**In The**

# *Court of Appeals*

## *Ninth District of Texas at Beaumont*

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**NO. 09-09-00151-CR**
**NO. 09-09-00152-CR**
**NO. 09-09-00153-CR**

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**TERRY KEITH KELLY, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the County Court**
**Jasper County, Texas**
**Trial Cause Nos. JC28304, JC28551, JC28903**

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## MEMORANDUM OPINION

A jury convicted Terry Keith Kelly of misdemeanor offenses of driving while intoxicated, possession of a dangerous drug (carisoprodol), and carrying an illegal weapon. The three cases were consolidated for trial, and the jury assessed Kelly's punishment at 180 days in jail for the DWI, one year for the drug possession offense, and 180 days for the weapons offense. Kelly appeals each conviction.

## BACKGROUND

Kelly was arrested on March 24, 2007, after a traffic stop and roadside investigation. Officer Kevin Brewster conducted field sobriety tests. He arrested Kelly for DWI. A search of Kelly and his vehicle revealed the presence of an illegal weapon and drugs in prescription-pill form in his boots. Kelly was initially charged by complaint and information in each of the three offenses. In each case, Kelly filed a pre-trial "Motion to Quash Complaint/Information" on the ground that the information was not supported by a sworn affidavit as required by article 15.04 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 15.04 (Vernon 2005). The record does not contain the October 6, 2008, hearing on the motions to quash, but both the State and Kelly have indicated the trial court orally granted the motions to quash prior to trial.

On October 9, 2008, the State filed an amended complaint and an amended information in each case. Except for the dates of signature and filing, the amended pleadings are the same as the original complaints and informations. Kelly did not object to the amended charging instruments prior to or during trial.

On December 15, 2008, the case proceeded to trial. Kelly pled guilty to the carrying-an-illegal-weapon offense, not guilty to the DWI offense, and not guilty to the possession-of-a-dangerous-drug offense. Kelly was found guilty in all three cases. The trial court signed the judgment in each case on December 17, 2008.

Approximately three weeks later, on January 9, 2009, the trial court signed orders granting the three motions to quash that had been orally granted in October 2008. With the exception of the cause numbers, the orders are identical. Handwritten on the orders is the statement "Orally rendered on October 6, 2008[.] Signed on January 9, 2009." In each case, Kelly filed a motion for new trial, which the trial court denied.

In issue one, Kelly argues the trial court erred in denying his motions for new trial. He contends the amended charging instruments "were void and without legal effect[,]" because the amendments were without court permission and the "quashing of the prior complaint[s] and information[s] had terminated the prosecution in [each] cause and Appellant had been discharged." Kelly argues "[t]here was no active case at that time into which amended charging instruments could be filed"; therefore, the amended charging instruments did not vest the trial court with jurisdiction to try him for these offenses. Kelly acknowledges there was no objection to the amended complaints or informations, but, relying on *Casias v. State*, he contends this may not be waived. *Casias v. State*, 503 S.W.2d 262, 265 (Tex. Crim. App. 1973). Kelly maintains that a validly filed information is necessary to confer jurisdiction upon a county court in a criminal case. *See Diez v. State*, 157 Tex. Crim. 275, 248 S.W.2d 486 (1952). The State argues the trial court had the authority to proceed on the instruments, regardless of whether they were filed in the original cause numbers or new cause numbers, because the State had the right to continue with its prosecution.

Articles 28.04 and 28.09 of the Code of Criminal Procedure address motions to set aside or exceptions to an information or indictment. TEX. CODE CRIM. PROC. ANN. arts. 28.04, 28.09 (Vernon 2006). Article 28.04 (entitled "Quashing charge in misdemeanor") provides that "[i]f the motion to set aside or the exception to an indictment or information is sustained, the defendant in a misdemeanor case shall be discharged, but may be again prosecuted within the time allowed by law." *Id.* As long as the State's information or indictment is within the statute of limitations, the State may charge the defendant again. *Id*. Here, the State charged Kelly again after the trial court granted the motions to quash. The fact that the trial court granted the motions to quash, that the State entitled the new pleadings "amended," and that the State used the same cause numbers as the prior charging instruments does not preclude the State from prosecuting those cases again.

Further, article 28.09 provides that if the trial court sustains an exception (quashes the information or indictment), the State may amend the information or indictment prior to trial so long as the State complies with article 28.10. TEX. CODE CRIM. PROC. ANN. arts. 28.09, 28.10 (Vernon 2006); *see State v. Chardin*, 14 S.W.3d 829, 831 (Tex. App.--Austin 2000, pet. ref'd) ("If the exception to an information is sustained, the information may be amended and the cause may proceed upon the amended information."); *Ex parte Garcia*, 927 S.W.2d 787, 789 (Tex. App.--Austin 1996. no pet.) (Article 28.09 gives trial courts "continuing jurisdiction sufficient to permit amendment after a defense attack on the charging instrument is sustained."). Article 28.10(a) provides that "[a]fter notice to

the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences." TEX. CODE CRIM. PROC. ANN. art. 28.10(a). Even if trial has commenced, the State may amend a matter of form or substance in an indictment or information if the defendant does not object. *Id*. art. 28.10(b).

