PD-1229-16
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/17/2016 10:46:08 AM
Accepted 10/18/2016 3:21:37 PM
ABEL ACOSTA
CLERK

No. 13-15-00417-CR

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ERNESTO LERMA, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Nueces County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

LISA C. McMINN
State Prosecuting Attorney
Bar I.D. No. 13803300

STACEY M. SOULE
Assistant State's Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

TABLE OF CONTENTS

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Ernesto Lerma.

* The trial Judge was the Hon. Missy Medary, 347th District Court.

* Trial counsel for the State was David Patrick Jakubowski, 901 Leopard, Room 206, Corpus Christi, Texas 78401.

* Counsel for the State before the Court of Appeals was Doug Norman, 901 Leopard, Room 206, Corpus Christi, Texas 78401.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellant at trail and on appeal was Celina Lopez Leon, 5151 Flynn Parkway, Suite 616, Corpus Christi, Texas 78411.

INDEX OF AUTHORITIES

Cases

Statutes

No. 13-15-00417-CR

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ERNESTO LERMA, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Nueces County

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

Appellant filed a pretrial motion to suppress cocaine found during a traffic stop of a car in which he was a passenger. The trial court denied the motion, and

Appellant pled guilty to second-degree felony possession of a controlled substance and was sentenced to twenty five years' imprisonment. The court of appeals reversed the suppression ruling. It held that the officer's frisk of Appellant, made during an unjustifiably prolonged stop, was not supported by reasonable suspicion.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed the trial court's denial of Appellant's pretrial motion to suppress. *Lerma v. State*, No. 13-15-00417-CR, 2016 Tex. App. LEXIS 10146 (Tex. App.—Corpus Christi Sept. 15, 2016) (substitute opinion and judgment) (not designated for publication).[1] The court denied the Nueces Country District Attorney's motion for rehearing on September 15, 2016.

GROUND FOR REVIEW

When the cocaine was seized after Appellant attempted to flee a reasonably timed traffic-stop-detention, does an alleged unlawful pre-arrest frisk and prolonged detention render the cocaine inadmissible?

ARGUMENT

I. Background

Patrol Officer Javier Lolando Salinas, Jr., conducted a stop for a traffic violation. 1 RR 20-21; State's Exhibit A, Title 1 (dash-cam video). Appellant was the front-seat passenger, and a woman holding a baby in her lap was in the back. 1

[1] The court issued its original opinion on September 1, 2016.

RR 22.

While Salinas interacted with the driver at the passenger's side window, he observed that Appellant was nervous, moving his feet around, trying to reach into his pocket, and putting his hands between the seats. 1 RR 25-26, 36, 41. Salinas ordered Appellant out of the car. 1 RR 26-27; State's Exhibit A at 3:10. Salinas asked Appellant if he had any weapons on him, and Appellant said, "No." State's Exhibit A at 3:30-35. Salinas then told Appellant to face the car so he could pat him down "real quick." 1 RR 44; State's Exhibit A at 3:35. As Salinas explained that he wanted to make sure Appellant did not have any weapons, Appellant interrupted and told Salinas that he had a knife in his pocket. 1 RR 43, 52; State's Exhibit A at 3:35-40. When Appellant went to remove it, Salinas said he would do it. State's Exhibit A at 3:40-42. Salinas tossed the knife in the front passenger's side of the car. 1 RR 44; State's Exhibit A at 3:43-46. Salinas had felt a pack of cigars and a plastic bag containing a soft substance while retrieving the knife,[2] 1 RR 27-28, 45, but he did not alert Appellant of his suspicions because he was alone and concerned Appellant would run or fight. 1 RR 30, 48.

Appellant did not have any identification but identified himself as Bobby Diaz.

---

[2] The cigars, in Salinas' experience, are commonly used to role synthetic marijuana. 1 RR 29-31. He was not certain but suspected that Appellant had narcotics. 1 RR 30, 45.

