In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00358-CR
NO. 09-09-00372-CR

ROGER DALE CARTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause Nos. 09-03-02827-CR and 09-03-02825-CR

MEMORANDUM OPINION

Roger Dale Carter burglarized a home in February 2009. Among the items he stole were eight credit cards, some of which he later used to make purchases. Carter pled guilty on June 2, 2009, to two counts of credit card abuse and to one count of burglary of a habitation.[1] At his July 17, 2009, punishment hearing, the trial court assessed a punishment of 5 years each in the two credit card abuse offenses and 50 years in the

[1]The trial cause number in the burglary-of-a-habitation offense is No. 09-03-02825-CR. The trial cause number in the credit card abuse case is No. 09-03-02827-CR.

burglary-of-a-habitation offense. The sentences in the credit card abuse offenses were to run concurrently with each other, and the burglary-of-a-habitation offense was to run consecutively to the credit card abuse cases. Carter appeals the punishment assessed in each case. We hold that the error in the written admonishment in the burglary-of-a-habitation offense was harmless, and the trial court did not err in sentencing Carter as a habitual offender. Carter's sentence in Count II of the credit card abuse offense is not outside the statutory punishment range.

BURGLARY OF A HABITATION

The State alleged one enhancement paragraph in the burglary-of-a-habitation indictment. Carter pled guilty to that offense and stipulated in writing to the single felony enhancement alleged in the indictment. The written admonishment, signed on June 2, 2009, stated a punishment range of 5 to 99 years or life.

Carter raises two issues: the trial court, upon Carter's plea of guilty, erred in failing to properly admonish him on the punishment range for burglary of a habitation, and the trial court erred in punishing Carter as a habitual offender when the State did not properly amend the indictment. The State acknowledges that the trial court incorrectly admonished Carter that his range of punishment was from 5 to 99 years or life.

Article 26.13(a)(1) requires that prior to accepting a defendant's guilty plea, the trial court shall admonish the defendant as to the range of punishment. Tex. Code Crim. Proc. Ann. art. 26.13(a)(1) (West Supp. 2010). The trial court must substantially comply

with the statutory requirement. *Id*. art. 26.13(c), (d) (West Supp. 2010). The range of punishment for the second degree felony offense of burglary of a habitation, enhanced to a first degree felony with one prior felony conviction, is 5 to 99 years or life. Tex. Penal Code Ann. §§ 12.32, 12.33, 12.42(b) (West Supp. 2010); *id.* § 30.02(a)(3), (c)(2) (West 2003). However, the range of punishment for a second degree felony offense with enhancements of two prior felony convictions (properly sequenced) is 25 to 99 years or life. *See* Tex. Penal Code Ann. § 12.42(d) (West Supp. 2010). The amended enhancement allegations raised the minimum punishment range from 5 to 25 years, a substantially different minimum requirement.

The State argues that because the sentence of fifty years for the burglary-of-a-habitation offense is within the actual and the stated range, the admonishment substantially complies with article 26.13. *See Robinson v. State*, 739 S.W.2d 795, 801 (Tex. Crim. App. 1987); *Taylor v. State*, 610 S.W.2d 471, 478 (Tex. Crim. App. 1981) (op. on rehearing). *Robinson* and *Taylor* are distinguishable from this case because they do not involve trial court error in setting out the minimum amount of time required to be assessed. *See Robinson*, 739 S.W.2d at 798-99; *Taylor v. State*, 610 S.W.2d 471, 473 (Tex. Crim. App. 1980). Here, although the 50 year sentence is within the 5 to 99 years or life range (stated amount) and within the 25 to 99 years or life range (actual amount), an admonishment setting out a minimum sentence that is incorrect by 20 years is not in substantial compliance with article 26.13(a).

The failure to substantially comply with article 26.13 is subject to a harm analysis under rule 44.2(b) for non-constitutional error. *See VanNortrick v. State*, 227 S.W.3d 706, 708 (Tex. Crim. App. 2007); *see also* Tex. R. App. P. 44.2(b). "If the error affected substantial rights, then, it is not harmless." *Id.* To determine whether the trial court's error affected substantial rights, we conduct an independent examination of the whole record. *VanNortrick,* 227 S.W.3d at 708-09. Neither party has the burden to prove harm or harmlessness resulting from the error. *Id.* at 709. As the Court of Criminal Appeals stated in *Anderson v. State*, the question is: "[C]onsidering the record as a whole, do we have a fair assurance that the defendant's decision to plead guilty would not have changed had the court admonished him?" *Anderson v. State,* 182 S.W.3d 914, 919 (Tex. Crim. App. 2006). We draw reasonable inferences from facts in the record when conducting a harm analysis based on the trial court's failure to admonish a defendant about the consequences of pleading guilty. *VanNortrick,* 227 S.W.3d at 710.

