

No. 01-24-00264-CR

**IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS**

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1st COURT OF APPEALS
HOUSTON, TEXAS
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ADERNE NICKERSON
Appellant

DEBORAH M. YOUNG
Clerk of The Court

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause No. 1826426
From the 208th District Court of Harris County, Texas

BRIEF FOR APPELLANT

Oral Argument Not Requested

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Statement of the Case

Aderne Nickerson was charged by indictment with Evading Arrest/Detention with a Vehicle on June 14, 2023. (C.R. at 35; Tex. Pen. Code. Ann. §38.04). Defense counsel filed a written motion to suppress which, after a hearing with testimony, was denied by the trial court. (C.R. at 62). Mr. Nickerson then pled guilty on April 2, 2024, and was sentenced to twenty-five (25) years in the Texas Department of Criminal Justice, Correctional Institutions Division. (C.R. at 75). This appeal stems from the trial court's denial of the motion to suppress.

Issue Presented

Issue One: The trial court erred in denying Mr. Nickerson's motion to suppress because its ruling is not supported by the record. The video evidence shows nothing to support reasonable suspicion for the traffic stop itself and no drugs or paraphernalia in plain view to support a reasonable suspicion of criminal activity.

Statement of Facts

A written pre-trial Motion to Suppress was filed by Mr. Nickerson seeking to suppress the evidence recovered by police on the night of his traffic stop. (C.R. at 55). A hearing on the Motion to Suppress was held. The officers and Mr. Nickerson testified at the hearing. Ultimately, the trial court denied the Motion to Suppress. (2 R.R. at 103; C.R. at 62). Mr. Nickerson's motion requested findings of fact and conclusions of law from the trial court, but none appear in the record. (C.R. at 60).

Houston Police Department Officer Patrick Moreno

Officer Patrick Moreno was on duty with his partner, Arthur Reyes, in Southeast Houston on June 14, 2023. (2 R.R. at 8-9). As members of the Gang Division Crime Reduction Unit, they were in a marked patrol vehicle and wearing police uniforms when they encountered Mr. Nickerson. (2 R.R. at 8-9). It was Moreno's testimony that he initiated a traffic stop of Mr. Nickerson for running a stop sign at the intersection of Mainer St. at Tierwester St. (2 R.R. at 10). *See* Tex. Transp. Code Ann. 544.01. It was a four-way stop. (2 R.R. at 13). Moreno stated he initiated lights and sirens upon witnessing the alleged traffic violation, and Mr. Nickerson stopped his car before reaching the next street. (2 R.R. at 13-14). Moreno approached the driver's side of Mr. Nickerson's car, explained the reason for the stop, and asked for his driver's license. (2 R.R. at 14). Mr. Nickerson was alone, and he promptly provided his driver's license. (2 R.R. at 14-15).

It was Moreno's testimony that his partner began gesturing for them to remove Mr. Nickerson from the car, but he was unsure why. (2 R.R. at 15). Moreno stated it was his partner who asked Mr. Nickerson to get out of the car and mentioned something about "pills." (2 R.R. at 15). After Officer Reyes mentioned the pills, Moreno asked Mr. Nickerson to get out of the car because "we needed to figure out if it was possibly narcotics." (2 R.R. at 15).

The State next offered State Ex. 1—Officer Moreno's body worn camera video—for the court's consideration. (2 R.R. at 17-18). It was Moreno's testimony that his patrol car had not been equipped with a dash camera on the day of the incident. (2 R.R. at 18). Moreno stated Mr. Nickerson did not get out of the car upon being asked, but instead left the scene. (2 R.R. at 20). Moreno estimated they had interacted with Mr. Nickerson for "maybe a minute, a minute and a half maybe" before he left the scene of the stop. (2 R.R. at 20). According to Moreno, when Mr. Nickerson made his exit, he had not yet written a traffic ticket and Nickerson was not free to leave. (2 R.R. at 20). Moreno further stated Mr. Nickerson drove onto Interstate 610 and they followed, but lost sight of him after "probably a mile, mile and a half." (2 R.R. at 20-21). Police still had Mr. Nickerson's driver's license in-hand. (2 R.R. at 21). They verified the license and discovered he was on parole. (2 R.R. at 21). They contacted his parole officer, saw to it that a warrant was issued, and waited for Mr. Nickerson to arrive at his next parole meeting. (2 R.R. at 21).

Cross-Examination

Moreno estimated that Mr. Nickerson was traveling at “maybe 15, 20 miles per hour” when he approached the stop sign and then “Just kind of just rolled through it.” (2 R.R. at 22-23). He maintained that “the wheels never stopped.” (2 R.R. at 23). Officer Moreno agreed with defense counsel that Mr. Nickerson stopped his car immediately upon their display of police authority. (2 R.R. at 35). He was cooperative. (2 R.R. at 35). Officer Reyes then motioned for Moreno to order Mr. Nickerson out of the car. (2 R.R. at 35). Despite having just testified that they asked Nickerson to get out of the car because his partner claimed he saw “pills,” Moreno stated that Mr. Nickerson was going to be arrested for running the stop sign. (2 R.R. at 37).

Defense counsel: So y’all were going to actually take him to jail for running a red light (*sic*) that day?

Moreno: Yes, sir. But once – once we saw what we saw, I mean, we had to arrest him for his – for his violations.

Defense counsel: Wait, wait, wait. When you saw what you saw. What did you see?

Moreno: Well, whatever he said he saw, we immediately advised him he was going to be placed under arrest. ...

Defense counsel: So what were – what were – y’all going to put him under arrest for what Officer Reyes had seen, basically?

Moreno: No. For his – for running the stop sign.

(2 R.R. at 37).

Defense counsel continued:

Counsel: How did you – why did you all of a sudden decide to arrest him for running a red light (*sic*)?

Moreno: Once – once we decided, hey he wasn't being cooperative, he was going to go for his – his traffic violations.

(2 R.R. at 38).

Moreno did not claim to have seen any pills or contraband in Mr. Nickerson's car.

(2 R.R. at 39).

Houston Police Department Officer Arthur Reyes

Officer Reyes was riding in the passenger seat of the marked patrol unit on the day of the incident. (2 R.R. at 45). Reyes stated once they initiated the traffic stop, Moreno approached the driver's side while he approached the passenger side. (2 R.R. at 46). It was Reyes' testimony that upon shining his flashlight into the car he saw "a digital scale in the center console area" and "a sandwich bag hanging out of the defendant's right pocket with some pills." (2 R.R. at 48). Next, the prosecution asked:

"State: And so when you see a digital scale and multicolored pills in a Ziploc baggie, what does that typically indicate to you?

