An investigative stop was allowed where the officer’s suspicion that Appellant had engaged in criminal activity was based on far more than a mere “hunch.” [In the Matter of E.O.E.](16-3-3)

On May 5, 016, the El Paso Court of Appeals held that police officer’s stop was not based on any single factor or mere hunch, but a collective assessment of the scene as he observed it and the information he received when he encountered the juvenile.

¶ 16-3-3. **In the Matter of E.O.E.**, No. 08-14-00144-CV, --- S.W.3d ----, 2016 WL 2609515 (Tex.App. – El Paso., 5/5/2016).

**Facts:** An altercation over alcohol arose between E.O.E. and Jorge Quinones at a house party on June 30, 2013. E.O.E. became argumentative and aggressive when Quinones denied him access to the ice chest containing the alcohol. He confronted Quinones, stating that “he didn’t give a f\* \*k, he didn’t care what anybody said and whoever got in his face, he was going to f\* \*k everybody up.” This verbal exchange escalated into a physical fight when E.O.E. punched Quinones first, but missed. The fight began at the main entrance of the home, moved to the parking lot, and eventually into the street. Quinones testified that he was protecting his family when the fight began. Quinones noticed at some point during the fight that E.O.E. pulled a knife and began swinging it at him. Quinones told E.O.E. to put the knife down so that they could fight “hand in hand, no knifes [sic],” but E.O.E. continued swinging the knife at Quinones. When the party moved into the street, E.O.E. and his friends threw rocks at Quinones. Quinones explained that he continued chasing E.O.E. and his friends away from the house in order to protect his family. Once the fight was over, Quinones noticed that he had been stabbed in his abdomen. Quinones gave his statement to the police on September 13, 2013, in which he referred to E.O.E. as the “fat kid, six, one, heavy, dark skin, about 17 years old, very short hair.” He was unable to make a positive identification in any photo lineups.

Officer Jesus Munoz received a call around midnight regarding a fight in progress and arrived at the scene shortly thereafter. The radio dispatch indicated that some of the individuals fled the scene. Officer Munoz spoke with Quinones who indicated that he was involved in a physical altercation in which he was stabbed. Quinones gave Officer Munoz a description of his attacker. He described the person as a “Hispanic juvenile,” of medium build, and provided Officer Munoz with a clothing description. Officer Munoz immediately dispatched this description over his radio to other officers in the surrounding area, but failed to later include the description in his written report. Officer Rodolfo Moreno received Officer Munoz’s dispatch call concerning a fight involving weapons on the corner of Elm St. and Porter Ave. He was already in the vicinity of where the fight occurred when he received the call. The dispatch call he initially heard did not indicate that there had been a stabbing. As he approached the intersection, Officer Moreno encountered E.O.E. along with two other juveniles walking eastbound on Porter Ave. The trio were located only three or four houses away from the house where the fight occurred, and were walking away from the scene. When the two juveniles accompanying E.O.E. noticed Officer Moreno, they fled southbound while E.O.E. continued walking eastbound. As Officer Moreno approached E.O.E. in his vehicle, he noticed that E.O.E. kept looking over his shoulder and reaching for his back pocket with his left hand. Officer Moreno testified that he was concerned that E.O.E. might be carrying a weapon given the nature of the dispatch call. E.O.E. initially refused to stop at Officer Moreno’s request, but finally did so after the third request. Once he stopped, he voluntarily raised his hands in the air and walked toward Officer Moreno, sweating profusely. According to Officer Moreno, the profuse sweating indicated that he was either running or had just finished doing something physical. When Officer Moreno asked E.O.E. what he was doing and where he was coming from, the juvenile responded: “[We] were just walking by some party and there were—some guys were trying to jump [us], like beat [us] up and that’s why [we] were running away from the property.” Officer Moreno testified both at the suppression hearing and at trial that E.O.E.’s response, his vicinity to the fight, the time of night, and his consistent efforts to reach for his back pocket caused him to become suspicious of his activities. Accordingly, Officer Moreno conducted a pat down and found a knife in the juvenile’s back left pocket. When Officer Moreno asked E.O.E. what was in his pocket, he responded, “I think it’s a knife.” Officer Moreno secured the knife onto his belt and continued questioning. While attempting to contact E.O.E.’s mother, Officer Moreno received an update over the radio indicating that there was a stabbing where the fight took place. Another officer who was at the fight scene—Officer Argomedo—contacted Officer Moreno on the radio to ask him if he still had a subject detained, to which Officer Moreno responded in the affirmative. Officer Argomedo asked for a clothing description and Officer Moreno told him the suspect was wearing a “red top, black pants,” and Officer Argomedo instructed Officer Moreno to “hold onto [the subject].” Officer Argomedo met Officer Moreno at the street location where Officer Moreno stopped E.O.

