COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00191-CR

DOUGLAS PAUL CARTER — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 1419623D

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Douglas Paul Carter appeals his conviction for possession of a controlled substance of one gram or more but less than four grams, namely heroin. *See* Tex. Health & Safety Code Ann. § 481.115(c) (West 2010). In two points, Carter argues that the trial court erred by denying his requested article

[1]*See* Tex. R. App. P. 47.4.

38.23(a) jury instruction and that the statute assessing a $133 consolidated court cost is facially unconstitutional. For the reasons set forth below, we will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Officer Tyler Rawdon and Corporal White were together in a marked police unit[2] when they located a white sedan that an undercover officer in an unmarked police car had radioed about. The undercover officer communicated that he had seen the driver of the white sedan commit two traffic violations before the white sedan pulled into the parking lot of a vacant business. Officer Rawdon spotted the vehicle as it was coming to a stop in the parking lot of the vacant business and noticed an older black male, later identified as Carter, standing at the passenger-side window of the white sedan.[3] When Carter turned and saw the officers, he acted surprised, turned away from them, made a reaching motion to "his pants area," and then made "a distinct motion to his mouth." Based on his training and experience, as well as his location in a "high crime narcotics area" and Carter's walking up to a car that had pulled into the parking lot of an abandoned building, Officer Rawdon recognized Carter's motions as those made by someone who was trying to get rid of illegal narcotics by swallowing them. Officer Rawdon commanded Carter to get on the ground and to spit out what he

[2]Although the patrol unit was equipped with a dash camcorder, it was not working on the date in question.

[3]It was undisputed at trial that Carter was never a passenger in nor the driver of the white sedan.

had placed in his mouth. Carter complied, and Officer Rawdon saw Carter spit out two plastic bags containing what Officer Rawdon believed to be black tar heroin.

A jury found Carter guilty of possession of a controlled substance of one gram or more but less than four grams, namely heroin. The trial court found the habitual-offender notice to be true and sentenced Carter to twenty-five years' imprisonment. Carter then perfected this appeal.

III. CARTER WAS NOT ENTITLED TO AN ARTICLE 38.23 JURY INSTRUCTION

In his first point, Carter argues that the trial court erred by denying his requested article 38.23(a) jury instruction.

Article 38.23(a) of the code of criminal procedure prohibits the admission of evidence against an accused in a criminal trial if the evidence was obtained in violation of the Texas or United States constitutions or laws. Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2005). When evidence presented before the jury raises a question of whether the fruits of a police-initiated search or arrest were illegally obtained, "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." *Id.*; *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012).

To be entitled to an article 38.23(a) instruction, a defendant must show that (1) an issue of historical fact was raised in front of the jury, (2) the fact was contested by affirmative evidence at trial, and (3) the fact is material to the

constitutional or statutory violation that the defendant has identified as rendering the particular evidence inadmissible. *Robinson*, 377 S.W.3d at 719. When a defendant successfully raises a disputed, material issue of fact, the terms of the statute are mandatory, and the jury must be instructed accordingly. *Id.* Evidence to justify an article 38.23(a) instruction can derive "from any source," no matter whether "strong, weak, contradicted, unimpeached, or unbelievable." *Id.* (quoting *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004)). But it must, in any event, raise a "factual dispute about how the evidence was obtained." *Id.* When the issue raised by the evidence at trial does not involve controverted historical facts, but only the proper application of the law to undisputed facts, it is properly left to the determination of the trial court. *Id.*

During the charge conference, Carter requested a 38.23 jury instruction. His requested instruction and the argument related to the instruction are set forth below in their entirety:

> Judge, I'm asking for the jury to be instructed words -- these words: You are instructed 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 the Constitution or laws of the United States of America shall be admitted into evidence against the accused in the trial of any criminal case. You are further instructed that our law permits the stop, arrest, detention[,] and search of a person by a peace officer without a warrant only when probable cause exists to believe that an offense against the laws of this state or the United States have been violated. An officer is permitted to make an arrest of a person if the officer has probable cause to believe that the person has committed or is committing an offense. By the term probable cause as used herein it is meant where the facts and circumstances within the officer's knowledge and of which he has trustworthy information [are] sufficient unto themselves to warrant a

> man of reasonable caution to believe that an offense has been or is being committed. Therefore, if you believe beyond a reasonable doubt that the peace officer lawfully obtained the evidence, you may consider it. If you have a reasonable doubt about that the peace officer lawfully obtained the evidence you may not consider it.
>
> And, Judge, we're asking that be included in the Court's charge.

Looking just at Carter's requested jury instruction, neither the trial judge, nor this court, could have any idea of what specific fact or facts Carter believed were in dispute. *See Madden v. State*, 242 S.W.3d 504, 511–12 (Tex. Crim. App. 2007).

On appeal, Carter argues that Officer Rawdon's testimony that Carter "had nothing to do with the purpose for the detention of the occupants of the white sedan, combined with the common-sense testimony that [Carter] could just have easily been placing a candy bar in his mouth are sufficient to raise a fact issue regarding the legality of the detention" of Carter by the police. Based on his argument on appeal, it appears that what Carter wanted was a jury instruction on whether the totality of the facts that Officer Rawdon listed as his reasons for detaining Carter constituted "reasonable suspicion" under the Fourth Amendment, which amounts to an instruction focused on the law. *See id.* at 512. But as set forth above, to obtain a 38.23 instruction, Carter was required to set forth a disputed, material fact issue. *See Robinson*, 377 S.W.3d at 719. Carter, however, failed to point to any disputed material issue of fact, nor have we found any evidence controverting the reasonable suspicion that Officer Rawdon articulated for the detention: the area involved was a "high crime narcotics area";

Carter had walked up to the white sedan that had pulled into the parking lot of an abandoned building; when Carter saw the marked patrol unit, he turned away, reached into "his pants area," and put his hand to his mouth; and Officer Rawdon's training and experience in seeing such actions "so many times in the past" when individuals were trying to get rid of illegal narcotics by swallowing them.

