PD-1226-18

1226-18 C.O.A. Case No. 05-17-00492-CR

PD-1226-18

ORIGINAL

IN THE CRIMINAL COURT OF APPEALS, TEXAS

MARK DAVID ZIMMERMAN, Appellant

v.

The State of TEXAS, Appellee

PETITION FOR DISCRETIONARY REVIEW

Appellant's PETITION

On Appeal From Cause Number

067724

In THE 397th DISTRICT

of Grayson County, TEXAS

Hon. Brian Gary, Presiding

ORAL ARGUMENT REQUESTED

Identity of Judges, Parties and Counsel

Appellant / Petitioner:

Mark David Zimmerman, Pro Se

Attorney for Appellant:

At Trial

Rick Dunn
402 W. Lamar, Ste. #101
Sherman, Tx 75090
Bar No. 00783995
Telephone #903-893-5535

On Appeal

Christie M. Merchant
Merchant Law Office
17304 Preston Rd.
Ste. #1250
Dallas, Tx 75252
Bar No. 24070219
Telephone #817-251-0610

Appellee:

The State of Texas

Attorney For The State:

On Appeal

Karla Hackett
Bar No. 01923400
Asst. COA
Grayson County,
Texas
200 S. Crockett St.
Ste. #100
Sherman, Tx 75090
Telephone #903-813-4361
FAX #903-892-9933

Elected Official

Joseph O. Brown
Bar No. 00793413
COA
Grayson County,
Texas
200 S. Crockett St.
Ste. #100
Sherman, Tx 75090
Telephone #903-813-4361
FAX #903-892-9933

At Trial

Jeremy Wood
Bar No. 24063074
Donald Carter
Bar No. 24065011
Asst. COA's
Grayson County, Texas
200 S. Crockett St.,
Ste. #100
Sherman, Tx 75090
Telephone #903-813-4361
FAX #903-892-9933

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Statement Regarding Oral Argument

Petitioner states that absent an immediate reversal, an oral argument is necessary to expand upon the issues and rulings discussed in this brief and Petition For Discretionary Review.

The previous court of appeals has decided an important question of State and Federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals and the Supreme Court of the United States. An oral argument would enlighten the Court as to this conflict in a poignant and succinct manner.

Should the Criminal Court of Appeals in Texas grant Oral Argument, Petitioner would be able to demonstrate upon the evidence in record to the Court exactly where the conflict arises on the DVD of the arrest, as well as show the Court conflicting statements from the record, sworn affadavits and actual reality of the arrest.

Petitioner moves that the Court grant Oral Argument as a matter of sound judicial judgement.

PD-1226-18

IN THE CRIMINAL COURT OF APPEALS

MARK DAVID ZIMMERMAN, Appellant

v.

State of Texas, Appellee

Petition For Discretionary Review
From Cause No. 05-17-00492-CR
On Appeal From the 397th Judicial District
Court of Grayson County, Texas
Trial Court No. 067724

TO THE HONORABLE JUSTICES OF THE COURT:

COMES NOW, MARK DAVID ZIMMERMAN, petitioner pro se, to file this brief pursuant to the TEXAS RULES OF APPELLATE PROCEDURE and would show the court as follows:

STATEMENT OF THE CASE

On December 14th, 2016, a Grayson County Grand Jury returned a five count indictment alleging the commission of various controlled substances offenses and that Appellant was a habitual offender. CR 12-13 On May 1st, 2017, the state amended the indictment in which it struck the habitual offender enhancements and charged Appellant with four offenses: Possession with intent to deliver a controlled substance, namely, gamma hydroxybutyric acid in an amount of more than 400

... grams (Count I); Possession of Marijuana in an amount of four ounces or More but less than Five pounds (Count II); Possession of a Controlled Substance, namely Methamphetamine, in an amount of less than one gram (Count III); and possession of a controlled substance, namely tetrahydrocannabinol, in an amount of less than one gram (Count IV) CR 66-67. The indictment further alleged that each count was committed in a drug free zone. CR 66-67. Appellant pleaded, "Not Guilty," to each count, and a jury trial was held. 5 RR 14. The State filed a seperate notice of enhancement in which it was alleged Appellant had three prior felony convictions, two counts of Aggravated Assault with a Deadly Weapon and one count of Manufacture and Delivery of Methylenedroxymethamphetamine, one of which was not present until the day of trial on any indictment. CR 37-38

On May 2nd, 2017, the jury found Appellant guilty of all four counts alleged in the State's Amended indictment. 5 RR 172-173. During the punishment phase of the trial, the state sought drug free zone and habitual offender enhancements, to which Appellant pleaded, "Not True." 6 RR 11. On May 3rd 2017, the jury found each of the State's enhancements / paragraphs, "true," and assessed Appellant's punishment at ninety-nine (99) years of imprisonment in the Texas Department of Criminal Justice Institutional Division with a $100,000 fine for Count I. 6-RR 66-69. For Counts II, III and IV, the jury assessed Appellant's punishment at fifteen (15) years of imprisonment with a $10,000 fine for each. CR 113-116. The trial court sentenced Appellant's punishments in accordance with the jury's verdicts and ordered the sentences to run concurrently. CR 90-91. Appellant filed a motion for new trial which was denied by operation of law. Direct appeal followed, oral argument was granted and then the appeal was denied. This petition for discretionary review followed.

Statement of Procedural History

- Appellant arrested on June 7th, 2016, in Whitesboro Texas
- Appellant was Indicted, according to the actual indictment, on cause number 67375, in the 59th Judicial District of Grayson County Texas, during the July term of 2016 A.D., for Possession with intent to deliver a controlled substance, Cocaine, in an amount of four grams or more but less than 200 grams, (count I), Possession of Marijuana in an amount of more than four ounces but less than 5 pounds, (count II), and Unlawful Possession of a Firearm by a Felon. (count III), According to the Court's register of actions, the indictment passed on August 31st, 2016, in the 397th Judicial District of Grayson County, Texas
- Appellant was indicted, according to the actual indictment, on cause number 67724, in the 59th Judicial District of Grayson County Texas during the July term of 2016 A.D., for Possession with Intent to Deliver a Controlled Substance, Gamma Hydroxybutyric Acid, in an amount of more than 400 grams (count I), Possession of Marijuana in an amount of more than four ounces but less than 5 pounds (count II) Unlawful Possession of a Firearm by a Felon (count III), Possession with intent to deliver a controlled substance, Methamphetamine, in an amount less than one gram (count IV) and Possession of a controlled substance, tetrahydrocannibihol, in an amount less than one gram (count IV). However, the July term Grand Jury shows no 67724 in existence, nor were any proceedings conducted in the 59th District. Every action occurred in the 397th District in December 2016 or later.
- Indictment 67375 was dismissed by order of dismissal on January 3rd, 2017
- On May 1st, 2017, trial began for cause number 67724

- On May 2nd, Appellant was found guilty of all four counts by a Jury in Grayson County Texas, after the State amended the indictment, the day before.
- On May 3rd, 2017; the jury assessed Appellant's punishment at 99 years of incarceration with a $100,000 fine for Count I and 15 years of incarceration with a $10,000 fine for Counts II, III and IV.
- A notice of appeal was filed and Appellant's direct appeal brief was filed on November 6th, 2017, by Attorney Christie M. Merchant.
- The State's reply brief was filed on December 28th, 2017.
- Appellant's reply brief was filed on January 17th, 2018.
- The Fifth Court of Appeals in Dallas granted Oral Argument on May 29th, 2018 at 1:00pm CST.
- The Fifth Court of Appeals entered it's opinion on August 20th, 2018 and affirmed Appellant's conviction.
- Appellant's Appellate Attorney filed a motion for Rehearing on September 3rd, 2018.
- The Fifth Court of Appeals denied Appellant's motion for rehearing on October 18th, 2018
- The Court of Criminal Appeals of Texas granted Appellant's motion for an extension of time in which to file Petition for Discretionary Review on November 12th, 2018
- The time to file the Petition for Discretionary Review was extended to Friday, January 18th, 2018.
- The Petition was struck on February 27th, 2019, because it was too long and did not contain a copy of the Court of Appeals opinion.
- The Deadline to file the redrawn Petition was set for 30 days after February 27th, 2019.
- This Petition follows.

Grounds For Review

1. The Fifth District Court of Appeals erred by affirming the trial court's decision in denying Appellant's motion to suppress

ARGUMENT

1. The Fifth District Court of Appeals erred by affirming the trial court's decision in denying Appellant's Motion to Suppress.

In Appellant's sole remaining point in his petition for Discretionary Review; Appellant contends that the Fifth District Court of Appeals erred by affirming the trial court's decision in denying Appellant's motion to suppress. Appellant asserts that as per Tex.R.App.P. 66.3(c), the reason for granting Appellant's Petition for Discretionary Review is whether a court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the court of criminal appeals or the Supreme Court of the United States.

