Reversed and Remanded; Majority and Dissenting Opinions filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01036-CR

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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

MAJORITY OPINION

Appellant was charged by information with the offense of driving while intoxicated. Appellant filed several pretrial 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 reverse and remand.

I. Historical Facts.

In his first point of error, appellant contends his initial detention was illegal because it was not supported by reasonable suspicion. At the hearing on appellant's pretrial 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 of appellant. That portion of the stipulation reads as follows:

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.*[1]

Following this detention, Officer Juenke arrived and began a driving while intoxicated investigation which resulted in appellant's arrest.[2]

II. Legality of the Detention

In his first point of error, appellant contends the trial court erred in denying the motion to suppress because the initial detention was not based upon reasonable suspicion.

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[1] The stipulation is a typewritten document. The italicized portion, however, is a handwritten addition agreed to by the parties, initialed by the parties, and read into the record. Furthermore, the parties stated on the record that they agreed to this addition to the stipulation.

[2] At this juncture, we note that the results of Officer Juenke's investigation cannot be considered in our resolution of this point of error because the fruits obtained after an illegal detention cannot be used to cure the initial illegality. *See Wilson v. State*, 621 S.W.2d 799, 804 (Tex. Crim. App. 1981); *Colston v. State*, 511 S.W.2d 10, 13 (Tex. Crim. App. 1974).

A. Waiver of Appellate Review

The State contends we need not address the merits of this point of error, arguing appellant's pretrial motions were "little more than the sandbags from which [defense counsel] hoped to ambush the trial court." In support of this argument, the State cites *Moore v. State*, 981 S.W.2d 701, 704 (Tex. App.--Houston [1st Dist.] 1998, pet. ref'd), where the defendant stipulated to the evidence at trial, but on appeal attacked the stipulation because it did not set out the underlying basis for the arresting officer's conclusions. *See also Maxcey v. State*, 980 S.W.2d. 90, No. 4-97-00305-CR, 1999 WL 219175 (Tex. App.--Houston [14th Dist.] April 15, 1999, no pet.). However, we do not read appellant's brief as making that argument in the instant case. Instead, appellant argues the stipulation "is void of any suggestion that Davis observed anything about appellant's conduct or appearance that was unusual or indicative of intoxication to justify a detention and further investigation." Appellant contends, therefore, there was insufficient evidence to support a finding of reasonable suspicion to support the continued detention of appellant.[3]

At the beginning of the pretrial hearing, the trial court specifically noted it was considering the motion to suppress. The State concedes the motion alleged the seizure of appellant was made without reasonable suspicion. Moreover, the trial court signed an order denying the motion. As set forth in footnote 1, *supra*, the parties carefully prepared the stipulation of evidence in this case. In the context of this point of error, it is readily apparent the parties knew reasonable suspicion was a central issue because they added the italicized language to the stipulation. *See* part I, *supra*. When defense counsel read that addition into the record, the prosecutor stated that the addition was made on behalf of both parties. From this record, we find that the trial court was fully aware of the stipulation and the addition, and

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[3] In our consideration of the facts set forth in the stipulation, *infra*, we will presume those facts were personally observed by Lieutenant Davis. *See Yorko v. State*, 699 S.W.2d 224, 226 (Tex. Crim. App. 1985) (holding that trial court, as trier of fact, could draw reasonable inferences and deductions from stipulation).

that reasonable suspicion was an issue upon which he had just ruled. Accordingly, we will proceed to address the merits of this point of error.

B. 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. We now turn to the level of suspicion required to justify appellant's detention.

C. The Applicable Law--Reasonable Suspicion

In *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Supreme Court recognized three categories of police-civilian interaction: (1) encounter; (2) temporary detention or stop; and, (3) arrest. Of these three categories, only investigative detentions and arrests amount to "seizures" of persons. *See Terry*, 392 U.S. at 19; *Amores*, 816 S.W.2d at 417 (Campbell, J. dissenting). In the instant case, we are confronted with the second category, an investigative detention.

Law enforcement officers may stop and briefly detain persons suspected of criminal activity on less information than is constitutionally required for probable cause to arrest. *See Terry*, 392 U.S. at 22; *Davis v. State*, 947 S.W.2d 240, 242-43 (Tex. Crim. App. 1997); *Garza v. State*, 771 S.W.2d 549, 558 (Tex. Crim. App. 1989) ("It is clear that circumstances short of probable cause may justify temporary detention for purposes of investigation."); *Schwartz v. State*, 635 S.W.2d 545, 546 (Tex. Crim. App. 1982); *Crockett v. State*, 803 S.W.2d 308,

311 (Tex. Crim. App. 1991). To justify an investigative detention, the officer must have reasonable suspicion. *See Terry*, 392 U.S. at 21; *Davis*, 947 S.W.2d at 242-43. Reasonable suspicion requires that the officer have specific articulable facts which, in light of his experience and personal knowledge, together with rational inferences from those facts, would reasonably warrant the intrusion on the freedom of the detainee for further investigation. *See Comer v. State*, 754 S.W.2d 656, 657 (Tex. Crim. App. 1986); *Johnson v. State*, 658 S.W.2d 623, 626 (Tex. Crim. App. 1983). In determining the presence of reasonable suspicion, an objective standard is utilized: would the facts, available to the officer at the moment of seizure or search, warrant a man of reasonable caution in the belief that the action taken was appropriate. *See Terry*, 392 U.S. at 21-22; *Davis*, 947 S.W.2d at 243.