Because none of the above testimony creates a disputed fact issue,[4] Carter was not entitled to an article 38.23 jury instruction. *See Hamal v. State*, 390 S.W.3d 302, 307 (Tex. Crim. App. 2012) (holding that because there was no dispute about what trooper did, said, saw, or heard, appellant was not entitled to article 38.23 jury instruction); *Madden*, 242 S.W.3d at 518 (holding that appellant was not entitled to article 38.23 jury instruction concerning whether trooper had reasonable suspicion to continue appellant's detention because no evidence raised a disputed fact issue material to the admissibility of the challenged evidence). We hold that the trial court did not err by refusing to include an article 38.23 instruction in the charge. Accordingly, we overrule Carter's first point.

[4]As pointed out by the State, "the trial court did not base its implicit finding of reasonable suspicion on *what* Appellant put in his mouth; rather, the trial court based reasonable suspicion on Appellant's suspicious act of putting *something* in his mouth combined with the other suspicious circumstances articulated by Officer Rawdon."

IV. TEXAS LOCAL GOVERNMENT CODE SECTION 133.102(A)(1) IS NOT FACIALLY UNCONSTITUTIONAL

In his second point, Carter argues that section 133.102(a)(1) of the Texas Local Government Code, under which a $133 "consolidated court cost" was assessed against him, is facially unconstitutional. Specifically, Carter argues that the $133 "consolidated court cost" is an unconstitutional tax under the Separation of Powers Clause.

The State argues that Carter waived his right to challenge the imposed consolidated court cost—a nonsystemic, nonpenal challenge—because he raises it for the first time on appeal. But we conclude, as we have in the past, that Carter may raise his complaint on appeal, even though he did not raise it to the trial court, because the $133 "consolidated court cost" was not imposed in open court or itemized in the judgment. *See, e.g.*, *Ingram v. State*, No. 02-16-00157-CR, 2016 WL 6900908, at *2 (Tex. App.—Fort Worth Nov. 23, 2016, no pet. h.); *Rogers v. State*, No. 02-16-00047-CR, 2016 WL 4491228, at *1 (Tex. App.—Fort Worth Aug. 26, 2016, pet. filed) (mem. op., not designated for publication) (both cases relying on *London v. State*, 490 S.W.3d 503, 506–07 (Tex. Crim. App. 2016)). But even though Carter did not waive his argument, it is unavailing in light of this court's recent holding in *Ingram*. *See* 2016 WL 6900908, at *3.

The $133 "consolidated court cost" at issue was authorized by the local government code. Tex. Loc. Gov't Code Ann. § 133.102(a)(1) (West Supp. 2016). With his facial challenge, Carter has the burden to establish this statute's

unconstitutionality. *See Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1188 (2016). To successfully do so, Carter must establish that no set of circumstances exists under which this statute would be valid. *See id.* We look for an interpretation that supports and upholds a statute's constitutionality unless the contrary interpretation is clearly shown. *See id.* Regarding statutes authorizing the imposition of court costs against criminal defendants, the court of criminal appeals has specified that for such statutes to pass constitutional muster, they must "provide[] for an allocation of . . . court costs to be expended for legitimate criminal justice purposes," which are ones that "relate[] to the administration of our criminal justice system." *Id.* at 517–18.

Regarding section 133.102(a)(1)'s $133 "consolidated court cost," Carter asserts that three of the fourteen prescribed percentage allocations for the $133 are not legitimate criminal-justice purposes. Specifically, he points to (1) the allocation of 5.0034% to "law enforcement officers standards and education," which is now collected into an account in the general revenue fund; (2) the allocation of 9.8218% to "comprehensive rehabilitation," which is spent at the direction of an agency in the executive branch; and (3) the allocation of 0.0088% to a fund for "abused children's counseling" with no statutory direction to which State account the percentage should be directed. *See* Tex. Loc. Gov't Code Ann. § 133.102(e)(1), (5), (6). We follow our decision in *Ingram* in which we concluded, as have other courts of appeals, that these three enumerated designated uses as written are related to the administration of the criminal justice

system and that the legislature's directive to the comptroller to disburse those monies from the general revenue fund for those uses passes constitutional muster. *See* 2016 WL 6900908, at *3 (citing *Salinas v. State*, 485 S.W.3d 222, 226 (Tex. App.—Houston [14th Dist.] 2016, pet. granted); *Penright v. State*, 477 S.W.3d 494, 497–500 (Tex. App.—Houston [1st Dist.] 2015, pet. granted); *Denton v. State*, 478 S.W.3d 848, 851–52 (Tex. App.—Amarillo 2015, pet. ref'd) (concluding section 133.102 did not violate Takings Clause of Texas constitution)). Accordingly, Carter has failed to carry his burden to establish that section 133.102 cannot operate constitutionally under any circumstance, i.e., that the statute is invalid in all possible applications. *See Ingram*, 2016 WL 6900908, at *3 (citing *McAfee v. State*, 467 S.W.3d 622, 645–47 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd); *O'Bannon v. State*, 435 S.W.3d 378, 381–82 (Tex. App.—Houston [14th Dist.] 2014, no pet.)).

We overrule Carter's second point.

V. CONCLUSION

Having overruled Carter's two points, we affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: December 15, 2016