Article 28.11 states that "[a]ll amendments of an indictment or information shall be made with the leave of the court and under its direction." TEX. CODE CRIM PROC. ANN. art. 28.11 (Vernon 2006). Although the record does not establish that the State sought or obtained the trial court's permission to amend the charging instruments, Kelly did not object prior to or during trial to the filing of the new complaints and informations, and did not object to the State's failure to obtain leave of court to file them. Kelly has waived any complaint regarding the new charging instruments.

"[M]ere presentment of an information to a trial court invests that court with jurisdiction over the person of the defendant, regardless of any defect that might exist in the underlying complaint." *Ramirez v. State*, 105 S.W.3d 628, 629 (Tex. Crim. App. 2003). A defendant's failure to object prior to trial that an information was not based on a valid complaint waives the error. *See also Aguilar v. State,* 846 S.W.2d 318, 320 (Tex. Crim. App. 1993); *Hoitt v. State,* 30 S.W.3d 670, 674 (Tex. App.--Texarkana 2000, pet. ref'd) (Defendant failed to timely object to the amendment of the indictment and did not preserve error.). Moreover, Kelly acquiesced in the filing of the new complaints and

informations by proceeding to trial under them; and the trial court impliedly gave the State permission to amend by allowing the State to go to trial on the amended charging instruments. *See* TEX. R. APP. P. 33.1(a). We overrule issue one in each case. Kelly raises no other issues in the appeals of the DWI and illegal weapon offenses.

In the possession-of-a-dangerous-drug offense, Kelly challenges the legal and factual sufficiency of the evidence to sustain the jury's verdict. Kelly was charged with possession of carisoprodol (a prescription drug) without a valid prescription. *See* TEX. HEALTH & SAFETY CODE ANN. § 483.041(a) (Vernon Supp. 2009); § 483.042(a)(1), (2) (Vernon 2003). He contends he had a prescription for the drug. Section 483.041 of the Health and Safety Code provides as follows:

> (a) A person commits an offense if the person possesses a dangerous drug unless the person obtains the drug from a pharmacist acting in the manner described by Section 483.042(a)(1) or a practitioner acting in the manner described by Section 483.042(a)(2).

TEX. HEALTH & SAFETY CODE ANN. § 483.041(a). Under section 483.042, the prescription drug must have a label attached to the immediate container in which the drug is delivered or offered to be delivered. TEX. HEALTH & SAFETY CODE ANN. § 483.042(a)(1)(B) (Vernon 2003). The label must contain the following information: the name and address of the pharmacy from which the drug is delivered or offered for delivery; the date the prescription is dispensed; the number of the prescription; the name of the practitioner who prescribed the drug; the name of the patient; and directions for the use of the drug. *Id*.

The record reveals that Trooper Brewster performed a pat-down search of Kelly and found pills concealed in Kelly's boots. "In his left boot he had a blue bottle of pills and he had several plastic bags that was inside his left boot[.]" The bags also contained pills. Both boots contained pills. There was no prescription label on the pill bottle. Brewster testified that the blue bottle contained twelve-and-a-half Xanax pills, four hydrocodone pills, and fourteen Soma (carisoprodol) tablets. In explaining the presence of the pills in his boots, Kelly stated he was working undercover for Stacy Chambers of the Jasper County Sheriff's Office. Stacy Chambers, the captain over criminal investigations at the Jasper County Sheriff's Office, testified she knew Kelly, and he was not working for Jasper County or the sheriff's office and had never done so.

Kelly testified he takes prescription drugs -- Xanax, Soma, and Lorcet -- and he had taken Lorcet (hydrocodone) that morning. The traffic stop was on March 24, 2007. He testified he had a receipt for the prescriptions for Xanax, Soma, and Lorcet. On the sheet of paper offered into evidence as a receipt was the following information: the pharmacy name and address, the names of a doctor and a pharmacist, the phrase "Patient Education," the name "Terry K. Kelly," the date of the prescriptions (March 20, 2007), the name carisoprodol, along with other medication names (alprazolam and hydrocodone), the quantity of the medications, and the price of the medications. Kelly testified that the quantities on each of the prescriptions were 120 Soma (carisoprodol), 120 Lorcet (hydrocodone), and 60 Xanax (alprazolam).

