Affirmed and Opinion filed January 17, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00134-CR

DERLIZ RAY HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 810,450

O P I N I O N

Appealing his conviction of possession of heroin, appellant Derliz Hernandez contends the trial court erred by: (1) denying his motion to suppress evidence allegedly seized in violation of his Fourth Amendment rights and (2) failing to instruct the jury on the issue of probable cause. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Around seven o'clock in the evening on April 14, 1999, Frank Scoggins, a Houston Police Department narcotics officer, received a telephone call from a confidential informant

he had used several times in the past. On each previous occasion, the informant had provided credible and reliable information. This time, the confidential informant claimed he had just left appellant, who was in possession of heroin and had immediate plans to sell it. The informant told Officer Scoggins that appellant went by the nickname, "D" and would be at the corner of Pecore and North Main selling heroin out of a gray Toyota van. The informant gave a description of appellant and of the van, including the license plate number. This description matched a more detailed physical description of appellant and the van which the same informant had given Officer Scoggins on a previous occasion. Moreover, Officer Scoggins was personally familiar with this particular van because he arrested, two weeks earlier, another individual selling heroin out the same van.

Upon receiving the informant's tip and without obtaining a warrant, Officer Scoggins headed for the specific location. When he did not find the van at the designated location, Officer Scoggins drove approximately one mile to the residence of the drug dealer he had arrested two weeks earlier selling heroin out the van. There, he saw a gray Toyota van with the license plate number the informant had provided. Officer Scoggins drove past the van in his unmarked vehicle and identified appellant, who sat in the driver's seat conversing with an individual standing outside the driver's side window. Officer Scoggins recognized the individual standing outside the van from a previous drug related arrest. Officer Scoggins called for assistance from marked patrol units and waited for their arrival. Officers Bigger, Guerrero, Murray, and Curtis arrived almost immediately. All the officers approached the van from the front and back.

Officer Scoggins testified that he approached the driver's side, identified himself, and instructed appellant to step out of the van. Appellant complied, but had difficulty responding to any of Officer Scoggins' questions. While Officer Scoggins questioned appellant, Officer Bigger approached the individual standing outside the van and Officer Murray questioned the passenger of the van.

Officer Scoggins informed the other officers that he believed appellant was hiding

the drugs in his mouth. Officer Scoggins and the others then pushed appellant over the front of the van, grabbed his neck, and ordered him to "spit it out." Out of appellant's mouth fell a golf-ball sized plastic bag with electrical tape wrapped around a piece of "tar heroin." Officer Scoggins seized the substance.

At trial, appellant gave a substantially different version of the events leading to his arrest. According to appellant's trial testimony, Officer Scoggins ran up to his van door, pulled him out the van, and yelled at him to put his "hands up." Appellant claimed Officer Scoggins pulled everything out of his pockets and looked down his shorts, and then ordered him to open his mouth. Appellant testified that he complied, raising and lowering his tongue at Officer Scoggins' directions. Appellant maintained that although the golf-ball sized object was in his mouth, Officer Scoggins completely missed it. Appellant testified that Officer Scoggins looked in his mouth twice, told him to put his hands on the van, and told the other officers to watch appellant. Appellant alleges that Officer Scoggins then proceeded to search the van and during this search told the other officers, "It is in his mouth." Appellant testified that it was only after the van had been fully searched, that the officers pushed him over the front of the van, choked him, and ordered him to spit out the drugs. Johnny Verastigui, Jr., the passenger in the van, also testified that the police searched the whole vehicle and appellant before forcing appellant to spit out the object.

Indicted for possession of heroin with intent to distribute, appellant pleaded not guilty and filed a motion to suppress the heroin. After a hearing on the motion, the trial court denied appellant's motion to suppress. In the trial that followed, appellant sought a jury instruction under article 38.23 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2001). The trial court refused to give the instruction. The jury convicted appellant as charged and assessed punishment at twenty-five years' confinement in the Texas Department of Criminal Justice, Institutional Division.

