IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0974-15

THE STATE OF TEXAS, Appellant

v.

OLIN ANTHONY ROBINSON, Appellee

ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS JACKSON COUNTY

RICHARDSON, J., filed a concurring opinion in which JOHNSON, J. joined.

CONCURRING OPINION

I agree with the majority's decision to reverse the judgment of the court of appeals and affirm the October 21, 2013 trial court order granting shock probation to the appellee.[1] The trial court had jurisdiction to issue its October 21, 2013 order because the time limitation for granting shock probation was tolled while the State's complaints regarding the first order

[1] The terms "shock probation" and "shock community supervision" mean the same and are used interchangeably.

granting shock probation (issued on February 2, 2012), were resolved by the appellate court.[2] I agree that to hold otherwise would produce an absurd result. I write separately to address the majority's holding that the State has the right to appeal a trial court's order granting shock probation. I agree that the State should have a remedy if the trial court grants shock probation in violation of a statute, such as in this case when the trial court judge failed to hold a hearing in contravention of Texas Code of Criminal Procedure Article 42.12, section 6(c).[3]

But, wouldn't mandamus be the proper remedy?

At first blush, mandamus would appear to be the proper vehicle for the State to challenge a statutorily unauthorized (i.e., void) order granting shock probation, such as the one in this case.[4] This is because the act sought to be compelled—vacating a void order—is purely ministerial, as opposed to discretionary or judicial in nature.[5] Although a court's

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[2] *State v. Robinson*, No. 13-12-00121-CR, 2013 WL 1188101, at *1-2 (Tex. App.—Corpus Christi/Edinburg Mar. 21, 2013) (mem. op., not designated for publication). The trial court erred by first granting appellee's motion for shock probation without holding a hearing. TEX. CODE CRIM. PROC. art. 42.12 § 6(c) ("The judge may deny the motion without a hearing but may not grant the motion without holding a hearing and providing the attorney representing the State and the defendant the opportunity to present evidence on the motion.").

[3] Consistent with other cases cited herein, I also agree that both the State and the defendant should have an appellate remedy when a trial court grants or denies shock probation to a defendant based solely on an erroneous determination of that defendant's eligibility for shock probation.

[4] To establish entitlement to mandamus relief, a relator must satisfy two requirements: 1) there must be no adequate remedy at law to redress his alleged harm; and 2) the act sought to be compelled is purely ministerial. *State ex rel. Hill v. C.A. for the Fifth Dist.*, 34 S.W.3d 924, 927 (Tex. Crim. App. 2001); *Buntion v. Harmon*, 827 S.W.2d 945, 947 (Tex. Crim App. 1992) (orig. proceeding).

[5] "The essential question in deciding if an act is ministerial 'is whether the respondent had the authority' to do what is the subject of the complaint." *Stearnes v. Clinton*, 780 S.W.2d 216, 219 (Tex. Crim. App. 1989) (quoting *State ex rel. Thomas v. Banner*, 724 S.W.2d 81, 83 (Tex. Crim.

decision whether to grant probation is a discretionary act,[6] a trial court judge exceeds his statutory authority if he grants shock probation without holding a hearing. Thus, vacating such an order would be considered ministerial. But, as discussed more fully herein, because challenges to orders granting shock probation *have* been entertained on appeal, it would seem that the second requirement to seeking a mandamus—that there be no other available adequate remedy at law—cannot be met under these circumstances.[7]

Nevertheless, in the past, this Court has taken the position that mandamus is the proper remedy when a court erroneously grants shock probation. In *State ex rel. Vance v. Hatten*,[8] this Court examined the State's challenge to the trial judge's order granting shock probation. The defendant had been found guilty of involuntary manslaughter and assessed ten years in prison. Within the authorized time period, the trial court granted the defendant shock probation. In its request for mandamus relief, the State claimed the judge did not have the authority to grant the defendant shock probation because the defendant was not eligible.

App. 1987)); *see also Smith v. Gohmert*, 962 S.W.2d 590, 593 (Tex. Crim. App. 1998).

[6] *State ex rel. Thomas*, 724 S.W.2d at 83 (citing to *Washington v. McSpadden*, 676 S.W.2d 420, 422 (Tex. Crim. App. 1984)).

[7] The two avenues for relief—direct appeal and mandamus—are mutually exclusive. In *In re State ex rel. De Leon*, the State sought mandamus relief requesting that the Thirteenth Court of Appeals direct the trial court to vacate its order granting the motion for shock community supervision since the trial court did not have the authority to order community supervision. 89 S.W.3d 195 (Tex. App. —Corpus Christi/Edinburg 2002, orig. proceeding). The Thirteenth Court concluded that the State could have appealed the order granting the defendant's motion for shock community supervision under Article 44.01(a)(2)'s provision relating to the arrest or modification of a judgment. Thus, because the State had an adequate remedy at law, it was not entitled to mandamus relief. *Id*. at 196.

