Motion for Rehearing Granted, Affirmed, Opinion of September 30, 1999, Withdrawn and Substitute Majority and Concurring and Dissenting Opinions filed December 9, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-00990-CR

———————————

RODERIC WADDELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 746,237

MAJORITY OPINION ON REHEARING

The State's motion for rehearing is granted, the opinion issued in this case on September 30, 1999, is withdrawn, and the following opinion is issued in its place.

Roderic Waddell appeals a felony conviction for cocaine possession on the grounds that the trial court erred in: (1) denying a hearing on his motion for new trial and denying the motion; (2) refusing to suppress evidence of the cocaine seized from appellant; and (3) failing to quash one of the punishment enhancement paragraphs. We affirm.

Background

During a narcotics investigation at a hotel, a plain clothes police officer observed appellant and a female loading bags into a truck. As the truck passed the officer's unmarked car, he noticed that neither appellant nor the female passenger were wearing seatbelts and began to follow their vehicle. After observing other traffic violations and determining that the owner of the vehicle had two outstanding warrants, the officer radioed for a patrol car to pull the vehicle over. Subsequently, appellant was arrested for failing to produce a driver's license and proof of insurance. Crack pipes, syringes, powdered cocaine, and crack cocaine were found in the vehicle during the inventory search. After a search of appellant at the jail uncovered a small bag of powdered cocaine in his pants pocket, appellant was charged with possession of a controlled substance, found guilty by a jury, and sentenced to thirty years confinement.

Motion for New Trial

Appellant's first point of error argues that the trial court erred in overruling his motion for a new trial without conducting a hearing because the motion was supported by an affidavit describing juror misconduct. His second point of error contends that the trial court abused its discretion in overruling the motion for new trial based on jury misconduct.

Appellant's motion for new trial alleged that the jury weighed appellant's silence heavily against him and improperly determined the weight of the contraband by a compromise verdict rather than from the evidence. The motion was accompanied by the affidavit of one of the jurors. However, because the trial court denied appellant's request to hold a hearing on the motion, the parties had no opportunity to question and cross examine the jurors. Therefore, we lack a sufficient record to determine that the denial of the motion was in error, and overrule appellant's second point of error. We thus turn to a review of the denial of a hearing on the motion for new trial.

For all proceedings on or after March 1, 1998, upon an inquiry into the validity of a verdict, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. *See* TEX. R. EVID. 606(b). Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence

for any of these purposes. *See id*. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve. *See id*.

Although this version of rule 606(b) was not in effect in 1997 when appellant's motion for new trial was filed and denied, it would govern any future proceeding that would be held if this case were remanded. Because the grounds and evidence relied upon by appellant to support his motion for new trial would be precluded from consideration by rule 606(b), no useful purpose could be served by remanding this case for a hearing on the motion for new trial based on the grounds asserted by appellant. Accordingly, appellant's first point of error is overruled.

Suppression of Evidence

Appellant's third point of error argues that the trial court erred in refusing to suppress evidence of the cocaine found on his person because the initial traffic stop was fabricated in order to produce an arrest that would allow a search of appellant and the vehicle.

A trial court's ruling on a motion to suppress is generally reviewed for abuse of discretion. *See Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999). In making such reviews, we afford almost total deference to trial courts' determinations of historical facts supported by the record and their rulings on application of law to fact questions, also known as mixed questions of law, when those fact findings and rulings are based on an evaluation of credibility and demeanor. *See Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998). We review *de novo* mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor. *See id* at 773.[1] In reviewing a trial court's ruling on mixed questions of law and fact, we view the evidence in the light most favorable to the trial court's ruling. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

---

[1] On the one hand, the Court of Criminal Appeals has stated that an abuse of discretion standard does not necessarily apply to application of law to fact questions the resolution of which does not turn on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). On the other hand, the Court has recognized that a misapplication of the law to the facts of a particular case is a *per se* abuse of discretion. *See State v. Ballard*, 987 S.W.2d 889, 893 (Tex. Crim. App. 1999).

In this case, appellant acknowledges that: (1) an objectively valid traffic stop is not made unlawful by the fact that the detaining officer has an ulterior motive for making it;[2] (2) an officer testified that he observed appellant driving without wearing a seat belt; (3) failing to wear a seat belt is a traffic law violation which, if observed by an officer, is a valid ground to make a traffic stop;[3] (4) an officer testified that, after pulling appellant over, appellant failed to produce a driver's license; and (5) failures to wear a seat belt and produce a driver's license are offenses for which an officer observing them may validly make a warrantless arrest.[4] Although appellant challenges the credibility of the officers' testimony that they observed appellant commit the traffic violations, he does not challenge the sufficiency of that evidence and did not offer any controverting evidence. Because the credibility of the evidence is beyond the scope of our review, and because appellant's third point of error does not demonstrate that the denial of his motion to suppress resulted from error by the trial court in either finding facts or applying the law to them, the point of error is overruled.

