER: A. Based on his actions at the time, he was nervous, unsure of answering any of my questions. I made the decision to call a canine officer out to the scene to sniff around the vehicle.
PROSECUTOR: Q. Is that something that you normally do?
OFFICER: A. In a situation such as this, I do. If they can't give me straight answers, if they're being evasive in answering any of my questions, if they're becoming nervous, my suspicions are aroused.
....

From this testimony, we conclude that Freeman decided to continue his detention of R.J. after R.J. denied consent to search because R.J. seemed nervous, was evasive in answering the question about contraband, and avoided eye contact with Freeman. Nervousness is a weak indicator of hidden narcotics. McQuarters, 58 S.W.3d at 257 (nervousness evidenced by failure to make eye contact, shaking hands, and shallow breathing). The State points to this weak indicator only as Freeman's basis for reasonable suspicion in the case. However, the State cites no cases in which actions evidencing nervousness, standing alone, constitute reasonable suspicion.

In McQuarters, the court rejected the State's contention that a reasonable suspicion of hidden narcotics in a car could be rationally inferred from (1) nervousness, (2) failure to make eye contact with the officer, (3) shaking hands, (4) shallow breathing, (5) a rental agreement that named someone other than the appellant or his passenger as the authorized driver of the car, and (6) conflicting stories from the appellant and his passenger about their trip. Id. We likewise conclude that R.J.'s nervousness, failure to make eye contact with Freeman, and evasiveness in answering Freeman's question about contraband are insufficient to constitute reasonable suspicion. See id.

The law allowed Freeman to consider the totality of the circumstances as well as his personal experience when forming a reasonable suspicion. See id. However, based upon the record presented here, a reasonable suspicion that R.J. was hiding drugs cannot be rationally inferred from the facts. Consequently, we hold that Freeman's continued detention of R.J. after R.J. denied consent to search was unreasonable. Accordingly, we sustain R.J.'s first issue.

VOLUNTARINESS OF CONSENT

In his second issue, R.J. contends that the trial court should have granted his motion to suppress because his consent to search was involuntary. The State urges that R.J.'s consent was voluntary.

Applicable Law

Under the Fourth Amendment to the United States Constitution, a search conducted without a warrant issued upon probable cause is per se unreasonable, subject only to specifically established and well-delineated exceptions. [FN2] Rayford v. State, 125 S.W.3d 521, 528 (Tex.Crim.App.2003) (citing Schneckloth, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). A search conducted with consent is one such exception, so long as the consent is voluntary. Rayford, 125 S.W.2d at 528 (citing Schneckloth, 412 U.S. at 219-23, 93 S.Ct. at 2043-46).

FN2. The Fourth Amendment is substantially similar to Article I, Section 9 of the Texas Constitution. R.J. does not contend that Article I, Section 9 of the Texas Constitution affords greater protection than does the Fourth Amendment to the United States Constitution. Therefore, we do not address R.J.'s federal and state claims separately.

The United States Constitution requires the State to prove the voluntariness of consent by a preponderance of the evidence. Carmouche v. State, 10 S.W.3d 323, 331 (Tex.Crim.App.2000). The Texas Constitution requires the State to show by clear and convincing evidence that the consent was freely given. Id. Voluntariness is determined from the totality of the circumstances. Reasor v. State, 12 S.W.3d 813, 818 (Tex.Crim.App.2000). If the record supports a finding by clear and convincing evidence that consent to search was freely and voluntarily given, we will not disturb that finding. See Carmouche, 10 S.W.3d at 331.

In order to be voluntary, the consent to search must "not be coerced, by explicit or implicit means, by implied threat or covert force." Id. (quoting Schneckloth, 412 U.S. at 228, 93 S.Ct. at 2048). To be considered voluntary, a suspect's consent must not be the result of physical or psychological pressures from law enforcement. Erdman v. State, 861 S.W.2d 890, 893 (Tex.Crim.App.1993). Thus, if consent is obtained through duress or coercion, whether actual or implied, that consent is not voluntary. Schneckloth, 412 U.S. at 248-49, 93 S.Ct. at 2059; Allridge v.. State, 850 S.W.2d 471, 493 (Tex.Crim.App.1991). Consent must be shown to be positive and unequivocal, and it is not shown by an acquiescence to a claim of lawful authority. Carmouche, 10 S.W.3d at 331.

