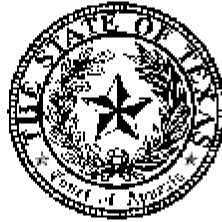
Affirmed and Opinion filed July 12, 2001.



In The

Fourteenth Court of Appeals

NO. 14-96-01017-CR

LOUIS ANTHONY GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 713,733

O P I N I O N O N R E M A N D

Louis Anthony Gutierrez appealed his conviction for cocaine possession on the ground that the trial court erred in denying his motion to suppress evidence. We affirmed on the basis that appellant's complaint was not preserved because the record contained neither a ruling by the trial court on the motion to suppress nor an objection by appellant to the trial court's refusal to rule. Appellant obtained discretionary review, and the Court of Criminal Appeals vacated our decision and remanded the case for us to consider

whether the trial court made an implicit ruling on appellant's motion to suppress.[1] We affirm.

As a prerequisite to presenting a complaint for appellate review, the record must show that: (1) the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the requested ruling with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and (2) the trial court either ruled on the request, objection, or motion, expressly or implicitly,[2] or refused to rule on the request, objection, or motion, and the complaining party objected to the refusal. TEX. R. APP. P. 33.1(a).

In this case, appellant's lawyer filed a handwritten motion to suppress on June 25, 1996, asserting only the following ground: "[Appellant's] arrest is not in compliance with Chapter 14 of the Code of Criminal Procedure & pursuant to Article 38.23 of the Code of Criminal Procedure, the fruits of this unlawful arrest should be suppressed."

During the hearing held on the motion the same day, appellant's counsel did not specify the ground(s) for his motion to suppress except to state that the only issue was the lawfulness of the warrantless arrest. Nor were any grounds apparent from the direct or cross-examination of the arresting officer, which touched on a number of different subjects preceding and during appellant's detention and arrest. At the conclusion of the hearing, appellant's counsel asked if he could submit a memorandum, and the trial court assented without a discussion of any grounds. An "agreed setting" form filed the same day indicates that an "MSEH" was reset for July 9. Handwritten in the margins of that form are "Brief in 7/2" and "1week - brief[,] next week - ruling." It thus appears that appellant's

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[1] *See Gutierrez v. State,* 36 S.W.3d 509, 511 (Tex. Crim. App. 2001) ("No one contends the trial court made an express ruling on appellant's motion. The only question is whether the trial court's ruling was implicit. . . . The judgment of the Court of Appeals is vacated and this case is remanded to that court to consider whether the trial court's ruling was implicitly made, within the meaning of Rule 33.1(a).").

[2] *See supra* note 1.

brief was expected on July 2 and a further hearing and ruling on July 9.

However, the record does not reflect that appellant ever submitted a brief, that a further hearing was ever conducted on the motion, or that any activity occurred in the case on July 2 or 9. Another agreed setting form, filed July 18, 1996, reflects that the case was set for "Disp." on July 25 (with a notation that defendant need not be present) and on August 8. Although the record does not reflect that any proceedings were held on either of those days, appellant's negotiated guilty plea, the trial court's judgment, and appellant's notice of appeal were all filed or dated August 9.

The front side of appellant's notice of appeal (the "notice") states that a hearing was held on his motion to suppress on July 9, the trial court overruled the motion on August 8, appellant entered a guilty plea on August 9, and appellant was tendering the notice of appeal as evidence of his desire to appeal the conviction.[3] On the reverse side of the notice, the signatures of defense counsel and appellant appear under the phrase, "Respectfully submitted." Below their signatures is a single line, "The bond on appeal is set at______." A figure of $30,000.00 is handwritten in the blank. Below this sentence is a signature line for the presiding judge on which a handwritten signature appears. A corresponding entry on the court's docket sheet states "Defense gave notice of appeal. Court allowed original bond to remain on appeal."

The foregoing record reflects a failure to comply with Rule 33.1(a) and, thus, to preserve appellant's complaint on appeal in two principles respects. First, appellant contends on appeal that the trial court erred in denying his motion to suppress because the consent to search his automobile and residence were the fruits of an unlawful detention. More specifically, appellant contends that the detention was illegal because the officer lacked reasonable suspicion to detain him for investigation. Appellant claims that reasonable suspicion was lacking in that the detention was based on information supplied

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[3] Apart from reciting that the motion to suppress was filed and overruled, the notice does not state that the motion was the substance of the appeal, that the appeal was for a jurisdictional defect, or that the trial court granted permission to appeal. *See* TEX. R. APP. P. 25.2(b)(3)(A)-(C).

by an untested informant who did not provide a basis for the information. Appellant thus argues that because the arresting officer lacked reasonable suspicion, "he illegally detained Appellant when he had him blocked in by the patrol unit and he was approached and questioned pursuant to their investigation."

