Affirmed as Reformed and Memorandum Opinion filed December 16, 2010.

In The

Fourteenth Court of Appeals

NO. 14-10-00033-CR

MARK ANTHONY LOPEZ JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 54th District Court
McLennan County, Texas
Trial Court Cause No. 2009-809-C2

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

Appellant Mark Anthony Lopez Jr. pleaded guilty to robbery. *See* Tex. Pen. Code Ann. § 29.02 (Vernon 2003). The trial court sentenced appellant to imprisonment for ten years and ordered appellant to pay costs and attorney's fees. *See id.* § 12.33 (Vernon 2003). We reform the trial court's judgment to delete the order to pay costs and fees, and affirm the judgment as reformed.

BACKGROUND

Appellant was indicted for aggravated robbery and released on bond. Appellant entered into a negotiated plea agreement with the State and pleaded guilty to the lesser included offense of robbery. The State recommended that appellant be sentenced to imprisonment for ten years, and further recommended that the trial court suspend the sentence and place appellant on community supervision. On October 9, 2009, the trial court accepted appellant's plea agreement,[1] stated that he found appellant guilty, and stated that he would sentence appellant to imprisonment for ten years. The trial court ordered a presentence investigation to determine whether appellant should be placed on community supervision.

The trial court declined to place appellant on community supervision at appellant's December 3, 2009 sentencing hearing for reasons discussed below. The trial court re-assessed the same punishment of imprisonment for ten years and ordered appellant to pay $1,190 in court costs. The clerk's record contains a notation that appellant is also required to pay $750 in appointed attorney's fees. The trial court granted appellant permission to appeal. Appellant's appeal was transferred to this court from the Tenth Court of Appeals.[2]

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[1] The trial court was required to inform the defendant whether it would follow or reject the plea agreement (1) before any finding on the plea; and (2) in order for the plea agreement to become binding. *See* Tex. Crim. Proc. Code Ann. art. 26.13(a)(2) (Vernon 2009); *Ortiz v. State*, 933 S.W.2d 102, 104 (Tex. Crim. App. 1996). The trial court explained the terms of the plea agreement to appellant at a hearing on October 9, 2009 and confirmed that appellant understood the agreement. The trial court then stated: "[H]aving received your plea of guilty, I do find you guilty . . . of the lesser included offense of robbery. I am going to assess your punishment at 10 years in the penitentiary. I'm not going to grant your plea for probation at this time. I am going to order a presentence investigation into your case." The trial court also granted appellant's request to remain free on bond, which was part of the plea agreement. At appellant's December 3, 2009 sentencing hearing, the trial court stated: "Well, I'm following the plea bargain agreement, and the plea bargain agreement included that agreement on bond." Even without the trial court's express acceptance of the plea agreement at the October 9 hearing, the record supports the conclusion that the trial court accepted the plea agreement at that time. *See Ortiz*, 933 S.W.2d at 140 n.3 ("[W]hether the trial judge accepted the plea agreement when he 'accepted' the guilty plea is largely a matter of factual interpretation of the record. Such factual interpretation is predominantly the domain of the Court of Appeals.").

[2] In cases transferred by the Supreme Court of Texas from one court of appeals to another, the transferee court must decide the case in accordance with the precedent of the transferor court under

ANALYSIS

I. Bond Request

Appellant agreed "[s]eparate[ly] from and in addition to the plea agreement concerning the length of [appellant's] sentence" to appear for all interviews and meetings with McLennan County community supervision officials if the trial court granted his request to remain free on bond during the presentence investigation. Appellant agreed that if he failed to appear, as promised, the trial court could impose a sentence within the full range of punishment and refuse to allow appellant to withdraw his entered plea of guilty. The trial court granted appellant's request. When appellant failed to cooperate with the presentence investigation, the trial court rejected the State's community service recommendation and sentenced appellant to imprisonment for ten years.

A. Enforceability

The State and appellant were entitled to agree that if appellant failed to abide by the terms of the bond request, appellant's plea would become an open plea and the trial court could determine the sentence based on the full punishment range. *See State v. Moore*, 240 S.W.3d 248, 253–54 (Tex. Crim. App. 2007). The trial court may enforce such a remedy so long as the agreement was (1) knowingly and voluntarily made; and (2) approved by the trial court. *Id*.

