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

NEWELL, J., delivered the opinion of the unanimous Court. RICHARDSON, J., filed a concurring opinion in which JOHNSON, J., joined.

O P I N I O N

Does a court of appeals have subject-matter jurisdiction to entertain a State's appeal from a trial court's grant of shock probation? If so, does the pendency of that State's appeal deprive the trial court of subject-matter jurisdiction to consider a motion for shock probation after the mandate has issued on that appeal? Yes and no. The State may appeal a grant of shock probation, but that appeal stays the proceedings in the trial court. Given the stay in the proceedings, the trial court's

October 21, 2013 order placing Appellee on shock probation is valid. We reverse the judgment of the court of appeals and enter judgment affirming the shock probation order of the trial court.

Background

The facts in this case were set out by the Thirteenth Court of Appeals in its first of three opinions on this case. *Robinson v. State* (*Robinson I*), 13-10-00064-CR, 13-10-00065-CR, 2011 WL 861152, at *1-2 (Tex. App.—Corpus Christi Mar. 10, 2011) (not designated for publication). Olin Anthony Robinson, and his wife, Floria were tried together for offenses arising out of a traffic stop. Deputy Bobby Doelitsch activated his overhead lights after he observed a vehicle fail to stop completely at a stop sign and fail to properly signal a turn. The vehicle's driver, Floria, did not stop, but continued for three and a half blocks before turning into her own driveway and finally stopping at the back of her house. Floria, ignoring the deputy's request that she remain in the truck, exited the pickup, and tried to reach its bed. The deputy lowered the top of the bed cover on Floria's hand to stop her. She then interfered with the deputy's efforts to keep Appellee inside the truck. Deputy Doelitsch arrested Floria, which prompted Appellee to punch him.

The couple were tried together. The jury found Floria guilty of evading arrest or detention with a vehicle and imposed punishment of two years' confinement. The

jury also found Appellee guilty of the third-degree felony offense of assault on a public servant and imposed punishment of four years' imprisonment. Both convictions were upheld on appeal. The court rejected Appellee's sole issue–that the trial court erred in denying his motion to suppress evidence because he had been illegally detained. The court held that, even if Appellee's initial detention was unlawful, evidence of his subsequent assault on Deputy Doelitsch was not subject to suppression under the exclusionary rule. *Id.* at *6.

Mandate issued on December 20, 2011. Eight days later, on December 28, 2011, Appellee began serving his sentence, and, that same day, filed a motion for continuing jurisdiction community supervision ("shock probation"). Thirty-seven days later, on February 2, 2012, the trial court entered its order granting Appellee shock probation for four years. The State filed a notice of appeal on February 14, 2012; this was forty-nine days after Appellee began serving his sentence. On its review of the State's appeal, the court of appeals first recognized its jurisdiction to hear the appeal and then held that the trial court erred in granting Appellee's motion for shock probation without holding a hearing. *State v. Robinson (Robinson II)*, 13-12-00121-CR, 2013 WL 1188101, at *1-2 (Tex. App.—Corpus Christi Mar. 21, 2013) (not designated for publication). TEX. CRIM. PROC. CODE 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."). The court of appeals reversed the February 2, 2012 judgment of the trial court and remanded the case to the trial court for proceedings consistent with its opinion. Mandate issued on August 13, 2013.

On October 21, 2013–sixty-two days after mandate on *Robinson II* issued–the trial court held a Section 6(c) hearing on Appellee's motion for shock probation. The trial court also heard the State's motion to dismiss that motion. The State argued that the trial court lacked jurisdiction to grant the motion because more than 180 days had elapsed since the execution of Appellee's sentence began on December 28, 2011. TEX. CRIM. PROC. CODE art. 42.12, § 6(a) ("the jurisdiction of a court imposing a sentence requiring imprisonment in the Texas Department of Criminal Justice for an offense other than a state jail felony continues for 180 days from the date the execution of the sentence actually begins"). The State also put on witnesses–including original jurors, the county sheriff, and the deputy county sheriff–to say that they wanted the trial court to impose the four-year sentence. But none knew of any "untoward conduct" of Appellee since he had been sentenced.

