In The

Court of Appeals

Seventh District of Texas at Amarillo

Nos. 07-15-00310-CR
07-16-00069-CR

SANDY D. CLAYTON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 242nd District Court
Hale County, Texas
Trial Court No. B19689-1406, Honorable Kregg Hukill, Presiding

February 25, 2016

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and HANCOCK, JJ.

Via marriage, two individuals combine to make one union composed of a "husband" and "wife." This appeal involves a like situation. Two indictments (each averring a single crime) were married into one and the remaining instrument encompassed the two crimes. Through each crime, the State accused appellant of possessing controlled substances, namely cocaine and methamphetamine. Yet, the quantum of cocaine he allegedly possessed made that offense a state jail felony while

the amount of methamphetamine possessed made that crime a felony of the third degree. Eventually, both accusations were included in a single jury charge and labelled "counts" one (cocaine possession) and two (methamphetamine possession). The jury convicted appellant of both and assessed punishment for the former at nine months imprisonment in a state jail facility plus a $5000.00 fine and the latter at eight years imprisonment plus another $5000.00 fine. Appellant appealed. Each of the seven issues before us arise from the trial court's marriage of the two indictments into one. According to appellant, the joinder 1) was improper, 2) resulted in the abandonment of the methamphetamine charge, 3) deprived the trial court of jurisdiction over that charge, 4) improperly allowed the jury to convict him for and sentence him on that charge, and 5) resulted in an illegal sentence and judgment. We affirm.

Background

This is what occurred. Appellant was arrested after being seen discarding a container that held less than a gram of cocaine and between one and four grams of methamphetamine. This resulted in the State initiating two criminal cases against appellant through two separate indictments, that is, B19689-1406 (cocaine) and B19690-1406 (methamphetamine). As previously mentioned, the former constituted a state jail felony and the latter a third degree felony.

Prior to trial, the State filed two motions, both being entitled "State's Motion to Consolidate and Join." It requested the trial court, through those motions, "to consolidate and join the above styled and numbered cases [*i.e.,* the cocaine and methamphetamine charges] and for the cases to proceed to trial as one, with each

indictment being a separate case but tried as one." The motions were considered in open court and shortly before jury voir dire began.

While discussing them, the following exchange occurred:

> [State]: Your Honor, the State had conferred with Defense Counsel Terry McEachern several months back, and we had filed a motion with the Court to consolidate. And just for the record, or just to protect the record, we wanted to put on that we have, this morning, on the day of trial, conferred again with Mr. McEachern, and he has talked to his client, and everybody is in agreement that we will consolidate both causes of action for trial today.
>
> THE COURT: We're going to *consolidate them into the first number, B19689-1406* [cocaine indictment]. Is that correct?
>
> [State]: That's correct, Your Honor.
>
> THE COURT: Mr. McEachern?
>
> MR. McEACHERN: That's fine, Your Honor.
>
> THE COURT: So you all are asking me to go ahead and enter this written order. We've got this on the record, and we'll put that in a written order in each file. Is that correct?
>
> [State]: That's correct.
>
> MR. McEACHERN: Yes, sir.
>
> THE COURT: I'm going to clarify that *on these orders that it's consolidated into the first number, B19689-1406* [cocaine indictment]. This motion is granted and so entered.
>
> (Emphasis added).

Once the foregoing transpired, the trial court asked (within the presence of the prospective jurors): "Now, in Cause No. B19689-1406, styled the State of Texas versus Sandy D. Clayton, what says the State?" This led to both the State and defense announcing "ready." At that point, the trial court began to explain the nature of the proceeding to the venire. It said:

> In this matter the defendant is accused of, first of all, the offense of possession of a controlled substance in Penalty Group 1, in an amount of less than one gram, and also with possession of a controlled substance in an amount of one gram or more but less than four grams.
>
> Now, the range of punishment for *that first offense* is from two – excuse me, from six months up to two years in a state jail facility. And the range of punishment *for the second offense* is that of a third degree felony; that is, two years to ten years in prison in the Texas Department of Criminal Justice, Institutional Division. Both of those have a possible fine not to exceed $10,000.00.
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> * * * * *
>
> The possible punishment in this case in the *first count* is from six months up to two years' confinement in the Texas Department of Criminal Justice, State Jail Division, and an optional fine of up to $10,000.00. And the possible punishment in t*he second count* is from two years' to ten years' . . . .