II. ISSUES PRESENTED ON APPEAL

Appellant presents four points of error for our review. In the first three, appellant contends the trial court erred in denying his motion to suppress because the officers did not have reasonable suspicion to detain him or probable cause to arrest and search him. In the fourth, appellant contends that the trial court erred in denying his request for an Article 38.23 probable cause instruction.

III. MOTION TO SUPPRESS

A. Standard of Review

A ruling on a motion to suppress will not be reversed unless the trial court abused its discretion. *Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999). When reviewing a trial court's ruling on a motion to suppress evidence, we apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historical facts and reviewing *de novo* the trial court's application of the law of search and seizure. *See Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 88–89 (Tex. Crim. App. 1997). Our review affords almost total deference to the trial court's determination and evaluation of the credibility and demeanor of the witnesses who testify. *Guzman*, 955 S.W.2d at 87; *see also Durrett v. State*, 36 S.W.3d 205, 208–09 (Tex. App.–Houston [14th Dist.] 2001, no pet.).

Where the trial court made no explicit findings of historical fact, we presume it made those findings necessary to support its ruling, provided they are supported in the record. *See Carmouche*, 10 S.W.3d at 328. Likewise, we view evidence in the light most favorable to the trial court's ruling on mixed questions of law and fact. *See Guzman*, 955 S.W.2d at 89. The trial court's determinations as to both reasonable suspicion and probable cause are reviewed *de novo*. *See Carmouche*, 10 S.W.3d at 328; *Guzman*, 955 S.W.2d at 87.

B. Reasonable Suspicion For Investigative Detention

In his first point of error, appellant argues the police officers lacked the necessary reasonable suspicion to detain him. Appellant's contention lacks merit. An investigative detention occurs when a police officer, under a display of law enforcement authority, temporarily detains a person for purposes of an investigation. *See Johnson v. State*, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995). A law enforcement officer may stop and briefly detain persons suspected of criminal activity on less information than is constitutionally required for probable cause to arrest. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Davis v. State*, 947 S.W.2d 240, 244 (Tex. Crim. App. 1997); *Garza v. State*, 771 S.W.2d 549, 558 (Tex. Crim. App. 1989). However, the officer still must have reasonable suspicion to justify an investigative detention. *See Davis*, 947 S.W.2d at 242–43. "Reasonable suspicion" requires that the officer have specific articulable facts which, in light of his experience and personal knowledge, together with rational inferences from those facts, would reasonably warrant the intrusion on the freedom of the detainee for further investigation. *See Comer v. State*, 754 S.W.2d 656, 657 (Tex. Crim. App. 1986). These "articulable facts" must create a reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detained person with the unusual activity, and some indication that the activity is related to a crime. *See Davis*, 947 S.W.2d at 244.

Whether reasonable suspicion is present is determined under an objective standard. *See Terry*, 392 U.S. at 21–22; *Davis*, 947 S.W.2d at 243. The officer making an investigative detention or stop must be able to articulate something more than an unparticularized suspicion or hunch. *See Williams v. State*, 621 S.W.2d 609, 612 (Tex. Crim. App. 1981). Reasonable suspicion is based on the totality of the circumstances and is dependent upon the reliability of the information possessed by the police. *Alabama v. White*, 496 U.S. 325, 330 (1990); *Guevara v. State*, 6 S.W.3d 759, 763(Tex. App.–Houston [1st Dist.] 1999, pet. ref'd.).

In situations involving the police's use of an informant, we consider the informant's

reliability in analyzing the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417 (1981) (stating that under the totality of the circumstances, the entire incident must be taken into account.); *see also Woods v. State*, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997). We also consider, as part of the totality of the circumstances, whether an informant's tip contains details relating not only to easily obtainable facts and conditions existing at the time of the tip, but also to future actions of third parties not easily predicted. *See Illinois v. Gates*, 462 U.S. 213, 241–46 (1983).