1 RR 26, 32; 3:09, 3:29, 4:15-17, 5:33-40. With a back-up officer now on the scene, Salinas returned to his patrol car and ran a check through TCIC and NCIC to verify Appellant's identity and make sure he did not have any warrants. 1 RR 32; State's Exhibit A at 6:35. After learning that Appellant's physical description did not match the one for Bobby Diaz, Salinas returned and asked Appellant when he last smoked marijuana. 1 RR 32; State's Exhibit A at 8:39-9:08. He told Appellant that he could smell it all over him, and he wanted to determine whether it was on Appellant's person or emanating from his pockets. State's Exhibit A at 8:39-9:08. Appellant stated he had smoked some synthetic marijuana and possessed some. 1 RR 33, 52. State's Exhibit A at 9:04-18. Salinas removed the synthetic marijuana from Appellant's pocket, handed it to the other officer, and Appellant took off running. 1 RR 33; State's Exhibit A at 9:49-56. Salinas caught and arrested him. 1 RR 34; State's Exhibit A at 10:27. Salinas seized more synthetic marijuana and crack cocaine from Appellant. 1 RR 35.

II. Court of Appeals

Appellant appealed, arguing that the stop was unlawfully prolonged when Salinas frisked him without reasonable suspicion that he had any weapons or was involved in criminal activity. *Lerma*, 2016 Tex. App. LEXIS 10146, at *14. The court of appeals held, "Because the initial pat-down of [Appellant] was not supported

by reasonable suspicion, there was no basis to have continued the traffic stop beyond the point where Salinas had concluded his 'investigation of the conduct that initiated the stop.'" *Id*. at *19. The court relied upon this Court's decision in *St. George v. State*, 237 S.W.3d 720 (Tex. Crim. App. 2007), reasoning that it is analogous. *See Lerma*, 2016 Tex. App. LEXIS 10146, at *16-19. *St. George* held:

> At the time the driver was issued the warning citation, the deputies did not have specific articulable facts to believe that Appellant was involved in criminal activity, thus, the questioning of Appellant[, a passenger,] regarding his identity and checks for warrants, without separate reasonable suspicion, went beyond the scope of the stop and unreasonably prolonged its duration.

237 S.W.3d at 726.

III. Discussion

The alleged unlawful pre-arrest frisk and prolonged stop are unconnected to the cocaine seizure, and the detention before the arrest was not unlawfully prolonged.

Appellant's and the court of appeals' determination of the legal significance of the key facts was wrong. The original, complained-of pre-arrest frisk is not controlling. So whether there was reasonable suspicion that Appellant was armed and dangerous before the frisk is irrelevant.

Appellant was charged with possession of cocaine, which was not seized during the frisk. It was seized after Appellant fled. So the frisk, even if unlawful, is entirely

separate from the legality of the arrest despite being part of the same narrative. Salinas' demand that Appellant get out of the car was lawful. *See Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (police may order passengers to get out of a vehicle during a traffic stop). Appellant was not free to leave or "move about at will" absent evidence that Salinas granted him permission to do so. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with police and move about at will."). Therefore, Appellant's flight from that lawful detention constituted an offense. TEX. PENAL CODE § 38.04(a).[3] His apprehension by Salinas was supported by probable cause that Appellant committed a crime. Thus, the post-frisk arrest was lawful. *See Matthews v. State*, 431 S.W.3d 596, 605 (Tex. Crim. App. 2014) (post-frisk detention was not unreasonable because flight from lawful detention, supported by reasonable suspicion, constituted its own offense). And it was during this second, separate detention that Salinas found the cocaine. 1 RR 35.

The court of appeals' conclusion that the stop was unlawfully prolonged also fails. The entire rationale for its holding was the segment of time before and during the frisk: because Salinas took the time to frisk Appellant absent reasonable suspicion

[3] "A person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him." TEX. PENAL CODE § 38.04(a).

after having concluded his "investigation" into the reason for the stop, the stop was therefore was unlawfully prolonged. But that is simply not the case. The court of appeals misconstrued the record and incorrectly applied the law when deciding at what point in the chain of events the purpose of the stop was completed. As for misconstruing the record, the court erred to find that the stop was concluded (or perhaps should have concluded) before the pat-down because Salinas testified that he completed his "investigation" as to the basis for the stop. *Lerma*, 2016 Tex. App. 10146, at *19. Salinas' statement, on its face, does not support the court's legal conclusion. Even though Salinas had completed his investigation of the traffic offense, he was undecided as to whether he would issue a citation. 1 RR 39-40, 55. Additionally, after the initial stop, Salinas observed another violation—the unrestrained baby. 1 RR 22, 55. This is a significant fact that the court of appeals never took into account. Salinas was entitled to address and remedy the newly identified offense before allowing the driver to leave.[4] Salinas testified that he wanted to speak with the woman and that he had not yet determined whether to issue