In his second issue, E.O.E. complains that the trial court erred in denying his motion to suppress. He contends that Officer Moreno stopped, detained, and ultimately arrested him based on a mere “hunch.”

**Held:** Affirmed

**Opinion:** When reviewing a trial court’s decision to deny a motion to suppress, we “afford almost total deference to a trial court’s determination of the historical facts that the record supports especially when the trial court’s fact findings are based on an evaluation of credibility and demeanor.” Guzman v. State, 955 S.W.2d 85, 89 (Tex.Crim.App.1997). We also afford 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 questions ultimately turns on an evaluation of credibility and demeanor. Montanez v. State, 195 S.W.3d 101, 106 (Tex.Crim.App.2006), quoting Guzman, 955 S.W.2d at 89; State v. Ross, 32 S.W.3d 853, 856 (Tex.Crim.App.2000). Finally, where the resolution of mixed questions of law and fact do not turn on an evaluation of credibility and demeanor, we conduct a de novo review. Montanez, 195 S.W.3d at 106, quoting Guzman, 955 S.W.2d at 89.

Generally, we consider only the evidence adduced at the suppression hearing because the trial court’s ruling was based on it rather than evidence introduced later at trial. Rachal v. State, 917 S.W.2d 799, 809 (Tex.Crim.App.1996); Hardesty v. State, 667 S.W.2d 130, 135 n. 6 (Tex.Crim.App.1984). However, this general rule is inapplicable where, as in this case, the parties subsequently re-litigated the suppression issue during the trial on the merits. Hardesty, 667 S.W.2d at 135 n. 6. In such an instance, it is appropriate that we consider all evidence, from both the pre-trial hearing and the trial, in our review of the trial court’s determination. Rachal, 917 S.W.2d at 809 (“Where the State raises the issue at trial either without objection or with subsequent participation in the inquiry by the defense, the defendant has made an election to reopen the evidence, and consideration of the relevant trial testimony is appropriate in our review.”); see also Webb v. State, 760 S.W.2d 263, 272 n. 13 (Tex.Crim.App.1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3202, 105 L.Ed.2d 709 (1989).

The Fourth Amendment of the United States Constitution and Article I, Section 9 of the Texas Constitution protect against unreasonable searches and seizures by government officials. See Wiede v. State, 214 S.W.3d 17, 24–25 (Tex.Crim.App.2007); Johnson v. State, 912 S.W.2d 227, 232–234 (Tex.Crim.App.1995); Martinez v. State, 72 S.W.3d 76, 81 (Tex.App.–Amarillo 2002, no pet.). Our decision here turns on whether Officer Moreno had a reasonable suspicion that E.O.E. was engaged in wrongdoing when he encountered him on the sidewalk. In Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884–85, 20 L.Ed.2d 889 (1968), the United States Supreme Court held that a police officer can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity “may be afoot,” even is the officer lacks probable cause. U.S. v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). The officer, of course, must still be able to articulate something more than an “inchoate and unparticularized suspicion or ‘hunch.’” Terry, 392 U.S. at 27, 88 S.Ct. at 1883. The level of suspicion required for a Terry stop is obviously less demanding than that for probable cause. Sokolow, 490 U.S. at 7, 109 S.Ct. at 1585.