At the punishment hearing, the State sought to admit various exhibits containing judgments of Carter's prior convictions. Defense counsel stipulated to the judgments, and the trial court admitted them into evidence. During the punishment hearing, Carter pled "true" to six enhancements contained in the "Notice of Amended Enhancement" filed by the State on July 15, 2010, two days before the punishment hearing. The six prior convictions (listed in the amended notice of enhancements) were also among the judgments admitted into evidence at the punishment hearing. Present at the punishment

hearing, Carter was aware of their admission, and Carter's counsel stipulated to the admission of the judgments.

During closing argument at the punishment phase, the following exchange occurred:

> [STATE'S COUNSEL]: Your Honor, the defendant is looking at a punishment range between 25 to 99 years. The State respectfully requests that you punish this defendant to no less than 50 years. That's only asking for half of what he could be looking at.
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> . . . .
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> THE COURT: Now, I have the burglary of habitation which would normally be a second degree felony; however, because of the enhancements, it has the punishment range of first degree felony; is that correct? The 5 to 99 -- that's what the admonishments told him.
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> [STATE'S COUNSEL]: My understanding, Your Honor, is it's 25 to 99.
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> THE COURT: [I]s that your understanding, [defense counsel]?
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> [DEFENSE COUNSEL]: It's kind of double level deal, Your Honor.
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> . . . .
>
> [DEFENSE COUNSEL]: [H]e gets enhanced for punishment purposes up to a first degree, 5 to 99. But because he's habituated, he's looking at 25 to life.
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> THE COURT: Okay. And I was just thinking that maybe the amended enhancement paragraphs were not, in fact -- indeed they weren't part of the original indictment.
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> [DEFENSE COUNSEL]: That's correct, Your Honor.
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> . . . .
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> THE COURT: Well, the one indictment [burglary of a habitation] doesn't have but [Enhancement Paragraph] A on it.
>
> [DEFENSE COUNSEL]: That's correct, Your Honor.

> THE COURT: And the other [credit card abuse offenses], . . . our range is still the 2 to 10 on the state jail felony.
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> [DEFENSE COUNSEL]: Yes, Your Honor.
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> THE COURT: But 25 to 99 or life on the burglary.
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> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> . . . .
>
> THE COURT: I am sentencing you on the burglary of habitation to 50 years in the Institutional Division of the Texas Department of Criminal Justice. On Count 1 of the credit card abuse, I'm sentencing you to 5 years. On Count 2, to an identical 5 years. Those will run concurrently, but I'm going to request that the burglary of habitation and the two counts of the credit card abuse run consecutively, one after the other.

The court made the punishment range of 25 to 99 years for the burglary-of-a-habitation offense clear to Carter at the punishment hearing. Carter received notice prior to the punishment hearing of the additional enhancements. He pled "true" to the additional enhancements at the punishment hearing. During that hearing, defense counsel stated the correct range and indicated that Carter was subject to the habitual offender range. Carter did not object to the range of punishment and did not request a continuance. The record contains references to the correct punishment range, and there is nothing in the record that shows Carter remained unaware of the correct range. *See Aguirre-Mata v. State*, 125 S.W.3d 473, 476-77 (Tex. Crim. App. 2003).

Based on the record before us, we conclude that the error did not affect Carter's substantial rights. Considering the record as a whole, we have fair assurance that Carter's

plea would not have been different. *See Anderson v. State*, 182 S.W.3d at 919. We find the error was harmless.

In issue two, Carter contends the trial court erred in punishing him as a habitual offender "when the State did not properly amend the indictment." However, the State filed an amended notice of enhancements, which is allowed by the statutory provisions regarding the amendment of an indictment. *Brooks v. State*, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997).

While prior convictions used for enhancement purposes must be pled in some form, they need not be pled then in the indictment. *Villescas v. State*, 189 S.W.3d 290, 292 (Tex. Crim. App. 2006); *Brooks v. State*, 957 S.W.2d at 32 34. There is no set time period by which the notice of enhancements must be given. *Villescas*, 189 S.W.3d at 294. As noted in *Villescas*, "when a defendant has no defense to the enhancement allegation and has not suggested the need for a continuance in order to prepare one, notice given at the beginning of the punishment phase satisfies the federal constitution." *Id*.; *see also Hughen v. State*, 265 S.W.3d 473, 479 (Tex. App.—Texarkana 2008), *aff'd on other grounds*, 297 S.W.3d 330 (Tex. Crim. App. 2009). Prior to the punishment hearing, the State gave Carter notice of its additional enhancement allegations; Carter pled true to each of the additional enhancements; Carter did not object to the enhancements or ask for a continuance. The trial court did not err in sentencing Carter as a habitual offender. We overrule issue two in the burglary-of-a-habitation offense and affirm the conviction.

