

Opinion filed March 31, 2016



In The

# **Eleventh Court of Appeals**

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**No. 11-14-00096-CR**

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**JOSHUA ROYCE HOWARD, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 29th District Court**

**Palo Pinto County, Texas**

**Trial Court Cause No. 15032**

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## **MEMORANDUM OPINION**

This is an appeal from the revocation of Joshua Royce Howard's community supervision in an aggravated robbery case. We affirm.

The State charged Appellant by information with aggravated robbery of an elderly person and injury to an elderly person with intent to cause bodily injury. Appellant waived his right to an indictment and his right to have ten days to prepare

for trial. He pleaded guilty to aggravated robbery of an elderly person, and the State dismissed the charge of injury to an elderly person. Under the terms of a plea bargain agreement, the trial court suspended Appellant's ten-year sentence and placed him on community supervision for a term of ten years. Appellant was ordered to pay a fine in the amount of \$2,000, as well as restitution, court costs, and court-appointed attorney's fees. In addition, as a term of Appellant's community supervision, Appellant was ordered to confinement in a Substance Abuse Felony Punishment Facility<sup>1</sup> (SAFPF) for a term of not less than ninety days but no more than twelve months.

Subsequently, the State filed a motion to revoke Appellant's community supervision and alleged that Appellant failed to successfully complete SAFPF in that he was "unsuccessfully discharged" from the program. After a hearing, the trial court found the State's allegation to be true and revoked Appellant's community supervision. The trial court assessed Appellant's punishment at confinement for a term of eight years in the Institutional Division of the Texas Department of Criminal Justice and a fine in the amount of \$2,000. The trial court also ordered restitution in the amount of \$40.

Appellant's brief contains three issues. In his first issue, Appellant argues that the trial court abused its discretion when it admitted hearsay testimony from Chester Watkins, Appellant's community supervision officer. Appellant asserts in his second issue that the evidence was insufficient to support a finding of true because the evidence, when viewed in the light most favorable to the verdict, established that Appellant did not violate Term 17 of his community supervision order. In his third issue, Appellant contends that the trial court granted an illegal punishment.

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<sup>1</sup>We note that the judgment refers to the facility as a "Substance Abuse Felony Treatment Facility." However, the Government Code, as well as the parties in this case, refers to the facility as a "Punishment Facility" and as "SAFPF" for short. *See* TEX. GOV'T CODE ANN. § 493.009 (West Supp. 2015). For consistency, we will refer to it in this way as well.

We will first address Appellant's second issue in which he challenges the sufficiency of the evidence. We review a trial court's decision to revoke community supervision under an abuse of discretion standard. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). We will uphold a trial court's decision to revoke if any one of the alleged violations of the conditions of community supervision is supported by sufficient evidence. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980). The State has the burden to prove a violation by a preponderance of the evidence. *Cardona*, 665 S.W.2d at 493.

In addition to his sufficiency challenge, Appellant also contends that the State did not give him proper notice of the violation because the State alleged in its motion to revoke that he was "unsuccessfully discharged" from the facility, yet a successful discharge was not a term of his community supervision. Appellant concedes that he failed to object to the State's motion to revoke on the ground that it failed to allege a violation of a term of which he was required to adhere. Regardless of whether Appellant objected to the motion to revoke, the provision in the judgment of community supervision provided that Appellant must abide by "all rules and regulations" of the SAFPF program and that, upon release from the program, Appellant must "participate in a drug or alcohol abuse continuum of care treatment plan . . . , abiding by all rules and regulations of said treatment plan until discharged by the staff of the continuum of care program and remain in such facility until discharged by the Court." In addition, the Modification Special Condition provided that, "upon *successful completion* of the [SAFPF] program," Appellant must participate in a drug or alcohol continuum of care treatment plan (emphasis added). Furthermore, the trial court noted a "Special Condition of Probation" on its docket sheet: "remain in custody until bed space becomes available at SAFP facility and successfull[y] complete program." Therefore, we find that Appellant was required to successfully complete the program under the terms of his community supervision.

