NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES D. TUTTOILMONDO JR.,
PETITIONER

vs.

STATE OF TEXAS,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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Oscar O. Peña, J.D.
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QUESTION PRESENTED

Does Texas' use of commercial motor vehicle inspectors combined with a roving drug interdiction task force unconstitutionally and unreasonably abuse the doctrinal gap between the "special needs" exception to Brignoni-Ponce's roving patrol doctrine and City of Indianapolis v Edmond's restrictions on programmatic purpose for checkpoints?

LIST OF PARTIES

Petitioner is Charles D. Tuttoilmondo. Tuttoilmondo was the Appellant below in the Fourth Court of Appeals.

Petitioner Charles D. Tuttoilmondo Jr. is represented by Attorney Oscar O. Peña who was appointed to represent him on appeal by the 49th District Court, Zapata County, Texas.

Petitioner was represented at trial by Attorney Jesus Dominguez.

Respondent is the State of Texas. The State of Texas was the Appellee below in the Fourth Court of Appeals of Texas and the Texas Court of Criminal Appeals.

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Charles D. Tuttoilmondo Jr., respectfully requests that a writ of certiorari issue to review the judgment of the Fourth Court of Appeals of Texas and the Texas Court of Criminal Appeals' denial of discretionary review in this case.

OPINION BELOW

Charles D. Tuttoilmondo Jr. filed a Petition for Discretionary Review in the Texas Court of Criminal Appeals located in Austin, Texas. His request for discretionary review was denied without an opinion. The denial appears at Appendix A of this petition.

Tuttoilmondo sought review of the unpublished opinion denying relief issued by the Texas Fourth Court of Appeals in San Antonio, Texas, (COA No. 04-17-00375-CR). The unpublished memorandum opinion appears at Appendix B of this petition.

JURISDICTION

The Texas Court of Criminal Appeals denied Petitioner discretionary review on April 3, 2019 (PD-0007-19). No Petition for Rehearing was filed.

The deadline for filing this Petition for Writ of Certiorari is July 2, 2019. This Petition is timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257. It is a final judgment rendered by the highest court of the State of Texas and Petitioner is invoking a right claimed under the Fourth Amendment, United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

At issue is a drug interdiction task force's programmatic use of multiple commercial motor vehicle inspectors to stop and detain commercial motor vehicles at will and then to use the opportunity created by the commercial inspection (normal duration can exceed an hour) for the drug interdiction task force to develop probable cause. The combined use of commercial inspection and drug interdiction was not factually contested—it was the State's sole justification for the stop and initial detention that led to the discovery of marijuana in the commercial vehicle driven by the Petitioner on December 12, 2012.

Following the discovery of the contraband, Petitioner was arrested and he confessed orally and in writing.

Petitioner was indicted on May 29, 2013 for one count of Possession of Marijuana (Felony 2) pursuant to Art. 481.121 Tex. Health and Safety Code.

Tuttoilmondo's trial counsel urged a motion to suppress the Petitioner's written and oral confessions. The written motion contained the following language:

1. "The statements made by [Tuttoilmondo] were tainted by the illegal and unlawful detention and arrest, in violation of [Tuttoilmondo's] constitutional rights under the Fifth and Fourteenth Amendments,"
2. "The admission of statements by Charles D. Tuttoilmondo, Jr. is a violation of [his] rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments,"

The motion to suppress was argued. Although the written motion was broad, trial counsel focused his efforts on attacking the voluntariness of the confessions and did not specifically argue that the task force's programmatic combination of commercial motor vehicle inspection and drug interdiction constituted an abuse of the administrative exception to roving patrols in U.S. v. Brignoni-Ponce, 422 U.S. 873, 883, 95 S. Ct. 2574, 2581, 45 L. Ed. 2d 607 (1975). Trial counsel also did not specifically argue that the task force's programmatic purpose violated City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) and Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

The motion to suppress was denied.

The confessions were admitted at the jury trial.

Tuttoilmondo was convicted and the jury assessed punishment at eight years to be served in the Texas Department of Corrections, Institutional Division.

Petitioner appealed to the Fourth Court of Appeals, San Antonio, Texas. He challenged the task force's programmatic policy as unconstitutional and unreasonable citing U.S. v. Brignoni-Ponce, City of Indianapolis v. Edmond, and Delaware v. Prouse, and argued that the objection was preserved and in the alternative that it was reviewable under a novelty exception.

