Affirm, Reversed and Remand; Opinion Filed June 29, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00826-CR
No. 05-19-00828-CR

RUSSELL TODD WILSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 291st Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F18-34038-U, F17-20666-U

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Schenck

Russell Todd Wilson appeals his convictions for manufacture or delivery of a controlled substance causing death or serious bodily injury and possession of a controlled substance. With respect to his conviction for manufacture or delivery of a controlled substance causing death or serious bodily injury (trial cause number F17-20666-U), appellant urges the judgment is void because the indictment does not allege an offense. With respect to his conviction for possession of a controlled substance (trial cause number F18-34038-U), appellant urges (1) the trial court erred in increasing the minimum jail term by five years under the drug-free zone

punishment enhancement statute and (2) his plea of guilty was not made knowingly, intelligently, and voluntarily because he was improperly admonished on the range of punishment. We affirm the trial court's judgment in cause number F17-20666-U and reverse the trial court's judgment in cause number F18-34038-U and remand that case to the trial court for a new trial. Because all issues are settled in the law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Appellant was indicted for the offenses of manufacture or delivery of a controlled substance, to wit: methamphetamine in an amount of 4 grams or more and less than 200 grams to Richard Bell,[1] which caused Bell's death, and possession of a controlled substance, to wit: heroin, in an amount less than 1 gram. TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(2)(6), 481.112(d), 481.115(b), 481.141(b). In connection with the possession charge, the State filed notice of its intent to seek a finding that appellant committed the offense in a drug-free zone and enhance his minimum sentence by five years. *See id.* §141.134. The State also filed notice of its intent to enhance appellant's possession charge with two prior state-jail felony convictions. *See* TEX. PENAL CODE ANN. § 12.425(a).

In a consolidated plea proceeding, appellant judicially confessed to having committed the charged offenses and pleaded guilty to both charges. Appellant also

[1] Richard Bell was appellant's cousin. He suffered from mental and behavioral disorders.

pleaded true to having previously been convicted of two state-jail felony drug offenses and to having possessed heroin in a drug-free zone. The trial court accepted appellant's pleas and found him guilty as charged in the indictments. Appellant elected to have the trial court assess punishment. The trial court assessed punishment at fifteen years' confinement in the manufacture or delivery case, and at seven years' confinement in the possession case. The trial court ordered the sentences to run consecutively. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08 (with exceptions that do not apply here, the trial court has the discretion to order sentences imposed to run concurrently or consecutively).

DISCUSSION

I. Manufacture or Delivery Case

In his first issue, appellant asserts the judgment in the manufacture or delivery case is void because the indictment does not allege an offense. More particularly, appellant claims he was erroneously charged under section 481.141 of the health and safety code, titled "Manufacture or Delivery of a Controlled Substance Causing Death or Serious Bodily Injury," which only applies to a state-jail felony, or a second- or third-degree felony, not to a first-degree felony for which he was charged and convicted.[2] In response, the State asserts (1) appellant forfeited and waived his

[2] Section 481.141 of the health and safety code, increases the punishment by one degree, in a trial of listed offenses, including the manufacture or delivery of a controlled substance in penalty group 1, which includes methamphetamine, if the jury or judge finds that a person died or suffered serious bodily injury as a result of injecting, ingesting, inhaling, or introducing into the person's body any amount of the controlled

right to raise this complaint, (2) the indictment clearly alleged appellant committed a first-degree felony, and (3) the fact that the offense for which appellant was on trial was already a first-degree felony, and thus, could not be enhanced to a felony of a degree higher under section 481.141, does not render the indictment or appellant's conviction void.

Article 1.14(b) of the code of criminal procedure provides a defendant forfeits his right to challenge a defect, error, or irregularity of form or substance in an indictment on appeal or in any other post-conviction proceeding if he does not object to the defect, error, or irregularity before the beginning of trial. CRIM. PROC. art. 1.14(b); *Teal v. State*, 230 S.W.3d 172, 176 (Tex. Crim. App. 2007). Appellant concedes that he did not object to the indictment and freely and voluntarily entered a plea of guilty to the charge, expressly waiving "any and all defects, errors or irregularities, whether of form or substance, in the charging instrument." Thus, appellant has waived this complaint.