The following factors are among those that are relevant in determining whether consent is voluntary: (1) the youth of the accused; (2) the education of the accused; (3) the intelligence of the accused; (4) the constitutional advice given to the accused; (5) the length of the detention; (6) the repetitiveness of the questioning; and (7) the use of physical punishment. Reasor, 12 S.W.3d at 818. Additionally, testimony by law enforcement officers that no coercion was involved in obtaining the consent is evidence of the consent's voluntary nature. Martinez v. State, 17 S.W.3d 677, 683 (Tex.Crim.App.2000). A police officer's failure to inform the accused that consent can be refused is also a factor to consider. Johnson v. State, 68 S.W.3d 644, 653 (Tex.Crim.App.2002). The absence of such information does not automatically render the consent involuntary. Id. However, the fact that such a warning was given has evidentiary value. Allridge, 850 S.W.2d at 493. Moreover, consent is not rendered involuntary merely because the accused has been detained. See Johnson, 68 S.W.3d at 653.

Analysis

The record reflects that R.J. was sixteen years old at the time of the offense. He had no prior experience with law enforcement. More particularly, R.J. was unfamiliar with his Fourth Amendment rights as evidenced by his question regarding whether the law required Freeman to search his vehicle. These factors weigh against the voluntariness of R.J.'s consent.

As the State points out, the record further reflects that Freeman initially advised R.J. that he had the right to refuse consent to a vehicle search, and R.J. did so. This factor weighs in favor of voluntariness.

When R.J. refused to consent to the search, Freeman called for the canine officer. After making the call, Freeman explained to R.J. that the dog would sniff the vehicle and that the officers would have probable cause to search the vehicle if the dog "hit" on any scent indicating narcotics or other illegal substances. By this explanation, Freeman implicitly represented to R.J. that (1) the canine sweep was inevitable, (2) R.J. could not refuse to permit the sweep, and (3) he was not free to leave prior to the completion of the sweep. We have held that Freeman did not have reasonable suspicion to continue R.J.'s detention after R.J. refused consent to search. Therefore, Freeman could not continue R.J.'s detention to conduct a canine sweep. See State v. Marino, No. 2-01-474-CR, 2003 WL 851953 (Tex.App.-Fort Worth 2003, pet. ref'd) (not designated for publication) (citing McQuarters, 58 S.W.3d at 257) (canine sweep is generally not considered a search and therefore does not require consent, but officer is required to establish reasonable suspicion to prolong a traffic stop to perform a canine sweep for drugs); see also Veal v. State, 28 S.W.3d 832, 835 (Tex.App.-Beaumont 2000, pet. ref'd). However, Freeman's explanation of the impending sweep conveyed the opposite message. This factor weighs against voluntariness.

After explaining the sweep to R.J., Freeman asked if there was marijuana in the vehicle. R.J. then admitted there was marijuana in a compartment above the rear view mirror. Freeman again requested permission to search the vehicle, and this time R.J. gave his consent, despite his prior refusal. Because this reversal occurred immediately after it became apparent that the canine sweep was inevitable, this factor weighs against voluntariness.

Based upon our application of the relevant factors to the record before us, we conclude that, on balance, the factors supporting R.J.'s assertion of involuntary consent outweigh those supporting the State's position. Consequently, we hold that the State did not meet its heightened burden to prove voluntariness of R.J.'s consent by clear and convincing evidence. Accordingly, we sustain R.J.'s second issue.

DISPOSITION

Having sustained R.J.'s first and second issues, we hold that the trial court abused its discretion in denying R.J.'s motion to suppress. We reverse the trial court's order and remand the cause for proceedings consistent with this opinion.