Enhancement

Appellant's fourth point of error argues that the trial court erred in failing to quash the second punishment enhancement paragraph of his indictment because it alleged merely that "[appellant] *committed* the felony of [drug possession] and *was convicted . . . .*" but does not specifically state the offense of which he was convicted. Appellant contends that this constituted a failure to allege a necessary element of the offense which rendered the indictment fundamentally defective. *See Ex parte Abbey*, 574 S.W.2d

---

2 *See Whren v. U.S.*, 116 S.Ct. 1769, 1774 (1996); *Crittenden v. State*, 899 S.W.2d 668, 674 (Tex. Crim. App. 1995).

3 *See* TEX. TRANSP. CODE ANN. § 545.413(a) (Vernon Supp. 1998) (a person commits an offense if they are over age 15 and ride in the front seat of a passenger car without wearing a safety belt); *Armitage v. State*, 637 S.W.2d 936, 939 (Tex. Crim. App.1982) (reciting that a traffic violation committed in an officer's presence authorizes an initial stop).

4 *See* TEX. TRANSP. CODE ANN. § 521.021 (Vernon Supp. 1998) (a person may not operate a motor vehicle on a highway unless he holds a valid driver's license); *id.* § 521.025(a), (c) (a driver who violates the requirement to have a driver's license in his possession while operating a vehicle or to display the license on the demand of a peace officer commits an offense); *id.* § 543.001 (a peace officer may, without a warrant, arrest a person found committing a violation under subtitle C); TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977) (a peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view).

104, 105-06 (Tex. Crim. App. 1978) (holding that the omission of an element of the *charged* offense rendered the information fatally defective).

Prior to the 1985 amendments to the Texas Constitution, the failure of a charging instrument to allege all of the elements of an offense was a fundamental defect that deprived the trial court of jurisdiction and could be raised for the first time on appeal. *See Ex parte Patterson*, 969 S.W.2d 16, 18 (Tex. Crim. App. 1998); *Cook v. State*, 902 S.W.2d 471, 476 (Tex. Crim. App. 1995). Even then, however, it was not necessary to allege prior convictions for enhancement of punishment with the same particularity as was required for pleading the charged offense. *See Cole v. State*, 611 S.W.2d 79, 80 (Tex. Crim. App. 1981). Moreover, if the sufficiency of such punishment allegations were to be challenged on appeal, the defendant must have made a proper motion to quash the enhancement portion of the indictment at the trial court. *See id*.

Since the 1985 amendments to the Texas Constitution, the omission of an element of the charged offense is a substantive defect that renders the charging instrument subject to a motion to quash but, in the absence of a pretrial objection, does not prevent the instrument from supporting a conviction. *See Patterson*, 969 S.W.2d at 19; *Cook*, 902 S.W.2d at 477. Therefore, so long as a charging instrument purports to charge an offense against a specified person,[5] a defendant must now object to any defects of substance or form in the charging instrument prior to the day of trial, or they are waived and may not be raised on appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1998).

In this case, the jury was empaneled and the trial commenced on August 25, 1997, and appellant filed his motion to quash the second enhancement paragraph on August 27, 1997. When appellant filed his motion to quash, the jury was already deliberating on the guilt or innocence of appellant. Because appellant failed to object to the alleged defect in the indictment before trial, his complaint was not preserved.

However, citing *Luken*, appellant argues that his failure to raise a pre-trial objection to the enhancement paragraph did not waive the complaint because an accused is not required to complain that he faces too *lenient* a punishment. *See Luken v. State*, 780 S.W.2d 264, 268 (Tex. Crim. App. 1989).

---

5 *See Patterson*, 969 S.W.2d at 19; *Cook*, 902 S.W.2d at 477.

However, *Luken* held only that a failure to allege the use or exhibition of a deadly weapon was not a defect in an indictment because it went beyond what was required to charge a person with the commission of the charged offense. *See id.* Where no such allegation is made, the accused cannot know to object to it until the issue arises when a question is submitted to the jury or an affirmative finding is made by the trial court. *See id.* In this case, the enhancement paragraph was set forth in the indictment. Unlike the indictment in *Luken*, the indictment in this case put appellant on notice of what the State was seeking. Therefore, appellant's reliance on *Luken* is misplaced, his fourth point of error is overruled, and the judgment of the trial court is affirmed.

Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).

Motion for Rehearing Granted, Affirmed, Opinion of September 30, 1999, Withdrawn and Substitute Majority and Concurring and Dissenting Opinions filed December 9, 1999.