The conviction was affirmed; the Court held that the argument was procedurally barred. The memorandum opinion (Appendix B) is not designated for publication; see Tuttoilmondo v State, 04-17-00375-CR (Ct. App. – San Antonio, December 5, 2018.

Neither party requested a re-hearing.

Instead, Petitioner requested discretionary review from the Texas Court of Criminal Appeals, Texas' highest court for criminal cases.

The Texas Court of Criminal Appeals denied discretionary review by notice, without an opinion.

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10(c) of the Supreme Court Rules, the Petitioner contends that the matters presented herein constitute important questions of federal law that have not been, but should be, settled by the Supreme Court.

Regarding the procedural default, Petitioner relies on the following:

1. Texas Rules of Evidence, Rule 103(e), which states that a Court may take notice of fundamental errors affecting a substantial right, even if the claim of error was not properly preserved;
2. The inherent power of the Texas Court of Criminal Appeals to grant judicial review at its discretion as described in Texas Rules of Appellate Procedure 66.1 and 66.3; and
3. The spirit of excusing failure to make a contemporaneous objection when claim not made was so novel that basis of claim was not reasonably available at time of trial.

Clarity of Facts Relating to Claim

This case presents clarity of the facts relating to the claim made, i.e. the programmatic combination of drug interdiction and commercial motor vehicle inspection. The State presented no other probable cause to justify the stop--the State relied entirely on the Special Needs exception for commercial motor vehicle inspections. The record also contains uncontroverted testimony that the task force's purpose was drug-interdiction and that it was using commercial motor vehicle inspectors to stop people.

Consequently, the task force had unfettered power to stop commercial motor vehicles for criminal interdiction purposes and used it in a way that is unreasonable and abusive of Brignoni-Ponce's "special needs" exception to

roving patrol doctrine; *see* New York v. Burger, 482 U.S. 691, 702–03, 107 S. Ct. 2636, 2643–44, 96 L. Ed. 2d 601 (1987).

Procedural Bar

Texas Rules of Evidence, Rule 103(e) allows a Court to take notice of fundamental errors affecting a substantial right, even if the claim of error was not properly preserved.

The Texas Court of Criminal Appeals has inherent power to grant judicial review at its discretion as described in Texas Rules of Appellate Procedure 66.1 and 66.3.

Lastly, procedural default is excusable because of the novelty of the issue presented. "The courts of every jurisdiction in this country have some doctrine that permits appellate courts to consider claims that fundamental rights were violated without objection. In the criminal law of this state, such errors are called "fundamental errors." Before 1993 this Court had recognized more than a dozen kinds of fundamental error. Sanchez v. State, 120 S.W.3d 359, 365 (Tex.Crim.App.,2003).

Then in 1993 the Texas Court of Criminal Appeals decided Marin v State,

Marin recognized three categories of rights:

1. absolute requirements and prohibitions;

2. rights of litigants which must be implemented by the system unless expressly waived; and
3. rights of litigants which are to be implemented upon request.

Marin held that procedural default only applies to the last category because those rights are "forfeitable".

Although, Fourth Amendment law is known to all criminal law practitioners, its mis-application in this context is difficult to perceive because it is hidden behind the Brignoni Ponce exception.

Unless and until one recognizes that the task force was attempting to thread the needle between roving patrols and fixed checkpoints, the facts strongly suggest that the highway safety "special needs" exception permits the commercial motor vehicle inspection that led to the detention, search, arrest, and collection of the confessions from Tuttoilmondo.

Tuttoilmondo also argues that Texas' Marin framework is utilitarian, but it does not adequately account for the jurisprudential benefits of allowing novel arguments to escape procedural bar. Marin does not account for the circumstances at issue in this case: an uncontroverted record as to the lack of probable cause for the stop and the programmatic purpose of the task force. Although the Marin analysis saves resources, the development of jurisprudence is hindered by its framework.

Here, the facts are not an issue—the only issue is the application of the law to the undisputed facts and that the public interests.

The stop and detention were not permissible under the "pervasively regulated industry" exception to the warrant requirement, as set forth in New York v. Burger, 482 U.S. 691, 702–03, 107 S. Ct. 2636, 2643–44, 96 L. Ed. 2d 601 (1987). This is often referred to as the "special needs" doctrine. A warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only if three criteria are met; New York v. Burger, 482 U.S. 691, 702–03, 107 S. Ct. 2636, 2643–44, 96 L. Ed. 2d 601 (1987).

