IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0483-15

RUBEN TOTTEN, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS HARRIS COUNTY

KEASLER, J., delivered the opinion of the Court, in which KELLER, P.J., MEYERS, JOHNSON, HERVEY, ALCALA, RICHARDSON, and YEARY, JJ., joined. NEWELL, J., not participating.

O P I N I O N

The court of appeals held that, because there was a factual dispute whether the vehicle Ruben Totten was riding in and pulled over was the same vehicle involved in a traffic violation, the trial judge erred in refusing a jury-charge instruction pursuant to Texas Code of Criminal Procedure Article 38.23(a). Because the dispute was not dispositive of whether evidence was obtained in violation of the law under Article 38.23(a), we reverse the court

of appeals' judgment and remand for the court to address Totten's alternative argument.

I.

In October 2012, Houston Police Department Officer Trant, while sitting in an unmarked car, surveilled a duplex known for narcotics activity. While watching the duplex, Trant saw a green Ford Ranger drive past him and pull into the duplex's parking lot. Two men got out of the vehicle. One opened the Ranger's hood and appeared to be examining the engine. The other walked toward the duplex. After a short time, the man returned from the duplex and got into the Ranger. They both drove off. As the Ranger left the location, the driver failed to use the turn signal as it turned from Brownsville on to Frankie Street.

Instead of attempting to pull the Ranger over for the traffic violation, Trant notified Officers Kunkel and Betancourt, who were driving a marked patrol unit, about the traffic violation he saw. Trant described the vehicle to Kunkel and Betancourt as a green Ford Ranger. On direct examination, Trant admitted that he never saw the vehicle the officers pulled over. He did not know if the person the officers pulled over was the same person he had seen drive by him. The record provides that the State's questioning continued in similar vein:

Q. Did you notice if it was the same vehicle that they—

A. It wasn't the same vehicle.

Q. And how do you know that?

A. Just by what they told me, description-wise.

The balance of Trant's testimony tended to other matters.

Kunkel confirmed that Trant notified the officers that he observed a green Ford Ranger turn without using a turn signal and provided the direction the Ranger was traveling. Although he did not recall being given a licence-plate number, Kunkel identified the vehicle within a few seconds, and he and Officer Betancourt pulled over a green Ford Ranger. Kunkel approached the passenger side window where Totten was sitting. When asked if he had anything illegal on his person, Totten responded that he had a switchblade knife. Kunkel placed Totten in handcuffs for possession of a prohibited weapon and, searching Totten incident to the arrest, found crack cocaine in Totten's shoe.

At the charge conference, the judge denied Totten's request for an Article 38.23[1] instruction. The jury found Totten guilty of possession of a controlled substance, found the two enhancement paragraphs true, and assessed punishment at twenty-five years' confinement.

II.

Article 38.23(a) provides that "[n]o evidence obtained by an officer . . . in violation of any provisions of the Constitution or laws . . . shall be admitted in evidence against the accused" at trial.[2] If the evidence presented to the jury raises a question whether certain evidence was obtained in violation of the law, "the jury shall be instructed that if it believes,

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[1] TEX. CODE CRIM. PROC. art. 38.23(a) (West 2006).

[2] *Id.*

or has a reasonable doubt, that the evidence was obtained in violation of [Article 38.23], then and in such event, the jury shall disregard any such evidence so obtained."[3] To be entitled to an Article 38.23 instruction, a defendant must show that (1) an issue of historical fact was raised in front of the jury; (2) the fact was contested by affirmative evidence at trial; and (3) the fact is material to the constitution or law that the defendant has identified as rendering the particular evidence inadmissible.[4]

In an unpublished opinion, the court of appeals held that Totten was entitled to the requested Article 38.23 jury instruction and that its omission required reversal.[5] The court found affirmative evidence of a disputed fact in that, although Trant saw the driver of a green Ford Ranger commit a traffic violation, the current record established that the vehicle Kunkel and Betancourt pulled over was not the same vehicle that Trant observed.[6] The court further held the dispute was material because "whether the vehicle that committed the traffic violation was the same one that was pulled over goes to the only legal justification proffered by the State for [Totten's] detention leading to his arrest for possession."[7] The court did not address Totten's argument that there was a material factual dispute as to whether Trant

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[3] *Id.*

[4] *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012).