Reyes: Usually, consistent with narcotic sells." (2 R.R. at 48).¹

¹ Officer Reyes had not mentioned "multicolor" pills in his testimony.

Reyes said he then went over to his partner, told him what he saw and asked Mr. Nickerson to get out of the car. (2 R.R. at 48-49). According to Reyes, Mr. Nickerson became agitated and asked them to simply write him a traffic ticket. (2 R.R. at 49). In response to the prosecution's question, Officer Reyes said Mr. Nickerson was under arrest at the point he asked him to get out of the car. (2 R.R. at 49-50).

The State then asked him, "And was the defendant informed why – was the defendant informed why y'all wanted him to step out of the vehicle?" (2 R.R. at 50). "Yes." Reyes replied. "First, it was for the traffic violation, and then secondly, what I observed – once I observed the pills, then it became a narcotics investigation." (2 R.R. at 50). He stated Mr. Nickerson then drove away, leaving his driver's license behind. (2 R.R. at 50).

Cross-Examination

When asked what color the pills were, Reyes responded, "It was multi-color. I can't remember exactly, but I remember they weren't one specific color. Might have been blue, red." (2 R.R. at 51). He again claimed the baggie was in Mr. Nickerson's right pocket. (2 R.R. at 51). Defense counsel published State Exhibits 2 and 3, asking Reyes to circle the pills. (2 R.R. at 51). "It's not in this picture," Reyes replied. (2 R.R. at 52). He agreed with defense counsel that he needed to see the actual video footage, so defense counsel published it for his review. (2 R.R. at

52). Reyes still claimed the video footage omitted the view of Mr. Nickerson's pocket with the baggie of pills hanging out of it. (2 R.R. at 52). He stated he saw "approximately four or five" pills. (2 R.R. at 52). "Where were they?" defense counsel queried before again publishing the video. (2 R.R. at 53). "We just saw that — his whole leg and they're not there" asserted defense counsel before publishing the video again. (2 R.R. at 53). "That's what you saw?" asked defense counsel. (2 R.R. at 53). "No, that's what the body camera takes," stated Reyes. "It's, like, when you're wearing the body camera, it — it can only see a certain —" (2 R.R. at 53). Reyes continued to claim the bag was "hanging out of the pocket." (2 R.R. at 54). He concluded they were "methamphetamine pills." (2 R.R. at 55). When pressed to explain how he knew they were methamphetamine pills, Reyes responded, "Because they're different shapes and colors." (2 R.R. at 55). When pressed further about the shape, he replied, "I couldn't remember, but they weren't norm—normal shapes, like something from a pill press....Like I said, different shapes." (2 R.R. at 56). Defense counsel continued this line of questioning:

Defense Counsel: I know. But oval shaped or circles.

Reyes: Like I said, different shapes. Some of them could be a shape of like a triangle or things like that.

Defense Counsel: Like not from other pills. You see, I'm talking about these specific pills. What color is the orange pill?

Reyes: I can't remember if it was orange.

Defense Counsel: What color is the blue pill?

Reyes: I can't remember.

Defense Counsel: You don't—

Reyes: Remember what color was the blue pill or —

Defense Counsel: What shape?

Reyes: The pill was blue.

Defense Counsel: Okay.

Reyes: The blue pill was blue.

Defense Counsel: Okay. What shape was it?

Reyes: I can't remember.

Defense Counsel: But you can picture right now the four pills hanging out, right, in the corner of the pocket? Why are you smiling?

Reyes: Based on my recollection, there are multiple full-colored pills in different shapes.

Defense Counsel: Okay.

Reyes: I cannot recall the exact pill, shape, and color of each one.

Defense Counsel: What was your specific articulable fact that Mr. Nickerson had methamphetamine?

Reyes: Based on my training and experience.

(2 R.R. at 56-57).

While at first, Reyes admitted that he cannot tell by looking at a pill what it is made of, he then tried to claim he *could* determine the identity of a pill by looking

at it. (2 R.R. at 57-58). Reyes stated he saw something that appeared homemade: “I saw some other shapes that were—that weren’t consistent with a manufactured pill that would be prescribed with things like that.” (2 R.R. at 60).

It was also Reyes’ testimony that they ordered Mr. Nickerson out of the car for a narcotics investigation. (2 R.R. at 63). Reyes stated he saw a scale “between the center console and the shifter.” (2 R.R. at 69). Defense counsel reviewed the scene images with Reyes and showed that nothing unusual was visible in the camera frame. (2 R.R. at 69).

Redirect

The prosecution elicited testimony to establish that the body camera “does not capture everything.” (2 R.R. at 74).

Aderne Nickerson Testifies

It was Mr. Nickerson’s testimony that when he encountered police, he was on his way home to Missouri City. (2 R.R. at 78). He stated he saw the officers as he came to the stop sign and so he made a complete stop for two or three seconds. (2 R.R. at 79). He pulled over as soon as he saw the police lights and sirens. (2 R.R. at 80). He accessed his car insurance information on his phone and placed it on his lap to have at the ready. (2 R.R. at 80). When asked by defense counsel why he did that, he stated: “I wanted to have everything ready so I wouldn’t get caught reaching for something and they mistake me for reaching for a gun, so I tried to have

everything ready for him.” (2 R.R. at 81). Nickerson also stated he believed Reyes mistook one of his two cell phones for a scale. (2 R.R. at 83).

