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

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

The court of appeals got this one exactly right. I would affirm its judgment reversing the sentence imposed against Phillip Devon Deen, appellant, and awarding him a new punishment hearing. I agree with the court of appeals that, under the facts of this case, the doctrine of estoppel is an improper basis for denying appellant's complaint. The issue here is whether the doctrine of estoppel is a proper basis for rejecting appellant's challenge to the

validity of his aggravated robbery conviction that was used by the State to enhance his punishment to a higher range for his instant conviction for possession of cocaine. If the doctrine of estoppel is inapplicable to appellant's challenge to his aggravated robbery conviction, as the court of appeals determined, then appellant's sentence for possession of cocaine is illegal because it is outside of the punishment range for that offense. I conclude that, although it is true that the doctrine of estoppel may apply to cases in which a defendant has plea bargained for an illegally lenient sentence or in which he has knowingly and voluntarily accepted the illegally lenient sentence, those are not the circumstances here. In this case, the doctrine of estoppel is inapplicable because (1) appellant never bargained for or agreed to the trial court's error in the aggravated-robbery case that resulted in more favorable treatment than what was permitted under the statutory punishment scheme, (2) the record fails to establish that appellant was aware of the improper sentence so that there is no evidence that he knowingly accepted the benefits of the illegal sentence, and (3) there is no proof that appellant voluntarily accepted the more favorable treatment so that this appears to be a case in which appellant merely silently submitted to a trial court's unilateral order. I thus agree with the court of appeals that appellant's prior conviction is void due to his being sentenced outside the statutory range of punishment and that the prior conviction is unavailable to enhance his punishment for the instant offense. I, therefore, respectfully dissent from this Court's judgment that reverses the court of appeals's judgment and upholds appellant's sentence.

I. Background

Appellant was convicted of the state-jail felony of possession of less than one gram of cocaine, which ordinarily would be punishable with a statutory two-year maximum sentence for state-jail felonies.[1] In this case, however, the State alleged in the indictment that appellant had a prior conviction for aggravated robbery, which, if proven, would enhance the punishment range to that of a third-degree felony, with a minimum sentence of two years' imprisonment and a maximum sentence of ten years' imprisonment.[2] At sentencing, after appellant pleaded true to the enhancement as alleged, the trial court found the prior conviction for aggravated robbery to be true, and it sentenced appellant to four years in prison for the cocaine case. On appeal, appellant contended that the prior conviction for aggravated robbery that had been used to enhance his punishment for the cocaine case was void because he had been sentenced below the statutory punishment range for that offense. On this basis, appellant asserted that, due to the void prior conviction for aggravated robbery, his four-year sentence for cocaine possession exceeded the statutory two-year maximum sentence for state-jail felonies and was thus illegal. The court of appeals agreed with appellant and remanded the case for a new trial on punishment. *Deen v. State*, No. 11-13-00271-CR, 2015 WL 6123728, at *5-7 (Tex. App.—Eastland Oct. 15, 2015) (mem. op., not designated for publication). On direct appeal, the court of appeals's opinion rejected the

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1 *See* TEX. HEALTH & SAFETY CODE § 481.115(b); TEX. PENAL CODE § 12.35(a).

2 TEX. PENAL CODE § 12.35(c)(2)(A).

State's assertion that the doctrine of estoppel should prevent appellant from obtaining his requested relief, and the State filed this petition for discretionary review in response to that opinion.

II. Analysis

I agree with the court of appeals that it is improper to rely on the doctrine of estoppel as a basis for upholding appellant's enhanced sentence for cocaine possession in this case. Here, appellant never bargained for or agreed to the trial court's error in the aggravated-robbery case that resulted in more favorable treatment than what was permitted under the statutory punishment scheme, nor is there anything in the record to establish that he was aware of the improper sentence or that he voluntarily accepted the more favorable treatment. Because the basic principles for establishing a claim of estoppel are not met under these circumstances, I cannot agree with this Court's determination that appellant is estopped from challenging his prior conviction on the mere basis that he benefitted from the prior judgment without any additional proof that he was even aware of the court's error. Below, I will explain further why I conclude that (A) general principles of estoppel by acceptance of benefits do not apply to this situation, and (B) this Court's precedent interpreting and applying the law of estoppel in similar contexts does not compel application of that doctrine to appellant's case.

