

AFFIRMED and Opinion Filed December 28, 2018



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-18-00202-CR

SIMEON DEWAYNE THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F17-71405-N**

MEMORANDUM OPINION

Before Justices Stoddart, Whitehill, and Boatright
Opinion by Justice Boatright

A jury found appellant Simeon Dewayne Thomas guilty of possession of less than one gram of phencyclidine (“PCP”). The trial court assessed his punishment, enhanced by prior convictions, at ten years’ confinement. The trial court then suspended imposition of that sentence and placed appellant on community supervision for ten years. Appellant challenges the trial court’s denial of his request for an article 38.23 instruction in the jury charge.¹ We affirm.

Background

Dallas police officers Christopher Blow and Christopher Mazin were working together as part of a larger team observing a suspected drug house. Deployment officers, working undercover,

¹ Appellant also asked us to reform the trial court’s judgment to correct errors therein. The State agreed and pointed out that the errors stemmed from the trial court’s use of an incorrect form for the judgment. We abated this appeal briefly and ordered the trial court to prepare and sign a corrected judgment, using the form appropriate for a judgment of conviction by a jury, and including all statutorily required information. The trial court complied and has filed a supplemental clerk’s record containing the corrected judgment. As a result, appellant’s second, third, and fourth issues have been rendered moot.

watched the house itself and alerted patrol officers to any vehicle leaving the house. Blow and Mazin, wearing uniforms and driving department marked vehicles, would then follow and watch the vehicle to observe any traffic violations that would give the officers the opportunity to stop the vehicle and engage with its occupants.

On the night of appellant's arrest, he was the passenger in a Mercury Grand Prix that the deployment team observed leaving the suspected drug house. The deployment team contacted Blow and Mazin—who were waiting in a nearby parking lot—and identified the Mercury, which was heading toward their location. As Blow drove slowly toward the Mercury's location, both officers saw the Mercury run a stop sign. Blow pulled up behind the Mercury when it was stopped at a red light. When the light turned green, Blow turned on the car's lights, and the driver of the Mercury pulled into a nearby parking lot. The officers approached the Mercury and, when its window was rolled down, both reported smelling the strong odor of PCP. They ordered the Mercury's occupants out of the car and, after searching the car and finding PCP on the driver's side, arrested appellant for possession of the drug.

At trial, Blow and Mazin testified that they saw the driver of the Mercury run the stop sign and that the failure to stop at the sign was the reason they pulled the Mercury over. The State introduced a map of the area, and Blow used the map to show the jury where the stop sign was located. The only other witness at trial was Julian Aguilar, a drug chemist at the Southwestern Institute of Forensic Sciences, who testified concerning the PCP discovered in the Mercury. The jury found appellant guilty of possession of less than one gram of PCP, and he was ultimately sentenced to ten years of community supervision.

Article 38.23 Instruction

In the single issue before us, appellant contends the trial court erroneously denied his request for an article 38.23 instruction in the jury charge. Appellate resolution of a jury-charge

issue involves two steps. First, we determine whether the jury charge is erroneous and, if it is, we analyze that error for harm. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

Article 38.23 provides:

No evidence obtained by an officer or other person in violation of any provisions 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.

TEX. CRIM. PROC. CODE ANN. § 38.23(a). The right to a jury instruction under article 38.23(a) is limited to disputed issues of fact that are material to the defendant's claim of a constitutional or statutory violation that would render evidence inadmissible. *Madden v. State*, 242 S.W.3d 504, 509–10 (Tex. Crim. App. 2007). The evidence on the purported fact issue must be affirmatively contested. *Id.* at 510.

Appellant argues that there was a fact issue at trial concerning whether the officers had probable cause to stop the Mercury. Specifically, he contends that he disputed the responding officers' testimony that the driver of the Mercury failed to stop at the stop sign. As evidence of this purported fact issue, appellant relies upon Blow's body camera video, which, he asserts, "did not capture the traffic violation itself or reflect that the officers actually pulled over the car for running a stop sign." But the absence of evidence—here, visual evidence of the failure to stop at the stop sign or a recorded statement of the purpose for the stop—is not sufficient to raise a fact issue that would support an article 38.23 instruction. There must be some affirmative evidence of a fact that creates a disputed fact issue and, if there is such evidence, an instruction on this disputed fact can be given *Id.* at 514. In our case, there must be affirmative evidence that the driver of the

Mercury *did* stop at the stop sign before a fact issue would exist and an instruction would be merited. But there is no such evidence in this record.

We conclude that appellant was not entitled to an article 38.23 instruction in this case.

There is no error in the court's jury charge. We overrule appellant's first issue.

Conclusion

We affirm the trial court's judgment.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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TEX. R. APP. P. 47
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

SIMEON DEWAYNE THOMAS,
Appellant

No. 05-18-00202-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District
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Trial Court Cause No. F17-71405-N.
Opinion delivered by Justice Boatright.
Justices Stoddart and Whitehill
participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered December 28, 2018