The decision that conflicts with the applicable decisions of the Court of Criminal Appeals and the Supreme Court of the United States revolves around Officer Goodman's pretense of a traffic stop as a fishing expedition to conduct a dog sniff test and how that extension of a traffic stop violates our United State's Constitutional shield against unreasonable search and seizures.

Rodriguez v. U.S., 135 S.Ct. 1609 (2015) held that, "Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures." Rodriguez also held that, "A traffic stop becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket." Additionally, Davis v. State, 947 S.W.2d at 243 (Tex. Crim. App. 1997) held that, "The stop may not be used as a fishing expedition for unrelated criminal activity."

Appellant contends that since Officer Goodman did not write him a ticket, admitted on the record he was going to explicitly not write Appellant a ticket (R.R. 82-10) and stated unequivocably on the arrest DVD that, "He (Goodman) was not going to write you (Appellant) a ticket anyway," that Officer Goodman used a traffic stop as a fishing expedition for unrelated criminal activity,

Unreasonably detained Appellant after all tasks tied to the alleged traffic violation were completed and completely engaged in the very definition of an unreasonable seizure in violation of our constitution's protection.

Appellant argues that since Officer Goodman used the pretense of a minor traffic violation to stop him, yet clearly indicated that no ticket or warning would be issued, that anything that occurred after Officer Goodman stated he was, "not issuing you a ticket anyway," should be suppressed. Appellant contends that all evidence collected after Goodman's statement to Appellant that no ticket would be issued, should be judged under the, "Fruit of the Poisonous Tree," doctrine and therefore, all the evidence that was derived from the exploitation of an illegal seizure must be suppressed, as that evidence is a product of a Fourth Amendment violation. Appellant moves that because the initial detention was longer than reasonably necessary to effectuate the purpose of the stop and that Goodman indicated that he was not interested in issuing a warning or citation for the stop, that the pretense of a traffic stop and its unreasonable prolonged detention, the very definition of a fishing expedition for unrelated criminal activity, violated Appellant's Fourth Amendment rights.

Standard of Review

A trial court's ruling on a motion to suppress is reviewed for an abuse of discretion, see Martinez v. State, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011) When an abuse of discretion has occurred, such as in this case where a trial court and appellate court have decided an important question of state or federal law in a way that conflicts with the applicable decisions of The Court of Criminal Appeals or the Supreme Court of the United States, it is the ruling Court's mission to uphold a minimum standard regarding prevailing precedents and reverse a ruling that constitutes that aforementioned abuse of discretion.

A trial court's determination of historical facts and mixed questions of laws and fact that rely on credibility are granted almost total deference when supported by the record, see State v. Kerwick, 393 S.W.3d 270, 273 (Tex.Crim.App. 2013) But when mixed questions of law and fact do not depend on the evaluation of credibility and demeanor, the trial court's ruling is reviewed de novo. Id. That deference that is traditionally granted cannot be accepted as correct if there is a contradiction or if a prevailing precedent on the exact same issue exists. That deference to the trial court's ruling would be called into question and reviewed de novo if testimony contradicts video evidence in the record. After all, how can one credit testimony that is directly contradicted by video?

Whether the facts known to the officer at the time of the detention amount to reasonable suspicion is a mixed question of fact and law that is reviewed de novo on appeal. Id.; see also State v. Taylor, No. 05-15-01542-CR, 2016 WL 6135521, at *3 (Tex.App.-Dallas 2016 pet. ref'd.)(Not designated for Publication) Given the fact that less than one minute and twenty seconds into the DVD video of the traffic stop (State's Exhibit 2 at 1:15), Officer Goodman states, "I'm not going to give you a ticket for your tag light or anything like that or anything." Appellant begs the Court to review this stop and the pretense of a traffic violation as a, "Fishing Expedition for Unrelated Criminal Activity," described in Davis v. State, 947 S.W.2d at 243 (Tex.Crim.App. 1997), and suppress everything in evidence that falls under the standard of review for a fishing expedition and an illegal prolonged extension of a traffic stop.

Being that the warrant check came back clear, Officer Goodman stating that he was not writing a warning nor a citation and that Officer Goodman agreed that Appellant had appropriate eye contact, was not too nervous, saw nothing in plain view and Appellant was not under the influence of drugs or alcohol and no odor of illegal substances was present (2 R.R. 25), Appellant demonstrates that the authority for the seizure would have ended when tasks tied to the traffic infraction were completed.

Because the Fourth Amendment is applicable to the states through the Fourteenth Amendment, the court should look to both state and federal case law in it's analysis, see Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949) and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, 816 Ohio Op. 2d 384, 6 Ohio Law Abs. 513 (1961)

RODRIGUEZ V. U.S.

In the landmark case of Rodriguez v. U.S., the Supreme Court held several key points in relation to traffic stops. #1. "Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the constitution's shield against unreasonable seizures" and #2. "The critical question is not whether the dog sniff occurs before or after the Officer issues a ticket, but whether conducting the sniff adds time to the stop, as a traffic stop becomes unlawful if it is prolonged beyond the time reasonably required to issue a warning ticket, the mission itself."

Officer Struble, a K-9 officer, stopped Rodriguez for driving on the highway shoulder, a violation of Nebraska law. After Struble attended to everything related to the stop, including, inter alia, checking the drivers licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez for permission to walk his dog around the vehicle. Rodriguez refused, Struble detained him until a Second Officer arrived. Struble then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed Methamphetamine. Seven or eight minutes elapsed from the time Struble issued the written warning until the dog alerted. Rodriguez moved to suppress the stop.

Rodriguez appealed the denial of his motion to suppress, Certiorari was granted by the United States Supreme Court. The Court held that," A routine traffic stop is more like a brief stop under Terry v. Ohio, 392 U.S. 1,

88 S.Ct. 1868, 20 L.Ed.2d 889, than an arrest, see, e.g., Arizona v. Johnson, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d. 694. It's tolerable duration is determined by the seizure's "mission", which is to address the traffic violation that warranted the stop. Illinois v. Caballes, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 and attend to related safety concerns. Authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed. However, a traffic stop becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket. Id., at 407, 125 S.Ct. 834.

Beyond determining whether to issue a traffic ticket or merely a warning, an officer's mission during a traffic stop typically includes checking the drivers license, determining whether there are outstanding warrants against the driver, and inspecting the automobiles registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: Ensuring that vehicles on the road are operated safely and responsibly, See Delaware v. Prouse, 440 U.S. 648, 658-659, 99 S.Ct. 1391, 59 L.Ed.2d. 660. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In concluding that the de minimis intrusion in Rodriguez could be offset by the Government's interest in stopping the flow of illegal drugs, the Eighth Circuit relied on Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d. 331. The Court reasoned in Mimms that the government's "legitimate and weighty" interest in officer safety outweighed the "de minimis" additional intrusion of requiring a driver, lawfully stopped, to exit a vehicle, Id., at 110-111, 98 S.Ct. 330. The officer-safety interest recognized in Mimms, however, stemmed from the danger to the officer associated with the traffic stop itself. On-scene investigation into other crimes, in contrast, detours from the officer's traffic-control mission and therefore cannot gain support from Mimms, either in Rodriguez or in Appellant's case.

In both cases, requiring a driver to exit his vehicle qualifies as a prolonged stop and is not a part of the traffic control mission.

The key note in Appellant's case when compared to the precedent in Rodriguez, is that Appellant was never issued a warning nor a citation and Appellant was told very early on in the traffic stop that he was not getting a ticket. Viewed in that light, the entire traffic stop was unlawful because it was prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket. Officer Goodman's on-scene investigation and questioning of other possible crimes and criminal activity, a "fishing Expedition," detoured from the Officer's original traffic control issue and becomes the very definition of a prolonged traffic stop that violates the constitution's shield against unreasonable seizures. The specifically barred extension of time to conduct an unwarranted dog sniff compounds the illegality of the flagrantly prolonged pretense of a traffic stop. Any evidence that came to light only as a result of the illegal detention should unquestionably be subject to suppression under the exclusionary rule of the Fourth Amendment and Tex. Code. Crim. Proc. Ann. 38.23(a). After all, in Rodriguez, a citation was issued, yet in Appellant's case it was not. The 5th District's error lies in it's opposition to already established precedent.

Davis v. State

Police officers stopped Davis on suspicion of driving while intoxicated at one o'clock in the morning in a rural location, Davis, 947 S.W.2d at 241. Davis exited his vehicle and explained that he was not intoxicated, but Merely tired. The officers did not smell alcohol on Davis, nor did they smell alcohol or drugs coming from his vehicle. Id. Although the initial purpose of the traffic stop had been completed at this time, the officers questioned both Davis and his passenger and the officers believed the

answers were inconsistent. Id. A background check on Davis showed no history of convictions, however, his passenger had one prior drug-related conviction. Id. Finally, although the vehicle was not registered to Davis, it had not been reported stolen and Davis told the officers that he had borrowed it from his girlfriend. Id. The officers told Davis he was free to leave, but they detained his vehicle and called a canine unit to the scene. Id. After the dog alerted to the presence of narcotics, Davis gave the officers his keys and allowed them to search his trunk, where they found marijuana. Id.

