# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NO. PD-0212-15**

**CHRIS FURR, Appellant**

**v.**

**THE STATE OF TEXAS**

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS NUECES COUNTY**

**HERVEY, J., delivered the opinion of the Court in which KELLER, P.J., JOHNSON, KEASLER, RICHARDSON, YEARY, and NEWELL, JJ., joined. MEYERS, J., filed a dissenting opinion. ALCALA, J., dissented.**

## O P I N I O N

Chris Furr was charged with possession of a controlled substance after police found heroin on him while patting him down for weapons. He filed a motion to suppress, arguing that he was illegally stopped and frisked. The trial court denied the motion. Furr pled guilty, and was sentenced to two years' imprisonment, probated for three years. He appealed the denial of the motion to suppress, once again arguing that he was illegally

stopped and frisked. The court of appeals affirmed the trial court's ruling. *Furr v. State*, No. 13-14-00287-CR, 2015 WL 307757, at *1 (Tex. App.—Corpus Christi Jan. 22, 2015) (mem.op.) (not designated for publication). We granted Furr's petition for discretionary review to determine whether the court of appeals erred when it held that the stop and frisk of Furr did not violate the Fourth Amendment prohibition on unreasonable searches and seizures.[1] Because we agree with the court of appeals, we will affirm its judgment.

**FACTS**

One Tuesday afternoon, Officer George Alvarez of the Corpus Christi Police Department responded to an anonymous tip that two white males, one in all black and one in a black shirt and carrying a brown backpack, were using drugs on a street corner. An officer who later arrived at the scene testified that the corner was located in a "high drug, high crime" area. In response to the call, Alvarez drove by the street intersection and saw two males who fit the description given by the informant. As he drove past the men in his police car, he noticed in his rearview mirror that they were watching him as he drove past. He then approached the two,[2] but Furr avoided Alvarez and quickly walked into the

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[1]The ground which we granted for review states,

> Whether the Court of Appeals erred in holding that, under its view of *Florida v. J.L.*, 529 U.S. 266, 272 (2000), an anonymous tip that a unidentified pedestrian is doing drugs near a homeless shelter, without more, is sufficient to justify a police officer's stop and frisk of a pedestrian the police find near that location?

[2]The record is not clear, but it appears that Alvarez got out of his cruiser after driving past the two men and approached them on foot.

nearby Mother Theresa Shelter. As he walked away, he repeatedly looked over his shoulder at Alvarez. Alvarez spoke to the other man, Collier, about the call police received. When another officer arrived, Officer Ayala, Alvarez told him that Furr walked away from him "furtive[ly], like he was trying to get away."

Both officers entered the shelter to make contact with Furr. They found him in the facility's yard, where according to Ayala, he was still acting nervous, seemed anxious, was profusely sweating, appeared to be evasive, and was trying to avoid them. Ayala asked Furr if he had any weapons on him, but Furr did not initially respond. It appeared to Ayala that Furr was "kind of out of it" and "looked like he was under the influence of a drug." To protect himself and others, Ayala frisked Furr for weapons. While doing so, he felt something in Furr's right front pocket that he knew from experience was a glass crack pipe. As he removed the pipe, he also found two syringes. After seizing the contraband, Furr was arrested for possession of drug paraphernalia, and according to Ayala, he was no longer free to leave. Ayala asked if he had any identification, and Furr said that it was in his pocket. After removing the wallet and opening it, Ayala found two small balloons of what he believed to be heroin.

Furr was charged with possession of a controlled substance. He filed a motion to suppress, which the trial court denied. The record contains no findings of fact or conclusions of law. Furr pled guilty after losing his motion to suppress, but he reserved his right to appeal the ruling of the trial court.