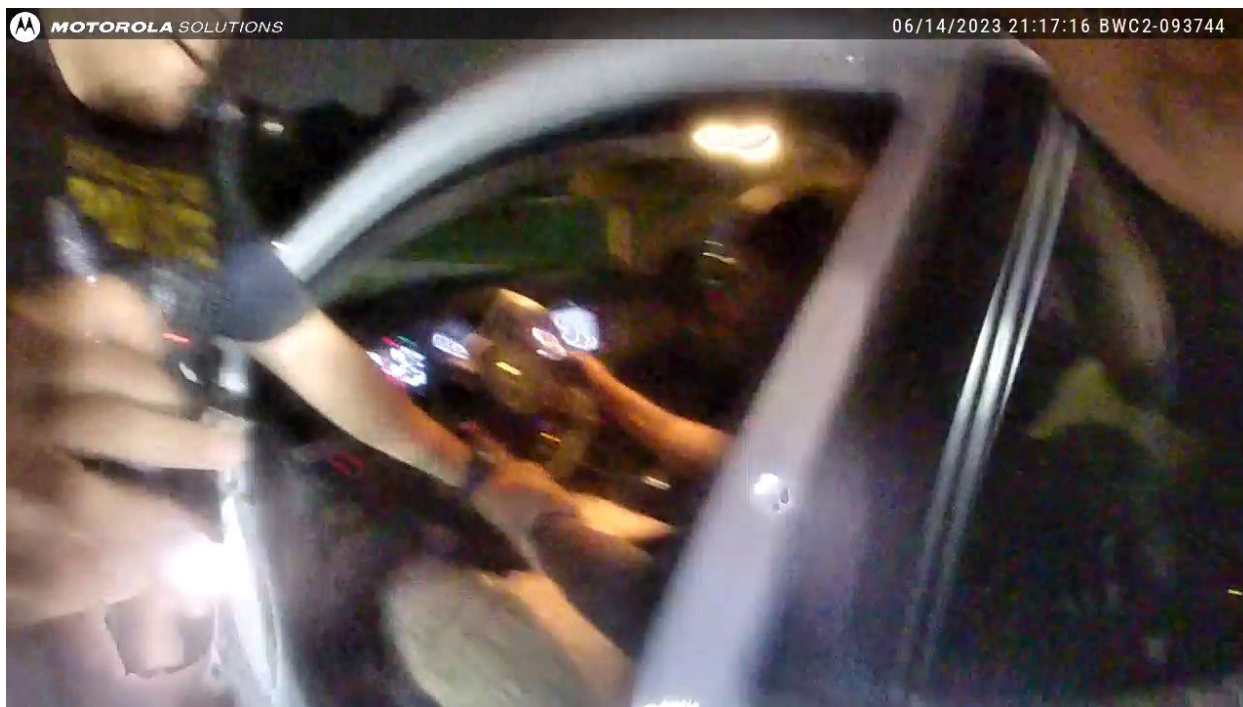
When asked why he drove away, Nickerson said he was afraid:

Because when they was trying to get me out, one officer, he went to grab on me. I got scared. I didn’t know what was going on. Why did he even pull me over in the first place? Then I had another officer saying that he had seen something in my car. So I didn’t know what was going on. I didn’t trust it.

(2 R.R. at 83).

He stated he knew the officer did not see any contraband that day because he did not possess any. (2 R.R. at 84).

Though Nickerson believed his rights were being violated from the moment he was pulled over, he complied with the traffic stop. (2 R.R. at 85). Things escalated quickly once Officer Reyes claimed he saw something in the car; not only did Moreno open Nickerson’s car door (Defense Ex. 1 at 21:16:38), but he reached inside and physically grabbed him. (Defense Ex. 1 at 21:17:14).



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Mr. Nickerson testified that he would have stayed at the scene had this been an ordinary traffic stop, but asking him to get out of the car, opening his car door and trying to pull him out caused him to panic in fear. (2 R.R. at 86; State Ex. 1 at 21:16:35; Defense Ex. 1 at 21:17:16).

State Cross-Examination of Mr. Nickerson

The State began by questioning Mr. Nickerson about his criminal history, including a 2019 felony conviction for Possession of a Controlled Substance—a conviction for which he was on parole. (2 R.R. at 86). He also confirmed he was convicted of Aggravated Robbery, Aggravated Assault, and Unauthorized Use of a

² Screenshot of Defense Ex. 1 at 21:17:16.

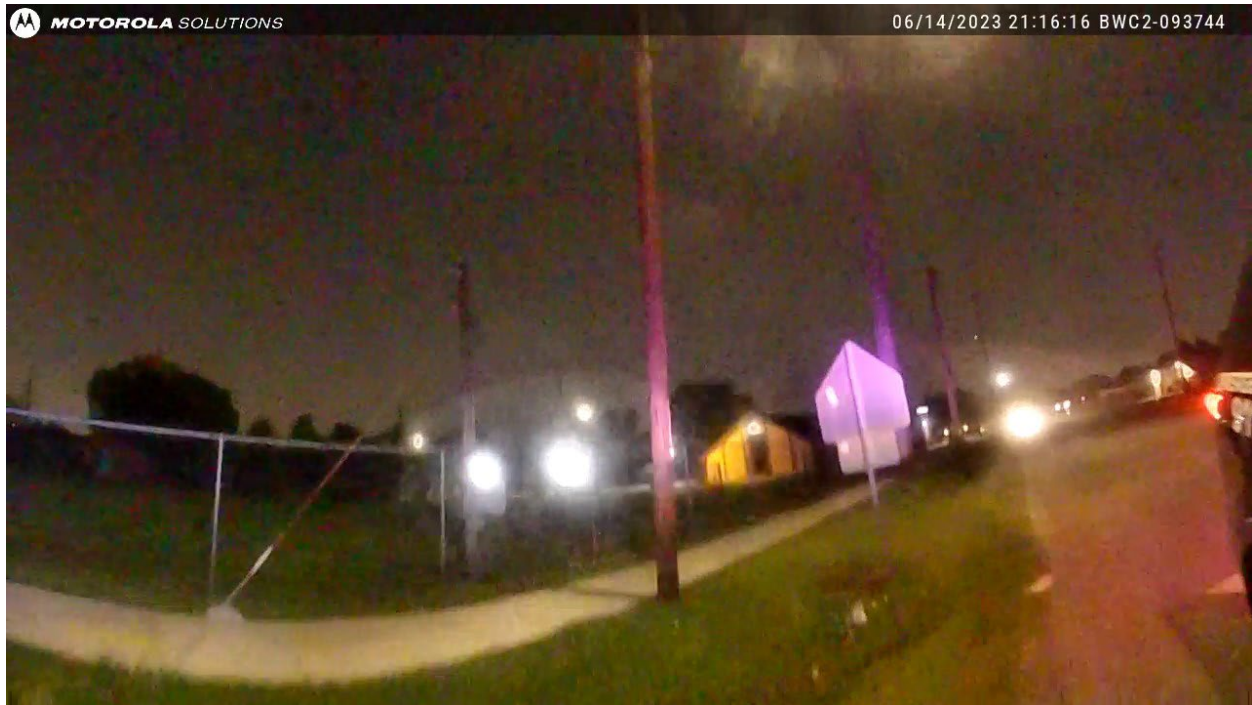
Motor Vehicle. (2 R.R. at 86-87).³ He admitted he knew he was not free to leave when officers asked him to get out of the car. (2 R.R. at 87, 88). He reiterated that he had a cell phone that night, not a scale. (2 R.R. at 89).

Defense Exhibit 1—Officer Reyes’ Body Worn Camera

It is nighttime. The audio starts two minutes into the video footage from Officer Reyes’ body worn camera. When it begins, one of the officers is relaying information to dispatch: “We have a rolled stop sign,” he says. (Defense Ex. 1 at 21:15:46)⁴. The video shows a dark and virtually empty street scene: an empty field sits beside them, and one set of oncoming headlights can be seen in the distance behind. Opposite the empty field, houses sit dark and quiet. There is no vehicle or pedestrian traffic in front of them.