The Beaumont Court of Appeals found that the circumstances were sufficient to constitute reasonable suspicion, but the Court of Criminal Appeals disagreed. Id. at 241-42. The Court noted that consistent with Terry v. Ohio, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 1879, 20 L.Ed. 2d. 889, 44 Ohio Op. 2d 383 (1968), Texas courts require reasonable suspicion before a seizure of the person or property can occur. Id. at 244. "To justify an investigative detention, the officer must have specific articulable facts, which, premised upon his experience and personal knowledge, when coupled with the logical inferences from those facts, would warrant the intrusion on the detainee. These facts must amount to more than a mere hunch or suspicion." Id.

The articulable facts used by the officer must create reasonable suspicion of: (1) Some activity out of the ordinary that is occurring or has occurred; (2) Some suggestion to connect the detainee with the unusual activity; and (3) some indication the unusual activity is related to crime. Id. The Court emphasized that, "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Id. at 245. The Court also emphasized, "The stop may not be used as a fishing expedition for unrelated criminal activity." Id. at 243.

In reversing the judgement of conviction, the court concluded that the purpose of the investigative detention was effectuated when the officers determined that Davis was not intoxicated. Id. As to a continued detention,

the Court found, "When viewed in an objective fashion, no known fact, or rational inferences from those facts, would support the conclusion that appellant was engaged in or would soon engage in criminal activity." Id.

When applying the precedent in Davis to Appellant's case, the similarities are striking. In both cases, the officers performing the traffic stop set aside their original mission and reason for the stop and prolonged the detentions so that they could perform a K9 search. In Appellant's case, Officer Goodman never wrote a ticket nor intended to, completely disregarding the mission of traffic control. In Davis, Davis was determined to not be intoxicated very early on, but continued to be detained. This prolonged detention and fishing expedition into unrelated criminal activity outside the scope of the original traffic control mission was determined by this very court to be unconstitutional. Appellant's case is the same in this regard and he asks the Court to uphold it's previous ruling in his case.

WOLF v. STATE

At about three o'clock in the morning, Wolf was stopped by State Trooper Nelson for a defective, "Tag lamp," on the Chevy S-10 Blazer that Wolf was driving. After brief initial questioning, Trooper Nelson told Wolf and his passenger, Freed, that he was only going to issue a warning, not a ticket, then returned to his patrol car and radioed a request for criminal histories and outstanding warrant reports.

Trooper Nelson then called in for a K-9 patrol officer to come to the scene. Nelson noted that, "Not sure what we're going to have here," in his request to the K-9 officer as, "There was nervousness there." Nelson later testified during the Suppression hearing and at trial that Freed was nervous and Wolf was overly cooperative.

The K-9 officer arrived about ten to fifteen minutes after the car was stopped. The K-9 sniff test was performed after Wolf was told to exit the

and Wolf complied. Although neither Officer testified to the dog's alert, the arrest video shows Nelson telling Wolf that the dog had alerted to the presence of drugs. Both officers stated Wolf gave consent to both the K-9 sniff and the subsequent search. Wolf denies this as he contends that he could not have given consent to search a vehicle he did not own himself.

The officers executed the search and found Marijuana and a bag containing seven pills, later determined to be, "Ecstacy," or 3-4 Methylenedioxymethamphetamine. At the suppression hearing, Trooper Nelson testified, "I don't know if I've ever issued a citation [for a defective tag lamp.]."

Trooper Nelson testified on cross-examination that he prolonged the detention, after receiving a clear warrant-report, because of Freed's nervousness and Wolf's overly cooperative behavior. Wolf v. State, 137 S.W.3d 797, Id. at 801, 2004 Tex.App. LEXIS 4358. The Court denied Wolf's motion to suppress and the ecstacy was admitted into evidence. The Court of Appeals reversed the denial of suppression, holding that the prolonged detention violated Wolf's fourth amendment rights.

When the facts in Appellant's case are applied to the standard set forth in Wolf v. State, the similarities abound. Both were stopped for a defective license plate light. Wolf was told he was going to get a warning for the traffic violation. Appellant was told he was not going to get anything. Wolf was clear of all warrants or holds. Appellant was clear of all warrants or holds. Both were detained longer than necessary to effectuate the purpose of the traffic stop and never issued a warning or citation.

However, if Wolf was forced to be applied to Appellant's issues, a few key points arise. Wolf very clearly consented to the search, yet argued later on he could not legally have consented to a search of a vehicle he did not own. Appellant never consented at all, even having to be silenced when he raised an objection to Officer Goodman using a squeeky toy on one knee while pointing and gesturing to his K-9 during the sniff test. In Wolf's case, as Trooper Nelson

was having technical difficulties retrieving the criminal history, Nelson detained Wolf and Freed until backup arrived, then telling Wolf to exit the vehicle. In Appellant's case, no such technical difficulty existed and after receiving the all clear report, Goodman still chose to prolong the detention.

The Court of Appeals looked to see if the detention during the wait for the report and backup was a prolonged detention that violated Wolf's Fourth Amendment rights. The Court of Appeals held that because the initial detention was longer than was reasonably necessary to effectuate the purpose of the stop, that is, to warn Wolf about the defective tag light, and because the prolonged detention was not supported by reasonable suspicion, the Court of Appeals found that the prolonged detention violated Wolf's Fourth Amendment rights.

As applied to Appellant's case, this precedent of Wolf is of the exact same issue in the exact same court. Under the construct of Wolf, the Court of Appeals decided that even prolonging the detention after the decision to only issue a warning was illegal and the nervousness and overly cooperative behavior did not meet the required standard for reasonable suspicion to detain the passengers. The Court of Appeals determined that the traffic stop began to be a prolonged detention that violated Wolf's Fourth Amendment rights. Using this precedent in Appellant's case, the record shows that Goodman stated in trial that Appellant was not nervous, not under the influence of drugs or alcohol, was cooperative and came back clear on the warrant check, thus there was no initial basis for a prolonged detention. Telling Appellant to exit his SUV, while keeping a hand on his sidearm in a draw position, could not possibly have been related to the original mission of traffic control, as that mission was abandoned very early on in the stop. Appellant and Wolf were both detained illegally in the same manner and style. This very court has already made a ruling on this exact issue and the court should uphold this ruling again.

APPLICATION

Officer Goodman stopped Appellant under the pretense of issuing a warning or citation for a license plate light not being on. (State's Exhibit 2 at 1:07) Officer Goodman told Appellant he was not going to issue him a warning nor a citation for the stop very early on. (State's Exhibit 2 at 1:15) After questioning Appellant and running Appellant's warrant check, which came back clear, Goodman told Appellant to exit his vehicle with a hand on his sidearm. Appellant submits that this prolonged detention violated his Fourth Amendment rights either at that point or earlier on when Goodman told Appellant he was not going to issue him a warning.

As the state never actually introduced evidence proving that Appellant's license plate lights were not functioning correctly, despite a pretrial request to do so, one could draw the inference that the evidence never backed up Goodman's statement or that the evidence not submitted would have been exculpatory in nature. Appellant submits that because his Mercedes-Benz has two license plate lights, the state would have had to prove that both of the lights were not functioning properly, had Goodman actually written a ticket and Appellant contested the ticket. These unproven assertions of Goodman leave a very dark cloud over the legality of the traffic stop as well as the entire case.

The "tolerable duration" of the stop is determined by the seizure's "mission", which is to address the traffic violation that warranted the stop and attend to related safety concerns, Rodriguez v. U.S., 135 S.Ct. 1609, 1614 (2015). As Goodman never wrote a ticket, nor intended to, and since the state never definitively proved Goodman's statement regarding the malfunctioning license plate lights, Appellant submits that the tolerable duration of the stop regarding the seizure's mission, which was to address the traffic violation, would have been extremely limited in nature, if it ever existed at all.

When Goodman returned to Appellant's vehicle, he had already ran Appellant's warrant check. Goodman could have chosen to issue a ticket then, yet did not, and instead asked Appellant to exit his vehicle. Goodman continued to detain Appellant until Goodman told Appellant he was going to perform a K-9 sniff test.

During the K-9 sniff test, the record and evidence shows that Goodman spoke to the K-9, pointed and gestured, got down on one knee and used a squeeky toy to induce the K-9 to alert. Appellant submits that the Court consider these facts as those actions performed by an officer conducting a K-9 sniff test are prohibited and illegal and therefore the evidence obtained on the basis of an alert by the K-9 should be considered under the fruit of the poisonous tree doctrine and thus suppressed.