A confidential informant can provide the requisite reasonable suspicion to justify an investigative detention providing additional facts are present to demonstrate the informant's reliability. *See State v. Sailo*, 910 S.W.2d 184, 189–90 (Tex. App.–Fort Worth 1996, pet. ref'd.) (stating that an informant's veracity, reliability, and basis of knowledge are highly relevant.); *Carmouche*, 10 S.W.3d at 326 (placing significant emphasis on informant's previous history of providing reliable information in finding warrantless detention justified based upon informant's tip).

During the suppression hearing, Officer Scoggins testified that he received information from a confidential informant he had used on several prior occasions. This informant had always given credible and reliable information in the past. When questioned as to the informant's reliability and credibility, Officer Scoggins testified that he had dealt with informant on a dozen prior occasions and considered him reliable.

There is nothing in the record to suggest that Officer Scoggins had reason to doubt the informant's reliability or credibility. In addition, Officer Scoggins was able to corroborate much of the information the informant provided. In a totality of the circumstances analysis, corroboration by the law enforcement officer necessarily goes to the quality and reliability, of the information. *See Sailo*, 910 S.W.2d at 188.

The informant told Officer Scoggins that he had been with appellant the entire day and that appellant was in the possession of heroin which he intended to sell out of a van. The

informant described the vehicle and gave the license plate number. Within minutes from receiving the tip, Officer Scoggins left to find appellant. Although the officer did not find appellant in the designated location, the officer spotted him nearby in a van matching the description and license plate number given by the informant. The area was known for its drug trafficking. The fact that the informant had provided reliable information in the past, that appellant was near the place the informant had indicated, and that appellant and his vehicle matched the descriptions the informant had given the police, provided the officers with sufficient corroborating evidence to give rise to "reasonable suspicion" to stop and detain appellant. *See Carmouche*, 10 S.W.3d at 328. The totality of the circumstances shows that Officer Scoggins' warrantless detention of appellant was justified. Accordingly, we overrule appellant's first point of error.

C. Probable Cause to Arrest and Search

In his second point of error, appellant argues the police, without probable cause or a warrant, arrested him when they approached the van, ordered him out of the van, and instructed him to spit the drugs out of his mouth. In his third point of error, appellant contends the police, without probable cause or a warrant, conducted an unreasonable search of his mouth. We review *de novo* the determination of the existence of probable cause. *Guzman*, 955 S.W.2d at 87.

The Fourth Amendment of the United States Constitution and Article I, section 9 of the Texas Constitution guarantee the right to be secure from unreasonable searches and seizures made without probable cause. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9. No evidence obtained by an officer or other person in violation of any provisions of the constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted against the accused in a criminal case. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2000).

Appellant contends he was arrested without probable cause when the officers

approached the van and ordered him to exit. Alternatively, appellant maintains that if no arrest occurred initially, then he was arrested without probable cause when the officers choked him and forced him to spit the heroin out of his mouth. The State does not address whether appellant was arrested or merely detained at the time the officers approached him and instructed him to spit out the heroin; rather, the State maintains that the circumstances surrounding appellant's detention were more than sufficient to find probable cause for an arrest. We agree that whether appellant was arrested or detained at the time the officers approached him and ordered him out of the van is irrelevant to the resolution of this point of error. We find that probable cause existed for a warrantless arrest.

Generally, an arrest or search without a valid arrest warrant is unreasonable. *See Wilson v. State*, 621 S.W.2d 799, 803-04 (Tex. Crim. App. 1981). However, this rule has several exceptions. *See* TEX. CODE CRIM. PROC. ANN. art. 14.01-14.03 (Vernon 1977). An officer may make a warrantless arrest or search if (1) there is probable cause and (2) the arrest falls within the provision of one of the statutes authorizing a warrantless arrest. *Anderson v. State*, 932 S.W.2d 502, 506 (Tex. Crim. App. 1996); *McGee v. State*, 23 S.W.3d 156 (Tex. App.–Houston [14th Dist.] 2000, pet. granted). The State must show the existence of probable cause at the time of the arrest or search and the existence of circumstances which made the procuring of a warrant impracticable. *Crane v. State*, 786 S.W.2d 338, 346 (Tex. Crim. App. 1990).