**COURT OF APPEALS**

Furr argued on appeal that the anonymous tip did not establish reasonable suspicion to detain and frisk him, but the court of appeals disagreed. *Furr*, 2015 WL 307757, at *6. It noted that brief investigative detentions are permitted when police have reasonable suspicion to believe that a person is involved in criminal activity and that, police are justified in patting down a suspect for weapons, if they have reasonable suspicion to believe that the suspect may be presently armed and dangerous. *Id.* at *3.

When analyzing whether police had reasonable suspicion to detain Furr, the court of appeals stated,

> That Furr looked back at Alvarez when he walked away is not indicative of imminent criminal activity and is not "sufficiently distinguishable" from the behavior in which an innocent person would have engaged. Ayala stated that Furr was acting "nervous" and was "sweating," but nervousness alone is insufficient to constitute reasonable suspicion. Moreover, we do not believe that sweating while standing outside in the middle of a south Texas summer afternoon is indicative of anything but a properly functioning human thermoregulation system.

*Id.* at *6 (internal citations omitted). Nevertheless, based on Ayala's testimony that Furr "was just kind of out of it," "looked like he was under the influence of a drug," and Furr's failure to respond when Ayala asked if he was armed, the court held that the tip was sufficiently corroborated to warrant a brief detention and a limited pat down of Furr for weapons.[3] *Id.* Although it concluded that the pat down was justified, it rejected the State's

[3]In a footnote, the court of appeals also stated that "there were facts other than Furr's failure to respond promptly to the question of whether he was armed that supported reasonable suspicion to detain—such as the fact that Furr matched the anonymous tipster's vague

argument that the "guns follow drugs" presumption should be extended to people who are merely accused of possessing drugs.[4] *Id.* at n.6.

**ARGUMENTS**

Furr argues that United States Supreme Court precedent requires us to conclude that the anonymous tip in this case, without more, was insufficient to justify the stop and frisk. Among other cases, he relies on *Florida v. J.L.*, 529 U.S. 266 (2000). According to Furr, in that case, the Supreme Court held that an anonymous tip that a person was carrying a gun was insufficient standing alone to justify a police officer's stop and frisk of that person. *Id*. at 273–74.

The State responds that Furr's detention did not begin until the frisk itself; therefore, anything that happened prior to the frisk can be considered in determining reasonable suspicion. The State also argues that there are a number of other factors that, when considered together, are sufficient to establish reasonable suspicion here: (1) the relative contemporaneity; (2) the high-crime location of the incident; (3) Furr's altering course and retreating into the shelter upon seeing law enforcement; and (4) Furr's nervousness, (5) unresponsiveness, and (6) possible intoxication.

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description and that he appeared to be under the influence of drugs." *Furr*, 2015 WL 307757, at *6 n.7.

[4]That argument states that, because people who possess drugs tend to have weapons, police are justified in frisking for weapons anyone suspected of possessing drugs. While acknowledging many cases holding that drug-trafficking suspects can be frisked for weapons because of the nature of the alleged criminal activity, the court declined to apply that presumption to people merely suspected of drug possession. *Furr*, 2015 WL 307757, at *6 n.6.

With respect to the weapons frisk, the State contends that an officer's objective belief that a suspect is armed and dangerous can be predicated on the nature of the alleged criminal activity alone, and it argues that we should apply the "guns follow drugs" presumption to people accused only of possessing drugs. *Griffin v. State*, 215 S.W.3d 403, 409 (Tex. Crim. App. 2006). According to it, because it is inherently difficult to separate drug dealers from drug users, officers should not be prevented from conducting a pat down of someone who is observed with drugs in a high crime area. The State also asserts that there was a heightened threat to officer safety in this case because the incident took place in a homeless shelter and Furr appeared to be under the influence of drugs and did not initially respond when asked whether he had a weapon.