Should the Court go against the precedents that exist and decide that the 5th district did not err in it's opinion, the court will create a dangerous precedent. This dangerous precedent is where an officer can stop a motorist under the pretense of an unproven traffic violation, never write a ticket, demand that a motorist exit their vehicle, continue detaining a motorist to conduct a non-consensual K-9 sniff test despite not seeing or smelling any narcotics, induce the K-9 to alert by performing prohibited actions, gestures and spoken commands and then procede to search the motorist's vehicle. In the context of a civil rights lawsuit under U.S.C. 42 §1983, this is highly illegal and actionable. Yet, the 5th District has somehow ruled against prior State and Supreme Court precedents and decided that this is indeed legal and not at all erroneous. In the interest of all prevailing American notions of freedom and liberty, this Court must reverse the ruling on the motion to suppress.

In 3 seperate cases, 2 out of this very court, it has been held that a police extension of a traffic stop in order to conduct a K-9 sniff test violates the constitution's shield against unreasonable seizures,

See, Wolf v. State, 137 S.W.3d 797 (Tex. App. 2004), Davis v. State, 947 S.W.2d 240 (Tex. Crim. App. 1997) and Rodriguez v. U.S., 135 S.Ct. 1609 (2015). Appellant asks the Court to uphold the decisions in these precedents and the application framework to his case and reverse the denial of Appellant's suppression motion.

HARM ANALYSIS

Should the Court conclude that the lower courts and or presiding judge should have granted Appellant's motion to suppress, the Court would be bound to conduct a harm analysis as per Tex. R. App. P. 44.2(a). "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the Court of Appeals must reverse a judgement of conviction or punishment unless the Court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Atkins v. State, 951 S.W.2d 787, 797 (Tex. Crim. App. 1997) (citing Cain v. State, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) "All errors, except certain federal constitutional errors deemed "structural", are subject to a harm analysis."

Without the evidence discovered as a result of the illegal detention and search, the state would have had no basis on which to convict Appellant of possession of anything. See, Dortch, 199 F.3d at 203; see also Hall, 74 S.W.3d 521, 527 (Tex. App. Amarillo 2002) no pet. Thus, the Court should not be able to conclude beyond a reasonable doubt that the error did not contribute to the conviction. See, Tex. R. App. P. 44.2(a). The Court should reverse the judgement.

Prayer For Relief

Petitioner comes now to pray that the Honorable Court of Appeals of Texas sustain his issue and reverse the judgement of the lower courts and issue a remand to the lower courts or render a decision upon Petitioner's behalf.

CERTIFICATE OF SERVICE

Comes now, Mark David Zimmerman, Petitioner Pro Se, being of sound Mind and judgement and completely of his own volition to fully swear that everything contained within this Petition For Discretionary Review is both true and correct, under penalty of perjury, on this date of March 19, 2019 A.O.
Served on the following Parties:

- Clerk of The Court of Criminal Appeals
  PO Box 12308
  Capitol Station
  Austin, Texas 78711

- Texas Attorney General's Office
  300 W. 15th St.
  Austin, Texas 78701

Respectfully Submitted,

X _____

Mark O. Zimmerman
#02136697
Ferguson Unit
12120 Savage Drive
Midway, Tx 75852

APPENDIX

A1-A2 - Appellant's Original Indictment for traffic stop. Appellant was indicted without a lab test for narcotics

A3-A4 - Appellant's 2nd Indictment, before the State added a 3rd Aggravated Enhancement on day of trial

A5 - Court Order of Actions for 1st Indictment

A6 - Court's Order of Actions for 2nd Indictment

OP-1 - OP-15 - 5th's District Opinion

APPENDIX NOTES

- Ref. A3: The July term of the 59th District is listed on Cause # 067724, yet there was no cause with this number presented in the 59th Judicial District. All proceedings show the 397th Judicial District. This could invalidate the indictment and case altogether, which should be considered as Appellant will raise this on Habeas if necessary.
- Ref. A4: On Count 5, there is no tetrahydrocannibihol listed in the Health and Safety Code. This would invalidate this count.
- Ref. A4: The first Punishment enhancement is for an aggravated / bodily injury offense, which could not be used to enhance a non-violent drug offense in the Health and Safety Code
- Ref. A4: On the Second Punishment enhancement, there is no Methylenedroxymethamphetamine in existence in the Health and Safety Code. This would invalidate this enhancement.

- All of this bears note to the Court to save the people time and money in the interest of justice.

A1

402 West Lamar
Sherman, Tx 75090

DEFENDANT'S COPY

DEFENDANT: MARK DAVID ZIMMERMAN
ADDRESS: 18484 PRESTON RD APT 102-332
DALLAS TX 75252
CAUSE NUMBER: 67375

COUNT	DEGREE	OFFENSE	BOND AMOUNT
1	1st Degree	COUNT 1 POSS CS PG 1 >=4G<200G W/INT.	15,000
2	Felony;	DELIVER;	5,000
3	3rd Degree	COUNT 2 POSS MARIJ >4 OZ<=5LBS	5,000
	Felony;	DRUG FREE ZONE;	
	3rd Degree	COUNT 3 UNL POSS FIREARM BY FELON	
	Felony		

PA CONTROL NO. 16-02962
TRN #:9242014982; TRS#: A002; A003; A004
DESCRIPTION: DOB 07/31/1986, White, Male
WITNESSES FOR GRAND JURY: Cole Dotson
ARREST DATE: 06/07/2016;
CO-DEFENDANT(S): ____________

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jurors, duly selected, organized and impaneled as such in and for the County of Grayson, State of Texas, at the July Term, 2016, A.D., of the District Court in and for the 59th Judicial District of Texas and for said County upon their oaths in said Court at said Term present that on or about the 7th day of June, 2016, A.D., and anterior to the presentment of this indictment, in the County of Grayson and State of Texas, MARK ZIMMERMAN hereinafter called "Defendant", did then and there,

COUNT 1

intentionally or knowingly, possess with intent to deliver, a controlled substance, namely, cocaine, in an amount of four (4) grams or more but less than two hundred (200) grams,

COUNT 2

intentionally or knowingly possess a usable quantity of marijuana in an amount of four ounces or more but less than five pounds, And it is further presented that the defendant committed the above offense in, on, or within 1,000 feet of the premises of a school, to-wit: Whitesboro High School,

COUNT 3

having been convicted of the felony offense of Aggravated Assault with a Deadly Weapon on the 9th day of December, 2009, in cause number F-0912973 in the 204th District Court of Dallas

DISTRICT COURT OF GRAYSON COUNTY TEXAS

402 West Lamar
Sherman, Tx 75090

DEFENDANT'S COPY

County, Texas, intentionally or knowingly possess a firearm before the fifth anniversary of the defendant's release from supervision under parole following conviction of said felony,

PUNISHMENT ENHANCEMENT

And it is further presented that, prior to the commission of the charged offense hereafter styled the primary offense, on the 16th day of April, 2007, in cause number 199-80161-07 in the 199th District Court of Grayson County, Texas, the defendant was finally convicted of the felony offense of Possession of Controlled Substance Penalty Group 2 or 2A, four grams or more but less than 400 grams with intent to deliver,

And it is further presented that, prior to the commission of the primary offense, and after the conviction in cause number 199-80161-07 was final, the defendant committed the felony offense of Aggravated Assault with Deadly Weapon, and was finally convicted of said felony on the 9th day of December, 2009, in cause number F-0912973 in the 204th District Court of Dallas County, Texas,

against the peace and dignity of the State.

JOSEPH D. BROWN
Criminal District Attorney

Foreman of the Grand Jury

STATE OF TEXAS
COUNTY OF GRAYSON
I, Kelly Ashmore, District Clerk in and for Grayson County Texas, do hereby certify that the above and foregoing is a true and correct copy of the original document as the same appears on the file in the District Court, Grayson County, Texas. Witness my hand and seal of the Court, this the 12 day of Sept A.D. 2016
KELLY ASHMORE, DISTRICT CLERK
GRAYSON COUNTY, TEXAS
By _____ Deputy

FILED FOR RECORD
BY _____
2016 AUG 31 PM 12:26
KELLY ASHMORE
DISTRICT CLERK
GRAYSON, TX

RECEIVED
2016 SEP 13 PM 2:08
SHERIFF'S OFFICE
CIVIL DIVISION
SHERMAN, TEXAS

Attorney at Law
Rick Dunn
402 West Lamar
Sherman, Tx 75090

DEFENDANT COPY

DEFENDANT: MARK DAVID ZIMMERMAN
ADDRESS: 18484 PRESTON RD APT 102-332
DALLAS TX 75252
CAUSE NUMBER: 067724

COUNT	DEGREE	OFFENSE	BOND AMOUNT
1;	1st Degree Felony;	COUNT 1 POSS CS PG 1 >=400G W/INT. DELIVER;	15,000
2;	3rd Degree Felony;	COUNT 2 POSS MARIJ >4 OZ<=5LBS DRUG FREE ZONE;	5,000
3;	3rd Degree Felony;	COUNT 3 UNL POSS FIREARM BY FELON;	5,000
4;	3rd Degree Felony;	COUNT 4 POSS CS PG 1 <1G W/INT.	5,000
5	State Jail Felony	DELIVER-DFZ; COUNT 5 POSS CS PG 2 < 1G	5,000