First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. See Donovan v. Dewey, 452 U.S., at 602, 101 S.Ct., at 2540 ("substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines"); New York v. Burger, 482 U.S. 691, 702–03, 107 S. Ct. 2636, 2643–44, 96 L. Ed. 2d 601 (1987).

Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." Donovan v. Dewey, 452 U.S., at 600, 101 S.Ct., at 2539.

Third, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." *Ibid.* In other words, the regulatory statute must

perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. See Marshall v. Barlow's*, Inc.,* 436 U.S., at 323, 98 S.Ct., at 1826; see also *id.,* at 332, 98 S.Ct., at 1830 (STEVENS, J., dissenting)

The warrantless inspection conducted in the instant case was not "necessary to further [the] regulatory scheme;" Donovan v. Dewey*,* 452 U.S., at 600, 101 S.Ct., at 2539.

Roving Patrol Doctrine

The Supreme Court addressed random roving-patrol stops in United States v. Brignoni-Ponce, 422 U.S. 873, 877–78, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607 (1975) and Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). The Supreme Court stated that the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. Id., at 20—21, 88 S.Ct., at 1879; Camara v. Municipal Court, 387 U.S. 523, 536—537, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967); United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578–79, 45 L. Ed. 2d 607 (1975). The court held that: "[t]o approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with

their use of the highways, solely at the discretion of Border Patrol officers." United States v. Brignoni-Ponce, 422 U.S. 873, 882–83, 95 S. Ct. 2574, 2581, 45 L. Ed. 2d 607 (1975).

However, the Brignoni-Ponce Court specifically addressed and excepted highway safety issues, like the one at issue in the present case in a footnote: "[o]ur decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters." United States v. Brignoni-Ponce, 422 U.S. 873, 883, 95 S. Ct. 2574, 2581, 45 L. Ed. 2d 607 (1975).

However, the exception mentioned in Brignoni-Ponce does not apply to this case because the purpose of the task force was interdiction of contraband—not highway safety.

The instant case involves a programmatic purpose—the use of a task force for the interdiction of contraband, and the use of CVI certified peace officers (composing half of the team) to conduct the functional equivalent of unconstitutional roving-patrols. Tuttoilmondo concedes that pretext stops are legal and that the subjective intent of the detaining officer is not subject to analysis. However, the subjective intent of a program IS subject to scrutiny according to City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).

Checkpoint Doctrine

A checkpoint to verify drivers' licenses and vehicle registration is permissible, but a checkpoint whose primary purpose is to detect evidence of ordinary criminal wrongdoing is not; Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). The legality of a checkpoint turns on whether its primary purpose was to check drivers' licenses and insurance, or whether the primary purpose was general crime control; s*ee* Lujan v State, 331 S.W.3d 768, 771–72 (Tex. Crim. App. 2011). The uncontested testimony presented by the State was that the three-day task force was operating for the specific purpose of drug interdiction. The Troopers said so, every time they were asked.

In City of Indianapolis, the Supreme Court recognized the regulatory exception of Burger, in the context of traffic checkpoints, as permitting searches for administrative purposes without particularized suspicion of misconduct; *see id.* at 452, 121 S.Ct. 447. The key phrase in that holding was "for administrative purposes".

The checkpoint program at issue in City of Indianapolis was found to "unquestionably [have] the primary purpose of interdicting illegal narcotics." The Supreme Court held that, "[b]ecause the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment; City of

Indianapolis v. Edmond, 531 U.S. 32, 40–42, 121 S. Ct. 447, 453–54, 148 L. Ed. 2d 333 (2000).

Reconciliation of *Brignoni-Ponce* and *City of Indianapolis*

The facts before the Appellate Court in the instant case bridge the gap between the roving patrols outlawed in Brignoni-Ponce and the criminal interdiction checkpoints outlawed in City of Indianapolis—both of which were found to be unconstitutional violations of the Fourth Amendment. The method used by the Texas Department of Public Safety, combines the worst aspects of the roving patrol with the worst aspects of criminal interdiction road-blocks.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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Fax: (956) 722-5186

By: /s/ Oscar O. Peña
Oscar O. Peña, J.D.
Texas State Bar Number: 90001479
oscar@oscarpenalaw.com
Attorney for Petitioner

Date: July 2, 2019

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES D. TUTTOILMONDO JR.,
PETITIONER

vs.