[4] Texas Transportation Code Section 545.412(a) provides:
A person commits an offense if the person operates a passenger vehicle, transports a child who is younger than eight years of age, unless the child is taller than four feet, nine inches, and does not keep the child secured during the operation of the vehicle in a child passenger safety seat system according to the instructions of the manufacturer of the safety seat system.

the driver a citation for that offense. 1 RR 40-41, 49.

Second, Salinas' investigation into the reason for the stop is one among many tasks to be performed during a routine traffic stop. Beyond deciding whether to issue a citation, other inquiries incident to a stop include: checking registration, proof of insurance, verifying a driver's identification and license status, and determining whether there are outstanding warrants. *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015). A traffic stop is not complete until the "tasks tied to the traffic infraction have been—or reasonably should have been—completed." *Id*. Unrelated checks are permissible but cannot unreasonably extend the duration of the stop absent reasonable suspicion. *Id*. Here, the permissible and necessary tasks were not concluded when Salinas turned his attention to Appellant and began interacting with him exclusively. 1 RR 39-40, 55.

Approximately eighteen minutes later, after Appellant was arrested, seated in the patrol car, and properly identified, Salinas resumed his interactions with the woman. State's Exhibit A at 10:27-27:51. He told the woman to call her cousin so she could bring a car seat to the scene. State's Exhibit A at 28:07-09. After the deat was installed, Salinas returned the driver's license, and the driver, woman, and baby left. State's Exhibit A at 2:01-3:25. The facts show that this case is nothing like *St. George*, as the court of appeals found. The record firmly shows that the duration of

the stop was not unreasonably extended before or during the frisk. Though not challenged by Appellant, there is no legitimate argument that the time between the frisk and Appellant's flight constituted an unlawfully prolonged detention. Salinas discovered that Appellant misidentified himself and smelled of marijuana. These two facts alone—regardless of Appellant's sketchy behavior—gave Salinas reasonable suspicion to further investigate.

IV. Conclusion

The seizure of cocaine, made after Appellant was arrested due to his attempt to flee during a lawful detention, was proper and entirely unconnected to any alleged unlawful frisk. *See Wherenberg v. State*, 416 S.W.3d 458, 465 (Tex. Crim. App. 2013) ("the independent source doctrine provides that evidence derived from or obtained from a lawful source, separate and apart from any illegal conduct by law enforcement, is not subject to exclusion."). And the frisking of Appellant did unlawfully extend the stop. The court of appeals' fundamentally erroneous analysis that the cocaine should have been suppressed should be set aside and the trial court's ruling affirmed.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition and reverse the court of appeals' determination that the trial court should have granted the motion to suppress.

Respectfully submitted,

LISA C. McMINN
State Prosecuting Attorney
Bar I.D. No.13803300

/s/ Stacey M. Soule
Assistant State Prosecuting Attorney
Bar I.D. No. 24031632

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 1,753 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Petition for Discretionary Review has been served on October 17, 2016, via certified electronic service provider to:

Hon. Doug Norman
901 Leopard, Room 206
Corpus Christi, Texas 78401
douglas.morman@nuecesco.com

Celina Lopez Leon
5151 Flynn Parkway, Suite 616
Corpus Christi, Texas 78411
celinamarielopez@gmail.com

/s/ Stacey M. Soule
Assistant State Prosecuting Attorney

APPENDIX

(Substituted Court of Appeals' Opinion)

Lerma v. State

Court of Appeals of Texas, Thirteenth District, Corpus Christi - Edinburg

September 15, 2016, Delivered; September 15, 2016, Filed

NUMBER **13-15-00417-CR**

Reporter
2016 Tex. App. LEXIS 10146

ERNESTO LERMA, Appellant, v. THE STATE OF TEXAS, Appellee.

Notice: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the 347th District Court of Nueces County, Texas.

