PD-0474-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 5/11/2018 3:49 PM
Accepted 5/11/2018 3:59 PM
DEANA WILLIAMSON
CLERK

No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/11/2018
DEANA WILLIAMSON, CLERK

ADRIAN PARKER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Gregg County
06-17-00167-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

EMILY JOHNSON-LIU
Assistant State's Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Adrian Parker.

* The trial judge was Hon. David Brabham, Presiding Judge, 188th District Court, 101 E. Methvin, Suite 408, Longview, Texas 75601.

* Counsel for Appellant at trial was Rick Berry, Berry & Berry, 111 West Austin Street, Marshall, Texas 75670.

* Counsel for Appellant on appeal was Hough-Lewis ("Lew") Dunn, 201 E. Methvin, Suite 102, Longview, Texas 75601.

* Counsel for the State at trial were Tanya Reed and Debbie Garrett, Assistant Criminal District Attorneys, Gregg County Criminal District Attorney's Office, 101 E. Methvin, Suite 333, Longview, Texas 75601.

* Counsel for the State before the court of appeals was John J. Roberts, Assistant Criminal District Attorney, Gregg County Criminal District Attorney's Office, 101 E. Methvin, Suite 333, Longview, Texas 75601.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ADRIAN PARKER, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review.

The court of appeals decided two issues currently pending review in this Court: (1) whether possession with intent to deliver is a predicate offense for engaging in organized criminal activity (EOCA)[1] and, if so, (2) whether the EOCA conviction can be reformed to the wrongly alleged predicate offense.[2] The recurrence of cases like this underscores the need for final, statewide resolution of these issues.

---

[1] *Hughitt v. State*, Nos. PD-0275-18 & PD-0276-18 (pet. pending, filed Mar. 13, 2018).

[2] *Walker v. State*, No. PD-0399-17 (pet. granted; case submitted Feb. 28, 2018)

STATEMENT REGARDING ORAL ARGUMENT

The State does not request argument.

STATEMENT OF THE CASE

Appellant pled guilty without a plea bargain to four counts, including one count of engaging in organized criminal activity (EOCA) with possession of a controlled substance with intent to deliver as the predicate offense. CR at 111. On appeal, Appellant challenged his conviction for EOCA on the ground that possession with intent to deliver is not a predicate offense for EOCA. The court of appeals agreed, acquitted Appellant of that offense, and held that the conviction was not susceptible to reformation under *Thornton v. State*, 425 S.W.3d 289 (Tex. Crim. App. 2014).[3]

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion on April 11, 2018. *Parker*, 2018 WL 1733969. This petition is timely filed on May 11, 2018.

(contesting remedy only, where the State Prosecuting Attorney assumed that possession with intent to deliver was not a proper predicate).

[3] *Parker v. State*, No. 06-17-00167-CR, 2018 WL 1733969, at *4 & n.8 (Tex. App.—Texarkana Apr. 11, 2018) (not designated for publication).

GROUNDS FOR REVIEW

1. Is "possession with intent to deliver" a predicate offense for engaging in organized criminal activity because it falls within "unlawful manufacture, delivery . . . of a controlled substance," which is one of EOCA's enumerated predicate offenses?

2. Can an EOCA conviction predicated on an offense that is not a predicate be reformed to that necessarily subsumed offense?

ARGUMENT

I. Issue 1: Status of the offense as a predicate

A. Possession with intent to deliver falls within "unlawful manufacture, delivery."

This Court should decide whether possession with intent to deliver is a predicate offense for EOCA. The statute lists the offenses that qualify, and, relevant here, it includes:

> (5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception;

TEX. PENAL CODE § 71.02(a)(5). While "possession with intent to deliver" is not specifically named, two potentially relevant phrases appear in the statute: "possession of a controlled substance . . . through forgery, fraud, misrepresentation, or deception" and "unlawful manufacture, delivery, dispensation, or distribution of a controlled substance." *Id.* The court of appeals reasoned that the statute's only mention of drug possession requires "possession through forgery, fraud,

misrepresentation, or deception," and since possession with intent to deliver does not include any of these fraudulent elements, it cannot qualify. *Parker*, 2018 WL 1733969, at *3. But the court of appeals erred in ending its analysis there. Because possession with intent to deliver is a statutory manner and means of "Manufacture or Delivery,"[4] it should qualify under the enumerated predicate offense of "unlawful manufacture, delivery . . . of a controlled substance." TEX. PENAL CODE § 71.02(a)(5). As explained below, that interpretation is consistent with the rest of the statute's structure and the laws in effect when EOCA was enacted.[5]

B. "Unlawful manufacture, delivery" refers to an entire statute.

EOCA criminalizes having the intent to establish or participate in a combination or street gang and committing or conspiring to commit "one or more of the following:"

> (1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, continuous sexual abuse of

---

[4] TEX. HEALTH & SAFETY CODE §§ 481.112(a), 481.1121(a), 481.113, 481.114, 481.119; *Weinn v. State*, 326 S.W.3d 189, 194 (Tex. Crim. App. 2010); *Lopez v. State*, 108 S.W.3d 293, 297 (Tex. Crim. App. 2003) ("[T]here are at least five ways to commit an offense under Section 481.112," including possession with intent to deliver).

