Affirmed and Opinion filed December 30, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00648-CR

JUSTIN FOSTER SHAW, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 7
Harris County, Texas
Trial Court Cause No. 97-04297

O P I N I O N

Justin Foster Shaw appeals a conviction for driving while intoxicated on the grounds that the trial court erred in: (1) denying his motion to suppress; (2) failing to declare section 724.061 of the Texas Transportation Code unconstitutional; (3) failing to suppress his breath test refusal; and (4) admitting into evidence the invocation of his right to terminate his police interview. We affirm.

Background

Appellant was charged with misdemeanor driving while intoxicated ("DWI") and filed motions to suppress various evidence. The trial court suppressed the portion of the video showing appellant's receipt of his *Miranda*[1] warnings and invocation of his *Miranda* rights but denied all other relief. Appellant thereafter entered a negotiated plea of nolo contendere, and the trial court found appellant guilty and assessed punishment at 180 days confinement, probated for one year, and a $750 fine.

Conclusory Stipulations

The first three of appellant's six points of error argue that the trial court erred in denying his general motion to suppress because the stipulated evidence he offered to support it was too conclusory to establish the stipulated facts.

Appellant's general motion to suppress argued, among other things, a lack of reasonable suspicion and probable cause. At the hearing on the motion, appellant offered an Agreed Stipulation for Motions to Suppress which described appellant's arrest as warrantless and stated, in part:

> A. Probable Cause for the Stop Facts
>
> Houston Police Officer Lambright stopped [appellant] in his vehicle because he concluded a traffic offense had occurred, i.e., that [appellant] drove his car through a red light at Richmond Avenue while driving northbound on Hillcroft.
>
> B. Probable Cause for the Arrest
>
> Having stopped [appellant], Officer Lambright became suspicious that he might be intoxicated and began a DWI investigation. Based upon [appellant's] admissions, speech, demeanor, failure of the field sobriety tests and the odor of an alcoholic beverage, Officer Lambright arrested [appellant] without incident . . . .

Neither side presented any other evidence at the hearing. On appeal, appellant complains that these stipulations are too conclusory to support denial of the motion to suppress because they failed to establish: (1) the basis for Lambright's conclusion that appellant had committed a traffic offense; (2) the basis for Lambright's seizure of appellant to commence a DWI investigation; (3) the facts about appellant's

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[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

admissions, speech, and demeanor that would justify the probable cause for his arrest; and (4) the basis for Lambright's conclusion that appellant failed the field sobriety tests.

Substantially identical attempts by appellant's counsel to offer conclusory stipulations in a trial court and then challenge their conclusory character for the first time on appeal have been rejected by this court and at least one other due to the failure to raise the complaint in the trial court. *See Maxcey v. State*, 990 S.W.2d 900, 903-04 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *Moore v. State*, 981 S.W.2d 701, 705 (Tex. App.–Houston [1st Dist.] 1998, pet. ref'd). In addition, the stipulations which appellant claims are conclusory are no more so than that describing the arrest as warrantless. Therefore, to whatever extent the State's evidence was deficient, so was that which shifted the burden to the State in the first place. Accordingly, appellant's first three points of error are overruled.[2]

Constitutionality of Section 724.061

Appellant's fourth point of error argues that the trial court erred in failing to find that § 724.061 of the Texas Transportation Code is unconstitutional because the statute: (1) does not require the State to establish a proper relevance predicate before introducing a defendant's refusal to take a breath test, thereby depriving the defendant of his due process rights; and (2) is void for vagueness because of the word "may" in the phrase "may be introduced into evidence." As with the preceding points of error, however, these contentions were expressly rejected in *Maxcey* and *Moore*. *See Maxcey*, 990 S.W.2d at 904; *Moore*, 981 S.W.2d at 707-09. Accordingly, appellant's fourth point of error is overruled.

Erroneous Statutory Warnings

Appellant's fifth point of error argues that trial court erred in failing to suppress the evidence of his refusal to take a breath test because the police gave him an erroneous warning on the consequences of his refusal. The police officers told appellant that if he took the test and it revealed a blood-alcohol content of 0.10 percent or greater, *i.e.*, at the time of the test, his license would be suspended for sixty days.

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[2] Apart from our decision on the merits, we note our disapproval of the disingenuous ploy that was attempted with the stipulations in these cases. This tactic has served no purpose other than to waste judicial and prosecutorial resources. Should it continue to do so in other cases, it will be incumbent upon this Court to consider formal action to deter it.

Appellant contends that when read together, section 724.015(3) of the Transportation Code and section 49.04 of the Penal Code require the State to prove that the driver's blood alcohol level was 0.10 percent or more *at the time of driving*. Appellant argues that because the warnings given to him were thereby inconsistent with sections 724.015 and 49.04, his refusal to take the test was not voluntary.

It is undisputed that appellant was given the statutory warnings prescribed in section 724.015 of the Transportation Code. As above, appellant's contention was specifically rejected in *Moore*. *See* 981 S.W.2d at 705-07. Therefore, appellant's fifth point of error is overruled.

Videotape

Appellant's sixth point of error argues that the trial court erred in "admitting into evidence" the portion of the videotape at which he invoked his right to terminate the interview with police because it would allow the jury to infer guilt. However, the record does not support this contention. First, because appellant entered a nolo plea, the case never went to trial, and the videotape was never offered into evidence. More importantly, at the conclusion of the suppression hearing, the trial court suppressed the portion of the videotape at which appellant received his *Miranda* warnings and invoked his *Miranda* rights. Because the record therefore does not reflect that the trial court took the action complained of, appellant's sixth point of error is overruled, and the judgment of the trial court is affirmed.

Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 30, 1999.

Panel consists of Chief Justice Murphy and Justices Edelman and Frost.

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