PA CONTROL NO. 16-02962
TRN #: TRS#:
DESCRIPTION: DOB 07/31/1986, White, Male
WITNESSES FOR GRAND JURY: Cole Dotson
ARREST DATE:

FILED FOR RECORD
2016 DEC 14 AM 8:55
KELLY ASHMORE
DISTRICT CLERK
GRAYSON, TX
BY

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jurors, duly selected, organized and impaneled as such in and for the County of Grayson, State of Texas, at the July Term, 2016, A.D., of the District Court in and for the 59th Judicial District of Texas and for said County upon their oaths in said Court at said Term present that on or about the 7th day of June, 2016, A.D., and anterior to the presentment of this indictment, in the County of Grayson and State of Texas, MARK ZIMMERMAN hereinafter called "Defendant", did then and there,

COUNT 1

intentionally or knowingly, possess with intent to deliver, a controlled substance, namely, Gamma Hydroxybutyric Acid, in an amount of more than (400) four hundred grams,

COUNT 2

intentionally or knowingly possess a usable quantity of marijuana in an amount of four ounces or more but less than five pounds,

And it is further presented that the defendant committed the above offense in, on, or within 1,000 feet of the premises of a school, to-wit: Whitesboro High School,

Nick Um
Attorney At law
902 West Lamar
Sherman, Tx 75090

COUNT 3

DEFENDANT'S COPY

having been convicted of the felony offense of Aggravated Assault with a Deadly Weapon on the 9th day of December, 2009, in cause number F-0912973 in the 204th District Court of Dallas County, Texas, intentionally or knowingly possess a firearm before the fifth anniversary of the defendant's release from supervision under parole following conviction of said felony,

COUNT 4

intentionally or knowingly, possess with intent to deliver, a controlled substance, namely, methamphetamine, in an amount of less than one gram,

And it is further presented that the defendant committed the above offense in, on, or within 1,000 feet of the premises of a school, to-wit: Whitesboro High School,

COUNT 5

intentionally or knowingly possess a controlled substance, namely tetrahydrocannibihol, in an amount of less than one gram,

And it is further presented that the defendant committed the above offense in, on, or within 1,000 feet of the premises of a school, to-wit: Whitesboro High School,

PUNISHMENT ENHANCEMENT

And it is further presented that, prior to the commission of the charged offense hereafter styled the primary offense, on the 9th day of December, 2009, in cause number F-0912973 in the 204th District Court of Dallas County, Texas, the defendant was finally convicted of the felony offense of Aggravated Assault with Deadly Weapon,

And it is further presented that, prior to the commission of the primary offense, and after the conviction in cause number F-0912973 was final, the defendant committed the felony offense of Possession of Controlled Substance four grams or more but less than 400 grams with intent to deliver to-wit: methylenedroxymethaphetamine (Deoxymethamphetamine), and was finally convicted of said felony on the 1st day of October, 2010, in cause number 199-80161-07in the 199th District Court of Collin County, Texas, April 16th 2007

against the peace and dignity of the State.

JOSEPH D. BROWN
Criminal District Attorney

Foreman of the Grand Jury

STATE OF TEXAS
COUNTY OF GRAYSON
I, Kelly Ashmore, District Clerk in and for Grayson County Texas, do hereby certify that the above and foregoing is a true and correct copy of the original document as the same appears on the file in the District Court, Grayson County, Texas. Witness my hand and seal of the Court, this the 2 day of [illegible] A.D. 20[illegible]
KELLY ASHMORE, DISTRICT CLERK
GRAYSON COUNTY, TEXAS
By [illegible] Deputy

DISTRICT COURT
TEXAS

A5

REGISTER OF ACTIONS
CASE No. 067375

The State of Texas VS. MARK DAVID ZIMMERMAN §§§§§

Case Type: Adult Felony
Date Filed: 08/31/2016
Location: 397th District Court

PARTY INFORMATION

Defendant	**ZIMMERMAN, MARK DAVID** 18484 PRESTON RD, APT. 102-332 DALLAS, TX 75252 SID: TX07680312	Male White 5' 10", 190 lbs	**Lead Attorneys** **JAMES R. DUNN** *Court Appointed* 903-893-5535(W)
State	**The State of Texas**		

CHARGE INFORMATION

Charges: ZIMMERMAN, MARK DAVID	Statute	Level	Date
1. COUNT 1 POSS CS PG 1 >=4G<200G W/INT. DELIVER	481.112(d)	1st Degree Felony	06/07/2016
2. COUNT 2 POSS MARIJ >4 OZ<=5LBS DRUG FREE ZONE	481.134(d)	3rd Degree Felony	06/07/2016
3. COUNT 3 UNL POSS FIREARM BY FELON	46.04 (a)	3rd Degree Felony	06/07/2016

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

01/04/2017 **Disposition** (Judicial Officer: Gary, Brian K.)
1. COUNT 1 POSS CS PG 1 >=4G<200G W/INT. DELIVER
Dismissed
2. COUNT 2 POSS MARIJ >4 OZ<=5LBS DRUG FREE ZONE
Dismissed
3. COUNT 3 UNL POSS FIREARM BY FELON
Dismissed

OTHER EVENTS AND HEARINGS

06/08/2016 **Adult Magistrate Warning**
CT 1, 2 & 3
06/14/2016 **Affidavit of Indigency to Court**
06/15/2016 **Notice of Appointment**
Rick Dunn
08/31/2016 **Indictment (OCA)**
09/08/2016 **Order Setting Conditions of Bond**
09/12/2016 **Motion**
for an Itemized Lab Test
09/13/2016 **Writ**
ZIMMERMAN, MARK DAVID — Served 09/13/2016; Returned 09/16/2016
09/13/2016 **Motion**
to Reduce Bond or Perform a Bond Reduction
09/15/2016 **Motion**
to Dismiss all Charges and Counts-Pro Se
09/16/2016 **Defendant Receipt of COB**
09/22/2016 **First Setting** (8:30 AM) (Judicial Officer Gary, Brian K.)
10/12/2016 **Letter**
10/26/2016 **Plea Conference** (8:30 AM) (Judicial Officer Gary, Brian K.)
11/03/2016 **Motion to Suppress (OCA)**
11/04/2016 **Motion**
to Reduce Bond
11/14/2016 **Notice**
State's First Amended Notice of Intent to Enhance Punishment
11/16/2016 **Motion**
for a Personal Recognizance Bond
12/12/2016 **Motion to Suppress** (1:30 PM) (Judicial Officer Gary, Brian K.)
and Motion to Reduce Bond
12/29/2016 **MOTION TO DISMISS**
01/03/2017 **ORDER OF DISMISSAL**
01/19/2017 *CANCELED* **Motion to Suppress** (1:30 PM) (Judicial Officer Gary, Brian K.)
Case Disposed
and Motion to Reduce bond
02/13/2017 *CANCELED* **Jury Trial** (8:30 AM) (Judicial Officer Gary, Brian K.)
Case Disposed

REGISTER OF ACTIONS
CASE NO. 067724

The State of Texas VS. MARK DAVID ZIMMERMAN §§§§§§

Case Type: **Adult Felony**
Date Filed: **12/14/2016**
Location: **397th District Court**

PARTY INFORMATION

Defendant	**ZIMMERMAN, MARK DAVID** 18484 PRESTON RD, APT. 102-332 DALLAS, TX 75252 SID: TX07680312	Male White 5' 10", 190 lbs	**Lead Attorneys** **J. RICHARD DUNN** *Court Appointed* 903-893-5535(W)
State	**The State of Texas**		

CHARGE INFORMATION

Charges: ZIMMERMAN, MARK DAVID	**Statute**	**Level**	**Date**
1. COUNT 1 POSS CS PG 1 >=400G W/INT. DELIVER	481.112(f)	1st Degree Felony	06/07/2016
2. COUNT 2 POSS MARIJ >4 OZ<=5LBS DRUG FREE ZONE	481.134(d)	3rd Degree Felony	06/07/2016
3. COUNT 3 UNL POSS FIREARM BY FELON	46.04 (a)	3rd Degree Felony	06/07/2016
4. COUNT 4 POSS CS PG 1 <1G W/INT. DELIVER-DFZ	481.112(b)	3rd Degree Felony	06/07/2016
5. COUNT 5 POSS CS PG 2 < 1G	481.116(b)	State Jail Felony	06/07/2016

