

A pretextual stop does not make an objectively reasonable seizure unlawful.[Martienz v. State](14-1-7A)

On December 11, 2013, the El Paso Court of Appeals found that although an officer may have had another subjective motive for seizing a driver, that does not make an objectively reasonable seizure unlawful under the constitutions of the United States or of this state.”

¶ 14-1-7A. **Martinez v. State**, No. 08-11-00314-CR, 2013 WL 6561611 (Tex.App.—El Paso, 12/11/13).

Facts: On December 28, 2009, Officer Jesus Alaniz of the Fort Worth Police Department’s Gang Enforcement Unit was patrolling Weber Street in a marked police vehicle at around 11 p.m. After several young men standing in the front yard of a house on Weber Street made eye contact with Officer Alaniz, he became suspicious and ran a computer check on the house in the police gang database. The computer identified the house as one frequented by members of the Varrio North Side and Varrio Diamond Hill street gangs. Based on the hit, Officer Alaniz requested that an unmarked unit conduct surveillance on the house, and Officer Ryan Perales responded to that request. Perales subsequently notified Officer Alaniz and other officers that he was following a vehicle which had left the house and the driver had failed to signal a left-hand turn onto Decatur Avenue. Officer Alaniz subsequently stopped the vehicle for the traffic violation observed by Officer Perales.

Michelle Becerra testified that on that evening, Appellant was helping her and her family move into a house on Weber Street. At some point, Becerra and Appellant left the house in separate cars, with Becerra driving in front and Appellant driving a Dodge Charger registered to his then-girlfriend and Becerra’s sister-in-law, Nicole Lopez. Becerra disputed Officer Perales’ account of events and testified that she had seen Appellant use his turn signal in turning left on Decatur Street because Appellant had been tailgating her, which led her to check her mirrors and watch him make the turn. She further testified that Officer Perales pulled her over shortly after she and Appellant went in different directions on 23rd Street, informed her that he stopped her for failing to use a turn signal, and then asked her where her “friend” was. Becerra also said she knew Officer Perales personally, that they had gone to school together, and that he had acknowledged her at several social events. Officer Perales denied knowing Becerra personally or having pulled her over that night. On cross-examination, Becerra admitted that her sons had previous run-ins with the police and were associated with the Varrio North Side gang, but denied that those facts would bias her testimony.

Based on these facts, Appellant moved both before and during trial to suppress all evidence obtained from Officer Alaniz’s traffic stop, arguing that Becerra’s testimony proved that Appellant did not commit a traffic offense and that Officer Alaniz’s stop was pretextual and unsupported by probable cause. Appellant also introduced evidence that he did not have exclusive control over the vehicle, that several of Lopez’s ex-boyfriends and others who had “ties to the drug world” had previously used the Charger in the months between September 2009 and December 2009, and that a stereo behind which drugs were found had been broken by Lopez’s ex-boyfriend and fixed before Appellant came into possession of the car. The trial court deferred ruling on the motion to suppress until trial, but ultimately denied it, finding that

Becerra's testimony about seeing Appellant signal a traffic turn was not credible because her sons were associated with the same street gang as Appellant.

Officer Alaniz testified that during the stop, he asked for and received Appellant's verbal consent to search the vehicle. Officer Alaniz also testified that Appellant admitting to possessing a small amount of marijuana. Sgt. Enright seized a bag containing marijuana in plain view in the driver's side door pocket, then placed Appellant under arrest for possession of marijuana. During the search incident to arrest, officers found a glass jar containing methamphetamine in the cup holder. They also found a bag of cocaine, a bag of methamphetamine, and a Ruger P95 9mm handgun located behind a removable radio console after a police dog alerted to the presence of drugs. Additionally, police found a digital scale in a CD case during a subsequent inventory search of the vehicle.

The jury found Appellant guilty on two counts of possession with intent to deliver and found that Appellant had used or exhibited a deadly weapon by keeping the handgun in the radio console. During the punishment phase of trial, the State introduced Appellant's prior juvenile record, evidence suggesting that Appellant was associated with the Varrío North Side street gang, and evidence linking Appellant to the death of Michelle Chavez and the wounding of Maria Guadalupe Cavillo, who were innocent bystanders caught in a shoot-out alleged to have been between rival gangs while Appellant was on probation for another offense. The shooting formed the heart of the State's punishment case against Appellant, and the facts are essentially undisputed. On March 27, 2009, Appellant and several friends who were on the north side of Fort Worth decided to go to a party on the other side of town with a group of acquaintances. Riding in a maroon Yukon, they followed the group of acquaintances who were in a light brown Cadillac. As they approached the party, a white Cadillac stopped in front of them, obstructing their path. Luciano Hernandez, one of the passengers in the brown Cadillac, exited the vehicle and approached the white Cadillac to confront the driver when an unidentified person emerged from the white Cadillac and opened fire. Hernandez was shot several times. Several rounds also hit the Yukon in which Appellant and others were riding. Jose Otero, Appellant's cousin, testified that at that point, Appellant grabbed a semi-automatic AK-47 from the back of Yukon, exited the vehicle, and began firing back toward the unidentified shooter.

