In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00208-CR

BENITO CRUZ RAMIREZ, APPELLANT

V.

STATE OF TEXAS, APPELLEE

On Appeal from the 119th District Court of
Concho County, Texas
Trial Court No. DSM-18-2011, Honorable Ben Woodward, Presiding

June 23, 2020

MEMORANDUM OPINION

Before QUINN, CJ., and PARKER and DOSS, JJ.

Benito Cruz Ramirez, appellant, appeals the trial court's judgment by which he was convicted of possession with intent to deliver more than four but less than 200 grams of methamphetamine and sentenced to sixty years' imprisonment, said punishment having been enhanced by a prior felony conviction. He brings four issues on appeal. First, he challenges the trial court's decision to hold a pretrial hearing in his absence. Second, he complains of the trial court's denial of his motion for continuance. Third, he maintains the trial court erred when it admitted evidence of the controlled substance over his objections

concerning the chain of custody. Finally, he contends the trial court erred when it permitted the State to give notice of its intent to enhance punishment by using a conviction different than the one originally alleged in the indictment. We affirm.[1]

Background

On June 27, 2018, appellant sold 16.84 grams of what later testing confirmed was methamphetamine to an undercover officer, Investigator Lorenzo Arredondo. The latter was with the neighboring Upton County Sheriff's Office. After the transaction, Arredondo returned to his room and contacted Concho County Sheriff Chad Miller to turn over the evidence to him. He placed the bag containing the substance inside a Ziploc bag and wrote on it identifying information about appellant and the transaction. After Concho County received the substance, it discarded the bag upon which Arredondo wrote the information, field tested the substance, placed it in an official sealed evidence bag, placed it in the county's evidence locker, and sent it off for testing the next day.

Appellant was charged with possession of more than four grams but less than 200 grams of methamphetamine. In November of 2018, his cause was assigned a trial date of April 29, 2019. So too was he assigned appointed counsel. The latter had to be replaced due to his being unqualified to represent those charged with first-degree felonies. Thereafter, the court appointed Todd Simons to represent appellant. The two met in early February of 2019 but had difficulty communicating thereafter. Appellant apparently gave Simons a phone number at which appellant could not be reached. Thus, Simons's several attempts to contact appellant between February through April 12 were

[1] Because this appeal was transferred from the Third Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3

unsuccessful. The circumstance was corrected on April 12 when both appeared at a pretrial conference. Appellant then gave Simons a different phone number. Because Simons was in the midst of preparing for a different trial set to start before appellant's, he asked appellant to contact him on Monday, April 15 so the two could review the evidence together.[2] Appellant did not call. That resulted in Simons calling appellant on April 16 and being told he was being replaced with a retained attorney. Simons then filed motions to continue and withdraw. The motions were filed and heard on April 22nd, and appellant was told of the upcoming hearing by Simons on the morning of the 22nd. Appellant opted to work and forgo attending it.

Simons explained to the trial court his difficulties in communicating with appellant, his unpreparedness to try the cause due to the difficulties in contacting appellant, and his being contacted by several attorneys about the cause. The trial court denied both motions, observed that the case was not complex, and noted that it was appellant who placed defense counsel in the situation he was in. It left open the possibility of permitting counsel to withdraw if appellant actually hired someone, though.

On April 29, another pretrial hearing was convened. Appellant attended it, along with Simon, and a prospective retained attorney. The latter had with him a motion to substitute and to continue the trial date. The motion to substitute was conditioned upon securing a continuance. After hearing arguments from counsel on these and other motions, the trial court expressed frustration regarding the age of the case and appellant's belated attempt to retain counsel. It denied the continuance and began trial on April 30 with Simon representing appellant.

[2] Counsel had already reviewed the evidence himself.

Absence from Pretrial Hearing

As noted, appellant opted to forgo attendance at the Aprill 22nd hearing on the motions to continue and withdraw. At same, his attorney advanced two motions: a motion for continuance and a motion for leave to withdraw as counsel. Both were ultimately denied. Appellant maintains that holding the pretrial hearing in his absence ran afoul of Article 28.01 of the Texas Code of Criminal Procedure. Appellant also challenges the trial court's hearing in his absence in terms of his right to due process and due course of law. *See* U.S. Const. amends. V, XIV; TEX. CONST. art. I, § 19. We overrule the issue for several reasons.

