IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0576-16

BURT LEE BURNETT, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS TAYLOR COUNTY

KELLER, P.J., filed a dissenting opinion in which YEARY and KEEL, JJ., joined.

I would hold that the jury instruction regarding intoxication by a controlled substance was proper because the evidence was sufficient to show that appellant was under the influence of hydrocodone, an intoxicating drug. The Court contends that the evidence is insufficient to show that some of the pills possessed by appellant were hydrocodone. I disagree. The video of the stop was played for the jury. Officer Coapland retrieved a bag of pills from Appellant's pocket and asked Appellant, "What's in the bag?" Appellant responded, "I don't know." Officer Coapland then

handed the bag of pills to Officer Allred. Officer Allred verbally identified the pills as "hydrocodone."[1] Eleven seconds later, Officer Allred asked Appellant, "Do you have a prescription for that?"[2] Appellant replied, "Yes." This interaction provided sufficient evidence from which a jury could conclude that the pills were hydrocodone. Officer Allred's identification of them as such is some evidence from which a jury could conclude they were hydrocodone, and Appellant's affirmative answer to the question of whether he had a prescription "for that," without disputing the officer's characterization of the pills as hydrocodone, is an implicit admission that they were.

The Court also contends that there is insufficient evidence that hydrocodone is an intoxicating substance. Again, I disagree. "Hydrocodone is the generic name for a common, widely distributed, opioid narcotic analgesic, which is produced in various combinations under brand names such as Lorcet, Lortab, and Vicodin."[3] The Supreme Court of Ohio has recently held, "When the effects of a drug are sufficiently well known—as they are with hydrocodone—expert testimony linking ingestion of the drug with indicia of impairment is unnecessary."[4] It is true that we held in *Smithhart v. State* that "[u]nlike alcohol intoxication, which is 'of such common occurrence' that its recognition requires no expertise . . ., this court is unable to say that such is the case with being under the influence of drugs."[5] But that holding, issued over 43 years ago, is outdated, at least with

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[1] *See* Video at 16:24.

[2] *See* Video at 16:36.

[3] *United States v. Brown*, 553 F.3d 768, 773 n.1 (5th Cir. 2008).

[4] *State v. Richardson*, ___ N.E.3d ___, 2016 WL 7645344, *4 (Ohio December 29, 2016). *See also Montero v. State*, 996 So.2d 888, 891 (Fla App. 2008) ("Hydrocodone and alprazolam are two widely-abused prescription drugs that have well-known intoxicating effects.").

[5] 503 S.W.2d 283, 286 (Tex. Crim. App. 1973).

respect to hydrocodone. I would follow the lead of the Supreme Court of Ohio and hold that a rational jury could conclude that hydrocodone is a drug that is capable of producing intoxication without specific testimony to that effect.

There was also some evidence before the jury that hydrocodone was an intoxicating substance. On cross-examination, defense counsel showed Officer Coapland a document produced by the National Highway Traffic Safety Administration. The following colloquy occurred:

> Q. It talks about narcotic – I think it's analgesic?
>
> A. Analgesics.
>
> Q. Analgesics, okay. And if we go down just a little bit, it talks about what one of those is, type, example. Hydrocodone would be one of them?
>
> A. Correct.
>
> Q. All right, and up there, (indicating), it, uh – we're still under analgesics, right?
>
> A. Correct.
>
> Q. It says, (reading), "Eye indicators" –
>
> A. Correct.
>
> Q. – "for somebody intoxicated by an analgesic."
>
> A. Correct.

The status of hydrocodone as an intoxicating substance makes *Ouellette*[6] controlling in this case; consequently, it was not error to refer to a controlled substance in the jury charge.

I respectfully dissent.

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Publish

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[6] *Ouellette v. State*, 353 S.W.3d 868 (Tex. Crim. App. 2011).