Because this case was transferred from the Tenth Court of Appeals, we must follow precedent from that court if it would be inconsistent with ours. *See* Tex. R. App. P. 41.3. The Tenth Court of Appeals has considered a virtually identical "Request Concerning Bond Pending Further Proceedings Disclosure of Further Negotiated Plea Agreement" on appeal from McLennan County. *Delgado v. State*, No. 10-07-00077-CR, 2008 WL 1759089, at *2–3 (Tex. App.—Waco Apr. 16, 2008, no pet.) (mem. op., not designated for publication). Like the bond request at issue in this case, the *Delgado* bond

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principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. *See* Tex. R. App. P. 41.3.

request was made in conjunction with the State's agreement to recommend community supervision in exchange for the defendant's guilty plea. *Id*. at *2. The trial court ordered a presentence investigation, and defendant Delgado requested that the trial court allow him to remain free on bond while the investigation was conducted. *Id.* Delgado agreed that the trial court could refuse to allow Delgado to withdraw his guilty plea if he failed to cooperate with the presentence investigation while free on bond. *Id*. at *2–3. The trial court stated at Delgado's subsequent sentencing hearing: "I've determined that I am not going to follow the State's recommendation and give [Delgado] deferred adjudication probation," and sentenced Delgado to imprisonment for ten years. *Id*. at *3. The State then presented evidence that Delgado had failed to cooperate with the presentence investigation, and the trial court refused to allow Delgado to withdraw his guilty plea pursuant to the bond request. *Id*.

The Tenth Court of Appeals distinguished *Delgado* from *State v. Moore*, 240 S.W.3d 248, in that the *Moore* trial court "accepted the agreement and enforced one of its provisions converting the agreed plea into an open plea; the trial court below, instead, rejected [Delgado's] plea bargain." *Id*. at *3.[3]

Delgado has no precedential value because it is an unpublished opinion. *See* Tex. R. App. P. 47.7. Even if it had been published, it would not change the analysis here because it is factually distinguishable. Here, the trial court never stated that he rejected appellant's plea agreement. The trial court stated: "Well, I'm following the plea bargain agreement, and the plea bargain agreement included that agreement on bond." Thus, *Delgado* is distinguishable, and we hold that the trial court properly enforced the bond request remedy. *See State v. Moore*. 240 S.W.3d at 253–54.

[3] Although the *Delgado* opinion does not provide the full text of the bond request, the quoted excerpts are identical to appellant's bond request. *Delgado*, 2008 WL 1759089, at *2–3. The *Delgado* bond request also may have included the same alternative remedy as the one in appellant's bond request: "Defendant agrees . . . that [his] failure to appear [at presentence investigation appointments] authorizes the Trial Court to . . . impose a sentence within the full range of punishment . . . ." The Tenth Court of Appeals did not consider whether this provision, if it was contained in Delgado's bond request, affected the trial court's decision to reject the State's recommendation of community supervision.

B. Admonishments

Appellant argues that his plea agreement was involuntary because the trial court did not specifically admonish him regarding the effect of his failure to appear when he requested to remain free on bond.[4]

The trial court was required to admonish appellant regarding the following before accepting his guilty plea: (1) the range of punishment for the offense; (2) the State's recommendation is not binding on the court, and the defendant may withdraw his plea if the court rejects the agreement; and (3) the trial court must give appellant permission to appeal a punishment assessed that does not exceed the State's recommendation, except for matters raised by pre-trial motions. *See* Tex. Crim. Proc. Code Ann. art. 26.13(a)(1)–(3) (Vernon 2009).[5] The trial court's substantial compliance relative to these admonitions is sufficient to satisfy the statute, unless appellant shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonition. *Id*. art. 26.13(c). To substantially comply with the statute, the trial court need not advise appellant of every aspect of his case relevant to his case or sentencing, but only the direct consequences of entering a guilty plea. *Mitschke v. State*, 129 S.W.3d 130, 136 (Tex. Crim. App. 2004). Direct consequences of a plea are generally held to be those listed in the article 26.13(a) admonishments. *Id*.

The trial court admonished appellant according to the statute and further confirmed with appellant that he understood the terms of his plea agreement with the State. The record reveals that appellant understood the provisions of the agreement, including the consequences of his failure to cooperate with the presentence investigation:

[4] This court has jurisdiction to review the voluntariness of appellant's plea agreement because the trial court granted appellant permission to appeal. *See* Tex. R. App. P. 25.2(a)(2)(B).

[5] Admonishments under subsections (a)(4)–(5) do not apply here because they pertain to non-citizens and sex-offender registration. *See* Tex. Crim. Proc. Code Ann. art. 26.13(a)(4)–(5).

THE COURT: [I] have a document before me that's titled "Request Concerning Bond Pending Further Proceedings, Disclosure of Further Negotiated Plea Agreement." Is that your signature at the bottom of that document?

