

ISSUE

Does failure to investigate, subpoena or call a witness for trial

STATEMENT OF THE CASE

Appellant, Lathaniel Haney, Jr. (“Haney”), appeals from his criminal convictions for simple possession of a Schedule II narcotic and delivery of a Schedule II narcotic after a jury trial on September 12, 2007 and the trial court’s denial of his motion for new trial on November 19, 2008. Haney was indicted on March 6, 2007 in a two (2) count presentment in the Cocke County Circuit Court No. 0380 for sell of a narcotic in Count 1, and delivering a narcotic in Court 2 in violation T.C.A. 39-17-417. Haney was sentenced to fifteen (15) years confinement as a Range IV (career) offender on December 11, 2007. TR pp. 91-92. Haney filed a motion for new trial and an amended motion for new trial. TR pp. 96-97, 104-105.

STATEMENT OF FACTS

Defendant was indicted on March 6, 2007 on a two (2) count presentment in the Cocke County Circuit Court No. 0380 for sell of a narcotic in Count 1, and delivering a narcotic in Court 2 in violation of the same statute, T.C.A. 39-17-417. The indictment alleges that the sell and the delivery occurred on or about November 28, 2006, with the same drug. The defendant was tried by a jury on September 12, 2007. The defendant was found not guilty on Count 1, but guilty on Count 2 of the multi-count indictment.

At trial and after presentation of the case to the jury, defendant moved for a mistrial after discovering that some jurors were sleeping during important evidence. The court denied the motion for a mistrial. Defendant was convicted in Count 1 of simple possession of a narcotic, being a class A misdemeanor, and in Count 2 of delivery of a weighing less than .5 grams being

a class C felony. The trial court sentenced the defendant to fifteen (15) years confinement as a Range IV (career) offender on December 11, 2007. TR pp 91-92.

Defendant filed a motion for a new trial and amended motion for a new trial which were heard on December 16, 2008. The court denied the motion, but made findings that “some members of the jury were sleeping” and the “defendant was likely under the influence of drugs or other intoxicants” at his trial on September 12, 2007. TR pp. 110-111.

STATEMENT OF THE CASE

The State entered an audio recording of an alleged drug transaction, however, the Defendant contends that an such transaction was a casual exchange. Mr. Haney was acquainted with the confidential informant, Hicks, and Hic

ARGUMENT

I. Sleeping Jurors

Defendant contends that the judgment of the trial court should set aside because he did not have a trial as decribed by law. Jurors were sleeping during the trial and not giving proper attention to all evidence that was presented at trial. Specifically, defendant’s case was based on listening to the audio recording in the alleged drug transaction, which requires absolute attention to discrepancies, inconsistencies and statements by the confidential informant.

The trial court found that members of the jury were sleeping were identified prior to defendant moving for a mistrial and were removed from the jury panel. There were several members of the jury inattentive, but only two (2) were easily identified. The court room was hot in September, 2007 and the jury had returned from lunch after the presentation of the majority of the State’s case-in-chief. Members of the jury became

II. Inconsistent Verdict

Defendant contends that the jury verdicts are inconsistent. The defendant was indicted and tried on two (2) counts of that involve the same set of circumstances, and occurred at the same time. Further, the facts do not change in the proof. The two (2) counts are both contained as a violation of the same crime as codified at Tennessee Code Annotated Section 39-17-417.

The statute reads in part:

Offenses; violations, fines; habitual drug offenders

(a) It is an offense for a defendant to knowingly:

(1) Manufacture a controlled substance;

(2) Deliver a controlled substance;

(3) Sell a controlled substance; or

(4) Possess a controlled substance with intent to manufacture, deliver or sell the controlled substance.

The jury returned a not guilty verdict on Count 1, sell of a controlled substance. The jury convicted the defendant of the lesser included offense of simple possession in Count 1. The offense of simple possession and casual exchange are codified together in one part that reads as in pertinent part:

§ 39-17-418. Simple possession; casual exchange

(a) It is an offense for a person to knowingly possess or casually exchange a controlled substance, . . .

(c) Except as provided in subsections (d) and (e), a violation of this section is a Class A misdemeanor.

The jury found the defendant guilty of on Count 2 for violating the same statute. Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to

another of a controlled substance, whether or not there is an agency relationship. T.C.A. 39-17-402.

The verdicts are inconsistent because the charges should merge by operation of law. The conviction on the lesser included offense of simple possession in Count 1 should operate as an acquittal on the greater charge in Count 2, delivery of a narcotic. *State v. Turnbull*, 640.

III. Double Jeopardy

The elements of the charges in Counts 1 and 2 are the same. The court reasoned that a casual exchange is based on a friendly gesture. *State v. Prince*, 713 S.W.2d 914, 918 (Tenn. Crim. App. 1986). Also, a casual exchange can involve money. *State v. Helton*, . In this case, the confidential informant testified that she knew the defendant for some time, she purchased a candy bar for him, and smoked cocaine during the alleged transaction. *Trans* .

IV. Insufficient Evidence

Defendant contends that insufficient evidence exists to convict him on Count 2, delivery of a controlled substance. The detective, Ron Seals, testified that the contraband in this matter only weighed two-tenths (.2) gram. Transcript p. 56 p. 23. “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. T.C.A. 39-17-402.

§ 39-17-419. Inferences

It may be inferred from circumstances indicating a casual exchange among individuals of a small amount of a controlled substance or substances that the controlled substance or substances so exchanged were possessed not with the purpose of selling or otherwise dispensing in violation of the provisions of § 39-17-417(a). The inferences shall be transmitted to the jury by the trial judge's charge, and the jury will consider the inferences along with the nature of the substance possessed when affixing the penalty.

