Affirmed as Modified and Majority and Concurring Opinions filed March 22, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00406-CR

FOREST PENTON, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1384434

CONCURRING OPINION

While appellant was handcuffed in the back of a patrol car, he told the police officer that the drugs were his and to let his nephew—the driver—go. It is undisputed that appellant did not receive any warnings before this statement. The defense moved to suppress this confession. The State stipulated that it was a warrantless arrest[1] and agreed that the State had the burden of proof. The State

[1] The trial court ultimately found that appellant was not under arrest but only detained.

called the arresting officer to the stand who stated that the car ran the red light, giving him "probable cause" to pull the car over.

The officer testified: "We saw the car traveling . . . and the light turned yellow and the car tried to speed through the light and didn't make it; ran the red light."

The officer approached the passenger side of the car. After seeing appellant "squirming around" and tossing what appeared to be drugs out of his pocket, the officer "detained" appellant by putting him in handcuffs in the his nephew's car. Appellant was yelling and upset. The officer then moved appellant to the patrol car. After retrieving the drugs from the nephew's car, the officer returned to the patrol car, where the appellant was still yelling and upset, and appellant confessed. The confession was not made in response to any type of questioning or interrogation.

On cross-examination, the officer testified that the stop was a pretextual stop—meaning that the officers were following the vehicle to watch for a traffic violation to "develop our own probable cause."

Q. So this vehicle, you then follow it for a fairly short distance?
A. Short.
Q. As soon as you saw it, it basically rolled a stop light?
A. It did.
Q. Went through a red light?
A. Changing from yellow to red. They didn't make it.

The remainder of the cross-examination focused on the circumstances of the detention/arrest and whether or not the officer questioned the appellant before he made his confession. There were no other questions about the traffic stop.

The judge made oral findings that the statement was spontaneous and not in response to any questioning. In other words, the judge found that there was no custodial interrogation and therefore no violation of Article 38.22.

On appeal, appellant claims that there was no probable cause for the traffic stop because it is not a violation of the traffic laws if the vehicle entered the intersection before the light turned red. On this record, I agree with the majority that appellant waived a complaint about whether or not there was probable cause to stop the vehicle. The motion was generic, there were very few questions asked about the traffic stop in the hearing, there was no discussion of the traffic laws during the hearing, and no argument about the stop. In addition, the judge's oral findings do not address the stop at all.

Because the majority opinion is so broad, I write separately to show that appellant did preserve the issue as to whether or not the confession was made in response to an interrogation, even though the motion was generic and there was no argument made at the hearing. However, appellate counsel chose not to bring a point of error as to that finding.[2]

The Court of Criminal Appeals has held that preserving a motion to suppress requires more than a generic written motion. *See Swain v. State*, 181 S.W.3d 359, 365 (Tex. Crim. App. 2005). The motion must be as specific as it can be and then defense counsel must make every argument that is in the motion at the hearing. *See Resendez v. State*, 306 S.W.3d 308, 312–13 (Tex. Crim. App. 2009). If counsel hears something objectionable at the hearing that is not in the written motion, then counsel needs to make sure that the judge and the prosecutor understand that counsel is making a new argument. *See Vasquez v. State*, No. PD-0078-15, — S.W.3d —, 2016 WL 735786, at *3–5 (Tex. Crim. App. Feb. 24, 2016).

[2] The record supports the trial judge's finding.

The hearing on the motion to suppress was very typical of most motions that we review. Here the judge took testimony and never gave counsel the opportunity to explain the basis of his motion to suppress—where in an opening or a closing statement. Nor did counsel ask for time to explain his motion or object to the failure of the court to allow argument.

> COURT: Defense has previously filed a Motion to Suppress defendant's statement. I have that in front of me. I'm not sure when it was filed. At any rate, call your first, please.
>
> STATE: Well, your Honor, we will stipulate that it was a warrantless arrest.
>
> COURT: You say you're going to stipulate that there was no warrant?
>
> STATE: Correct. So the State will have the burden and we will call Deputy Santos.

After the Deputy testified:

> STATE: State rests your Honor.
>
> COURT: You rest on your motion, [defense counsel]?
>
> DEFENSE: For the purposes of the hearing, I need to call the defendant, Mr. Penton, to the stand for the limited purposes of the statement.

After appellant testified:

> COURT: Both sides close?
>
> DEFENSE: Yes, your Honor. Close.
>
> STATE: State rests and closes, your Honor.
>
> COURT: Okay. I'll see y'all tomorrow morning when I decipher my notes.
>
> DEFENSE: Okay. So we will follow up then?
>
> COURT: Yes.

The next day:

> COURT: Yesterday we had a hearing outside the presence of the jury on defense's motion to suppress statements by the defendant. Heard from a witness from the State and then the defendant took the stand and testified. It was stipulated that no warrant was involved in the search or arrest. I did find that statements by the defendant were voluntarily made. And that the statements by the defendant, spontaneous statements by the defendant while he was seated in the back of the patrol car were not in response to any questioning by law enforcement officers and this relates to statements to the effect that the stuff, referring to the methamphetamine found in the vehicle, did not belong to his nephew and that it was all his, meaning the defendant's. The statements are not going to be suppressed and they may be mentioned in the presence of the jury and referred to in the opening statement, if the State chooses.

And then the trial started.

Preservation of error is tricky. In the heat of trial, not every defense attorney will preserve every argument. And as is well known, a defendant is not entitled to error-free representation. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). Most motions to suppress are correctly denied but if defense counsel has a good argument,[3] it has to be properly preserved.

How can our system of justice make sure this is done? First, courts of appeals should publish more opinions, including those where waiver is found. Those opinions can reinforce what is necessary to preserve. Second, our continuing legal education seminars need to include preservation in every substantive topic, not limiting it to an "appellate track." Providing checklists for preservation would be useful. Third, counsel should customize the motion to suppress after a

[3] *E.g.*, *State v. Rendon*, 477 S.W.3d 805 (Tex. Crim. App. 2015); *State v. Villarreal*, 475 S.W.3d 784 (Tex. Crim. App. 2015).

discussion with the client and with the police if possible.[4] Fourth, on a routine basis, trial judges should ask for argument from counsel at the motion to suppress, and/or counsel must ask for it.

If defense counsel spoke to just his client, and no other person involved in the traffic stop, counsel would have been unaware of a viable defense to the traffic stop because appellant testified that he did not know why the car was pulled over. It would have been impossible for counsel to have made the specific legal objection in his written motion that appellant is now claiming on appeal. Maybe counsel could have known about the argument from talking to the driver, appellant's nephew. But sometimes it is only after hearing the testimony under oath of the police officer that an issue develops. If that happens, defense counsel must make a "new" argument and ensure that everyone understands the "new" argument.[5] *See Vasquez*, 2016 WL 735786, at *3–5.

I agree with the majority's finding of waiver and respectfully concur to flesh out the parameters of the waiver.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.
Publish — Tex. R. App. P. 47.2(b). (Frost, C.J., majority).

[4] I recognize that it is not always possible to talk to the police before the filing of the written motion.

[5] I do not think that this "new" argument would have been successful either. *See Little v. State*, No. 14-13-00832-CR, 2014 WL 7172403 (Tex. App.—Houston [14th Dist.] Dec. 16, 2014, no pet.) (mem. op., not designated for publication).