A. General Principles of Estoppel

Because the issue before this Court hinges on the proper application of the doctrine

of estoppel, I begin my analysis by reviewing the principles underlying that doctrine. As the discussion below will show, the particular type of estoppel that this Court applies to appellant's case is one that turns on a party's acceptance of benefits flowing from a judgment. But that type of estoppel is inapplicable when, as in the instant case, the party's acceptance of benefits is involuntary and made without full knowledge of the relevant facts and circumstances.

Broadly speaking, estoppel is defined as:

> 1. A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.
>
> 2. A bar that prevents the religitation of issues.
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> 3. An affirmative defense alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance.

BLACK'S LAW DICTIONARY 667 (10th ed. 2014). The doctrine has spawned many sub-species. Under the more specific theory of estoppel by contract, a litigant is barred from "denying a term, fact, or performance arising from a contract that the person has entered into." *Id.* at 668; *see also Rhodes v. State*, 240 S.W.3d 882, 891 (Tex. Crim. App. 2007) (estoppel by contract means that "a party who accepts benefits under a contract is estopped from questioning the contract's existence, validity, or effect"). Because the parties in the instant case agree that the record is inadequate to establish that any plea bargain existed in the aggravated-robbery case, I do not dwell on the proper application of estoppel by contract here.

Of greater relevance to the instant case is the theory of estoppel which provides that a party who accepts the benefits of a judgment is estopped from later challenging the judgment by appeal. *See Tex. State Bank v. Amaro*, 87 S.W.3d 538, 544 (Tex. 2002); *see also Taub v. Hous. Pipeline Co.*, 75 S.W.3d 606, 624 (Tex. App.—Texarkana 2002) ("When the basis of the estoppel is the acceptance of benefits by the party to be estopped, the need for application of the doctrine is supported by the rule that a person who accepts and retains the benefits of a particular transaction will not thereafter be permitted to avoid its obligations or repudiate the disadvantageous position."). Although this Court has in the past referred to this principle as estoppel by judgment, *see Rhodes*, 240 S.W.3d at 891, this species of estoppel is more commonly known in Texas civil law as the acceptance-of-benefits doctrine. *See, e.g., Waite v. Waite,* 150 S.W.3d 797, 803 (Tex. App.—Houston [14th Dist.] 2004).[3] The Texas Supreme Court has described this doctrine as providing that a "litigant cannot treat a judgment as both right and wrong, and if he has voluntarily accepted the benefits of a judgment, he cannot afterward prosecute an appeal therefrom." *Amaro*, 87 S.W.3d at 544 (quoting *Carle v. Carle*, 234 S.W.2d 1002, 1004 (Tex. 1950)). An exception to this doctrine

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[3] I note here that, in Texas civil cases, estoppel by judgment is frequently referred to as another name for collateral estoppel, or issue preclusion. *See, e.g., Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362 (Tex. 1971) ("The rule of collateral estoppel, or as sometimes phrased, estoppel by judgment, bars relitigation in a subsequent action upon a different cause of action of fact issues actually litigated and essential to a prior judgment."); *Avila v. St. Luke's Lutheran Hosp.*, 948 S.W.2d 841, 847 (Tex. App.—San Antonio 1997) ("Collateral estoppel, often referred to as issue preclusion and estoppel by judgment, is much more narrow than res judicata[.]")*; B & L Cherry Hill Assocs., Ltd. v. Fedders Corp.,* 696 S.W.2d 667, 669 (Tex. App.—Dallas 1985) ("Collateral estoppel is the doctrine of estoppel by judgment where *issues* have been adjudicated.").

