In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00122-CR

DAVID SYLVESTER CHAMBERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court No. 13-02053-CRF-272

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

After a Brazos County[1] jury found David Sylvester Chambers guilty of theft of property valued at $1,500.00 or more but less than $20,000.00,[2] the trial court found punishment enhancement allegations true and sentenced him to fifteen years' imprisonment. Chambers does not contest the sufficiency of the evidence to prove the offense,[3] but challenges an indictment amendment made during trial and the trial court's ruling on his motion to suppress evidence.

We modify the judgment to reflect the correct offense level of Chambers' conviction and affirm the judgment, as modified, because (1) allowing the date of an enhancement conviction to be amended was harmless, (2) denying Chambers' motion to suppress was not error, and (3) the judgment must be amended to reflect the correct offense level.

(1) Allowing the Date of an Enhancement Conviction To Be Amended Was Harmless

Chambers complains that the State should not have been allowed to amend, after the jury had been sworn, an enhancement allegation in the indictment. After voir dire, but before the jury was impaneled and sworn, the State asked to correct the date of a prior conviction alleged in the indictment for enhancement purposes. Chambers argues that such a change amounted to an amendment of the indictment on the day of trial, contrary to law.

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[1]Originally appealed to the Tenth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Tenth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[2]*See* Act of May 29, 2011, 82d Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws 3302, 3310 (amended 2015) (current version at TEX. PENAL CODE ANN. § 31.03(e)(4)(A) (West Supp. 2015)).

[3]It was proven that Chambers unlawfully attached a trailer to his truck and left the area. Two citizens witnessed this act, notified law enforcement, and followed Chambers until a police officer took over pursuit.

An indictment may not be amended, over the defendant's objection, after trial commences. *See* TEX. CODE CRIM. PROC. ANN. art. 28.10(b) (West 2006). Just after voir dire, and before the parties made their peremptory strikes, the State told the trial court that, while the enhancement allegation in the indictment erroneously said Chambers had been convicted of a felony August 4, the date of that conviction was actually August 14. At that point, Chambers told the trial court he had no objection to this amendment. Apparently no physical amendment was made to the indictment at that time. However, the next time the matter of the date change appears in the record was after the jury had been sworn, other proceedings had occurred, and the State had presented its first witness. When the State said it had amended the indictment, Chambers objected on the basis that the amendment occurred after the jury had been sworn.[4]

There remains, in our opinion, some uncertainty concerning whether Article 28.10 of the Texas Code of Criminal Procedure applies to any amendment of a sentence-enhancement notice, within or separate from an indictment. *Compare James v. State*, 425 S.W.3d 492, 500 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (Article 28.10 applies), *with Thomas v. State*, 286

[4]After voir dire, the State told the court it wished to amend the conviction date for one of the enhancement allegations in the indictment. Chambers' attorney unequivocally said he did not object; his concern was that no prior conviction allegations be read to the jury with the indictment. The parties and the court then conducted further individual voir dire and a suppression hearing, and the State presented its first witness. The jury was then released for the day, and then Chambers' attorney objected that the amendment was being made after the jury had been sworn. When the trial court asked the State what was going on, the State replied that the August 4 date had been changed to August 14 in the indictment's first enhancement allegation. When the trial court questioned Chambers about objecting now, when he had earlier said he had no objection, Chambers stated he had "concerns" about amending an indictment after the jury had been sworn. The State argued that, as long as Chambers received adequate notice, per *Brooks v. State*, 957 S.W.2d 30 (Tex. Crim. App. 1997), a change to a prior conviction date was permissible. Both parties agreed they had discussed the matter that morning, before voir dire. Chambers never argued unfair surprise, but had thought the amendment had already been made. The trial court told defense counsel the State "tried to [amend the indictment] at three o'clock, but [Chambers] was not here. He was 12 minutes late," and the court instructed the State to wait until Chambers arrived to amend the indictment.