CREDIT CARD ABUSE

The trial court sentenced Carter to five years in prison for each credit card abuse case (sentences to run concurrently). In Count I of the credit card abuse offenses, Carter stipulated to five enhancements. In Count II, he did not stipulate to any enhancements. He only stipulated to the commission of the offense itself. At the punishment hearing, Carter stipulated, without limitation or restriction, to five judgments (previously stipulated to in writing on Count I), and the judgments were admitted into evidence. Moreover, he also pled "true" to those enhancement paragraphs that were contained in the indictment for Counts I and II[2] and in the amended enhancement notice for the burglary-of-a-habitation offense.

On appeal, Carter contends he did not stipulate to any enhancement paragraphs in Count II of the credit card abuse indictment, and his sentence is void because it is outside the statutory punishment range. He maintains that the punishment hearing record "is silent as to whether or not his pleas of true applied to one or all of his cases." He asserts that it "appears from the context that the pleas of true only apply to the [b]urglary case." Without an enhancement, the punishment range in the Count II credit card abuse case (a

[2]The original judgments in both Counts I and II reflect a finding of true on the enhancements. The State filed a motion for nunc pro tunc judgment for each count. Each motion states that "the degree of offense was changed on the judgment in only one place." In each corrected judgment, the degree of offense is changed to a state jail felony enhanced to a third degree felony.

state jail felony) is 180 days to two years. *See* Tex. Penal Code Ann. §§ 12.35(a), 32.31(d) (West Supp. 2010).

The State argues the trial court had sufficient evidence, as to Count II, to find each of the five enhancement paragraphs true, because Carter "orally stipulated to each enhancement paragraph and also stated that he had no objection to the admission of the pen packet containing the judgments for all five enhancement paragraphs."

The punishment evidence on the two counts of credit card abuse and the burglary-of-a-habitation offenses was presented in a single hearing. The trial court called the cause numbers of the credit card abuse and burglary-of-a-habitation cases at the beginning of the punishment hearing. The prosecutor informed the trial court that she was going to offer a pen packet and several judgments into evidence. Defense counsel stated, "We will stipulate to those judgments." The trial court admitted the stipulated-to judgments into evidence. The prosecutor went through the judgments, named the offense and the court in which conviction occurred, and the date of the judgment. Noting that there was an amended enhancement in the file and that Carter's pleas to the enhancement paragraphs needed to be taken, the trial court received Carter's pleas of true. There was no indication the trial court intended that the judgments admitted into evidence and Carter's pleas of "true" to the enhancements applied only to the burglary-of-a-habitation case or to Count I of the credit card abuse cases. The trial judge stated, "I have two cases in front of me at this time, is that right? I have the credit card abuse which the admonishments tell me -- he

understand[s] is a state jail felony with enhancements which gives it a third degree range of 2 to 10 years; is that right?" Later the trial judge stated, "So, our range is still the 2 to 10 on the state jail felony." The trial judge sentenced Carter to five years in both the credit card abuse counts, with the sentences to run concurrently.

Carter did not object to, or seek to limit the application of, the enhancement allegations to which he pled "true" at the punishment hearing. He did not object to the admission of the judgments evidencing the enhancements, but instead stipulated to them.

Unless the offense is committed against an elderly individual, credit card abuse is a state jail felony. *See* Tex. Penal Code Ann. § 32.31(d) (West Supp. 2010). Under section 12.42 of the Texas Penal Code, a state jail felony may be enhanced to a third-degree felony if the defendant has previously been finally convicted of two state jail felonies. *See* Tex. Penal Code § 12.42(a)(1) (West Supp. 2010). The range of punishment for a third degree felony is 2 to 10 years. *See* Tex. Penal Code Ann. § 12.34 (West Supp. 2010). The trial court had sufficient evidence -- through the judgments admitted into evidence and Carter's pleas of "true" to the enhancement allegations -- to sentence Carter to 5 years on Count II of the credit card abuse offense. The sentence was not outside the statutory punishment range. We overrule the issue raised in the credit card abuse case. The judgments in No. 09-09-00358-CR and No. 09-09-00372-CR are affirmed.[3]

[3]Whether section 3.03 of the Texas Penal Code applies in this case has not been raised below or on appeal. *See* TEX. PEN. CODE ANN. § 3.03 (West Supp. 2010). This Court has held that "we look only to the original plea proceeding in determining whether ordering sentences to run consecutively is permissible." *Hancock v. State*, Nos. 09-09-

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on September 24, 2010
Opinion Delivered October 20, 2010
Do Not Publish

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

00017-CR, 09-09-00046-CR, 2010 WL 2854410, at *2 (Tex. App.—Beaumont July 21, 2010, no pet. h.). We do not have the record from the earlier guilty plea hearing before us.