As the shooting began, a Chevrolet Cobalt containing Isela Caldera, Maria Guadalupe Cavillo, and Michelle Chavez became trapped amidst the roadblock created by the white Cadillac, traffic, and several cars parked along the street. The three women had just returned to the house party after briefly leaving for food, and had no knowledge of gang activity at the party or any involvement in the shooting. As Caldera maneuvered into a small gap between parked cars to try and escape from the scene, her car entered into the line of fire. Cavillo was shot through the hip, and Chavez was shot in the chest and later died of her injuries.

An eyewitness testified that after the shooting, he saw the Yukon and the light brown Cadillac drive off from the scene, but that at some point they stopped to transfer the AK-47 and personnel, including Appellant, from the Yukon to the Cadillac. Police stopped the brown Cadillac as the occupants of the Yukon were taking Luciano Hernandez to the hospital. Police took the Cadillac's occupants, including Appellant, to the police station for questioning about the shooting. During questioning, Appellant submitted to a gunshot residue and gunshot primer

residue test. His hands and clothing both tested positive for gunshot primer residue. A bullet recovered from Cavillo's hip was of the same caliber fired by AK-47s.

At the close of evidence, counsel for Appellant requested a jury charge on self-defense and defense of third persons. The trial court denied the requested instruction. The jury sentenced Appellant to 99 years in prison on both counts, to be served concurrently at the Texas Department of Criminal Justice Institutional Division.

Held: Affirmed

Opinion: In Issue One, Appellant contends that the trial court should have granted his motion to suppress the drugs found in the Dodge Charger because the State failed to establish probable cause justifying the initial traffic stop.¹ At the motion hearing and at trial, the State alleged that an officer in an unmarked police vehicle witnessed Appellant fail to signal a turn in violation of the TEX. TRANSP. CODE ANN. § 545.104(b)(West 2011), thus providing probable cause for a second officer in a marked police car to stop Appellant.

At a suppression hearing, the trial judge is the sole and exclusive trier of fact and may choose to believe or disbelieve any or all of the evidence presented before it. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex.Crim.App.2011); *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex.Crim.App.2002). We review a ruling on a motion to suppress using a bifurcated standard of review. *Valti v. State*, 310 S.W.3d 442, 447 (Tex.Crim.App.2010); *Guzman v. State*, 955 S.W.2d 85, 87–91 (Tex.Crim.App.1997). Under this standard, the trial court's findings of historical fact must be afforded almost total deference provided they are supported by the record. *Valtierra*, 310 S.W.3d at 447; *Amador v. State*, 221 S.W.3d 666, 673 (Tex.Crim.App.2007). We also defer to the court's determination of mixed questions of law and fact that turn on an assessment of a witness's credibility or demeanor. *Valtierra*, 310 S.W.3d at 447; *Amador*, 221 S.W.3d at 673. We will review de novo the trial court's determination of legal questions and its application of the law to facts that do not turn upon a determination of witness credibility and demeanor. See *Valtierra*, 310 S.W.3d at 447; *Amador*, 221 S.W.3d at 673.

As a general rule, appellate courts view the evidence in the light most favorable to the trial judge's ruling, regardless of whether the judge granted or denied the suppression motion. *State v. Woodard*, 341 S.W.3d 404, 410 (Tex.Crim.App.2011). If the ruling is reasonably supported by the record and is correct under any theory of the law applicable to the case, the reviewing court will uphold it. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App.1996). Generally, we only consider the evidence adduced at the suppression hearing; however, where, as here, the parties relitigate the suppression issue at the trial on the merits, we consider all the evidence, from both the pretrial hearing and the trial, in our review of the trial court's ruling. See *Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex.Crim.App.2007).

Appellant does not argue that the facts found by the trial court fail to establish probable cause to believe Appellant violated Section 545.104(b) of the Transportation Code. He instead argues that the traffic stop was pretextual and that the trial court abused its discretion by not crediting the testimony of a defense witness who claimed to have been driving in front of Appellant at the time and said she saw him use his turn signal. The subjective intent of a police

officer initiating an otherwise valid traffic stop is usually irrelevant. “The fact that the officer may have had another subjective motive for seizing [a driver] would not have made an objectively reasonable seizure unlawful under the constitutions of the United States or of this state.” *State v. Gray*, 158 S.W.3d 465, 469–70 (Tex.Crim.App.2005), citing *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Crittenden v. State*, 899 S.W.2d 668, 674 (Tex.Crim.App.1995). The only relevant issue here is whether the stop was otherwise justified by probable cause.

There is no question that a violation of the Texas Transportation Code provides a police officer with probable cause to stop and seize a driver. *Gray*, 158 S.W.3d at 469. As such, the suppression issue turns on the trial court’s resolution of the conflicting testimony between Officer Perales and Michelle Becerra about whether Appellant actually used his turn signal. The trial court did not find Becerra credible and it found that Officer Perales observed Appellant fail to signal the turn.

Conclusion: The trial court’s determination of historical fact is supported by the record. Deferring to the trial court’s resolution of credibility and fact finding as we must as we must, we conclude that the traffic stop of Appellant was supported by probable cause. Issue One is overruled.