³ Mr. Nickerson asks this Court to take judicial notice of information contained in the online file of the Harris County District Clerk’s Office for Cause Numbers 1093715, 0938231 and 0881845. Based on the file dates for these offenses of conviction, Mr. Nickerson would have been twenty-two (22) years old, nineteen (19) years old and seventeen (17) years old, respectively, when the charges were filed against him. He is now a forty-year-old man.

⁴ Counsel refers to the time clock in the upper righthand corner of the video image.



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⁵ Screenshot of Defense Ex. 1 at 21:16:16.

⁶ Screenshot of Defense Ex. 1 at 21:17:17.

As Reyes walks up to the car, Moreno is already speaking with Mr. Nickerson: “How you doing, sir? You doing alright? We stopped you because you ran that stop sign back there.” (Defense Ex. 1 at 21:16:26). Reyes shines his flashlight into the car and Mr. Nickerson’s lap is immediately visible; his cell phone is resting on his right leg. (Defense Ex. 1 at 21:16:28). No plastic baggie can be seen “hanging out of the pocket.” (2 R.R. at 54). About five seconds later, Reyes tells Moreno, “Pull him out, dude,” and walks around to the driver’s side. (Defense Ex. 1 at 21:16:34). “Step out for me,” Moreno orders, simultaneously opening the driver’s side door. (Defense Ex. 1 at 21:16:36). “I’m telling you, sir. Hop out,” he adds. (Defense Ex. 1 at 21:16:38). Both officers are shining their flashlights at Mr. Nickerson. Moreno is speaking quickly; the tension in the officers’ voices escalates. “For what?” Mr. Nickerson nervously, but calmly replies. (Defense Ex. 21:16:39). “Hop out, sir,” Moreno repeats. (Defense Ex. 1 at 21:16:40). “Get out. Step out. Step out,” both officers order Mr. Nickerson out of his car. (Defense Ex. 1 at 21:16:40). (At this point, Moreno still has no idea why Reyes was keen on ordering Mr. Nickerson out of the car.) “I’m saying, what am I hopping out for?” Mr. Nickerson calmly asks again. (Defense Ex. 1 at 21:16:42). The conversation escalates:

Reyes: What’s that in your pocket? (Reyes’ right hand is now resting on Mr. Nickerson’s car.)

(Mr. Nickerson looks down.) (Defense Ex. 1 at 21:16:45)

Nickerson: What you mean?

Reyes: The other pocket?... Step out. Step out.

Nickerson: What am I—Man, listen. What am I hopping out for?

Reyes: It's an investigation right now. Just step out.

Nickerson: No. What are y'all trying to get me out of the car for?

Moreno: (Looks at Reyes). What'd you see, dude? (Defense Ex. 1 at 21:16:54)

Reyes: Uh. Looks like pills or something. (Defense Ex. 1 at 21:16:58).

Moreno: What do you have in your hand?

Reyes: In his pocket.

Nickerson: I ain't got nothing.

Reyes: Just step out.

Moreno: Just step out.

Reyes: If you don't got nothing, you've got nothing to worry about.

Moreno: Hop out.

Nickerson: For what?

Moreno: Sir, it's an investigation. You're being detained for your traffic violation, okay? You want to be arrested for your traffic violation?

Nickerson: No. I'm saying you need to write me a ticket or something.

Moreno: No. We can...you can be arrested for the violation.

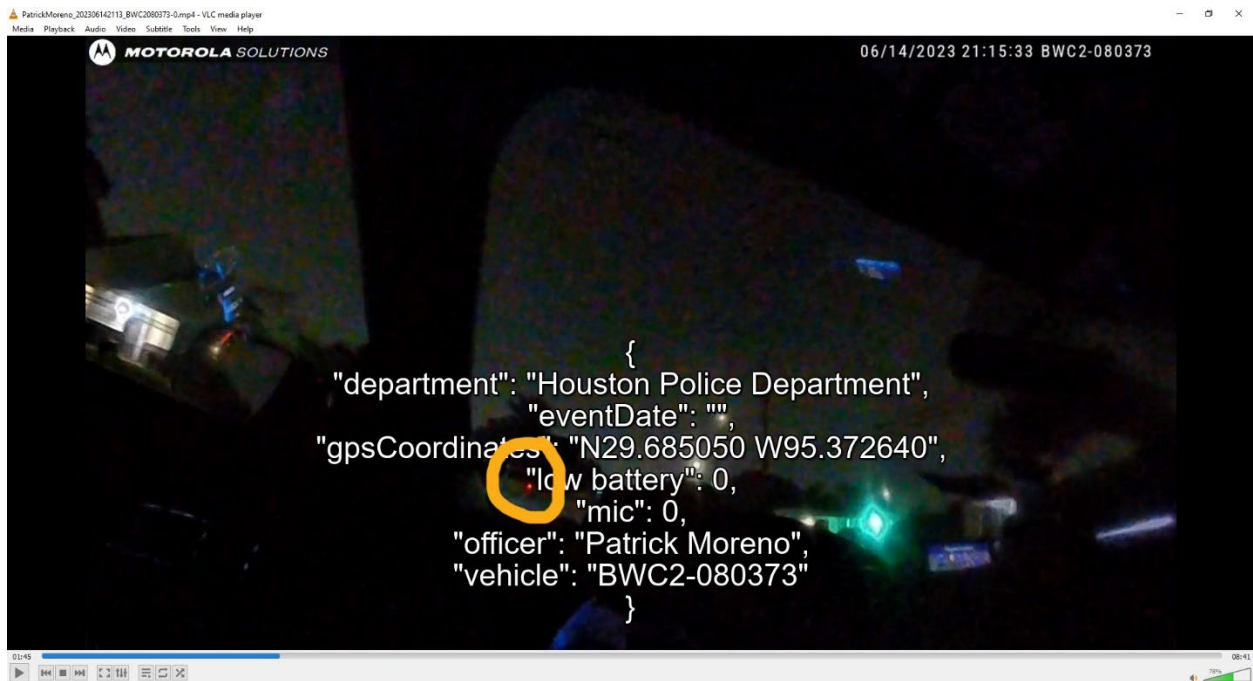
Nickerson: No, sir.

Moreno: Yes, you can, okay. Hop out. Let's go. Let's go. Do not...
(Defense Ex. 1 at 21:17:16).

In the next moment, Mr. Nickerson drives away.

