IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1484-15

PHILLIP DEVON DEEN, Appellant

v.

THE STATE OF TEXAS

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

YEARY, J., delivered the opinion of the Court in which KELLER, P.J., and KEASLER, HERVEY, RICHARDSON, NEWELL, KEEL, and WALKER, JJ. joined. ALCALA, J., filed a dissenting opinion.

O P I N I O N

After being released from the penitentiary earlier than permitted by the statutory minimum sentence for his crime, Appellant was convicted of another crime, and his sentence was enhanced by his prior conviction. He argued on appeal that his prior judgment of conviction was void because it imposed confinement for less time than the statutory minimum and that, because it was void, it should not have been used to enhance his sentence for a subsequent offense. We hold that an appellant may not reap the benefit of an illegally

lenient sentence and then, once he has discharged that sentence, invoke the illegal lenity in an attempt to prohibit the use of that conviction to enhance the sentence for a subsequent offense.

BACKGROUND

After violating the conditions of his deferred adjudication, Appellant was adjudicated guilty of aggravated robbery, a first degree felony, TEX. PENAL CODE § 29.03, and possession of cocaine, a third degree felony.[1] TEX. HEALTH & SAFETY CODE § 481.115(c). Although a first degree felony carries a minimum sentence of five years,[2] the adjudicating court sentenced Appellant to only four years in the penitentiary for the aggravated robbery, to be served concurrently with a four-year sentence for the cocaine possession. He was released from prison approximately nine months before the minimum sentence authorized by statute would have expired.[3]

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[1] Though Appellant was adjudicated guilty of aggravated robbery and cocaine possession on the same day, he committed the offenses approximately ten months apart.

[2] The sentence for a first degree felony is imprisonment "for life or for any term of not more than 99 years or less than 5 years." TEX. PENAL CODE § 12.32(a).

[3] Based on the pre-sentence time credited in the judgment for Appellant's aggravated robbery conviction, his four-year sentence for the aggravated robbery would have expired on approximately August 18, 2010. However, Appellant remained incarcerated until November 9, 2010, possibly because he had less pre-sentence time credited toward his cocaine possession sentence. A five-year sentence for the aggravated robbery would not have expired until approximately August 18, 2011. Appellant therefore has no more time left to serve on his aggravated robbery conviction, and was released approximately nine months earlier than he would have been had the adjudicating court imposed the statutory minimum sentence. We assume that when Appellant was released, he was fully aware that he had exhausted the sentence in his aggravated robbery judgment, and that he had served less than five years in prison.

Thirty days after he got out of the penitentiary for the aggravated robbery and cocaine possession offenses, Appellant was caught with cocaine again. This time, he possessed less than one gram, making the offense a mere state jail felony. TEX. HEALTH & SAFETY CODE § 481.115(b). However, the State pled Appellant's prior aggravated robbery conviction in the indictment in order to enhance the punishment range to that of a third degree felony. TEX. PENAL CODE § 12.35(c)(2)(A); TEX. CODE CRIM. PROC. art. 42.12 § 3g(a)(1)(F). The jury found Appellant guilty, and he elected to have the trial court assess punishment. At sentencing, Appellant pled "true" to the enhancement alleging the prior aggravated robbery conviction, and he admitted to the aggravated robbery conviction on cross examination.[4] The State introduced Appellant's pen packet, which included the judgments from his prior aggravated-robbery and possession-of-cocaine convictions. The trial court found the aggravated robbery allegation to be true and assessed punishment at four years' confinement in the penitentiary, which was within the two-to-ten-year range for third degree felonies. TEX. PENAL CODE § 12.34(a). Had the offense been punished as a state jail felony, the maximum term of confinement would have been two years. TEX. PENAL CODE § 12.35(a).

On appeal, Appellant contended that because his aggravated robbery sentence was shorter than the statutory minimum, the judgment imposing it was void, and his prior conviction was therefore unavailable to enhance his sentence in this case. On this basis, the

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[4] Appellant disputed other aspects of his criminal history, including his prior conviction for the cocaine possession. However, he repeatedly confirmed that he had been previously convicted of the aggravated robbery.

