In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00245-CR

KENYETTA DANYELL WALKER, APPELLANT

V.

STATE OF TEXAS, APPELLEE

On Appeal from the 163rd District Court of
Orange County, Texas
Trial Court No. B-150206-R077069-A-CR, Honorable Dennis Powell, Presiding

August 20, 2020

MEMORANDUM OPINION ON REMAND

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

"Oh, here we go again. Don't ever say it's over now. Ooh baby, here we go again."[1]

In our original opinion, we concluded that the evidence was sufficient to support the conviction of Kenyetta Danyell Walker as accused via the indictment and explained in the jury charge. *Walker v. State*, No. 07-16-00245-CR, 2017 Tex. App. LEXIS 2817, at *3–4 (Tex. App.—Amarillo, Mar. 30, 2017) (mem. op., not designated for publication),

[1] The Isley Brothers, *Here We Go Again*, *on* GO ALL THE WAY (T-Neck Records Inc. 1980).

rev'd, 594 S.W.3d 330 (Tex. Crim. App. 2020). Yet, both the State and appellant missed the defect in the jury charge and indictment. We did not. The purported offense with which appellant was accused via both documents was not a crime. *Id.* at *5–8. So, we reversed the conviction on charge error and remanded the cause to the trial court. *Id.* at *8.

The State appealed, and the Court of Criminal Appeals reversed. The latter did so not because this Court decided that the State attempted to prosecute appellant for a non-existent crime. It recognized, just as we did, that the State may not secure a conviction for engaging in organized criminal activity by using the act of possessing a controlled substance with intent to deliver as the predicate offense. *Walker*, 594 S.W.3d at 336–37; *Walker*, 2017 Tex. App. LEXIS 2817, at *5–8. And, that was the accusation levied against appellant.

Instead, we erred in "effectively allow[ing] a conviction on the greater offense [i.e., engaging in organized crime] in violation of due process because the State did not prove every element of the offense beyond a reasonable doubt."[2] *Walker*, 594 S.W.3d at 337. What we should have done is contemplated what a hypothetically correct jury charge would say in relationship to the non-existent crime alleged by the State. Had we done that, then we would have necessarily found that no evidence supported appellant's conviction due to the missing proof of a predicate offense.[3] *See id.* (finding the evidence

[2] We do not attempt to reconcile how this Court "effectively allowed" a conviction to stand "in violation of due process" when it actually discovered, *sua sponte*, that the crime for which the State convicted appellant was not a crime and, therefore, reversed the conviction. Maybe truth does lie in the lyric "I tell you one and one makes three." LIVING COLOUR, *Cult of Personality*, *on* VIVID (Epic Records 1988).

[3] Had we so concluded, then we apparently would have been in agreement with the State that the evidence was insufficient to support the conviction. *See Walker,* 594 S.W.3d at 340 (wherein the Court of Criminal Appeals "agree[d] with both Appellant and the State that the evidence was legally insufficient to

insufficient to prove a predicate offense). Our job would not have ended there, though, and we complete it now per the directive of the Court of Criminal Appeals.

It charged us, on remand, to conduct a reformation analysis. *Id.* at 340. That is, the Court of Criminal Appeals determined "that reformation [of appellant's conviction] to possession of a controlled substance with intent to deliver is authorized by the indictment." *Id.* And, the court "remand[ed] the case to [us] to determine if the remaining conditions necessary for reformation [were] met." *Id.* Those conditions are "1) whether the jury necessarily found all the elements of that offense beyond a reasonable doubt, and 2) whether the evidence was legally sufficient to support that offense." *Id.*

This task is made easier by the very words of the Court of Criminal Appeals when indicating we denied appellant due process. Those words follow: "Further, ***even though there was evidence that Appellant, or a member of the combination, possessed a controlled substance with the intent to deliver***, there was insufficient evidence to support a conviction for actual delivery of the hydrocodone." *Id.* at 337 (emphasis added). Obviously, the Court of Criminal Appeals believed the record contained some evidence illustrating appellant or her compatriots possessed a controlled substance with intent to deliver. We went further in our 2017 opinion and found the presence of "more than some evidence . . . of record enabling a reasonable fact-finder to conclude, beyond a reasonable doubt, that (1) those residing in the house, including appellant, operated a drug business therefrom, [and] (2) appellant possessed the quantity of hydrocodone

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support the conviction for engaging in criminal activity"). Oddly, the brief tendered us by the State said nothing about it believing that no evidence supported appellant's conviction for the crime described in the indictment and jury charge. Instead, it told us that "Appellant was properly convicted of Engaging in Organized Criminal Activity based on the testimony and evidence presented at trial." Even after this Court sought supplemental briefing on the erroneously charged offense, the State maintained that the "indictment, as amended[,] alleged a crime encompassed within Section 71.02 of the Texas Penal Code" and prayed that the conviction for engaging in organized criminal activity be affirmed.

alleged in the indictment with intent to deliver." *Walker*, 2017 Tex. App. LEXIS 2817, at *4. The quantity alleged in the indictment was 400 grams or more. No one has offered us basis to change that determination; nor did we uncover one. So, the second prong of the reformation analysis is satisfied.

As for the first prong, we cannot ignore the fact that the road to conviction paved by the original, inaccurate jury charge included the element of possessing a controlled substance, i.e., hydrocodone, with intent to deliver.[4] So, logically, in finding appellant guilty of the non-crime encompassed within that charge, the jury necessarily found she also possessed, directly or as a party, 400 grams or more of the controlled substance with intent to deliver. So, the first prong of the test similarly is met.

Consequently, we reform the judgment to reflect appellant's guilt for and conviction of possessing, with intent to deliver, 400 grams or more of a controlled substance, namely

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[4] The jury charge stated:

> You must decide whether the State has proved, beyond a reasonable doubt the following, elements. The elements are that-
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> 1. One or more of the following persons: the defendant KENYETTA DANYELL WALKER or BRIAN GANT or DESRICK WARREN, possessed Dihydrocodeinone, (Hydrocodone) in Orange County, Texas, on or about December 12,2014; and
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> 2. The Dihydrocodeinone, Hydrocodone was, by aggregate weight, including adulterants or dilutants, 400 grams or more; and
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> 3. Such person knew he/she was possessing a controlled substance; and
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> 4. Such person ***intended to deliver*** the controlled substance; and
>
> 5. the defendant intended to establish, maintain, or participate in· a combination or in the profits of a combination.
>
> If the person you found in # 1, 3, and 4 was not the defendant, then the State must prove beyond a reasonable doubt that the defendant acted with intent to promote or assist the commission of the offense, and she aided or attempted to aid the other person to commit the offense.

(Emphasis added).

hydrocodone. We again remand the cause to the trial court, this time, though, for a new trial on punishment.

Brian Quinn
Chief Justice

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