Lerma v. State, 2016 Tex. App. LEXIS 9756 (Tex. App. Corpus Christi, Sept. 1, 2016)

Core Terms

driver, pocket, passenger, reasonable suspicion, trial court, license, weapon, criminal activity, traffic stop, identification, suppress, replied, frisk, seat, memorandum opinion, pat-down, warrants, felony, pulled, feet, police officer, articulable, investigate, outstanding, questioning, prolonged, arrested, nervous, signal, okay

Judges: Before Chief Justice Valdez and Justices Garza and Longoria. Memorandum Opinion on Rehearing by Justice Garza.

Opinion by: DORI CONTRERAS GARZA

Opinion

MEMORANDUM OPINION ON REHEARING

Memorandum Opinion on Rehearing by Justice Garza

We issued our original memorandum opinion in this case on September 1, 2016. Appellee, the State of Texas, has filed a motion for rehearing. *See* *Tex. R. App. P. 49.1*. We deny the motion for rehearing but withdraw our prior memorandum opinion and judgment and substitute the following memorandum opinion and accompanying judgment in their place.

Appellant Ernesto Lerma pleaded guilty to possession of four grams or more but less than 200 grams of cocaine, a second-degree felony. *See* *Tex. Health & Safety Code Ann. § 481.115(a)*, (d) (West, Westlaw through 2015 R.S.). Prior to the plea, the trial court denied a motion to suppress evidence obtained as a result of a traffic stop. By one issue on appeal, Lerma contends the trial court erred in doing so. We reverse and remand.

I. BACKGROUND

The only witness to testify at the suppression hearing was police officer Javier Salinas Jr. Salinas stated that he became a certified police officer on August 9, 2013. On the evening of November 2, 2014, Salinas **[*2]** was patrolling in Corpus Christi when he pulled over a vehicle because the driver had failed to stop behind the stop line at a red light and had failed to use his turn signal at least 100 feet prior to the

intersection. *See* *Tex. Transp. Code Ann. § 545.104(b)* (West, Westlaw through 2015 R.S.) ("An operator intending to turn a vehicle right or left shall signal continuously for not less than the last 100 feet of movement of the vehicle before the turn."); *id.* *§ 544.007(d)* (West, Westlaw through 2015 R.S.) ("An operator of a vehicle facing only a steady red signal shall stop at a clearly marked stop line.").

A video recording of the traffic stop was entered into evidence and played for the trial court. The recording shows that the vehicle, which appeared to be travelling at a normal rate of speed, had its turn signal activated approximately ten seconds prior to stopping for a red light. When the vehicle stopped, the front wheels were beyond the stop line but the rear wheels were behind the stop line. The vehicle stopped for approximately four seconds and then turned right. Salinas pulled the vehicle over and asked the driver for his license and insurance information, whether there were any weapons in the car, where the occupants of **[*3]** the car were headed, and where they were coming from. He then asked Lerma, who was seated in the front passenger's seat, whether he had any identification. Lerma replied that he did not have any identification on him.

Salinas then moved to the passenger's side of the car and asked again if Lerma had any identification. At that point, the driver reached over Lerma to hand the officer his license and insurance information. Salinas briefly examined the insurance papers and returned them to the driver; however, Salinas retained the license so that he could later determine whether the driver had any outstanding warrants. Salinas then asked Lerma to step out of the vehicle. Lerma hesitated, and Salinas asked, "Is there a reason you don't want to come out or something?" Lerma then exited the car. Lerma stated that he had a pocket knife, and he gave it to the officer, who then placed it on the front passenger seat. Lerma then placed his hands on the car's roof as directed by Salinas, and Salinas patted him down. It appears from the video that Salinas found something in Lerma's pocket; he then asked Lerma "How many have you got on you?" The officer could then be heard saying "You're being a **[*4]** little—a little funny, man. You alright? Just chill out, okay?"

Salinas asked Lerma for his name and birthdate; Lerma replied that his name was "Bobby Diaz" and his birthdate was September 22, 1984.[1] Salinas then asked Lerma when he was last arrested, and Lerma replied "months ago." Salinas asked Lerma about the passenger in the back seat; Lerma replied that she was "his girl," referring to the driver. The officer remarked that the back seat passenger had a "baby in her hands." At that point, a second officer arrived at the scene.

