Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01318-CR

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ANTHONY POSTEL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 742,499

O P I N I O N

Anthony Postel appeals his conviction by a jury for felony driving while intoxicated (DWI). The trial court assessed his punishment at 32 years imprisonment, enhanced by two prior felony narcotics convictions. In two points of error, appellant contends the trial court erred (1) in receiving evidence because the officer had no probable cause to arrest appellant, and (2) in denying appellant's request for a jury instruction concerning lawfully obtained evidence under article 38.23, Texas Code of Criminal Procedure. We affirm.

On January 16, 1997, Deputy Cook (Cook) was driving to the location of a reported disturbance in Harris County. Cook was driving north on John Ralston street and observed

appellant's car coming toward him about 500 feet away at a high rate of speed. Cook made a left turn onto Scenic River street, and then observed appellant's vehicle run off the road. Appellant's vehicle then came straight toward Cook, and Cook accelerated to avoid a collision. Cook turned around and followed appellant, and observed that appellant was not wearing his seatbelt. Cook turned on his overhead lights and siren, and appellant pulled into a gas station and stopped. Cook walked up to the driver's side of appellant's vehicle, and smelled a strong odor of alcohol on appellant. In talking to appellant, Cook observed that appellant's speech was slurred and his eyes were glassy and bloodshot. Cook observed two open beer cans in the front seat of appellant's car. Cook stated that the cans were half full and cold. Appellant got out of his car, almost fell, and had to catch himself using his car to break his fall. Appellant appeared very unsteady, and Cook had appellant perform two field sobriety tests. Appellant performed poorly on the tests, and he almost fell down on one of the tests. Cook stated that appellant's passenger, Rodney Rodriguez, was "worse off" than appellant. Before Cook took appellant to the police station, he ordered a wrecker to tow appellant's car from the scene. Cook released Rodriguez on his own recognizance, and Rodriguez got a ride home with the wrecker driver. Cook took appellant to the police station, and appellant refused to take a breath test. Cook then videotaped appellant, and appellant refused to perform any field sobriety tests while being videotaped.

At trial, after Cook was cross-examined by appellant's counsel, the State proved up two prior misdemeanor DWI convictions to support the felony DWI charge. Appellant's counsel did not object to the two prior convictions, and they were admitted into evidence. The videotape was admitted into evidence without objection. After Cook testified, and after the prior misdemeanor convictions were admitted into evidence, appellant's counsel then sought a ruling on his motion to suppress. Appellant's counsel argued that Cook did not have reasonable suspicion to stop appellant and the State's evidence should be suppressed. The trial court overruled appellant's motion to suppress.

Rodney Rodriguez, appellant's brother-in-law, testified that he was with appellant that night. He said appellant swerved to avoid a tree stump in the road, causing him to run off the

road. Rodriguez stated there were no beer cans in the front seat of appellant's car, and that neither he nor appellant had anything to drink that night. Rodriguez said they drank a couple of "Mountain Dew" sodas that evening, but no alcohol.

Several of appellant's friends and relatives testified to the effect that appellant had nothing to drink on the date of the offense. In rebuttal, Deputy Cook again testified that Rodriguez was "highly intoxicated."

In point one, appellant contends the trial court erred in receiving evidence resulting from a warrantless arrest when there was no probable cause shown for the arrest. Appellant argues that appellant committed no traffic violation when he ran off the road which would justify the officer's stop. The State contends appellant has waived this point of error because he did not object to the State's evidence in a timely fashion and request a hearing on his motion to suppress out of the presence of the jury. The State further contends appellant has waived his complaint because he did not meet his initial burden by proving that the police seized him without a warrant. We agree.

In *Thomas v. State,* the court of appeals ruled on a similar procedural default. 884 S.W.2d 215, 216 (Tex.App.–El Paso 1994, pet. ref'd). As in this case, the appellant in *Thomas* did not obtain a hearing or ruling upon his motion to suppress before trial, and he agreed that the motion to suppress could be carried over to trial and raised by objection at the appropriate time. *Id.* Under those circumstances, the mere filing of the motion to suppress did not preserve error, and the appellant as in *Thomas* was required to make a timely objection at trial in order to do so. TEX.R.APP.P. 33.1(a); TEX.R.EVID. 103(a)(1); *see Ross v. State*, 678 S.W.2d 491, 493 (Tex.Crim.App.1984); *Thomas*, 884 S.W.2d at 216.

