



IN THE  
TENTH COURT OF APPEALS

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No. 10-14-00192-CR

TYRONE CALVIN SMITH, III,

Appellant

v.

THE STATE OF TEXAS,

Appellee

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From the 361st District Court  
Brazos County, Texas  
Trial Court No. 13-01748-CRF-361

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MEMORANDUM OPINION

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Tyrone Smith, III appeals from a conviction for possession of a controlled substance. TEX. HEALTH & SAFETY CODE ANN. § 481.116(b) (West 2010). Smith complains that the trial court erred by denying a requested jury instruction pursuant to article 38.23 of the Code of Criminal Procedure. Because we find that the trial court did not err, we affirm the judgment of the trial court.

## FACTS

During a night patrol while training a new officer, an officer with the College Station Police Department checked the metal license plate that was displayed on the rear of a vehicle driven by Smith. The officer testified that it was routine to run license plates during patrol. The search showed that the license plate registration associated with the license plate had been expired for several months. The officer initiated a traffic stop, using the lights on his patrol vehicle as well as a second set of lights. When the second set of lights were activated, the officer observed what was later determined to be a temporary tag in the rear window of the vehicle. The officer testified that he could not read the numbers on the tag or the expiration date of the tag, which was later determined to be valid.

When the officers approached the vehicle to ask for Smith's license and insurance, the officers smelled marijuana coming from the vehicle and after a consensual search, the officer found a usable quantity of marijuana in the front pocket of Smith's pants. Smith was arrested. When Smith was being searched at the county jail, a pill fell from his sock which was determined to be methydone, a controlled substance.

A motion to suppress evidence was filed but never heard. During trial, the issue of the reasonableness of the traffic stop was litigated. At the jury charge conference, Smith objected to the omission of an instruction pursuant to article 38.23 of the Code of

Criminal Procedure and requested the trial court to include an instruction pursuant to article 38.23. The trial court overruled the objection and did not include the instruction in the charge to the jury.

### JURY CHARGE ERROR

In his sole issue, Smith complains that the refusal of the trial court to include an instruction pursuant to article 38.23 of the Code of Criminal Procedure was erroneous. When we review a claim of jury charge error, we engage in a two-step process. First, we determine whether error exists, and then we determine whether sufficient harm resulted from the error to require reversal. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). We do not reach the harm issue, however, unless we first find error in the charge.

When a fact question arises at trial regarding how evidence was obtained, article 38.23 requires the trial court to instruct the jury to disregard the evidence if the jury believes that the evidence was obtained in violation of the Constitution or laws of the United States or of Texas. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005). There are three requirements that a defendant must meet before he is entitled to the submission of a jury instruction to disregard evidence: (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. *Madden v. State*, 242 S.W.3d 504, 510

(Tex. Crim. App. 2007). Accordingly, an article 38.23 instruction is only required if there is a factual dispute about how the evidence was obtained. *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004). Further, an article 38.23 instruction is not proper for disputes regarding the legal significance of facts. *Robinson v. State*, 377 S.W.3d 712, 722 (Tex. Crim. App. 2012).

There are two statutes at issue relating to the validity of the traffic stop that were at issue in this proceeding, Transportation Code Section 502.407 relating to the offense of driving with an expired license plate and section 502.095 relating to the use and display of a temporary tag.

Section 502.407 states in relevant part:

- (a) A person commits an offense if, after the fifth working day after the date the registration for the vehicle expires:
  - (1) the person operates on a public highway during a registration period a motor vehicle, trailer, or semitrailer that has attached to it a license plate for the preceding period; and
  - (2) the license plate has not been validated by the attachment of a registration insignia for the registration period in effect.

TEX. TRANSP. CODE ANN. § 502.407(a) (West 2013).

Section 502.095 states in relevant part:

- (a) The department may issue a temporary permit in lieu of registration for a vehicle subject to registration in this state that is not authorized to travel on a public highway because of the lack of registration in this state or the lack of reciprocity with the state or country in which the vehicle is

registered.

(f) A registration receipt shall be carried in the vehicle at all times during the period in which it is valid. The temporary tag must contain all pertinent information required by this section and must be displayed in the rear window of the vehicle so that the tag is clearly visible and legible when viewed from the rear of the vehicle. If the vehicle does not have a rear window, the temporary tag must be attached on or carried in the vehicle to allow ready inspection. The registration receipt must be carried in the vehicle at all times during the period in which it is valid.

TEX. TRANSP. CODE ANN. § 502.095.

Smith argues that his mother's testimony that she was able to observe the temporary tag in the rear windshield after she arrived at the scene on the night in question creates a fact question as to whether reasonable suspicion existed that Smith had committed a traffic offense. The officer testified that he did not see the temporary tag until after he had initiated the traffic stop and could not read the numbers or letters on the tag. The State argues that the facts are undisputed regarding the display of an expired license plate and that the question of how to harmonize sections 502.095 and 502.407 is a question of law, which is not proper for the jury to determine.

The question of whether it is unlawful to display an expired license plate pursuant to section 502.407 even when a valid temporary registration is displayed pursuant to section 502.095 is not a question for the jury's determination but is a question of law for the trial court's determination. Because of this, an article 38.23 instruction was not proper for this dispute regarding the legal significance of the facts.

*Robinson v. State*, 377 S.W.3d 712, 722 (Tex. Crim. App. 2012). Further, in his reply brief

to this Court, Smith argues that there is no requirement to remove the expired license plate and the display of the temporary tag in the rear window would constitute the display of an appropriate registration insignia. However, this is also a legal question for the trial court's determination. Smith did not ask the trial court to make these determinations and likewise, those legal questions are not before us. The trial court did not err by refusing to include an instruction pursuant to article 38.23 in the charge to the jury. We overrule Smith's sole issue.

#### CONCLUSION

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY  
Chief Justice

Before Chief Justice Gray,  
Justice Davis, and  
Justice Scoggins

Affirmed

Opinion delivered and filed February 11, 2016

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