No. PD-1300-16

In The

Court of Criminal Appeals of Texas

Elvis Elvis Ramirez-Tamayo,
Appellant,

versus

The State of Texas,
Appellee.

On Discretionary Review from 07-15-00419-CR
Seventh Court of Appeals

On Appeal from Cause Number 69-523-E
108th District Court of Potter County, Texas

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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STATEMENT REGARDING APPEARANCE AS AMICUS CURIAE

The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit, voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and the constant improvement of the administration of criminal justice in the State of Texas.

Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts by acting as amicus curiae.

Neither TCDLA nor any attorney representing TCDLA have received any fee or other compensation for preparing this brief.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the Texas Criminal Defense Lawyers Association, *Amicus Curiae*, and respectfully submits this Amicus Curiae Brief in Support of Applicant and would respectfully show the Court as follows:

INTRODUCTION

Appellant Elvis Elvis Ramirez-Tamayo was stopped for speeding. 2 RR 9. Mr. Ramirez-Tamayo was driving a rental car, and he had difficultly communicating in English with the officer. *Id.* 27, 36.

When the officer approached the vehicle, Mr. Ramirez-Tamayo opened up the passenger door instead of rolling down the window. *Id.* 12. He was wearing cologne, and there were cigarette ashes in the vehicle. *Id.* 22. He was nervous and excited. *Id.* 23.

Based on these behaviors, the officer concluded Mr. Ramirez-Tamayo was trafficking drugs. *Id.* 26. Mr. Ramirez-Tamayo did not consent to a search, but the officer had a drug detection dog with him. *Id.* 27. The dog alerted, and drugs were found.

Appellant's motion to suppress was denied by the trial court. *Id.* 52. That decision was reversed on appeal. *Ramirez-Tamayo v. State*, 501 S.W.3d 788, 800 (Tex. App.—Amarillo 2016, pet. granted). This Court granted the State's petition for discretionary review.

ARGUMENT

In the American justice system, no one gets to say "it is because I say it is" and expect the entire judicial system to unquestioningly oblige. And when a trial court does give deference to any witness without a foundation for doing so, a reviewing court is not required to perpetuate that error by falling into the exact same flawed thinking. Appellate courts are courts of meaningful review, not courts of blind approval.

In this case, the State asks the Court to give police officers absolute, unquestioned, *carte blanch* deference for no reason other than they're police officers. The officer in this case testified that in his training and experience a hand full of totally innocent behaviors, when combined, indicated drug trafficking. What was it about the officer's training and experience that informed such a conclusion? He never said. The only way the trial court could have concluded reasonable suspicion existed is if it gave deference to the officer's testimony without any grounds in the evidence for doing so.

This is not an issue of whether the trial court believed the officer. That matter is not for review on appeal. What *is* reviewable on appeal is whether the trial court had a sufficient record basis for its conclusion.

The appellate court below, in line with decades of Supreme Court and this Court's precedence, reviewed whether there was any basis in evidence for the trial court's ruling. It correctly found there was not. The court's actions were well within the bounds of reasonable appellate review. The appellate court did not err. Its opinion should be affirmed.

I. The State asks the Court to vitiate *Terry's* reasonable suspicion requirement, thereby lowering the State's burden of proof

A. It is the State's burden to establish reasonableness of a search

There is a familiar back-and-forth when it comes to the burden of proof in securing the suppression of evidence. Courts start out with a presumption that police have properly conducted themselves. *Delafuente v. State*, 414 S.W.3d 173, 176 (Tex. Crim. App. 2013) (citing *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005); *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002)).

The defendant has the initial burden of overcoming that presumption. *Id.* One way he can meet that burden is by establishing the search or seizure occurred without a warrant. *Id.* Once the defendant shows the search was warrantless, the burden of proof shifts back to the State, which is then tasked with establishing (i) the search was conducted pursuant to a warrant or (ii) the search was otherwise reasonable. *Id.*

In the case at bar, the burden of proof landed on the State to establish how the search was reasonable, as the State stipulated it was a warrantless search. 2 RR 7.

