Opinion issued July 17, 2008

In The

Court of Appeals

For The

First District of Texas

NO. 01-07-00255-CR

CHARLES EDWARD SERRATT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 11
Harris County, Texas
Trial Court Cause No. 1406773

MEMORANDUM OPINION

Appellant, Charles Edward Serratt, was convicted of misdemeanor driving

while intoxicated[1] enhanced by a prior felony conviction. Appellant entered a plea of no contest in exchange for a punishment recommendation of incarceration for 45 days. In his sole point of error, appellant contends that the trial court erred in denying his motion to suppress.

We affirm.

Background

On September 30, 2006, during his evening patrol, Sergeant K. Bitz of the Tomball Police Department heard the squealing of tires from approximately 50 yards away. Sergeant Bitz drove in the direction of the squealing sound and observed appellant driving in circular motions and creating skid marks on the pavement of the parking lot of a local bar. Sergeant Bitz recognized this conduct as a violation of the Tomball City ordinance against "digging out," or producing tire squeal due to sudden acceleration. Sergeant Bitz conducted a traffic stop and eventually arrested appellant for driving while intoxicated.

Appellant filed a Motion to Suppress Evidence based on the allegedly illegal stop of appellant's vehicle by Sergeant Bitz. The motion to suppress alleged that Sergeant Bitz lacked reasonable suspicion and probable cause to detain appellant and sought to exclude the physical and testimonial evidence derived as a result of the illegal arrest, including "all items of physical and/or tangible evidence, all

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[1] *See* TEX. PEN. CODE ANN. § 49.04(a) (Vernon 2003).

photographs, all digital still images and videotaped images . . . , all testimony of any law enforcement officers . . . [, and] the results of any and all scientific tests or procedures. . . .”

At the suppression hearing, the State called Sergeant Bitz to testify to what he had observed that led him to initiate the traffic stop of appellant. Sergeant Bitz testified that he observed appellant driving in what he believed was a reckless manner, driving in circles and causing his tires to squeal and leave skid marks in the parking lot. Sergeant Bitz recognized appellant’s driving as a violation of the Tomball City Ordinance against “digging out.” On cross-examination, appellant asked whether Sergeant Bitz had a friend on the Tomball Police Department who had played pool against appellant on the day of the incident. Sergeant Bitz testified that he did not know of anyone who had played pool against appellant. Appellant also asked whether Sergeant Bitz had received a phone call from a fellow police officer concerning a dispute with appellant prior to his observation of appellant’s reckless driving, and Sergeant Bitz denied that he had received any phone calls regarding appellant.

Appellant himself testified at the suppression hearing that he did not drive in circles in the parking lot or cause his tires to squeal. He also testified that his truck was not capable of making the squealing noise that Sergeant Bitz heard. Appellant presented the testimony of a certified mechanic regarding the mechanical capabilities

of appellant's truck. The mechanic testified that he did not believe appellant's truck was capable of making the noise Sergeant Bitz described or of leaving the tire marks found at the scene. On cross-examination of the mechanic, the State established that the mechanic had not been specially trained in identifying skid marks and had not done any testing to confirm the exact capabilities of appellant's truck.

In support of his motion to suppress, appellant argued,

> Our allegation is that [Sergeant Bitz] was lying. If the Officer was telling the truth, obviously there would be probable cause. And, reasonable suspicion. But, our allegation is that [Sergeant Bitz] is completely lying. He fabricated everything. And, the reason and motive he fabricated everything—I think he lied about whether he got a cell phone call from a fellow officer saying, "There is somebody in here trying to scam me at pool."

To support his argument, appellant pointed to the testimony that appellant's truck was not capable of driving in a circle while causing the tires to squeal and leaving marks, and to the lack of skid marks. He finished his argument to the trial court by stating, "So, our contention is that [Sergeant Bitz] was completely lying. There is no probable cause. He stopped [appellant] because he got a cell phone call, 'He cheated me at pool.'"

The trial court denied appellant's motion to suppress, stating that it found Sergeant Bitz's testimony credible. As a result of the trial court's ruling denying his motion to suppress, appellant entered a plea of no contest and was assessed punishment of incarceration for 45 days. This appeal followed.

Analysis

In his sole point of error, appellant argues that the trial court erred in denying his motion to suppress and states that Sergeant Bitz's testimony failed to establish that appellant violated the Tomball City Ordinance against "digging out" because he "never testified that . . . appellant's vehicle was making [the squealing sound] by its tires turning under sudden acceleration." Appellant argues that Sergeant Bitz's testimony failed to state objective facts "that would allow a detached magistrate to determine that appellant had violated the law." The State argues that appellant has not preserved this argument for appeal. We agree that the error has not been preserved.

To preserve error for appellate review, a timely and reasonably specific objection is required. TEX. R. APP. P. 33.1(a); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). The argument made on appeal must correspond with the objection made to the trial court—an appellant cannot object based on one legal theory at trial and use this objection to support another legal theory on appeal. *Broxton*, 909 S.W.2d at 918; *see also Hailey v. State*, 87 S.W.3d 118, 122 (Tex. Crim. App. 2002) (holding that violation of "ordinary notions of procedural default" occurs when court of appeals reverses trial court's decision based on error raised for first time on appeal).

Here, the record reflects that appellant's objection and testimony during the

hearing on the motion to suppress asserted that Sergeant Bitz's testimony was not credible because he had other motives for stopping appellant in the parking lot on the night in question. Appellant argued that probable cause was lacking because Sergeant Bitz lied about observing appellant driving in a circular motion or creating skid marks on the pavement of the public parking lot. In contrast, on appeal, appellant contends that Sergeant Bitz's testimony was insufficient to show that appellant had violated the particular Tomball City Ordinance against "digging out" because Sergeant Bitz failed to state that he observed appellant making a squealing sound by making his tires turn under "sudden acceleration."

Because appellant's point of error on appeal questions whether Sergeant Bitz's testimony was sufficient to establish probable cause, but his argument to the trial court was that Sergeant Bitz was lying and that his testimony lacked credibility, appellant failed to preserve his point of error for appeal. *See* TEX. R. APP. P. 33.1(a); *Broxton*, 909 S.W.2d at 918.

We overrule appellant's sole point of error.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.

Do not publish. TEX. R. APP. P. 47.2(b).