State Exhibit 1—Officer Patrick Moreno's Body Worn Camera

Near the beginning of the video, through the bottom left-hand corner of the windshield, a single red brake light shines in the distance near the stop sign at the intersection. (State Ex. 1 at 21:15:33).

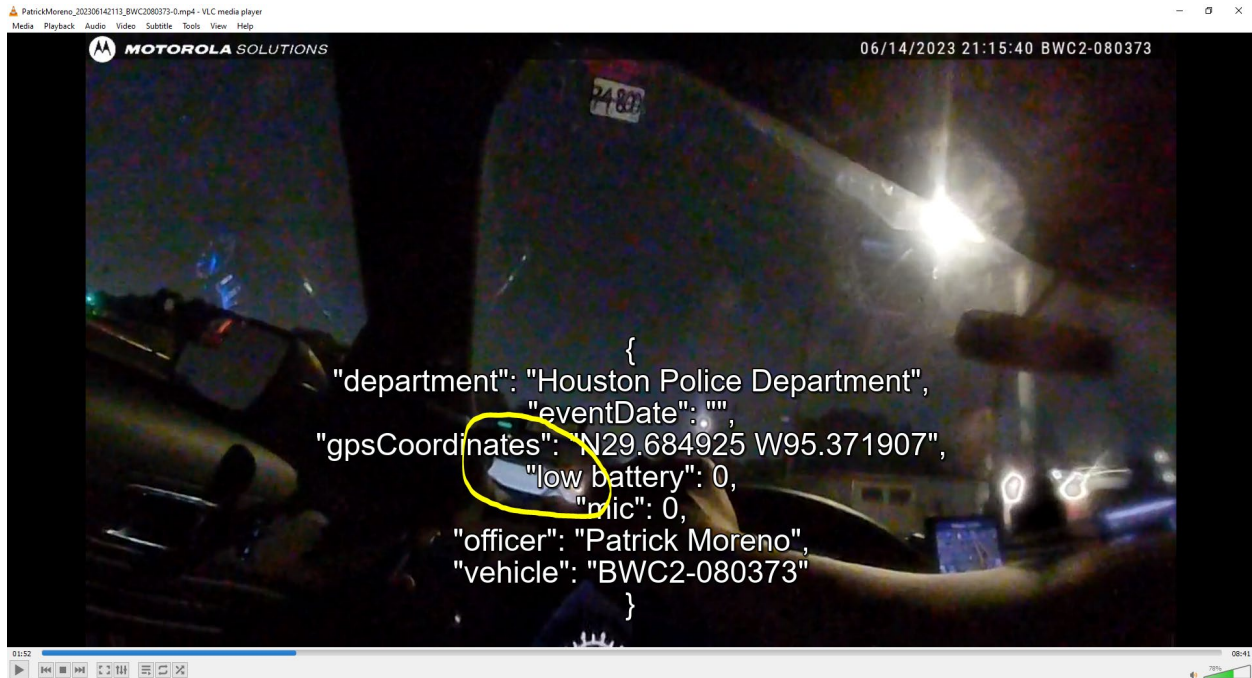


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The light remains stationary for a moment before disappearing from the frame just as the green street sign appears. (State Ex. 1 at 21:15:35). About seven seconds

⁷ Screenshot from State Ex. 1 at 21:15:33. The circle in the lower middle section of the image above encircles the red dot of Mr. Nickerson's brake light. This can be seen clearly on State Ex. 1.

after the red brake light appears, Mr. Nickerson's white car passes the street sign as the officers approach the intersection. (State Ex. 1 at 21:15:40).



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As Officer Moreno turns right, it can be noted that the stop sign is set back several feet from the actual intersection where the green street sign is located. (State Ex. 1 at 21:15:41). Though the side mirror and car frame somewhat obscure the view, enough footage is visible to determine that Mr. Nickerson did not run the stop sign. (State Ex. 1 at 21:15:33-21:15:42).

⁸ Screenshot of State Ex. 1 at 21:15:40. The circled white area in the lower middle section of the image is Mr. Nicholson's car, as seen through the patrol car windshield. This can be seen clearly on State Ex. 1.

Arguments of Counsel

The State's argument cited three cases, but the citations are not included in the record. The prosecution began with the following quotation from an indiscernible case name: "a police officer is justified in stopping if the officer has reasonable suspicion to believe that a traffic violation has occurred." (2 R.R. at 95).

Next, to argue that police had the right to detain Mr. Nickerson for further investigation, the State relied on *Rodriguez v. U.S.* (no citation): "an officer may ask the driver about matters unrelated to the purpose of the stop, as long as the questioning does not measurably extend iteration (*sic*) of the stop." (2 R.R. at 95).

Still relying on *Rodriguez v. U.S.* (no citation), the State implied that Officer Moreno developed reasonable suspicion during the stop, justifying the intrusion: "if an officer develops reasonable suspicion that an occupant in the vehicle is involved in a criminal activity, that officer then may continue questioning that person regardless however long the stop will last." (2 R.R. at 95).

The State pointed to Officer Reyes' testimony regarding his "training and experience," and what he claimed to have observed in the seconds before ordering Mr. Nickerson out of the car: a digital scale and multi-colored pills in a plastic baggie. (2 R.R. at 96). These alleged observations, the State argued, created reasonable suspicion that Mr. Nickerson possessed methamphetamines. (2 R.R. at 96).

The State argued that in his own testimony, Mr. Nickerson conceded he was not free to leave the scene of the traffic stop. (2 R.R. at 96). Alternatively, the State argued the police had probable cause to arrest Mr. Nickerson because he allegedly ran the stop sign. (2 R.R. at 96-97).

Defense counsel argued that Mr. Nickerson's testimony indicated he had come to a complete stop at the stop sign. (2 R.R. at 98). Further, he argued Mr. Nickerson felt his rights were being violated because not only did he stop at the stop sign, but within seconds the officers' aggression made him fear for his safety. (2 R.R. at 99).

Defense counsel argued that Officer Reyes' claims defied common sense because the videos do not lie: there were no pills. (2 R.R. at 99-100). Officer Reyes claimed he saw a scale near the "gear shifter," but Mr. Nickerson testified it was his cell phone. (2 R.R. at 100). He further argued that when Officer Reyes walked around the car to the driver's side, he asked Mr. Nickerson:

"[W]hat was in your pocket? He didn't say, hey, get out because I saw pills hanging out of your pocket. Or hey, get out because we see a plastic bag sticking out. Or I see what some colorful things or I think there's something. He says, what's—he asked him the question, "Well, what's in your pocket? Then when Mr. Nickerson says, "nothing," he goes, "Well, what's in the other pocket?"

(2 R.R. at 100-101).

