Opinion issued December 13, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-01080-CR

HAROLD EARL REED, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1404938

MEMORANDUM OPINION

A jury found Harold Earl Reed guilty of possession of cocaine in an amount greater than four grams and less than two hundred grams. *See* TEX. HEALTH & SAFETY CODE §§ 481.102(3)(D), 481.115. The trial court sentenced him to 25 years in prison. In a prior appeal we affirmed his conviction, but we reversed the

portion of the judgment assessing punishment and remanded the case for a new punishment hearing. *Reed v. State*, No. 01-14-00622-CR, 2015 WL 4548962, at *4 (Tex. App.—Houston [1st Dist.] July 28, 2015, no pet.) (mem. op., not designated for publication). The State conceded the error, that insufficient evidence had been presented to show the finality of a prior felony conviction used to enhance the range of punishment.

On remand, the trial court again sentenced Reed to 25 years in prison. He appealed, arguing in a single issue that the State still has not proven the finality of the 2001 first-degree felony conviction.

Background

At the original sentencing hearing, the judgment offered to prove a 2001 felony conviction stated that "notice of appeal was given," but there was no proof that an appellate court mandate issued. On remand the State offered into evidence, as Exhibits 2 and 4, two different copies of the trial court judgment in the 2001 felony conviction. A portion of the judgment form, beneath the judge's signature line, related to post-judgment events. Among other things, the form included blanks to note the dates corresponding to "notice of appeal," "mandate received," and "sentence to begin date."

Exhibit 2 came from a penitentiary packet and was accompanied by an affidavit from the Chairman of Classification and Records for the Texas

Department of Criminal Justice—Correctional Institutions Division (TDCJ-CID). On Exhibit 2, the blank for "Notice of Appeal" was filled in with a stamped date, "May 1, 2001." It also included an image of Reed's right thumbprint. A fingerprint examiner testified that he took a set of fingerprints from Reed, compared his right thumbprint to the right thumbprint on Exhibit 2, and found them to be a match. Exhibit 4 was a certified judgment from the clerk's office. It was admitted without objection. On Exhibit 4, the same stamped date appears on the blank beside "Notice of Appeal." In addition, the blank for "Mandate Received" reflects a handwritten notation, "7-19-02," and the blank for "Sentence to Begin Date" shows the handwritten notation, "5-1-01 w/166 days."

The State also introduced judgments from two prior third-degree felony convictions from 1999, which Reed did not appeal, and as to which he did not contest finality. The trial court again sentenced Reed to 25 years in prison, and he appealed.

Analysis

In a single issue, Reed argues that the evidence is insufficient to support the trial court's finding of a final conviction for enhancement purposes. He contends that the difference between Exhibits 2 and 4—handwritten notations appearing on Exhibit 4 but not on Exhibit 2—are conflicts that raise a question about the authenticity of the judgments.

In this review of the legal sufficiency of the punishment-phase evidence, we view the evidence in the light most favorable to the judgment and determine whether any rational trier of fact could have found the essential elements of the matter under review beyond a reasonable doubt. *E.g.*, *Tate v. State*, 414 S.W.3d 260, 265 (Tex. App.—Houston [1st Dist.] 2013, no pet.). "To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction." *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). When the record shows that an appeal has been taken from a prior conviction, the State bears the burden to prove that the conviction has become final. *Fletcher v. State*, 214 S.W.3d 5, 8 (Tex. Crim. App. 2007).

The trier of fact is the sole judge of the weight and credibility of the evidence. *See Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). "We do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact." *Wiley v. State*, 388 S.W.3d 807, 813 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *see Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

Possession of cocaine in an amount more than four but less than two hundred grams is a second degree felony. TEX. HEALTH & SAFETY CODE §§ 481.102(3)(D), 481.115. The range of punishment for a second-degree felony is

imprisonment for 2 to 20 years. TEX. PENAL CODE §12.33. If the State proves that the defendant previously has been convicted of a felony other than a state-jail felony, the punishment range is enhanced to that of a first-degree felony, i.e., 5 to 99 years or life in prison. *Id.* § 12.32, § 12.42(b). But if the State proves that the defendant previously has been convicted of two felony offenses, and the second prior felony conviction is for an offense that occurred after the first felony conviction became final, then the defendant may be sentenced as a habitual offender, with the punishment range enhanced to 25 to 99 years or life in prison. *Id.* § 12.42(d).