Like probable cause, the concept of reasonable suspicion is not “readily, or even usefully, reduced to a neat set of legal rules.” Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Reasonable suspicion is established if the officer can point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the police officer’s intrusion into the suspect’s constitutionally protected interests. Terry, 392 U.S. at 21, 88 S.Ct. at 1880. We consider the totality of the circumstances when evaluating the validity of a Terry stop. United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981); Moore v. State, 760 S.W.2d 808, 809–10 (Tex.App.-Austin 1988, pet. ref d). The “totality of the circumstances” analysis requires us to respect “the common-sense, reasonable judgments of law enforcement officers, as informed by all surrounding facts and circumstances and the rational inferences and deductions officers may draw from them based on their experience and familiarity and the areas they serve.” In re R.S.W., No. 03–04–00570–CV, 2006 WL 565928, at \*3 (Tex.App.-Austin, Mar. 9, 2006, no pet.); Ford v. State, 158 S.W.3d 488, 494 (Tex.Crim.App.2005)(law enforcement training or experience can factor into a reasonable suspicion analysis); see also United States v. Cortez, 449 U.S. 411, 417–18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

Here, Officer Moreno identified numerous objective facts that could have led him to reasonably conclude that E.O.E. had engaged in criminal activity. He stopped and detained E.O.E. due to the suspicious circumstances surrounding the encounter. Collectively, these circumstances included: (1) the juvenile’s continuous behavior of reaching toward his back pocket; (2) the time of night (it was past the City’s 11 p.m. curfew for juveniles); (3) the location where he encountered E.O.E. and its proximity to the location where the fight with weapons occurred; (4) E.O.E.’s juvenile companions who fled the scene as soon as he approached them in his vehicle; (5) and E.O.E.’s response that he had just come from the direction of the fight. In re R.S.W., 2006 WL 565928 at \*11; Woods v. State, 956 S.W.2d 33, 38 (Tex.Crim.App.1997); State v. Bryant, 161 S.W.3d 758, 762 (Tex.App.–Fort Worth 2005, no pet.)(time of night and area’s crime rate supported a reasonable suspicion that defendant was, or would soon be, engaged in criminal activity); Alexander v. State, 879 S.W.2d 338, 342 (Tex.App.–Houston [14th Dist.] 1994, pet. ref’d)(being in a park hours past curfew and acting as if one were trying to hide something are facts sufficient to constitute reasonable suspicion).

Officer Moreno’s stop was not based on any single factor or mere hunch, but a collective assessment of the scene as he observed it and the information he received when he encountered E.O.E. Moreover, upon encountering E.O.E., Officer Moreno was permitted to ask him, with or without reasonable suspicion, what he was doing and where he was going. Florida v. Royer, 460 U.S. 491, 497–98, 103 S.Ct. 1319, 1323–24, 75 L.Ed.2d 229 (1983); Johnson v. State, 912 S.W.2d 227, 235 (Tex.Crim.App.1995). Appellant’s profuse sweating and response indicating that he had just come from the direction of where the fight occurred provided Officer Moreno with an additional reasonable basis for the stop. See Balentine v. State, 71 S.W.3d 763, 769 (Tex.Crim.App.2002). We do note, however, that in isolation, each factor individually would not be sufficient to establish reasonable suspicion. See Horton v. State, 16 S.W.3d 848, 853–54 (Tex.App.–Austin 2000, no pet.)(finding that nervous behavior alone was not enough to establish reasonable suspicion); Gamble v. State, 8 S.W.3d 452, 454 (Tex.App.–Houston [1st Dist.] 1999, no pet.)(explaining that walking away from police in a residential neighborhood at night without any other factors giving rise to suspicion was not sufficient to justify a frisk).

**Conclusion:** In sum, Officer Moreno’s suspicion that Appellant had engaged in criminal activity was based on far more than a mere “hunch” that Appellant alleges. Accordingly, we overrule Appellant’s second issue on appeal.