Salinas again asked Lerma whether he had any weapons or anything else illegal on his person; Lerma stated that he did not. Salinas then asked: "You okay if I check your pockets to make sure you don't got nothing on you?" Lerma replied: "I'd rather you didn't." Salinas then asked again for Lerma's name, which he again gave as Bobby Diaz. Salinas then instructed Lerma to "chill out" and sit with the other officer on the curb. He then went back to his patrol unit and, after running the personal information given by Lerma, determined that Lerma did not match the physical description of **[*5]** "Bobby Diaz" that he had obtained from his computer.

---

[1] According to the indictment, Lerma's actual date of birth is October 24, 1982.

Salinas then asked Lerma where he was from and "When was the last time you smoked weed?" Lerma replied, "I don't know, a while ago." Salinas informed Lerma that "I can smell it all over you, man." Lerma then conceded that he had smoked synthetic marijuana and that he had some on his person. Salinas then began to search Lerma's pockets again. At that point, Lerma attempted to flee on foot. He was immediately captured and arrested. The officers recovered a bag of synthetic marijuana and a "Tupperware bowl" containing "17 crack cocaine rocks" from Lerma's pockets.

Salinas testified that, as soon has he gave the insurance papers back to the driver, he had determined that he would give the driver a warning rather than a citation. The trial court then asked:

> THE COURT: What you are telling the Court is that you were finished with—based on just looking at the driver's license and whatever insurance that he handed to you, that you were done with your investigation on the traffic stop?
>
> [Salinas]: For the actual reason why I pulled him over, not for the entirety of the stop, such as running his name and anything else that may have come up. But **[*6]** for the reason that he was stopped, yes.

Salinas stated that the driver was not free to leave at that point. Salinas noted that he needed to check the two passengers for outstanding warrants and that the backseat passenger had an unrestrained child on her lap.

Salinas testified that, as he started to interact with the driver, he could see Lerma "moving around on his feet a lot, trying to reach into his pocket. . . . He seemed to be moving more than—more than usual when somebody gets pulled over." Salinas stated that Lerma's "hands were shaking" and that he was moving his hands "between the seats" and "kind of seemed unsure of himself." Salinas stated that he asked Lerma to step out of the car because he did not have any identification; he wanted to separate Lerma from the other occupants of the car in order "to get a proper identification." Salinas testified that at this point, other than the traffic violation, he had no indication that any sort of crime was being committed, though he had "suspicions" because of Lerma's nervous behavior. He stated it is his normal procedure to frisk a person after they have been removed from a vehicle.

Salinas stated that, when he began to pat Lerma down, **[*7]** Lerma "seemed to be guarding his pocket areas, trying to reach into his pocket." As a result of the pat-down, Salinas "felt what was consistent with cigars and a bag or some sort of soft substance inside." Salinas explained that he "pa[tted] the outside of [Lerma's] clothing . . . touching the area of his pocket, to see if there is anything that feels heavy or hard or consistent with a weapon, or anything that may be illegal that we commonly come across." As to the "cigars" Salinas felt in Lerma's pocket, Salinas opined that "[t]he pack was consistent with what we commonly see used to rol[l] synthetic marijuana, things of that nature." At that point, Salinas "believe[d Lerma] had some sort of narcotics or some sort of illegal substance."

According to Salinas, after Lerma was captured and subdued, Lerma stated "that he was a habitual offender, looking at 25 years to life. He had a lot of crack on him and more synthetic cannabis product and lied about his name and had a warrant."

On cross-examination, Salinas explained that, when he first patted down Lerma, he felt

something in Lerma's pockets which could have been narcotics, but was not a weapon. The following colloquy occurred on cross-examination:

> Q. [Defense **[*8]** counsel] Okay. So you were—you pa[tt]ed him down, because that's your routine of what you normally do and because he was nervous and because you were looking for narcotics; is that fair to say?
>
> A. [Salinas] At that point, I felt—once I felt the substances that I felt, then it kind of switched me over. Once I did not feel anything heavy, such as a gun or knives, and I felt the substances, then I kind of switched over for, okay, maybe he was not so nervous from weapons, it was narcotics.
>
> Q. Okay. So, at that point, you are shifting from worrying about safety to worrying about him having illegal substances on his person.
>
> A. On his person, yes. I do not know what is inside the car where he was sitting.