S.W.3d 109, 114 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (Article 28.10 does not apply), *Stautzenberger v. State*, 232 S.W.3d 323, 327–28 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (Article 28.10 does not apply), *and Johnson v. State*, 214 S.W.3d 157, 158–59 (Tex. App.—Amarillo 2007, no pet.) (Article 28.10 does not apply).

This case was transferred to this Court from our sister Court of Appeals in Waco. Thus, we will be guided by that court's precedents. *See Hackett v. State*, 160 S.W.3d 588 (Tex. App.—Waco 2005, pet. ref'd) (sentence-enhancement notice effectively amends indictment). Taking our cue from *Hackett*, we will, for the purpose of this opinion, assume but not decide that it was error here to allow, over Chambers' objection, the State to amend the date of the enhancement allegation after seating the jury, under the terms of Article 28.10(b) of the Texas Code of Criminal Procedure.

We turn to a harm analysis. *See Wright v. State*, 28 S.W.3d 526, 530 (Tex. Crim. App. 2000); *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997). A violation of Article 28.10 is harmless unless the error affects the defendant's substantial rights. TEX. R. APP. P. 44.2(b); *Gray v. State*, 159 S.W.3d 95, 98 (Tex. Crim. App. 2005) (statutory violations treated as non-constitutional errors in conducting harm analysis); *Hamann v. State*, 428 S.W.3d 221, 225 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

We conclude that this amendment was harmless. Here, the amendment was only as to the date of a prior offense and adjusted that date by only ten days. Before trial started, Chambers had received notice of, and had expressed no objection to, the State's intent to so amend the date of the prior offense. He claims no surprise arising from the amendment. In fact, Chambers conceded he was not surprised by the prior conviction. When he made his later objection, citing the just-sworn

jury, he told the court, "I'm not complaining about any undue surprise or anything like that. I don't have a problem with that." Further, in addition to proving the two enhancement allegations in the indictment, at punishment, the State proved two other felony convictions and one state jail felony conviction, as well as a few misdemeanor convictions. Chambers also did not seek, and does not now claim that he wanted or needed, time to prepare for the adjusted information.

Even if the amendment to the enhancement allegation in the indictment is governed by Article 28.10, Chambers suffered no harm. We overrule this point of error.

(2) Denying Chambers' Motion To Suppress Was Not Error

Chambers also complains that the trial court erred in denying Chambers' motion to suppress evidence. Chambers argues that the police officer who stopped him lacked the requisite reasonable suspicion to justify the temporary detention of stopping Chambers' vehicle. We find no error in the trial court's ruling.

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review, giving almost total deference to the trial court's determination of historical facts that turn on credibility and demeanor while reviewing de novo other application-of-law-to-fact issues. *See Johnson v. State*, 68 S.W.3d 644, 652–53 (Tex. Crim. App. 2002); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We also afford nearly total deference to the trial court's rulings on application-of-law-to-fact questions, also known as mixed questions of law and fact, if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We must review mixed questions of law and fact not falling within this category on a de novo basis. *Id*. We must affirm the decision if it is

correct on any theory of law that finds support in the record. *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex. Crim. App. 2002).

Shortly before 1:00 a.m. on March 9, 2013, Mario Thompson and a companion saw a person attach a trailer to the person's truck and drive away. Thompson and his friend thought this suspicious, followed the truck and trailer, and called 9-1-1. They told the 9-1-1 dispatcher they suspected a theft had just occurred, based on the fact they lived across from the area where the trailer had been parked and observed the actor attaching the trailer to his truck at 1:00 a.m. and driving "crazy," including driving over curbs and swerving. Bryan Police Officer James Hauke was contacted by the 9-1-1 dispatcher and alerted to "a reckless vehicle with a possible stolen trailer behind it." Thompson and his friend continued to follow the suspect vehicle and stayed on the telephone with the 9-1-1 dispatcher. A recording of the 9-1-1 conversation and a video recording from Hauke's police car dashboard camera (dash cam) were played for the trial court at the suppression hearing. On the 9-1-1 recording, Thompson and his passenger narrated to the dispatcher their locations as they continued to follow the suspected thief; Hauke's dash cam showed the suspect driving at high rates of speed[5] and eventually falling in behind the white box trailer described in Thompson's 9-1-1 call.

