NO. 12-16-00238-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

GILBERT T. RODRIGUEZ, APPELLANT	***§***	***APPEAL FROM THE 349TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

Gilbert T. Rodriguez appeals his conviction for possession of a controlled substance in a correctional facility. Appellant raises two issues on appeal, in which he challenges the constitutionality of the statute and the sufficiency of the evidence. We affirm.

BACKGROUND

While incarcerated in the Eastham Unit, Appellant was found in possession of XLR-11, which is a synthetic cannabinoid that the commissioner of the Texas Department of State Health Services (the Department) listed as a controlled substance in 2013. At the time of Appellant's alleged possession, XLR-11 had not been included in penalty group 2A of the Texas Health and Safety Code or permanently added as a schedule 1 controlled substance.

A Houston County grand jury returned an indictment charging Appellant with possession of a controlled substance in a correctional facility. At the plea hearing, Appellant moved to dismiss the indictment on grounds that XLR-11 had been denominated a controlled substance by the commissioner of the Department instead of the legislature and, consequently, the Department performed a legislative function without approval from the legislature. The trial court denied Appellant's motion, but granted Appellant permission to appeal the issue. Pursuant to a plea

bargain, Appellant pleaded "guilty" and received a sentence of imprisonment for four years, to run consecutively to the sentence he was currently serving. This appeal followed.

VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS

In issue one, Appellant maintains that the Department, an arm of the executive branch, improperly "performed a legislative function by independently criminalizing the possession of XLR-11, violating the separation of powers provision of article II, section 1 of the Texas Constitution."

Applicable Law

The Government of the State of Texas is divided into three distinct departments, Legislative, Executive, and Judicial. TEX. CONST. art. II § 1. Under the separation of powers clause, "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." ***Id***. In ***State v. Rhine***, 297 S.W.3d 301 (Tex. Crim. App. 2009), the court of criminal appeals reaffirmed that the clause may be violated in either of two ways:

> First, it is violated when one branch of government assumes, or is delegated, to whatever degree, a power that is more 'properly attached' to another branch. The provision is also violated when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.

Rhine, 297 S.W.3d at 305 (quoting ***Armadillo Bail Bonds v. State***, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990)).

The authority to define crimes, and to fix punishments for those crimes, is vested exclusively in the legislature. *See* ***Grant v. State***, 505 S.W.2d 279, 282 (Tex. Crim. App. 1974). However, "there are many powers that may be delegated by the legislature to other bodies where the legislature cannot itself practically or efficiently perform the required functions." ***Ex parte Granviel***, 561 S.W.2d 503, 514 (Tex. Crim. App. 1978). The legislature, after declaring a standard, may delegate to an administrative agency or officer power to establish rules, regulations, or minimum standards necessary to implement the expressed purpose of the act. ***Id***. "[T]he existence of an area for exercise of discretion by an administrative officer under delegation of authority does not render delegation unlawful where standards formulated for guidance and limited discretion, though general, are capable of reasonable application." ***Id***.

In ***Rhine***, the concurring opinion distinguished between a law that properly confers administrative authority and one that improperly delegates legislative authority. *See* ***Rhine***, 297 S.W.3d at 320-21 (Keller, P.J., concurring). "'The legislature cannot delegate its power to make law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government.'" ***Id.*** at 321 (quoting ***Marshall Field & Co. v. Clark***, 143 U.S. 649, 694, 12 S. Ct. 495, n.505, 36 L. Ed. 294 (1892)).

> [A] delegation of authority to an administrative agency is constitutionally permissible under the separation-of-powers provision of the Texas Constitution if the following four conditions are met: (1) the delegation can, at lease by implication, be characterized as the delegation of authority to make a factual determination relevant to the purpose of the statute, rather than simply a policy decision, (2) the statute contains standards, expressly provided or implied from an express statutory purpose, that are sufficiently specific to give guidance to the agency and to the courts as to what types of rules or other actions are and are not permissible, (3) pre-adoption procedural safeguards exist to ensure that the agency has the opportunity to consider whether the rule or other action conforms to the legislative standards, and (4) post-adoption judicial review is available to ensure that the agency rule or other action does in fact comply with the legislative standards.

Id. at 327-28.