[5] In interpreting a statute, courts should focus on the statute's literal text "to discern the fair, objective meaning of that text *at the time of its enactment*." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (emphasis added).

young child or children, solicitation of a minor, forgery, deadly conduct, assault punishable as a Class A misdemeanor, burglary of a motor vehicle, or unauthorized use of a motor vehicle;
(2) any gambling offense punishable as a Class A misdemeanor;
(3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;
(4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons;
(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception;
(5-a) causing the unlawful delivery, dispensation, or distribution of a controlled substance or dangerous drug in violation of Subtitle B, Title 3, Occupations Code;
(6) any unlawful wholesale promotion or possession of any obscene material or obscene device with the intent to wholesale promote the same;
(7) any offense under Subchapter B, Chapter 43,[1] depicting or involving conduct by or directed toward a child younger than 18 years of age;
(8) any felony offense under Chapter 32;
(9) any offense under Chapter 36;
(10) any offense under Chapter 34, 35, or 35A;
. . . .

Id. § 71.02(a) (1)-(10). Of the original five categories of predicate offenses, nearly all are listed by their section heading.[6] "Murder" is the heading for Penal Code § 19.02, "capital murder" is the heading for Penal Code § 19.03, and so on. Section

[6] While the "heading of a . . . section does not limit or expand the meaning of a statute," TEX. GOV'T CODE § 311.024, the legislature sometimes uses headings as cross-references to other statutes. *See, e.g.*, TEX. PENAL CODE § 30.02 (defining burglary to include entering a habitation with intent to commit "theft or an assault").

71.02(a)(5) should be interpreted in a consistent manner. Thus, the offenses listed there naturally refer to entire offenses, like "Manufacturer or Delivery of Substance in Penalty Group 1."[7]

The other possibility, which the court of appeals adopted in *State v. Foster*, is to interpret "unlawful manufacture, delivery . . . of a controlled substance" as specifying only the "manufacture" or "delivery" manner and means of the umbrella offense. No. 06-13-00190-CR, 2014 WL 2466145, at *2 (Tex. App.—Texarkana June 2, 2014, pet. ref'd on this issue) (not designated for publication). This has facial appeal because, as the statute currently reads, the predicate offenses are not only listed by section heading. Sometimes the statute refers to entire chapters or only certain manners of committing an offense. Only Class A gambling offenses qualify, for instance. So it might make sense that the Legislature was intending to limit the more general offense of "Manufacture or Delivery" to a subset of what that umbrella offense covers.

But this interpretation is not consistent with how the Legislature would have understood the phrase "unlawful manufacture, delivery" at the time it was written.

---

[7] TEX. HEALTH & SAFETY CODE § 481.112.

When EOCA was enacted in 1977,[8] there was a single, comprehensive offense with the heading "Unlawful Manufacture or Delivery of Controlled Substances."[9] It provided that "a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1, 2, 3, or 4."[10]

The Legislature is presumed to know the law on related matters and should be able to assume that new legislation will be interpreted *in pari materia* with existing law. This is part of a textualist approach. *See* Antonin Scalia & Bryan A. Garner *Reading Law: The Interpretation of Legal Texts* 252 ("Related Statute Canon"). Given the identical language in the original heading for manufacture or delivery and

---

[8] Act of 1977, 65th Leg., R.S., ch. 346, § 1, 1977 Tex. Gen. Laws 922 (S.B. 151) (effective June 10, 1977), attached as Appendix B.

[9] Act of 1973, 63rd Leg., R.S., ch. 429, § 4.03, 1973 Tex. Gen. Laws 1132, 1153 (H.B. 447) (effective Aug. 27, 1973) (originally at TEX. REV. CIV. STAT. art. 4476-15 § 4.03 and recodified at TEX. HEALTH & SAFETY CODE §§ 481.112, 481.113, 481.114), attached as Appendix C.

[10] *Id*. Likewise, there was a single, comprehensive offense behind § 71.02(a)(5)'s reference to possessing a controlled substance "through forgery, fraud, misrepresentation, or deception," namely TEX. REV. CIV. STAT. art. 4476-15 § 4.09(a)(3) (prohibiting possession of a controlled substance "by misrepresentation, fraud, forgery, deception, or subterfuge.") (recodified at TEX. HEALTH & SAFETY CODE § 481.129(a)(5)) (cited in *State v. Colyandro*, 233 S.W.3d 870, 883 (Tex. Crim. App. 2007)).

the use of headings in the other parts of § 71.02(a) to refer to statutory offenses, the reference to "unlawful, manufacture . . . of a controlled substance" should be interpreted to include possession with intent to deliver.

It would also be consistent with this Court's interpretation in *Nichols v. State*, decided nearer to the time of enactment. 653 S.W.2d 768, 771 (Tex. Crim. App. 1981). Nichols argued that "delivery" and "controlled substance" in § 71.02(a)(5) were vague terms because they were undefined in the penal code. This Court rejected the argument and explained:

> We think it obvious that the references of Sec. 71.02(a)(5) to 'unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception' are necessarily references to those offenses as defined in the Controlled Substances Act and the Dangerous Drugs Act.

Id. None of the courts deciding this issue considered *Nichols*.