**STANDARD OF REVIEW**

We review a trial court's denial of a motion to suppress for an abuse of discretion and apply a bifurcated standard of review, affording almost complete deference to the trial court's determination of historical facts, especially when those determinations are based on assessments of credibility and demeanor. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). We review de novo, however, whether the facts are sufficient to give rise to reasonable suspicion in a given case. *Crain*, 315 S.W.3d at 48–49. When the trial court does not make express findings of fact, as in this case, we view the evidence in the light most favorable to the trial court's ruling and will assume it made findings that are consistent with its ruling and that are supported by the record. *Turrubiate v. State*, 399

S.W.3d 147, 150 (Tex. Crim. App. 2013). If the ruling of the trial court is correct under any applicable theory of law, we will sustain its ruling. *Arguellez v. State*, 409 S.W.3d 657, 662–63 (Tex. Crim. App. 2013).

**DETENTIONS & FRISKS**

"There are three distinct types of police-citizen interactions: (1) consensual encounters that do not implicate the Fourth Amendment; (2) investigative detentions that are Fourth Amendment seizures of limited scope and duration that must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures, that are reasonable only if supported by probable cause." *Wade v. State*, 422 S.W.3d 661, 667 (Tex. Crim. App. 2013). This case implicates the first and second categories: consensual encounters and investigative detentions.

We review de novo the question of whether a consensual encounter has advanced into a detention. *Id*. at 668. There is no bright-line rule dictating when a consensual encounter becomes a detention. *Id.* at 667. Courts must examine the totality of the circumstances to determine whether a reasonable person would have felt free to ignore the officer's request or to terminate the consensual encounter. *Id*. Formulated a different way, a Fourth Amendment seizure occurs when there is application of physical force or, where such is absent, a submission to an assertion of authority. *Id.* at 667–68. The test to determine whether a person has been detained is objective and does not rely on the subjective belief of the detainee or the police. *Id*. at 668.

Reasonable suspicion to detain a person exists when a police officer has "specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity." *Id.* at 668. "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The test to determine whether reasonable suspicion existed is also an objective standard that disregards the subjective intent of the officer,[5] and we look to the totality of the circumstances, including the cumulative information known to cooperating officers at the time of the detention. *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App.

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[5]Addressing the objective nature of the *Terry* test, the Fifth Circuit has explained,

> *Terry* cannot be read to condemn a pat-down search because it was made by an inarticulate policeman whose inartful courtroom testimony is embellished with assertions of bravado, so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger. Under the familiar standard of the reasonable prudent man, no purpose related to the protective function of the *Terry* rule would be served by insisting on the retrospective incantation "I was scared."
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> Some foolhardy policemen will never admit fear. Conversely, reliance on such a litany is necessarily prone to self-serving rationalization by an officer after the fact. It would be all too easy for any officer to belatedly recite that he was scared in situations where he neither had any reason to be scared, nor was indeed scared.

*United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976). Thus, the testimony of Ayala that he was not in fear of Furr when patting him down is irrelevant to the analysis. *Griffin*, 215 S.W.3d at 409.

2011).

An officer is justified in engaging in a protective frisk if he reasonably suspects that the person who he has lawfully detained is presently armed and dangerous. *Wade*, 442 S.W.3d at 669. The police need not be absolutely certain that the individual is armed. *O'Hara v. State*, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000). The test is simply whether a reasonably prudent person under the circumstances would be warranted in believing that his safety or that of others was in danger. *Id.* The intrusion must be based on specific articulable facts which, in the light of the officer's experience and general knowledge, together with rational inferences from those facts, would reasonably warrant the intrusion. *Anderson v. State*, 701 S.W.2d 868, 873 (Tex. Crim. App. 1985).

