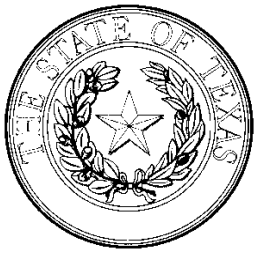
Opinion issued November 23, 2011



In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00476-CR

ANTHONY W. ACKLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law
Washington County, Texas
Trial Court Case No. 08-560

MEMORANDUM OPINION

After Anthony Wayne Ackley was found guilty by a jury of driving while intoxicated,[1] the court, pursuant to an agreed punishment recommendation, assessed punishment as 180 days in jail, suspended for 18 months, and a $500 fine. On appeal, he contends that the trial court erred by (1) not granting a requested jury instruction and (2) finding probable cause for his traffic stop. We affirm.

BACKGROUND

Lake Somerville Marina and Campground has been developed on land owned by the U.S. Army Corps of Engineers but leased and operated as a private business open to the public for a fee. Solon Carver and his wife operated the campground and marina under a lease requiring them to maintain the park's roads. Carver testified that his marina and campground is privately leased and privately maintained property; access to which is restricted by not just an admission fee but fencing, gates, guard shacks, hours of operation, and tire spikes preventing entry via the exits.

While patrolling the Lake Somerville Marina and Campground in Washington County, Department of Public Safety Trooper Steven Blackmon saw a black pickup truck going "rather fast" on a dirt road pull up to a camper trailer. The driver—later identified as Ackley—got out of the truck with a bottle in his hand and stumbled toward the picnic area in front of the camper. Although

[1] TEX. PENAL CODE ANN. § 49.04(a) (West 2011 & Supp. 2011).

Blackmon thought the driver had been drinking, since he had apparently arrived at his destination, Blackmon continued his patrol.

Minutes later, however, Blackmon saw the truck again, now being driven along the dirt road as if the driver were lost and could not figure out how to get out of the area he was in. The truck moved forward; then it backed up. Brockman described this as "confused" or "maybe disoriented." Blackmon turned on his dashboard camera. Shortly thereafter, the driver turned on to an asphalt road that the trooper testified was "publically maintained," at which point Blackmon noticed that neither the driver nor passenger was wearing a seat belt and the driver was wearing sunglasses at night. Blackmon stopped the truck because of the seat belt "violation" by waving his flashlight around and was greeted by Ackley and his passenger with, "Hey, highway patrol."

As Blackmon explained to Ackley that he had been pulled over for not wearing a seat belt, he noticed two open beer bottles in the truck's center console. Blackmon had Ackley step out of the truck and noticed that he smelled of alcohol. Asked how much he had to drink, Ackley answered, "quite a few," "more than I should have been drinking," and admitted to having been drinking beer since noon. When Brockman told Ackley that he was going to conduct field-sobriety tests, Ackley asked why, saying, "We are in a public park" and commented, "I am not on a street traveling down a road."

Brockman concluded from field-sobriety tests that Ackley was intoxicated, arrested him for driving while intoxicated and drove him to the Washington County jail where he refused a breath test. Pursuant to policy in Washington County, Blackmon drafted an affidavit for an evidentiary search warrant for Ackley's blood that was presented to and granted by a Burleson County district judge. The laboratory test results: a blood-alcohol level of 0.19 grams of alcohol per 100 milliliters of blood.

REQUEST FOR JURY INSTRUCTION UNDER 38.23

Ackley's first issue asserts that the trial court erred by not submitting a jury instruction regarding "whether Trooper Brockman had valid and legal reasonable suspicion that an offense had been committed to stop and detain Appellant" when "a material fact issue existed regarding the reasonable suspicion for the stop." *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005). At trial, Ackley neither submitted a written proposed article 38.23 instruction to the court, nor dictated any proposed instruction into the record.

Ackley here asserts that the trial testimony raised a factual dispute as to: (1) whether "the Campground was a public place"; (2) whether "Appellant was operating a motor vehicle on a private or public road"; and (3) "whether it is an offense against the State of Texas to drive a motor vehicle on a private road and not wear a seat belt." Ackley maintains that because there was a factual dispute as

to Brockman's basis to believe that an offense had occurred, he was entitled to an article 38.23 instruction, the absence of which caused him significant harm.