Eleventh Court of Appeals reversed the trial court's judgment with respect to Appellant's punishment and remanded the cause for a new punishment hearing. *Deen v. State*, No. 11-13-00271-CR, 2015 WL 6123728, at *7 (Tex. App.—Eastland Oct. 15, 2015) (mem. op., not designated for publication).

This Court granted the State's petition for discretionary review. The State argues, as it did before the court of appeals, that Appellant should be estopped from disputing the validity of his aggravated robbery conviction. The State posits two theories of estoppel. First, the State contends that, because Appellant has already "accepted the benefit" of an illegally lenient sentence, he should not be heard to complain of its illegality now. Second, the State argues that, by pleading "true" to the enhancement paragraph, Appellant caused the State to forgo the opportunity to introduce evidence at the punishment phase to show that the illegally lenient sentence was the product of a negotiated guilty plea. If the illegally lenient sentence was in fact the product of a plea bargain, the State maintains, then Appellant should be estopped from challenging it for that reason as well.[5]

Appellant accepted the benefit of his illegally lenient sentence, and we hold that he is therefore estopped by the prior judgment from collaterally attacking the validity of the conviction it imposed. Because Appellant is estopped under this estoppel-by-judgment

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[5] The record before us does not indicate whether the illegally lenient sentence was a product of a negotiated plea bargain. The State also argues that, even if the case must be remanded for a new punishment proceeding, the State should still be given the opportunity to prove up such a plea bargain at the new punishment hearing and obtain an enhanced sentence. Given our ultimate disposition of the case, we need not address this argument.

principle, we need not reach the question of whether he should also be estopped by his plea of "true" to the enhancement (or by any plea bargain for the illegally lenient sentence that the State may have been able to prove absent the Appellant's plea of "true"—a kind of estoppel-by-contract principle). Nor need we decide whether his prior conviction is void.

ANALYSIS

The Opinion Below

The court of appeals analogized this case to *Wilson v. State*, 677 S.W.2d 518 (Tex. Crim. App. 1984). *Deen*, 2015 WL 6123728, at *7. Like Appellant, Wilson was sentenced to four years' incarceration for a first degree felony, which has a statutory minimum sentence of five years. 677 S.W.2d at 521. The State then used that felony conviction to enhance his punishment for a subsequent attempted burglary to life imprisonment. *Id.* at 520. We held that the prior conviction was void and should not have been used to enhance punishment, and we remanded for resentencing. *Id.* at 524. But we were not called upon to address, and did not address, the issue of estoppel in *Wilson*. The primary question in this case is not whether an illegally lenient sentence is void, but whether Appellant is estopped from complaining of the illegal lenity of his sentence after he has already taken advantage of that lenity. In short, can estoppel by judgment bar collateral attack of an illegally lenient sentence?

Estoppel by Judgment

The argument that a conviction is void because the sentence is not authorized by the

Legislature is subject to principles of estoppel.[6] Estoppel is a flexible doctrine that takes many forms. *Rhodes v. State*, 240 S.W.3d 882, 891 (Tex. Crim. App. 2007). We explicitly described two forms of estoppel in *Rhodes*: Estoppel by contract and estoppel by judgment. *Id*. Estoppel by contract describes the situation in which "a party who accepts the benefits under a contract is estopped from questioning the contract's existence, validity or effect." *Id*.; 31 C.J.S. *Estoppel & Waiver* § 164, p. 542 (2008). Estoppel by judgment is a form of estoppel whereby a person "who accepts the benefits of a judgment, decree, or judicial order is estopped from denying the validity or propriety thereof, or of any part thereof, on any grounds; nor can he or she reject its burdensome consequences." *Id.*; 31 C.J.S. *Estoppel & Waiver* § 172, p. 553 (2008). To be estopped by a judgment, a person must accept the benefits of the judgment voluntarily. *Gutierrez v. State*, 380 S.W.3d 167, 178 (Tex. Crim. App. 2012). In *Rhodes*, we declared that "[t]he variant of estoppel at issue here is 'estoppel by judgment.'" 240 S.W.3d at 891. We concluded that a "defendant who has enjoyed the benefits of an agreed judgment prescribing a too-lenient punishment should not be permitted

