Opinion filed April 13, 2017

In The

Eleventh Court of Appeals

No. 11-15-00045-CR

DOMINGO SAUCEDO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 106th District Court

Gaines County, Texas

Trial Court Cause No. 14-4458

M E M O R A N D U M O P I N I O N

In an open plea, Domingo Saucedo pleaded guilty to possession with intent to deliver a controlled substance (Count One) and possession of a controlled substance (Count Two). *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(a), (d), 481.115(a), (d) (West 2010). The trial court convicted Appellant of possession with intent to deliver a controlled substance and assessed his punishment at confinement

for sixty-five years. Appellant presents three issues on appeal. We modify and affirm.

In Appellant's first issue, he asserts that his constitutional right against double jeopardy was violated when he was punished twice for the same offense. In Appellant's second issue, he contends that his constitutional rights were violated when the trial court did not provide an interpreter. In Appellant's third issue, he asserts that his plea was constitutionally invalid because an interpreter was not appointed.

Under the U.S. Constitution, the Double Jeopardy Clause provides in part that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "The Double Jeopardy Clause protects criminal defendants from three things: 1) a second prosecution for the same offense after acquittal; 2) a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense." *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013) (citing *Brown v. Ohio*, 432 U.S. 161, 164–65 (1977)).

Appellant argues that the trial court considered Count Two of the indictment when it assessed punishment and, thus, assessed punishment for both Count One and Count Two. Appellant contends that, because Count Two is a lesser included offense of Count One, a double jeopardy violation occurred. Appellant points to a document in the clerk's record entitled "SENTENCE," in which the trial court stated: "With the consent of the State, under Section 12.45, Texas Penal Code, the Court will, in assessing punishment, consider Cause #14-4458, Possession of a Controlled Substance, to-wit, Cocaine-Count 2." Section 12.45 of the Texas Penal Code provides:

> (a) A person may, with the consent of the attorney for the state, admit during the sentencing hearing his guilt of one or more unadjudicated offenses and request the court to take each into account

> in determining sentence for the offense or offenses of which he stands adjudged guilty.
>
> . . . .
>
> (c) If a court lawfully takes into account an admitted offense, prosecution is barred for that offense.

TEX. PENAL CODE ANN. § 12.45 (West 2011). Although the trial court stated in the written sentence that it took Count Two into consideration under Section 12.45, that is the only reference to Section 12.45 in the record. When the trial court orally pronounced sentence, it made no mention of Section 12.45. We perceive, then, a conflict between the oral pronouncement of sentence and the subsequent written one.

When there is a variation between the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. *Coffey v. State*, 979 S.W.2d 326, 328–29 (Tex. Crim. App. 1998). Because the trial court did not mention any consideration of Count Two when it orally pronounced Appellant's sentence and because we have the necessary information for reformation, we modify the trial court's judgment to delete the reference in the written judgment and sentence to any consideration of Count Two in the assessment of punishment. *See Taylor v. State*, 131 S.W.3d 497, 502 (Tex. Crim. App. 2004); *Cerna v. State*, No. 11-14-00363-CR, 2015 WL 3918259, at *2 (Tex. App.—Eastland June 25, 2015, no pet.) (mem. op., not designated for publication).

Appellant was convicted of Count One only, and he was assessed a single punishment for that conviction. The punishment assessed was within the proper range of punishment for Count One, and there is no evidence that the trial court may have assessed any part of that punishment in connection with Count Two. The record shows that the trial court assessed punishment at sixty-five years' confinement for the offense of possession with intent to deliver a controlled

substance as charged in Count One of the indictment. The trial court assessed that punishment with no reference to a consideration of Count Two. We also note that Appellant has an extensive criminal record, including convictions for murder, driving while intoxicated, and possession with intent to distribute—all of which the trial court took into consideration when it assessed punishment. We modify the written judgment and sentence to delete any reference to the Section 12.45 consideration of Count Two. We hold that Appellant's double jeopardy rights were not violated. Appellant's first issue is overruled.