Counsel argued that if Officer Reyes had actually seen what he testified to, he would have clearly said so on the body camera. Instead, Reyes claimed he thought he saw "pills or something;" "[h]e never mentions a scale," he added. (2 R.R. at

101). When compared to the testimony, the video itself calls Officer Reyes' alleged observations into question. (2 R.R. at 101). The court took a brief recess, and thirty-three minutes later denied Mr. Nickerson's suppression motion. (2 R.R. at 103; C.R. at 111).

Summary of the Argument

The trial court erred in not suppressing the stop. Mr. Nickerson was driving safely when Officer Moreno decided to make an investigatory stop. The body worn camera does not show that he ran the stop sign. The trial court's implied findings are not evidenced in the video. There was no reasonable suspicion for the stop or for the order for Mr. Nickerson to get out of the car.

The video evidence indisputably contradicts the testimony of Officer Reyes regarding the allegations of contraband in plain view. These officers went far outside the bounds of the mission of a traffic stop, turning what should have been a run-of-the-mill encounter into a dangerous fishing expedition.

Argument

Issue One: The trial court erred in denying Mr. Nickerson's motion to suppress because its ruling is not supported by the record. The video evidence shows nothing to support reasonable suspicion for the traffic stop itself and no drugs or paraphernalia in plain view to support a reasonable suspicion of criminal activity.

I. Standard of Review

An appellate court is to review a trial court's decision to grant or deny a motion to suppress using an abuse-of-discretion standard. *Swain v. State*, 181 S.W.3d 359, 365 (Tex. Crim. App. 2005). In reviewing the trial court's denial of a motion to suppress, an appellate court must uphold the trial court's judgment as long as it is reasonably supported by the record and is correct under any applicable theory of law. *Hereford v. State*, 339 S.W.3d 111, 117–18 (Tex. Crim. App. 2011)(citing *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002); *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App.1990)). The appellate court must view the record in the light most favorable to the trial court's ruling and reverse that ruling only if it is outside the zone of reasonable disagreement. *Hereford v. State*, 339 S.W.3d 111, 118 (Tex. Crim. App. 2011)(citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex.Crim.App.2006)).

The *Hereford* Court stated:

In its review, the appellate court does not perform its own fact-finding mission, but limits the scope of its factual review to determining whether the trial court's findings were reasonable in light of the evidence presented. If these findings are reasonable, the appellate court must defer to the trial court.

However, as explained in *Guzman*, this standard of almost total deference applies only to findings of historical fact and “mixed questions of law and fact” that rely upon the credibility of a witness. It has long been recognized that, during a hearing on a motion to suppress, the trial judge is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The trial judge has the

opportunity to view the demeanor of the witnesses and is therefore in a better position to make these factual determinations than appellate judges. In situations such as this, in which no findings of historical fact were made by the trial judge, the appellate court will infer factual findings implicit in the trial court's conclusion *as long as the implied findings are supported by the record*.

Hereford v. State, 339 S.W.3d 111, 118 (Tex. Crim. App. 2011)(internal citations omitted.)(emphasis added).

Questions regarding “whether the facts are sufficient to give rise to reasonable suspicion,” however, are reviewed *de novo*. *Furr v. State*, 499 S.W. 3d 872, 877 (Tex. Crim. App. 2016).⁹ In addition, appellate courts review *de novo* “indisputable visual evidence” contained in a videotape, although some deference must be afforded to the finding by the trial court.¹⁰ “In reviewing a trial court's ruling on a motion to suppress, appellate courts must view all of the evidence in the light most favorable to the trial court's ruling,” but in this case, a *de novo* review of the video does not support the trial court’s finding.¹¹

“[T]he videotape presents indisputable visual evidence contradicting essential portions” of the officers’ testimony.¹² In these situations, the Court of Criminal

⁹ “A law enforcement officer has reasonable suspicion to detain a person if he has specific, articulable facts that, combined with rational inferences from those facts, would lead him reasonably to conclude that the person is, has been, or soon will be engaging in criminal activity.” *Monjaras v. State*, 679 S.W.3d 834, 846 (Tex. App.—Houston [1st Dist.] 2023).

¹⁰ *State v. Duran*, 396 S.W.3d 563, 570–71 (Tex. Crim. App. 2013).

¹¹ *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008).

¹² *Carmouche v. State*, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000).

Appeals has expressly held that this Court can consider the video evidence.¹³ “But when evidence is conclusive, ...such as ‘indisputable visual evidence,’ then any trial-court findings inconsistent with that conclusive evidence may be disregarded as unsupported by the record, even when that record is viewed in a light most favorable to the trial court's ruling.”¹⁴

II. Analysis

A. The trial court erred in denying the motion to suppress because the video evidence shows no reasonable suspicion justifying the traffic stop of Mr. Nickerson.

The trial court’s findings are not entitled to deference in light of the indisputable evidence. Considering the officer’s lack of credibility as argued below, and the exhibit offered into evidence, the stop itself is of dubious origin. What can be seen on Moreno’s body camera supports what Mr. Nickerson testified to—that he saw the patrol car driving down the street and stopped appropriately at the stop sign. This stop can be seen because Mr. Nickerson’s brake light is in full view of Officer Moreno’s body camera in State Ex. 1. The green street sign at the intersection is located several feet ahead of the visible brake light, and as the video progresses that fact becomes evident. About seven seconds after the red brake light appears, Mr. Nickerson’s white car passes the street sign as the officers approach the intersection.

¹³ *Id.*

¹⁴ *Miller v. State*, 393 S.W.3d 255, 263 (Tex. Crim. App. 2012), citing *Tucker v. State*, 369 S.W.3d 179, 187 (Tex. Crim. App. 2012) (Alcalá, J., concurring).

While failing to stop at a stop sign can be a sufficient basis for a stop, the video evidence contradicts this allegation and the officers' testimony regarding such may be disregarded as unsupported by the record. Their statements are insufficient to support the allegations.

Evidence discovered after the stop cannot be included in the calculus for determining the reasonableness of the stop. "Information that the officer either acquired or noticed after a detention or arrest cannot be considered. A detention is either good or bad at the moment it starts."¹⁵

Based on the totality of the evidence, there was no reasonable suspicion for the stop of Mr. Nickerson's car. The trial court erred in not suppressing the evidence obtained from the stop. Reversible error is presented.

B. The video evidence shows no drugs or paraphernalia in plain view to support a reasonable suspicion of criminal activity.

The trial court's denial of Mr. Nickerson's suppression motion was unreasonable in light of the evidence presented. Solely for the sake of argument, Mr. Nickerson will suppose the traffic stop was, indeed, supported by a reasonable suspicion that he ran the stop sign.¹⁶

¹⁵ *State v. Duran*, 396 S.W.3d 563, 569–70 (Tex. Crim. App. 2013).

