

Opinion issued October 20, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00630-CR

KENNETH ANDERSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1237409

MEMORANDUM OPINION

A jury convicted appellant Kenneth Anderson of possession of cocaine weighing one gram or more but less than four grams, a third-degree felony, and sentenced him to 35 years in prison. *See* TEX. HEALTH & SAFETY CODE ANN.

§§ 481.102(3)(D), 481.115(a), (c) (West 2011) (establishing offense of cocaine possession between one and four grams). Anderson entered a plea of not true to two enhancements, and the jury found both enhancements to be true. In his sole issue, Anderson argues that the trial court erred in denying his motion to prohibit the State from impeaching him with his prior convictions. *See* TEX. R. EVID. 609; *Theus v. State*, 845 S.W.2d 874 (Tex. Crim. App. 1992). We modify the judgment of the trial court to reflect Anderson’s plea of “not true” to the second enhancement paragraph and the jury’s finding that the first enhancement paragraph was “true,” and we affirm the trial court’s judgment as modified.

Background

Anderson was arrested in a car near an apartment complex that had been under surveillance for suspected narcotics dealing. As the police approached the car, Anderson ducked his head while he chewed a bag containing approximately two grams of crack cocaine.

Anderson filed a *Theus* motion before voir dire, requesting that he be allowed to testify free from impeachment concerning various prior convictions, specifically several felonies more than ten years old and several misdemeanors less than ten years old. Alternatively, the motion sought to restrict the State from specifying the nature of those convictions. The trial court declined to rule on the

motion at that time, expressly reserving its decision until Anderson would take the stand.

After the State rested, Anderson re-urged his *Theus* motion, explaining that the court's ruling would impact his decision to testify. Following arguments by the defense and the State, the trial court treated the motion as one in limine and ruled that the State could raise Anderson's prior convictions but would need to reapproach the bench for leave to specify them. Anderson then informed the court that, as a result of its ruling, he would not testify. The defense rested without calling any witnesses or presenting any evidence. The jury convicted Anderson of possession of cocaine and sentenced him to 35 years in prison.

Analysis

Anderson's sole issue is that the trial court erred in its evidentiary ruling denying his *Theus* motion. When the issue has been preserved for appeal, we review for clear abuse of discretion, that is, whether the decision lies outside the zone of reasonable disagreement. *Theus*, 845 S.W.2d at 881; *Davis v. State*, 259 S.W.3d 778, 780 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

However, a criminal defendant must testify to preserve error on a *Theus* motion. *See Jackson v. State*, 992 S.W.2d 469, 479–80 (Tex. Crim. App. 1999) (citing *Luce v. United States*, 469 U.S. 38, 41–43, 105 S. Ct. 460, 463–64 (1984)); *Long v. State*, 245 S.W.3d 563, 572–73 (Tex. App.—Houston [1st Dist.] 2007, no

pet.). Anderson did not testify. We hold that Anderson has failed to preserve this issue for appeal.

We overrule Anderson's sole issue.

Reformation of the Judgment

Finally, the trial court's judgment does not accurately comport with the record in that it does not reflect Anderson's plea of not true to the second enhancement charged in the indictment or the jury's finding of true on the first enhancement charged. "An appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source." *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (citing *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd)); accord *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("An appellate court has the power to correct and reform a trial judgment to make the record speak the truth when it has the necessary data and information to do so."); see also TEX. R. APP. P. 43.2(b). The record supports modification of the judgment because the court reporter's record reflects that Anderson entered a plea of not true to the second enhancement paragraph and that the jury found the first enhancement paragraph to be true. Accordingly, the trial court's judgment is modified to reflect that Anderson

pleaded not true to the second enhancement alleged by the State and to reflect that the jury found the first enhancement true.

Conclusion

We modify the trial court's judgment to reflect appellant's plea of "not true" to the second enhancement paragraph and the jury's finding of "true" regarding the first enhancement paragraph. We affirm the judgment of the trial court as modified.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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