Article 28.01 provides in relevant part that "the defendant must be present at the arraignment, and his presence is required during any pre-trial proceeding." TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1 (West 2006); *Adanandus v. State*, 866 S.W.2d 210, 218 (Tex. Crim. App. 1993). The parties seem to agree that, for purposes of Article 28.01, the hearing held on April 22, 2019, was a "pre-trial proceeding" invoking the strictures of that article. They also agree that appellant was not personally present during the April 22nd hearing. Yet, complaint about the proceeding on April 22nd in appellant's absence was not raised at that hearing or the one held a week later. Alleged error must be preserved through contemporaneous objection or objection urged at the earliest opportunity. *Leoning v. State*, No. 07-18-00213-CR, 2019 Tex. App. LEXIS 10427, at *2–3 (Tex. App.—Amarillo Dec. 2, 2019, no pet.) (per curiam) (mem. op., not designated for publication). And, this requirement encompasses constitutional error such as the purported denial of due process. *See Clark v. State*, 365 S.W.3d 333, 340 (Tex. Crim.

App. 2012) (holding that appellant waived his due process argument by failing to urge the ground). That requirement went unsatisfied here.

Second, statute provides that a defendant "may waive any rights secured by him by law." TEX. CODE CRIM. PROC. ANN. art. 1.14(a) (West 2005). This includes the right to be present as granted under Article 28.01, § 1. *See Brown v. State*, No. 12-01-00117-CR, 2002 Tex. App. LEXIS 4365, at *6 (Tex. App.—Tyler June 18, 2002, pet. ref'd) (not designated for publication); *Jones v. State*, No. 07-96-0176-CR, 1997 Tex. App. LEXIS 4680, at *23 (Tex. App.—Amarillo Aug. 28, 1997, pet. ref'd) (not designated for publication). Appellant having opted to work rather than attend a hearing when given the opportunity, he waived the right bestowed by Article 28.01, § 1.

Third, a week after the April 22nd hearing, the trial court held another at which appellant appeared. It covered, among others, the substantive matters considered at the 22nd proceeding, that is, new counsel and a continuance of the trial date. So, the opportunity allegedly denied him on April 22nd was actually afforded him on April 29th. And, appellant fails to explain to us what he could have done at the hearing on April 22nd that he lacked the chance to do at the one on the April 29th. So, we see no harm arising from the court proceeding with the April 22nd hearing in his absence.

Denial of Motion for Continuance

We next address the contention that the trial court erred in denying appellant's motion to continue because he was not prepared for trial. We overrule the issue.

The indictment was issued in the Summer of 2018. In November of 2018, trial was set for April 29, 2019. Appellant's second attorney (Simon) was appointed to replace the first at least three months before the scheduled trial date. Simon informed the court, on

April 22, of having personally reviewed the evidence but not with his client. The record further reveals attempts on the part of Simon to communicate with appellant. They proved fruitless because appellant gave him a phone number to a phone he did not answer, failed to call counsel on previously selected dates, and opted to search for new counsel and forgo speaking with Simon.

The granting or denial of a motion for continuance lies within the discretion of the trial court. *Heiselbetz v. State*, 906 S.W.2d 500, 511 (Tex. Crim. App. 1995) (en banc). To find an abuse of that discretion in the denial of a continuance, there must be a showing that counsel was prejudiced by his counsel's inadequate preparation time. *Montgomery v. State*, No. 07-00-0574-CR, 2002 Tex. App. LEXIS 8878, at *18 (Tex. App.—Amarillo Dec. 12, 2002, pet. ref'd) (not designated for publication) (citing *Heiselbetz*, 906 S.W.2d at 513). The bare assertion that counsel did not have adequate time does not alone establish prejudice; there must be a showing of specific prejudice. *Id.* (citing *Heiselbetz*, 906 S.W.2d at 513); *Jalomo v. State*, No. 07-10-00345-CR, 2012 Tex. App. LEXIS 574, at *20 (Tex. App.—Amarillo Jan. 25, 2012, pet. ref'd) (mem. op., not designated for publication).

As recognized by the trial court, the position in which defense counsel was placed was due to his client's action. We hesitate to recognize unpreparedness as a basis for a continuance when the trial court afforded the defendant adequate time but the defendant, instead, engaged in conduct impeding his own attorney's effort to communicate and prepare. Counsel had reviewed the evidence but had not discussed same with appellant because of appellant's uncooperativeness. Moreover, appellant does not explain to us what else he could or would have done in his defense had he answered the phone calls

placed to the number he gave his attorney, had he called counsel on the designated dates, had he spoken to existing counsel in lieu of merely searching for alternate counsel, and had he been given more time. The foregoing circumstances and appellant's failure to actually illustrate (as opposed to allege) prejudice leads us to conclude that the trial court did not abuse its discretion in denying the continuance.