Thus, if the State failed to prove the 2001 conviction was final, then the range of punishment in his case would have been 5 to 99 years or life in prison. But if the State adduced sufficient evidence to show that the 2001 conviction was final, then the punishment range was 25 to 99 years or life in prison. In either case, the trial court's sentence of 25 years was within the statutory guidelines.

"A conviction from which an appeal has been taken is not considered final until the appellate court affirms the conviction and issues its mandate." *Johnson v. State*, 784 S.W.2d 413, 414 (Tex. Crim. App. 1990). If the State's proof of a prior conviction shows on its face that the conviction was appealed, then the State also must make a prima facie showing of finality with evidence demonstrating the appellate court's mandate has issued. *Ex parte Chandler*, 182 S.W.3d 350, 358

(Tex. Crim. App. 2005). This may be done by introduction of the actual mandate or by "any other manner of proof showing the disposition of the appeal." *Johnson*, 784 S.W.2d at 414. Proof that the mandate has issued may be shown by a notation on the trial court's judgment. *See Ballard v. State*, No. 01-10-00246-CR, 2011 WL 497072, at *6 (Tex. App.—Houston [1st Dist.] Feb. 10, 2011, no pet.) (mem. op., not designated for publication).

The rules of procedure explain why the two copies of the judgment differ. Copies of the trial court's judgment and sentence must be delivered to a designated officer along with the defendant when he is transferred to the TDCJ. TEX. CODE CRIM. PROC. art. 42.09, § 8. The Court of Criminal Appeals has explained that typically:

> there are two separate sets of records of the judgment and sentence—the district clerk of the convicting court retains the originals of the judgment and sentence on file in that court and sends a certified copy to [TDCJ-CID] which, in turn, retains the certified copies as part of the inmate's permanent file in the penitentiary.

Reed v. State, 811 S.W.2d 582, 584 (Tex. Crim. App. 1991). A defendant must give timely notice of appeal, and the notice of appeal will always precede issuance of the mandate. *Compare* TEX. R. APP. P. 26.2 (time to perfect appeal), *with* TEX. R. APP. P. 18.1 (issuance of mandate). A mandate is to be issued by a court of appeals after it has issued its opinion and the appellant has exhausted his avenues for further appellate review. *See* TEX. R. APP. P. 18.1. Based on these rules, if a

defendant is transferred to TDCJ upon conviction and pending an appeal, a mandate necessarily will be issued by the court of appeals after his transfer, and after the copy of the judgment was first sent to TDCJ.

State's Exhibit 2 is a copy of the judgment obtained from TDCJ-CID. It was originally sent with Reed as required and kept as part of his file, the "penitentiary packet." *See* TEX. CODE CRIM. PROC. art. 42.09, § 8. Reed's sentence in Cause No. 861400 began on May 1, 2001, when his sentence was imposed, and the same day he filed his notice of appeal. Because the mandate could not have yet been issued by the court of appeals at that time, the line next to "Mandate Received" necessarily would have been left blank.

State's Exhibit 4 is a copy of the original judgment maintained by the Harris County District Clerk. Among the district clerk's duties are to record the acts and proceedings of the court and enter all judgments of the court under the direction of the judge. TEX. GOV'T CODE § 51.303(b). As such, State's Exhibit 4 includes a notation of the date when the appellate court mandate was issued. This is prima facie evidence of finality of the judgment in cause number 861400. *See Johnson*, 784 S.W.2d at 414; *Ballard*, No. 01-10-00246-CR, 2011 WL 497072, at *6.

Viewing the punishment-phase evidence in the light most favorable to the outcome, we hold that a rational trier of fact could have believed beyond a reasonable doubt that Reed committed the 861400 offense and that it was final,

making the enhanced punishment range (with the unchallenged prior offenses) 25 to 99 years or life in prison. We overrule Reed's sole issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Massengale, Brown, and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).