In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00486-CR

NORVIN CULPEPPER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 128th District Court
Orange County, Texas
Trial Cause No. A-090029-R

MEMORANDUM OPINION

After entering a plea-bargain agreement, Norvin Culpepper[1] pled guilty to aggravated assault with a deadly weapon, a second degree felony. *See* Tex. Penal Code Ann. § 22.02 (West Supp. 2010).[2] Culpepper's plea agreement expressly provided that "If the defendant fails to appear for sentencing, any agreed punishment recommendation

[1]Appellant's name also appears in the record as Norvin Charles Culpepper, Jr.

[2]Although the Legislature amended section 22.02 of the Texas Penal Code after the date Culpepper is alleged to have committed the offense, there were no changes in the provision pertinent to this appeal. Therefore, we cite the current version.

is no longer in effect, and this will instead be an open plea, and the defendant will not be allowed to withdraw his plea if the court does not follow the original agreed punishment recommendation." On the date scheduled for Culpepper's sentencing, he failed to appear. The trial court then revoked Culpepper's bond, pronounced him guilty, and assessed Culpepper's punishment at twenty years in prison with an affirmative finding of a deadly weapon together with a fine of $10,000. In two appellate issues, Culpepper argues his plea was involuntary and that the trial court's admonishments did not comply with article 26.13 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 26.13 (West Supp. 2010).

After Culpepper failed to appear for sentencing, he was arrested, and at his subsequent appearance, the trial court pronounced a sentence of twenty years in prison and a fine of $10,000. Because Culpepper pled guilty pursuant to a plea agreement, and because the trial court's sentence is within the sentence permitted under his plea agreement, we conclude that Culpepper has no right to appeal. *See* Tex. R. App. P. 25.2(a)(2). We dismiss Culpepper's appeal for want of jurisdiction.

Background

In January 2009, the State indicted Culpepper for aggravated assault with a deadly weapon. In May 2009, Culpepper pled guilty, but the trial court reset the case for sentencing at Culpepper's request. Culpepper's plea-bargain agreement reflects that the State and Culpepper agreed to a punishment recommendation of five years in prison with

an affirmative finding of his having used a deadly weapon during the commission of the offense. However, Culpepper's plea agreement further specified that if he failed to appear for sentencing, the agreed punishment was "no longer in effect[.]"

The failure-to-appear provision effectively opened Culpepper to the possibility of receiving a punishment exceeding five years in the event that he failed to appear for sentencing, limited only by the punishment range for the crime of aggravated assault with a deadly weapon. In June 2009, Culpepper failed to appear at his sentencing hearing. At that point, the trial court revoked Culpepper's bond, found him guilty of aggravated assault, and assessed Culpepper's punishment at twenty years in prison and a $10,000 fine. When Culpepper was later arrested, the trial court conducted another hearing. During the second sentencing hearing of October 5, 2009, Culpepper claimed to have been coerced into signing the plea agreement. Culpepper told the trial court during the October 5 hearing: "I think that I need to go to trial."

The trial court did not indicate that it intended to allow Culpepper to withdraw his plea of guilty. Based on Culpepper's plea agreement, in which he had agreed to plead guilty, which was at that point an open plea, the trial court sentenced Culpepper to twenty years in prison and a $10,000 fine. That same day, the trial court certified that Culpepper had the right of appeal, and the trial court's certification states that this was not a plea-bargain case.

In November 2009, the trial court heard Culpepper's motion for new trial and motion in arrest of judgment. Culpepper's motion for new trial argued the trial court failed to follow the plea-bargain agreement and did not allow Culpepper to withdraw his plea of guilty. Culpepper's motion for new trial was denied by operation of law. *See* Tex. R. App. P. 21.8. Culpepper filed a timely notice of appeal.