An officer can arrest or search a suspect without a warrant when exigent circumstances justify a warrantless arrest. *Farmah v. State*, 883 S.W.2d 674, 677 (Tex. Crim. App. 1994). Four requirements must be met before such arrest can occur: (1) the person who gives the information to the peace officer must be credible; (2) the offense must be a felony; (3) the offender must be about to escape; and (4) there must be no time to procure a warrant. TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1977). Another exception to the warrant requirement is an officer's reasonable belief that the individual has committed an offense. TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon 1977). Furthermore, a peace officer may

arrest an offender without a warrant for any offense committed in his presence. TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon 1977).

The ultimate issue of whether a warrantless arrest or search is authorized comes down to whether the officer had probable cause to believe that the arrested person was committing or had committed an offense. *See Beverly v. State*, 792 S.W.2d 103, 105 (Tex. Crim. App. 1990). The test for the existence of probable cause is "whether at that moment the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense." *Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989). The existence of probable cause requires an analysis of the facts of each case. *See Gonzales v. State*, 648 S.W.2d 684, 687 (Tex. Crim. App. 1983). This test considers whether in light of "all the facts and circumstances including the veracity and basis of knowledge of persons supplying hearsay information, a fair probability exists that contraband or evidence of a crime will be found in a particular location." *Rodriguez v. State*, 838 S.W.2d 780, 782 (Tex. App.–Corpus Christi 1992, no pet.). An investigating officer's mere suspicion, without more, is insufficient to constitute probable cause for an arrest. *See Adkins v. State*, 764 S.W.2d 782, 785 (Tex. Crim. App. 1988). However, it is not necessary that the offense be committed within the arresting officer's presence, as long as he has reasonably trustworthy information to warrant a prudent person in believing that the suspect has committed the offense. *See Joseph v. State,* 3 S.W.3d 627 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *De Jesus v. State,* 917 S.W.2d 458 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd).

Probable cause to arrest a person can exist based upon a tip from a reliable and credible informant, if the informant's information is highly detailed and, before making the arrest, the officers verify the details given by the informant. *See Draper v. United States*, 358 U.S. 307, 309 (1959) (finding probable cause where informant gave detailed physical description of the defendant, the clothing he was wearing, the bag he was carrying, and his

habit of walking fast); *Curry v. State*, 965 S.W.2d 32, 34 (Tex. App.–Houston [1st Dist.] 1998, no pet.) (finding probable cause where a detailed description of the defendant and his first name was provided); *Rodriguez v. State*, 775 S.W.2d 27, 30–31 (Tex. App.–Houston [14th Dist.] 1989, pet. ref'd); *Whaley v. State*, 686 S.W.2d 950, 951 (Tex. Crim. App. 1985) (holding probable cause existed where informant described defendant wearing a white shirt with colored trim and blue jeans, and the bag he was carrying).

The evidence at trial must show the informant's reliability and credibility. Evidence as to either the informant's specific veracity or his basis of knowledge is sufficient to show credibility and reliability. *Eisenhauer v. State*, 678 S.W.2d 974, 952 (Tex. Crim. App. 1984). An informant's reliability can be proved by showing the informant has provided truthful information in the past. *Rodriguez*, 838 S.W.2d at 782. Another way is to corroborate the information through independent investigation. *See id*. Reliability is strengthened if the tip is based on personal observation rather than hearsay and if the tip is given in great detail, showing the informant has a strong basis for his knowledge. *Id*. When an informant has given reliable and credible information in the past, and all of the details of the informant's tip are corroborated except the question of whether appellant possessed drugs, *i.e.*, heroin, the police have probable cause to arrest and search the accused under the "totality of the circumstances" test. *See e.g., Whaley*, 686 S.W.2d at 951.