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ON PETITION FOR WRIT OF CERTIORARI
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_____

APPENDIX

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Appendix Exhibit A
Notice of Denial of Discretionary Review

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

4/3/2019 **COA No. 04-17-00375-CR**
TUTTOILMONDO, CHARLES D. JR. Tr. Ct. No. 2246 **PD-0007-19**
On this day, the Appellant's petition for discretionary review has been refused.
Deana Williamson, Clerk

4TH COURT OF APPEALS CLERK
KEITH HOTTLE
300 DOLOROSA, THIRD FLOOR
SAN ANTONIO, TX 78205-3037
* DELIVERED VIA E-MAIL *

Appendix Exhibit B
Memorandum Opinion

FILE COPY

COURT OF APPEALS

FOURTH COURT OF APPEALS DISTRICT
CADENA-REEVES JUSTICE CENTER
300 DOLOROSA, SUITE 3200
SAN ANTONIO, TEXAS 78205-3037
WWW.TXCOURTS.GOV/4THCOA.ASPX

KEITH E. HOTTLE,
CLERK OF THE COURT

TELEPHONE
(210) 335-2635

FACSIMILE NO.
(210) 335-2762

Wednesday, December 5, 2018

Honorable Jose A. Lopez
49th Judicial District Court
201 E. 6th Avenue, Suite 330
Zapata, TX 78076

Oscar O. Pena
1720 Matamoros
Laredo, TX 78040
* DELIVERED VIA E-MAIL *

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Dora Martinez Castanon
Zapata County District Clerk
200 E. 7th Avenue, Ste. 119
Zapata, TX 78076
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 04-17-00375-CR
Trial Court Case Number: 2246

Style: *Charles D. Tuttoilmondo Jr. v. The State of Texas*

Enclosed please find the opinion which the Honorable Court of Appeals has issued in reference to the above styled and numbered cause.

If you should have any questions, please do not hesitate to contact me.

Sincerely,
KEITH E. HOTTLE, CLERK

Lynn Domangue
Lynn Domangue
Legal Assistant, 335-3207

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00375-CR

Charles D. **TUTTOILMONDO** Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 49th Judicial District Court, Zapata County, Texas
Trial Court No. 2246
Honorable Jose A. Lopez, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: December 5, 2018

AFFIRMED

Charles D. Tuttoilmondo Jr. appeals his conviction for possession of marijuana. He argues the trial court erred by denying his pretrial motion to suppress evidence obtained from a warrantless search and seizure of his commercial vehicle and, at trial, by admitting his written confession into evidence. We affirm the trial court's judgment.

BACKGROUND

In December 2012, Tuttoilmondo was operating a commercial vehicle, specifically a tractor-trailer, on the highway. Tuttoilmondo was stopped by Texas Department of Public Safety

(DPS) Corporal Samuel Montalvo for a commercial vehicle inspection. As Corporal Montalvo was questioning Tuttoilmondo, several other state troopers arrived. During Trooper Montalvo's conversation with Tuttoilmondo, Tuttoilmondo gave consent to search the tractor-trailer, where over 1,500 pounds of packaged marijuana was found.

Tuttoilmondo was arrested and transported to DPS's district office, where he was interviewed by Agent Carol Alfred Frost, III. Because Agent Frost had worked at DPS for approximately three or four weeks at the time of the interview, Agent Frost's supervisor Captain Maria Garza was also present for the interview. According to Agent Frost, he advised Tuttoilmondo of his rights under *Miranda v. Arizona* and Texas Code of Criminal Procedure article 38.22, and Tuttoilmondo wanted to proceed with the interview.

At the beginning of the interview, Agent Frost put a "Bloggie" (a recording device) on the table, but the interview was not recorded. At the end of the interview, Tuttoilmondo completed a Voluntary Statement of Accused form and handwrote a confession at the bottom of the form. The form contained warnings as to Tuttoilmondo's rights, and according to Agent Frost, Tuttoilmondo initialed next to each of the warnings. The form was not otherwise signed.

