Affirmed in Part, Reversed and Remanded in Part, and Opinion filed September 30, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00990-CR

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RODERIC WADDELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 746,237

O P I N I O N

Roderic Waddell appeals a felony conviction for cocaine possession on the grounds that the trial court erred in: (1) denying a hearing on his motion for new trial and denying the motion; (2) refusing to suppress evidence of the cocaine seized from appellant; and (3) failing to quash one of the punishment enhancement paragraphs. We affirm in part and reverse and remand in part.

Background

During a narcotics investigation at a hotel, a plain clothes police officer observed appellant and a female loading bags into a truck. As the truck passed the officer's unmarked car, he noticed that neither appellant nor the female passenger were wearing seatbelts and began to follow their vehicle. After observing other traffic violations and determining that the owner of the vehicle had two outstanding warrants, the officer radioed for a patrol car to pull the vehicle over. Subsequently, appellant was arrested for failing to produce a driver's license and proof of insurance. Crack pipes, syringes, powdered cocaine, and crack cocaine were found in the vehicle during the inventory search. After a search of appellant at the jail uncovered a small bag of powdered cocaine in his pants pocket, appellant was charged with possession of a controlled substance, found guilty by a jury, and sentenced to thirty years confinement.

Denial of Hearing on Motion for New Trial

Appellant's first point of error argues that the trial court erred in overruling his motion for a new trial without conducting a hearing because the motion was supported by an affidavit describing juror misconduct.

A hearing on a motion for new trial is not necessary if the court can determine from the record the issues raised in the motion for new trial. *See Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993). However, a hearing is required if an appellant presents a timely, verified motion for new trial and demonstrates in an affidavit reasonable grounds for relief which are extrinsic to the record. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994); *Reyes*, 849 S.W.2d at 816.[1] The purpose of the hearing is to develop the issues raised in the motion for new trial. *See Jordan*, 883, S.W.2d at 665. Therefore, the affidavit need not reflect every component legally required to establish relief, only reasonable grounds for holding that such relief could be granted. *See Reyes*, 849 S.W.2d at 816.

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[1] Because the order on appellant's motion for new trial is signed and there is also a handwritten note from the judge denying a hearing on the motion, presentment of the motion is not an issue in this case. *See Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998) (holding that the record must show that the movant brought the motion for new trial to the attention of the trial court by such things as obtaining the trial court's ruling on the motion for new trial).

A new trial must be granted when the jury has decided the verdict by lot or in any manner other than a fair expression of the jurors' opinion or has engaged in such misconduct that the accused has not received a fair and impartial trial. *See* TEX. R. APP. P. 21.3(c), (g). In this case, appellant's motion for new trial alleged that the jury weighed appellant's silence heavily against him and improperly determined the weight of the contraband by a compromise verdict rather than from the evidence.

As to the first allegation, the failure of a defendant to testify must not be taken as a circumstance against him. *See* TEX. CRIM. PRO. ANN. art. 38.08 (Vernon 1979). However, a casual reference by the jury during deliberations to the failure of the accused to testify does not vitiate the verdict. *See Powell v. State*, 502 S.W.2d 705, 711 (Tex. Crim. App.1973); *see also Garcia v. State*, 887 S.W.2d 862, 882-83 (Tex. Crim. App. 1994). Rather, to constitute reversible error, such a reference must amount to a discussion by the jurors or be used as a circumstance against the accused. *See Powell*, 502 S.W.2d at 711.