applies "when the acceptance of benefits is not voluntary." *See Waite,* 150 S.W.3d at 803; *see also Smith v. Tex. Commerce Bank*, 822 S.W.2d 812, 814 (Tex. App.—Corpus Christi 1992) (if there is "no voluntary acceptance or acquiescence in the judgment," then estoppel by acceptance of benefits does not apply); *Garza v. Garza*, 155 S.W.3d 471, 475 (Tex. App.—San Antonio 2004) (acceptance-of-benefits doctrine "applies only to a voluntary acceptance of benefits" and thus does not apply to a party who is "compelled to accept the benefits of a judgment").[4]

Further, "[i]n order to create an estoppel by the acceptance of benefits, [ ] it is essential that the party against whom the estoppel is claimed should have acted with knowledge of the facts and of his rights." *Turcotte v. Trevino*, 499 S.W.2d 705, 712 (Tex. Civ. App.—Corpus Christi 1973). "It is an indispensable requisite in order to assert the doctrine of estoppel that the person claimed to be estopped shall have had the full knowledge of the full facts at the time his conduct is alleged to be related thereto, in order to constitute the basis of estoppel." *Id.* at 712-13. "Estoppel cannot be successfully asserted against a person who is ignorant of the facts or who acted under a mistake of facts, unless his ignorance or mistake is a result of negligence." *Id.* at 713; *see also Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 738 (Tex. App.—Corpus Christi 1994) (observing that,

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[4] In the civil context, an acceptance of benefits may be held to be "not voluntary because of financial duress or other economic circumstances." *Waite v. Waite*, 150 S.W.3d 797, 803 (Tex. App.—Houston [14th Dist.] 2004). The acceptance-of-benefits doctrine "often arises in divorce cases when one spouse accepts some of the benefits of the judgment and then tries to appeal the judgment." *In re M.A.H.*, 365 S.W.3d 814, 818 (Tex. App.—Dallas 2012).

"[w]hen a person accepting benefits does not have knowledge of all material facts, ratification or estoppel cannot ensue from acceptance of the benefits"); *Little v. Delta Steel, Inc.,* 409 S.W.3d 704, 713 (Tex. App.—Fort Worth 2013) ("We have explained that there can be no estoppel from acceptance of the benefits by a person who did not have knowledge of all material facts") (citations and quotations omitted); *Richardson v. Allstate Tex. Lloyd's*, 235 S.W.3d 863, 865 (Tex. App.—Dallas 2007) (acceptance-of-benefits doctrine applies when a party "accepts a benefit voluntarily *and* with knowledge of all material facts").

The foregoing discussion makes clear that, before a court may properly apply the doctrine of estoppel by acceptance of benefits—or, as this Court has referred to it, estoppel by judgment—it must be shown that the party to be estopped accepted the benefits voluntarily and with full knowledge of all material facts. *See Richardson*, 235 S.W.3d at 865. Here, nothing in this record shows that appellant was aware that he was receiving any benefit at all, let alone establish that he was doing so voluntarily and with full knowledge of all material facts. Rather, the existing record shows only that appellant was sentenced by the trial-court judge who, on his own judgment, assessed against appellant an illegally lenient sentence for aggravated robbery. Nothing in this record shows that appellant agreed to the illegally lenient sentence, that he voluntarily accepted it, or that he even knew that the sentence was illegal. Given that the voluntariness and knowledge requirements for applying estoppel by acceptance of benefits have not been met here, I cannot agree that it is proper to apply that doctrine under these circumstances on the mere basis that the trial judge erred in

appellant's favor based on the judge's independent assessment of a too-lenient sentence against appellant.

B. Estoppel is Inapplicable to Appellant's Case Under a Proper Application of this Court's Precedent

Under a proper application of this Court's precedent, appellant's complaint is not subject to estoppel. As I explain in more detail below, I conclude that, by misunderstanding the law of estoppel as described in *Murray v. State* and *Rhodes v. State*, this Court's majority opinion reaches an erroneous result in this case. *See Murray v. State*, 302 S.W.3d 874, 882-83 (Tex. Crim. App. 2009); *Rhodes*, 240 S.W.3d at 891-92.

