Motion for Rehearing En Banc Overruled, Opinion of September 16, 1999, Withdrawn; Affirmed and Majority and Dissenting Substituted Opinions filed March 23, 2000.

In The

Fourteenth Court of Appeals

NO. 14-97-01036-CR

JAMES JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Cause No. 97-20651

O P I N I O N O N R E H E A R I N G

The State's motion for rehearing en banc is overruled. We withdraw our original opinion of September 16, 1999, and substitute the following.

Appellant was charged by information with the offense of driving while intoxicated. Appellant filed several pre-trial motions, including a motion to suppress, but the motions were denied. Appellant then entered into a plea bargain agreement and preserved the right to appeal the trial court's ruling on the aforementioned motions. Punishment was assessed

at 180 days' confinement in the Harris County Jail, probated for one year, and a fine of $250.00. Appellant raises three points of error. We affirm.

BACKGROUND

At the hearing on appellant's pre-trial motions, the parties agreed to and the trial court admitted into evidence a stipulation of evidence which described, *inter alia*, the events surrounding the initial detention and arrest of appellant. Those portions of the stipulation state the following:

A. Probable Cause for the Stop Facts

> Houston Police Lt. Davis came up on the scene of a recent accident at 3200 Mainford. Lt. Davis noted that the Defendant was not involved in the one-car/guard rail accident, but that the Defendant did try to assist the driver in getting his vehicle off the guardrail. Lt. Davis then called for Houston Police Officer Juenke to come to the scene. Lt. Davis detained Mr. Johnson, the Defendant, until Officer Juenke arrived. Lt. Davis did the preceding because he observed the Defendant attempting to remove the car from the guard rail, attempting to remove it by driving the motor vehicle.

B. Probable Cause for the Arrest

> Having arrived at the accident scene, Officer Juenke began a driving while intoxicated investigation. Based upon the Defendant's demeanor, his indifferent attitude, his slurred speech and eye condition, his failure of the field sobriety tests and the odor of an alcoholic beverage, Officer Juenke arrested James Johnson without incident and thereafter transported him to the Houston Police Department for further DWI investigation, i.e., videotaping and for an intoxilyzer test request. Officer Juenke spoke with the Defendant and observed prior to his investigation that M. Johnson had slurred speech, a strong odor of an alcoholic beverage on his breath, bloodshot eyes, watery eyes and slow reflexes. The arrest by Officer Juenke was based on his belief the Defendant had lost the normal use of his mental and physical faculties.

The foregoing stipulation with its two exhibits was the only evidence offered at the

suppression hearing.

STANDARD OF REVIEW

In reviewing the trial court's ruling on a motion to suppress evidence, an appellate court must determine the applicable standard of review. In *Guzman v. State*, 955 S.W.2d 85, 87-88 (Tex. Crim. App. 1997), the Court of Criminal Appeals made clear that while appellate courts should afford almost total deference to the trial judge's determination of the historical facts, mixed questions of law and fact not turning on an evaluation of credibility and demeanor are to be reviewed *de novo*. Specifically, questions of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. *Id*. at 87 (citing *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). This is so because "the trial judge is not in an appreciably better position than the reviewing court to make that determination." *Id*. at 87. A trial court may, however, as the trier of fact, draw reasonable deductions and inferences from stipulated facts. *See Yorko v. State*, 699 S.W.2d 224, 226 (Tex. Crim. App. 1985). While we review the trial court's decision *de novo*, we must allow for reasonable deductions from the stipulation. *See Maxcey v. State*, 990 S.W.2d 900, 903 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

DISCUSSION

Reasonable Suspicion and Probable Cause

In his first and second points of error, appellant contends that the trial court erred in overruling his motion to suppress because the State failed to sustain its burden of demonstrating reasonable suspicion for appellant's initial detention.[1] We disagree.

According to the written stipulation of evidence, set forth above, Lieutenant Davis arrived on the scene of a traffic accident in which an automobile collided with a guardrail.