The trial court denied the motion to suppress. Later, Lerma pleaded guilty to possession of cocaine, and the trial court found as true an enhancement paragraph alleging that Lerma had been twice previously convicted of felonies. He was sentenced to twenty-five years' imprisonment. *See* TEX. PENAL CODE ANN. § 12.42(d) (West, Westlaw through 2015 R.S.) (providing generally that, if it is shown on the trial of a felony offense other than a state jail felony that the defendant has previously been finally convicted of two felony offenses, **[*9]** and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment for any term of not more than 99 years or less than 25 years). This appeal followed.[2]

II. DISCUSSION

A. Standard of Review

In reviewing a trial court's ruling on a motion to suppress, we apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historic facts and mixed questions of law and fact that rely upon the credibility of a witness, but applying a de novo standard of review to pure questions of law and mixed questions that do not depend on credibility determinations. *Martinez v. State, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011)*.

We review the trial court's decision for an abuse of discretion. *Id.* "We view the record in the light most favorable to the trial court's conclusion and reverse the judgment only if it is outside the zone of **[*10]** reasonable disagreement." *State v. Dixon, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)*. The trial court's ruling will be upheld if it "is reasonably supported by the record and is correct on any theory of law applicable to the case." *Id.* (citing *Romero v. State, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990))*. However, a trial court has no discretion in determining what the law is or applying the law to the facts. *State v. Kurtz, 152 S.W.3d 72, 81 (Tex. Crim. App. 2004)*. Therefore, the question of whether a given set of historical facts gives rise to reasonable suspicion is reviewed de novo. *Wade v. State, 422 S.W.3d 661, 669 (Tex. Crim. App. 2013)*.

When, as here, no findings of fact or

[2] In our original memorandum opinion of September 1, 2016, we stated incorrectly that the State had not filed a brief in this matter. In fact, the State filed its brief on July 29, 2016, and we have fully considered the arguments made in the brief in our analysis herein.

conclusions of law are filed, we assume the trial court made all findings in support of its ruling that are consistent with the record. *Carmouche v. State, 10 S.W.3d 323, 327-28 (Tex. Crim. App. 2000)*; *cf. Vasquez v. State, 411 S.W.3d 918, 920 (Tex. Crim. App. 2013)* (holding that, when the issue in a motion to suppress is voluntariness of a confession, a trial court must file findings of fact and conclusions of law "whether or not the defendant objects to the absence of such omitted filing").

B. Applicable Law

The *Fourth Amendment to the United States Constitution* provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." *U.S. CONST. amend. IV*. "[E]vidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States **[*11]** of America" is inadmissible in a criminal case. *Tex. Code Crim. Proc. Ann. art. 38.23* (West, Westlaw through 2015 R.S.).

In *Terry v. Ohio*, the United States Supreme Court held:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the *Fourth Amendment*, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Carmouche, 10 S.W.3d at 329 (Tex. Crim. App. 2000)*

"A brief investigative *detention* is authorized once an officer has a reasonable suspicion to believe that an individual is involved in criminal activity. However, the 'exigencies' which permit the additional *search* are **[*12]** generated strictly by a concern for the safety of the officers." *Carmouche, 10 S.W.3d at 329* (citing *Terry, 392 U.S. at 25-26, 29* ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer")); *see Wade, 422 S.W.3d at 669* ("The purpose of a *Terry* frisk is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."). Therefore, "the additional intrusion that accompanies a *Terry* frisk is only justified where the officer can point to specific and articulable facts which reasonably lead him to conclude that the suspect might possess a weapon." *Carmouche, 10 S.W.3d at 329* (citing *Terry, 392 U.S. at 26-27*; *Worthey v. State, 805 S.W.2d 435, 438 (Tex. Crim. App. 1991)*; *see Wade, 422 S.W.3d at 669* ("[P]olice may not escalate a consensual encounter into a protective frisk without reasonable suspicion that the person (1) has committed, is

committing, or is about to commit a criminal offense and (2) is armed and dangerous."). "The purpose of a limited search after [an] investigatory stop is not to discover evidence of a crime, but to allow the peace officer to pursue investigation without fear of violence." *Id.* (citing **[*13]** *Wood v. State, 515 S.W.2d 300, 306 (Tex. Crim. App. 1974)*.