This Court's majority opinion determines that "the rule that applies here" is the law on estoppel by judgment as stated in *Murray*, but reliance on that case is misplaced. *See* 302 S.W.3d at 882. In *Murray,* the defendant had pleaded guilty to what he believed was a lesser-included misdemeanor offense of the charged felony offense, but, prior to his plea being accepted by the trial court, he moved to withdraw his plea. *Id.* at 876. The basis for Murray's request to withdraw his plea was his discovery that the misdemeanor offense was not in fact a lesser-included offense of the offense charged in the indictment. *Id.* The trial court rejected his request and found him guilty of the misdemeanor offense. *Id.* On direct appeal, the court of appeals held that Murray's judgment of conviction was void or, alternatively, that the trial court had committed reversible error, and it further rejected the State's claim that Murray should be estopped from challenging the voidness of the trial court's judgment. *Id.* On discretionary review, this Court also rejected the State's theory of

estoppel. *Id.* at 882-83. In addressing that argument, this Court described the relevant rule of estoppel by judgment by stating, "[A] party who 'accepts the benefits of a judgment, decree, or judicial order is estopped to deny the validity or propriety thereof, or any part thereof, on any grounds; nor can he reject its burdensome consequences.'" *Id.* (quoting *Rhodes*, 240 S.W.3d at 891). In support of that general proposition, this Court cited its prior opinion in *Rhodes*, and it further described the holding of that case as being 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." *Id.* (citing *Rhodes*, 240 S.W.3d at 892). This Court swiftly concluded that estoppel by judgment as described in *Rhodes* was inapplicable to Murray's case because Murray had objected at trial and thus clearly did not accept the trial court's judgment or any benefit flowing from it. *Id.* (concluding that, given his objection at trial, Murray "did not accept the benefits of the judgment of conviction in this case").

Although this Court in *Murray* recited the general principle that estoppel may be triggered due to a party's acceptance of benefits, including the benefit of an illegally lenient sentence, this Court did not conduct any extensive analysis of what would constitute acceptance of benefits in this context because, under the facts of that case that showed that Murray objected at trial, it could not reasonably be said under any construction of the rule that Murray had accepted the benefits of the judgment. *Id.* at 882. Because this Court swiftly rejected estoppel under the clear-cut facts, *Murray* did not present any detailed analysis of what would constitute an acceptance of benefits of a judgment, and thus that case provides

little guidance as to whether the record in the instant case establishes that appellant voluntarily and knowingly accepted the benefits of the trial court's judgment, which is required for application of estoppel by judgment. *See Richardson*, 235 S.W.3d at 865. In sum, *Murray* illustrated a situation that plainly did not involve an acceptance of benefits because the defendant objected to the trial court's judgment. Importantly, that case did not hold that a defendant who passively receives an illegally lenient sentence but fails to object has voluntarily and knowingly accepted the benefit of that sentence. That was not the situation in *Murray*, and to the extent that the majority opinion now relies on *Murray* as the basis for establishing such a rule, it does so through a significant expansion of the general rule in *Murray* that is wholly untethered from the facts in that case.

This Court's reliance on *Rhodes,* a case decided two years prior to *Murray*, is similarly misplaced because the discussion of estoppel in that case was premised on the hypothetical existence of a plea bargain, but, in the instant case, there is no suggestion that any plea bargain existed. *See Rhodes,* 240 S.W.3d at 889. In *Rhodes*, the defendant had been convicted of escape from prison. *Id.* at 884. The written judgment for Rhodes's escape conviction failed to indicate that his ten-year sentence for that offense was to run consecutively with his prior sentences for burglary and sexual assault, as was required by statute. *Id.* (citing TEX. CODE CRIM. PROC. art. 42.08(b)). The record was silent as to whether the lack of a concurrent-sentencing order had been the product of a plea bargain. *Id.* Later, when Rhodes was indicted for more crimes, the State alleged the escape conviction

