Affirmed and Opinion filed May 31, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00661-CR

JAMES EDWARD SPENCER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 838,693

O P I N I O N

James Edward Spencer appeals a conviction for possession of cocaine[1] on the grounds that: (1) the trial court erred by failing to (a) enter a judgment of acquittal; (b) grant his motion to suppress; and (c) allow appellant ten days to prepare for trial; and (2) the evidence was insufficient to support his conviction. We affirm.

Judgment of Acquittal

Appellant's first point of error contends that the trial court's failure to enter a judgment of acquittal and its allowing the jury to reconsider its verdict after the jury

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[1] A jury convicted appellant and sentenced him to eight years confinement.

foreman announced a "not guilty" verdict violated appellant's "constitutional right against double jeopardy."[2]

Article 37.04 of the Texas Code of Criminal Procedure provides:

> When the jury agrees upon a verdict, it shall be brought into court by the proper officer; and if it states that it has agreed, the verdict shall be read aloud by the judge, the foreman, or the clerk. If in proper form and no juror dissents therefrom, and neither party requests a poll of the jury, the verdict shall be entered upon the minutes of the court.

TEX. CODE CRIM. PROC. ANN. art. 37.04 (Vernon 1981). In this case, the following exchange occurred when the verdict was first read:

> THE COURT: . . . "We the jury, find the defendant, James Edward Spencer, not guilty, " signed Jeffrey T. Jones, Foreman of the Jury.
>
> Ladies and gentlemen, this concludes your jury service.
>
> THE FOREMAN: Did I sign the wrong one?
>
> THE COURT: "We, the jury, find the defendant, James Edward Spencer, not guilty": That's what it says. Is that what you meant to do?
>
> THE FOREMAN: No, sir.
>
> THE COURT: Please go back into the jury room and reconsider.

The jury returned after reconsideration, and a verdict of guilty was read in open court. The Foreman stated that he previously misread the sentence and the not guilty verdict was a mistake. All of the jurors were polled and responded affirmatively that the verdict of guilty was their verdict.

Because appellant failed to object when the judge retired the jury to review what it had written on the verdict form, he failed to preserve a complaint on that decision for our review. Moreover, because the foreman dissented from the verdict and the record clearly reflects that the verdict form did not then reflect the jury's actual decision, the court did

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[2] *See* U.S. Const. AMEND. V (no person shall be subjected to twice having life or limb in jeopardy for the same offense); TEX. CONST. art. 1, § 14 (no person shall be put in jeopardy twice for the same offense after a verdict of not guilty in a court of competent jurisdiction); TEX. CODE CRIM. PROC. ANN. art. 1.10 (Vernon 1977) (same).

not err in requesting a review of it by the jury and subsequently accepting their corrected verdict.[3] Accordingly, appellant's first point of error is overruled.

Motion to Suppress

Appellant's second point of error challenges the trial court's denial of his motion to suppress because the informant's tip on which the officer's suspicion was based lacked sufficient indicia of reliability to justify a search of appellant and the van in which the officer found him.

When a pre-trial motion to suppress evidence is overruled, the accused need not subsequently object to the admission of the same evidence at trial in order to preserve error. *Fuller v. State*, 827 S.W.2d 919, 930 (Tex . Crim. App. 1992). However, when the accused affirmatively asserts during trial that he has no objection to the admission of previously complained of evidence, he waives any error in the admission of the evidence despite the pre-trial denial of his motion to suppress. *Moody v. State*, 827 S.W.2d 875, 889 (Tex. Crim. App. 1992).

In the instant case, appellant failed to obtain a pre-trial ruling on his motion to suppress and affirmatively stated "no objection" at trial upon the State's offer of the cocaine, razor blade, and crack pipe that were the subjects of his motion to suppress. Accordingly, no complaint is preserved for our review, and appellant's second point of error is overruled.

