In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00499-CR

ROBERT WAYNE MAZE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 95980

MEMORANDUM OPINION

Appellant Robert Wayne Maze appeals from the trial court's revocation of his deferred adjudication community supervision finding him guilty of sexual assault of a child, and sentencing him to seventy-five years in prison. A grand jury indicted Maze as a repeat felony offender for sexual assault of a child, a second-degree felony. Pursuant to a plea-bargain agreement, Maze pleaded guilty to sexual assault of a child. The trial court deferred adjudicating Maze's guilt and placed him on ten years deferred adjudication community supervision and assessed a fine of $1,000. Subsequently, the State filed a motion to revoke unadjudicated probation, alleging that Maze violated the terms and

conditions of his community supervision. At a hearing on the State's motion, Maze pleaded true to two counts in the motion, but pleaded not true to one count. After presentation of evidence on the contested allegation, the trial court found the evidence sufficient as to all three counts, revoked Maze's unadjudicated community supervision, found him guilty of sexual assault of a child, and sentenced him to seventy-five years in prison.

Admonishments and Voluntariness

In his first issue, Maze contends that the trial court improperly admonished him concerning the applicable punishment range for his offense. In his second issue, Maze argues that this was reversible error because the improper admonishments misrepresented the direct consequences of his plea, causing his plea to be involuntary. The State concedes that Maze was improperly admonished, but argues that the erroneous admonishment does not cause Maze's plea to be involuntary.

Our review of the trial court's order adjudicating guilt is ordinarily limited to whether the trial court abused its discretion in determining that the defendant violated the terms of his community supervision. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 5(b) (West Supp. 2010). Generally, a defendant may not raise the issue of the voluntariness of a plea on appeal from a plea-bargained, felony conviction, which was honored by the trial court. *See Cooper v. State*, 45 S.W.3d 77, 81 (Tex. Crim. App. 2001); *see also* Tex. Code Crim. Proc. Ann. art. 44.02 (West 2006). Moreover, the Court of Criminal Appeals has specifically held that "a defendant placed on deferred adjudication community

supervision may raise issues relating to the original plea proceeding . . . only in appeals taken when deferred adjudication community supervision is first imposed." *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999); *Clark v. State*, 997 S.W.2d 365, 368 (Tex. App.—Dallas 1999, no pet.) (op. on reh'g) ("[A] defendant must appeal the voluntariness of his plea at the time he is placed on deferred adjudication probation and cannot wait until he is adjudicated to bring this issue."); *see also* Tex. Code Crim. Proc. Ann. art. 42.12, § 23(b) ("The right of the defendant to appeal for a review of the conviction and punishment, as provided by law, shall be accorded the defendant at the time he is placed on community supervision.").

Maze entered into a plea-bargain agreement that the trial court honored. Prior to entering his plea, Maze informed the trial court that he had received written admonishments, that his attorney had sufficiently explained the admonishments to him, and that he read and signed the admonishments. The admonishments indicated that Maze had been charged with sexual assault, a first degree felony, punishable for "[a] term of life or any term of not more than 99 years or less than 5 years[.]" At the plea hearing, Maze confirmed with the trial court that he entered into his plea of guilty freely and voluntarily. In compliance with the plea agreement, the trial court placed Maze on deferred adjudication community supervision in March 2009. Maze did not appeal after his original plea hearing. The State filed a motion to revoke in October 2010. Since Maze did not challenge the voluntariness of his plea following the original plea

proceeding, he may not now complain about the voluntariness of his plea. *See Cooper*, 45 S.W.3d at 81; *Manuel*, 994 S.W.2d at 661-62.

Illegal Sentence

In his third and fourth issues, Maze complains that the trial court imposed an illegal sentence that is void as a matter of law. The indictment charged Maze with sexual assault of a child. *See* Tex. Penal Code Ann. § 22.011(a)(2)(A) (West 2011) ("A person commits an offense if [he] intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means[.]"). Under the circumstances of this case, an offense under Section 22.011 is a second-degree felony. *Id.* § 22.011(f). The range of punishment for a second-degree felony is limited to "not more than 20 years or less than 2 years." *Id.* § 12.33(a).

The indictment contained an enhancement paragraph, which had it been properly established, would have allowed the trial court to enhance Maze's punishment to a first-degree felony, which carries a range of punishment of "life or for any term of not more than 99 years or less than 5 years." *See id.* §§ 12.32(a), 12.42(b). "[W]hen the State seeks to enhance a defendant's sentence for the primary offense by alleging that a defendant has a prior conviction, and the defendant enters a plea of not true, the factfinder must decide whether the State has sustained its burden by entering a finding that the enhancement allegation is either true or not true." *Jordan v. State*, 256 S.W.3d 286, 291 (Tex. Crim. App. 2008). Here, the State failed to meet its burden of proof. Maze argues, and the State concedes, that no one mentioned the enhancement paragraph

during the plea hearing, Maze did not plead true to the enhancement, and the State did not offer proof of the enhancement. We conclude the State introduced insufficient evidence to prove the enhancement allegation. Therefore, Maze's seventy-five year sentence exceeds the maximum penalty allowed for a second-degree felony. *See* Tex. Penal Code Ann. § 12.33(a). A sentence outside the range applicable to the offense is void. *Hern v. State*, 892 S.W.2d 894, 896 (Tex. Crim. App. 1994). When reversible error occurs in the punishment phase of trial, the appellant is entitled only to a new hearing on punishment. Tex. Code Crim. Proc. Ann. art. 44.29(b) (West Supp. 2010).

Concluding that Maze's issues regarding the voluntariness of his plea are untimely, we affirm the trial court's judgment on his conviction, but we reverse the trial court's judgment on punishment and remand the case to the trial court with instructions to conduct a new punishment hearing.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

_____

CHARLES KREGER
Justice

Submitted on August 4, 2011
Opinion Delivered August 24, 2011
Do not publish

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