

Affirmed and Opinion filed May 24, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00460-CR

MICHAEL MAURICE TOWNSEND, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Cause No. 99-38465**

MEMORANDUM OPINION

Appellant, Michael Maurice Townsend, was charged by information with the misdemeanor offense of driving while intoxicated. *See* TEX. PEN. CODE ANN. § 49.04 (Vernon 1994 & Supp. 2001). The information was enhanced with (1) a 1994 felony conviction for possession of a controlled substance and (2) a 1998 conviction for DWI. *See* § 49.09.

Appellant filed a pretrial motion to testify free from impeachment from prior convictions. After hearing arguments, the trial court denied the motion. Appellant then pleaded “no contest” to the offense charged. Appellant did not testify. The court found him

guilty and, pursuant to a plea bargain agreement, sentenced appellant to 45 days' confinement in the Harris County jail.

Raising two points of error,¹ appellant now challenges his conviction. Appellant asserts the trial court erred in denying his motion to testify free from impeachment from prior convictions because (1) the State failed to prove that a balancing of factors under Texas Rule of Evidence 609² demonstrated that the probative value of appellant's 1994 conviction outweighed its prejudicial effect; and (2) the trial court erred by failing to issue findings of fact or conclusions of law which "enunciate on the record not only whether the probative value of a conviction outweighs its prejudicial effect, but also the rationale behind such a determination."

Because appellant did not testify, he failed to preserve these issues for appellate review. *See Jackson v. State*, 992 S.W.2d 469, 479–80 (Tex. Crim. App. 1999) (holding defendant cannot appeal trial court's refusal to exclude evidence of a prior conviction that the state intended to use for impeachment in the event that the defendant testified) (adopting reasoning in *Luce v. United States*, 469 U.S. 38, 41–42 (1984)); *Caballero v. State*, 919 S.W.2d 919, 923 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (holding defendant failed to preserve error on a trial court's ruling allowing the state to impeach a defendant with prior convictions because the defendant did not testify). Accordingly, appellant's points of error are overruled.

¹ Although appellant actually asserts three points of error, the first two points are indistinguishable and will be addressed together.

² Rule 609 provides rules for attacking a witness's credibility through evidence of a prior conviction. *See* TEX. R. EVID. 609.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
 Justice

Judgment rendered and Opinion filed May 24, 2001.

Panel consists of Justices Edelman, Frost, and Senior Chief Justice Murphy.***

Do Not Publish TEX. R. APP. P. 47.3(b).

*** Senior Chief Justice Paul C. Murphy sitting by assignment.