These "specific articulable facts" must create a reasonable suspicion that "some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime." *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Davis*, 947 S.W.2d at 244; *Viveros v. State*, 828 S.W.2d 2, 4 (Tex. Crim. App. 1992); *Garza*, 771 S.W.2d at 558; *Johnson*, 658 S.W.2d at 626. As the *Terry* Court noted: "Simple good faith on the part of the arresting officer is not enough...." 392 U.S. at 21-22.[4] The officer making an investigative detention or stop must be able to articulate something more than an inchoate and unparticularized suspicion or hunch. *See id.* at 27.[5] *See also United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); *Williams v. State*, 621 S.W.2d 609, 612

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[4] The *Terry* Court continued: "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects only in the discretion of the police." 392 U.S. at 21-22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97, 85 S.Ct. 223, 229, 13 L.Ed.2d 142 (1964)) (internal quotations deleted).

[5] In this regard, the *Terry* Court stated: "In determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." 392 U.S. at 27.

(Tex. Crim. App. 1981). An investigative detention not based upon reasonable suspicion is unreasonable and, thus, violates the Fourth Amendment. *See Davis*, 947 S.W.2d at 243.

The reasonableness of an investigative detention turns on the totality of the circumstances in each case. *See United States v. Mendenhall*, 446 U.S. 544, 557, 100 S.Ct. 1870, 1879, 64 L.Ed.2d 497 (1980); *Shaffer v. State*, 562 S.W.2d 853, 855 (Tex. Crim. App. 1978); *State v. Sailo*, 910 S.W.2d 184, 188 (Tex. App.--Fort Worth 1995, pet. ref'd); *Davis v. State*, 794 S.W.2d 123, 125 (Tex. App.--Austin 1990, pet. ref'd). In *Woods v. State*, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997), the Court of Criminal Appeals stated the applicable standard:

> We hold that the reasonableness of a temporary detention must be examined in terms of the totality of the circumstances and will be justified when the detaining officer has specific articulable facts, which taken together with rational inferences from those facts, lead him to conclude that the person detained actually is, has been, or soon will be engaged in criminal activity.

D. Application to Instant Case

We are called upon to determine from the stipulated facts, set forth in part I, *supra*, whether Lieutenant Davis had reasonable suspicion to detain appellant until Officer Juenke arrived.[6] As noted earlier, "specific articulable facts" are required to create a reasonable suspicion that "some activity out of the ordinary is occurring or had occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime." *Royer*, 460 U.S. at 497; *Davis*, 947 S.W.2d at 244; *Viveros*, 828 S.W.2d at 4; *Garza*, 771 S.W.2d at 558; *Johnson*, 658 S.W.2d at 626. In the instant case, "the one-car/guard rail accident" may be classified as "some activity out of the ordinary." There is nothing, however, to connect *appellant* with that unusual activity. Instead, the evidence is to the contrary -- appellant was not involved in the accident but instead was attempting to assist

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[6] As the evidence in this case came through an agreed stipulation of evidence, the trial court undertook no evaluations of credibility or demeanor. *See Guzman*, 955 S.W.2d at 88.

the driver in removing the vehicle from the guardrail. To accomplish this, appellant drove the vehicle. Finally, there is no indication that appellant's driving of the vehicle was illegal, suspicious, or related to a crime.

In determining the presence of reasonable suspicion, we must employ an objective standard, *i.e*., would the facts available to the officer at the moment of the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate. *See Terry*, 392 U.S. at 21-22; *Davis*, 947 S.W.2d at 243. We cannot deduce any facts, which at the moment of the detention and in light of Lieutenant Davis' experience and personal knowledge and the rational inferences from those facts, that would warrant a man of reasonable caution in the belief that the seizure of appellant was appropriate.

Moreover, we are reminded that simple good faith is not enough to support an investigative detention. *See Terry*, 392 U.S. at 21-22. Rather, the detaining officer must be able to articulate something more than an inchoate and unparticularized suspicion or hunch. *See id*. at 27; *Sokolow*, 490 U.S. at 7; *Williams*, 621 S.W.2d at 612. In the instant case, there is no articulation of any fact or circumstance that would warrant the detention of appellant. In sum, there is nothing in the record to show that the detention of appellant was based upon anything more than an inchoate and unparticularized suspicion or hunch condemned by *Terry*.