for enhancement purposes, but Rhodes moved to quash the alleged enhancement on the basis that the judgment was void due to the lack of a proper consecutive-sentencing order. *Id.* The trial court rejected his request, but the court of appeals reversed. *Id.* at 885. On discretionary review, this Court initially observed that, although the written judgment was silent as to whether Rhodes's sentence had been a product of a plea agreement, the Court "need not decide" whether there had been a plea agreement regarding the concurrent-sentencing issue because, with or without a plea bargain, Rhodes's challenge to his prior conviction would fail. *Id.* at 887-88. The Court explained that, if there was no plea agreement on the concurrent-sentencing issue, then the judgment was not void and thus not subject to collateral attack because the judgment could be reformed on appeal to correct the error. *Id.* at 887, 889. On the other hand, the Court indicated that, if there was a plea agreement on the concurrent-sentencing issue, then Rhodes would be estopped from challenging the judgment on appeal. *Id.* at 887, 890-91. As to this matter, the Court explained that, in general, there are two varieties of estoppel—estoppel by judgment and estoppel by contract. *Id*. at 891. After reviewing the general principles underlying estoppel by judgment and estoppel by contract, this Court cited precedent from "several other jurisdictions [that] have held that a defendant cannot enter a plea agreement that imposes an illegal sentence, benefit from that sentence, and then attack the judgment later when it is suddenly in his interests to do so." *Id.* at 891. The Court applied that principle to Rhodes's case and held that a "defendant who has enjoyed the benefits of an agreed judgment prescribing a too-lenient punishment should not be

permitted to collaterally attack that judgment on a later date on the basis of the illegal leniency." *Id*. at 892. The Court further observed that, "[i]f [Rhodes] agreed to the concurrent sentencing provision, then through his own conduct he helped procure and benefit from the illegality and he should not now be allowed to complain." *Id*. *Rhodes*, therefore, was not decided on silent submission to a unilateral order of leniency by a trial-court judge; rather, it was based on a theory of Rhodes's plea-bargain agreement to the leniency.

The foregoing makes clear that the discussion of estoppel by judgment in *Rhodes* was rooted in this Court's assumption as to the existence of a plea bargain. Importantly, *Rhodes* does not support the position that estoppel by judgment may be applied to a non-plea bargain case, as here. Unlike *Rhodes*, nothing in this record shows that appellant "agreed" to the trial court's judgment, nor does it show that appellant, "through his own conduct[,] [ ] helped procure and benefit from the illegality." *Id.* Thus, even if his silent submission resulted in his receipt of a benefit from the illegality through a shorter prison sentence than that which he otherwise would have received under the applicable law, appellant may not be denied relief under the doctrine of estoppel as described in *Rhodes* that would apply only to situations in which a party helped in some way to procure the benefit, either by a contract or through some affirmative action. The instant record shows nothing more than that appellant was sentenced to four years in prison for aggravated robbery pursuant to the trial court's unilateral assessment of punishment. In sum, unlike this Court's majority opinion, I conclude that the combined force of *Rhodes* and *Murray* does not support the determination that this

appellant is estopped from his collateral attack on his prior conviction, given that the record fails to show that he had any role in procuring the illegality or that he was even aware of the trial court's error in sentencing him outside the statutory range of punishment, let alone that he accepted the benefit voluntarily and knowingly.

This Court's majority opinion acknowledges that, before subjecting a defendant to estoppel under these circumstances, it must be shown that the defendant accepted the benefits of the judgment voluntarily, and it further concludes that that requirement was met here. In support, it cites this Court's opinion in *Gutierrez v. State*, but I conclude that that case instead supports my position that appellant's receipt of an illegally lenient punishment here was not voluntary. *See* 380 S.W.3d 167 (Tex. Crim. App. 2012). In *Gutierrez*, this Court considered whether a defendant, who was an illegal immigrant, could be subjected to a condition of community supervision that required her to leave the country within twelve months if she was unable to obtain lawful immigration status. *Id.* at 169. The court of appeals determined that the trial court lacked the authority to impose that condition upon Gutierrez, and it reversed the judgment revoking her community supervision. *Id.* at 173. On discretionary review, the State argued that Gutierrez should be estopped from complaining about the challenged condition because she had enjoyed the benefit of her contract with the trial court to place her on community supervision in exchange for her promise to abide by the prescribed conditions. *Id.* at 177. This Court disagreed. In declining to apply estoppel by judgment to Gutierrez's case, this Court explained that "appellate courts in Texas have