In the course of a routine traffic stop, the detaining officer may request a driver's license, car registration, and insurance; use that information to conduct a computer check for outstanding arrest warrants; question the vehicle's occupants regarding their travel plans; and issue a citation. *Kothe v. State, 152 S.W.3d 54, 64 n.36 (Tex. Crim. App. 2004)* (citing *United States v. Zabalza, 346 F.3d 1255, 1259 (10th Cir. 2003)*; *Davis v. State, 947 S.W.2d 240, 245 n.6 (Tex. Crim. App. 1997)*; *Caraway v. State, 255 S.W.3d 302, 307-08 (Tex. App.—Eastland 2008, no pet.)*. If, during that investigation, an officer develops reasonable suspicion that another violation has occurred, the scope of the initial investigation expands to include the new offense. *Goudeau v. State, 209 S.W.3d 713, 719 (Tex. App.—Houston [14th Dist.] 2006, no pet.)*. Reasonable suspicion must be "founded on specific, articulable facts which, when combined with rational inferences from those facts, would lead the officer to conclude that a particular person actually is, has been, or soon will be engaged in criminal activity." *Crain v. State, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010)* (citations omitted).

An investigative stop that is reasonable at its inception may violate the *Fourth Amendment* because of excessive intensity or scope. *Davis, 947 S.W.2d at 243* (citing *Terry, 392 U.S. at 18*). A detention may last no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer, 460 U.S. 491, 499, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)*; *see Davis, 947 S.W.2d at 243*. Moreover, when the reason for the stop has been satisfied, the stop must end and may not be used as a "fishing expedition for unrelated criminal activity." *Davis, 947 S.W.2d at 243* (quoting *Robinette, 519 U.S. at 41 (Ginsburg, J., concurring)*). **[*14]** Once the officer concludes the investigation of the conduct that initiated the stop, continued detention of a person is permitted only if there is reasonable suspicion to believe that another offense has been or is being committed. *Id. at 245*.

C. Analysis

Lerma argues that the drug evidence should have been suppressed because: (1) there was no reasonable suspicion to support a "prolonged detention"; (2) the frisk was not lawful under *Terry* because there no reason for the officer to have believed that Lerma was armed or dangerous; and (3) even if the frisk was lawful at its inception, it "exceeded the scope of *Terry*."

Lerma cites *St. George v. State* in arguing that the search was unreasonably prolonged. In that case, two officers pulled over a car for having an inoperative license plate light and requested identification from both the driver and front-seat passenger. *237 S.W.3d 720, 722 (Tex. Crim. App. 2007)*. The passenger gave his name as "John Michael St. George," but the officers learned that there was no driver's license record of anyone with that name. *Id.* One of the officers then issued a citation to the driver for the inoperative license plate light. *Id.* While that officer "was explaining the warning ticket to the driver," the other **[*15]** officer asked the passenger if his license was expired and the passenger replied that it was. *Id.* "After further inquiries," the officers learned that the

passenger's true name was Jeffrey Michael St. George; and when they ran his correct name, they found that he had outstanding warrants, so they arrested him. *Id.* In a search incident to the arrest, the officers discovered marijuana in St. George's pocket. *Id.*

The Texas Court of Criminal Appeals concluded that the search was unreasonable because:

> At the time the driver was issued the warning citation, the deputies did not have specific articulable facts to believe that Appellant was involved in criminal activity, thus, the questioning of Appellant regarding his identity and checks for warrants, without separate reasonable suspicion, went beyond the scope of the stop and unreasonably prolonged its duration.

Id. at 726. The Court noted that, although the State claimed that St. George's misidentification and his "nervous behavior" provided reasonable suspicion to prolong the stop, the officers did not learn that it was a misidentification until after the citation was issued. *Id.* "Therefore, giving a false name when officers did not know it was false **[*16]** could not give them reasonable suspicion to investigate further" nor "was the fact that the dispatcher found no record of the first name given by Appellant sufficient to raise suspicion of criminal activity." *Id.*

At the suppression hearing, the State argued that *St. George* is distinguishable from the instant case because here, the officers did not formally "conclude" the traffic stop, such as by issuing the driver a citation, before questioning Lerma. The State also noted that, according to Salinas, not only did Lerma appear nervous, but he was also "reaching for things in his pocket," and it turned out that he did have a knife in his possession.