EVENTS & ORDERS OF THE COURT

OTHER EVENTS AND HEARINGS

12/14/2016	**Indictment (OCA)**
01/03/2017	**Judicial Docket Entry - Public** *No arrest on any ct in this indictment; issue capias on each ct; set bail as follows: Ct 1 at $15,000, Cts 2, 3, 4 and 5 all at $5,000 each, all w/ COB - - BKG*
01/03/2017	**Writ** ZIMMERMAN, MARK DAVID — Served 01/03/2017; Returned 01/05/2017
01/03/2017	**Order Setting Conditions of Bond**
01/03/2017	**Inactivate Case Event (OCA)**
01/03/2017	**Defendant Receipt of COB**
01/05/2017	**Adult Magistrate Warning** *CT 1-5*
01/12/2017	**First Setting** (8:30 AM) (Judicial Officer Gary, Brian K.)
01/13/2017	**Motion to Suppress (OCA)** *Defendant's*
01/17/2017	**Subpoena Returned Served**
01/17/2017	**Application for Issuance of Subpoena** *State 1*
01/25/2017	**Motion** *to Inspect, Examine and Independently Test Physical Evidence*
02/09/2017	*CANCELED* **Motion to Suppress** (1:30 PM) (Judicial Officer Gary, Brian K.) *Other* *and Pre-Trial hearing*
02/09/2017	**Motion Hearing** (2:30 PM) (Judicial Officer Gary, Brian K.) *Motion to Suppress*
02/13/2017	*CANCELED* **Jury Trial** (8:30 AM) (Judicial Officer Gary, Brian K.) *By Request*
03/07/2017	**Motion to Suppress** (9:00 AM) (Judicial Officer Gary, Brian K.)
03/07/2017	**Order** *on Motion to Inspect, Examine, and Independently Test Physical Evidence*
03/07/2017	**Judicial Docket Entry - Public** *hrg on mtn to suppress; State -- Cory Goodman, exhibits, take under advisement -- BKG*
03/07/2017	**Motion** *to Find Dedendant's Bond Insufficient-State's*
03/08/2017	**State's Notice of Intent** *State's First Amended Notice of Intent to Enhance Punishment*
03/09/2017	**Order Setting Hearing**
03/10/2017	**Application for Issuance of Subpoena** *State 1*
03/14/2017	**Subpoena Returned Served**
03/15/2017	*CANCELED* **Motion Hearing** (1:30 PM) (Judicial Officer Gary, Brian K.) *Other* *Motion To Find Defendant's Bonds Insufficient*
03/15/2017	**Motion** *for a Personal Recognizance*
03/22/2017	*CANCELED* **Motion Hearing** (1:30 PM) (Judicial Officer Gary, Brian K.)

Affirmed as modified; Opinion Filed August 20, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00492-CR

MARK DAVID ZIMMERMAN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 397th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 067724

MEMORANDUM OPINION

Before Justices Lang, Myers, and Stoddart
Opinion by Justice Myers

A jury convicted Mark David Zimmerman of four drug-related offenses: (1) possession with intent to deliver more than 400 grams of gamma hydroxybutyric acid (GHB); (2) possession of four ounces or more but less than five pounds of marijuana; (3) possession of less than one gram of methamphetamine; and (4) possession of less than one gram of tetrahydrocannabinol. The State alleged drug-free zone and habitual offender enhancements. The jury found the enhancement allegations to be true and assessed punishment at ninety-nine years' imprisonment and a $100,000 fine for possessing more than 400 grams of GHB; for the other three counts, the jury assessed punishment for each offense at fifteen years' imprisonment and a $10,000 fine. Appellant brings two issues, contending the trial court erred in denying appellant's pretrial motion to suppress and that the trial court lacked the authority to order $180 in restitution for lab fees. The State responds

that the trial court did not err in denying the motion to suppress, but that the restitution order was an abuse of discretion and should be set aside. As modified, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

Officer Cory Goodman was the K-9 officer for the Whitesboro Police Department and was patrolling with his K-9 partner, Ninja. Goodman was a seven-year police department veteran who was certified as a K-9 handler and had been trained in narcotics interdiction. At around 10:24 p.m. on the night of June 7, 2016, Goodman observed a silver Mercedes SUV with a defective license plate light driving westbound on Highway 82 in Grayson County, Texas. Officer Goodman's body camera recorded the subsequent interaction he had with the driver of that vehicle, appellant.

About thirty seconds after initiating the stop, Goodman approached the driver's side door of the vehicle and asked appellant for his driver's license and proof of insurance. Appellant complied, producing a Colorado driver's license as identification. Appellant asked why he had been pulled over, and the officer said he had a "tag light out." The officer asked appellant if he knew that, and appellant said he did not. The officer then quickly added, "I'm not going to give you a ticket for a tag light or anything, no, nothing like that." He asked appellant, "So what brings you down to Texas?" Appellant said he was "pretty much from Texas," that he "grew up here," that his "brother is from here," and that he was "cutting out of here" and "going on vacation." The officer asked appellant where he was going on vacation, and appellant said he going to visit some family in Colorado, then going to Las Vegas. The officer asked, "So, uh, whereabouts are you living now?" Appellant replied, "Right now I was just actually staying in Austin Ranch, over in The Colony." Goodman asked appellant if he was heading to Colorado now, and appellant said he was. The officer inquired, "Have you ever been in trouble with the law or anything?" Appellant replied, "Uh, not in quite some time." The officer asked appellant "[w]hen was the last time," and appellant replied, "Eight, nine years ago." Goodman asked if it was for "[a]nything serious," to

which appellant said, "Not too serious."

The body camera video shows Officer Goodman walking back to his patrol car and asking Whitesboro dispatch to check appellant's driver's license, criminal history, and search for outstanding warrants. He also checked the vehicle registration information. During the hearing on appellant's pretrial motion to suppress, Goodman testified that appellant's driver's license was clear and valid, as was the proof of insurance. The vehicle registration information was in good order. There were no outstanding warrants for appellant. But the "[c]riminal history revealed multiple possession, misdemeanor possession, and [a] manufacture/delivery of controlled substance arrest." Goodman added that appellant had two offenses that were in penalty group two. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.103, 481.113. "[A]t that point," Goodman testified, he believed, based on his training in narcotics interdiction, that appellant was "transporting narcotics" or was "in some type of illegal activity" because appellant's "story [was] not really adding up for a long-distance travel, and he avoided multiple questions as to his criminal history, answering not serious criminal history, things along that nature." Goodman also testified that he saw only "a very small bag" on the floorboard inside appellant's vehicle, which the officer believed was "not typical for a long-distance trip[,] as he was talking about."

Goodman testified that he did not detect the odor of marijuana or anything else of an illegal nature, and appellant did not appear to be under the influence of any drugs or alcohol. Nor did the officer notice anything of an illegal nature in plain view. Appellant made good eye contact. When asked if appellant appeared to be in any way nervous, Goodman testified that he was "[n]ot too extremely nervous."

After receiving criminal history information from dispatch that was inconsistent with appellant's statements, Officer Goodman returned to appellant's vehicle, pausing to shine his flashlight into the back of the SUV. Goodman testified that, for officer safety because of the traffic

on the highway, he asked appellant to step out of the vehicle so that he talk with him further. As appellant was about to get out of the vehicle, Goodman asked him if he had "no weapons or anything on you, is there?" Appellant started reaching for something with his left hand, and Goodman told him, "No reach, no reach. What you got? Knife?" Then appellant said, "No, I got a paperweight." Appellant removed brass knuckles from his left pocket and, at Goodman's request, handed them over to the officer. Goodman asked appellant to walk to the back of the vehicle, and then asked him if he had any other weapons on him. Appellant said, "No."

Goodman patted appellant down, after which the officer told appellant that he did drug interdiction and that he noticed appellant had a couple of convictions for possession of marijuana, and another for manufacture/delivery. He asked appellant if there was anything illegal inside of the vehicle. Appellant said, apparently referring to his criminal history, that "[a]ll of that stuff was from a long time ago." Goodman asked, "There's no more of that going on now?" Appellant said, "No, sir," and quickly added, "I've been very, very good." Appellant told the officer he had his own company and that if Goodman was interested in "VIP" asset protection, "That's actually what I do." Appellant added that he hires exclusively officers and ex-military. Goodman continued to question appellant, asking him, "Now, you live in The Colony?" Appellant said he was staying in The Colony with an older woman; that he had lived there before; and that he had moved back to Texas from Colorado.

Goodman and appellant had been standing behind the SUV while they talked, and the sound of several passing vehicles could be heard on the body camera video. Goodman said he was concerned about standing so close to the highway, and he asked appellant to move. They both moved over to the side of the road, after which appellant said, "Now, I think I'm moving back for a little bit." Appellant paused before adding that he was going to do this "after I get done with my vacation." Goodman asked appellant how long he had been in Texas, and appellant said he had

been here for the "past couple of months." While Goodman questioned appellant, another officer who arrived on the scene during the traffic stop, Officer Pruitt, joined Goodman. On the video, he can be seen standing next to appellant's vehicle and looking inside as Goodman continued questioning appellant.

Officer Goodman asked appellant if was originally from Texas, to which appellant said his father moved to Texas when appellant was about six months old, and that he had "pretty much" lived in Texas, mostly the DFW area, since that time. Goodman said that he noticed appellant did not have very much luggage in his car, and he asked appellant if was going to Las Vegas "on a whim." Appellant said he had his backpack and a "couple of changes of clothes" in the back of his car, and that was all he needed. Appellant added that he "figure[d]" he would buy everything else that he needed and "put it on the corporate card."