[1] Appellant states in his brief to this Court that "[a]ppellant is not challenging the legality of his subsequent arrest except to the extent it is a product of his initial illegal seizure."

He observed appellant attempting to extricate the vehicle by trying to "drive" it off the guardrail. He thereafter summoned Officer Juenke and detained appellant until his arrival. Upon his arrival, Officer Juenke spoke with appellant and noticed he had slurred speech, a strong odor of alcohol on his breath, blood-shot eyes, watery eyes, and slow reflexes. Officer Juenke then conducted several field sobriety tests which appellant failed. Appellant was then arrested by Officer Juenke for suspicion of driving while intoxicated.

The stipulation fails to articulate why Lieutenant Davis summoned Officer Juenke. It also fails to specify why he detained appellant. However, while the stipulation is terse and lacking in details, it may be reasonably inferred from the sequence of events that the same indicia of intoxication seen by Officer Juenke were also observed by Lieutenant Davis. First, the symptoms described by Officer Juenke were open and obvious; that is, blood-shot and watery eyes, slow reflexes, slurred speech, and a strong odor of alcohol. There is nothing in the stipulation to suggest these manifestations would not also have been visible to Lieutenant Davis. Second, Officer Juenke was summoned *after* Lieutenant Davis had observed appellant. Presumably, Officer Juenke was summoned for a specific purpose, and the stipulation reflects that upon his arrival Officer Juenke spoke to appellant and administered field sobriety tests. This activity is consistent with having been summoned for that specific purpose.

As a general proposition, a stipulation is regarded as a contractual agreement between the parties. *See Howeth v. State*, 645 S.W.2d 787, 789 (Tex. Crim. App. 1983). It is not a device for attacking an unsuspecting opponent. Thus, if there is an ambiguity in a stipulation, it is to be resolved in favor of the party in whose interest the stipulation was made. *See St. Paul Guardian Ins. Co. v. Luker*, 801 S.W.2d 614, 620 (Tex. App.—Texarkana 1990, no writ); *Firestone Tire & Rubber Co. v. Chipman*, 194 S.W.2d 609,

610 (Tex. App.—San Antonio 1946, no writ).[2] Here, because Lieutenant Davis did not have a warrant, the State had the burden of proving facts establishing reasonable suspicion to detain appellant. The stipulation relieved the prosecution of this burden, however; and it presumably was in the State's interest that such a stipulation was made.

At the hearing on the motion to suppress, appellant made no showing that Lieutenant Davis did not observe the same indicia of intoxication that were observed by Officer Juenke. Absent such a showing, the stipulations will be viewed in the light most favorable to the trial court's judgment. *See Moore v. State*, 981 S.W.2d 701, 705 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). A stipulation is in the nature of a contract which reflects a meeting of the minds of the parties regarding the relevant facts. If there had been any disagreement as to what Lieutenant Davis observed to establish the basis for his detention of appellant, the State could have called Lieutenant Davis to the witness stand to clarify any ambiguity in the stipulation. Conversely, if the parties had truly agreed that Lieutenant Davis lacked any articulable reasons for detaining appellant, they could have so stipulated. A reasonable inference may be drawn that the State and appellant did not dispute the existence of reasonable suspicion to support appellant's detention by Lieutenant Davis.

Where a stipulation is silent or ambiguous, it should be construed in the light most favorable to the trial court's judgment. *See id*. Here, the stipulation is silent on what, if anything, Lieutenant Davis observed about appellant. And, the record of the suppression hearing is silent as to any disagreement regarding the existence of reasonable suspicion to detain appellant. We do not believe that we may infer from this silence facts contrary to the trial court's judgment. Rather, we hold that the stipulation reasonably implies that Lieutenant Davis summoned Officer Juenke to the scene due to appellant's visible and

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[2] *See also O'Conner v. State*, 401 S.W.2d 237, 238 (Tex. Crim. App. 1966); *Bender v. State*, 739 S.W.2d 409, 412 (Tex. App.–Houston [14th Dist.] 1987, no pet.) (holding that stipulations are to be reasonably and liberally construed with a view of effectuating the parties' intentions).

apparent intoxication. Therefore, because our *de novo* standard of review allows for reasonable deductions and inferences from the stipulated facts by the trial court, the record supports the trial court's finding that Lieutenant Davis' initial detention of appellant was based on reasonable suspicion. Points of error one and two are overruled.