C. This is a recurring issue warranting statewide resolution.

In deciding this issue, the court of appeals relied on its earlier decision in *Foster*, 2014 WL 2466145, and two other courts of appeals decisions: *Hughitt v. State*, Nos. 11-15-00277-CR & 11-15-00278-CR, 2018 WL 827227 (Tex. App.—Eastland Feb. 8, 2018), and *Walker v. State*, No. 07-16-00245-CR, 2017 WL 1292006 (Tex. App.—Amarillo, Mar. 30, 2017, pet. granted). Numerous other prosecutions for EOCA have alleged possession with intent to deliver as the

predicate offense.[11] While the legitimacy of the predicate offense was not raised in these cases (except for *Horne*), their convictions have been affirmed.

This Court should interpret § 71.02(a)(5) to provide clarity and consistency for prosecutions of this kind across the State.

II. Issue 2: Remedy

2. Can an EOCA conviction predicated on an offense that is not a predicate be reformed to that necessarily subsumed offense?

This is the same issue pending in *Walker*, PD-0399-17 (submitted Feb. 28,

---

[11] *See Burt v. State*, No. 11-15-00125-CR, 2017 WL 3923484, at *2 (Tex. App.—Eastland, Aug. 31, 2017, pet. ref'd on other grounds) (not designated for publication); *Williams v. State*, No. 11-12-00103-CR, 2014 WL 3865786, at *1 (Tex. App.—Eastland July 31, 2014, no pet.) (not designated for publication); *Willis v. State*, No. 11-10-00224-CR, 2012 WL 3525622, at *1 (Tex. App.—Eastland Aug. 16, 2012, no pet.) (not designated for publication); *Horne v. State*, No. 07-07-0498-CR, 2009 WL 649702, at *3 (Tex. App.—Amarillo Mar. 13, 2009, pet. ref'd) (not designated for publication) (finding counsel not ineffective for failing to file motion to quash indictment alleging possession with intent to deliver as predicate offense); *Allen v. State*, No. 11-10-00354-CR, 2012 WL 3264488, at *4 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd) (not designated for publication); *Smith v. State*, No. 11-10-00355-CR, 2012 WL 3264489, at *4 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd) (not designated for publication) (co-defendant to Allen); *Bridgeforth v. State*, No. 11-10-00356-CR, 2012 WL 3264490, at *3 (Tex. App.—Eastland Aug. 9, 2012, pet. ref'd, untimely filed) (not designated for publication) (co-defendant to Allen); *Adkins v. State*, No. 07-07-0387-CR, 2008 WL 1903465, at *1 (Tex. App.—Amarillo, Apr. 30, 2008, no pet.) (not designated for publication).

2018).[12]

Even if possession with intent to deliver is not a predicate offense for EOCA, the court of appeals should have reformed the conviction to conspiracy to possess a penalty group 1 controlled substance with intent to deliver.[13] Under *Thornton v. State*, if the evidence is sufficient to support every element of a lesser-included offense and the factfinder necessarily found every such element in its conviction for the greater, a court of appeals is required to reform the verdict to show a conviction for the lesser. 425 S.W.3d at 300 & n.55; *see also* TEX. R. APP. P. 43.6 (permitting the court of appeals to enter "any other appropriate order that the law and the nature of the case require.").

An offense is a lesser if it is "established by proof of the same or less than all the facts required to establish the commission of the offense charged" or if it is "an otherwise included offense." TEX. CODE CRIM. PROC. art. 37.09(1) & (4). Here, conspiracy to possess a penalty group 1 substance with intent to deliver is established

---

[12] The wording of the issue in *Walker* is: "Can a conviction for a charged, but nonexistent, offense be reformed to a subsumed and proven offense that does exist?"

[13] The indictment alleged EOCA by conspiring to commit "Possession of a Controlled Substance in an Amount of Four Grams or More but Less than 200 Grams with Intent to Deliver." CR 5. Although the EOCA count did not specify the controlled substance, only penalty group one substances are categorized by degree of offense based on the increment of four grams or more but less than 200 grams. *See* TEX. HEALTH & SAFETY CODE § 481.112(d).

by proof of all the "elements" of EOCA except the intent to establish, maintain, or participate in a combination. TEX. PENAL CODE § 71.02; *see Garza v. State*, 213 S.W.3d 338, 351 (Tex. Crim. App. 2007) (finding only difference between EOCA and predicate offense is commission of predicate as a gang member). It is necessarily subsumed within the allegation of EOCA, and thus reformation should be permitted.

Although *Thornton* and *Bowen v. State*, on which it relies, involved contested trials,[14] an "unjust result" like that in *Bowen* occurs when a defendant's presumed-voluntary[15] guilty plea to a greater offense is reduced to a complete acquittal. By pleading guilty, a defendant has necessarily admitted to all the elements of a lesser-included or subsumed offense.[16] Such defendants are "foreclosed by the admissions inherent in their guilty pleas" from raising a factual claim contrary to their plea. *See Class v. United States*, 138 S. Ct. 798, 804 (2018) (quoting *United States v. Broce*, 488 U.S. 563 (1989)). Moreover, in the open plea context, there is frequently

---

[14] *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012). Reformation has already been applied to bench trials. *Rabb v. State*, 483 S.W.3d 16, 22 (Tex. Crim. App. 2016).