In this case, appellant's motion for new trial was accompanied by the affidavit of one of the jurors which stated, in part:

> [A]s jurors were determining [appellant's] guilt or innocence some of the jurors took into account and discussed repeatedly the fact that [appellant] didn't testify on his own behalf. There was one juror who on at least three different occasions kept bringing up the fact that [appellant] didn't testify or defend himself and this fact bothered him. I was the only person on the panel that spoke out and said that we weren't suppose [sic] to consider whether [appellant] testified or not. The foreman didn't back me up on the issue and he just kind of shrugged his shoulders and half way nodded when I spoke out and looked at him. This issue turned into a discussion and I tried to stifle the issue when another female juror who appeared annoyed with me said that she didn't know why it couldn't be considered. The discussion continued and comments like, I would be screaming it to the heavens or shouting it to the heavens that I was innocent were made. Other comments that were made were that it really bothers me that he didn't say anything and why didn't he tell somebody if he was innocent. The discussion was going around the room between jurors and when it came time for the foreman to say something he (the foreman) said that he agreed with Nick. The foreman looked at me and told me that he knew he wasn't suppose [sic] to talk about it, but they continued talking about it. Nick was the juror who was initially bothered by the fact that [appellant] didn't defend himself.
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> * * * *

> There was discussion on the possibility that maybe some drugs were planted on [appellant] and it really bothered the jurors that [appellant] didn't testify.

We believe that the foregoing affidavit provided adequate grounds to believe that the jurors' references to appellant's failure to testify could have: (i) amounted to a discussion by the jurors; or (ii) been used as a circumstance against him such that a hearing on the motion was required. Therefore, appellant's first point of error is sustained, and we need not address his second point of error challenging the denial of his motion for new trial.

Suppression of Evidence

Appellant's third point of error argues that the trial court erred in refusing to suppress evidence of the cocaine found on his person because the initial traffic stop was fabricated in order to produce an arrest that would allow a search of appellant and the vehicle.

A trial court's ruling on a motion to suppress is generally reviewed for abuse of discretion. *See Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999). In making such reviews, we afford almost total deference to trial courts' determinations of historical facts supported by the record and their rulings on application of law to fact questions, also known as mixed questions of law, when those fact findings and rulings are based on an evaluation of credibility and demeanor. *See Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998). We review *de novo* mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor. *See id* at 773.[2] In reviewing a trial court's ruling on mixed questions of law and fact, we view the evidence in the light most favorable to the trial court's ruling. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

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[2] On the one hand, the Court of Criminal Appeals has stated that an abuse of discretion standard does not necessarily apply to application of law to fact questions the resolution of which does not turn on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). On the other hand, the Court has recognized that a misapplication of the law to the facts of a particular case is a *per se* abuse of discretion. *See State v. Ballard*, 987 S.W.2d 889, 893 (Tex. Crim. App. 1999).

In this case, appellant acknowledges that: (1) an objectively valid traffic stop is not made unlawful by the fact that the detaining officer has an ulterior motive for making it;[3] (2) an officer testified that he observed appellant driving without wearing a seat belt; (3) failing to wear a seat belt is a traffic law violation which, if observed by an officer, is a valid ground to make a traffic stop;[4] (4) an officer testified that, after pulling appellant over, appellant failed to produce a driver's license; and (5) failures to wear a seat belt and produce a driver's license are offenses for which an officer observing them may validly make a warrantless arrest.[5] Although appellant challenges the credibility of the officers' testimony that they observed appellant commit the traffic violations, he does not challenge the sufficiency of that evidence and did not offer any controverting evidence. Because the credibility of the evidence is beyond the scope of our review, and because appellant's third point of error does not demonstrate that the denial of his motion to suppress resulted from error by the trial court in either finding facts or applying the law to them, the point of error is overruled.

Enhancement

Appellant's fourth point of error argues that the trial court erred in failing to quash the second punishment enhancement paragraph of his indictment because it alleged merely that "[appellant] *committed* the felony of [drug possession] and *was convicted . . . .*" but does not specifically state the offense of which he was convicted. Appellant contends that this constituted a failure to allege a necessary element

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3 *See Whren v. U.S.*, 116 S.Ct. 1769, 1774 (1996); *Crittenden v. State*, 899 S.W.2d 668, 674 (Tex. Crim. App. 1995).