Breath Test

In his third point of error, appellant contends that the trial court erred in overruling his motion to suppress his refusal to provide a breath specimen because the uncontroverted evidence establishes that section 724.015 of the Texas Transportation Code was violated. He argues that his refusal to submit to a breath test should have been suppressed because he was not provided with a written copy of the statutory warnings before the police officer requested him to submit to a breath test. *See* TEX. TRANSP. CODE ANN. § 724.015 (Vernon 1999).

Appellant was taken to the police station where he was asked to submit a specimen of his breath for testing. Appellant received the *oral* DWI statutory warning required under section 724.015 of the Texas Transportation Code, at which time he refused to submit to the test. Officer O.J. Gutierrez did not, however, give appellant the statutory warnings in writing before requesting the specimen; rather, the written warning was provided after appellant refused to submit to the breath test. Appellant, upon receiving the written warnings, refused to sign the form stating his refusal to submit to a breath specimen.[3] It is the failure of Officer Gutierrez to provide appellant with a *written* copy of the statutory warnings which appellant contends required the trial court to suppress his refusal to take a breath test.

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[3] On the written DWI Statutory Warning form, Officer Gutierrez marked an "X" in a box which precedes the statement, "Subject refused to allow the taking of a specimen and further refused to sign below as requested by this officer."

Section 724.015 provides, "*Before* requesting a person to submit to the taking of a specimen, the officer shall inform the person orally and in writing" of the statutory warnings provided under section 724.015, which include the consequences of refusing to submit to the breath test. *See* TEX. TRANSP. CODE ANN. § 724.015 (Vernon 1999) (emphasis added); *Rowland*, 983 S.W.2d at 60. The purpose of section 724.015 is "to ensure that a person who refuses to give a requested specimen does so with a full understanding of the consequences." *See Rowland*, 983 S.W.2d at 60 (citations omitted).

There is no evidence in the record of this case to show that the failure to provide appellant with the written statutory warning prior to the first request to submit a specimen impacted appellant in an adverse manner. *See id.*; *Jessup v. State*, 935 S.W.2d 508, 511 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (stating that once the appellant received the written warnings, if he had not understood the oral warning he could have changed his mind and submitted to the test); *see also Lane v. State*, 951 S.W.2d 242, 244 (Tex. App.—Austin 1997, no pet.). Further, there is nothing in the record to suggest that appellant did not understand the consequences of refusing to submit to a breath specimen. Indeed, appellant continued to refuse the test after the oral warnings were provided *and* after he had been provided the written warnings.

Because appellant has shown no causal connection between his refusal and the fact that he was not given the written warnings before he refused the breath test, we hold that the trial court did not err in refusing to grant appellant's motion to suppress. *See Rowland*, 983 S.W.2d at 60; *O'Keefe v. State*, 981 S.W.2d 872, 875 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Point of error three is overruled.

The judgment is affirmed.

/s/ John S. Anderson
Justice

Judgment rendered and Substituted Opinion filed March 23, 2000.

Panel consists of Justices Anderson, Hudson, and Baird.[4]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] Former Judge Charles F. Baird sitting by assignment.

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D I S S E N T I N G O P I N I O N O N R E H E A R I N G

Believing this case was correctly decided on original submission, I respectfully dissent to granting rehearing and the opinion issued in connection therewith.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed March 23, 2000.

Panel consists of Justices Anderson, Hudson and Baird.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Judge Charles F. Baird sitting by assignment.