I. Applicable Law

Code of Criminal Procedure article 38.23(a) provides that

> 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 evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 2005).

A trial court must submit to the jury "the law applicable to the case." *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West Supp. 2011); *Bolden v. State*, 73 S.W.3d 428, 431 (Tex. App.—Houston [1 Dist.] 2002, no pet.). When a statute such as article 38.23 requires an instruction under certain circumstances, that instruction is "law applicable to the case," and the trial court must instruct the jury regarding what is required under the statute. *Oursbourn v. State*, 259 S.W.3d 159, 180–81 (Tex. Crim. App. 2008).

However, a defendant's right to the submission of a jury instruction under article 38.23 is limited to disputed issues of fact material to a 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). In order to be entitled to such jury instruction, the defendant must meet three requirements:

> (1) the evidence heard by the jury must raise an issue of fact;
>
> (2) the evidence on that fact must be affirmatively contested; and
>
> (3) that contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.

Id. at 510. The contested factual issue must be essential to the resolution of the legality of the challenged conduct; if other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence. *Id*. at 510–11.

Additionally, in order to be entitled to an article 38.23 instruction a defendant must request an instruction on a specific historical fact. *Id.* at 511. When a defendant does not present a proposed article 38.23 jury instruction asking the jury to decide a specific disputed historical fact, any potential error in the charge should be reviewed only for egregious harm. *See id*. at 513.

A person commits the offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place. TEX. PENAL CODE ANN. § 49.04(a) (West 2011). A person violates the Transportation Code if that person: (1) is at least 15 years of age; (2) is riding in the front seat of a passenger

vehicle while the vehicle is being operated; (3) is occupying a seat that is equipped with a safety belt; and (4) is not secured by a safety belt. *See* TEX. TRANSP. CODE ANN. § 545.413 (West 2011). In order for this section to apply, however, the vehicle must be operated on a highway. *See* TEX. TRANSP. CODE ANN. § 542.001 (West 2011) ("A provision of [the Rules of the Road, Transportation Code, §§ 541.001- 600.004] relating to the operation of a vehicle applies only to the operation of a vehicle on a highway unless the provision specifically applies to a different place.") For purposes of this section, the term "highway" means "the width between the boundary lines of a publicly maintained way any part of which is open to the public for vehicular travel." TEX. TRANSP. CODE ANN. § 541.302(5) (West 2011).

II. Discussion

On appeal, Ackley asserts three matters which he claims are factual disputes that required an article 38.23 instruction:

(1) whether "the Campground was a public place";

(2) whether "Appellant was operating a motor vehicle on a private or public road"; and

(3) "whether it is an offense against the State of Texas to drive a motor vehicle on a private road and not wear a seat belt."

The trial court initially agreed to provide an article 38.23 instruction, but not to tie it to any specific facts, because "38.23 doesn't go to a specific. It is going to

go to them telling them that they can disregard any evidence that is illegally obtained." Ackley responded, "Right." Ackley asked if he was allowed to argue specific evidence, and the court agreed that he could. Later, the court stated that it was putting the definition of article 38.23 in the charge and that the parties could argue as to whether there was any violation. Ackley answered "that is fine."

After a recess, the court said it was reversing its prior ruling and not putting the article 38.23 instruction in the charge. Ackley objected, saying that there was an "issue" raised because of testimony that the road was private.

The actual charge included an instruction to the jury regarding reasonable suspicion and instructing them to disregard any evidence if they found that Brockman did not have reasonable suspicion for the stop, stating:

> You are instructed that before you may consider the arrest or anything subsequent to the arrest of ANTHONY W. ACKLEY, that you must first find and believe beyond a reasonable doubt that there was sufficient probable cause to warrant the stop of the vehicle driven by ANTHONY W. ACKLEY. An officer is permitted, however, to make a temporary investigative detention of a motorist if the officer has a reasonable suspicion that some activity out of the ordinary is or has occurred, that the person detained is connected with such activity, and that there is some indication that the activity is related to crime or a criminal offense. Now bearing in mind these instructions, if you find from the evidence that on the occasion in question the officer did not have a reasonable suspicion that some activity out of the ordinary is or has occurred, that the person detained is connected with such activity, and that there is some indication that the activity is related to a criminal offense, immediately preceding the stop and detention by the police officer involved herein, or you have a reasonable doubt thereof, you will disregard all evidence subsequent to the stopping of the

> defendant and you will not consider such evidence for any purpose whatsoever.