Tuttoilmondo was thereafter indicted for possession of marijuana (50 lbs. to 2,000 lbs.). Numerous pretrial hearings were held from June 17, 2013, until November 7, 2016. At the June 30, 2014 hearing on Tuttoilmondo's motion to suppress, the trial court addressed Tuttoilmondo's written confession. Agent Frost testified he had read Tuttoilmondo his rights before Tuttoilmondo confessed to transporting marijuana in exchange for $10,000. Agent Frost explained that because the room used for the interview was not equipped for recording interviews, he attempted to record the interview with the Bloggie. According to Agent Frost, the Bloggie did not record the interview. Agent Frost was asked whether he threatened to detain Tuttoilmondo until after Christmas. Agent Frost denied threatening Tuttoilmondo or promising him anything in exchange for his written

confession. Captain Garza testified Agent Frost never threatened Tuttoilmondo or made him any promises during the interview. The trial court ruled any testimony about Tuttoilmondo's oral statements would not be admissible, but denied Tuttoilmondo's motion as to the written confession.

The case proceeded to a three-day jury trial, starting on March 27, 2017. During trial, Tuttoilmondo again objected to the admissibility of his written confession. Agent Frost again testified about the circumstances leading up to Tuttoilmondo's written confession, and the trial court overruled Tuttoilmondo's objection and admitted his written confession. Corporal Montalvo testified about the initial stop and subsequent search of Tuttoilmondo's tractor-trailer. Tuttoilmondo did not object to Corporal Montalvo's testimony on the grounds that the search and seizure were unlawful. The jury thereafter found Tuttoilmondo guilty, sentenced him to eight years in prison, and the trial court pronounced his sentence in open court. Tuttoilmondo timely perfected this appeal.

SEARCH & SEIZURE

In his first issue, Tuttoilmondo argues the trial court erred by denying his motion to suppress evidence obtained from the search and seizure of the tractor-trailer he was operating. Tuttoilmondo argues the administrative inspection of his tractor-trailer did not satisfy the regulatory exception to the Fourth Amendment's warrant requirement.

Tuttoilmondo argues he preserved error because he filed and urged a written motion to suppress, and the trial court denied the motion. He also argues he raised additional objections at trial, and the objections were overruled. Although the State does not directly address preservation, we may not reverse a judgment of conviction without addressing error preservation. *See* TEX. R. APP. P. 33.1(a); *Obella v. State*, 532 S.W.3d 405, 407 (Tex. Crim. App. 2017).

Tuttoilmondo's motion to suppress states in relevant part, "The statements made by [Tuttoilmondo] were tainted by the illegal and unlawful detention and arrest, in violation of [Tuttoilmondo's] constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Article I, Section 9 of the Texas Constitution and Article 38.23 of the Texas Code of Criminal Procedure." At the suppression hearing, Tuttoilmondo sought to suppress only his statements. Agent Frost and Captain Garza testified about the interview, and Corporal Montalvo and the other officers involved with the stop did not testify. Tuttoilmondo did not raise any issue about the stop and subsequent search of his tractor-trailer at the hearing.

Tuttoilmondo states the trial court overruled further objections he made at trial. Tuttoilmondo cites to parts of the record that do not concern the stop and subsequent search of the tractor-trailer. Tuttoilmondo cites Agent Frost's testimony about Tuttoilmondo's statements, and objections regarding his statements. The stop and subsequent search of Tuttoilmondo's tractor-trailer were not mentioned during this part of the trial. When Corporal Montalvo testified about the stop and subsequent search of Tuttoilmondo's tractor-trailer, Tuttoilmondo did not object to the testimony about the commercial-vehicle stop, Tuttoilmondo's consent to search, or the discovery of the marijuana in the tractor-trailer.

To preserve a complaint for appellate review, an appellant must have presented a timely and specific complaint, objection, or motion to the trial court. *Kou v. State*, 536 S.W.3d 535, 542 (Tex. App.—San Antonio 2017, pet. ref'd) (citing TEX. R. APP. P. 33.1(a)). The purpose of requiring a specific objection in the trial court is twofold: (1) to inform the trial judge of the basis of the objection and give him the opportunity to rule on it; and (2) to give opposing counsel the opportunity to respond to the complaint. *Resendez v. State*, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009). The unlawfulness of the stop and subsequent search of the tractor-trailer was not presented to the trial court in the motion to suppress or at the suppression hearing. There was also no

objection to Corporal Montalvo's testimony about the commercial-vehicle stop, Tuttoilmondo's consent to search, and the discovery of the marijuana in the tractor-trailer. We therefore hold Tuttoilmondo failed to preserve this complaint for appellate review. *See* TEX. R. APP. P. 33.1(a); *Kou*, 536 S.W.3d at 542.