Hauke testified that, at the time he stopped Chambers, he had not been privy to the conversation happening on the 9-1-1 call between the dispatcher and Thompson. Hauke indicated that he knew the reporting citizen was driving a maroon Dodge Charger and the trailer was being pulled by a black dually pick-up truck. Chambers argues that, as this was all Hauke testified he

[5]The video exhibit includes the speed of Hauke's vehicle.

knew at the time he stopped Chambers, Hauke's knowledge did not amount to a reasonable suspicion that Chambers had recently or was about to engage in criminal activity.

It is not, however, just the facts known by Hauke which must be considered. The existence of reasonable suspicion by officers is gauged by objectively viewing the totality of the circumstances present; if these circumstances, in the aggregate, "combine to reasonably suggest the imminence of criminal conduct, an investigative detention is justified." *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011) (citing *Reid v. Georgia*, 448 U.S. 438, 441 (1980)). The aggregate known information is not limited to the officer effecting the detention, but also includes officers who, at the time of the stop, are cooperating with the officer making the stop. *Id.*

After the stop, Hauke met and interviewed Thompson and his passenger; both gave their names and driver's licenses, as well as written statements. Thompson can be heard giving his name and telephone number to the dispatcher on the 9-1-1 call.

> [I]nformation provided to police from a citizen-informant who identifies himself and may be held to account for the accuracy and veracity of his report may be regarded as reliable. In such a scenario, the only question is whether the information that the known citizen-informant provides, viewed through the prism of the detaining officer's particular level of knowledge and experience, objectively supports a reasonable suspicion to believe that criminal activity is afoot.

Id. at 914–15 (footnotes omitted) (citations omitted). In *Derichsweiler*, a couple in the drive-through lane at a fast-food restaurant called 9-1-1 to report odd behavior by a man later found to be Derichsweiler. Derichsweiler had pulled his car next to the couple's and sat staring and smiling at them for some time; he then drove to a neighboring parking lot and was observed pulling next to other drivers. The couple stayed on the telephone and narrated their observations to the 9-1-1 dispatcher until a police officer arrived to investigate. *Id.* at 909–10. The dispatcher did not relay

the specific information narrated by the couple; the officer knew only that he was responding to a report of a suspicious vehicle made by a named citizen.[6] "Even if [the responding officer] was not personally aware of the detailed information the [couple] had reported to substantiate their perception that the appellant's car was 'suspicious' the . . . dispatcher was." *Id*. at 915.

> In assessing reasonable suspicion, *vel non*, a reviewing court looks to the totality of objective information known collectively to the cooperating police officers, including the 911 dispatcher. The issue in this case boils down, therefore, simply to whether the totality of that reliable information provided specific, articulable facts that, combined with reasonable inferences to be derived from those facts, would lead to the reasonable conclusion that the appellant was committing, or soon would be engaged in, some type of criminal activity.

Id. at 915–16 (footnotes omitted). *Derichsweiler* is analogous to the situation before us.

In his brief, Chambers complains that Hauke did nothing to corroborate the information from the citizen-informant who was following Chambers and speaking to the 9-1-1 dispatcher. We do not find this to be accurate. While Hauke did not personally witness any reckless driving of the suspect vehicle, he did find, on the roadway location given him by the dispatcher, a maroon Dodge Charger matching the description the citizen gave of the vehicle, following a black dually truck pulling a white box trailer, which also matched the description given by the caller. That this occurred just before 1:00 a.m. serves to offer some corroboration of the information the citizen-informant gave to the dispatcher, who then relayed that information to Hauke.[7]

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[6]Derichsweiler was arrested and convicted of driving while intoxicated.