Officer Goodman asked again, "Okay, so there's nothing illegal inside of that vehicle," to which appellant said, "No, sir, there is not." Goodman asked appellant if he had any problem with the officer searching the vehicle. Appellant said he did not consent to a search, and that he wanted to be on his way. Goodman advised appellant he had a K-9 in his car and that he alerts on narcotics, specifically marijuana, cocaine, methamphetamine, heroin, and ecstasy. He asked appellant if any of those substances were in the car, and that "if it is in that vehicle he will alert on it." Appellant again said he did not consent to any search of his vehicle.

The officer told appellant that he was going to "run" the dog now, and that he did not need appellant's consent to do that. Goodman added, "I was just giving you the opportunity to be honest with me; if there's something in that vehicle he is going to alert on it." Appellant said, "I don't believe there is; the vehicle has been borrowed by a few people in the past." While Goodman was walking to get Ninja, Officer Pruitt could be heard on the body camera video telling Goodman that he saw what looked "like about four glassine bags" of marijuana sticking out of a partially

unzipped cooler in the center of the back seat of the vehicle. Goodman responded by stating that he would see if Ninja would "alert in that area."

The video from Goodman's body camera shows that Ninja alerted on three areas of appellant's vehicle—the open window on the driver's door, the front passenger side of the vehicle, and the right rear passenger side. Upon receiving these alerts, Goodman handcuffed appellant and placed him in the back of the patrol car. Goodman told appellant he was being placed under arrest for the brass knuckles, a prohibited weapon. *See* TEX. PENAL CODE ANN. § 46.05.

Officers Goodman and Pruitt searched the vehicle, finding a loaded .38 revolver in the driver's door. Nearby, also on the front driver's side, the officers found a meth pipe that contained a caked white residue. And in the rear passenger area of the vehicle, inside a clear plastic bag that was stowed in an insulated cooler bag, the officers found "[a] large amount of marijuana."

According to evidence introduced at trial, the officers also found a 7 mm Remington rifle (with three rounds in the magazine), a smaller amount of marijuana in the front passenger side of the vehicle, THC extract patches, a white brick substance, scales, glassine baggies, drug paraphernalia, a brown substance in a plastic container, approximately five hundred dollars in cash, and a Gatorade bottle with a clear substance inside that did not smell like Gatorade. The marijuana found in the cooler weighed 4.12 ounces. Trial testimony further showed that the white brick substance contained lidocaine, the pipe contained a net weight of .06 grams of methamphetamine, the THC extract patches contained a net weight of .75 grams of tetrahydrocannabinol, and the clear substance in the Gatorade bottle contained GHB. The net weight of the liquid in which the GHB was found totaled 452.01 grams.

Appellant filed a pretrial motion to suppress evidence, arguing the arresting officer did not have any reasonable suspicion to extend the routine traffic stop, and that the drug-detecting dog was used during the ensuing illegal search. Following a pretrial hearing on the motion to suppress,

which was held on March 7, 2017, the trial court informed the parties by letter dated March 28, 2017 that after consideration of the video and the arguments of counsel, the court was going to deny the motion to suppress.

Appellant was subsequently convicted of all four counts alleged in the amended indictment. During the punishment phase of the trial, the State sought the drug-free zone enhancement (i.e., committing the offenses in, on, or within 1,000 feet of the premises of a school) and the habitual offender enhancement (i.e., two prior felony convictions for aggravated assault with a deadly weapon on December 9, 2009; and one for possession with intent to deliver four grams or more but less than 400 of methylenedioxymethamphetamine (MDMA) on October 1, 2010). Appellant pleaded "not true" to the enhancement allegations. The jury found each the enhancement allegations to be true and assessed punishment at ninety-nine years' imprisonment and a $100,000 fine for possessing more than 400 grams of GHB. For the other three counts, the jury assessed punishment for each offense at fifteen years' imprisonment and a $10,000 fine. The sentences were ordered to run concurrently. Appellant filed a motion for new trial that was overruled by operation of law. This appeal followed.

DISCUSSION

1. Motion to Suppress

In his first issue, appellant contends the trial court erred in denying appellant's pretrial motion to suppress because the officer did not have specific articulable facts to prolong the detention beyond the mission of the traffic stop.

We review a trial court's ruling on a motion to suppress using a bifurcated standard of review, affording almost total deference to a trial court's determination of historical facts. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). The trial court is the sole trier of fact and the judge of the credibility of the witnesses and the weight to be given to their testimony.

Id. It is entitled to believe or disbelieve all or part of the witness's testimony—even if that testimony is uncontroverted—because it has the opportunity to observe the witness's demeanor and appearance. *Id.* When, as in this case, no findings of fact are entered, we view the evidence in the light most favorable to the trial court's ruling and assume the trial court made implicit findings of fact that support its ruling so long as those findings are supported by the record. *Id.* We review a trial court's application of the law of search and seizure to the facts de novo. *Id.* We will sustain the trial court's ruling if that ruling is reasonably supported by the record and is correct under any theory of law applicable to the case. *Id.* at 448.

Under the Fourth Amendment, a warrantless detention of a person that amounts to less than a full-blown custodial arrest must be justified by a reasonable suspicion. *Derichsweller v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011). Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude a particular person actually is, has been, or soon will be engaged in criminal activity. *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007). In other words, those specific, articulable facts must show unusual activity, some evidence that connects the detained individual to the unusual activity, and some indication that the unusual activity is related to crime. *Derichsweiler*, 348 S.W.3d at 916. Additionally, whether reasonable suspicion exists is based on an objective standard that disregards the officer's subjective intent. *Furr v. State*, 499 S.W.3d 872, 878 (Tex. Crim. App. 2016). Furthermore, circumstances that an officer relies on "'must be sufficiently distinguishable from that of innocent people under the same circumstances as to clearly, if not conclusively, set the suspect apart from them.'" *Wade v. State*, 422 S.W.3d 661, 670 (Tex. Crim. App. 2013) (quoting *Crockett v. State*, 803 S.W.3d 308, 311 (Tex. Crim. App. 1991)).

A traffic stop is a detention, and it must be reasonable under the United States and Texas

constitutions. *See Davis v. State*, 947 S.W.2d 240, 245 (Tex. Crim. App. 1997). To be reasonable, the traffic stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *See Florida v. Royer*, 460 U.S. 491, 500 (1983); *Davis*, 947 S.W.2d at 245. Determining whether an investigative detention is reasonable is a two-pronged inquiry, focusing first on whether the officer's action was justified at its inception and then on whether the action "was reasonably related, in scope, to the circumstances that justified the stop in the first place." *Kothe v. State*, 152 S.W.3d 54, 63 (Tex. Crim. App. 2004). This is a factual determination made by considering the totality of the circumstances existing throughout the detention. *Belcher v. State*, 244 S.W.3d 531, 538–39 (Tex. App.—Fort Worth 2007, no pet.). Also, an investigative stop that "is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Davis*, 947 S.W.2d at 243;

As for the length of the detention, "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *United States v. Place*, 462 U.S. 696, 709 (1983). But there is no rigid time limit. *See St. George v. State*, 237 S.W.3d 720, 727 (Tex. Crim. App. 2007); *State v. Taylor*, No. 05–15–01542–CR, 2016 WL 6135521, at *4 (Tex. App.—Dallas 2016, pet. ref'd) (mem. op., not designated for publication). Instead, the issue is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. . . ." *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

The "tolerable duration" of the stop "is determined by the seizure's 'mission,' which is to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. U.S.*, 135 S. Ct. 1609, 1614 (2015) (citation omitted). Consequently, during a routine traffic stop, police officers may request a driver's license and car registration to conduct a computer check on that information. *See Kothe*, 152 S.W.3d at 63. A request for insurance information, the

driver's destination, and the purpose of the trip are also proper inquiries. *Ortiz v. State*, 930 S.W.2d 849, 856 (Tex. App.—Tyler 1996, no pet.). However, an officer "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez*, 135 S. Ct. at 1615. "[T]he stop may not be used as a 'fishing expedition for unrelated criminal activity.'" *Davis*, 947 S.W.2d at 243 (quoting *Ohio v. Robinette*, 519 U.S. 33, 41 (1996) (Ginsberg, J., concurring)).

Generally, a traffic stop investigation is fully resolved after the computer check is completed and the officer knows the driver has a valid license, no outstanding warrants, and the car is not stolen. *Kothe*, 152 S.W.3d at 63–64. The detention must end at this point and the driver must be allowed to leave unless there is another proper basis for the investigatory detention. *Id.* at 64. There must, in other words, be reasonable suspicion regarding a different offense to support further detention. *See Rodriguez*, 135 S. Ct. at 1615; *Davis*, 947 S.W.2d at 243; *Taylor*, 2016 WL 6135521, at *4. In addition, a dog sniff is aimed at detecting ordinary criminal wrongdoing and is not an ordinary incident of a traffic stop. *Rodriguez*, 135 S. Ct. at 1615 ("[A] dog sniff is not fairly characterized as part of the officer's traffic mission."); *Taylor*, 2016 WL 6135521, at *4. Absent facts showing reasonable suspicion that a different offense has been, is being, or soon will be committed, the officer may not prolong the traffic stop to conduct a dog sniff. *Rodriguez*, 135 S. Ct. at 1614–16; *Taylor*, 2016 WL 6135521, at *4.