Appellee argued that, because the court of appeals, in *Robinson II*, reversed the February 2, 2012 judgment and remanded to the trial court for further proceedings,

Appellee was placed in the same posture as if a new hearing had been granted by the trial court:

> The gravamen of [the prosecutor's] action is that more than 180 days have elapsed since the time he started serving his sentence, but as this Court well knows once an appeal is filed, all of that is held in abeyance until the mandate is received back and once that mandate was received back and the instructions of the Court, pursuant to Texas Rules of Appellate Procedure 43.2(d), the Court specifically said that when a Court of Appeals reverses and remands a case to the trial court without instructions to render a specific judgment, the effect is to restore the parties to the same situation as they were before the appeal.

The trial court agreed, again granted Appellee's motion, and again placed him on shock probation for a period of four years.

> Let me just say one thing, when I initially granted the shock probation in this case, I erred, evidently, in the opinion of the Court of Appeals in not affording the State an opportunity to argue and the State appealed that and got me reversed, which is fine. That's why we have the Court of Appeals, but it seems to me it would be an absurd result if, because the State appealed and during that whole time period we were unable to have a hearing because it was on appeal, it would seem to me to be an absurd result that because the State appealed the Defendant has lost a remedy that the Code of Criminal Procedure provides for and that is to at least ask for the shock probation. And so we're back to where we were, I believe the date was February the 2nd, of 2012, after the mandate of the first appeal had come back. And it is still my opinion that Mr. Robinson should be placed on shock probation and the motion is granted and I'm signing an order today that will track the language of the order that I signed back in February of 2012.

On the State's appeal from that second order, the court of appeals again recognized its jurisdiction to hear the appeal and held that the trial court did not

have the jurisdiction to enter the order granting shock probation after remand. *State v. Robinson* (*Robinson III*), No. 13-13-00571-CR, 2014 WL 4401523 (Tex. App.—Corpus Christi Aug. 26, 2014) (not designated for publication). The court of appeals held that the trial's court order placing Appellee on shock probation was void and vacated that order and dismissed the cause. We granted review to look at the two jurisdictional questions.[1]

The Appellate Court Had Subject Matter Jurisdiction to Hear the State's Appeal of the Trial Court Order Modifying the Judgment

Jurisdiction concerns the power of a court to hear and determine a case. Appellate jurisdiction is invoked by giving notice of appeal. *State v. Riewe*, 13 S.W.3d 408, 410 (Tex. Crim. App. 2000). The standard for determining jurisdiction is not whether the appeal is precluded by law, but whether the appeal is authorized by law. *Abbott v. State*, 271 S.W.3d 694, 696-97 (Tex. Crim. App. 2008). When the Texas Legislature adopted Article 44.01, it made clear its intent to afford the State the same appellate powers afforded the federal government under 18 U.S.C. § 3731.

---

[1] We granted review of three questions: 1) The court of appeals erred in reversing the order of the trial court on the basis that the trial court lacked jurisdiction to enter the order of "shock probation" after remand from the court of appeals; 2) The court of appeals erred in reversing the trial court's order on the basis that the trial court lacked subject-matter jurisdiction over the Appellee's motion for "shock probation" after remand; and 3) The court of appeals did not have the subject-matter jurisdiction to entertain a direct appeal from a trial court granting continuing jurisdiction community supervision. We need not address the third issue because we hold that the court of appeals erred in reversing the trial court's order on the basis that the trial court lacked subject-matter jurisdiction over the motion for "shock probation" after remand.