[7]On the 9-1-1 call, the citizen also tells the dispatcher he has his flasher lights on so the responding officer will recognize which vehicle was placing the call. The State introduced, at the suppression hearing, a set of time-stamped notes apparently generated from the 9-1-1 call. Those notes say the reporting person has his flasher lights on. From our viewing of the exhibit, we cannot tell if the Charger's lights are flashing. The trial court's findings of fact found Hauke corroborated the reporting citizen's call to the 9-1-1 dispatcher. Thompson and his passenger also read to the

As in *Derichsweiler*, a citizen-informant telephoned the 9-1-1 dispatcher and related objectively suspicious behavior—a man, after midnight, attaching a trailer to his truck and driving off in a "crazy" manner, hitting curbs, and swerving. The 9-1-1 dispatcher notified on-duty officers; Hauke, in response, located Thompson's car and the suspect vehicle pulling the trailer. The citizen is heard on the 9-1-1 recording to give his name and telephone number, and that informant followed the driver and trailer until Hauke caught up to the vehicles. The citizen and his passenger remained in the area, and Hauke contacted them and got their identifying and contact information after stopping Chambers and confirming the trailer was indeed stolen. Considering the totality of information available collectively to law enforcement, there was reasonable suspicion to stop Chambers' vehicle.[8] We overrule this issue.

dispatcher the trailer's license plate, which they said was 8136668. When Hauke passed Thompson's car and fell in behind the trailer, he could not read the entire license plate—he read what he could to the dispatcher as "David 1 3."

[8]*See also Brother v. State*, 166 S.W.3d 255 (Tex. Crim. App. 2005). A citizen called 9-1-1 with a report of erratic driving—the caller reported seeing the suspect driver "speeding, tailgating, and weaving across several lanes of traffic," *Id.* at 256, and followed the other driver and stayed in contact with the 9-1-1 dispatcher until an officer arrived and stopped Brother, the driver. The citizen caller stayed at the scene and gave the police officer her contact information. The Texas Court of Criminal Appeals found the totality of the circumstances present established reasonable suspicion for the officer's stopping Brother's vehicle. "To require officers who are apprised of detailed facts from citizen-eyewitnesses to observe suspects and wait until additional suspicious acts are committed, would be foolish and contrary to the balance of interests struck in *Terry* [*v. Ohio*, 392 U.S. 1 (1969)] and its progeny." *Brother*, 166 S.W.3d at 259.

(3) The Judgment Must Be Amended To Reflect the Correct Offense Level

The parties agree the trial court's judgment incorrectly characterizes the offense level of which Chambers was convicted. As cited above, Chambers was convicted of the state jail felony of theft. *See* TEX. PENAL CODE ANN. § 31.03(e)(4)(A) (West Supp. 2015). The judgment recites his conviction to be a "STATE JAIL FELONY ENHANCED TO A 2nd DEGREE FELONY."

The trial court found two enhancement allegations true, increasing the possible range of punishment from that of a state jail felony to that of a second degree felony.[9] *See* TEX. PENAL CODE ANN. § 12.425 (West Supp. 2015). Statutes enhancing punishment ranges for the primary offense do "not increase the severity level or grade of the primary offense." *Ford v. State*, 334 S.W.3d 230, 234 (Tex. Crim. App. 2011); *see also Ex parte Reinke*, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012). So while Chambers was sentenced within the range of punishment for a second degree felony, he was convicted of a state jail felony. The range of punishment was enhanced; the felony of conviction remained a state jail felony.

The Texas Rules of Appellate Procedure give this Court authority to modify judgments and correct clerical errors to make the record speak the truth. TEX. R. APP. P. 43.2; *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Land v. State*, 291 S.W.3d 23, 31 (Tex. App.—Texarkana 2009, pet. ref'd) (modifying judgment to reflect correct degree of offense). We, therefore, modify the judgment to reflect the correct degree of the offense as a state jail felony.

[9] *Cf.* TEX. PENAL CODE ANN. § 12.33 (West 2011), § 12.35 (West Supp. 2015)

As modified, the trial court's judgment and sentence are affirmed.

Josh R. Morriss, III
Chief Justice

Date Submitted: December 28, 2015
Date Decided: March 16, 2016

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