Kelly stated that he has the prescriptions filled monthly. He explained that he had previously sustained back and hip injuries, had been shot in the thigh, and had a broken kneecap. Kelly testified he is in pain "[a]ll the time[,]" and the medicine helps him to bear the pain so that he can work and function. Kelly testified he takes the prescription drugs for his injuries "[t]o be able to get up and move and walk and work." Explaining that the drugs are considered "downers," Kelly indicated they would tend to slow a person down, make him stumble and fall around if he took too many, and slur his speech. He testified he did not bring his prescription bottles with him to court, because he could not find the original prescription bottles he was instructed to bring. Kelly testified he took Lorcet (pain pill) the morning of March 24, 2007, but no other pills prior to being pulled over that evening.

When asked his doctor's name, Kelly could not remember it. He explained he had to change doctors three times "because I go to a pain management and they shut down two of them I went to." Kelly testified he had the pills stuffed down in his boots, because "that's the way I carried them." He testified he also had the pills in his boots because he was working for Officer Stacy Chambers, and Kelly was gathering evidence.

Kelly relies on the defense that he had a prescription for the dangerous drug, carisoprodol. Citing *Luck v. State*, 588 S.W.2d 371, 375 (Tex. Crim. App. 1979), a murder case, he argues that once a defendant presents evidence that he obtained the drug from a pharmacist in accordance with section 483.042(a)(1), the prosecution's case

against him fails "unless the State can prove such evidence produced is wrong beyond a reasonable doubt." Kelly asserts that he met his initial burden through the pharmacy receipt for the drugs. He argues the State did not then meet its burden.

In *Saxton v. State*, 804 S.W.2d 910, 913-14 (Tex. Crim. App. 1991), the Court of Criminal Appeals determined that the court of appeals, in its reliance on *Luck* and section 2.03(d) of the Penal Code, "utilized an incorrect standard of review for the sufficiency of the evidence when a defendant raises a defensive issue." The Court explained that in resolving the sufficiency of the evidence issue, "we look not to whether the State presented evidence which refuted appellant's [defensive issue], but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of [the offense] beyond a reasonable doubt and also would have found against appellant on the [defensive] issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914.

Section 483.071 sets out the burden of proof for the dangerous drug offense:

> § 483.071. Exceptions; Burden of Proof.
>
> (a) In a complaint, information, indictment, or other action or proceeding brought for the enforcement of this chapter, the state is not required to negate an exception, excuse, proviso, or exemption contained in this chapter.
>
> (b) The defendant has the burden of proving the exception, excuse, proviso, or exemption.

TEX. HEALTH & SAFETY CODE ANN. § 483.071 (Vernon 2003). The State has the burden to prove the elements of the offense beyond a reasonable doubt. TEX. PEN. CODE ANN. §

2.01 (Vernon 2003). We review the jury's verdict under legal and factual sufficiency standards.

In a legal sufficiency review, we consider the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Young v. State*, 283 S.W.3d 854, 861 (Tex. Crim. App. 2009), *cert. denied*, 130 S.Ct. 1015, 78 U.S.L.W. 3360 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The factfinder resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. *Id*. "[I]n analyzing the legal sufficiency, we will determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence, both direct and circumstantial, when viewed in the light most favorable to the verdict." *Id*. at 861-62. (footnote omitted).

In a factual sufficiency review, we review the evidence in a neutral light rather than in the light most favorable to the verdict. *Id*. at 862. Evidence is factually insufficient in one of two ways: "(1) when the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust, and (2) when the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust." *Id*.

A review of the record reveals the evidence is both legally and factually sufficient to support the verdict. Kelly admitted that he possessed carisoprodol. Rather than being in a labeled prescription bottle, the carisoprodol was contained in a blue bottle in his boots, along with a baggie containing pills. Kelly contends he had a prescription for the drug, but the bottle had no prescription label on it, contrary to section 483.042(a)(1)(B). *See* TEX. HEALTH & SAFETY CODE ANN. 483.042(a)(1)(B). Though Kelly stated he filled the prescription once a month, he could not name his doctor. Kelly did not call the pharmacist or a physician to testify that Kelly had a prescription for the pills. Kelly testified that the reason the pills were stuffed in his boots was because he was in the process of gathering evidence for his work for Officer Stacy Chambers. However, Chambers testified Kelly did not work for him or the sheriff's department and had never done so. On this record, the jury could reasonably conclude that Kelly had no prescription for the pills stuffed in his boots in an unmarked bottle and in a baggy.

The evidence is legally and factually sufficient to support the conviction for illegal possession of a dangerous drug. We overrule issue two.

The judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on March 23, 2010
Opinion Delivered April 14, 2010
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Before McKeithen, C.J., Gaultney and Kreger, JJ.