[5] *Totten v. State*, No. 01-14-00189-CR, 2015 WL 1501799 (Tex. App.—Houston [1st Dist.] Aug. 26, 2015) (not designated for publication).

[6] *Id.* at *4.

[7] *Id.* at *5.

actually saw the traffic offense occur.[8] After finding Totten suffered "some harm" as a result of the instruction's omission, the court reversed and remanded for a new trial.[9] We granted the State's petition for discretionary review to examine the court's judgment.

III.

On the current record, the court of appeals is correct in noting that there is a disputed issue: whether the green Ford Ranger Trant saw turn without signaling was the same green Ford Ranger Kunkel and Betancourt pulled over. Indeed, Trant testified that Kunkel and Betancourt did not pull over the same vehicle he saw involved in a traffic offense. However, the dispute is immaterial to whether the stop was lawful. Even if the jury was asked to determine whether Kunkel and Betancourt pulled over the same green Ford Ranger Trant observed, the jury's answer would not have resolved whether the evidence—here, the crack cocaine—was illegally obtained.[10] And if the jury found that the officers pulled over a different green Ford Ranger or had a reasonable doubt about the two vehicles' sameness, Article 38.23(a) would not require the jury to disregard any evidence obtained after the detention.

An officer's reasonable mistake about the facts may justify his own conclusion that

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[8] *Id.* at *2.

[9] *Id.* at *5.

[10] *See Madden v. State*, 242 S.W.3d 504, 511 (Tex. Crim. App. 2007) ("The disputed fact must be an essential one in deciding the lawfulness of the challenged conduct.").

there is probable cause to arrest or reasonable suspicion to detain.[11] "This is so because a mistake about the facts, *if* reasonable, will not vitiate an officer's actions in hindsight so long as his actions were lawful under the facts as he reasonably, albeit mistakenly, perceived them to be."[12] There is no factual dispute about what Kunkel and Betancourt did, saw, or heard from Trant about the traffic violation and the vehicle's description.[13] There was not, for example, affirmative evidence that Kunkel and Betancourt pulled over a vehicle of a different style or color from the description Trant provided. Had there been, an Article 38.23 instruction would be appropriate because whether the officers had reasonable suspicion to detain the vehicle would turn on the resolution of a discrete fact—whether Kunkel was truthful in testifying that he and Betancourt pulled over a green Ford Ranger.[14] For probable cause purposes though, as long as the car they pulled over matched the description Trant provided, the car need not be the same.[15] Even though the current record states that Trant

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[11] *Robinson*, 377 S.W.3d at 720.

[12] *Id.* at 720–21 (citing *Reynolds v. State*, 848 S.W.2d 148, 149 (Tex. Crim. App. 1993)) (emphasis in original).

[13] *See Hamal v. State*, 390 S.W.3d 302, 307 (Tex. Crim. App. 2012) (distinguishing *Madden*, 242 S.W.3d at 506, and holding that there was insufficient factual evidence undermining the arresting officer's testimony to warrant an Article 38.23(a) instruction).

[14] *See Robinson*, 377 S.W.3d at 721.

[15] *See Hill v. California*, 401 U.S. 797, 802–805 (1971) (concluding that officers with probable cause to arrest a suspect did not violate the Fourth Amendment when they arrested another matching the suspect's description).

testified that Kunkel and Betancourt pulled over a different car, the only material dispute was whether, in light of Trant's testimony, Kunkel and Betancourt's detention was objectively reasonable under the Fourth Amendment. The dispute here lies only in the legal significance of the officers' testimony. But this is solely a legal question that juries are unauthorized to resolve.[16]

We hold that the court of appeals erred to conclude that Totten was entitled to an Article 38.23 instruction based on this particular issue. Because we hold that this issue does not entitle Totten to an Article 38.23 instruction, we need not reach the State's other grounds for review, one of which seeks to correct the record to reflect that Trant stated, "It was the same vehicle." We reverse the court of appeals' judgment. However, because the court did not address Totten's alternative argument in support of his jury-charge claim, we remand the case to determine, consistent with this opinion's principles, whether a material factual dispute existed that required an Article 38.23 instruction.

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[16] *See Robinson*, 377 S.W.3d at 722; *Madden*, 242 S.W.3d at 510 ("If there is no disputed factual issue, the legality of the conduct is determined by the trial judge alone, as a question of law.").