[15] *Mallet v. State*, 65 S.W.3d 59, 64 (Tex. Crim. App. 2001) (a duly admonished guilty plea is prima facie evidence that a guilty plea was knowing and voluntary).

[16] Absent a showing to the contrary, there is a presumption of the regularity of the judgment of conviction and the proceedings that the defendant must overcome. *Ex parte Wilson*, 716 S.W.2d 953, 956 (Tex. Crim. App. 1986).

sufficient record evidence to support a conviction for the lesser-included offense, as required in *Thornton*. If reformation is appropriate, following a contested trial, to preserve the jury's factual determinations unaffected by the error in the greater offense, why would it not be equally appropriate where the defendant has acknowledged his guilt of the lesser and waived his right to have the jury make such findings?

Nevertheless, because the court of appeals rejected reformation on the basis of the issue before this Court in *Walker*, it has not had the opportunity to consider whether *Thornton* can be extended to the open-plea context. If the State is successful in *Walker*, remand to the court of appeals would be appropriate to consider that issue.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgments of the court of appeals, and affirm Appellant's conviction for EOCA, or in the alternative, remand for reconsideration of the appropriate remedy.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,391 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of May 2018, the State's Petition for Discretionary Review was served electronically on the parties below.

John J. Roberts
Assistant Criminal District Attorney
Gregg County Criminal District Attorney's Office
101 E. Methvin, Suite 333
Longview, Texas 75601
John.Roberts@co.gregg.tx.us

Debra Parker
Counsel for Adrian Parker
111 Soledad, Suite 300
San Antonio, Texas 78205
DebraParkerLaw@gmail.com

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

APPENDIX A

Court of Appeals's Opinion

2018 WL 1733969
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do Not Publish
Court of Appeals of Texas,
Texarkana.

Adrian Jerome PARKER, Appellant
v.
The STATE of Texas, Appellee

No. 06–17–00167–CR
|
Submitted: April 3, 2018
|
Decided: April 11, 2018

On Appeal from the 188th District Court, Gregg County, Texas, Trial Court No. 44950–A

Attorneys and Law Firms

John J. Roberts, for The State of Texas.

Lew Dunn, for Adrian Jerome Parker.

Before Morriss, C.J., Moseley and Burgess, JJ.

MEMORANDUM OPINION

Memorandum Opinion by Chief Justice Morriss

***1** Adrian Jerome Parker rendered his open guilty plea to the trial court in Gregg County, on all four counts of the indictment against him, and pled true to a sentence-enhancement allegation. The trial court found Parker guilty of all four charges, found the enhancement allegation true, and sentenced Parker to forty-five years' imprisonment on each of Count I (engaging in organized criminal activity [1]) and Count II (possession with intent to deliver a controlled substance, cocaine, in an amount of four grams or more, but less than 200 grams [2]), and to twenty years' imprisonment on each of Count III (tampering with evidence [3]) and Count IV (possession with intent to deliver a controlled substance, cocaine, in an amount of one gram or more, but less than 4 grams [4]). Parker's four sentences have been set to run concurrently.

1 *See* TEX. PENAL CODE ANN. § 71.02(a) (West Supp. 2017).

2 *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(d) (West 2017).

3 *See* TEX. PENAL CODE ANN. § 37.09(d)(1) (West 2016).

4 *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(c) (West 2017).

On appeal, Parker challenges the sufficiency of evidence to support his conviction under each of the four counts. [5] We reverse and render the judgment in part, modify it in part, and affirm it in part. We reach that result because (1) there is insufficient evidence to support Parker's conviction under Count I; (2) sufficient evidence supports Parker's conviction under Counts II, III, and IV; and (3) the trial court's judgment should be modified to accurately reflect the statutes of offenses and their degrees.

5 Although Parker presents to us seven issues, all of his issues, except his issue number three addressing due process, which we do not reach, are arguments in support of his challenge to the sufficiency of the evidence to support his conviction under one or more of the counts in the indictment.

In pleading guilty, Parker admitted to having committed the actions alleged in the indictment. He also stipulated the evidence, which, as to Count I, admitted that Parker,

> [w]ith the intent to establish, maintain, or participate in a combination or in the profits of a combination, said combination consisting of [Parker], and Ladelsha Price and Christopher Crosby, who collaborated in carrying on the hereinafter described criminal activity, conspire to commit the offense of Possession of a Controlled Substance with Intent to Deliver by agreeing with each other that Christopher Crosby would engage in conduct that constituted said offense, and [Parker] and Ladelsha Price performed an overt act

> in pursuance of said agreement, to-wit: providing a location for the possession of said controlled substance ....

To support Parker's plea, the State introduced twenty-one separate exhibits, including (1) a stipulation of evidence, (2) investigative folders containing, *inter alia*, investigative reports and laboratory reports for substances collected on various dates concluding that each substance was cocaine of various amounts, (3) video recordings of statements given by Parker and his associates, (4) surveillance photographs and video recordings, and (5) a certified copy of the judgment of conviction concerning Parker's prior felony conviction.

***2** In evaluating legal sufficiency of the evidence, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). We defer to the responsibility of the fact-finder "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge in any particular case is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.* Due process requires that the State prove beyond a reasonable doubt every element of the crime charged. *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001) (citing *Jackson*, 443 U.S. at 319). All relevant authority appears to presuppose that a crime was actually charged.