Officer Goodman was justified in stopping appellant's vehicle. "For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle." *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). The reason given by Goodman for stopping appellant was a traffic violation—a defective license plate light. Failure to have an illuminated license plate light while other driving lights—i.e., headlights—are

illuminated is a violation of the transportation code. *See* TEX. TRANSP. CODE ANN. § 547.322(g) ("A taillamp, including a separate lamp used to illuminate a rear license plate, must emit a light when a headlamp or other auxiliary driving lamp is lighted."). Appellant does not dispute that Goodman was justified in stopping his vehicle.

The evidence showed appellant's driver's license and insurance information was valid, the vehicle registration information was in good order, and there were no outstanding warrants. Furthermore, Goodman told appellant that he was not going to ticket him for the traffic offense, i.e., he was "not going to give you a ticket for a tag light." The purpose of the traffic stop having been completed, Goodman, therefore, could not prolong appellant's detention unless he had reasonable suspicion of additional criminal activity. *See Rodriguez*, 135 S. Ct. at 1614 (authority for traffic stop ends when tasks tied to infraction are complete).

The State argues the officer had reasonable suspicion to prolong appellant's detention based on the totality of the circumstances. More specifically, it points to the fact that (1) appellant misrepresented his criminal history; (2) he had one small bag for a long-distance trip; and (3) he had prior convictions for marijuana possession and manufacture/delivery of a controlled substance.

The video from Goodman's body camera shows that when the officer asked appellant about his travel plans, appellant said he was going on vacation—first to visit family in Colorado, and then to Las Vegas. Although appellant had a Colorado driver's license, he told the officer he was currently living in Austin Ranch, in The Colony. Goodman asked appellant if he had been in trouble with the law, to which appellant responded, "Uh, not quite in some time." The officer asked appellant "[w]hen was the last time," and appellant replied, "Eight, nine years ago." Goodman asked if it was for "[a]nything serious," and appellant said, "Not too serious."

Appellant's criminal history, however, included multiple drug-related offenses, i.e., multiple possession, misdemeanor possession, and a manufacture/delivery of a controlled

substance arrest, according to Officer Goodman's testimony. Further, when Goodman—an experienced narcotics interdiction officer—was asking appellant about his criminal history, the video from the officer's body camera showed appellant's hesitancy about directly answering questions regarding the severity of his criminal history. The officer also testified that he saw only "a very small bag" on the floorboard inside appellant's vehicle, which the officer believed was unusual for a long-distance trip.

A stop may not exceed its permissible duration unless the officer has reasonable suspicion of criminal activity, but if the initial, routine questioning generates reasonable suspicion of other criminal activity, the stop may be lengthened to accommodate its new justification. *See Rodriguez*, 135 S. Ct. at 1615; *Davis*, 947 S.W.2d at 243. A defendant's criminal history cannot alone form the basis for reasonable suspicion. *See Hamal v. State*, 390 S.W.3d 302, 308 (Tex. Crim. App. 2012). But it is a factor that may be considered in determining reasonable suspicion, and deception regarding one's own criminal record is likewise a factor that can contribute to reasonable suspicion. *See id.* (defendant responding no when asked if she had ever been in trouble with the law before, when she had previously been arrested nine times, including four times for possession of a controlled substance, was factor in reasonable suspicion analysis; and defendant falsely stating that her arrests were "a long time ago" when her most recent arrest occurred seven months earlier reinforced existence of reasonable suspicion); *see also Parker v. State*, 297 S.W.3d 803, 811 (Tex. App.—Eastland 2009, pet. ref'd) (lengthy criminal history, including numerous drug-related offenses, considered as part of the reasonable suspicion analysis); *Coleman v. State*, 188 S.W.3d 708, 718–19 (Tex. App.—Tyler 2005, pet. ref'd) (same); *Powell v. State*, 5 S.W.3d 369, 378 (Tex. App.—Texarkana 1999, pet. ref'd) (same); *Morris v. State*, No. 07–06–00141–CR, 2006 WL 3193724, at *3 (Tex. App.—Amarillo Nov. 6, 2006, no pet.) (mem. op., not designated for publication) (same).

The trial court could have reasonably found, based on the videotape of the stop and Officer Goodman's testimony, that a reasonable officer would have believed appellant was being deceptive regarding his criminal history when he told the officer, in response to the officer's question whether it was "[a]nything serious," that it was "[n]ot too serious." Appellant argues that Goodman's "hunch that criminal activity was afoot" is an insufficient basis for finding the continued questioning of appellant to be justified. But when the evidence in this case is viewed in an objective manner—e.g., appellant was traveling late at night, his demeanor during the stop as shown by the videotape, his deception regarding his criminal history and the revelation his criminal history included multiple drug-related offenses, the fact he had "a very small bag" for what appeared to be a long-distance trip—it supplied the articulable facts to support reasonable suspicion. In addition, this reasonable suspicion was reinforced by subsequent statements because what appellant claimed was a "paperweight" turned out to be brass knuckles, a prohibited weapon. Also, Officer Pruitt could be heard on the body camera video telling Officer Goodman prior to conducting the K-9 open-air sniff that he saw what looked "like about four glassine bags" of marijuana protruding from a partially unzipped cooler in the back seat of the vehicle.

We conclude that the facts and the reasonable inferences drawn therefrom are sufficient to support the conclusion that appellant was engaged in or soon would be engaged in criminal activity. Therefore, we cannot say the trial court erred in denying appellant's motion to suppress, and we overrule appellant's first issue.

2. Restitution Order

In his second issue, appellant contends the trial court lacked the authority to order restitution for lab fees.

The record reflects that after pronouncing appellant's sentence, the trial court asked the prosecutor, "How much restitution was there for lab fees?" and the prosecutor responded, "$180,

Your Honor." The trial court ordered, "There will be $180 of restitution." The $180 restitution is incorporated into the trial court's final judgment and bill of costs. Although the judgment does not state to whom the $180 in restitution is owed, the record shows it was intended for the payment of "lab fees."

In this case, appellant was sentenced to imprisonment. Thus, the trial court had no authority to order appellant to reimburse DPS, and DPS lab fees are not properly subject to a restitution order under article 42.037(a). *See Aguilar v. State*, 279 S.W.3d 350, 353 (Tex. App.—Austin 2007, no pet.); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.037(a). The State agrees the $180 restitution order was an abuse of discretion and that the judgment should be modified to delete the restitution order.

We have the authority to modify a judgment to make the record speak the truth when we have the necessary data and information to do so. *Brewer v. State*, 572 S.W.2d 719, 723 (Tex. Crim. App. 1978); *Ingram v. State*, 261 S.W.3d 749, 754 (Tex. App.—Tyler 2008, no pet.); *Davis v. State*, 323 S.W.3d 190, 198 (Tex. App.—Dallas 2008, pet. ref'd). Accordingly, we will modify the judgment to delete the $180 in restitution. *See* TEX. R. APP. P. 43.2(b); *see also Brewer*, 572 S.W.2d at 723; *Ingram*, 261 S.W.3d at 754; *Davis*, 323 S.W.3d at 198.

As modified, we affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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TEX. R. APP. 47.2(b).
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARK DAVID ZIMMERMAN, Appellant	On Appeal from the 397th Judicial District Court, Grayson County, Texas
No. 05-17-00492-CR V.	Trial Court Cause No. 067724.
	Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Lang and Stoddart participating.

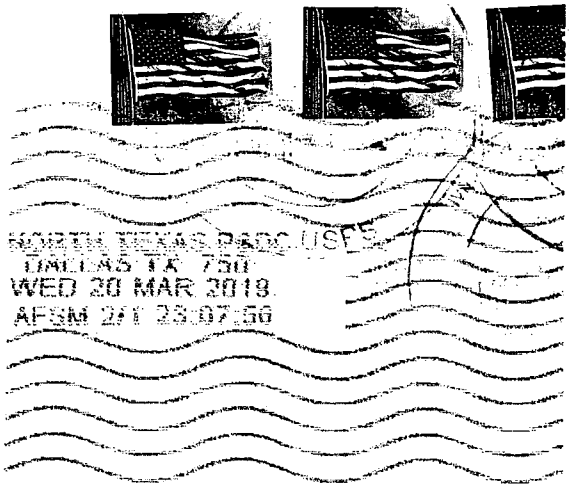
Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The section entitled "Restitution" is modified to show "N/A."

As modified, we **AFFIRM** the trial court's judgment.

Judgment entered this 20th day of August, 2018.

Mark Zimmerman
#02136697
Ferguson Unit
12120 Savage Drive
Midway, Tx 75852



Clerk of the Court of
Criminal Appeals
PO Box 12308
Capitol Station
Austin, Texas 78711