

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00161-CR

STACY BRENNAN SCHULTZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 08-06-05713 CR**

MEMORANDUM OPINION

Stacy Schultz appeals the portion of the trial court’s judgment assessing restitution as a condition of her community supervision. We affirm the trial court’s judgment.

Schultz was charged with credit card abuse. *See* TEX. PEN. CODE ANN. § 32.31(b) (Vernon Supp. 2009).¹ She entered a plea of guilty.² The trial court found Schultz guilty,

¹Because the applicable sections of the statutes cited in this Opinion have not changed substantively since the date of Schultz’s offense, we cite to the current versions of the statutes.

²In the plea admonishments, Schultz acknowledged that she “fully underst[oo]d” that “if community supervision in any form is recommended, the Court has the discretion to

and sentenced her to two years' confinement in a state jail facility, probated for two years. The trial court ordered Schultz to serve thirty days in county jail as a condition of community supervision. Restitution was not discussed on the record at the initial hearing suspending the sentence. Schultz was taken into custody and placed in jail for thirty days.

After her release, the State filed a "Restitution Hearing Setting Notice." Over defense counsel's objections, the trial court held the hearing on restitution. The docket entry for the initial hearing states that a written judgment was not prepared after the initial hearing because the restitution amount was in dispute. The trial court heard testimony from a witness and arguments from counsel, and ordered Schultz to pay restitution as a condition of her community supervision. The written judgment placing Schultz on community supervision includes a restitution order.³

Schultz argues that because restitution was not included in the oral pronouncement at the initial hearing, the trial court erred in including restitution in the written judgment. She asks that this Court modify the judgment to delete the restitution requirement.

The sentence in a felony case is pronounced in the defendant's presence. *See* TEX.

impose any reasonable condition of supervision (including confinement in various facilities, treatment and restitution) without violating the plea agreement, if any, unless the plea agreement expressly limits or prohibits such a condition."

³The trial judge subsequently signed a judgment nunc pro tunc changing only the recipient of the restitution.

CODE CRIM. PROC. ANN. art. 42.03, § 1 (Vernon Supp. 2009) (providing that “sentence shall be pronounced in the defendant’s presence”). The parties are present and able to hear and respond to the imposition of sentence. *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002). The judgment is the written declaration and embodiment of the oral pronouncement. TEX. CODE CRIM. PROC. ANN. art. 42.01, § 1 (Vernon Supp. 2009); *Madding*, 70 S.W.3d at 135. When the pronouncement of sentence and the written judgment vary, the oral pronouncement controls. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004).

The Texas Court of Criminal Appeals stated in *Ex Parte Cavasos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006), that “restitution is punishment.” Schultz relies on *Weir v. State*, 252 S.W.3d 85 (Tex. App.--Austin 2008), *aff’d in part and rev’d in part*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009), in arguing that the order of restitution must be deleted. In *Weir*, the defendant was ordered to pay restitution as a condition of his probation, which was later revoked. *Id.* at 86. During the revocation hearing, the court adjudicated the appellant guilty and sentenced the defendant to ten years’ confinement in prison. *Id.* at 87. The trial court did not mention the previously ordered restitution or court costs in its oral pronouncement. *Id.* The written judgment required the defendant to pay the restitution and costs. *Id.*

The Austin Court of Appeals held that restitution must be pronounced orally to be included in the written judgment. *Id.* at 87-88. The court also held that the costs provision

in the written judgment had to be deleted after deciding that court costs are at least in part punitive. *Id.* at 88-90.

The State appealed the decision, raising only the issue of whether or not the assessment of court costs must be included in the oral pronouncement of sentence. *See Weir v. State*, 278 S.W.3d at 365 n.2. The Court of Criminal Appeals held that the court costs were not punitive and therefore did not have to be included in the oral pronouncement of sentence in that case as a precondition to their inclusion in the trial court's written judgment. *Id.* at 367. The remainder of the judgment was affirmed. *Id.* In a footnote, the Court noted that the State did not challenge "the court of appeals' decision with respect to the restitution issue." *Id.* at n.9.