**FLORIDA v. J.L.**

In *J.L.*, an anonymous informant called police and reported that a young black male was at a bus stop wearing a plaid shirt and had a gun. *J.L.*, 529 U.S. at 268. Two officers arrived at the bus stop and saw three black males standing at the stop, one of whom was wearing a plaid shirt. *Id.* "Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements." *Id.* The police frisked J.L. and found the gun in his pocket. *Id.* The issue was whether an anonymous tip that a person has a gun is, by itself, sufficient to justify the stop and frisk of a person. *Id.*

The court noted that the only suspicion officers had that J.L. was armed was based

on the anonymous tip, not any observations of their own, and that because the tip lacked sufficient indicia of reliability, the police did not have reasonable suspicion for the stop and frisk. *Id.* at 271, 274. In reaching that conclusion, the court explained that, whether J.L. actually had a gun did not matter to the analysis because the reasonableness of an officer's suspicion is measured by what they knew before conducting the search. *Id.* at 271. It also reasoned that, although the anonymous tip was useful for identifying the person accused of illegal activity by the informant, to supply reasonable suspicion the tip must show knowledge of concealed criminal activity. *Id.* at 272. The Court concluded by distinguishing *Terry* frisk cases, stating that the decision in *J.L.* discussed only whether the police had reasonable suspicion to detain J.L., but it did not address pat downs of people who have been legitimately stopped. *Id.* at 274.

**ANALYSIS**

The court of appeals held that Furr's nervousness in combination with Ayala's observation that he appeared to be under the influence of a drug corroborated the tip sufficiently to support a brief investigative detention and that Furr's failure to promptly respond to Ayala's question about whether he was armed, in combination with the other circumstances, supported the protective frisk. *Furr*, 2015 WL 307757 at *6. We agree.

*1. The Stop*

Police received an anonymous tip that two people were using drugs on a specific street corner, and the tipster gave a description of the two men. The police knew that

street corner to be a "high drug, high crime" area. When Alvarez approached the area in question, he found two individuals who matched the description provided by the informant. As he drove past Collier and Furr, he saw the two through his rearview mirror watching his vehicle as he drove away. When Alvarez approached them on foot to discuss the anonymous tip, Collier talked with Alvarez, but Furr walked away like he was trying to get away, glancing back at the duo repeatedly as he went.[6] The officers made contact with Furr in the shelter, and when they made contact, Ayala thought Furr's demeanor was still suspicious and that he appeared eager to avoid a conversation with the police. He was also anxious, nervous, sweating, and evasive. When Ayala asked Furr if he had any weapons on him, Furr did not initially respond, and it appeared to Ayala that Furr was "kind of out of it" and "looked like he was under the influence of a drug." At that point, Ayala frisked him for weapons and found a glass crack pipe.

Here, as in *J.L.*, the tip was sufficient only to identify the people that were allegedly engaging in illegal activity. *J.L.*, 529 U.S. at 271–72. However, unlike in *J.L.*, once police arrived on the scene, they made a number of independent observations

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[6]Furr had the legal right to avoid the consensual encounter by walking away before it began or to end it after it began by walking away. That is the essence of "consensual." But we emphasize that the inquiry at this point is whether, under the totality of the circumstances, the police had reasonable suspicion to detain Furr for investigative purposes. Furr's decision to walk away, while Collier stayed to talk to Alvarez, was a perfectly acceptable one, but when considering the cumulative force of *all* of the circumstances, his choice to walk away may appear considerably more suspicious.

supporting the tip that Collier and Furr had drugs and were using them.[7] At the time Furr was detained, police had the following information: (1) an anonymous informant reported that two individuals on a specific street corner were using drugs; (2) Furr and Collier were at that the location and matched the descriptions provided by the tipster; (3) the police knew this location to be a "high drug, high crime" area; (4) Furr and Collier watched Alvarez as he drove past them; (5) when Alvarez approached Furr and Collier, Furr walked away furtively; and (6) when police found Furr in the shelter, he was sweaty, nervous, anxious, and seemed out of it, like he was under the influence of a drug. The observations of the police after arriving on the scene here distinguish this case from *J.L.*, in which the *only* basis for the reasonable-suspicion determination was the anonymous tip giving the description of a person carrying a gun at a bus stop. *J.L.*, 529 U.S. at 270. Based on the totality of the circumstances in this case, we hold that police had reasonable suspicion to detain Furr and investigate the allegations of drug use and possession based on the anonymous tip and the observations of responding police.[8]

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[7]We agree with the State that Furr was not detained until the frisk itself; therefore, anything that happened prior to the frisk can be considered in determining whether the police had reasonable suspicion to seize Furr. It was not until Ayala informed Furr that he was going to pat him down for weapons, and Furr submitted to that assertion of authority, that a reasonable person would not have felt free to ignore Ayala's command or to terminate the encounter.