¹⁶ *State v. Cortez*, 543 S.W. 3d 198, 204 (Tex. Crim. App. 2018), *reh'g denied* (citing *Jaganathan v. State*, 479 S.W. 3d 244, 247 (Tex. Crim. App. 2015), "An officer may make a warrantless traffic stop if the 'reasonable suspicion' standard is satisfied.")

Police officers are permitted to conduct searches and seizures while remaining within the permissible bounds of the Fourth Amendment so long as articulable suspicion exists that a person has committed or is about to commit a crime.¹⁷ As a general rule, the standard used to determine the permissibility of an investigative detention is determined under a dual inquiry of whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.¹⁸

However, an intrusion by law enforcement amounting to a search or seizure is not a license to conduct a "fishing expedition" for evidence of criminal activity unrelated to the reason for the initial intrusion.¹⁹ Rather, the scope of a search or seizure is limited to the circumstances which justified the interference.²⁰ Should law enforcement venture beyond this restraint and into matters not reasonably related to the articulable suspicion, the search or seizure is unreasonable and violative of the Fourth Amendment.²¹ Similarly, the police must diligently pursue a means of

¹⁷ *Terry v. Ohio*, 392 U.S. 1 (1968); see also *Crockett v. State*, 803 S.W.2d 308, 311 (Tex. Crim. App. 1991) ("It has been an accepted part of state and federal jurisprudence for many years that 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.")

¹⁸ *Terry*, 392 U.S. at 19-20.

¹⁹ See *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997) (citing *Ohio v. Robinette*, 519 U.S. 33, 41 (1996) (Ginsberg, J., concurring))

²⁰ *Davis*, 947 S.W.2d at 244 ("Additionally, Texas Courts recognize that investigative detentions become unreasonable when they are not reasonably related in scope to the circumstances which justified the interference in the first place.")

²¹ *Id.* at 243; see also *Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004) ("In deciding whether the scope of a Terry detention is 'reasonable,' the general rule is that an investigative stop can last no longer than necessary to effect the purpose of the stop. In other words, if a driver is

investigation that is likely to confirm or dispel their suspicions quickly during the time the suspect is detained.²² Any continued detention must be based on articulable facts which, taken together with rational inferences from those facts, would warrant a person of reasonable caution in the belief that a continued detention was justified in order to investigate a previously committed or soon to be committed crime.²³

The Transportation Code provides:

“Unless directed to proceed by a police officer or traffic-control signal, the operator of a vehicle or streetcar approaching an intersection with a stop sign shall stop as provided by Subsection (c)...

(c) An operator required to stop by this section shall stop at a clearly marked stop line. In the absence of a clearly marked stop line, the operator shall stop before entering the crosswalk on the near side of the intersection. In the absence of a clearly marked stop line or crosswalk, the operator shall stop at the place nearest the intersecting roadway where the operator has a view of approaching traffic on the intersecting roadway.

Tex. Transp. Code Ann. § 544.010 (West).

A traffic stop is, arguably, a *Terry* stop on wheels. Consider the following discussion from *Rodriguez v. U.S.*, 575 U.S. 348, 354 (2015):

A seizure for a traffic violation justifies a police investigation of that violation. “[A] relatively brief encounter,” a routine traffic stop is

stopped on suspicion of driving while intoxicated, once the police officer determines that the driver is not impaired, he should be promptly released.”).

²² *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (“In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. . . . The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.”).

²³ *Davis*, 947 S.W.2d at 244-45.

“more analogous to a so-called ‘*Terry* stop’ ... than to a formal arrest.” *Knowles v. Iowa*, 525 U.S. 113, 117, (1998) (quoting *Berkemer v. McCarty*, in turn citing *Terry v. Ohio*, 392 U.S. 1 (1968)). See also *Arizona v. Johnson*, 555 U.S. 323, 330, (2009). Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's “mission”—to address the traffic violation that warranted the stop, *Caballes*, and attend to related safety concerns. See also *United States v. Sharpe*, 470 U.S. 675, 685 (1985); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (“The scope of the detention must be carefully tailored to its underlying justification.”). Because addressing the infraction is the purpose of the stop, it may “last no longer than is necessary to effectuate th[at] purpose.” *Ibid.* See also *Caballes*, 543 U.S., at 407. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. See *Sharpe*, 470 U.S., at 686 (in determining the reasonable duration of a stop, “it [is] appropriate to examine whether the police diligently pursued [the] investigation”).

Rodriguez v. United States, 575 U.S. 348, 354, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492 (2015) (internal citations omitted).

The mission of the stop, then, would have been to investigate the alleged traffic infraction. What happened to Mr. Nickerson, however, was not that. Instead, the body worn cameras show two young and reckless officers engaged in a frightening and dangerous fishing expedition—enough to make a 39-year-old man alone with two officers on a deserted street at night panic in fear for his life.

It is telling that at the suppression hearing the State offered the video of Officer Moreno—the officer who was not alleged to have seen any suspected contraband—rather than the video of Officer Reyes who claimed he saw “pills.” Why would they

offer the video of the officer who admittedly saw nothing when their alleged reasonable suspicion was just on the other side of that center console?



This is not a traffic stop. Mr. Nickerson was caught in a net by a “Gang Unit” looking to initiate encounters with motorists to see what they might find. To pretend this was a simple traffic stop would be to contravene the self-described purpose of the “Gang Division’s” existence—they exist to hunt “criminals.”

As the City of Houston’s website indicates, the Gang Division exists “to identify and arrest as many wanted fugitives, repeat offenders and criminals as possible.”²⁵ Unfortunately for the people of Houston, this double-speak appears to

²⁴ RENÉ MAGRITTE, *LA TRAHISON DES IMAGES* (THE TREACHERY OF IMAGES) (1929). <https://collections.lacma.org/node/239578>. Housed in the L.A. County Museum of Art, this Surrealist oil on canvas painting contains the phrase “Ceci n’est pas une pipe.” or “This is not a pipe.”

²⁵ www.houstontx.gov/police/divisions/gang/index.htm. Last visited June 26, 2024.

fly in the face of HPD’s written policy against racial profiling²⁶--a policy born from historical violations of due process, due course of law and equal protection principles. *See* Tex. Code Crim. Proc. art. 2.131 and 2.132, Racial Profiling Prohibited and Law Enforcement Policy on Racial Profiling.