Riewe, 13 S.W.3d at 410. The federal statute provides, in relevant part, as follows: "An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release." 18 U.S.C. § 3731. Although a few states apply such statutes narrowly, the vast majority of states construe their state's-right-to-appeal statutes broadly. *State v. Medrano*, 67 S.W.3d 892, 899 (Tex. Crim. App. 2002). Texas is in that majority. By statute, the State may appeal from an order that "arrests or modifies a judgment." TEX. CODE CRIM. PROC. art. 44.01(a)(2). As pointed out by Professors Dix and Schmoleskey, "The Code of Criminal Procedure does not make clear what is meant by an order that 'modifies a judgment.'" George E. Dix & John M. Schmoleskey, 43B TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 56:114 (3rd ed. 2011).

We have held that Article 44.01(a)(2) "clearly allows" a State's appeal from "an order that reduces a defendant's sentence, and that is signed after the trial court's plenary jurisdiction has expired." *State v. Gutierrez*, 129 S.W.3d 113, 114 (Tex. Crim. App. 2004). In doing so, we remarked that the "plain" language of Article 44.01(a)(2), is unambiguous, and it authorizes the State to appeal a trial court's order that modifies its previous judgment regardless of the legal grounds for the appeal. *Id*. at 115. We went on to hold, in *Collins v. State*, 240 S.W.3d 925 (Tex. Crim. App.

2007), that an order that modifies the amount of back-time received by a defendant via an improperly granted judgment nunc pro tunc may be appealed by the State. We recognized that Article 42.01, § 1(18), of the Texas Code of Criminal Procedure includes "credit for time served" as an element of the judgment. *Id*. at 928. That same logic applies here. Article 42.01 § 1(10), includes "the length of community supervision, and the conditions of community supervision" as an element of the judgment. Granting "shock probation" substantively modifies a judgment just as surely as adjusting the amount of back-time credit does.

Although we have not expressly addressed whether an order granting "shock probation" is one that modifies a judgment, several of the intermediate courts have, and we have agreed, albeit in passing. *State v. Dunbar*, 269 S.W.3d 693, 695 (Tex. App.—Beaumont 2008) (allowing State's challenge to trial court's authority to place a defendant previously adjudicated guilty of a "3g" offense on shock probation), *aff'd*, 297 S.W.3d 777 (Tex. Crim. App. 2009) (recognizing that the State's complaint in the court of appeals–that no source of jurisdiction authorized the trial court's order placing Dunbar on shock community supervision–was truly jurisdictional and so could properly be raised for the first time in that court); *State v. Posey*, 300 S.W.3d 23, 26 (Tex.App.—Texarkana 2009) (concluding that the State possesses the right to appeal the trial court's order granting shock probation under Article 44.01(a)(2), relating to the arrest or modification of judgment), *aff'd*, 330 S.W.3d 311 (Tex. Crim.

App. 2011) (defendant convicted of vehicular homicide with deadly-weapon finding and for whom jury recommended regular community supervision was not eligible for shock probation).[2] But in this case, the issue is squarely before us. We hold that the State may appeal an order that modifies a judgment by imposing shock probation.

The Trial Court Had Subject-Matter Jurisdiction to Grant Shock Probation Because the State's Appeal Stayed the Proceedings

After the trial court imposes a sentence in open court and adjourns for the day, it loses plenary power to modify the sentence unless, within thirty days, the defendant files a motion for new trial or a motion in arrest of judgment. TEX. R. APP. P. 21.4, 22.3; *State v. Aguilera*, 165 S.W.3d 695, 697–98 (Tex. Crim. App. 2005). The Texas Constitution allows trial courts to suspend the "execution of sentence and to place the defendant on probation and to reimpose such sentence, under such conditions as the Legislature may prescribe." TEX. CONST. art. IV, § 11A. Article 42.12's purpose is "to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended,

---

[2] *See also State v. Smith*, 762 S.W.2d 235 (Tex. App.—Houston [1st Dist.] 1988) (jurisdiction to hear State's appeal of grant of motion for shock probation is derived from Article 44.01(b), which allows the State to appeal a sentence on the ground that it is illegal), *rev'd*, *Smith v. State*, 789 S.W.2d 590 (Tex. Crim. App. 1990) (holding, on State's PDR, that a trial court cannot grant 'shock probation' when the defendant has never served any of his sentence in the TDC).