We now turn to whether the evidence was sufficient to support a finding of true. Chester Watkins testified that he was familiar with Appellant because Appellant was assigned to his SAFPF caseload. At the time of the hearing, Watkins was a community supervision officer for Palo Pinto County, and he was also an SAFPF coordinator. Watkins testified that Appellant was discharged from the SAFPF on February 14, 2014, due to multiple infractions, including possession of contraband, “being out of place without authorization,” refusing to obey orders, creating a disturbance, disrespecting staff, sexually acting out by grabbing another client’s buttocks and groin area, sexual contact with another SAFPF client, and using vulgar language toward officers. Watkins explained that there are several things that the SAFPF can do to try and correct infractions and that “being unsuccessfully discharged is at the end of the rope.” The decision to discharge was made by a treatment team. The team consisted of Watkins, a transition coordinator, the warden, and a program director.

Appellant also testified at the hearing. The judgment revoking community supervision indicates that Appellant pleaded true to the violation alleged in the State’s motion to revoke; however, defense counsel stated at the hearing on the motion to revoke that Appellant “enters a plea of not true.” Appellant was not directly asked whether he was unsuccessfully discharged from the program, but during the State’s cross-examination, Appellant acknowledged that he was discharged. In addition, Appellant admitted that he committed some of the infractions but said that he was written up multiple times for no reason at all. He was at the facility for nine months and one day.

The State proved its allegation by a preponderance of the evidence. Watkins testified that Appellant was unsuccessfully discharged from the SAFPF program and that, due to Appellant’s discharge, there were no other drug treatment opportunities available to Appellant. The State met its burden to show that Appellant violated

Term No. 17 of the community supervision order. Thus, the trial court did not err when it found the State's allegation true and revoked Appellant's community supervision. We overrule Appellant's second issue.

In his first issue, Appellant argues that the trial court abused its discretion when it admitted the hearsay testimony of Watkins. Here, Appellant did not object to any specific testimony by Watkins. Instead, after the State passed Watkins as a witness, defense counsel made a blanket hearsay objection to all of Watkins's testimony. The prosecutor responded, "Probation is allowed to testify to the business records of their file. And therefore, I would object -- I would say that that's not a sustainable objection." The trial court overruled the objection.

On cross-examination, Watkins testified that he did not personally see Appellant commit the infractions; the SAFPF transition coordinator notified him about the infractions. In the context of defense counsel's cross-examination, we assume Appellant's hearsay objection was to Watkins's testimony concerning the specific infractions committed while at the SAFPF. We cannot be sure of that, however, because defense counsel failed to make a timely and specific objection to any portion of Watkins's testimony. *See* TEX. R. APP. P. 33.1. Even if a portion of Watkins's testimony was hearsay and should not have been admitted, Watkins testified that he was a part of the treatment team that made the ultimate decision to discharge Appellant. We do not see how Watkins did not have personal knowledge of the discharge if he was on the team that made the decision to discharge. Appellant's first issue is overruled.

In his third issue, Appellant asserts that the trial court granted an illegal punishment when it placed him on community supervision because the Texas Code of Criminal Procedure prohibits a trial court from placing a defendant that has been convicted of aggravated robbery on community supervision. Appellate counsel labels this issue as an "acknowledged issue" and suggests that Appellant file a writ

of habeas corpus so that he can “introduce evidence of the harm and involuntariness of his plea based on the void sentence that was offered to him.” In the “Issues Presented” section of his brief, Appellant notes that the issue is “acknowledged but not presented on direct appeal.” Because Appellant has expressly stated that this issue is not presented for direct appeal, we will not address it.

We affirm the judgment of the trial court.

JIM R. WRIGHT  
CHIEF JUSTICE

March 31, 2016

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,  
Willson, J., and Bailey, J.