It is worth examining the Texas Commission on Law Enforcement (TCOLE) training information on racial profiling here. TCOLE states its mission thusly: “The mission of the Texas Commission on Law Enforcement, as a regulatory State agency, is to establish and enforce standards to ensure that the people of Texas are served by highly trained and ethical law enforcement, corrections, and telecommunications personnel.”²⁷

One way the Commission works toward that goal is by publishing instructor resources guides (IRG) “to provide the instructor with the learning objectives and teaching steps needed to construct a complete and effective lesson plan.”²⁸ Course #3256 is a “Racial Profiling” course. *Id.*

²⁶ *See* Houston Police Department General Orders, Series 600: Operations, § 600-42, Racial Profiling Prohibited, Issue Date: April 24, 2018. Available at www.houstontx.gov/police/general_orders/index.htm (last visited July 12, 2024.) “This General Order establishes the Police Department's policy against the practice of racial profiling as set out in state and federal laws concerning racial profiling and discriminatory practices. Discrimination in any form, including racial profiling, is strictly prohibited and the department shall take immediate and appropriate action to investigate allegations of discrimination.”

²⁷ *See* TCOLE, Mission, *available at* <https://www.tcole.texas.gov/content/tcole-mission>. (Last visited August 19, 2024).

²⁸ RACIAL PROFILING, TCOLE COURSE No. 3256 (Revised 2023) at 2, *available at* www.tcole.texas.gov/document/3256-racial-profiling-april-2021.docx.

Unit 3 in the course sets up the discussion as “Racial Profiling Versus Reasonable Suspicion,” while noting that the objective is to ensure that “[t]he student will be able to identify elements of typical racially motivated traffic stops.”²⁹ After defining racial profiling and citing common examples, the guide outlines the elements of such an illegal stop:

C. A typical traffic stop resulting from racial profiling:

1. The vehicle is stopped on the basis of a minor or contrived traffic violation which is used as a pretext for closer inspection of the vehicle, driver, and passengers
2. The driver and passengers are questioned about things that do not relate to the traffic violation
3. The driver and passengers are ordered out of the vehicle
4. The officers visually check all observable parts of the vehicle
5. The officers proceed on the assumption that drug courier work is involved by detaining the driver and passengers by the roadside.
6. The driver is asked to consent to a vehicle search—if the driver refuses, the officers use other procedures (waiting on a canine unit, criminal record checks, license-plate checks, etc.), and intimidate the driver (with the threat of detaining him/her, obtaining a warrant, etc.)

(RACIAL PROFILING at 10-11) (Emphasis added).

This incident checks all the boxes. Stopped for a minor or contrived traffic violation? Check. Driver questioned about things unrelated to alleged traffic violation? Check. Driver ordered out of the car? Check. Officers visually check all observable parts of the car? Check. Officers proceed on assumption that drug

²⁹ *Id.* at 10.

courier work is involved? Check. Driver intimidation? Check. This traffic stop is a TCOLE textbook case. Moreover, HPD’s own statistics illustrate the fact that none of this happened in a vacuum.³⁰

There was no plastic baggie, no pills, no scale. The videos show this.



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Further, Officer Reyes’ cavalier attitude is evident both on the video itself and in the cold record of his testimony. At the scene, Moreno asks Reyes, “What’d you see,

³⁰ HPD 2023 Annual Racial Profiling Report indicates the practice of racial profiling persists despite the official policy. Though Black Houstonians make up an estimated twenty-two percent (22%) of the city’s population, the statistics show Black drivers are over-represented in traffic stops at 34.31% of the total.

www.houstontx.gov/police/departments_reports/racial_profiling/2023_Annual_Racial_Profiling_022324.pdf. Even more telling is the fact that out of a total of 19,020 traffic stop searches, 10,477 of them were of Black motorists—a whopping 55%. Further, the statistics indicate that while only 3.6% of white motorists were searched, 8.9% of Black motorists were searched. *See id.*

³¹ Screenshot of Defense Ex. 1 at 21:16:32.

dude?” Raising his eyebrows, Reyes replies: “Uh, looks like pills or somethin’.” (State Ex. 1 at 21:16:56).



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Reyes’ version of the incident evolved over time. On the video, when Moreno first asks him what he saw, Reyes says, “Uh. Looks like pills or something.” (Defense Ex. 1 at 21:16:58). Later during the pursuit, he again said there were “pills hanging out of his pocket.” (State Ex. 1 at 21:21:39). He added a “scale” to the narrative. (State Ex. 1 at 21:21:38). He repeated these claims in his suppression testimony. (2 R.R. at 48). The “pills or something” morphed into “narcotics” (2 R.R. at 48) and then “methamphetamine.” (2 R.R. at 55).

³² Screenshot of State Ex. 1 at 21:16:56.

The instant case is analogous to *Thompson v. State*, 408 S.W. 3d 614, 621 (Tex. App. –Austin 2013, no pet.). In *Thompson*, (a prolonged detention case) the court addressed the problem of what to do when an officer’s testimony is not supported by the record. It opined:

Although the trial court’s findings are afforded almost total deference, when evidence is conclusive, such as ‘indisputable visual evidence,’ any trial-court findings inconsistent with that conclusive evidence may be disregarded as unsupported by the record, even when that record is viewed in a light most favorable to the trial court’s ruling. Thus, when a videotape presents indisputable evidence contradicting essential portions of an officer’s testimony, that testimony cannot support a trial court’s finding even though the officer’s testimony might, by itself, be read to support the finding. ‘If the video evidence does not support the trial court’s conclusion, then the court of appeals should reverse.’”

Id. at 622. (Internal citations omitted.)

The evidence does not show that these officers “diligently pursued the investigation” as is required of them.³³ By frightening Mr. Nickerson, grabbing him and ordering him out of the car for a traffic stop in a situation where a reasonable suspicion of contraband was clearly not established, the officers transformed this routine encounter into an impermissible “fishing expedition.” This police action violated his right to be free from unreasonable searches and seizures.

³³ See *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985); *Rodriguez v. United States*, 575 U.S. 348, 354, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492 (2015).

All fruits of this detention should have been suppressed. The purpose of the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution “is to safeguard an individual’s legitimate expectation of privacy from unreasonable governmental intrusions.”³⁴ Based on the totality of the evidence, there was no reasonable suspicion to justify the traffic stop or the order for Mr. Nickerson to get out of the car for this heightened level of government intrusion into his liberty. The trial court erred in not suppressing the evidence obtained from this stop. Reversible error is presented.

Prayer

Mr. Nickerson prays this Court reverse and remand and order the trial court to suppress the illegally obtained evidence.

Respectfully submitted,

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³⁴ *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996).

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A true and correct copy of the foregoing brief was e-filed with the First Court of Appeals and was served electronically upon the Appellate Division of the Harris County District Attorney's Office on August 22, 2024.

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