consistently held that, before the doctrine may apply, an appellant's acceptance of the benefits must be voluntary." *Id.* at 178. This Court went on to hold that, because Gutierrez's "acceptance of the trial court's *ultra vires* condition of community supervision was not wholly voluntary," estoppel by judgment was inapplicable. *Id.* at 179. The Court reasoned that Gutierrez, who along with her husband was responsible for providing for four children, "had every incentive to accept any contingency that would rule out her having to serve penitentiary time." *Id*. The Court continued,

> What is more, 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 the appellant's shoes must simply take them or leave them if she wants to avoid incarceration. Under these circumstances, we do not think that the appellant's acquiescence to the condition of community supervision that she leave the country constitutes an "acceptance" sufficient to trigger the doctrine of estoppel by judgment.

Id.

The same reasoning applied by this Court in *Gutierrez* applies to appellant's case and suggests that his receipt of an illegally lenient sentence was not wholly voluntary so as to warrant application of estoppel by judgment. Here, like the trial court's imposition of the unlawful condition of community supervision at issue in *Gutierrez*, the trial court's imposition of its illegal sentence is the type of determination as to which a defendant generally has no say and is not the product of negotiation. Further, as explained above, the record here fails to show any indication that appellant was aware that he was receiving any benefit, let alone that he did so voluntarily. The crux of this Court's majority opinion's

holding is that, because appellant benefitted from the trial court's error and because he did not object at trial or at any point prior to the instant proceedings, this shows that he voluntarily accepted the benefits and now he is estopped from complaining about the prior judgment. But this approach effectively eviscerates the requirement that the receipt of a benefit be voluntary and knowing. I cannot agree that this is a proper application of estoppel by judgment when there is no indication that appellant was aware of the trial court's error or that he voluntarily accepted the benefit flowing from that error. Here, as in *Gutierrez*, the record supports only the view that appellant silently submitted to a trial court's unilateral order and, therefore, that appellant did not act voluntarily in receiving the illegal sentence.

This Court's majority opinion holds that a defendant who was sentenced entirely outside of the applicable punishment range for an offense may not obtain relief from that conviction when he has benefitted from the illegal sentence, even when there is no evidence in the record to show that he agreed to the sentence or that he voluntarily and knowingly accepted the benefits of that sentence. This is a far too expansive view on the law of estoppel. The unintended consequence of this view will be to create a new preservation-of-error requirement for collateral attack that requires defendants to object to void sentences that are in their favor, even if they did not agree to the error, plea bargain for it, or know about it, because if they do not timely complain, then they will be estopped forever from challenging it once they discover the irregularity. Consequently, this Court's majority opinion's holding transforms the law of estoppel into a new preservation-of-error

requirement for complaints about void convictions with sentences that fall below the punishment range.

III. Conclusion

For all of the foregoing reasons, I conclude that the doctrine of estoppel by judgment is inapplicable here because nothing in this record shows that appellant knowingly and voluntarily accepted the benefits of a too-lenient sentence that was erroneously and independently imposed by the trial-court judge at a sentencing hearing. I strongly disagree with this Court's expansion of the law of estoppel to disallow relief in situations in which a defendant did not either agree to the more lenient judgment through a plea bargain or acquiesce to the more lenient judgment through his knowledge of the benefit and voluntary acceptance of it. For these reasons, I would uphold the judgment of the court of appeals awarding appellant a new punishment hearing. I, therefore, respectfully dissent.

Filed: February 15, 2017

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