Notwithstanding appellant's waiver of this complaint, we conclude appellant's complaint that the indictment does not allege an offense has no merit. The proper test to determine whether a charging instrument alleges "an offense" is whether the allegations in it are clear enough that one can identify the offense

substance manufactured or delivered by the defendant. TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(6), 481.141. Section 481.141 applies to state-jail felonies and second- and third-degree felonies. *Id.* § 481.141(b).

alleged. *Teal*, 230 S.W.3d at 180. If they are, then the indictment is sufficient to confer subject-matter jurisdiction. *Id.* "Stated another way: Can the trial court (and appellate courts who give deference to the trial court's assessment) and the defendant identify what penal code [or health and safety code] provision is alleged and is that penal code [or health and safety code] provision one that vests jurisdiction in the trial court?" *Id.*

The indictment in appellant's manufacture or deliver case alleged that:

> [Appellant] . . . on or about the 21st day of December, 2016 . . . did unlawfully and knowingly deliver, to-wit: actually transfer, constructively transfer and offer to sell a controlled substance, to-wit: METHAMPHETAMINE, in an amount by aggregate weight, including any adulterants or dilutants, of more than 4 grams but less than 200 grams to RICHARD BELL,
>
> and further, RICHARD BELL died as a result of injecting, ingesting, and introducing into the body of RICHARD BELL, the said METHAMPHETAMINE manufactured and delivered by the defendant[.]

The first paragraph tracks section 481.112 of the health and safety code, titled "Manufacture or Delivery of Substance in Penalty Group 1"[3] and the second tracks section 481.141, titled Manufacture or Delivery of Controlled Substance Causing

[3] Section 481.112 of the health and safety code provides, "a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1." *Id.* § 481.112(a). Subsection (d) of section 481.112 provides, "An offense under Subsection (a) is a felony of the first degree if the amount of controlled substance to which the offense applies is by aggregate weight, including adulterants and dilutants, four grams or more but less than 200 grams." *Id.* § 481.112(d).

Death or Serious Bodily Injury."[4] Thus, the information reflected on the face of the indictment alleges the essential elements of the primary delivery of a controlled substance offense and the elements required to potentially enhance the punishment range on a delivery of a controlled substance offense if it results in death or serious bodily injury. *See id.* §§ 481.112(a), (d); 481.141. As such, the indictment vested subject-matter jurisdiction in the trial court. *See Kirkpatrick v. State*, 279 S.W.3d 324, 329 (Tex. Crim. App. 2009) (charging instrument vested jurisdiction where one could conclude from the face of same that the State intended to charge a felony offense).

In this case, appellant pleaded guilty to delivering 4 grams or more, but less than 200 grams, of methamphetamine to Bell. Thus, his offense was a first-degree felony that could not further be enhanced by section 481.141. *See* § 481.112(d). Appellant further pleaded guilty to having caused Bell's death, as alleged in the indictment. The fact that the applicable range of punishment is not increased by proof beyond a reasonable doubt that Bell died as a result of the drugs appellant sold him is of no consequence to the validity of appellant's conviction. *See Munoz v. State*, 533 S.W.3d 448, 456 (Tex. App.—San Antonio 2017, pet. ref'd) (superfluous language in indictment did not change nature of charged offense from felony murder to intentional murder). We overrule appellant's first issue.

[4] See footnote 2.

II. Possession Case

In his second issue, appellant asserts the five-year minimum jail term punishment enhancement for certain offenses committed in a drug-free zone does not apply to his state-jail drug charge. The State agrees.

In cause number 18-34038-U, appellant was convicted of possession of a controlled substance, heroin, in an amount of less than 1 gram, a state-jail felony. TEX. HEALTH & SAFETY CODE ANN. § 481.115(b). Appellant's conviction was enhanced by two prior state-jail-felony convictions, which raised the punishment range to that of a third-degree felony. TEX. PENAL CODE ANN. § 12.425. The trial court further enhanced appellant's punishment by five years for having possessed the drugs in, on or within a drug free-zone under section 481.134(c) of the health and safety code. TEX. HEALTH & SAFETY CODE ANN. § 481.134(c).

Section 481.134(c) provides, in part:

> The minimum term of confinement or imprisonment for an offense otherwise punishable under Section . . . 481.115(c)-(f) . . . is increased by five years and the maximum fine for the offense is doubled if it is shown on the trial of the offense that the offense was committed:
>
> (1) In, on, or within 1,000 feet of the premises of a school, . . .

Id.