B. The *Terry v. Ohio* standard is satisfied only after critical court evaluation of specific evidence presented by the State

Reasonableness of a search or seizure is traditionally evaluated using the *Terry v. Ohio* standard: "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968).[1]

In *Terry*, the Supreme Court did more than establish a rule for reasonable suspicion. It established a mechanism for substantive judicial review of investigative detentions. The entire point of *Terry* was based upon the Supreme Court's recognition,

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

[1] Routine traffic stops are analogous to investigative detentions and are governed by *Terry v. Ohio*. *Davis v. State*, 947 S.W.2d 240, 244 (Tex. Crim. App. 1997) Thus, the framework for determining the reasonableness of an investigative detention based on a traffic stop is provided by *Terry's* reasonable suspicion standard. *Id.*

Id. The Supreme Court additionally recognized, "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 22 n. 18, 88 S.Ct. at 1880.

C. The State's position overlooks *Terry's* requirements and calls for unquestioning acceptance of police testimony in justifying a search

Unquestioned deference to the police is the exact opposite of *Terry's* requirements. The State has the *burden* of proof, not the *benefit* of a presumption that an officer's suspicions are justified simply because he has training and experience.

This is not to say an officer's training and experience is irrelevant. The Supreme Court has established "the evidence collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v. Cortez*, 449 U.S. 411, 418, 011 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

The State, however, takes this principle too far. While a court must weigh the evidence in view of how an officer interprets it, given his training and experience, it must never automatically accept that just because an officer has training and experience *his* determination as to reasonable suspicion is correct.

An officer in the field may feel as though he has sufficient indicia of criminal activity to support reasonable suspicion. But when he is in a court helping the State meet its burden of proof on a suppression motion, it is not his determination that matters. It is the court's. At no point should the court abdicate its decision-making authority to the officer just because he is wearing a uniform. This is the opposite of the framework crafted by and the fundamental values recognized in *Terry*.

Every officer who ever takes the stand will have "training and experience." He cannot become an officer without it. Therefore, under the State's reasoning every officer – from a rookie to a veteran – can confidently take the stand, with his unspecified degree of "training and experience" and expect that whatever he says will, and ought to be, blindly accepted by the court. He is a police officer. He has training and experience. *His* determinations are all the reviewing court needs to hear, without any consideration as to whether he has the foundation upon which to make those determinations.

This position is contrary to the central teachings of Fourth Amendment jurisprudence. Officers must be able to provide specific details of how and why they formed reasonable suspicion.

II. The State asks the Court to change the standard of review on appeal from "almost total deference" to "blind deference"

A. A reviewing court can only assume facts in support of a trial court's ruling if those facts are supported in the record

The question in traffic stop continuations is whether reasonable suspicion justified the continuation. A reasonable suspicion determination, in turn, is made by considering the totality of the circumstances. *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001).

In conducting a totality of the circumstances analysis, the reviewing court employs a bifurcated standard of review: (i) giving "almost total deference" to a trial court's determination of historical facts and application of law to fact questions that turn on credibility and demeanor, and (ii) reviewing *de novo* application of law to fact questions that do not turn upon credibility and demeanor. *Id.*

If a trial court does not make specific findings of fact, the reviewing court must evaluate the evidence "in a light most favorable to the trial court's ruling and assume that the trial court made implicit findings of fact *supported in the record*." *Balentine v. State*, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002) (emphasis added).

No appellate court is ever required to invent facts to support a trial court's ruling. The reviewing courts of this state enjoy more freedom of thought than simply "figure out a way to affirm the trial court, even if you have to wholly invent facts to do so."

B. This Court has established that a reviewing court must look behind a trial court's ruling and reject rulings based on unspecific, conclusory officer testimony

This Court recognized this rule in *Ford v. State*, 158 S.W.3d 488 (Tex. Crim. App. 2005). In *Ford*, a traffic stop case, the Court recognized the State bore the burden of establishing reasonableness. *Id.* at 492. The officer in that case simply testified that the basis for his initial detention was that the appellant was "following too close." *Id.* at 491. The State did not elicit any testimony specifying why the officer concluded the appellant was following too close. It only presented the conclusive statement "he was following too close."