E. Conclusion

After examining the reasonableness of the detention of appellant in terms of the totality of the circumstances, we hold the detaining officer did not have the specific articulable facts, which taken together with rational inferences from those facts, would lead a person of reasonable caution to conclude that appellant was, had been or soon would be engaged in criminal activity. *See Woods*, 956 S.W.2d at 38. Consequently, the detention of appellant was unreasonable and, thus, violated the Fourth Amendment. *See Davis*, 947 S.W.2d at 243. We sustain appellant's first point of error.

Having sustained appellant's first point of error, we need not address either the second or third points of error. We reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinions filed September 16, 1999.

Panel consists of Justices Anderson, Hudson, and Baird.[7]

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

[7] Former Justice Charles F. Baird sitting by assignment.

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NO. 14-97-01036-CR

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JAMES JOHNSON, Appellant

V.

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On Appeal from the County Criminal Court at Law Number Six
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Trial Court Cause No. 97-20651

D I S S E N T I N G O P I N I O N

According to the written stipulation of evidence before us, Lieutenant Davis arrived on the scene of a traffic accident in which an automobile had collided with a guardrail. 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. Accordingly, appellant was arrested by Officer Juenke for driving while intoxicated.

The stipulation fails to articulate why Lieutenant Davis summoned Officer Juenke. It also fails to specify why he detained appellant. Thus, the majority holds there is no evidence to support a finding of reasonable suspicion or probable cause.

While the stipulation is terse and lacking in details, I believe 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, e.g., 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).[1] Here, the State had the burden of proving facts establishing reasonable suspicion or probable cause. Accordingly, the stipulation relieved the prosecution of this burden, and it was in the State's interest that such a stipulation was presumably made.

Appellant's counsel has now attempted, in several cases, to submit a motion to suppress on stipulated evidence and then, for the first time on appeal, challenge the adequacy of the

[1] 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).

stipulation. *See Mathieu v. State*, 992 S.W.2d 725, 727-28 (Tex. App.–Houston [1st Dist.] 1999, no pet h.); *Maxey v. State*, 990 S.W.2d 900, 901-03 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *Rowland v. State*, 983 S.W.2d 58, 59 (Tex. App.–Houston [1st Dist.] 1999, no pet.). These challenges have heretofore been denied.

A defendant cannot agree to submit a case on stipulated evidence, prepare the stipulation, submit it into evidence, and then attack it for the first time on appeal on the grounds the stipulation is too conclusory. *See Rowland*, 983 S.W.2d at 59. Thus, where a stipulation summarily asserts the defendant was initially stopped because he was not wearing a seat belt, the defendant cannot thereafter challenge, for the first time on appeal, the sufficiency of the stipulation because it failed to expressly say the officer personally observed the infraction. *See Moore v. State*, 981 S.W.2d 701, 705 (Tex. App.–Houston [1st Dist.] 1998, pet. ref'd). "Without a showing that the officers' conclusions were *not* based on their personal observations, the stipulations will be viewed in the light most favorable to the trial court's judgments." *Id*.

Here, appellant contends the stipulation is insufficient because it does not expressly allege the symptoms of intoxication observed by Officer Juenke were also perceived by Lieutenant Davis. At the hearing on his motion to suppress, appellant never articulated any theory as to why his detention and subsequent arrest were not proper. Had appellant made the same argument in the trial court which he now makes on appeal, the State could have conceivably called Lieutenant Davis to the witness stand to clarify the ambiguity in the stipulation. This is not to say a defendant cannot present a suppression issue on stipulated facts. Where the parties agree on the facts, but disagree on the law, a stipulation of evidence promotes judicial economy and helps sharpen the issue. However, the stipulation must be tailored to address the issue under consideration. If the parties had truly agreed that Lieutenant Davis lacked any articulable reasons for detaining appellant, they could have so stipulated.

Because a stipulation is an agreement in the nature of a contract which allegedly represents a meeting of the minds, it is not a tactical weapon to ambush the opposing party.

Where a stipulation is silent or ambiguous, it should be construed in the light most favorable to the trial court's judgment. Here, the stipulation is silent on what, if anything, Lieutenant Davis observed about appellant. I do not believe that we may infer from this silence facts contrary to the court's judgment. Rather, I would find the stipulation reasonably infers that Lieutenant Davis summoned Officer Juenke to the scene due to appellant's visible and apparent intoxication. Finally, I believe appellant waived his complaint by failing to raise the alleged inadequacy of the stipulation before the trial court. For these reasons, I respectfully dissent.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justices Anderson, Hudson and Baird.*

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

* Former Justice Charles F. Baird sitting by assignment.