[8] 600 S.W.2d 828 (Tex. Crim. App. 1980).

This Court held that the trial court exceeded the scope of its authority in granting the defendant shock probation and that "mandamus is the proper relief to set aside an improper order."[9] The Court conditionally granted mandamus relief, concluding that, "according to the clear and unambiguous language of the statute, the respondent was without authority to grant 'shock probation' pursuant to Article 42.12, sec. 3e, to defendant Norris, convicted of criminal homicide. Accordingly, such order is void."[10] In *State ex rel. Bryan v. McDonald*,[11] this Court recognized that mandamus would be the State's remedy in a situation where a trial court entered an order granting shock probation without authority to do so. The State filed an application for writ of mandamus to declare void an order granting shock probation that was entered more than 180 days after the defendant began serving his sentence. This Court agreed that the trial court's order was void, holding that, once the 180 days had passed, all discretion was removed and any decision on the motion for shock probation by the court was purely ministerial. "Under these circumstances, mandamus is available to correct the [trial court judge's] failure to follow the dictates of Article 42.12, Section 3e(a)."[12] In *State ex rel. Thomas v. Banner*,[13] the trial court judge granted the defendant shock probation on four

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[9] *Id.* at 830 (first citing *State ex rel. Wilson v. Harris*, 555 S.W.2d 470 (Tex. Crim. App. 1977); then citing *State ex rel. Vance v. Routt*, 571 S.W.2d 903 (Tex. Crim. App. 1978), and then citing *Thomas v. Stevenson*, 561 S.W.2d 845 (Tex. Crim. App. 1978)).

[10] *Id.* at 831.

[11] 642 S.W.2d 492 (Tex. Crim. App. 1982).

[12] *Id*. at 494.

[13] 724 S.W.2d at 83.

convictions. The State contested the judge's statutory authority to do so and requested mandamus relief. A unanimous Court held that the statute did not vest the trial judge with the authority to grant the defendant shock probation. Consequently "it was his ministerial duty to vacate the orders."[14] After the Court found that the State did not have an adequate remedy at law, it conditionally granted mandamus relief.[15]

Intermediate appellate courts have also come to the conclusion that the State has no right to appeal an order granting shock probation. In *Perez v. State*,[16] the Third Court of Appeals considered the procedural question of whether an appeal lies from an order granting shock probation. Considering this a "question of first impression," the court of appeals looked to two Court of Criminal Appeals opinions discussing the right to appeal "from analogous orders:"

> In *Basaldua v. State*, 558 S.W.2d 2 (Tex. Crim. App. 1977), the defendant sought to appeal from a trial court order refusing to modify the conditions of his probation. The Court of Criminal Appeals, after a thorough discussion, held that there was no constitutional or statutory authority permitting a direct appeal from an order modifying or refusing to modify probationary conditions. *Id.* at 5. In *Houlihan v. State*, 579 S.W.2d 213 (Tex. Crim. App. 1979), the defendant sought to appeal from a trial court order overruling a motion to place him on shock probation. The Court of Criminal Appeals again held that it was without appellate jurisdiction because neither article 42.12 nor any other statute authorized a direct appeal from such an order. *Id* at 215-16.

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[14] *Id.*

[15] *Id.* at 85.

[16] 938 S.W.2d 761 (Tex. App.—Austin 1997, pet. ref'd).

> We believe that the reasoning set forth in *Basaldua* and *Houlihan* applies with equal force to the instant appeal. Just as there is no statutory authority for an appeal from an order *refusing* shock probation, neither is there authority for an appeal from an order *granting* shock probation. Accordingly, we conclude that this Court lacks authority to entertain a direct appeal from the district court's order placing appellant on shock probation.[17]

In *Pippin v. State*,[18] the Seventh Court of Appeals followed *Perez* and held that the court of appeals lacked jurisdiction to review an order granting shock probation. Other appellate courts have similarly held that they lacked jurisdiction to entertain such appeals.[19] And, as recently as last year, in *Parker v. State*,[20] the First Court of Appeals followed *Perez* and *Pippin* in holding that "there is no right of appeal from a trial court's order granting shock probation."

Yet, Orders Granting Shock Probation Have Been Reviewed On Appeal.

This Court has entertained State appeals from orders granting shock probation without mentioning any jurisdictional issue. In *Smith v. State*,[21] the State appealed from an order

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[17] *Id*. at 762-63 (emphasis in original).

[18] 271 S.W.3d 861, 863-64 (Tex. App.—Amarillo 2008, no pet.) (citing *Perez*, 271 S.W.3d at 762).

[19] *See Roberts v. State*, No. 04-10-00558-CR, 2010 WL 4523788, *1 (Tex. App.—San Antonio 2010, pet ref'd) (citing to *Perez*, the court held that it has no jurisdiction over Roberts' appeal of the terms and conditions of his shock probation); *Davalos v. State*, No. 14-02-00440-CR, 2003 WL 253305, *1 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (dismissing the appeal for want of jurisdiction, holding that the court of appeals had no jurisdiction to review a discretionary, "nonreviewable" decision by the trial court.).