In The

Fourteenth Court of Appeals

———————

NO. 14-97-00990-CR

———————

RODERIC WADDELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 746,237

CONCURRING AND DISSENTING OPINIONS

Denial of Hearing on Motion for New Trial

This court originally reversed and remanded for a hearing on the jury misconduct issue. On rehearing, the majority compounds the trial court error by again denying appellant an opportunity to be heard on his motion for new trial. Without a hearing on the alleged jury misconduct, appellant's substantive and procedural due process rights are denied. The majority maintains the newly applicable version of TEX.

R. EVID. 606(b) precludes any evidence appellant might offer and therefore no useful purpose "could be served by remanding" the case for hearing on the motion for new trial. I disagree for several reasons.

A retroactive law is prohibited by the Texas Constitution.[1] *See* TEX. CONST. Art. I, § 16. This case was tried in 1997 before the March 1, 1998 effective date of new rule 606(b). As set out below, the applicable law at the time of the judgment required the trial judge to conduct a hearing to determine the presence vel non of jury misconduct. The alleged jury misconduct affected a substantial right of appellant, the right under the United States constitution against self-incrimination and the broader right under the Texas constitution against giving evidence against himself.[2] Accordingly, I would hold the retroactive application of this law violates a vested substantive right. *Weaver v. Graham,* 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)[3]; *Cf. Fowler v. State,* 991 S.W.2d 258 (Tex. Crim. App. 1999).

Procedural due process requires appellant be given the opportunity both to have a hearing on his jury misconduct claim and to constitutionally challenge the abrupt end to long-lived Texas common law on jury misconduct.[4] Both the United States and Texas Constitution forbid the taking of liberty without due process of law. Procedural due process dictates a person be given: 1. notice of the "case against him;" 2.

---

[1] When a retroactive law has the effect of entirely foreclosing all remedies, it may be unconstitutional, even if it merely pertains to a rule. *Church v. Crites,* 370 S.W.2d 419, 421 (Tex. Civ. App.--San Antonio 1963, writ ref'd n.r.e.) (citing *Collins v. Warren*, 63 Tex. [311] 314 (1885) (a new law cannot take away all remedies previously existing, but must leave a substantial one according to the course of justice) (citations omitted). Here, the majority in its substituted opinion admits the new Rule 606(b) has eliminated appellant's remedy of challenging improper jury conduct by asserting "no useful purpose could be served by remanding this case for a motion for new trial on the grounds asserted by appellant."

[2] It also denied him the fundamental right to a fair and impartial jury.

[3] Holding that even if statute alters penal provisions accorded by the grace of the legislature, it violates *Ex Post Facto* Clause if it is both retrospective and more onerous than the law in effect on the date of the offense; the effect, not the form of a law determines if it is *ex post facto*.

[4] In *Jackson v. Golden Archery, Inc.*, 974 S.W.2d 952 (Tex. App.–Beaumont 1998, pet. granted), the court recently ruled TEX. R. CIV. P. 327(b) unconstitutional. That rule and Rule 606(b) are nearly identical in that they both prohibit a juror from testifying to any matter or statement occurring during deliberations. *But see Hines v. State*, No. 06-98-00283-CR, slip op., 1999 WL 669210, at *4 (Tex. App.–Texarkana, Aug. 30, 1999, no pet. h.) (Rule 606(b) not unconstitutional), and *Soliz v. Saenz*, 779 S.W.2d 929 (Tex. App.–Corpus Christi 1989, writ denied) (TEX. R. CIV. P. 327(b) not unconstitutional).

the opportunity to be heard at a meaningful time and manner, *before* the termination of a benefit; and 3. to include an evidentiary hearing. *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d. 18 (1976).[5] The majority strips appellant of these opportunities.

When a longstanding rule is changed midstream in a case, fundamental fairness argues against retroactive application. *Chase Commercial Corp. v. Datapoint Corp.*, 774 S.W.2d 359, 362 (Tex. App.–Dallas 1989, no writ). This is especially true when the relative unforeseeability of a change in the law is contrasted with its longstanding nature. *See id*. Similarly, even if the trial court were constrained by the new evidentiary rule, I would never underestimate the ingenuity of Texas trial lawyers to fashion a new tool with which to unearth the truth and expose this potential jury misconduct.[6]

I believe the majority originally correctly recited the then existing law which the trial court failed to apply in refusing a hearing on the motion for new trial. That law was well set out by the majority's original opinion *before* rehearing. I reiterate that holding here, with full credit to my distinguished colleague.[7]

A hearing on a motion for new trial is not necessary if the court can determine from the record the issues raised in the motion for new trial. *See Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993). However, a hearing is required if an appellant presents a timely, verified motion for new trial and demonstrates in an affidavit reasonable grounds for relief which are extrinsic to the record. *See Jordan*

---

[5] Citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 287 (1970) ("pretermination hearing must include the following elements: (1) 'timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity (for the recipient) to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally'; (3) retained counsel, if desired; (4) an 'impartial' decision maker; (5) a decision resting 'solely on the legal rules and evidence adduced at the hearing'; (6) a statement of reasons for the decision and the evidence relied on.")