The Court rejected such a perfunctory explanation. It resisted the urge to employ a "strained reading of the record" and assume the facts necessary to fill in the blanks of what "following too close" means. *Id.* at 493. It refused to invent the assumptions necessary to transform the officer's testimony from the conclusory into the specific. *Id.*

> The record reveals an absence of any facts allowing an appellate court to determine the circumstances upon which [the officer] could reasonably conclude that [appellant] actually was, had been, or soon would have been engaged in criminal activity. Instead, the trial court was presented only with a conclusory statement that [appellant] was violating a traffic law. We do not quarrel with the notion that [the officer] may have in fact believed that [appellant] was following another car too closely. Nor do we dispute that the trial judge is free to believe or disbelieve [the officer's] testimony. But without specific, articulable facts, a court has no means in assessing whether this opinion was objectively reasonable.
>
> When a trial court is not presented with such facts, the detention cannot be "subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." And "[w]hen such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." Allowing a police officer's opinion to suffice in specific facts' stead eviscerates *Terry's* reasonable suspicion protection. If this Court were to hold [otherwise], we would be removing the "reasonable" from reasonable suspicion. Therefore, we adhere to the principle that specific, articulable facts are required to provide a basis for finding reasonable suspicion. Mere opinions are ineffective substitutes for specific, articulable facts in a reasonable-suspicion analysis.

Id. at 493. Thus, in *Ford*, this Court reinforced the idea that "almost total deference" does not mean "blind deference." Instead, reviewing courts must afford trial courts "almost total deference" to a trial court's determination of facts.

In cases where there is no explicit determination of facts, the reviewing court can only defer to the trial court inasmuch as the record supports such deference. A reviewing court is not a rubber stamp, and it cannot assume facts not in evidence. It cannot even assume facts necessary to change conclusory statements into specific, articulable facts. *Id.* at 493.

C. The State requests reviewing courts give blind deference to police officers

In its brief, the State misunderstands both *Ford* and the ruling below. It appears to contend that *Ford* establishes instances in which an appellate court can reject a trial court's determination as to witness credibility. (State's Brief on the Merits, pg. 13). It further concludes the court below, in reliance on *Ford*, rejected the trial court's determination of the officer's credibility.

In both *Ford* and the case at bar, there was no rejection of a credibility determination. Neither case calls into question the credibility of the officer. Both, however, recognize that it takes more than conclusory statements to satisfy the State's burden of proof in Fourth Amendment cases. Conclusory statements, without more, are insupportable upon review.

In misconstruing *Ford* and the opinion below, the State asks the Court to abdicate its ability to look behind the conclusory and see if there is evidence in support of the specific, articulable facts required by *Terry*. It avers, "[i]f an officer swears that his training and experience make a pedestrian fact suspicious, the trial court's inherent discretion to find that office credible should prevail." (State's Brief on the Merits, pg. 14).

This is a terrifying statement. It ignores the specificity mandated by *Terry*. It makes appellate review all but pointless, regardless of what the record shows. It takes those instances in which a trial court wrongly gives blind deference to a police officer and cloaks them in unassailable authority.

In both *Ford* and the case below, an officer took the stand and essentially testified "it is because I say it is." Rather than asking "why is that your conclusion?" the trial court blindly accepted the testimony. There was no testimony whatsoever possibly informing any credibility determination, other than the base fact that the witness was a police officer. Nevertheless, the State would have any officer statement regardless of record support become untouchable if it passed the trial court.

The State contends an officer taking the stand and swearing, without explanation, that his training and experience make a pedestrian fact suspicious somehow involves credibility. (State's Brief on the Merits, pg. 14). It does not. It is simply testimony. Anyone can take the stand and say "people who wear cologne are likely trafficking drugs." The power of that testimony comes from the source. And just because the person testifying is wearing a police uniform does not mean he is, *ipso facto*, to be unquestioningly believed. Determining the credibility of that testimony is an exercise that can only be undertaken with full knowledge of the witness's training and experience.

The State's reasoning implies a police officer automatically has credibility by mere virtue of being an officer. No one in the American judicial system or at any point in the criminal justice system starts out with more credibility than anyone else. Now, the State implicitly avers an *entire group* of people, i.e. police officers, can be imbued with credibility simply by virtue of being an officer who is testifying from the witness stand.[2]

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[2] This rationale continues with the State's position at the hearing on the motion to suppress:

> [N]ormally we have an officer who says I have a suspicion that there are drugs somewhere in the car and normally they're right that they're

Such a proposition ought to be rebuffed as an affront to the very foundations of the justice system. Not every statement made by an officer in testimony implicitly involves a credibility determination.