(1) There Is Insufficient Evidence to Support Parker's Conviction under Count I

Parker challenges the sufficiency of the evidence supporting his conviction under Count I, engaging in organized criminal activity. Parker argues, and the State does not dispute, that the State purportedly charged him with, and he was convicted of, violating Section 71.02(a) of the Texas Penal Code. A person commits an offense under Section 71.02(a) if he, (1) with intent to establish, maintain, or participate (a) in a combination, (b) in the profits of a combination, or (c) in a criminal street gang, (2) commits or conspires to commit (3) one or more of the specific predicate offenses listed in subsections of Section 71.02(a) of the Texas Penal Code. TEX. PENAL CODE ANN. § 71.02(a). Parker points out, however, that the underlying offense that he allegedly committed is not one of the predicate offenses listed under Section 71.02(a). Therefore, he argues, the State's proof of an essential element of engaging in organized criminal activity failed.

In its brief, the State acknowledges that the conduct described in Count I does not describe organized criminal activity and that evidence of the conduct alleged in Count I, whether sufficient or not, should not normally lead to a conviction under that statute. Nevertheless, the State argues that Parker waived his complaint because he did not object to the form or substance of the indictment at trial, citing Article 1.14 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. § 1.14(b) (West 2005) (defendant who does not object to defect in form or substance of indictment before date of trial on merits waives right to object to that defect). The State misinterprets Parker's argument. Parker does not challenge the validity of the indictment; rather, he contends that the evidence was legally insufficient to convict him of an offense under Section 71.02(a) of the Texas Penal Code, as alleged by the State in its indictment. *See Miles v. State*, 357 S.W.3d 629, 632 n.11 (Tex. Crim. App. 2011). We agree.

***3** Our first step in analyzing Parker's complaint is determining what would be included in the hypothetically correct jury charge, as authorized by the indictment. As previously noted, Section 71.02(a) of the Texas Penal Code lists a number of predicate offenses, the commission of which may support a conviction under that statute. *See* TEX. PENAL CODE ANN. § 71.02(a)(1)–(18). As such, the statute provides for alternative "manner or means" of committing an essential element of the offense

of engaging in organized criminal activity. *See Curry v. State*, 30 S.W.3d 394, 403 (Tex. Crim. App. 2000). "[W]hen [a] statute defines alternative methods of manner and means of committing an element and the indictment alleges only one of those methods, 'the law' for purposes of the hypothetically correct charge, is the single method alleged in the indictment." *Gollihar*, 46 S.W.3d at 255 (citing *Curry*, 30 S.W.3d at 405).

Under Count I of the indictment, the State alleged that Parker

> did ... with the intent to establish, maintain, or participate in a combination or in the profits of a combination, ... conspire to commit the offense of Possession of a Controlled Substance in an Amount of Four Grams or More but Less than 200 Grams with Intent to Deliver ....

Thus, the alleged predicate offense set forth by the indictment is possession of a controlled substance, with intent to deliver, in an amount of four grams or more, but less than 200 grams. The State does not dispute that this is the alleged predicate offense for which Parker was tried. Therefore, the hypothetically correct jury charge in this case, which is authorized by the indictment and adequately describes the offense for which Parker was tried, would require the State to prove beyond a reasonable doubt that Parker (1) with intent to establish, maintain, or participate (a) in a combination, or (b) in the profits of a combination, (2) conspired to commit (3) the offense of possession of a controlled substance with intent to deliver.

Parker pled guilty to committing the actions alleged in the indictment, including those of Count I. He also stipulated the evidence as to Count I:

> With the intent to establish, maintain, or participate in a combination or in the profits of a combination, said combination consisting of [Parker], and Ladelsha Price and Christopher Crosby, who collaborated in carrying on the hereinafter described criminal activity, conspire to commit the offense of Possession of a Controlled Substance with Intent to Deliver by agreeing with each other that Christopher Crosby would engage in conduct that constituted said offense, and [Parker] and Ladelsha Price performed an overt act in pursuance of said agreement, to-wit: providing a location for the possession of said controlled substance ....

Section 71.02(a) of the Texas Penal Code sets out only one predicate offense that involves the possession of a controlled substance, "unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception ...." TEX. PENAL CODE ANN. § 71.02(a)(5); *see State v. Foster*, No. 06–13–00190–CR, 2014 WL 2466145, at *1–2 (Tex. App.—Texarkana June 2, 2014, pet. ref'd) (mem. op., not designated for publication). In *Foster*, we held that, although *possession* of a controlled substance *through forgery*, *fraud*, *misrepresentation*, *or deception* is a predicate offense under Section 71.02(a), the simple *possession* of a controlled substance *with intent to deliver* is not a predicate offense under the statute. *Foster*, 2014 WL 2466145, at *2 (citing TEX. PENAL CODE ANN. § 71.02(a)(5), (5A)); *see also Hughitt v. State*, Nos. 11–15–00277–CR, 11–15–00278–CR, 2018 WL 827227, at *3 (Tex. App.—Eastland Feb. 8, 2018, pet. filed) (accord); *Walker v. State*, No. 07–16–00245–CR, 2017 WL 1292006, at *3 (Tex. App.—Amarillo Mar. 30, 2017, pet. granted) (mem. op., not designated for publication) (accord).[6] We also held in *Foster* that possession as spelled out in Section 71.02(a)(5) of the Texas Penal Code is not the same offense as simple possession with intent to deliver. *See Foster*, 2014 WL 2466145, at *2. We believe the analysis in *Foster* is still sound.