Because Appellant's second and third issues are closely related, we will review the issues together. Appellant asserts on appeal that the trial court, on its own motion, should have appointed an interpreter. Appellant contends that, because he was not appointed an interpreter, his confrontation rights under the Sixth and Fourteenth Amendments and his due process rights under the Fourteenth Amendment were violated.

In a criminal proceeding, the defendant's right to an interpreter is part of the constitutional right to confrontation. *See Garcia v. State*, 149 S.W.3d 135, 140 (Tex. Crim. App. 2004). While confrontation rights and the right to an interpreter can be waived, the right to an interpreter "is not deemed waived if the trial court is aware 'that an accused does not speak and understand the English language.'" *Garcia*, 149 S.W.3d at 143 (quoting *Baltierra v. State*, 586 S.W.2d 553, 559 (Tex. Crim. App. 1979)). The Texas Code of Criminal Procedure provides that if, "on motion of the court, in any criminal proceeding, it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for the person charged or the witness." TEX. CODE CRIM. PROC. ANN. art. 38.30 (West Supp. 2016).

Here, the trial court asked Appellant if he understood that the word "waive" or "waiver" meant to give up something, and he responded, "Yes, ma'am."

Appellant also agreed that he understood the words "freely, knowingly, and voluntarily." Further, the trial court explained in English to Appellant that, "if there is anything that you don't understand during the proceeding, that you will ask us to stop and ask either me or your attorney to explain it to you." Appellant again responded, "Yes, ma'am." Appellant also agreed that he understood the charges against him, the range of punishment, and how a conviction in this case could be used to revoke probation or enhance the range of punishment in any future conviction. Appellant proceeded to plead guilty to the indictment.

Appellant also testified in English on his own behalf. Appellant responded in English to complex questions. For example, Appellant was asked when he first started getting into trouble with the law, and Appellant responded in English: "Well, I started drinking when I was a kid. And then I get bigger and I started using drugs and beer, getting drunk all the time, and got involved with people I wasn't supposed to, gone to the penitentiary, got out, got started using drugs again." Later, while discussing Appellant's health, the following exchange occurred:

[DEFENSE COUNSEL] What about 2007, do you remember going to UMC for --

[APPELLANT] Yeah.

[DENFENSE COUNSEL] Okay. Do you remember what they did while you were there?

[APPELLANT] They put me some stents in my heart.

[DEFENSE COUNSEL] Isn't it true that after years of choices you've made, and things like that, that you had -- a valve of your heart was completely closed, right?

[APPELLANT] Yes. 99 percent.

[DEFENSE COUNSEL] And they had to go through and open that, right, with angioplasty? Is that what it's called?

[APPELLANT] Uh-huh.

. . . .

[DEFENSE COUNSEL] And right now you take a daily barrage of medications that are related to your heart?

[APPELLANT] Yes.

. . . .

[DEFENSE COUNSEL] Do you know what metoprolol, M-E-T-O-P-R-O-L-O-L, is?

[APPELLANT] Well, they're all different -- for different -- some are for the cholesterol; some are for high blood pressure. They're all different, the medicines that I take.

"[T]he mere fact that an accused may be more fluent in speaking Spanish does not, in and of itself, make it incumbent upon a trial court to appoint an interpreter for an accused who speaks and understands the English language." *Flores v. State*, 509 S.W.2d 580, 581 (Tex. Crim. App. 1974). After a review of the record, there is no evidence to suggest that Appellant could not understand English. In fact, the record reflects that Appellant could understand and clearly communicate in English. Accordingly, we hold that the trial court was not required to appoint an interpreter for Appellant. Appellant's second and third issues are overruled.

We modify the judgment and sentence of the trial court to delete any reference to Section 12.45 considerations as they relate to Count Two. As modified, we affirm the judgment of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

April 13, 2017

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

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