Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-01445-CR

ROLAND HAYES SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 98-30545

O P I N I O N

A jury convicted Roland Hayes Smith of driving while intoxicated; the trial court assessed punishment at 180 days' confinement, probated for one year, and an $800 fine. In three points of error appellant contends the trial court erred in not granting his motion to suppress, in not permitting the jury to view the videotape of his arrest upon request, and in not instructing the jury pursuant to TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 2000). We affirm.

Appellant was stopped for a traffic violation. After the officer noticed signs of alcohol consumption, he administered roadside sobriety tests which indicated intoxication;

at that point appellant was arrested. Appellant contends the trial court should have suppressed testimony about his performance of these tests because he was not warned of his rights prior to performing these tests, in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). We find the trial court did not err.[1] A traffic stop does not constitute custody for purposes of *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 441-442 (1984); *State v. Stevenson*, 958 S.W.2d 824, 828 (Tex. Crim. App. 1997); *Hutto v. State*, 977 S.W.2d 855, 858 (Tex. App.—Houston [14th Dist.] 1998, no pet.). We therefore overrule appellant's first point of error.

In his second point of error appellant contends that the trial court erred in not permitting the jury to view the videotape of appellant's field sobriety tests. We find that appellant has failed to preserve error. During its deliberations, the jury sent out numerous notes, one of which asked to see the videotape of appellant's field sobriety tests. No objection was raised as to the trial court's handling of this request by the jury. Because this complaint was not presented to the trial court, nothing is presented for review. TEX. R. APP. P. 33.1. Appellant's second point of error is overruled.

In his third point of error appellant contends the trial court erred by not charging the jury on Article 38.23(a) of the Code of Criminal Procedure. That code section provides:

> No evidence obtained by an officer or other person in violation of any provision 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 in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

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[1] The State contends appellant failed to preserve error because his written motion to suppress did not contain this complaint. However, during the trial the trial court conducted a motion to suppress hearing during which appellant presented this complaint; the trial court overruled the motion. We therefore find appellant has preserved error.

> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

We overrule appellant's third point of error for two reasons. First, we have already determined there was no constitutional violation; therefore appellant was not entitled to this instruction. Secondly, there is no factual dispute as to what happened. Absent a factual dispute, there is no ground for instructing the jury under article 38.23. *See Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996).

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Hutson-Dunn, Sears, and Draughn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sears, Draughn, and Hutson-Dunn sitting by assignment.