Affirmed and Opinion filed November 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01237-CR

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RICARDO MANUEL ESCAURIZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law Number 8
Harris County, Texas
Trial Court Cause No. 98-19882

O P I N I O N

The trial judge convicted the appellant, Ricardo Manuel Escauriza of possessing a useable amount, less than two ounces, of marijuana, and sentenced him to one hundred eighty days of confinement, probated for one year, and a $200 fine.

Shortly before his arrest, Escauriza was a passenger in a pickup truck that had been in a one-vehicle accident. When Houston police arrived about 7:30 p.m. on May 15, 1998 in response to a DWI report, Escauriza was standing in the street near the truck. The truck was halfway in a ditch, and the left front wheel was askew. The vehicle had hit a gutter or culvert, and was undriveable. Escauriza smelled strongly of alcohol, his eyes were bloodshot, his speech was slurred, and his balance was unsteady. The officers thought his apparent intoxication rendered him a danger to himself or others.

Upon search incident to arrest, the police found marijuana. He was not charged with public intoxication, but was charged with possession of marijuana. At trial to the court, the defense filed motions to exclude, and objected to the admission of the marijuana as the product of an illegal detention. At the close of the State's evidence, defense counsel moved for the trial judge to enter a verdict of not guilty. Counsel argued that the marijuana was inadmissible because there was no probable cause to arrest Escauriza for public intoxication. The judge overruled this contention, and denied the motion.

On appeal, Escauriza continues to assert the same ground, arguing that the State failed to prove probable cause to believe essential elements of public intoxication. He contends the evidence was insufficient to show (1) he was intoxicated, (2) he was a danger to himself or others, or (3) he was in a public place. We disagree, and affirm.

As a general rule, we afford almost total deference to a trial court's determination of the historical facts the record supports. *See, e.g., Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). This is especially true when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Id.*

We afford the same deference to trial courts' rulings on mixed questions of law and fact "if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor." *See id.* The appellate courts may review de novo "mixed questions of law and fact" not requiring evaluation of credibility and demeanor. *See id.*

The abuse of discretion standard will not always apply when credibility and demeanor are factors. *Id.*; *O'Keefe v. State*, 981 S.W.2d 872, 873 (Tex. App.–Houston [1st Dist.] 1998, no pet.). Whether probable cause "turns" on an evaluation of credibility and demeanor is the critical question. *See Loserth v. State*, 963 S.W.2d 770, 772-73 (Tex. Crim. App.1998). A ruling on the application of law to the facts by the trial court will often depend on how the trial court assesses the credibility and demeanor. *Id.* Even where facts are undisputed, however, the finder of fact may believe some evidence and disbelieve other evidence. *Jones v. State*, 984 S.W.2d 254, 259 (Tex. Crim. App. 1998).

In reviewing the trial court's decision on a motion to suppress, if the appellant alleges error in the application of the law to the facts, we may review de novo. *See Guzman v. State*,

955 S.W.2d at 89. We apply a de novo standard when there are no issues dependent upon credibility or demeanor of the witnesses. *See State v. Fecci*, 9 S.W.3d 212, 220 (Tex. App.-San Antonio 1999, no pet.). De novo review is most frequently applied when the appellate court is presented with a question of law based on undisputed facts. *See Oles v. State*, 993 S.W.2d 103, 105 (Tex.Crim.App.1999); *Brown v. State*, 986 S.W.2d 50, 51 (Tex. App.--Dallas 1999, no pet.) (where facts are undisputed, reviewing court determines de novo whether probable cause or reasonable suspicion existed to justify stop or arrest). In such cases, the trial judge is often in no appreciably better position than the reviewing court to determine whether the officer had probable cause to seize a suspect. *Chapnick v. State*, 25 S.W.3d 875, 877 (Tex. App.–Houston [14th Dist.] 2000, n.w.h.). Therefore, de novo review of probable cause and reasonable suspicion issues is common. *See, e.g., id.; State v. Arriaga*, 5 S.W.3d 804, 805 (Tex. App.–San Antonio 1999, pet. ref'd).

In the present case, however, for the offense and circumstances involved in this case, the police officers had to judge factors that were clearly a matter of degree. They had to judge how dangerous it was for the defendant to stand on the street at 7:30 p.m. in mid-May. They had to judge how drunk he appeared. One officer testified Escauriza was stumbling so badly he was in danger of falling and hurting himself. They had to judge the likelihood he was drunk instead of merely injured in the crash, given that his companion appeared similarly drunk, and had engaged in a one-vehicle crash. Probable cause depends upon the totality of the circumstances. *See Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991). "Probable cause exists when the facts and circumstances within an officer's personal knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that, more likely than not, a particular suspect has committed an offense." *Hughes v. State*, 878 S.W.2d 142, 154 (Tex. Crim. App. 1992). It is not necessary to prove that Escauriza actually violated the law; it is sufficient to show that the officer reasonably believed that a violation was in progress. *Zervos v. State*, 15 S.W.3d 146, 152 (Tex. App.–Houston [14th Dist.] 2000, n.w.h.). In determining whether the officers had probable cause, the trial court had to decide how accurate their statements were. One officer, asked if the defendant was a threat to himself or others, answered that he was a danger to himself *and* others. There was no basis in the record for a statement that the defendant was

a danger to others. The officer volunteered that the defendant might have fallen and hurt himself when he was being asked about whether Escauriza was drunk. The trial court had to judge the officer's demeanor to determine whether the officer really meant Escauriza was a danger to others, and whether he was trying to arrive at additional reasons to justify the arrest in retrospect. In sum, the degree to which the judge believed the officers and believed truly meant all of the words they used required the type of discretion usually reserved to fact finders.

We may not usurp the trial court's discretion to judge demeanor and credibility. If, however, we accord full verity to all of the officers' undisputed statements, and review de novo, the officers had ample facts to warrant a person of reasonable caution in the belief that, more likely than not, a particular suspect had committed public intoxication. Among other things, he was stumbling in the street (a public place) in the evening; he might have hurt himself falling; and, the totality of the circumstances indicated he was more likely than not intoxicated. While the appellant asserts there was no evidence he was actually arrested in a public place instead of a citizen's property, the officers clearly saw Escauriza in a public place when he was in the street. There was no reason to exclude the marijuana from evidence, to consider conviction illegal because it required consideration of the fruits of an illegal arrest, or to find insufficient evidence requiring an instructed verdict on the ground the marijuana could not be considered. The judgment of the trial court is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed November 2, 2000.
Panel consists of Justices Sears, Cannon and Draughn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon and Joe L. Draughn sitting by assignment.