Weir involved a restitution order after revocation of probation. The State contends any requirement that a trial court orally pronounce a restitution order at the time of sentencing should not apply when payment of restitution is a condition of probation, and when the sentence is therefore suspended rather than imposed. The State also argues the determination of punishment was not complete until the restitution issue was resolved.

Schultz argues that she began serving her sentence immediately because she was placed in jail after the initial hearing. However, community supervision is an arrangement in lieu of the sentence; it is not part of the sentence. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3(a) (Vernon Supp. 2009); *Speth v. State*, 6 S.W.3d 530, 532 (Tex. Crim. App. 1999)

(holding that “sentence” does not include the assessment of conditions of probation). A judge may impose confinement in jail as a condition of community supervision. TEX. CODE OF CRIM. PROC. ANN. art. 42.12 §§ 12(a), (b), 18(b). Appellant’s confinement in the county jail was a condition of her community supervision, not part of her sentence. The sentence was suspended. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3; see *Bailey v. State*, 160 S.W.3d 11, 15 (Tex. Crim. App. 2004), see *Speth*, 6 S.W.3d at 532.

The order requiring Schultz to pay restitution was imposed as a condition of community supervision under article 42.037(h) of the Texas Code of Criminal Procedure. See TEX. CODE CRIM. PROC. ANN. art. 42.037(h) (Vernon Supp. 2009).⁴ Article 42.037(e) of the Texas Code of Criminal Procedure states in part that “[t]he imposition of the order [of restitution] may not unduly complicate or prolong the sentencing process.” TEX. CODE CRIM. PROC. ANN. art. 42.037(e) (Vernon Supp. 2009). In *Bailey v. State*, the Texas Court of Criminal Appeals explained that this part of article 42.037(e), which “essentially includ[es] restitution in the ‘sentencing process,’ implies that restitution is imposed as part of the original sentence, and that the sentence is not complete until restitution is imposed.” 160

⁴A trial court has broad discretion in determining the conditions of supervision. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11 (Vernon Supp. 2009); *Fielder v. State*, 811 S.W.2d 131, 134 (Tex. Crim. App. 1991). Article 42.12 of the Texas Code of Criminal Procedure allows a trial judge to “impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.” TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11(a) (Vernon Supp. 2009); *Speth v. State*, 6 S.W.3d 530, 533 (Tex. Crim. App. 1999).

S.W.3d at 15.

The question presented in this case is whether the suspension of the sentence at the initial hearing allowed the trial court to orally pronounce restitution at a subsequent hearing. We believe *Bailey* implicitly answers this question. In that case, the defendant pleaded guilty on February 12 and the trial court adjudicated him guilty of the charged offense, assessed punishment at five years' confinement, suspended imposition of the sentence, and ordered conditions of community supervision. *Bailey*, 160 S.W.3d at 12. The trial court reset the case for a hearing on March 12 to consider the State's request for restitution as a further condition of community supervision. *Id.* The defendant reserved the right to appeal any restitution order. *Id.* After the March 12 hearing, the court ordered Bailey to pay restitution. *Id.* The defendant filed his notice of appeal. *Id.* The court of appeals dismissed the appeal, concluding that the notice of appeal had been filed more than thirty days after sentence was suspended in open court. *Id.* at 12-13; *see* TEX. R. APP. P. 26.2(a)(1). The Court of Criminal Appeals concluded, however, that "[i]n the unique facts of this case, the parties considered the sentencing to be incomplete until the amount of restitution, if any, was set." *Id.* at 16. The Court held that the notice of appeal was timely filed. *See id.*

The premise for the Court's holding in *Bailey* was that the sentencing process was not complete until the date the restitution was awarded. *See id.* at 16 n.4. Because in this case the sentence was suspended and the sentencing process remained incomplete when the

restitution was orally pronounced in open court, the trial court did not err in subsequently including restitution in the written judgment.

Appellant's issue is overruled. The judgment is affirmed.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on November 5, 2009
Opinion Delivered January 27, 2010
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.