To be timely, an objection must be raised at the earliest opportunity or as soon as the ground of objection becomes apparent. *Martinez v. State*, 867 S.W.2d 30, 35 (Tex.Crim.App.1993); *Johnson v. State*, 803 S.W.2d 272, 291 (Tex.Crim.App.1990), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1078 (1991), overruled on other

grounds, *Heitman v. State*, 815 S.W.2d 681, 685 (Tex.Crim.App.1991); *Thomas*, 884 S.W.2d at 216. The record reflects that appellant in this case did not lodge any objection until after he had allowed Cook to testify extensively before the jury concerning the facts of this case. Appellant's statutory DWI warning, videotape, and prior DWI convictions were also admitted without objection. Although Appellant later urged his motion to suppress outside the presence of the jury and objected to the admission of the State's evidence on the grounds of no probable cause, we find that he failed to object at the earliest opportunity, and by so doing, waived error. *See Marini v. State*, 593 S.W.2d 709, 714 (Tex.Crim.App.1980) (defendant waived error in admission of LSD tablets and marihuana by failing to object to testimony of officer with regard to finding those drugs); *Thomas*, 884 S.W.2d at 217; *Turner v. State*, 642 S.W.2d 216, 217 (Tex.App.--Houston [14th Dist.] 1982, no pet.) (defendant's complaint with regard to admission of exhibits seized after search incident to arrest waived for failure to object to preceding testimony of officer regarding arrest and items found in search); *see also Johnson*, 803 S.W.2d at 291.

Furthermore, appellant's trial counsel never asked Deputy Cook if he had a warrant to arrest appellant, nor did he seek a stipulation that the arrest was warrantless. Accordingly, the burden of proof never shifted to the State to prove that Cook had probable cause to arrest appellant. As the movant, appellant was required to have produced evidence that defeated the presumption of proper police conduct. *Russell v. State*, 717 S.W.2d 7, 9 (Tex.Crim.App.1986); *White v. State*, 871 S.W.2d 833, 835 (Tex.App.–Houston[14th Dist.] 1994, no pet.). The appellant did not meet that burden. If the defendant does not produce any evidence that the arrest occurred without a warrant, the defendant fails to meet his initial burden and the burden of proof never shifts to the State. *White*, 871 S.W.2d at 835. Appellant's point of error one is overruled.

In point two, appellant contends the trial court erred in refusing to instruct the jury concerning the legality of his arrest. Appellant contends the facts giving rise to probable cause were disputed.

Deputy Cook stated he initially observed appellant drive off the shoulder of the road, which would be a violation of section 545.051, Texas Transportation Code (requiring drivers to drive only on the right side of the roadway). Deputy Cook then followed appellant and observed that he was not wearing his seatbelt which is a violation of section 545.413(a), Texas Transportation Code. Appellant contends he had to swerve off the road to avoid hitting a tree stump, but he did not contest the seatbelt violation. When an issue of fact concerning the validity of a vehicle stop is raised by the evidence, the defendant has a statutory right to have the jury charged concerning the issue. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 1984 & Supp. 1999); *Stone v. State*, 703 S.W.2d 652, 655 (Tex.Crim.App.1986). However, if there is no factual controversy concerning the stop or if the defendant testifies to the same facts, the defendant has no right to such a charge. *Murphy v. State*, 640 S.W.2d 297, 300 (Tex.Crim.App.1982); *Moulton v. State*, 486 S.W.2d 334, 337 (Tex.Crim.App.1971).

In this case, Rodriguez testified that appellant swerved off the road to avoid hitting a tree stump. Thus, there was no factual controversy as to whether or not appellant ran off the road, only *why* he ran off the road, and appellant was not entitled to the instruction he requested. *Beasley v. State*, 810 S.W.2d 838, 842 (Tex.App.-Fort Worth 1991, pet. ref'd). Furthermore, appellant produced no evidence to dispute Cook's observation of his seatbelt violation; therefore, Deputy Cook had probable cause to stop appellant's vehicle and arrest him for committing a traffic offense under section 543.001, Texas Transportation Code. *Madison v. State*, 922 S.W.2d 610, 612 (Tex.App.–Texarkana 1996, pet. ref'd)(seatbelt violation in officer's view gave officer probable cause to arrest and search). Because appellant's running off the road and the seatbelt violations were not disputed, appellant had no right to a jury charge on the legality of the arrest. The trial court did not err in denying the requested instruction. Appellant's second point of error is overruled.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed October 7, 1999.
Panel consists of Justices Sears, Cannon, and Lee.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justices Ross A. Sears, Bill Cannon, and Norman R. Lee sitting by assignment.