Affirmed and Opinion filed September 30, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00106-CR

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CHARLES EDWARD MATTHEWS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 758,108

O P I N I O N

Charles Edward Matthews, appellant, was charged with delivery of cocaine and possession of cocaine with intent to deliver. After the jury convicted appellant on the first count, delivery of cocaine, the trial court sentenced him to forty years confinement in the Texas Department of Criminal Justice, Institutional Division.[1] The jury found the appellant not guilty on the second count, possession of cocaine with intent to deliver. On appeal, Matthews brings two points of error.

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[1] Matthew's sentence was enhanced because of two prior felony convictions.

First, Matthews argues that the trial court erred by including three theories of delivery in the jury charge when no evidence was presented on two of the theories. Second, Matthews asserts the trial court erred by trying both charges together in a single proceeding where the State failed to file written notice of the consolidated actions. We affirm the judgment of the trial court.

I.
Factual Background

An undercover police officer, L.J. Allen, telephoned Matthews to arrange a narcotics purchase. After meeting with Matthews once, at an apartment, to buy $100 worth of crack cocaine, Allen called again, this time agreeing to meet Matthews at a fast food restaurant in order to buy $300 worth of cocaine. Officer Allen met Matthews at the restaurant, went into the restroom with him, and purchased the cocaine from Matthews in a hand-to-hand transfer of cash for drugs. Matthews was arrested immediately following the exchange. Later that day, police officers, pursuant to a valid search warrant, searched the apartment where Allen made the first narcotics purchase and found more crack cocaine in several locations in the apartment.

At trial, Officer Allen testified concerning his purchase of the narcotics in the fast food restaurant restroom. He described the purchase as a hand-to-hand transfer of the $300 for the crack cocaine stating, "he [Matthews] displayed some rock-like substances. And I looked at 'em and I told him, hey, this is only $200 worth. I asked for $300. So what he did, he pulled out some other rocks and he gave me some more and then he put the rest of them back in his pocket . . . I gave him $300 for what he gave me." Matthews first point of error involves the facts surrounding the narcotics purchase.

II.
Jury Charge

Matthews asserts the jury charge improperly included two theories of delivery not supported by the evidence. The jury charge included as alternate theories: (1) delivery by actual transfer; (2) delivery by

constructive transfer; and (3) delivery by offer to sell. Matthews correctly argues there was no evidence submitted on the second and third theories. However, evidence was submitted that supported the first theory, actual transfer. "Actual delivery" of a controlled substance consists in completely transferring real possession and control of the substance from one person to another. *Conway v. State*, 738 S.W.2d 692, 695 (Tex.Crim.App. 1987).[2] Here, Officer Allen testified he gave Matthews the $300 and Matthews gave him $300 worth of crack cocaine. Therefore, the record supports the theory of delivery by actual transfer. Further, the jury found Matthews guilty of delivery of a controlled substance, a general verdict, instead of finding him guilty of a particular method of delivery. The law in this area is clear: "[w]here a general verdict is returned and the evidence is sufficient to support a finding under any of the alternative methods submitted, no error is shown." *Rodriguez v. State*, 970 S.W.2d 66, 69 (Tex.App.—Houston [14th Dist.] 1998, pet. ref'd). Because the evidence supports one of the alternative methods of delivery of the cocaine to Officer Allen submitted in the jury charge, we overrule appellant's point of error one.

III.
Consolidation

In his second point of error, Matthews argues the trial court improperly tried his delivery of cocaine charge and his possession with intent to deliver charge together in the same proceeding because the prosecution failed to file written notice of the consolidation. Appellant concedes that the conduct alleged in both of his indictments arose out of the same "criminal episode," as defined by Penal Code Section 3.01. *See* TEX. PEN. CODE ANN. § 3.01 (Vernon 1994). If offenses meet the requirements of Penal Code Chapter 3 in terms of a "criminal episode" and are tried in a single criminal action, Chapter 3 applies. *See id.*

Under Chapter 3, the State should give the thirty days notice required by Section 3.02(b) if several charging instruments are used. *See LaPorte v. State*, 840 S.W.2d 412, 414 (Tex. Crim. App. 1992). Appellant correctly contends that the State was required, under the Texas Penal Code article 3.02(b), to

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[2] "Deliver" means to transfer, actually or constructively, to another a controlled substance, counterfeit substance, or drug paraphernalia, regardless of whether there is an agency relationship. The term includes offering to sell a controlled substance, counterfeit substance, or drug paraphernalia. TEX. HEALTH & SAFETY CODE ANN. § 481.002(8) (Vernon 1992).

provide notice thirty days prior to trial of its intent to prosecute the two offenses in a single criminal action because the delivery and possession offenses were charged under separate charging instruments. *See* TEX. PEN. CODE ANN. § 3.02(b) (Vernon 1994). However, as noted by the Court in *LaPorte*, Section 3.02(b) is merely a procedural requirement which can be waived if a defendant so chooses either affirmatively or by inaction. *See id.* The Court in *LaPorte* cited Texas Criminal Procedure article 1.14 as support for its holding. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 1999). Appellant concedes in his brief that there was no objection to the State's failure to provide appellant with the thirty day notice set out in Penal Code Section 3.02(b). Therefore, appellant waived this error by failing to object. *See York v. State*, 848 S.W.2d 341, 343 (Tex. App.—Texarkana 1993, pet. ref'd) (holding appellant waived error under article 1.14 by failing to object to State's failure to give appellant proper notice of the consolidation of the two indictments into a single trial). We overrule appellant's second point of error.

We affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed September 30, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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PCM: Yes ___ No ___

JSA: Yes ___ No _X__

JHH: Yes ___ No ___