TUTTOILMONDO'S WRITTEN CONFESSION

In his remaining issues, Tuttoilmondo argues the trial court erred by admitting his written confession into evidence. He argues the written confession did not "show on its face" that he knowingly, intelligently, and voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). He further argues his written confession was involuntary because it was elicited based on a false promise of one of the detaining officers.

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We review a trial court's conclusions of law de novo. *Id.* at 328. If a trial court's fact findings are supported by the record or are based on the evaluation of witness credibility and demeanor, we should afford them almost total deference. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). "The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). When the trial judge makes express findings of fact, we view the evidence in a light most favorable to the ruling and determine whether the evidence supports the findings. *Id.*; *see Rodriguez v. State*, 968 S.W.2d 554, 559 n.8 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

B. Tuttoilmondo's Written Confession

Tuttoilmondo's remaining issues relate to State's Exhibit 9, which the trial court admitted into evidence over Tuttoilmondo's objection. State's Exhibit 9 is a form that Tuttoilmondo

completed after his interview with Agent Frost. The top part of the completed form appears as follows:

TEXAS DEPARTMENT OF PUBLIC SAFETY
TEXAS RANGER DIVISION

COPY

VOLUNTARY STATEMENT OF ACCUSED

THE STATE OF TEXAS

COUNTY OF Webb

My name is Charles Tuttle Lowell I am 46 years of age, my date of birth is 4/3/66 and I presently reside at [redacted] The person to whom I am giving this statement has been identified to me as [redacted] a peace officer duly commissioned by the State of Texas.

This statement is being given voluntarily, without fear of duress or threat, and without promise of leniency. Prior to this statement being made, I was advised that I am suspected of or charged with the offense of [redacted].

The redacted line appears to be an address. The parties explained in the trial court that the top part of the form was incorrectly filled out. The middle and bottom of the form appear as follows:

Further, I was advised of the following **Constitutional Rights**:

CR 1. I have the right to remain silent and not make any statement at all and that any statement I make may be used against me at my trial;

CR 2. Any statement I make may be used as evidence against me in court;

CR 3. I have the right to have a lawyer present to advise me prior to and during any questioning;

CR 4. If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning; and

CR 5. I have the right to terminate the interview at any time; and

prior to and during the making of this statement, I knowingly, intelligently, and voluntarily waived the rights set out in the warning above, and having knowingly, intelligently and voluntarily waived those rights, I do hereby make the following free and voluntary statement:

I Charles Tuttle Lowell drove from Santa Fe TX. to Pharr TX. To pick up a load of wood and return it to Houston. For $10.00, The had no idea of amount of load or place

Agent Frost testified Tuttoilmondo initialed next to each of the numbers on this form and then wrote the statement at the bottom. The form was not otherwise signed, and there was no signature block on the form.

B. Knowing, Intelligent, and Voluntary Waiver

Tuttoilmondo argues his written confession is facially invalid because the form does not show he waived his rights knowingly, intelligently, and voluntarily, and the State otherwise failed to prove he waived his rights knowingly, intelligently, and voluntarily. The State must prove by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived his statutory and *Miranda* rights. *See Joseph v. State*, 309 S.W.3d 20, 24 (Tex. Crim. App. 2010). "The State does not have to prove that the defendant expressly waived his *Miranda* rights, only that he did so knowingly, intelligently, and voluntarily." *Howard v. State*, 482 S.W.3d 249, 255 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd).

For a suspect to make a valid waiver of the Fifth Amendment privilege against self-incrimination, the suspect's waiver must be made knowingly, intelligently, and voluntarily. *Miranda v. Arizona*, 384 U.S. at 444; *see* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2(b). Article 38.22 of the Texas Code of Criminal Procedure provides that a defendant's written statement obtained during custodial interrogation is inadmissible unless the written statement shows "on the face of the statement" that:

> (a) the accused, prior to making the statement, . . . received from the person to whom the statement is made a warning that:
> (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
> (2) any statement he makes may be used as evidence against him in court;
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
> (5) he has the right to terminate the interview at any time; and

> (b) the accused, prior to and during the making of the statement, knowingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

See TEX. CODE CRIM. PROC. ANN. art. 38.22 § 2. In analyzing whether a defendant's waiver of rights was valid, we consider whether: (1) the waiver was voluntary without deception, intimidation, or coercion; and (2) the waiver was made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. *See Joseph*, 309 S.W.3d at 25-27.