APPELLANT: Yes, sir.

THE COURT: Did you go over all these documents with your lawyer before you signed them?

APPELLANT: Yes, sir.

THE COURT: Okay. And so, you understand that the terms of being allowed to remain on bond while we were conducting the [presentence investigation] was that you timely appear at the probation department?

APPELLANT: Yes, sir.

* * *

THE COURT: Do you know of any reason why under law you should not be sentenced at this time?

APPELLANT: I didn't have a way to call the probation department. I didn't have a place to stay. At the time that when they sent that letter to that address, my mom had just let that house go and I don't have no family down here. My grandmother probably didn't answer the phone because she has cancer and she's doing radiation. And —

THE COURT: Well, you knew you needed to go there. You were told that after you entered your plea of guilty, didn't you?

APPELLANT: Yes, sir.

Appellant has not shown, and the record does not reveal that appellant was unaware of the consequences of his plea or that he was misled or harmed by the admonition of the court. *See* Tex. Crim. Proc. Code Ann. art. 26.13(c). The trial court sentenced appellant pursuant to the otherwise enforceable plea agreement. *See Moore*, 240 S.W.3d at 253–54. Accordingly, we affirm the trial court's judgment sentencing appellant to imprisonment for ten years.

II. Indigence

The trial court found appellant indigent on May 20, 2009. The trial court ordered appellant to pay $1,190 in court costs and $750 for attorney's fees. Appellant argues that there is insufficient evidence to support the trial court's implicit determination that appellant's indigent status materially changed after the initial indigence finding. Appellant requests that we reform the judgment by deleting the order to pay costs and fees.[6]

Once a defendant is declared indigent, he presumptively remains indigent for the entirety of the proceedings unless a material change in the defendant's financial circumstances occurs. *See* Tex. Code Crim. Proc. Ann. art 26.04(p) (Vernon 2009). The State argues that appellant's testimony at the sentencing hearing constitutes evidence rebutting the presumption of continued indigence and supporting the trial court's order:

> THE COURT: And you — you've got legs that work, don't you? You could walk [to the community supervision office], couldn't you?
>
> APPELLANT: Yes, sir.
>
> THE COURT: You went to other places . . . that required you to walk or get a ride or something like that, didn't you?
>
> APPELLANT: Just to work . . .
>
> THE COURT: Or did you stay in one place the entire time?
>
> APPELLANT: Just to work, sir.
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> THE COURT: Just to work. How did you get to work?
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> APPELLANT: I had a ride for a little bit. And then after that, they had to let me go because I couldn't find a ride anymore.[7]

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[6] Appellant may raise this issue on appeal despite the fact that he did not complain to the trial court about the order to pay costs and fees. *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010) ("We conclude that appellant's complaint about the sufficiency of evidence of his financial resources and ability to pay were . . . not waived by his failure to raise such a complaint at trial.").

[7] This testimony pertained to the trial court's determination that appellant failed to cooperate with

Appellant's financial resources and ability to pay are explicit, critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees under article 26.05(g). *See* Tex. Crim. Proc. Code Ann. art. 26.05(g); *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010). Without evidence to demonstrate appellant's financial resources, the trial court cannot order reimbursement of an appointed attorney's fees or other costs. *See Mayer v. State*, 274 S.W.3d 898, 901 (Tex. App.—Amarillo 2008), *aff'd*, *Mayer*, 309 S.W.3d 552, 555–56. Appellant's testimony that he went to "work" for a "little bit" does not demonstrate that appellant had sufficient financial resources to remit costs and attorney's fees. Accordingly, we reform the trial court's judgment by deleting the requirement that appellant pay any costs or fees.[8]

CONCLUSION

We reform the trial court's judgment by deleting the portion ordering appellant to pay costs and fees, and we affirm the judgment as reformed.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.

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the presentence investigation, and was not elicited pursuant to an inquiry into appellant's indigent status under article 26.04(p). *See* Tex. Crim. Proc. Code Ann. art. 26.04(p) ("If there is a material change in financial circumstances after a determination of indigency or nonindigency is made, the defendant, the defendant's counsel, or the attorney representing the state may move for reconsideration of the determination.").

[8] It is unnecessary to remand to the trial court for consideration of this issue. *See Mayer*, 309 S.W.3d at 557 ("When claims of insufficient evidence are made, the cases are not usually remanded to permit supplementation of the record to make up for alleged deficiencies in the record evidence. . . . [T]here is no indication that the State was precluded from presenting evidence [to the trial court] and being heard on the issue of appellant's financial resources . . . .").