6 Although unpublished cases have no precedential value, we may take guidance from them "as an aid in developing reasoning that may be employed." *Carillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

***4** Therefore, even assuming that the State has proven beyond a reasonable doubt all of the elements of Count I it had charged in this case, the allegedly underlying offense for which Parker was tried is not a predicate offense under Section 71.02(a) of the Texas Penal

Code.[7] Consequently, the evidence is legally insufficient to show that Parker committed a qualifying predicate offense necessary to support a conviction for engaging in organized criminal activity under Count I. Therefore, the evidence is insufficient to support Parker's conviction under Count I.[8]

7 Parker's stipulation of evidence also fails to support his conviction under Count I. A stipulation of evidence will sustain a conviction on a guilty plea only if it establishes all of the elements of the offense. *Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). In his stipulation of evidence regarding Count I, the only predicate conduct Parker confessed to committing was conspiring to commit possession of a controlled substance with intent to deliver. Therefore, his stipulation of evidence did not establish all of the elements of the offense of engaging in organized criminal activity.

8 When we find that the evidence is insufficient to support a conviction of the offense charged, we are normally required to determine whether there is sufficient evidence to convict the defendant of a lesser-included offense. *See Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014). As pertaining to this case, "[a]n offense is a lesser included offense if ... it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (West 2006). Therefore, to be a lesser-included offense requires that a greater-inclusive offense has been charged. In this case, Count I of the indictment failed to charge an offense. Consequently, since no greater-inclusive offense has been charged, there can be no lesser-included offense.

Accordingly, we sustain Parker's first and second issue.[9] Therefore, we reverse the trial court's judgment insofar as it convicts Parker of engaging in organized criminal activity and render a judgment of acquittal on that charge.

9 Since we have sustained Parker's first and second issues, we need not consider his third issue, asserting a violation of Parker's right to due process from being convicted for an act that is not a crime.

(2) Sufficient Evidence Supports Parker's Conviction under Counts II, III, and IV

In his fourth, fifth, sixth, and seventh issues, Parker challenges the sufficiency of the evidence to support his conviction under Counts II, III, and IV. Parker argues that since the laboratory reports introduced into evidence (1) show that no substance tested was marihuana and (2) were not certified as required by the Texas Code of Criminal Procedure,[10] there was no evidence of an essential element of each of his convicted offenses. In addition, Parker argues that no evidence shows that he concealed any evidence.

10 *See* TEX. CODE CRIM. PROC. ANN. art. 38.41, § 1 (West Supp. 2017).

We have previously rejected the argument that a laboratory analysis that lacks a certificate of analysis pursuant to Article 38.41 of the Texas Code of Criminal Procedure is not evidence. *Daniels v. State*, No. 06–16–00102–CR, 2017 WL 429602, at *2 (Tex. App.—Texarkana Feb. 1, 2017, no pet.) (mem. op., not designated for publication).[11] Here, the laboratory analyses were introduced without objection. Although the improperly certified analyses may have been hearsay, since they were admitted without objection, they had probative value. *Griffin v. State*, 491 S.W.3d 771, 781 n.3 (Tex. Crim. App. 2016) (citing TEX. R. EVID. 802).

11 Although unpublished opinions have no precedential value, we may take guidance from them "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

***5** Further, "a stipulation of evidence or judicial confession, standing alone, is sufficient to sustain a conviction on a guilty plea so long as it establishes every element of the offense charged." *Daniels*, 2017 WL 429602, at *2 (citing *Menefee*, 287 S.W.3d at 13). In this case, Parker signed a stipulation of evidence in which he confessed to all of the elements of the offenses charged in Counts II, III, and IV of the indictment. Therefore, his stipulation of evidence, along with his guilty plea, was sufficient to sustain his conviction under these counts. *Menefee*, 287 S.W.3d at 13. Consequently, we overrule Parker's fourth, fifth, sixth, and seventh issues.

(3) The Trial Court's Judgment Should Be Modified to Accurately Reflect the Statutes of Offenses and their Degrees

We have the authority to modify the judgment to make the record speak the truth, even if a party does not raise

such a problem. TEX. R. APP. P. 43.2; *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Rhoten v. State*, 299 S.W.3d 349, 356 (Tex. App.—Texarkana 2009, no pet.). "Our authority to reform incorrect judgments is not dependent on the request of any party, nor does it turn on a question of whether a party has or has not objected in trial court; we may act sua sponte and may have a duty to do so." *Rhoten*, 299 S.W.3d at 356 (citing *Asberry v. State*, 813 S.W.2d 526, 531 (Tex. App.—Dallas 1991, writ ref'd)); *see French*, 830 S.W.2d at 609.