Analysis

We must first address whether we have jurisdiction over Culpepper's appeal. The trial court's certification of appellant's right to appeal states that Culpepper's criminal case "is not a plea-bargain case," and that Culpepper "has the right of appeal." After reviewing the record, the record demonstrates that Culpepper pled guilty pursuant to the terms of his plea bargain. Culpepper's plea agreement provides that the State would not be required to make a recommendation on the length of Culpepper's sentence if he failed to appear for sentencing. The plea agreement also gave the trial court the right to sentence Culpepper without the benefit of any recommendation by the State, making Culpepper's plea of guilty an open plea.

We conclude the trial court's certification that this is not a plea-bargain case is defective because it is contrary to the record. *See Dears v. State*, 154 S.W.3d 610, 614 (Tex. Crim. App. 2005) (describing a defective certification as "a certification which is correct in form but which, when compared with the record before the court, proves to be inaccurate."); *Saldana v. State*, 161 S.W.3d 763, 764 (Tex. App.—Beaumont 2005, no

pet.) (holding the trial court's certification that case was not a plea-bargain case was incorrect and not supported by the record); *Barcenas v. State*, 137 S.W.3d 865, 866 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (finding that despite the trial court's certification of the appellant's right to appeal, the record showed that appellant had no such right).

The record shows that Culpepper's case is a plea-bargain case and that the trial court's actions were based on the terms of his plea agreement. Based on the entire record, we conclude that Culpepper was sufficiently informed by the trial court of its intent to follow the terms of his plea agreement. *See Ditto v. State*, 988 S.W.2d 236, 238 n.4 (Tex. Crim. App. 1999) (en banc) (concluding that a trial judge can be viewed as having "informed the defendant" of his intent to follow the plea-bargain agreement when the agreement is comprised of one or two simple terms, the trial judge's actions comport exactly with those terms, and no party objects or indicates an understanding that the trial judge is rejecting the agreement); *see also* Tex. Code Crim. Proc. Ann. art. 26.13(a)(2), (c) (substantial compliance by the trial court is sufficient to admonish the defendant of whether the court will follow a plea-bargain agreement, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court).

Here, the record reflects that Culpepper breached the plea-bargain agreement by failing to appear at his initial sentencing hearing. Culpepper's breach of the plea

agreement relieved the State of its duty to recommend a five-year sentence, and his guilty plea then became open as to sentencing. The record further reflects the trial court sentenced Culpepper to twenty years in prison, which is a punishment within the range of punishment for the crime of aggravated assault with a deadly weapon.

We conclude Culpepper has failed to demonstrate that the State did not live up to the plea agreement. The trial court's refusal to allow Culpepper to withdraw his plea and its decision to sentence Culpepper to twenty years in prison are within the terms of Culpepper's plea-bargain agreement. *See State v. Moore*, 240 S.W.3d 248, 251, 253-54 (Tex. Crim. App. 2007) (breach by the defendant of a term in a plea agreement released the State from its obligation to make a sentence recommendation of twenty-five years). In a plea-bargained case in which the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant, a defendant may only appeal those matters raised by written motion filed and ruled on before trial or after the defendant obtains the trial court's permission to appeal. Tex. R. App. P. 25.2(a)(2).

Culpepper's appeal does not challenge matters that were raised by written motions filed and ruled upon before trial. *See id.* 25.2(a)(2)(A). Because this is a plea-bargain case, and Culpepper has not shown that any exceptions apply allowing us to exercise appellate jurisdiction over his appeal, we dismiss Culpepper's appeal for lack of jurisdiction. *Waters v. State*, 124 S.W.3d 825, 826-27 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (dismissed for lack of jurisdiction when the record reflected that the trial

court's certification was incorrect and no exceptions gave the appellate court jurisdiction over the appeal).

DISMISSED – WANT OF JURISDICTION.

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HOLLIS HORTON
Justice

Submitted on September 28, 2010
Opinion Delivered October 27, 2010
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Before McKeithen, C.J., Gaultney and Horton, JJ.