Based on the facts cited above, the officers had probable cause to believe that appellant had committed or was committing the crime of possession of a controlled substance. *See Jones v. State*, 640 S.W.2d 918, 920 (Tex. Crim. App. 1982) (tip of informant, who had provided true and correct information on two previous occasions and had given highly detailed description of appellant and location of drugs, was sufficient to establish probable cause); *Vasquez v. State*, 699 S.W.2d 294, 295 (Tex. App.–Houston [14th Dist.] 1985, no pet.) (probable cause established by the detailed and comprehensive nature of the informant's tip). The informant had a long track record of reliability and had provided credible and reliable information on over a dozen occasions. The tip he gave Officer

Scoggins was based on his personal observations of appellant dealing heroin from a gray Toyota van at a specific location. The details given by the informant were independently corroborated by the officers when Officer Scoggins identified both appellant and the van in an area known for its drug activity. Under the totality of the circumstances, probable cause existed to justify a warrantless arrest of appellant. *See Guzman*, 955 S.W.2d at 90 (stating that the fact defendant was found in an area well-known for its drug trafficking is an important factor when considering the totality of the circumstances).

Furthermore, as to appellant's third point of error, we find that exigent circumstances justified a warrantless search of appellant for the purpose of preventing the imminent destruction or concealment of evidence. *See Moss v. State*, 878 S.W.2d 632, 641–42 (Tex. App.–San Antonio 1994, pet. ref'd). When an officer has probable cause to believe that an offense is being committed in his presence, he has the right to take reasonable measures to insure that incriminating evidence is not destroyed. *Hernandez v. State*, 548 S.W.2d 904 (Tex. Crim. App. 1977) (holding that reasonable physical contact is one measure which may be used). Officer Scoggins had probable cause to believe appellant was hiding contraband in his mouth. Based on his experience in heroin investigations, Officer Scoggins knew that suspects will sometimes place heroin in a balloon or something similar and swallow it when the police approach. After realizing appellant had difficulty in answering his questions, Officer Scoggins began to consider the possibility that appellant might be concealing something in his mouth. Upon closer observation of appellant's facial expressions and mannerisms, Officer Scoggins concluded appellant had something his mouth and was trying to swallow it. Viewing the totality of the circumstances, we find the informant's tip, coupled with the independent corroboration and direct observations by the police, provided sufficient probable cause to perform a warrantless search of appellant. *See e.g.*, *Guzman*, 955 S.W.2d at 90 (stating that probable cause existed, when coupled with the officer's prior knowledge, the defendant began overtly swallowing during questioning). We overrule appellant's second and third points of error.

IV. JURY CHARGE

In his fourth point of error, appellant asserts the trial court erroneously refused to instruct the jury under article 38.23 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2001). Appellant contends that because he raised an issue as to whether the officer's initial encounter with him was an arrest or detention, he was entitled to the instruction.

A. Preservation of Error

The State contends appellant's objection on appeal does not comport with the objection he voiced at trial and therefore he has waived any error. At trial, appellant's counsel requested a jury instruction regarding the law of probable cause, stating:

> **Mr. Zorn [defense attorney]:** . . . Also there's one other matter, Your Honor, while the jury's out. We're asking the Court to consider giving this jury an instruction regarding the law of probable cause to arrest and search.
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> . . .
>
> **Mr. Zorn:** The defendant's contention in this particular case, the officers came upon him in his vehicle, they blocked him, he was arrested at that point. There was no probable cause for this arrest and anything that happened to him after that time was illegal and unlawful. We had testimony that there was a confidential informant. We were not provided the name of the informant. We don't know who he was. We weren't given any credible facts that indicate that this informant was reliable or credible and, in short, Your Honor, we didn't have any probable cause established in this trial for there to be any arrest of the defendant; and, therefore, we're asking for this instruction and let the jury make that decision.
>
> **The Court:** Well, I found Officer Scoggin's testimony that he was investigating a violation of the narcotics law and had a confidential informant tip about the defendant he was following up on and he said he was detained. And I know that's maybe something you didn't agree with; but he said he was going to question him and he would have been free to go after that. Whether he ought [sic] have or not, it became a moot question because he said when the defendant spit out the evidence is when he - - you

> know, he arrested him and held him and then he took him under arrest. The difference between detaining him when he would be free to go after questioning versus taking him into custody and taking him to jail, he did make some distinction there. I'll deny your motion. It appears there's no disputed fact issues as to 38.23 charge.