However, nothing in the record suggests that appellant ever presented that, or any other, ground for suppression to the trial court. As noted above, the motion itself and defense counsel's remarks during the hearing indicated only an unspecified challenge to the lawfulness of the arrest. Because a challenge to the lawfulness of an arrest could conceivably be based on many distinct grounds, merely asserting that an arrest is unlawful does not satisfy the "sufficient specificity" requirement of Rule 33.1; nor were any specific grounds (let alone those asserted on appeal) apparent from the context at the hearing. To whatever extent a follow-up brief was to have provided the grounds necessary to preserve a specific complaint, no such brief appears in the record. Therefore, even if the record suggested that the trial court had somehow ruled on the motion to suppress (which we conclude below it does not), we have no basis to conclude that the trial court was ever presented, or had an opportunity to rule on, any specific ground for suppression, including that now being urged on appeal.

The second deficiency is the lack of even an implied ruling by the trial court.[4] The only item in the record appellant relies on to provide a record that the trial court ruled on the motion to suppress is the notice. Because the body of the notice states that the motion to suppress was overruled on August 8, 1996, appellant asserts that his signature and those of his counsel and the presiding judge on the notice provide a record that the denial of the motion to suppress on August 8, 1996 is the basis of the appeal. We disagree for two reasons.

First, the trial judge's signature at the bottom of the notice signifies nothing other

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4 *See Rey v. State,* 897 S.W.2d 333, 336 (Tex. Crim. App. 1995) ("[a] trial court's ruling on a matter need not be expressly stated if its actions or other statements otherwise unquestionably indicate a ruling.").

than the judge's setting of the appeal bond because: (1) other than for the bond setting, a judge's signature was not required on the notice, either to verify or rule on any of the statements made in it or for any other purpose; (2) the notice expressly reflects that the statements in its body are "Respectfully submitted" by appellant and his counsel, only; (3) there is nothing in the notice to otherwise associate the judge's signature below the bond setting line with the statements appearing in the body of the notice above the signatures of appellant and his counsel; and (4) it cannot be inferred that the trial court would have had no reason to set an appeal bond unless it had, in fact, ruled on the motion to suppress, because, if appellant otherwise met the requisites for an appeal bond, the trial court was required to set one even if it had not ruled on the motion to suppress.[5]

Second, a notice of appeal is not appropriate (or well suited) for use in reflecting a trial court's rulings on matters leading up to a judgment. It does not come into existence until after the trial court phase of a case has ended and any pre-judgment errors have not only been made but already preserved for appellate review. In other words, the purpose of a notice of appeal is to initiate the appeal of error, not provide a record that it occurred. If a pre-judgment complaint has not been preserved before a notice of appeal is filed, it is not preserved. By its very nature, the instrument that confers jurisdiction on the appeals court to review a judgment cannot also serve as that which provides a record of action taken by the trial court in reaching the judgment.

Therefore, the record in this case does not show that appellant's complaint on appeal was preserved in the trial court either with regard to presenting the grounds for it to the trial court or to obtaining an implied ruling on it. Accordingly, appellant's points

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[5] *See Strnad v. State*, 39 S.W.3d 363, 365 (Tex. App.—Houston [1st. Dist.] 2001, pet. filed.) (holding that trial court's setting of appeal bond on lower portion of notice of appeal did not impliedly indicate that trial court had thereby also granted permission to appeal because if appellant was eligible for bond pending appeal, trial court could not deny it regardless whether it had given permission to appeal); *Ex parte Zigmond*, 933 S.W.2d 666, 667-68 (Tex. App.—San Antonio 1996, no pet.) (holding that, if appellant qualified for an appeal bond, the trial court could not refuse to set one even if it concluded that appellant could not satisfy the requirements for a notice of appeal from a conviction based on a negotiated guilty plea).

of error are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed July 12, 2001.

Panel consists of Justices Hudson, Edelman, and Wittig.

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