We notice that the trial court's judgment incorrectly labels the level of Parker's offenses and misidentifies the Texas Penal Code section of Parker's conviction under Count III. Therefore, we will modify the trial court's judgment to speak the truth. Possession of four grams or more, but less than 200 grams, of a controlled substance in Penalty Group 1 is a second degree felony. TEX. HEALTH & SAFETY CODE ANN. § 481.115(d). If it is shown at the trial for a second degree felony that the defendant had previously been convicted of another felony, other than a state jail felony, punishment can fall within the range prescribed for a first degree felony. TEX. PENAL CODE ANN. § 12.42(b) (West Supp. 2017). Tampering with evidence while knowing that an offense has been committed is a third degree felony. TEX. PENAL CODE ANN. § 37.09(c) (West 2017). Possession of one gram or more, but less than four grams, of a controlled substance in Penalty Group 1 is also a third degree felony. TEX. HEALTH & SAFETY CODE ANN. § 481.115(d). If it is shown at the trial for a third degree felony that the defendant had previously been convicted of another felony, other than a state jail felony, punishment can fall within the range prescribed for a second degree felony. TEX. PENAL CODE ANN. § 12.42(a) (West Supp. 2017). The State's enhancement allegation in this case was used to enhance Parker's punishment range. However, this procedure does not increase the level of the original offense. In addition, under Count III of the indictment, Parker was charged under Section 37.09(d)(1) of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 37.09(d)(1).

For the reasons stated, as to Count I, we reverse the trial court's judgment and render a judgment of acquittal. As to Counts II, III, and IV, we modify the trial court's judgment to reflect the degree of offense under Count II as a second degree felony, to reflect the degree of offense under Counts III and IV as a third degree felony, and to reflect that the statute for the offense under Count III is Section 37.09(d)(1) of the Texas Penal Code.

We reverse the trial court's judgment as to Count I and render a judgment of acquittal on that Count. We affirm the trial court's judgment, as above modified, as to Counts II, III, and IV.

All Citations

Not Reported in S.W.3d, 2018 WL 1733969

APPENDIX B

Act of 1977, 65th Leg., R.S., ch. 346 (enacting Penal Code Ch. 71)

S.B. No. 151

AN ACT

relating to a definition of "combination" and "conspires to commit" in relation to organized crime and to the offense of engaging in organized criminal activity; creating certain offenses; providing penalties and venue for prosecution; providing testimonial immunity; excluding certain defenses; providing a defense by renunciation; amending the Penal Code to add Title 11, Organized Crime; adding Article 13.21 to the Code of Criminal Procedure, 1965, as amended; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. The Penal Code is amended by adding Title 11 to read as follows:

"TITLE 11. ORGANIZED CRIME

"CHAPTER 71. ORGANIZED CRIME

"Section 71.01. DEFINITIONS. In this chapter, (a) 'combination' means five or more persons who collaborate in carrying on criminal activities, although:

"(1) participants may not know each other's identity;

"(2) membership in the combination may change from time to time; and

"(3) participants may stand in a wholesaler-retailer or other arm's-length relationship in illicit distribution operations.

"(b) 'Conspires to commit' means that a person agrees with one or more persons that they or one or more of them engage in conduct that would consitute the offense and that person and one or

more of them perform an overt act in pursuance of the agreement. An agreement constituting conspiring to commit may be inferred from the acts of the parties.

"Section 71.02. ENGAGING IN ORGANIZED CRIMINAL ACTIVITY. (a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, he commits or conspires to commit one or more of the following:

"(1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, or forgery;

"(2) any felony gambling offense;

"(3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;

"(4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons; or

"(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception.

"(b) Except as provided in Subsection (c) of this section, an offense under this section is one category higher than the most serious offense listed in Subdivisions (1) through (5) of Subsection (a) of this section that was committed, and if the most serious offense is a Class A misdemeanor, the offense is a felony of the third degree, except that if the most serious offense is a

felony of the first degree, the offense is a felony of the first degree.

"(c) Conspiring to commit an offense under this section is of the same degree as the most serious offense listed in Subdivisions (1) through (5) of Subsection (a) of this section that the person conspired to commit.

"Section 71.03. DEFENSES EXCLUDED. It is no defense to prosecution under Section 71.02 of this code that:

"(1) one or more members of the combination are not criminally responsible for the object offense;

"(2) one or more members of the combination have been acquitted, have not been prosecuted or convicted, have been convicted of a different offense, or are immune from prosecution;

"(3) a person has been charged with, acquitted, or convicted of any offense listed in Subsection (a) of Section 71.02 of this code; or

"(4) once the initial combination of five or more persons is formed there is a change in the number or identity of persons in the combination as long as two or more persons remain in the combination and are involved in a continuing course of conduct constituting an offense under this chapter.

"Section 71.04. TESTIMONIAL IMMUNITY. (a) A party to an offense under this chapter may be required to furnish evidence or testify about the offense.

"(b) No evidence or testimony required to be furnished under the provisions of this section nor any information directly or

indirectly derived from such evidence or testimony may be used against the witness in any criminal case, except a prosecution for aggravated perjury or contempt.

"Section 71.05. RENUNCIATION DEFENSE. (a) It is an affirmative defense to prosecution under Section 71.02 of this code that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor withdrew from the combination before commission of an offense listed in Subdivisions (1) through (5) of Subsection (a) of Section 71.02 of this code and took further affirmative action that prevented the commission of the offense.