Credibility determinations require information. If there is no information to support a credibility determination, then the appellate court can so find. If a trial court makes a ruling not supported by the record, the appellate court's job is to step in and correct that error. The State, however, would have them rendered powerless to correct instances of unsupported rulings when the witness is an officer testifying on the State's behalf.

Recognizing a *lack* of evidence is an entirely different matter than rejecting evidence as not credible. Reviewing courts have the freedom to reject a trial court's ruling based upon a lack of evidence. This freedom was exercised by this Court in *Ford* and by the court below in the case at bar.

> somewhere in the car. This officer [from the driver opening the door, wearing cologne, smoking cigarettes, and being nervous] had enough information that he suspected they were in the door, specifically, and he was right that they were in the door, specifically. So those facts that he observed to lead him to that is reasonable suspicion and we would ask you not to suppress the evidence for that reason.

2 RR 52.

D. The court below properly applied this Court's precedent of evaluating the facts in the record and rejecting a trial court's ruling not supported by the record

The court below concluded the officer offered only his conclusory opinion that Mr. Ramirez-Tamayo's innocent behavior was much more nefarious than met the eye. *Ramirez-Tamayo*, 501 S.W.3d at 800. It reasonably and accurately relied upon this Court's reasoning in *Ford* in reaching that conclusion.

In denying the motion to suppress, the trial court did not have the sufficient, specific information required by Fourth Amendment jurisprudence. The appellate court, in turn, was left without any record evidence supporting the officer's testimony. As in *Ford*, the appellate court could not transform the officer's conclusory "my training and experience said these were indicia of criminal activity" into the specific "my training and experience of abc indicated to me these were indicia of criminal activity because xyz."

The State had the burden of establishing why the continuation of the stop was reasonable. It did not provide sufficient evidence to do so. The appellate court recognized this absence of evidence. It did just as this Court did in *Ford*, and as it ought to have done as a court of review.

III. The State asks the Court to perpetuate the trial court's error by holding simply because a police officer has unspecified "training and experience," his observations *ipso facto* will give him reasonable suspicion

"I have training and experience" are not the magic words that the State would have them be. They do not put police officers in an untouchable realm whereby anything they say (based solely upon their "training and experience") is Gospel truth. Officer's cannot say "I have training and experience" and expect everything that follows will, *ipso facto*, be entitled to automatic, blind deference.

The officer in this case took a hand full of innocent behaviors and, through the lens of his own training and experience, determined they indicated criminal activity. As the court below recognized, there was no discussion as to what his training and experience specifically was and how it informed his decision. It was a conclusory statement where only the specific will suffice.

This is an especially important consideration where, as here, the citizen was acting innocently. There was no smell of drugs, no contraband in plain view, and no furtive movements. Therefore accuracy and reliability of the officer's conclusions is of particularly heavy import.

CONCLUSION

The Court's decision in this case will either maintain or decrease the State's burden of proof in every hearing on a motion to suppress henceforth. It will either permit the appellate courts to continue in their already limited review of decisions on motions to suppress, or it will turn appellate courts into nothing more than rubber stamps of trial courts. It will maintain a standard of "almost total deference," or it will create anew and impose a standard of "blind deference."

Precedent both from the Untied States Supreme Court and from this Court properly instructed the court below. Accordingly, the Court should steadfastly refuse to change decades of its own precedence. It should resist the State's request for a lowered burden of proof. It should refuse to give blind deference to any one person, much less an entire groupe of people. It should sustain the opinion of the Court below.

PRAYER

The Texas Criminal Defense Lawyer's Association, amicus curiae in the above styled and numbered cause respectfully prays the Court will affirm the opinion of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 6, 2017, a copy of this brief was served on John Messinger, Assistant State Prosecuting Attorney, and Steven Denny, attorney for Appellant, via the e-mail address each attorney has listed with the state e-filing system.

/s/ Allison Clayton
Allison Clayton

CERTIFICATE OF COMPLIANCE

I certify the foregoing Amicus Brief complies with Rule 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure. The brief, excluding those portions detailed in Rule 9.4(i) of the Texas Rules of Appellate Procedure, is 3,403 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

/s/ Allison Clayton
Allison Clayton