Trial Preparation

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[3] *See Brown v. Gunter*, 562 F.2d 122, 123-25 (1st Cir. 1977) (holding that double jeopardy did not prevent a jury from altering its verdict where a juror reported, even after leaving the courtroom, that the not guilty verdict delivered in open court was incorrect); *see also Reese v.* State, 773 S.W.2d 314, 317-18 (Tex. Crim. App. 1989) (holding that it is the duty of the trial judge to reject an insufficient verdict and have it corrected by sending the jury back for further deliberations); *Jones v. State*, 511 S.W.2d 514, 515-17 (Tex. Crim. App. 1974) (determining that it was not error to request further deliberation by the jury when it was apparent a mistake had been made). We thus do not agree with appellant that the trial court's statement, "this concludes your jury service," in effect, decommissioned the jury and terminated its authority to take further action in determining guilt.

Appellant's fourth point of error contends that the trial court erred by failing to allow him ten days to prepare for trial. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(e) (Vernon Supp. 2001)(an appointed attorney is entitled to ten days to prepare for a proceeding). However, a trial court does not err by putting an attorney to trial within ten days of being appointed on a reindictment if the attorney had been appointed on the original indictment more than ten days before trial and the difference between the allegations in the indictments is too negligible to affect the defendant's ability to prepare for trial. *Marin v. State*, 891 S.W.2d 267, 270 (Tex. Crim. App. 1994).

In this case, appellant was charged by complaint with possession of cocaine on January 9, 2000. On January 10, the trial court appointed Ricardo Gonzalez to represent appellant. Appellant was indicted on February 22 and reindicted on March 10 under a separate cause number. On March 23, the trial court appointed Gonzalez to represent appellant under the second indictment. Trial began on March 27. The first indictment was dismissed on March 28. Although the second indictment was given a new cause number, the allegation in it was the same as in the original indictment except for the date of the offense. Because appellant has not demonstrated that this change affected the work necessary to prepare for trial, he was not entitled to ten days from the date his attorney was appointed on the reindictment to prepare for trial. Accordingly, appellant's fourth point of error is overruled.

Sufficiency of the Evidence

Appellant's third point of error contends that the evidence is legally insufficient to prove that appellant possessed the cocaine found in the van because: (1) the other occupants of the van at the time of arrest testified that they did not see cocaine in the van and had never seen appellant smoke crack cocaine; (2) the police officer who searched appellant failed to find any drugs; (3) appellant testified that he did not possess cocaine on the date in question and had never used crack cocaine before; (4) an officer testified that he heard something drop when he was searching appellant, but failed to testify that he

actually witnessed the crack cocaine pipe fall from appellant; and (5) the contamination of the evidence negates the proof that the cocaine came from the crack pipe.[4]

In reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict, asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). To convict a defendant of possession of cocaine, the State must prove, among other things, that the accused not only exercised actual care, control, or custody of the substance, but that he did so knowingly rather than fortuitously. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). To possess a substance knowingly, a defendant must have been conscious of his connection with it and have known what it was. *Id.* Such evidence of "affirmative links" may be direct or circumstantial. *Id.*

In this case, Houston Police Officer Dozier was responding to a theft investigation in the parking lot of a restaurant in Harris County. Dozier testified that upon arrival he spoke with a truck driver who identified someone sitting in a van that was involved in the theft. Dozier testified that when he approached the van, appellant and two other individuals were in it. Dozier testified that he instructed all three to exit the van, and officer Garrison then conducted a weapons pat down on appellant. According to Garrison, while patting appellant down, he heard something fall to the ground. When Garrison looked down, he saw a crack pipe on the ground next to appellant's foot. Garrison testified that he observed white flecks inside the crack pipe, which later field-tested positive for cocaine, and that based on his observations and experience, he believed the crack pipe fell from appellant's pants. Further, Houston Police Officer Johnson testified that an inventory of the vehicle disclosed a rock of crack cocaine floating in a cup of water on the floorboard in front of the driver's seat, where appellant had been seated, and a razor blade in the ashtray. From this evidence, a rational trier of fact could have found that appellant

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[4] Appellant claims the evidence was contaminated because the razor blade and crack pipe were placed in the same evidence bag.

knowingly exercised care, control, and custody over the cocaine.[5] Accordingly, appellant's third point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed May 31, 2001.

Panel consists of Justices Edelman and Frost and Senior Chief Justice Murphy.[6]

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[5] Because appellant has challenged only the legal sufficiency of the evidence, we do not consider matters which could bear on the admissibility, credibility, or factual sufficiency of the evidence.

[6] Senior Chief Justice Paul C. Murphy sitting by assignment.