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[6] For example, a plea agreement estops the parties from arguing that the agreed judgment imposes an illegally lenient sentence. *Rhodes v. State*, 240 S.W.3d 882, 891 (Tex. Crim. App. 2007). Absolute statutory requirements that are not waivable or forfeitable under *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), may nevertheless be subject to estoppel. *See Gutierrez v. State*, 380 S.W.3d 167, 177 (Tex. Crim. App. 2012) (noting "this Court's recognition, in *Saldano v. State*, [70 S.W.3d 873, 888 & n.69 (Tex. Crim. App. 2002)], that under some circumstances, the doctrine of estoppel can trump even *Marin*'s category of non-forfeitable/non-waivable absolute requirements or prohibitions"); *see also Prystash v. State*, 3 S.W.3d 522, 530-32 (Tex. Crim. App. 1999) (observing that *Marin*-categorizing a claim that the death penalty was imposed contrary to statute in *Powell v. State,* 897 S.W.2d 307 (Tex. Crim. App. 1994), did not preclude the application of the invited error doctrine, a species of estoppel).

to collaterally attack that judgment on a later date on the basis of the illegal leniency." *Id.* at 892.

Although *Rhodes* addressed estoppel by judgment in the context of a hypothetical plea agreement, and therefore spoke in terms of accepting the benefits of an "agreed" judgment, we have since made it clear that the focus of estoppel by judgment is the acceptance of a benefit rather than an agreement contemporaneous with the judgment. In *Murray v. State*, 302 S.W.3d 874, 882 (Tex. Crim. App. 2009), we characterized *Rhodes* as holding that "a party who accepts the benefit of a judgment that imposes an illegally lenient sentence is estopped from challenging the judgment at a later time."[7] This is the rule that applies here.

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[7] In declining to invoke estoppel by judgment, and relying on *Wilson* to invalidate Appellant's prior aggravated robbery conviction, the court of appeals made two mistakes. First, it concluded that this Court "did not rely upon estoppel grounds for its resolution in *Rhodes*." *Deen*, 2015 WL 6123728, at *6. Second, it construed *Rhodes* to require the existence of a plea agreement with respect to the illegally lenient sentence as a prerequisite to any application of the doctrine of estoppel by judgment. *Id*. at *7.

The record in *Rhodes* did not reveal whether any plea bargain had taken place or, if it had, whether it had embraced an agreement with respect to the illegally lenient punishment. Our holding in *Rhodes* was two-fold. Both facets of our holding were equally necessary to our resolution of the case. First, assuming that there had been no plea bargain with respect to punishment, we held that the type of punishment defect involved was not such as to render the entire conviction void, because it was subject to being remedied "without resort to resentencing." 240 S.W.3d at 889. Under that scenario, Rhodes could not obtain the relief he sought because the prior conviction used to enhance the punishment in his current conviction was not void after all. *Id*. Second, assuming that there *had* been a plea bargain that included the illegally lenient punishment, the prior conviction may have been void because it would not have been subject to remedy without the necessity of resentencing. *Id*. at 887. Under those circumstances, we held alternatively that, once Rhodes had reaped the benefits of the illegally lenient punishment, he was estopped from complaining about it later. *Id*. at 892. It is true that we characterized the benefits he enjoyed as having derived from an "agreed" judgment, *id*., but that was only a reflection of the particular plea agreement we hypothesized in *Rhodes*. We later recognized in *Murray* that such a plea agreement is not essential to application of estoppel by judgment. 302 S.W.3d at 882. Indeed, to hold that estoppel by judgment requires an

Appellant ultimately accepted the benefit of an illegal four-year sentence upon conviction of a crime for which the Legislature has mandated a minimum sentence of five years. Approximately four years passed between the date the adjudicating court imposed the illegally lenient sentence and the date the trial court below imposed the enhanced sentence. During that time, Appellant never complained about the aggravated robbery sentence's lenity. Instead, he served his illegally lenient sentence and was content to be released from prison altogether approximately nine months early. Thus, he took full advantage of the benefit of his illegally lenient sentence, and he cannot now deny its validity.