(Emphasis added).[1]

The litigants succeeded in selecting a jury, after which trial began. Once both litigants finished their respective presentation of evidence, the trial court drafted its charge on guilt/innocence. Both the cocaine and methamphetamine charges were incorporated into that one jury charge. Within it, the trial court labelled the two offenses "Count I" (*i.e.* cocaine possession) and "Count II" (*i.e.* methamphetamine possession). Neither party objected to the charge as written, and the jury found appellant guilty of both crimes mentioned in it.

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[1] After voir dire, the empaneling of a jury, and the State's reading of both indictments to the jury, the trial court asked the defendant how he pled to the "first indictment" and "second indictment." He answered "not guilty" to each.

The ensuing charge on punishment also described the offenses as "Count I" and "Count II." And again, neither party objected to the trial court doing so. Thereafter, the jury levied the aforementioned punishment.

Issue One – Improper Joinder

Through the first issue, appellant contends that:

> For the State to actually consolidate or join both offenses "*into cause number B19689-1406*", the State would need to have reindicted B19689-1406 or successfully amended the existing indictment for B19689-1406 to include both offenses in a legally valid manner. Neither of these were attempted or accomplished.
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> * * * * *
>
> The State failed to achieve a proper joinder within the indictment for B19689-1406 [cocaine indictment]. Because of this failure, the allegations found in B19690-1406 [methamphetamine indictment] were tried separately (under their own indictment) on July 14, 2015. As this indictment was not charged to the jury, no conviction can be had. This Honorable Court must reverse any conviction or judgement had on the indictment not charged to the Jury.

(Emphasis in original). We overrule the issue.

When all is said and done, what we have here is a decision combining the trial of two indictments into one proceeding under one cause number. No one voiced surprise below or here. No one claimed below or here that they did not understand that appellant remained accused of and was being tried for committing both crimes. No one objected to the trial court's decision to either combine the charges for trial or to try them simultaneously under one cause number. Indeed, both the State and defendant approved it. Whether the trial court's decision could be deemed the creation of a defectively amended indictment or the improper joinder of offenses within one indictment, both complaints required an objection below. *See* TEX. CODE CRIM. PROC.

ANN. art. 1.14(b) (West 2005) (stating that "[i]f the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post-conviction proceeding"); *Tear v. State*, 74 S.W.3d 555, 558 (Tex. App.—Dallas 2002, pet. ref'd) (holding that the appellant waived his complaint about two offenses being improperly joined because he did not object before trial began). Because appellant failed to object, and actually acquiesced in the decision of the trial court at bar, he waived the complaints now proffered in his first issue.

Issue Two – Abandonment of Methamphetamine Charge

Next, appellant contends that the State abandoned its prosecution of the methamphetamine charge because it did not move to amend the cocaine indictment to include the methamphetamine offense. We overrule the issue.

When attempting to clarify what the State and defendant agreed to, the trial court twice asked whether they wanted both charges consolidated into the one cause number. Both litigants answered in the affirmative. So too did each proceed accordingly. The State presented evidence of both crimes, and appellant defended himself against both. Furthermore, the jury charges submitted by the trial court encompassed both crimes. That hardly evinced an abandonment by the State of either offense.

If appellant had concern about how the two cause numbers and indictments were combined into one cause number and trial, he should have objected. Because he did not, he lost the opportunity to complain about that, as concluded above.