Agent Frost testified he read Tuttoilmondo his rights "off the card" he carried in his wallet "prior to" his conversation with Tuttoilmondo "and then [Tuttoilmondo] initialed these at the end of [the conversation] before writing this statement." Agent Frost further testified Tuttoilmondo "agree[d] that he would waive those rights and speak to" him. He also testified he did not coerce or threaten Tuttoilmondo into giving a statement; he did not deny Tuttoilmondo any basic necessities of going to the restroom or drinking water; Tuttoilmondo did not request an attorney or request that the interview cease; and he and Tuttoilmondo spoke in English during the conversation and Tuttoilmondo understood English. The DPS Voluntary Statement of Accused form tracks the language of article 38.22, section 2, and thereby shows on its face that Agent Frost, the person to whom the statement was made, advised Tuttoilmondo of his constitutional rights before making the statement. Agent Frost testified Tuttoilmondo initialed next to each of the five warnings required by article 38.22, section 2, which Agent Frost testified was why he believed Tuttoilmondo understood his rights. The trial court made express findings that Tuttoilmondo was given all required warnings and that his statement was voluntarily given.

The evidence supports that Tuttoilmondo's waiver was voluntary without deception, intimidation, or coercion and that the waiver was made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. *See id.*; *Perez v.*

State, No. 04-02-00822-CR, 2003 WL 22491578, at *2 (Tex. App.—San Antonio Nov. 5, 2003, pet. ref'd) (mem. op., not designated for publication). Tuttoilmondo notes he did not sign the written statement, but Agent Frost testified Tuttoilmondo wrote the statement at the bottom of the form, and under article 38.22, a written statement suffices if it is in the accused's handwriting. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 1(1), (2) (providing a written statement may be in the accused's "own handwriting" or "is signed by the accused").

In a separate issue, Tuttoilmondo argues his written statement was made involuntarily because Agent Frost "promised" Tuttoilmondo that his interview would be electronically recorded by a recording device. According to Tuttoilmondo, Agent Frost did not expressly make this promise, but instead impliedly made the promise or lied to him by placing the "recording device on the table directly in front of Tuttoilmondo." In support of this issue, Tuttoilmondo cites to his punishment-phase testimony that Agent Frost told him that if he did not cooperate, he "would be stuck here till after Christmas. [He] wouldn't be home with [his] family."

Initially, the trial court did not admit any testimony about the oral statements Tuttoilmondo made during the interview; the trial court admitted only Tuttoilmondo's written confession. Tuttoilmondo's argument as to how Agent Frost's conduct amounted to an implied promise in exchange for a written confession is difficult to follow, *see* TEX. R. APP. P. 38.1(i) (requiring a clear and concise argument in support of contentions in an appellant's brief), because the evidence supports the trial court's finding that no promises were made in connection with obtaining Tuttoilmondo's written statement. But even if Agent Frost's conduct constituted an implied promise, the implied promise would not render Tuttoilmondo's written confession involuntary unless the written confession was extracted by the improper influence of the implied promise. *See Roberts v. State*, 545 S.W.2d 157, 160-61 (Tex. Crim. App. 1977). Tuttoilmondo has not explained or cited any evidence showing how his written confession was extracted, or the decision to give

the written confession was improperly influenced by Agent Frost's implied promise to record the interview. *See* R. 38.1(i).

Because the trial court's findings turn on witness credibility and demeanor, we must afford them almost total deference. *See Guzman*, 955 S.W.2d at 89. We hold the evidence supports that Tuttoilmondo's written confession was made knowingly, intentionally, and voluntarily. Thus, the trial court did not abuse its discretion by admitting the written confession into evidence at trial.

CONCLUSION

We affirm the trial court's judgment of conviction.

Luz Elena D. Chapa, Justice

DO NOT PUBLISH

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-17-00375-CR

Charles D. **TUTTOILMONDO** Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 49th Judicial District Court, Zapata County, Texas
Trial Court No. 2246
Honorable Jose A. Lopez, Judge Presiding

BEFORE JUSTICE ANGELINI, JUSTICE CHAPA, AND JUSTICE RIOS

In accordance with this court's opinion of this date, the trial court's judgment of conviction is AFFIRMED.

SIGNED December 5, 2018.

Luz Elena D. Chapa, Justice