Appellant argues that he could not have voluntarily accepted the benefit of his aggravated robbery sentence because there is no plea agreement in the record and the sentence was "imposed" upon him by the judgment. But the question is not whether Appellant agreed to the prior judgment or negotiated for the sentence that it imposed. Unlike an estoppel by contract, which might prevent a defendant who has plea-bargained for a particular judgment from challenging its validity, an estoppel by judgment arises not when the person voluntarily agrees to the judgment, but when the person voluntarily accepts its benefits after the judgment issues. Voluntary acceptance of the benefits of a judgment can occur without an agreement. *Cf. In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005) (holding that non-signatories of a contract containing an arbitration clause who seek a direct benefit of the contract are bound by the arbitration clause). The benefit here was

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agreement would render it merely redundant with estoppel by contract. The court of appeals failed to acknowledge our construction of *Rhodes* in *Murray*.

Appellant's release from prison approximately nine months earlier than the Penal Code would have otherwise permitted. Appellant did not challenge the illegal lenity of his aggravated robbery conviction until after he had accepted this benefit.

The only circumstance that we have found to constitute involuntary acceptance of a benefit occurred in *Gutierrez v. State*, 380 S.W.3d 167 (Tex. Crim. App. 2012). In that case, the mother of four children, two of whom had special needs relating to Down's syndrome, plea bargained for probation so that she would be able to provide for her family. *Id.* at 170, 179. The trial court imposed a condition of probation requiring that she either obtain legal status within a year or leave the country—a condition that we found amounted to "banishment," which violated both the United States Constitution and the Texas Constitution. *Id.* at 173-74. We held that the mother was not estopped from challenging the banishment condition for the first time on appeal of her probation revocation, because she had no realistic choice but to accept the illegal condition. *Id.* at 179.[8]

Appellant faced no such circumstance. The specific issue Appellant complains of on

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[8] "What is more," we observed in *Gutierrez*, "a defendant ordinarily has no say in the trial court's decision regarding the appropriate conditions of community supervision. What those conditions will be is not a product of negotiation; a defendant in [Gutierrez's] shoes must simply take them or leave them if she wants to avoid incarceration." 380 S.W.3d at 179. This delineation was significant because Gutierrez *had* negotiated for probation, and avoided incarceration as a result—a benefit of the judgment. The "public-policy considerations" that weighed against enforcing a banishment condition and Gutierrez's familial circumstances that required her to avoid incarceration at all costs indicated that her acceptance of the probation was involuntary. *Id.* at 178-79. In light of her plea bargain for probation, the fact that she did not bargain for the banishment condition was something "more" that further supported the determination that the acceptance was involuntary. *Id.* at 179. Contrary to the dissenting opinion's intimation, nothing we said in *Gutierrez* suggests that the absence of an agreement, in itself, renders an acceptance of a benefit involuntary.

appeal is not an unconstitutional condition of his community supervision, but the very benefit he accepted—the lenity of his sentence. Nothing prevented him from bringing the statutory minimum sentence to the attention of the court at the time that he was sentenced or, indeed, at any time before he was released early. It simply would not have been in his interest to do so at that time, as it may have resulted in a sentence within the statutory punishment range. Having accepted the benefit of his illegally lenient sentence, he cannot now avoid having the judgment it imposes be used to enhance his punishment for a subsequent offense.

CONCLUSION

Estoppel by judgment turns on acceptance of benefits. Appellant here accepted the benefit of the lenity in the judgment he collaterally attacks. Estoppel by judgment bars this kind of collateral attack. Because Appellant is estopped, he is not entitled to a new punishment hearing. The portion of the court of appeals' judgment reversing the trial court's judgment and remanding Appellant's cause for a new punishment hearing is reversed. The judgment of the trial court, as otherwise modified by the court of appeals, is affirmed.[9]

DELIVERED: February 15, 2017
PUBLISH

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[9] Although Appellant's punishment was enhanced by the prior robbery conviction to that of a third degree felony, he was nevertheless convicted of a state-jail felony. *See* TEX. PENAL CODE § 12.35(c) ("An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that . . . ."). The trial court's judgment mistakenly recited that Appellant was actually convicted for a third degree felony offense, not a state jail felony. The court of appeals accordingly modified Appellant's judgment to reflect conviction for a state jail felony. *Deen*, 2015 WL 6123728, at *7. Nothing about our disposition of the State's petition for discretionary review today affects that modification.