

Affirmed and Opinion filed July 12, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00888-CR

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RUSSELL KEITH ENSLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 727346 & 727,511**

OPINION

This is a consolidated appeal from appellant's convictions for the offenses of possession with intent to distribute cocaine and possession of marijuana. TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(f), 481.120(4) (Vernon Supp. 2000). The jury assessed punishment at confinement for fifteen and two years, respectively. Challenging his conviction, appellant raises two issues arguing that the trial court erroneously admitted the controlled substances and packaging into evidence. We will affirm.

Background

On July 11, 1996, appellant's flight from Los Angeles landed in Houston's Intercontinental Airport. The airline's ground crew moved appellant's baggage to a transfer conveyor belt connecting to another flight. As appellant's luggage moved along the conveyor, a narcotics detection dog alerted police officers to the presence of drugs. After appellant collected the luggage, police asked for consent to search. Appellant gave verbal consent to search. Upon opening the luggage, police discovered and subsequently seized twenty-one bundles of controlled substances packaged in a red Saran-type wrapping. Appellant was convicted by a jury for possession of cocaine in an amount weighing at least 400 grams and possession of marijuana in an amount weighing at least five pounds. In two related issues, appellant argues that the trial court erred by admitting evidence of the controlled substances and packaging because the State failed to establish the chain of custody required under Rule of Evidence 901. We have combined both issues for review.

Admissibility Standard

An appellate court reviewing a trial court's ruling on the admissibility of evidence must utilize an abuse-of-discretion standard of review. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). In other words, the appellate court must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Id.*

Texas Rule of Evidence 901 governs authentication. *See* TEX. R. EVID. 901. A party offering an item into evidence must establish to the trial judge's satisfaction that the item is what the party represents it to be. *Id.* When physical evidence does not have unique characteristics, a chain of custody may be required to prove that the item presented in trial is the same one involved in the events at issue. *Jackson v. State*, 968 S.W.2d 495, 500 (Tex. App.—Texarkana 1998, pet. ref'd). Likewise, a proper chain of custody must be established before the court admits results of scientific testing. *See, e.g., Smith v. State*, 450 S.W.2d 92, 94 (Tex. Crim. App. 1970); *Moone v. State*, 728 S.W.2d 928, 930

(Tex.App.—Houston [14th Dist.] 1987, no writ).

The chain of custody is conclusively established if an officer testifies that the item was seized, tagged, marked, placed in storage, and retrieved for trial. *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997). To conclusively establish the chain of custody regarding evidence sent to a laboratory for analysis, the proponent must introduce testimony showing the laboratory handled the evidence the same way. *See Medellin v. State*, 617 S.W.2d 229, 232 (Tex. Crim. App. [Panel Op.] 1981). However, where the State shows the beginning and the end of the chain of custody, any gaps in between affect the weight of the evidence rather than its admissibility, particularly where the chain goes inside the laboratory. *Id.*

A review of the record shows that officer D. Mitchell testified to seizing a total of twenty-one bundles of controlled substances at the airport on July 11, 1996. Mitchell testified that he had written a case number on each bundle shortly after seizure. He identified the number on each bundle admitted into evidence. Mitchell also retained exclusive possession until the bundles were delivered to police chemist Sharmishta Patel. Finally, Mitchell testified that he retrieved the bundles from Patel on the morning of trial and brought them to the court room. Patel testified that on July 11, 1996, she received twenty-one wrapped bundles from Mitchell which she tagged with her initials and placed in the evidence vault. On the following day, Patel retrieved and analyzed the contents of the bundles from the vault. The results of this analysis showed twenty of the bundles contained marijuana weighing 33 pounds and one contained cocaine weighing 933 grams (2 pounds).

Approximately three years after the analysis was performed, the parties were called for trial. Patel had previously planned a vacation; therefore, she arranged for police chemist Calene Gamble to re-analyze the substances and testify. Gamble retrieved the substances from the vault and began preparation for certain tests. Prior to performing a chemical analysis of the substances, however, Gamble discovered a problem with Patel's

previous analysis. Gamble immediately called Patel. As a result of this conversation, Patel cancelled her vacation and re-analyzed the substances. Patel testified that her second analysis of the same twenty-one bundles revealed that eighteen contained marijuana and three contained cocaine. Patel also testified that the weight of the substances in the second analysis showed 23.7 pounds of marijuana and 3,900 grams of cocaine (8.5 pounds).

After reviewing the evidence, we find that a minor gap in the State's chain of custody existed because chemist Gamble did not testify as to her brief possession of the substances. Nevertheless, the State showed a proper chain of custody from the point when officer Mitchell seized the substances and delivered them to chemist Patel, and his subsequent retrieval of the substances from Patel on the day of appellant's trial. Therefore, any gaps within the chain of custody affect the weight of the evidence rather than admissibility, absent a showing of tampering or alteration. *Medellin*, 617 S.W.2d at 232.¹

After considering appellant's tampering allegation based on the variance between Patel's two laboratory tests, we agree with the trial court's decision to admit the evidence. Appellant's tampering allegations are not persuasive. For example, when questioned about the variance between the first and second analysis of the substances, Patel offered the following answer:

I don't know how I made a mistake, but I did it. Like I missed two bundles that time I did not analyze [sic]. I mean, I maybe went again [to] the same bundle. I did 21 bundles but [by] mistake maybe I [analyzed] two bundles again instead of the other two bundles and I made a mistake and I did not analyze the two bundles of cocaine that time.

In addition, Patel testified that the two pound weight differential between the first and

¹ We reject appellant's argument that our decision in *Rodriguez v. State* compels us to reverse his conviction. See 2 S.W.3d 744 (Tex. App.—Houston [14th Dist] 1999, no pet.). In *Rodriguez*, the trial court revoked appellant's community supervision based partly on evidence that his urine contained traces of cocaine. *Id.* at 745. On appeal, however, this court reversed, reasoning that no chain of custody was established where the State's witnesses testified only to general procedures followed in taking urine samples as opposed to what procedures were actually used. *Id.* at 748. The present case is easily distinguishable because officer Mitchell and chemist Patel testified about the specific procedures they employed in handling the substances.

second analysis could have resulted from a drying effect which occurred over the three year period the substances were stored in the evidence vault. Patel's testimony provided a reasonable explanation for the variance between the two laboratory tests.

In conclusion, we find that the trial court did not abuse its discretion by admitting the marijuana, cocaine, and packaging. Additionally, the gap in the State's chain of custody created by chemist Gamble's short possession of the substances affects the weight of the evidence and not its admissibility. *Id.* Accordingly, we overrule appellant's two issues for review and affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed July 12, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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