

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00250-CR

CLINTON RAY RASBERRY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Jefferson County, Texas
Trial Cause No. 272110

MEMORANDUM OPINION

The State charged Clinton Ray Rasberry by information with the misdemeanor offense of driving while intoxicated. A jury found Rasberry guilty of this offense and the trial court sentenced him to 120 days in jail, but suspended the sentence and placed him on probation for one year, assessed a fine of \$500 plus court costs, ordered forty hours of community service, and the completion of a DWI and drug education class. Rasberry timely appealed the trial court's judgment claiming that the trial court erred in admitting

State's Notice of Intent to use Certificate of Analysis and Notice of Intent to use Chain of Custody Affidavit. We affirm the trial court's judgment.

BACKGROUND

On the morning of June 14, 2008, DPS dispatched Trooper Martinez to investigate a traffic accident. Rasberry told Martinez that while driving to work another vehicle ran him off the roadway, which caused him to strike a tree. Martinez testified that Rasberry displayed many signs of intoxication and performed poorly on standardized field sobriety tasks. Martinez arrested Rasberry for driving while intoxicated. Martinez transported Rasberry to a local hospital and with Rasberry's consent obtained a blood draw.

On February 11, 2008, the State gave notice to Rasberry's counsel that it had filed a certificate of analysis and chain of custody affidavit for Rasberry's blood test results. *See* Tex. Code Crim. Proc. Ann. arts. 38.41, 38.42 (West 2005). Rasberry did not file any objections to the certificate of analysis or the custody affidavit. At trial, the State offered the certificate and affidavit indicating the results of the laboratory analysis performed on Rasberry's blood sample. Among other objections, Rasberry objected at trial that the documents were inadmissible under Rule 403 of the Texas Rules of Evidence. *See* Tex. R. Evid. 403. The trial court admitted the documents over Rasberry's objections. Rasberry appeals solely on the ground that the evidence is inadmissible under Rule 403. Rasberry specifically argues that "allowing the State to tender these documents, . . . with no expert witnesses, created an unfair prejudice which suggested a decision to the jury on an

improper basis against the Defendant[.]”

PRESERVATION OF ERROR

Articles 38.41 and 38.42 of the Texas Code of Criminal Procedure concern the admissibility of certificates of analysis and chain of custody affidavits. Article 38.41 provides that “[a] certificate of analysis . . . is admissible in evidence . . . to establish the results of a laboratory analysis of physical evidence conducted by or for a law enforcement agency without the necessity of the analyst personally appearing in court.” Tex. Code Crim. Proc. Ann. art. 38.41, § 1. Article 38.42 provides that a timely filed custody affidavit is admissible “to establish the chain of custody of physical evidence without the necessity of any person in the chain of custody personally appearing in court.” *Id.* art. 38.42, § 1. Both articles 38.41 and 38.42 provide that these documents are not admissible if the opposing party files a written objection “to the use of” the certificate or affidavit with the clerk of the court at least ten days before trial begins. *Id.* arts. 38.41, § 4, 38.42, § 4. The opposing party forfeits any objection to the certificate or affidavit by failing to timely object under the statute. *See id.* arts. 38.41, 38.42; *see also Deener v. State*, 214 S.W.3d 522, 527-28 (Tex. App.—Dallas 2006, pet. ref’d).

The State timely gave Rasberry’s counsel notice that it had filed a certificate of analysis and chain of custody affidavit for Rasberry’s test results. Rasberry made no pretrial objections to the trial court’s admission of this evidence without an analyst’s personal appearance in court. Rather, Rasberry waited until the State offered the affidavit

and certificate of analysis to object. We find that Rasberry's failure to timely file written objections to the use of the certificate and the affidavit pretrial, as provided in articles 38.41 and 38.42 constitutes a waiver of those objections. *See* Tex. Code Crim. Proc. Ann. arts. 38.41, 38.42; *see also* Tex. R. App. P. 33.1; *Deener*, 214 S.W.3d at 528. The trial court did not err in concluding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice or other factors considered in a Rule 403 analysis. *See* Tex. R. Evid. 403. Appellant's sole issue is overruled. We affirm the trial court's judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on January 24, 2011
Opinion Delivered March 16, 2011
Do not publish

Before Gaultney, Kreger, and Horton, JJ.