[8]Although the court of appeals ultimately reached the correct result, we are compelled to address a portion of its reasoning. In *Wade*, we said that the "the totality of the suspicious circumstances that an officer relies on must be sufficiently distinguishable from that of innocent people under the same circumstances as to clearly, if not conclusively, set the suspect apart from them." *Wade*, 422 S.W.3d at 670. Relying on this statement, the court of appeals appears to have engaged in a divide-and-conquer approach to viewing the evidence, analyzing and excluding individual circumstances as not suspicious instead of considering the cumulative force of all the

*2. Terry Frisk*

Ayala testified that he patted Furr down for safety reasons because, when officers make contact with a subject on the street who is accused of using drugs in a "high drug, high crime" area, there is always a reason to believe that they will have weapons. Alvarez testified similarly. On cross-examination, Ayala said that, when he patted Furr down, he did not feel in danger or threatened. Alvarez and Ayala agreed that they did not see Furr commit a crime and that all of this began because of an anonymous tip describing the clothing of two people who were "doing drugs" on a specific street corner.

At the outset, the State argues that we should adopt a rule that it is per se objectively reasonable for the police to pat down a suspect for weapons if they are accused of possessing drugs. While it is true that we have held "it is objectively reasonable for a police officer to believe that persons involved in the drug business are armed and dangerous," we made that comment in the context of sellers of narcotics, not mere drug use. *Griffin*, 215 S.W.3d at 409 (citing *Carmouche v. State*, 10 S.W.3d 323,

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circumstances. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). For example, first it considered only that Furr watched Alvarez as he drove past him and concluded such was not suspicious because it was insufficiently distinguishable from the behavior of an innocent person. *Furr*, 2015 WL 307757, at *6. It then decided that nervousness and sweating "alone is insufficient to constitute reasonable suspicion." *Id.*

Our statement in *Wade* did not change the reasonable-suspicion inquiry or its totality-of-the-circumstances approach. We merely recognized that reasonable suspicion does not exist unless the totality of the circumstances supports that conclusion. *Wade*, 422 S.W.3d at 670 (citing *Crockett v. State*, 803 S.W.2d 308, 311 (Tex. Crim. App. 1991)) (stating that, if a person's conduct is indistinguishable from that of an innocent person, there is no reasonable suspicion to believe criminal activity is afoot).

330 (Tex. Crim. App. 2000)) (stating that police are objectively justified in patting down drug dealers for weapons). And we decline the State's invitation to extend that reasoning now. We also reject the State's argument that, because the incident took place outside of a homeless shelter, Ayala was objectively justified in patting Furr down for weapons. The record from the suppression hearing does not indicate that the shelter was a homeless shelter, and even if it did, we fail to see how the fact that a person is accused of using drugs near a homeless shelter necessarily supports a reasonable suspicion that the person is armed and dangerous.

Nevertheless, we agree with the court of appeals that a reasonably prudent person considering all of the circumstances in this case, including the anonymous tip, the personal observations of police, and the area involved, would have been warranted in believing that his safety or that of others was in danger. Accordingly, we hold that police were objectively justified in patting down Furr for weapons.

**CONCLUSION**

Because we conclude that the police had reasonable suspicion to temporarily detain Furr and to pat him down for officer safety, we affirm the judgment of the court of appeals.

Hervey, J.

Delivered: September 21, 2016

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