

DA 17-0737

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 77N

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES COTTER THARIN, JR.,

Defendant and Appellant.

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APPEAL FROM: District Court of the Eighteenth Judicial District,  
In and For the County of Gallatin, Cause No. DC 16-109C  
Honorable John C. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Ryan D. McCarty, Angel, Coil & Bartlett, Bozeman, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant  
Attorney General, Helena, Montana

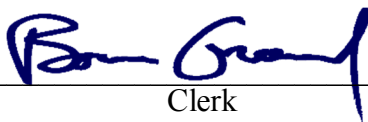
Ed J. Hirsch, City Prosecutor, Bozeman, Montana

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Submitted on Briefs: January 16, 2019

Decided: April 2, 2019

Filed:

  
Clerk

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Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 James Cotter Tharin Jr. appeals from the judgment of the Montana Eighteenth Judicial District Court, Gallatin County, affirming the judgment of the City of Bozeman Municipal Court denying Tharin's motion to suppress evidence of the offense of driving under the influence of alcohol or drugs (DUI). Tharin asserts that the arresting Bozeman police officer lacked sufficient particularized suspicion to effect the initial non-DUI-related traffic stop that ultimately led to the discovery of evidence that Tharin was operating a motor vehicle under the influence of alcohol or drugs. We affirm.

¶3 After midnight on August 18, 2014, Bozeman Police Officer Justin Chaffins (Chaffins) was on patrol in Bozeman westbound on West Mendenhall Street approaching its intersection with North 7th Avenue. Chaffins later testified in Municipal Court that, upon looking to his left up North 7th toward Main Street, he observed a vehicle make a right turn off of Main northbound onto North 7th Avenue across the outside lane into the inside lane. Viewing the turn as an improper right turn in violation of § 61-8-333(1), MCA (requiring right turns "as close as practicable to the right-hand curb or edge of the roadway"), Chaffins activated his emergency lights and effected an investigative traffic stop on the vehicle. As he approached on foot, Chaffins encountered Tharin sitting in the

driver's seat behind the wheel. Based on his observation that Tharin had bloodshot, glassy eyes and an alcoholic odor on his breath, Chaffins asked him to perform various field sobriety tests. Upon completion of the tests, Chaffins arrested Tharin on suspicion of DUI, ultimately citing him into Bozeman Municipal Court for violations of §§ 61-8-333(1) and -401, MCA (improper right turn and DUI).

¶4 Tharin later filed a motion to suppress all evidence discovered incident to the traffic stop on the asserted ground that the arresting officer lacked particularized suspicion to warrant the initial investigative stop as required by § 46-5-401(1), MCA.<sup>1</sup> In support of the motion, Tharin asserted that the officer was not in a position where he could have observed the alleged improper turn and thus lacked sufficient objective data to support a traffic stop based on particularized suspicion of that offense.

¶5 At the suppression hearing, the State presented the testimony of Officer Chaffins, an onboard patrol car video recording, and a post-incident daytime video of the intersection of Main Street and North 7th Avenue from the officer's reported vantage point at the time of the alleged improper turn. Tharin supported his motion with the expert testimony of Christopher A. Gayner, a highly experienced forensic engineering expert.<sup>2</sup> At the close of hearing, based on various predicate findings of fact, the Municipal Court denied the motion

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<sup>1</sup> Tharin also filed a separate evidentiary motion *in limine* seeking exclusion of the results of the officer's Horizontal Gaze Nystagmus test on the asserted ground that he was not sufficiently qualified to perform the test.

<sup>2</sup> Gayner's expertise included a Bachelor of Science and Master's degree in engineering, 29 years of experience as a forensic engineer expert regarding traffic cases, over 1,000 forensic consultations, and expert testimony in over 200 depositions and approximately 100 jury trials.

to suppress based on its ultimate finding that the officer had sufficient particularized suspicion of the alleged improper turn.

¶6 Tharin later pled guilty to an amended charge, operating a motor vehicle with a blood alcohol content in excess of 0.08%, under a plea agreement that reserved his right to appeal the denial of his suppression motion. Upon timely appeal, the District Court affirmed the Municipal Court ruling by order filed October 24, 2017. Tharin timely appeals to this Court and we restate the dispositive issue as whether the Municipal Court erroneously denied Tharin's motion to suppress due to lack of particularized suspicion to warrant the initial traffic stop?

¶7 District courts function as intermediate appellate courts on appeal from municipal courts of record, with review confined to the municipal court record and questions of law. Sections 3-5-303, 3-6-110(1), MCA; *State v. Luke*, 2014 MT 22, ¶ 9, 373 Mont. 398, 321 P.3d 70.<sup>3</sup> On appeal of a lower court judgment following intermediate appeal, we review the record independently of the district court as if appealed directly to this Court without intermediate review. *State v. Maile*, 2017 MT 154, ¶ 7, 388 Mont. 33, 396 P.3d 1270; *Stanley v. Lemire*, 2006 MT 304, ¶¶ 25-26, 334 Mont. 489, 148 P.3d 643. We review lower court findings of fact for clear error, conclusions of law de novo for correctness, and discretionary rulings for an abuse of discretion. *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 8, 391 Mont. 457, 419 P.3d 1208; *State v. Davis*, 2016 MT 206, ¶¶ 5-6, 384 Mont. 388, 378 P.3d 1192.

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<sup>3</sup> The City of Bozeman Municipal Court is a court of record as defined by § 3-6-101(1), MCA.