We find that *St. George* is analogous to the instant case. Having observed the driver of the vehicle violate a traffic law,[3] Salinas was entitled to stop the vehicle, request certain information from the driver such as a driver's license, insurance and car registration, and to conduct a computer check on that information to determine whether the license is valid, whether the driver had any outstanding warrants, and whether the car is stolen. *See Kothe, 152 S.W.3d at 64*. However, although "[o]fficers have the right to conduct an investigation of a driver following a traffic violation," **[*17]** they "do not have authority to investigate a passenger without reasonable suspicion." *St. George, 237 S.W.3d at 725*.

Here, Lerma advised Salinas that he did not have any identification. Salinas testified that, at the time he was questioning the driver, Lerma was "moving around on his feet a lot, trying to reach into his pocket." Salinas then asked Lerma to step out of the car and advised Lerma that he was going to pat him down for safety purposes. At that point, Lerma said that he had a pocket knife and he gave the knife to Salinas. Salinas then proceeded with the pat-down. Salinas testified: "[W]hen I began to pat him down, I felt what was consistent with cigars and a bag or some sort of soft substance inside."

Therefore, at the time Salinas advised Lerma that he was going to perform the initial pat-down, he had knowledge of the following specific, articulable facts: (1) Lerma was a

---

[3] The video recording appears to show that the vehicle clearly activated its turn signal for at least 100 feet of movement before the intersection, but that it failed to stop completely before the stop line. *See Tex. Transp. Code Ann. §§ 545.104(b), 544.007(d)* (West, Westlaw through 2015 R.S.).

passenger in a vehicle that had just been stopped for two minor traffic infractions; (2) Lerma **[*18]** was "moving around on his feet a lot, trying to reach into his pocket," and was reaching in between the seats of the car; and (3) Lerma had no identification on him. These facts, when combined with rational inferences therefrom, could not reasonably lead to the conclusion that Lerma possessed a weapon so as to justify a *Terry* frisk. *See* *Carmouche, 10 S.W.3d at 329*; *see also* *Garza v. State, No. 13-12-00240-CR, 2013 Tex. App. LEXIS 8142, 2013 WL 3378325, at *10 (Tex. App.—Corpus Christi July 3, 2013, pet. ref'd)* (mem. op., not designated for publication) (concluding that the officer did not articulate any specific facts that would lead a person to reasonably conclude that the act of "reaching" forward in the car during a traffic stop indicates that a person has a weapon or contraband). Nor could these facts have led the officer to conclude that Lerma "actually is, has been, or soon will be engaged in criminal activity," so as to justify prolongation of the stop. *See* *Crain, 315 S.W.3d at 52*; *see also* *Netherly v. State, No. 13-14-00374-CR, 2016 Tex. App. LEXIS 6189, 2016 WL 3225093, at *2 (Tex. App.—Corpus Christi June 9, 2016, pet. filed)* (holding that officer's testimony that defendant "reached for something" in his truck after being pulled over and exiting the vehicle, and that defendant was wearing a fanny pack, was insufficient to establish reasonable suspicion that criminal activity was afoot).

As in **[*19]** *St. George*, although Lerma gave false identifying information, there was no way for Salinas to have known that the information was false at the time he performed the initial pat-down. Moreover, though the State contends that *St. George* is distinguishable because the investigation of the traffic stop had not concluded at the time Lerma was questioned, Salinas testified that he had already completed his investigation as to "the reason that [the driver] was stopped" at the time of the pat-down. Because the initial pat-down of Lerma was not supported by reasonable suspicion, there was no basis to have continued the traffic stop beyond the point where Salinas had concluded his "investigation of the conduct that initiated the stop." *Davis, 947 S.W.2d at 243*. Accordingly, the trial court erred in denying the motion to suppress.

III. CONCLUSION

We reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion.

DORI CONTRERAS GARZA,

Justice

Do not publish.

Tex. R. App. P. 47.2(b).

Delivered and filed the

15th day of September, 2016.