Appellant contends that he was entitled to the instruction because there was a factual dispute as to whether appellant was arrested or detained when the officers initially approached him in the van. The State counters that because appellant's objection at trial was based on the fact that the State failed to establish probable cause or the reliability of the informant, and not on whether a factual dispute exists as to whether appellant was arrested or detained, he has preserved nothing for review. We disagree. To preserve error, an objection to the admission of evidence must state the specific ground for the objection if the specific ground is not apparent from the context. TEX. R. EVID. 103(a); TEX. R. APP. P. 33.1; *Bird v. State*, 692 S.W.2d 65, 70 (Tex. Crim. App. 1985).

It is clear from the above exchange that the trial court understood the basis of the objection and stated that there appeared to be no disputed fact issue as to whether appellant was detained or arrested. Because it is clear that the trial court understood the objection and its ground, error has been preserved. *See Dixon v. State*, 2 S.W.3d 263, 265 (Tex. Crim. App. 1998).

B. Exclusionary Rule Instruction

Appellant was entitled to an article 38.23 instruction only if the evidence raised a fact issue concerning whether the heroin was obtained in violation of the United States Constitution, Texas Constitution, or any of its laws. *See Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996). When the essential facts concerning a search or arrest are not in dispute, the legality of the search or arrest is a question of law, not fact. *Campbell v. State*, 492 S.W.2d 956, 958 (Tex. Crim. App. 1973); *Brooks v. State*, 707 S.W.2d 703, 706 (Tex. App.–Houston [1st Dist.] 1986, pet. ref'd). If material facts are not disputed, the decision of whether the facts provided probable cause is one for the court, not the jury. *See Rose v.*

State, 470 S.W.2d 198, 200 (Tex. Crim. App. 1971). Therefore, the trial court is not required to submit an issue to the jury if there is no fact issue and the matter can be resolved as a matter of law. *Pierce v. State,* 32 S.W.3d 247, 251 (Tex. Crim. App. 2000).

Appellant contends the evidence raises an issue as to whether he was under arrest or detained when the police initially ordered him out the van. Specifically, appellant alleges that defense witness Verastigui (van passenger) disproves the State's version of the initial approach. The particular facts on which appellant relies concern whether the officers had their guns drawn and searched appellant and his van *before* questioning him. Appellant maintains that if the jury believed these facts, then it would have been their duty to decide whether there was probable cause at the time of the initial approach. Appellant, however, does not refer us to any evidence in the record raising a factual dispute; he merely asserts on appeal that, at trial, he raised the issue by arguing the evidence seized by the officers was not supported by probable cause.

Probable cause for the arrest and search of both appellant and the van was established by information provided by an informant whose credibility and reliability was established by Officer Scoggins. Officer Scoggins acted on the informant's tip and independently verified the information through his own personal observations. The police, at the time of the *initial approach,* had probable cause to search and arrest appellant. Thus, whether the police had their guns drawn or searched appellant before questioning him are not material facts. On appeal, appellant does not challenge the facts and circumstances of the informant's tip or the independent corroboration by Officer Scoggins. Verastigui's testimony does not raise a material factual dispute as to whether the officers had probable cause to believe appellant was in possession of heroin with plans to distribute it out of a van. Verastigui's contradictory testimony as to the officers' actions upon arriving on the scene does not raise a factual issue as to the legality of the search of appellant or the van.

Appellant has failed to identify any relevant factual dispute and the evidence shows that the officers had probable cause to arrest and search him. Therefore, appellant was not

entitled an instruction on this issue. Accordingly, the trial court did not err in refusing to instruct the jury under article 38.23. We overrule appellant's fourth point of error.

Having found no merit in appellant's points of error, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 17, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).