After reviewing the actual charge, Ackley's only objection was a request to take out the language "activity out of the ordinary" from the above instruction and limit reasonable suspicion to an actual traffic violation.

Because Ackley did not present a proposed article 38.23 jury instruction to the court asking for the jury to decide a specific disputed historical fact, any potential error in the charge should be reviewed only for egregious harm. *See Madden*, 242 S.W.3d at 513. We therefore consider whether the trial court erred in not sua sponte providing a specific article 38.23 jury instruction on any of the three bases on which Ackley now complains on appeal. In making this determination, we consider whether, as to each of the complained-of omitted instructions:

> (1) the instruction is one which requires the jury to determine an issue of fact, not law;
>
> (2) the evidence at trial raised the issue of fact that Ackley is seeking the instruction on;
>
> (3) the evidence on that fact was affirmatively contested; and
>
> (4) that contested factual issue was material to the question of the lawfulness of the challenged conduct in obtaining the evidence—that is, the determination of the factual question was crucial to resolving whether the challenged conduct was lawful.

243 S.W.3d at 510–11.

In the context of the case before us, this final requirement means that the complained-of omitted instruction must have required the jury to determine a contested factual issue that was crucial to resolving whether Brockman had reasonable suspicion to stop Ackley. *See id.* Accordingly, if the complained-of omitted jury instruction asks the jury to resolve a factual dispute whose answer is *not* crucial to resolving the question of whether Brockman had reasonable suspicion to stop Ackley—either because the resolution of the factual dispute at issue does not affect the question of reasonable suspicion to stop or because there is other evidence at trial that would support a finding of reasonable suspicion even if the jury resolved the factual dispute in Ackley's favor—then there is no error in not providing such an instruction. *See id.* If we do find that there was error in failing to provide one of the three complained-of omitted instructions under article 38.23, we will next consider whether such error caused Ackley egregious harm. *See id.* at 513.

a. Whether "the campground was a public place"

Ackley first asserts that the jury should have been given an instruction requiring it to determine whether the campground was a public place. Although this instruction does require the jury to answer a factual question, the evidence at trial did not raise a factual dispute on this issue, and the resolution of this question

would not have been crucial to the determination of whether Brockman had reasonable suspicion to stop Ackley.

A public place is defined as "any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops." TEX. PENAL CODE ANN. § 1.07(a)(40) (West 2011). This broad, open-ended definition leaves discretion to the courts to expand its parameters where appropriate. *See Loera v. State*, 14 S.W.3d 464, 467 (Tex. App.—Dallas 2000, no pet.). Clearly, however, "'if the public has any access to the place in question, it is public.'" *See Woodruff v. State*, 899 S.W.2d 443, 445 (Tex. App.—Austin 1995, pet. ref'd) (internal citation omitted) (holding that air force base was "public place," despite restrictions placed on public access). Thus, the relevant inquiry is whether the public has any access to the area. TEX. PENAL CODE ANN. § 1.07(a)(40); *see Loera*, 12 S.W.3d at 467.

Although both the State and Ackley presented testimony that the campground was accessible by the public, subject to certain restrictions, Ackley argued that the campground was not a public place because admittance was only by a fee and at the discretion of the leaseholders. These factors, however, do not dictate that a place is private. *See State v. Nailor*, 949 S.W.2d 357, 359 (Tex. App.—San Antonio 1997, no pet.) (holding hotel parking lot that was open to the

public for fee constituted "public place"); *Woodruff*, 899 S.W.2d at 445 (holding that air force base was "public place," despite restrictions placed on public access); *Kapuscinski v. State*, 878 S.W.2d 248, 250 (Tex. App.—San Antonio 1994, pet. ref'd) (holding mall parking lot was public place as contemplated by Penal Code section 1.07(a)(40)).

