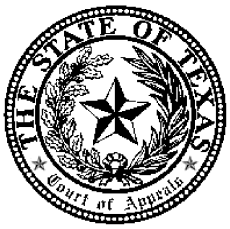
Affirmed and Opinion filed December 6, 2001.



In The

Fourteenth Court of Appeals

NO. 14-01-00404-CR

ROBERT MICHAEL CRAWFORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 852,654

O P I N I O N

Appellant, Robert Michael Crawford, appeals his conviction of the felony offense of driving while intoxicated. On appeal, appellant asserts the trial court erred in denying his motion for continuance. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 11, 2000, Officer Meredith initiated a traffic stop of appellant's vehicle because sparks were coming from appellant's car. Appellant's car had a flat tire and appellant was driving on the wheel rim. Upon approaching appellant, Officer Meredith

immediately noticed he had glassy eyes. Officer Meredith testified that appellant's breath smelled of alcohol, prompting him to ask appellant where he had been. According to Officer Meredith's testimony, appellant said he was at a bar in Pasadena and while there he had approximately four alcoholic beverages. Appellant also said he had an open container of alcohol in his car. Officer Meredith asked appellant to exit his vehicle in order to administer field sobriety tests.

Officer Meredith administered three tests: horizontal and vertical gaze nystagmus, the one-leg stand, and the walk and turn. According to Officer Meredith's testimony, appellant tested positive for four out of the six possible signs of intoxication that are looked for during the nystagmus test. Officer Meredith also testified that during the one-leg stand test, appellant put his foot down and swayed his body to maintain balance. These are two indications of intoxication officers are trained to look for in administering this test. Finally, Officer Meredith testified that during the walk and turn test appellant moved from the heel-to-toe stance while instructions were being given and he raised his arms higher than six inches from his body while walking. These are two indications of intoxication officers are trained to look for in administering the walk and turn test. As a result of appellant's performance on these tests, Officer Meredith determined that appellant was intoxicated.

Officer Pereira arrived on the scene while Officer Meredith was administering the walk and turn test. He testified that appellant did not perform well on the test and in his opinion appellant was very intoxicated. Officer Pereira also testified that he saw an open container of alcohol in appellant's car and remembered a strong odor of alcohol. Officer Pereira transported appellant to a facility in LaPorte in order to administer more sobriety tests and an intoxalyzer test. Officer Pereira testified that while in transport to LaPorte, appellant was very abusive and used a lot of profane language. Once there, appellant refused to take an intoxalyzer test. After approximately an hour had passed, appellant performed more sobriety tests. The administration of these tests was videotaped. Officer Pereira testified that appellant performed better on the tests at the LaPorte facility than he

did in the field, but he still failed them.

Claire Conners, the Chief District Attorney for the 179th District Court, testified that in August 2000, she arranged for appellant's trial counsel to view the videotape taken at the LaPorte facility. On February 15, 2001, appellant's trial counsel attempted to view the videotape again. It was then discovered that after appellant's trial counsel viewed the videotape in August 2000, it was misplaced and all efforts to locate the videotape since then have failed.

On February 19, 2001, a day before trial, appellant's trial counsel filed a motion for continuance seeking additional time to locate the videotape. The trial court denied appellant's motion. On appeal, appellant asserts the trial court erred because he believes the video contains exculpatory evidence and it is highly likely the video would have benefitted appellant at trial.

STANDARD OF REVIEW

The granting or denying of a motion for continuance is within the sound discretion of the trial court. *Wright v. State*, 28 S.W.3d 526, 532 (Tex. Crim. App. 2000) (citations omitted). In order to obtain a reversal for the denial of a continuance, an appellant must show that the evidence sought was material to his case and he was prejudiced by his inability to produce it. *Leach v. State*, 548 S.W.2d 383, 384–85 (Tex. Crim. App. 1977). Thus, the proper way for a defendant to demonstrate harm is to file a motion for new trial supported by an affidavit showing the evidence he would have offered if the motion for continuance had been granted and the materiality of the missing evidence. *Id*.; *Minx v. State*, 615 S.W.2d 748, 750 (Tex. Crim. App. 1981).

ANALYSIS

Appellant did not file a motion for new trial. Appellant preserved nothing for review. *See Baker v. State*, 467 S.W.2d 428 (Tex. Crim. App. 1987) (holding that a motion for new trial is a prerequisite for appealing a denial of a motion for continuance); *see also White v.*

State, 657 S.W.2d 877, 881 (Tex. App.—Fort Worth 1983, no pet.) (citing *Leach*, 548 S.W.2d at 384–85, for the requirement that in order to complain about a denial of a continuance, a defendant must file a motion for new trial showing the nature and materiality of the evidence).

Furthermore, even if appellant had preserved error, he could not demonstrate that he was prejudiced by the trial court's denial of his motion for continuance. First, Officer Pereira testified that although appellant performed better on the sobriety tests that were videotaped at the LaPorte facility, he still failed them. In other words, there is nothing in the record to suggest the videotape contained exculpatory evidence. Second, Claire Conners testified that her investigators had been searching for the tape and were unable to locate it. Thus, even if appellant's motion had been granted, it is unlikely the videotape would have been found.

CONCLUSION

We overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed December 6, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
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