Under section 38.11 of the Texas Penal Code, a person commits an offense if he possesses a controlled substance or dangerous drug while in a correctional facility or on property owned, used, or controlled by a correctional facility. TEX. PENAL CODE ANN. § 38.11(d)(1) (West 2016). "Controlled substance" has the meaning assigned by section 481.002 of the health and safety code and is defined as a substance, including a drug, adulterant, and dilutant, listed in schedules I through V or penalty groups 1 through 4. ***Id***. § 1.07(12) (West Supp. 2016); TEX. HEALTH & SAFETY CODE ANN. § 481.002(5) (West Supp. 2016). The health and safety code expressly provides that the commissioner of state health services "shall establish and modify" schedules I, II, III, IV, and V. TEX. HEALTH & SAFETY CODE ANN. § 481.032(a) (West 2010).

Section 481.035 of the health and safety code directs the commissioner to place a substance in one of schedules I through V dependent generally upon the substance's potential for abuse, whether it has an accepted medical use, and the degree of psychological or physical dependence that may result from its abuse. ***Id***. § 481.035 (West 2010). For instance, the commissioner placed XLR-11 in schedule I based on findings that XLR-11 (1) has a high potential for abuse, and (2) has no accepted medical use in treatment or lacks accepted safety for

use in treatment under medical supervision. *See* ***id***. § 481.035(a). Section 481.034(c) prevents the commissioner from adding a substance to the schedules if it has been deleted by the legislature, or rescheduling a substance placed in a schedule by the legislature. ***Id***. § 481.034(c) (West Supp. 2016). In making a determination regarding the scheduling of a substance, the statute directs the commissioner to consider the following factors:

> (1) the actual or relative potential for its abuse;
>
> (2) the scientific evidence of its pharmacological effect, if known;
>
> (3) the state of current scientific knowledge regarding the substance;
>
> (4) the history and current pattern of its abuse;
>
> (5) the scope, duration, and significance of its abuse;
>
> (6) the risk to the public health;
>
> (7) the potential of the substance to produce psychological or physiological dependence liability; and
>
> (8) whether the substance is a controlled substance analogue, chemical precursor, or an immediate precursor of a substance controlled under this chapter.

Id. § 481.034(d) (West Supp. 2016).

Discussion

In this case, Appellant was charged with possession of XLR-11 while in a correctional facility. At the time of his indictment, XLR-11 had been temporarily listed as a schedule 1 controlled substance by the Department, but had not yet been included in a penalty group by the legislature. Because XLR-11 was only listed in a schedule, but not among a penalty group approved by the legislature, Appellant argues that his conviction is therefore a direct result of the addition of XLR-11 to schedule 1 by the Department's commissioner. Thus, he argues, sections 481.032, 481.034, and 481.035 give the commissioner unconstitutional authority to criminalize possession of substances under section 38.11, when the legislature has not criminalized those substances under the health and safety code, by adding the substance to a penalty group.

Under the health and safety code, possession of a controlled substance is punished according to the penalty group that includes the substance. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102-.105 (West 2010 & Supp. 2016). Unless the controlled substance appears in one of the penalty groups, there can be no prosecution for its possession under the health and

safety code, because no penalty has been established for the offense. *See* ***id***. However, the State prosecuted Appellant under the penal code, not the health and safety code. Under section 38.11(d) of the penal code, it is a crime to possess any controlled substance while in a correctional facility. *See* TEX. PENAL CODE ANN. § 38.11(d)(1). Since the penalty for its violation, a third degree felony, is set out in the same section, there is no need to search among the penalty groups in the health and safety code in order to establish the appropriate penalty. *See* ***id***. § 38.11(g). In the instant case, the commissioner designated XLR-11 as a controlled substance by temporarily assigning it to schedule I, because he determined that XLR-11 had a high potential for abuse and no accepted medical use. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.035(a). After its designation as a controlled substance, possession of XLR-11 in a correctional facility was an offense under section 38.11(d) of the penal code.

Nevertheless, Appellant maintains that penal code section 38.11(d) and health and safety code sections 481.002(5), 481.032, 481.034, and 481.035 operate together to allow the commissioner to create a penal offense, which is a purely legislative function. This exercise of a legislative function by an officer of the executive branch, he argues, violates the separation of powers provision of the Texas Constitution.

In the case of the crime for which Appellant was convicted, the legislature made the policy decision that it be illegal to possess a controlled substance in a correctional facility. TEX. PENAL CODE ANN. § 38.11; TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(5), 481.035. The legislature's delegation to the Department of the task of making the factual determination which substances should be controlled and to what schedule they should be assigned was not a violation of the separation of powers. *See* ***Granviel***, 561 S.W.2d at 514. It was the delegation of fact finding to an agency much more suited to the task than the state legislature and a delegation of authority to make a factual determination relevant to the purpose of the statute, rather than a policy decision. *See* ***id.***; *see also* ***Rhine***, 297 S.W.3d at 327-28 (Keller, P.J., concurring); TEX. HEALTH & SAFETY CODE ANN. §§ 481.032, 481.034. As previously discussed, the health and safety code sets out the specific guidelines to limit and direct the commissioner's factual determination in which schedule to place a controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.034(d), 481.035(a); *see also* ***Rhine***, 297 S.W.3d at 327-28 (Keller, P.J., concurring). Section 481.034(c) insures that the commissioners' determination will not contradict a specific legislative determination. *See* TEX. HEALTH & SAFETY CODE ANN.