"(b) Renunciation is not voluntary if it is motivated in whole or in part:

"(1) by circumstances not present or apparent at the inception of the actor's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective; or

"(2) by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

"(c) Evidence that the defendant withdrew from the combination before commission of an offense listed in Subdivisions (1) through (5) of Subsection (a) of Section 71.02 of this code and made substantial effort to prevent the commission of an offense listed in Subdivisions (1) through (5) of Subsection (a) of Section 71.02 of this code shall be admissible as mitigation at the hearing

on punishment if he has been found guilty under Section 71.02 of this code, and in the event of a finding of renunciation under this subsection, the punishment shall be one grade lower than that provided under Section 71.02 of this code."

Sec. 2. Chapter 13, Code of Criminal Procedure, 1965, as amended, is amended by adding Article 13.21 to read as follows:

"Article 13.21. ORGANIZED CRIMINAL ACTIVITY. The offense of engaging in organized criminal activity may be prosecuted in any county in which any act is committed to effect an objective of the combination."

Sec. 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

S.B. No. 151

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 151 passed the senate on May 12, 1977, by the following vote: Yeas 26, Nays 2; May 13, 1977, senate reconsidered the vote by which finally passed; May 13, 1977, again finally passed by the following vote: Yeas 24, Nays 3; May 24, 1977, senate refused to concur in house amendments and requested appointment of Conference Committee; May 25, 1977, house granted request of the senate; May 27, 1977, senate adopted Conference Report by the following vote: Yeas 25, Nays 4.

Secretary of the Senate

I hereby certify that S.B. No. 151 passed the house, with amendments, on May 24, 1977, by the following vote: Yeas 128, Nays 4, one present not voting; May 25, 1977, house granted request of the senate for appointment of Conference Committee; May 27, 1977, house adopted Conference Report by the following vote: Yeas 123, Nays 20, two present not voting.

Chief Clerk of the House

Approved:

June 10, 1977
Date

/s/ Dolph Briscoe
Governor

Effective immediately

FILED IN THE OFFICE OF THE SECRETARY OF STATE
6:00 P.M. O'CLOCK
JUN 10 1977
Mark White
Secretary of State

APPENDIX C

1973 Tex. Gen. Laws 1153

(codifying "Unlawful manufacture or delivery of controlled substance")

cepted if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion. or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

(7) Any material, compound, mixture or preparation which contains any quantity of the following substances:

(A) Barbital;
(B) Chloral betaine;
(C) Chloral hydrate;
(D) Ethchlorvynol;
(E) Ethinamate;
(F) Methohexital;
(G) Meprobamate;
(H) Methylphenobarbital;
(I) Paraldehyde;
(J) Petrichloral;
(K) Phenobarbital.

(8) Any compound, mixture, or preparation containing any depressant substance listed in Subsection (d)(7) is excepted if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.

(9) Peyote, unless unharvested and growing in its natural state.

(e) Penalty Group 4. Penalty Group 4 shall include any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;

(2) not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;

(3) not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;

(4) not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(5) not more than 15 milligrams of opium per 29.5729 milliliters or per 28.35 grams.

Unlawful manufacture or delivery of controlled substances

Sec. 4.03. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1, 2, 3, or 4.

(b) An offense under Subsection (a) of this section with respect to:

(1) a controlled substance in Penalty Group 1 is a felony of the first degree;

(2) a controlled substance in Penalty Group 2 is a felony of the third degree;

(3) a controlled substance in Penalty Group 3 is a felony of the third degree;

(4) a controlled substance in Penalty Group 4 is a Class A misdemeanor.

(c) The provisions of Section 4.01(c) and (d) do not apply to an offense under this section relating to a controlled substance in Penalty Group 2.

Unlawful possession of a controlled substance

Sec. 4.04. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice.

(b) An offense under Subsection (a) of this section with respect to:

(1) a controlled substance in Penalty Group 1 is a felony of the second degree;

(2) a controlled substance in Penalty Group 2 is a felony of the third degree;

(3) a controlled substance in Penalty Group 3 is a Class A misdemeanor;

(4) a controlled substance in Penalty Group 4 is a Class B misdemeanor.

Possession and delivery of marihuana

Sec. 4.05. (a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a usable quantity of marihuana.

(b) An offense under Subsection (a) of this section is:

(1) a felony of the third degree if he possesses more than four ounces;

(2) a Class A misdemeanor if he possesses four ounces or less but more than two ounces;

(3) a Class B misdemeanor if he possesses two ounces or less.

(c) The possession of marihuana may not be considered a crime involving moral turpitude.

(d) Except as otherwise provided by this Act, a person commits an offense if he knowingly or intentionally delivers marihuana.

(e) Except as provided in Subsection (f) of this section, an offense under Subsection (d) of this section is a felony of the third degree.

(f) An offense under Subsection (d) is a Class B misdemeanor if the actor delivers one-fourth ounce or less without receiving remuneration.

Resentencing

Sec. 4.06. (a) Any person who has been convicted of an offense involving a substance defined as marihuana by this Act prior to the effective date of this Act may petition the court in which he was convicted for resentencing in accordance with the provisions of Section 4.05 of this Act whether he is presently serving a sentence, is on probation or parole, or has been discharged from the sentence.

(b) On receipt of the petition, the court shall notify the appropriate prosecuting official and shall set the matter for a hearing within 90 days.