

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00199-CR

TIMOTHY EUGENE THOMPSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 09-03-02703-CR

MEMORANDUM OPINION

Timothy Eugene Thompson appeals his conviction and life sentence for online solicitation of a minor. *See* TEX. PEN. CODE ANN. § 33.021 (Vernon Supp. 2009). The sole issue Thompson raises on appeal is that the trial court erred in denying Thompson's motion for continuance. In two sub-points, Thompson complains that the trial court abused its discretion in denying defense counsel's request for additional time pursuant to Articles 25.01, 27.11 and 27.12 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 25.01 (Vernon 2009); TEX. CODE CRIM. PROC. ANN. arts. 27.11, 27.12 (Vernon 2006). We affirm the trial court's judgment.

The grand jury handed down the original indictment in April 2008. Subsequently the grand jury handed down a re-indictment in November 2008. The State personally served Thompson with this re-indictment in November 2008. The grand jury handed down a second re-indictment on March 17, 2009. On March 26, 2009, Thompson filed a motion for continuance so that his expert could complete his investigation. This motion did not mention the re-indictment and bore the cause number of the original indictment from April 2008. The trial court arraigned Thompson on the new indictment on March 26, 2009. During arraignment, the trial court denied Thompson's motion for continuance. Counsel also advised the trial court that Thompson had not been served with the new indictment. The prosecutor advised the trial court that the State faxed the re-indictment to defense counsel on the day that the grand jury re-indicted Thompson. Defense counsel advised the trial court that he had been on vacation on that day. After the trial court arraigned Thompson, defense counsel made a "formal request for at least 14 days' preparation time." The trial court noted that defense counsel was only entitled to ten days, and denied the request. The trial commenced March 30, 2009, more than ten days after the grand jury handed down the indictment on which Thompson was tried.

Various statutes provide time for the defendant to respond to an indictment. In a felony case where the defendant is in custody, the sheriff must personally serve the indictment on the defendant. *See* TEX. CODE CRIM. PROC. ANN. art. 25.01. An arraignment cannot occur until the expiration of at least two days after the day that the

indictment is served on the defendant. TEX. CODE CRIM. PROC. ANN. art. 26.03 (Vernon 2009). Appointed counsel is entitled to ten days to prepare for a proceeding. TEX. CODE CRIM. PROC. ANN. art. 1.051(e) (Vernon Supp. 2009). After his arrest, the defendant is allowed ten days to file written pleadings. TEX. CODE CRIM. PROC. ANN. art. 27.11. In all cases where he is entitled to be served with the indictment, the defendant is allowed ten days to file written pleadings. TEX. CODE CRIM. PROC. ANN. art. 27.12. If the indictment is amended, the defendant may request ten days to respond to the amended indictment. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 2009). These statutes apply equally to re-indictments. *Johnson v. State*, 567 S.W.2d 214, 215 (Tex. Crim. App. 1978).

The purpose of these “right to time” statutes is to provide the defendant or his counsel an opportunity to carefully examine the formal accusation and to prepare and file any necessary pleadings. *Oliver v. State*, 646 S.W.2d 242, 245 (Tex. Crim. App. 1983). Although *Oliver* held that a failure to comply with Article 27.11 would not be subject to a harm analysis, the Court of Criminal Appeals subsequently held that all errors, other than those labeled as structural by the United States Supreme Court, must be reviewed for harm. *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). Personal service of an indictment is a matter of Texas procedural law. *Smith v. McCotter*, 786 F.2d 697, 702 (5th Cir. 1986).

In this case, the statutes' objectives have been achieved. *See Roberts v. State*, 93 S.W.3d 528, 532-33 (Tex. App.--Houston [14th Dist.] 2002, pet. ref'd). In *Roberts*, the trial court denied the defendant's motion for continuance based on non-compliance with Articles 25.01, 27.11 and 27.12. *Id.* at 531. In that case, the defendant had not been served with the indictment until the day of trial, but his counsel had reviewed the indictment some time before. *Id.* at 532-33. Here, Thompson was formally served with the November 2008 indictment. The record does not show that the sheriff personally served Thompson with the March 2009 indictment, but his counsel did receive it by facsimile. Counsel requested "at least 14" days to prepare for trial under the new indictment, but the prosecutor provided the new indictment to counsel at least ten days before the trial started. Although defense counsel was on vacation on the day the grand jury handed down the new indictment, counsel announced ready when the trial court called the case at the start of testimony. Thompson's written motion for continuance related to the preparation of an expert witness who had been appointed in January 2009 and had nothing to do with preparing defensive pleadings.

Moreover, Thompson has not identified any defect in the State's pleadings that could have been challenged if additional time had been provided for filing defensive pleadings and motions. *See Wright v. State*, 28 S.W.3d 526, 531-32 (Tex. Crim. App. 2000) (applying non-constitutional harm analysis to denial of motion for continuance based on Article 28.10). Relatively minor details distinguish the March 2009 re-

indictment from the November 2008 re-indictment that had been personally served on Thompson and had been in defense counsel's possession since November 2008. The State altered the "on or about" date of commission on one of the counts by approximately two weeks, and added an allegation that the solicited individual "represented herself to be younger than 17 years of age" to the previous allegation that the solicited individual was a person "whom the Defendant believed was younger than 14 years of age[.]" Thompson has not suggested how the difference between the two indictments affected his ability to prepare for trial. *See Guzman v. State*, 521 S.W.2d 267, 269-70 (Tex. Crim. App. 1975); *Hayles v. State*, 507 S.W.2d 213, 214-15 (Tex. Crim. App. 1974). The trial court's apparent failure to strictly comply with the statutes did not prevent the appellant from challenging the State's pleadings and had no effect on the proceedings.

The violation of a mandatory statute will not require reversal if the error did not have a substantial or injurious effect. *Scott v. State*, 235 S.W.3d 255, 257-260 (Tex. Crim. App. 2007). Assuming the trial court erred by proceeding to trial less than ten days after the appellant was served with the new indictment, because the protections afforded by the statutes have been met, the error did not affect a substantial right of the appellant. TEX. R. APP. P. 44.2(b); *see Alexander v. State*, 137 S.W.3d 127, 130 (Tex. App.--Houston [1st Dist.] 2004, pet. ref'd). We overrule the issue presented and affirm the judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on July 13, 2010
Opinion Delivered August 18, 2010
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.