the conditions of community supervision, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas." TEX. CODE CRIM. PROC. art. 42.12 § 1. When a trial court grants shock probation under the provisions of Article 42.12 § 6(a), it suspends the execution, rather than the imposition, of the sentence. *O'Hara v. State*, 626 S.W.2d 32, 35 (Tex. Crim. App. 1981). The defendant actually serves part of the sentence. The convicting court may then suspend the execution of the rest of the sentence. *Id*. For purposes of suspending further imposition of sentence and placing the defendant on shock probation, the jurisdiction of the trial court continues for "180 days from the date the execution of the sentence actually begins." TEX. CRIM. PROC. CODE art. 42.12 § 6(a).

Execution of sentence begins upon the defendant's incarceration. *Bailey v. State*, 160 S.W.3d 11, 14 n. 2 (Tex. Crim. App. 2004). Because the trial court's jurisdiction to grant shock probation continues for only 180 days from the date the execution of the sentence actually begins, any action taken by the trial court after the 180th day is void and subject to mandamus. *State ex rel. Bryan v. McDonald*, 642 S.W.2d 492, 493-94 (Tex. Crim. App. 1982) ("once the 180th day passed, all discretion was removed . . . respondent lost all of his discretionary authority and any decision on Dockery's motion was purely ministerial. The respondent entered a void order granting shock probation when he had no authority to do so. Under these

circumstances, mandamus is available").

The court of appeals here cited *Bryan*, noted that Appellee failed to address the clear language of art. 42.12, § 6, and found the trial court's order void.

> It is undisputed that execution of Robinson's sentence began on December 28, 2011. Robinson's sworn motion for shock probation states that he began serving his sentence on December 28, 2011. The October 31, 2013 order which purports to grant Robinson shock probation was issued well outside the statutory 180–day period after Robinson began serving his sentence on December 28, 2011. Therefore, the trial court was without jurisdiction to issue the October 31, 2013 order, and the order is therefore void.

Robinson III, 2014 WL 4401523, at *2. Under the plain language of Article 42.12 § 6(c) the court of appeals is exactly right. But, as pointed out by the trial court, application of that plain language leads to an absurd result that the Legislature could not have possibly intended.

When we interpret statutes, we seek to effectuate the collective intent or purpose of the legislators who enacted the legislation. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App.1991). In so doing, we focus our attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. *Id*. If the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning. *Id*. But a reviewing court can look beyond the text and consult extra-

textual sources if the statute's plain language is ambiguous or would lead to absurd results that the Legislature could not have possibly intended. *Basden v. State*, 897 S.W.2d 319 (Tex. Crim. App. 1995); *Cannady v. State*, 11 S.W.3d 205 (Tex. Crim. App. 2000).

As the State notes, the interpretation and history of Article 42.12 § 6 was examined and commented upon in *State ex rel. Bryan v. McDonald*. There, on a State's application for writ of mandamus, we found that the trial court lacked jurisdiction to grant a defendant's motion for shock probation that was granted a mere five days after the end of the 180-day period of extended jurisdiction even though the delay was in no part the fault of the defendant. 642 S.W.2d at 493. We cited a trio of cases holding that the jurisdictional period is not subject to any exception or grace period to hold that any action taken by the trial court after the 180th day is void because the court is acting without jurisdiction.[3]

---

[3] *See Tamez v. State*, 620 S.W.2d 586 (Tex.Crim.App. 1981) (panel op.) (holding, on defendant's appeal from revocation of probation, that trial court acted without jurisdiction when it granted shock probation six days after the end of the 120-day period then provided for jurisdiction of the trial court to act); *Adams v. State*, 610 S.W.2d 780 (Tex.Crim.App. 1981) (panel op.) (holding, on defendant's appeal from revocation of probation, that trial court acted without jurisdiction when it granted shock probation thirteen days after the end of the 120-day period then provided for jurisdiction of the trial court to act); *Houlihan v. State*, 579 S.W.2d 213 (Tex.Crim.App. 1979) (holding, on defendant's appeal from order denying shock probation, that the trial court had lost jurisdiction before it denied relief on erroneous grounds; "the forum to petition for redress for relief from untoward consequences of clear meaning of unambiguous statutory language is the Legislature that enacted it").