[6] Example: if appellant is granted a remand to the trial court, he would be permitted to prove jury misconduct through testimony of a non juror with personal knowledge of the misconduct. *See Sanders v. State*, 1 S.W.3d 885 (Tex. App.--Austin 1999, no pet. h.); *Mayo v. State*, 708 S.W.2d 854, 856 (Tex. Crim. App. 1986) (witness permitted to testify regarding telephone conversation with juror). Alas, this court's refusal to remand the case forecloses these and all other established methods of proof that should have been available to appellant under Texas law.

[7] Attribution for all before this point is mine; responsibility for all after this point is likewise mine but I see no need to re-write a well written and reasoned work.

v. State, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994); *Reyes*, 849 S.W.2d at 816.[8] The purpose of the hearing is to develop the issues raised in the motion for new trial. *See Jordan*, 883, S.W.2d at 665. Therefore, the affidavit need not reflect every component legally required to establish relief, only reasonable grounds for holding that such relief could be granted. *See Reyes*, 849 S.W.2d at 816.

A new trial must be granted when the jury has decided the verdict by lot or in any manner other than a fair expression of the jurors' opinion or has engaged in such misconduct that the accused has not received a fair and impartial trial. *See* TEX. R. APP. P. 21.3(c), (g). In this case, appellant's motion for new trial alleged that the jury weighed appellant's silence heavily against him and improperly determined the weight of the contraband by a compromise verdict rather than from the evidence.

As to the first allegation, the failure of a defendant to testify must not be taken as a circumstance against him. *See* TEX. CRIM. PRO. ANN. art. 38.08 (Vernon 1979). However, a casual reference by the jury during deliberations to the failure of the accused to testify does not vitiate the verdict. *See Powell v. State*, 502 S.W.2d 705, 711 (Tex. Crim. App.1973); *see also Garcia v. State*, 887 S.W.2d 862, 882-83 (Tex. Crim. App. 1994). Rather, to constitute reversible error, such a reference must amount to a discussion by the jurors or be used as a circumstance against the accused. *See Powell*, 502 S.W.2d at 711.

In this case, appellant's motion for new trial was accompanied by the affidavit of one of the jurors which stated, in part:

> [A]s jurors were determining [appellant's] guilt or innocence some of the jurors took into account and discussed repeatedly the fact that [appellant] didn't testify on his own behalf. There was one juror who on at least three different occasions kept bringing up the fact that [appellant] didn't testify or defend himself and this fact bothered him. I was the only person on the panel that spoke out and said that we weren't suppose [sic] to consider whether [appellant] testified or not. The foreman didn't back me up on the issue and he

---

[8] Because the order on appellant's motion for new trial is signed and there is also a handwritten note from the judge denying a hearing on the motion, presentment of the motion is not an issue in this case. *See Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998) (holding that the record must show that the movant brought the motion for new trial to the attention of the trial court by such things as obtaining the trial court's ruling on the motion for new trial).

> just kind of shrugged his shoulders and half way nodded when I spoke out and looked at him. This issue turned into a discussion and I tried to stifle the issue when another female juror who appeared annoyed with me said that she didn't know why it couldn't be considered. The discussion continued and comments like, I would be screaming it to the heavens or shouting it to the heavens that I was innocent were made. Other comments that were made were that it really bothers me that he didn't say anything and why didn't he tell somebody if he was innocent. The discussion was going around the room between jurors and when it came time for the foreman to say something he (the foreman) said that he agreed with Nick. The foreman looked at me and told me that he knew he wasn't suppose [sic] to talk about it, but they continued talking about it. Nick was the juror who was initially bothered by the fact that [appellant] didn't defend himself.
>
> * * * *
>
> There was discussion on the possibility that maybe some drugs were planted on [appellant] and it really bothered the jurors that [appellant] didn't testify.

The foregoing affidavit provided adequate grounds to believe that the jurors' references to appellant's failure to testify could have: (i) amounted to a discussion by the jurors; or (ii) been used as a circumstance against him such that a hearing on the motion was required. Therefore, appellant's first point of error should be sustained, and therefore need not address his second point of error challenging the denial of his motion for new trial.

Accordingly, I would reverse the trial court's order denying a hearing on appellant's motion for new trial, remand the case for a hearing on the motion for new trial, and affirm the denial of appellant's motions to suppress and to quash the second punishment enhancement paragraph of his indictment.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Amidei, Edelman and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).