



IN THE  
TENTH COURT OF APPEALS

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No. 10-07-00363-CR

STEVEN DOUGLAS FREEMAN,

Appellant

v.

THE STATE OF TEXAS,

Appellee

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From the 19th District Court  
McLennan County, Texas  
Trial Court No. 2007-297-C2

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OPINION ON REMAND

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On original submission, the Court, in a plurality opinion and in reliance on *Pena v. State*, 226 S.W.3d 634, 656 (Tex. App.—Waco 2007), held that Steven Douglas Freeman preserved his due course of law complaint by requesting a spoliation instruction. *See Freeman v. State*, 276 S.W.3d 630, 633-34 (Tex. App.—Waco 2008). Having reversed *Pena*, the Court of Criminal Appeals vacated our judgment in *Freeman* and remanded. *See Freeman v. State*, 286 S.W.3d 370, 370-71 (Tex. Crim. App. 2009); *see also Pena v. State*, 285 S.W.3d 459 (Tex. Crim. App. 2009). The sole issue on remand is whether Freeman

preserved his complaint for appellate review. *See Freeman*, 286 S.W.3d at 371. We affirm.

Freeman was convicted of felony driving while intoxicated. Before trial, the tape of the field sobriety tests was recorded over pursuant to department policy. The trial court denied Freeman's request for a spoliation instruction.

In *Pena*, the Court of Criminal Appeals held that Pena failed to preserve his due course of law claim because, even though he invoked the Texas due course of law provision, he at no time argued that the provision affords greater protection than the federal Due Process Clause. *See Pena*, 285 S.W.3d at 464. In this case, Freeman sought a spoliation instruction, but urged no constitutional or statutory support for his position. In light of *Pena*, Freeman's complaint is not preserved for appellate review. *Id.*; *see Rodriguez v. State*, No. 13-07-00494-CR, 2009 Tex. App. LEXIS 6981, at \*12-14 (Tex. App.—Corpus Christi Aug. 31, 2009, no pet.) (not designated for publication).

We overrule Freeman's sole issue and affirm the judgment.

FELIPE REYNA  
Justice

Before Chief Justice Gray,  
Justice Reyna, and  
Justice Davis

Affirmed  
Opinion delivered and filed January 20, 2010  
Do not publish  
[CRPM]