Judge Clinton, in a concurring opinion, noted that the Legislature had demurred when given ample opportunity to grant relief from "untoward consequences" of the unambiguous statutory language. *Id.* at 495 (Clinton, J., concurring). Judge Teague, in a dissent, took issue with the majority's literal construction of the statute because it led to an unjust result. He argued that the Court ought to look at how the federal courts allowed for the reduction of time served on an imposed sentence even after the time limit has expired because the motion for reduction of sentence had been filed within the time limit and the delay in granting the sentence reduction by the trial court was reasonable. *Id*. at 496-97 (Teague, J., dissenting) ("I do not believe in this instance a literal reading and interpretation of the Texas' shock probation statute is either proper or necessary.").

The State notes that, since *Bryan*, courts have continued to hold that when a person begins serving the sentence, the 180-day period begins to run in one continuous period and expires at the end of 180 days, at which time a trial court no longer has jurisdiction to act. But none of the "untoward consequences" at issue in the *State ex rel. Bryan v. McDonald* line of cases were precipitated by a State's direct appeal. These cases were all decided before the Legislature adopted Article 44.01 in 1987. Before 1987, the Texas Constitution provided "that the State has no right to appeal in a criminal case, making Texas the only state that bans all prosecution appeals." *State v. Moreno*, 807 S.W.2d 327, 329 n.3 (Tex. Crim. App. 1991) (quoting

the "Background" provision contained within the Bill Analysis to Senate Bill 762). As noted above, Article 44.01 allows the State "to appeal an order of a court in a criminal case if the order . . . arrests or modifies a judgment . . . ." TEX. CRIM. PROC. CODE art. 44.01(a)(2). And under Article 44.01(e), "The state is entitled to a stay in the proceedings pending the disposition of an appeal under Subsection (a)." When the State seeks to exercise its right to appeal an order modifying an existing judgment, the trial court is deprived of jurisdiction over the case during the pendency of such an appeal, and the court would be unable to modify or alter its ruling during that period. *See Kirk v. State*, 454 S.W.3d 511, 516 (Tex. Crim. App. 2015) (Alcala, J., concurring) (citing TEX. R. APP. P. 25.2(g)–providing that once the record has been filed in appellate court, "all further proceedings in the trial court ... will be suspended until the trial court receives the appellate-court mandate."). The trial court is then bound by the appellate court's subsequent ruling on the merits of the appeal. *Id*.

When the State appealed the trial court's grant of shock probation, that stayed the proceedings until the appeal was resolved. The timeline for the trial court to grant shock probation started on December 28, 2011, when Appellee began serving his sentence, and ran through February 14, 2012, when the State filed its notice of appeal. It was then stayed until the appellate court's first mandate issued on August 19, 2013, at which point it began running again. Therefore, only 111 days had

passed when the trial court granted Appellee shock probation on October 21, 2013, which was well within the court's 180-day deadline.

Applying Article 42.12 § 6, without harmonizing that statute with Article 44.01(e), could prevent a defendant from ever receiving shock probation because the State could simply appeal whenever a trial court grants it. And then, regardless of the State's points of error, by the time the appeal was resolved it would be too late for the trial court to grant shock probation. That, as the trial court put it, would be an absurd result. We reverse the judgment of the court of appeals and enter judgment affirming the shock probation order of the trial court.

Delivered: June 29, 2016
Publish