Chain of Custody Objection

Appellant next argues that the trial court abused its discretion when it overruled his objection to the admissibility of evidence. The evidence in question was the drugs which he was accused of possessing. It purportedly was inadmissible due to a break in the chain of custody. That alleged break consisted of discarding the original bag in which the drugs were placed once the drugs were removed from it and placed in an alternate bag. We overrule the issue.

Per Texas Rule of Evidence 901(a), the requirement of authentication or identification "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *See Cyphers v. State*, No. 07-05-0092-CR, 2005 Tex. App. LEXIS 10699, at *3 (Tex. App.—Amarillo Dec. 30, 2005, no pet.) (mem. op., not designated for publication). And, this can be done through "testimony that a matter is what it is claimed to be." TEX. R. EVID. 901(b)(1). Additionally, without evidence of tampering, questions regarding the chain of custody affect the weight a fact-finder may assign to the evidence and not its admissibility. *Davis v. State*, 313 S.W.3d 317, 348 (Tex. Crim. App. 2010); *Campbell v. State*, No. 07-09-0074-CR, 2011 Tex. App. LEXIS 5416, at *1 (Tex. App.—Amarillo July 14, 2011, pet. ref'd) (mem. op., not designated for publication); *see Dossett v. State*, 216 S.W.3d 7, 17 (Tex. App.—San Antonio 2006, pet.

ref'd) (observing that "gaps or theoretical breaches in the chain of custody do not affect the admissibility of the evidence, absent affirmative evidence of tampering or commingling").

From our review of the record, we discern no affirmative evidence of tampering or commingling. What we do discern is testimony indicating that the drugs confiscated from appellant were the very drugs tested and offered into evidence at trial. The loss of the bag in which they were originally placed may have mattered if appellant were being tried for possessing the original bag. Instead, he was being tried for possessing the drugs within the bag. So, the unavailability of the original bag did not render evidence of the drugs inadmissible.

Timing of Enhancement Allegation Notice

Next, appellant complains of the trial court's decision to allow the State to change the prior conviction it intended to use for enhancement purposes. He maintains that the late notice of the State's intent to use a McCulloch County conviction to enhance punishment ran afoul of appellant's rights to Due Process. We overrule the issue.

Originally, the State alleged a Kerr County conviction for enhancement purposes. After closing argument to the jury but before the end of the guilt/innocence phase of trial, it revealed its intent to use a McCulloch County conviction in lieu of the Kerr County one. While appellant objected, he did not request a continuance. Nor did he suggest that he had some type of defense to the McCulloch County conviction. Indeed, appellant pleaded "true" to the enhancement allegation.

The State must plead, in some form, any enhancement allegations which it intends to prove during the punishment phase of trial. *See Brooks v. State*, 957 S.W.2d 30, 33–

34 (Tex. Crim. App. 1997) (en banc). This requirement is of constitutional origin, and "the ultimate question is whether constitutionally adequate notice was given." *Villescas v. State*, 189 S.W.3d 290, 294 (Tex. Crim. App. 2006). Furthermore, when the State seeks to enhance a defendant's punishment via a prior conviction, "'[t]he accused is entitled to a description of the judgment of former conviction that will enable him to find the record and make preparation for a trial on the question of whether he is the named convict therein . . . . and if possible show there is a mistake in identity, or that there was no final former conviction or the like.'" *Id.* at 293 (quoting *Hollins v. State*, 571 S.W.2d 873, 875 (Tex. Crim. App. [Panel Op.] 1978)). Our Court of Criminal Appeals also has held that "when a defendant has no defense to the enhancement allegation and has not suggested the need for a continuance in order to prepare one, notice given at the beginning of the punishment phase satisfies the federal constitution." *See id.* at 294; *see also Pelache v. State*, 324 S.W.3d 568, 577 (Tex. Crim. App. 2010).

Here, notice was given prior to the commencement of the punishment phase of trial. And, though appellant objected, he did not seek a continuance to prepare a defense to the McCulloch County conviction and, even on appeal, does not suggest there is a defense available to bar use of that conviction for enhancement purposes. Thus, the timing of the State's notice of intent to use the McCulloch County conviction, rather than the Kerr County conviction, for enhancement was constitutionally adequate per *Villescas*. We overrule appellant's fourth and final issue.

Prior to our disposition, we note one modification to be reflected in the trial court's written judgment. The latter indicates appellant pleaded "not true" to the State's enhancement allegation, when he actually pled "true." We have the authority to modify a

trial court's judgment to make the record speak the truth when we have the necessary data and information to do so. *See* TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (en banc). Consequently, we modify the written judgment to reflect that appellant pled "true" to the enhancement paragraph and affirm the judgment as modified.

Per Curiam

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