Additionally, this alleged factual dispute—whether the campground was a "public place"—is not material to the question of reasonable suspicion to stop. Whether or not the campground was a public place was an issue for the jury to consider in determining whether the State had proved its case-in-chief, *see* TEX. PENAL CODE ANN. 49.04 (a) (providing that person commits offense if intoxicated while operating motor vehicle in public place), and the jury was so instructed, but it has no relevance to whether Brockman had reasonable suspicion to believe that Ackley had committed a crime,[2] and so it was not material to that question and no article 38.23 instruction was required. *See Madden*, 242 S.W.3d at 512.

b. *Whether "Appellant was operating a motor vehicle on a private or public road"*

[2] When determining whether Brockman could legitimately stop Ackley, the focus is not on whether Ackley actually committed the crime or the ultimate accuracy of the information upon which the officer relied; a stop may still be lawful even if the facts on which it was based are ultimately found to be false or wrong. *Icke v. State*, 36 S.W.3d 913, 916 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

Ackley next asserts that the jury should have been given an instruction requiring it to determine whether Ackley was operating a motor vehicle on a private or public road. This proposed jury instruction also requests the jury to answer a specific factual question. The factual dispute was one which was raised by the evidence at trial, and it was affirmatively contested. The remaining issue is whether this question was material—that is, is it essential in deciding the lawfulness of the challenged conduct. *Madden*, 242 S.W.3d at 510 (stating that if other nondisputed facts are sufficient to support lawfulness of challenged conduct, then disputed fact issue is not material to ultimate admissibility of evidence and no instruction is required). Here, even if the road were private, and even if Brockman had no reasonable suspicion to stop Ackley for driving without a seatbelt (an issue we need not resolve), the evidence at trial demonstrates that there were other facts that provided Brockman reasonable suspicion for a traffic stop—namely, Ackley's manner and mode of driving combined with Brockman's observations of Ackley stumbling with a bottle in his hand and wearing dark glasses at night. Thus, the resolution of the public road/private road question is not crucial to the question of reasonable suspicion to stop, and the trial court did not err in not instructing the jury on this issue. *See id.* at 506, 516–17 (holding that if even factual dispute regarding officer's given reason for reasonable suspicion—defendant's nervousness—was resolved in favor defendant, officer still had ample basis for

reasonable suspicion based on totality of other facts; noting that defendant's purported nervousness was "lagniappe—icing on the cake to determination of reasonable suspicion," rather than crucial).

c. *Whether "it is an offense in Texas to drive a motor vehicle on a private road and not wear a seatbelt"*

Ackley's final argument is that the jury should have been given an instruction requiring it to determine whether or not certain conduct (driving a motor vehicle on a private road while not wearing a seatbelt) is an offense in this state. This final proposed instruction does not present a question of fact for the jury's resolution, but a question of law, which is reserved to the court, and, so, no article 38.23 instruction was required on that question. *Spence v. State*, 325 S.W.3d 646, 648 (Tex. Crim. App. 2010) (holding that trial court did not err in declining to give article 38.23 jury instruction because there was no factual dispute for jury to resolve, only question of law for court).

We overrule Ackley's first issue.

REASONABLE SUSPICION

In his second issue, Ackley contends that the trial court erred "in finding probable cause existed that an offense occurred because Ackley was not required to wear a seatbelt on a private road within a privately owned, managed, and maintained marina and campground" and argues that "[i]n the absence of reasonable suspicion that an offense had occurred, a traffic stop and subsequent

search are illegal and any evidence procured from them must be excluded as tainted 'fruit' of the search."

Ackley filed a "DWI Motion to Suppress Blood" that included numerous contentions, including that "seizure" was made without reasonable suspicion. However, there was no pretrial hearing or ruling on this motion. There was a hearing on the motion to suppress during trial, but it occurred after the jury had already heard, without any objection, extensive testimony by Brockman regarding the stop and after the blood that Ackley sought to suppress had already been admitted without objection. At the time that the State offered the (vial of) blood seized from Ackley pursuant to the search warrant, Ackley affirmatively stated that he had "no objection" to its admission.

At the suppression hearing during trial, the only evidence that Ackley sought to have suppressed was the actual blood-alcohol-concentration result. Ackley affirmatively stated that he had "no objection" to testimony that blood-test results confirmed the presence of alcohol in his blood, but argued that the actual blood-alcohol-concentration results *number* should be suppressed because the State failed to "satisfy the scientific reliability aspect of this *Kelly*/*Daubert* motion."[3] This was

[3] *See Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992). Ackley's extensive motion to suppress included an argument that blood-test evidence could not be admitted unless there was proof of reliability as required by *Kelly*.

only argument advanced at the hearing before the trial court made its ruling denying Ackley's motion to suppress.