[20] No. 01-15-00334-CR, 2015 WL 5297526, *1 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (first citing *Pippin*, 271 S.W.3d at 863-64, and then citing *Perez*, 938 S.W.2d at 762-63).

[21] 789 S.W.2d 590 (Tex. Crim. App. 1990).

granting defendant's motion for shock probation, claiming that appellant had never served any of his sentence in TDCJ. The appellate court affirmed the order granting shock probation, and the State petitioned this Court for review. This Court reversed the appellate court's judgment, holding that, because the defendant had not served some portion of his sentence in TDCJ, as required by law, he was "statutorily ineligible" for shock probation.[22]

In *State v. Dunbar*,[23] the Ninth Court of Appeals in Beaumont entertained the State's appeal of the trial court's order granting shock probation, complaining that because Dunbar was ineligible for regular community supervision, he was ineligible for shock community supervision. Dunbar responded that the State had not objected at the time and thus failed to preserve error. In holding that the State could raise this issue for the first time on appeal, the court of appeals acknowledged the State's right to appeal, noting that "[t]he State has appealed an order that 'arrests or modifies a judgment.'"[24] Without addressing the issue of the State's right to appeal, this Court affirmed the appellate court's decision, holding that the State could raise the trial court's lack of authority to grant shock probation for the first time on direct appeal because such lack of authority was a trial court jurisdictional issue.[25] Even though in *Dunbar* the issue was whether the State had failed to preserve its right to complain

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[22] *Id.* at 592.

[23] 269 S.W.3d 693 (Tex. App.—Beaumont 2008), *aff'd*, 297 S.W.3d 777 (Tex. Crim. App. 2009).

[24] *Id.* at 695. Article 44.01(a)(2) permits the State to appeal an order of a court in a criminal case if the order "arrests or modifies a judgment."

[25] *State v. Dunbar*, 297 S.W.3d 777, 781 (Tex. Crim. App. 2009).

on appeal, not whether the State even had the right to appeal in the first place, logically, by holding that the State had preserved its right of appeal, this Court tacitly recognized that the State had the right to appeal.

The issue in *State v. Posey*[26] also involved whether the trial judge exceeded his statutory authority by granting shock probation. Again, without addressing the State's right to appeal, this Court agreed with the State that the trial court judge did not have the authority to grant shock community supervision because the defendant was not eligible for judge-ordered community supervision. As in *Dunbar*, although the jurisdictional issue was not addressed by this Court, it was addressed by the appellate court. Citing to the court of appeals's decision in *Dunbar*, the Sixth Court of Appeals in *Posey* resolved the issue in favor of the State's right to appeal by holding that the State possessed the right to appeal the trial court's order granting shock community supervision pursuant to Article 44.01(a)(2), relating to the arrest or modification of a judgment.[27] By affirming the court of appeals' decision in *Posey*, this Court again, by implication, recognized the State's right to appeal an order granting shock probation under Article 44.01(a)(2). Therefore, while it may seem axiomatic that a decision whether to grant shock probation is "wholly discretionary and nonreviewable,"[28] this Court has indeed reviewed such decisions.

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[26] 330 S.W.3d 311 (Tex. Crim. App. 2011).

[27] *State v. Posey*, 300 S.W.3d 23, 26 (Tex. App.—Texarkana 2009), *aff'd*, 330 S.W.3d 311 (Tex. Crim. App. 2011).

[28] *Speth v. State*, 6 S.W.3d 530, 533 (Tex. Crim. App. 1999) (first citing *Flournoy v. State*, 589 S.W.2d 705, 707 (Tex. Crim. App. 1979), and then citing *Burns v. State*, 561 S.W.2d 516, 517 (Tex.

So, where does that leave us?

I am concerned that the Court's decision today—that the State can appeal an order granting shock probation under Article 44.01(a)(2)—would seem to open up the State's right to appeal *all* decisions granting shock probation, even discretionary and "nonreviewable" ones. There has been little explanation among the various court opinions as to why there has been such inconsistency over the years.

Today's opinion answers the question whether the State has the right to appeal an order granting shock probation—it does. But there is no indication that the rule regarding the reviewability of a trial court's discretionary order regarding shock probation has changed. Thus, the reality seems obvious. A State's challenge on appeal to a trial court's order granting shock probation is doomed to fail, unless the State can show that the trial court was without jurisdiction to enter such an order, or if the trial court exceeded its statutory authority—such as, by not holding a hearing (as in this case), or if shock probation was granted to someone not eligible to receive it.

With these comments, I join the majority.

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Crim. App. 1978) ("[C]ourt's discretion to deny or grant community supervision to eligible defendant if jury waived or jury not elected to determine punishment is absolute and unreviewable.") (quoting *Flores v. State*, 904 S.W.2d 129, 130 (Tex. Crim. App. 1995)).