¶8 The Fourth and Fourteenth Amendments to the United States Constitution and Article II, § 11 of the Montana Constitution protect individuals from unreasonable government searches and seizures. Procedurally, those protections generally prohibit government searches and seizures except pursuant to a judicial warrant issued on probable cause. U.S. Const. amend. IV and XIV; Mont. Const. art. II, § 11.

¶9 As a limited exception to the warrant requirement, a law enforcement officer may stop and temporarily detain a person for investigative purposes without probable cause for an arrest if, based on *specific and articulable facts known to the officer*, including rational inferences therefrom based on the officer's training and experience, the officer has an objectively reasonable, particularized suspicion that the person is engaged, or about to engage, in criminal activity. *State v. Elison*, 2000 MT 288, ¶ 15, 302 Mont. 228, 14 P.3d 456; *State v. Roberts*, 1999 MT 59, ¶ 12, 293 Mont. 476, 977 P.2d 974; *State v. Reynolds*, 272 Mont. 46, 49-50, 899 P.2d 540, 542 (1995); *State v. Gopher*, 193 Mont. 189, 193-94, 631 P.2d 293, 295-96 (1981); *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 694-95 (1981); *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 1877-79 (1968). The 1991 Legislature codified the Fourth Amendment particularized suspicion standard articulated in *Terry*, *Cortez*, and *Gopher*, to wit:

In order to . . . determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.

Section 46-5-401(1), MCA (1991 Mont. Laws ch. 800, § 42). *See also State v. Bar-Jonah*, 2004 MT 344, ¶ 42, 324 Mont. 278, 102 P.3d 1229 (noting codification of constitutional

principles). The question of whether an officer had a particularized suspicion of criminal activity is generally a question of fact under the totality of the circumstances but may encompass predicate questions of law such as whether the suspected activity is illegal. *State v. Kaufman*, 2002 MT 294, ¶ 11, 313 Mont. 1, 59 P.3d 1166; *Cortez*, 449 U.S. at 417-18, 101 S. Ct. at 695.

¶10 Here, based on the hearing record, the Municipal Court essentially found that Officer Chaffins was an experienced police officer who likely had an unobstructed view of Tharin’s vehicle as it made the alleged right turn off of Main Street northbound onto North 7th Avenue across the outside lane into the inside lane. The court further found, *inter alia*, that an experienced officer could have observed the alleged turn as described and that Chaffins’s testimony was clear and credible.

¶11 Based on the independent site inspection and analysis of his forensic engineering expert, Tharin contrarily asserts that the District Court erroneously rejected compelling expert testimony and supporting demonstrative evidence that that it would have been “nearly impossible” for Chaffins to have observed the alleged improper turn due to the officer’s distant vantage point, the prevailing nighttime conditions, and the rapid sequence of events. However, except as otherwise provided by law, the finder of fact is the sole arbiter of the relative weight, credibility, and persuasiveness of evidence, including expert and non-expert testimony. *See* §§ 26-1-202, -203, MCA; *State v. Sanchez*, 2017 MT 192, ¶ 19, 388 Mont. 262, 399 P.3d 886. *See also* § 26-1-301, MCA (“direct evidence of one witness . . . entitled to full credit is sufficient for proof of any fact . . .”). The finder of fact is thus free to reject expert testimony in favor of other substantial evidence—including

non-expert testimony—found to be more persuasive, weighty, or credible. *See* §§ 26-1-203, -301, -302, and -303(2), MCA; *Sanchez*, ¶¶ 17-19; *State v. Race*, 285 Mont. 177, 181, 946 P.2d 641, 643 (1997). Here, substantial evidence in the Municipal Court record clearly supports the court’s essential findings of fact regardless of the presence of conflicting testimony from Tharin’s forensic engineering expert. The Municipal Court had broad discretion to resolve conflicting evidence based on its discretionary determination of the relative weight, credibility, and persuasiveness of the evidence under the totality of the circumstances. The record reflects no abuse of that discretion under our deferential standard of review for lower court findings of fact.

¶12 Tharin further asserts that the District Court erroneously weighed the evidence by viewing and weighing Officer Chaffins’s testimony as expert testimony under M. R. Evid. 702, rather than mere non-expert testimony under M. R. Evid. 701. Tharin correctly points out that the Municipal Court characterized Chaffins as “an expert just as others become experts in their fields.” However, in context, the court made this albeit loose statement as an unnecessary secondary comment to its primary finding that Chaffins was an experienced patrol officer, a factor highly relevant under the trial court standard for determining the existence of a particularized suspicion of criminal activity. *See Elison*, ¶ 15; *Gopher*, 193 Mont. at 193-94, 631 P.2d at 295-96; *Cortez*, 449 U.S. at 417-18, 101 S. Ct. at 694-95; *Terry*, 392 U.S. at 16-19, 88 S. Ct. at 1877-79. In that regard, the State did not offer or assert Chaffins as an expert—it merely presented and characterized him as an experienced police officer. Moreover, in contrast to expert testimony as defined by M. R. Evid. 702 (opinion or similar testimony based on “scientific, technical, or other specialized

knowledge” commonly beyond the ken of lay persons), Chaffins’s testimony clearly did not exceed the permissible scope of non-expert testimony under M. R. Evid. 701 (“opinions or inferences . . . rationally based on” the witness’s own personal “perception” of the factual occurrence at issue). Chaffins merely testified regarding his personal observations of the incident in question. We hold that the Municipal Court correctly determined that Officer Chaffins had sufficient particularized suspicion of the alleged improper right turn in violation of § 61-8-333(1), MCA, thus warranting his initial investigatory traffic stop of Tharin.

¶13 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶14 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH  
/S/ BETH BAKER  
/S/ INGRID GUSTAFSON  
/S/ JAMES JEREMIAH SHEA