§ 481.034(c). Pre-adoption procedural safeguards require changes to the schedules only be made with the approval of the executive commissioner, after a public hearing, and upon a specific finding based on enumerated considerations. *See* ***id***. This provides the commissioner and the Department the opportunity to consider whether the commissioner's decision conforms to legislative standards. *See* ***Rhine***, 297 S.W.3d at 327-28. A criminal appeal, as in the instant case, challenging the validity of the agency's action provides sufficient post-adoption judicial review to insure that the commissioner's or the Department's actions comply with legislative standards. *See* ***id***.

Accordingly, we conclude that the commissioner did not perform a legislative function in determining that XLR-11 was a controlled substance and placing it in schedule 1. Nor do sections 481.002(5), 481.032, 481.034, and 481.035 of the health and safety code operate together with section 38.11(d) of the penal code to allow the commissioner to independently create a penal offense. For these reasons, we conclude that section 481.032 of the health and safety code, which directs the commissioner to establish and modify the schedules of controlled substances, is not an unconstitutional delegation of legislative authority. Because we so hold, Appellant's first issue is overruled.

SUFFICIENCY OF THE EVIDENCE

In his second issue, Appellant challenges the legal sufficiency of the evidence on grounds that the substance he possessed, XLR-11, was temporarily listed as a controlled substance under schedule 1, but not listed in penalty group 2-A.

Standard of Review

In determining the legal sufficiency of the evidence, the reviewing court considers all the evidence in the light most favorable to the conviction to determine whether, based upon the evidence and the reasonable inferences therefrom, a rational trier of fact could have found each element of the offense beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, S. Ct. 2781, 61 L. Ed. 2d 560 (1979); ***Merritt v. State***, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012).

Analysis

Under the health and safety code, possession of a controlled substance is a crime governed by the particular penalty group to which the substance belongs. *See* TEX. HEALTH &

SAFETY CODE ANN. §§ 481.102-.105, 481.115-.118 (West 2010 & Supp. 2016). However, Appellant was charged under the penal code, not the health and safety code. Under section 38.11(d) of the penal code, it is a crime to possess *any* controlled substance in a correctional facility. *See* TEX. PENAL CODE ANN. § 38.11(d). The definition of a "controlled substance" includes substances in either the schedules or the penalty groups. TEX. HEALTH & SAFETY CODE ANN. § 481.002(5). The definition does not require that the substance appear in both a schedule and a penalty group in order to be considered a controlled substance. *See* ***id***. Therefore, the laws and decisions pertaining to prosecutions under the health and safety code upon which Appellant relies are not apposite.

At the time Appellant pleaded "guilty" to possession of XLR-11 in the Eastham Unit, XLR-11 was listed as a temporary schedule 1 drug and therefore was a controlled substance. Moreover, when Appellant entered his plea of guilty, he judicially confessed his commission of the offense alleged in the indictment and stated under oath that he had committed every element of the crime alleged. A stipulation of evidence or judicial confession, standing alone, is sufficient to sustain a conviction upon a guilty plea as long as it establishes each element of the charged offense. *See* ***Menefee v. State***, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). Accordingly, viewing all the evidence in the light most favorable to the conviction, we conclude that a rational factfinder could have found Appellant guilty of each element of possession of a controlled substance in a correctional facility. *See* ***Jackson***, 443 U.S. at 319, S. Ct. at 2789; *see also* ***Merritt***, 368 S.W.3d at 525. Because the evidence is legally sufficient to support Appellant's conviction, we overrule Appellant's second issue.

DISPOSITION

Having overruled Appellant's two issues, we ***affirm*** the trial court's judgment.

BILL BASS
Justice

Opinion delivered April 28, 2017.
Panel consisted of Hoyle, J., Neeley, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 28, 2017

NO. 12-16-00238-CR

GILBERT T. RODRIGUEZ,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 349th District Court
of Houston County, Texas (Tr.Ct.No. 15CR-195)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Bill Bass, Justice.
Panel consisted of Hoyle, J., Neeley, J. and Bass, Retired J, Twelfth Court of Appeals, sitting by assignment.