Section 481.134(c) only applies to an offense punishable by sections 481.115(c-f). Appellant was convicted of an offense under section 481.115(b), thus, his conviction was not subject to enhancement under section 481.134(c).

Because the five-year increase did not apply to the offense for which appellant was convicted, and because his prior state-jail felonies elevated his conviction to a third degree felony, he should have been admonished that the range of punishment he faced was for imprisonment for any term of not more than ten years or less than two years. TEX. PENAL CODE ANN. § 12.34. The trial court admonished appellant that, if the State proved the drug-free zone, his minimum punishment in the possession case would be seven years, rather than two, and sentenced appellant to what the court believed was the minimum sentence of seven years' confinement. Thus, the record demonstrates the trial court erroneously applied section 481.134(c) in appellant's possession case. Accordingly, we sustain appellant's second issue.

In his third issue, appellant claims, because the trial court incorrectly admonished him on the minimum applicable range of punishment, his plea of guilty in the possession case was not made knowingly, intelligently and voluntarily. Article 26.13(a)(1) of the Texas Code of Criminal Procedure requires a trial court to admonish a defendant about the punishment range attached to an offense before accepting a plea of guilty or no contest. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a); *Hughes v. State*, 833 S.W.2d 137, 139 (Tex. Crim. App. 1992). An admonishment that substantially complies with article 26.13(a)(1) is sufficient. *See* CRIM. PROC. art. 26.13(c). When the record reflects a trial court admonished a defendant under article 26.13(a)(1), even though incorrectly, *and* in fact assessed punishment within the actual and stated range for the offense, substantial compliance

will be deemed to have occurred, and there is a *prima facie* showing that the defendant's plea was knowing and voluntary. *See Hughes*, 833 S.W.2d at 140; *Robinson v. State*, 739 S.W.2d 795, 801 (Tex. Crim. App. 1987). Once it is shown a trial court substantially complied with article 26.13(a)(1) and that a defendant's plea was *prima facie* knowing and voluntary, the burden shifts to the defendant to show affirmatively both that he was unaware of the consequences of his plea and that he was misled or harmed by the trial court's admonishment. *See* CRIM. PROC. art. 26.13(c); *Robinson*, 739 S.W.2d at 801. If substantial compliance has not occurred, the burden never shifts to the defendant, and harm is presumed as a matter of law. *See Whitten v. State*, 587 S.W.2d 156, 158 (Tex. Crim. App. 1979) (op. on reh'g).

Notwithstanding the trial court's error in admonishing appellant, it assessed punishment both within the actual range for the offense and the incorrectly stated range. Consequently, the trial court's admonishment substantially complied with article 26.13(a)(1), and appellant's guilty plea was *prima facie* knowing and voluntary. The burden shifted to appellant to show otherwise.

The record before us demonstrates the State, the trial court, and appellant were all under the mistaken belief that appellant's punishment was subject to the special enhancement statute increasing the minimum sentence by five years for an offense committed in a drug-free zone. Thus, appellant was not aware of the consequences of his plea as it related to the correct range of punishment for his offense. Although

appellant's seven-year sentence fell within the correctly enhanced punishment range of two to ten years, he has shown he was harmed by the court's admonishment because he was denied the opportunity to receive a sentence less harsh than the minimum the judge understood applied in his case. *See, e.g.*, *Williams v. State*, 582 S.W.3d 612, 629 (Tex. App.—San Antonio 2019, pet. granted). Thus, appellant's guilty plea to the possession offense was not made knowingly, voluntarily and intelligently. We sustain appellant's third issue.

CONCLUSION

We affirm the trial court's judgment in trial cause number F17-20666-U. We reverse the trial court's judgment in trial cause number F18-34038-U and remand that case to the trial court for a new trial.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RUSSELL TODD WILSON, Appellant	On Appeal from the 291st Judicial District Court, Dallas County, Texas Trial Court Cause No. F18-34038-U.
No. 05-19-00826-CR V.	Opinion delivered by Justice Schenck. Justices Molberg and Nowell participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the cause **REMANDED** for further proceedings consistent with this opinion.

Judgment entered this 29th day of June, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RUSSELL TODD WILSON, Appellant	On Appeal from the 291st Judicial District Court, Dallas County, Texas Trial Court Cause No. F17-20666-U.
No. 05-19-00828-CR V.	Opinion delivered by Justice Schenck. Justices Molberg and Nowell participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 29th day of June, 2020.