4 *See* TEX. TRANSP. CODE ANN. § 545.413(a) (Vernon Supp. 1998) (a person commits an offense if they are over age 15 and ride in the front seat of a passenger car without wearing a safety belt); *Armitage v. State*, 637 S.W.2d 936, 939 (Tex. Crim. App.1982) (reciting that a traffic violation committed in an officer's presence authorizes an initial stop).

5 *See* TEX. TRANSP. CODE ANN. § 521.021 (Vernon Supp. 1998) (a person may not operate a motor vehicle on a highway unless he holds a valid driver's license); *id.* § 521.025(a), (c) (a driver who violates the requirement to have a driver's license in his possession while operating a vehicle or to display the license on the demand of a peace officer commits an offense); *id.* § 543.001 (a peace officer may, without a warrant, arrest a person found committing a violation under subtitle C); TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977) (a peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view).

of the offense which rendered the indictment fundamentally defective. *See Ex parte Abbey*, 574 S.W.2d 104, 105-06 (Tex. Crim. App. 1978) (holding that the omission of an element of the *charged* offense rendered the information fatally defective).

Prior to the 1985 amendments to the Texas Constitution, the failure of a charging instrument to allege all of the elements of an offense was a fundamental defect that deprived the trial court of jurisdiction and could be raised for the first time on appeal. *See Ex parte Patterson*, 969 S.W.2d 16, 18 (Tex. Crim. App. 1998); *Cook v. State*, 902 S.W.2d 471, 476 (Tex. Crim. App. 1995). Even then, however, it was not necessary to allege prior convictions for enhancement of punishment with the same particularity as was required for pleading the charged offense. *See Cole v. State*, 611 S.W.2d 79, 80 (Tex. Crim. App. 1981). Moreover, if the sufficiency of such punishment allegations were to be challenged on appeal, the defendant must have made a proper motion to quash the enhancement portion of the indictment at the trial court. *See id*.

Since the 1985 amendments to the Texas Constitution, the omission of an element of the charged offense is a substantive defect that renders the charging instrument subject to a motion to quash but, in the absence of a pretrial objection, does not prevent the instrument from supporting a conviction. *See Patterson*, 969 S.W.2d at 19; *Cook*, 902 S.W.2d at 477. Therefore, so long as a charging instrument purports to charge an offense against a specified person,[6] a defendant must now object to any defects of substance or form in the charging instrument prior to the day of trial, or they are waived and may not be raised on appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1998).

In this case, the jury was empaneled and the trial commenced on August 25, 1997, and appellant filed his motion to quash the second enhancement paragraph on August 27, 1997. When appellant filed his motion to quash, the jury was already deliberating on the guilt or innocence of appellant. Because appellant failed to object to the alleged defect in the indictment before trial, his complaint was not preserved.

However, citing *Luken*, appellant argues that his failure to raise a pre-trial objection to the enhancement paragraph did not waive the complaint because an accused is not required to complain that

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6 *See Patterson*, 969 S.W.2d at 19; *Cook*, 902 S.W.2d at 477.

he faces too *lenient* a punishment. *See Luken v. State*, 780 S.W.2d 264, 268 (Tex. Crim. App. 1989). However, *Luken* held only that a failure to allege the use or exhibition of a deadly weapon was not a defect in an indictment because it went beyond what was required to charge a person with the commission of the charged offense. *See id.* Where no such allegation is made, the accused cannot know to object to it until the issue arises when a question is submitted to the jury or an affirmative finding is made by the trial court. *See id.* In this case, the enhancement paragraph was set forth in the indictment. Unlike the indictment in *Luken*, the indictment in this case put appellant on notice of what the State was seeking. Therefore, appellant's reliance on *Luken* is misplaced, and his fourth point of error is overruled.

Accordingly, we reverse the trial court's order denying a hearing on appellant's motion for new trial, remand the case for a hearing on the motion for new trial, and affirm the denial of appellant's motions to suppress and to quash the second punishment enhancement paragraph of his indictment.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 30, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig. (J. Wittig concurs in result only).

Do not publish — TEX. R. APP. P. 47.b(3).