Issue Three – Trial Court's Jurisdiction over the Meth Prosecution

Next, appellant asserts that "[i]t is well settled that a valid indictment is essential to the Trial Court's jurisdiction in a criminal case." He, further states, "a Trial Court is without jurisdiction to convict a Defendant of an offense not charged in the indictment." Therefore, "[a]ppellant was only convicted under the authority of the indictment B19689-1406." Because "[t]he indictment B19689-1406 alleges only "*intentionally or knowingly possess a controlled substance, namely, cocaine, in an amount of less than one gram, against the peace and dignity of the State[,]*" appellant contends "[It] does not include any allegation of possession of methamphetamine." (Emphasis in original). Therefore, in his view, the trial court lacked jurisdiction over the methamphetamine prosecution since it was not part of the original indictment or cause numbered B19689-1406. We overrule the issue.

As discussed in the previous two issues, the trial court combined both offenses into cause number/indictment B19689-1406. Both parties agreed to and, thereby, waived complaint about that. Since both offenses were felonies and a district court has subject-matter jurisdiction to try felonies, TEX. CODE CRIM. PROC. ANN. art. 4.05 (West 2015), the district court at bar possessed jurisdiction over the two offenses of which appellant was accused, tried, and convicted.

Issues Four, Five and Six – Improper Jury Charge and an Illegal Sentence

Appellant's next three issues concern the jury charges. They are premised on the notion that because only one indictment or cause number remained after the decision to "consolidate" and the remaining indictment originally encompassed only the

cocaine charge, then the jury charges were wrong to also include the methamphetamine charge. And, in finding appellant guilty of the latter offense and punishing him for its commission, it supposedly rendered an illegal sentence. We overrule the issues.

Again, both indictments and their accusations were combined into one cause number/indictment. Appellant did not object to that or the way in which it occurred. So, two crimes remained for prosecution. Moreover, both of the trial court's jury charges encompassed the two offenses, though they were now labelled counts I and II.

Appellant does not suggest that he failed to recognize that he was being tried for both crimes. Nor does he suggest that either charge failed to inform him of his potential culpability for both. Similarly missing is citation to authority suggesting that two offenses, whether alleged in the same indictment or separate indictments, cannot be incorporated into one jury charge on guilt/innocence or one jury charge on punishment.[2]

Simply put, both crimes were encompassed within the jury charges. So, contrary to appellant's position, neither document permitted the jury to convict and punish him of some uncharged or unindicted offense.

Issue Seven – Jury Verdict creates an Illegal Judgment

Through his final issue, appellant asserts that "[t]he Jury's assessment, as well as the Trial Court's oral pronouncement, of the sentence of eight (8) years of

[2] Assuming *arguendo* that such a combination could not be made in one jury charge, no one objected. Thus, any harm would have to be egregious before it could be deemed reversible. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015). Given the course of proceedings, the acquiescence to what the trial court did, the evidence of guilt for both crimes within the record, and appellant's undeniable knowledge that he was still being tried for both crimes, we cannot say that the decision to so combine the charges into one charge caused him egregious harm.

incarceration in prison for the state jail felony in the indictment MUST BE void and illegal." We overrule the issue.

As before, his argument is based upon the supposition that he was being tried only for the cocaine charge since that was the accusation originally encompassed by cause number B19689-1406. But, as before, that indictment or cause number no longer included one crime once the court consolidated indictments into B19689-1406 without complaint from anyone. And, because the eight year sentence pertained to the methamphetamine charge, possessing more than one but less than four grams of that controlled substance was a felony of the third degree, *see* TEX. HEALTH & SAFETY CODE ANN. § 481.115 (a) & (c) (West 2010), such a felony was punishable by not less than two nor more than ten years and a maximum fine of $10,000.00, *see* TEX. PENAL CODE § 12.34 (West 2011), and the sentence levied came within that range, neither the sentence nor judgment were illegal or void.

In sum, if appellant did not want the two independent crimes married into one case or indictment, he should have spoken up. He did not. Now he must forever hold his peace about that marriage.

Accordingly, we affirm the judgments of the trial court.

Brian Quinn
Chief Justice

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