The only reference made to the trial court about a lack of reasonable suspicion for the stop took place long after the trial court's ruling on the motion to suppress and after the evidence in the case had been closed. During the jury-charge discussion, Ackley's counsel advised the court that he needed to file some memoranda of law, including one pertaining to the road being a private road. Counsel stated that, "in the event [the court] do[es] determine this is a public place, it's still a private road and there's no duty of law to wear a seat belt on a private road; therefore there is no reasonable suspicion to pull Mr. Ackley over and everything must be suppressed as fruit of the poisonous tree according to Texas Code of Criminal Procedure 38.23." The State objected that it had received no notice of the filing of "these motions," the trial court and Ackley's counsel noted that the documents were memoranda, and Ackley's counsel added that he had "a motion on file, a general motion to suppress and these are just memorandums to let you know where I am going with these." The trial court responded, "Sure. The Court denies the—I think I've already ruled on the motion to suppress, but I will continue with that ruling."

The filing of a motion to suppress alone does not preserve any error in the admission of the evidence sought to be suppressed. *Coleman v. State*, 113 S.W.3d

496, 499–500 (Tex. App.—Houston [1st Dist.] 2003), *aff'd on other grounds*, 145 S.W.3d 649 (Tex. Crim. App. 2004). If a motion to suppress has not been ruled on by the time that the evidence is offered at trial, a defendant must object to the evidence at the time it is offered in order to preserve error. *Ross v. State*, 678 S.W.2d 491, 493 (Tex. Crim. App. 1984). An objection to—or motion to suppress—evidence is untimely if made after the evidence, or substantial testimony about it, has already been admitted without objection. *Marini v. State*, 593 S.W.2d 709, 714 (Tex. Crim. App. 1980); *Stults v. State*, 23 S.W.3d 198, 205–06 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); *Laurant v. State*, 926 S.W.2d 782, 783 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd); *Thomas v. State*, 884 S.W.2d 215, 216–17 (Tex. App.—El Paso 1994, pet. ref'd). A motion to suppress urged after the State has rested its case and the challenged evidence has been admitted without objection is too late to preserve error.[4] *Nelson v. State*, 626 S.W.2d 535, 536 (Tex. Crim. App. [Panel Op.] 1981); *Sims v. State*, 833 S.W.2d 281, 284 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). Additionally, it is well-settled that if a defendant affirmatively states that he has "no objection" to the admission of the item that he sought to have suppressed, then he waives any

[4] A narrow exception to this rule applies when, and only when, the trial court has made specific pretrial comments that "essentially [directs the defendant] to wait until all the evidence is presented" before seeking a ruling from the court on the motion to suppress and has told the defendant that it would "make no ruling until all the testimony had been presented." *Garza v. State*, 126 S.W.3d 79, 84–85 (Tex. Crim. App. 2004).

complaint as to its admission. *Moraguez v. State*, 701 S.W.2d 902, 904 (Tex. Crim. App. 1986); *Thomas v. State*, 312 S.W.3d 732, 736 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

Ackley neither objected to the admission of Brockman's testimony regarding the stop, nor objected to the admission of the actual blood that he sought to have suppressed. Ackley affirmatively stated that he had no objection to the admission of the blood. The legal theory that Ackley advances on appeal was not presented to the trial court at his hearing on the motion to suppress and was only mentioned at the time of the discussion of the jury charge—long after the jury had all the evidence before it, including that which had been the subject of the motion to suppress, and after the State had rested its case. Ackley failed to preserve this contention for our review. *See See* TEX. R. APP. R. 33.1; *Moraguez*, 701 S.W.2d at 904; *Nelson*, 626 S.W.2d at 536; *Marini*, 593 S.W.2d at 714; *Thomas*, 312 S.W.3d at 736; *Stults*, 23 S.W.3d at 205–06; *Laurant*, 926 S.W.2d at 783; *Thomas*, 884 S.W.2d at 216–17; *Sims*, 833 S.W.2d at 284.

We overrule Ackley's second issue.

CONCLUSION

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Jennings, Higley and Sharp.[5]

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

[5] This case was originally submitted to a panel consisting of Justices Jennings, Alcala, and Sharp. Justice Alcala was sworn in as a judge of the Court of Criminal Appeals on May 20, 2011 and is no longer on this Court. *See* TEX. CONST. art. XLI, § 40(a).