In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00064-CR
NO. 09-11-00065-CR

BRIAN THOMAS WELKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause Nos. 97646, 97648

MEMORANDUM OPINION

Brian Thomas Welker entered agreed pleas in cause number 97646 and in cause number 97648. In each case, the trial court deferred adjudication of guilt, placed Welker on community supervision for nine years, and assessed a $750 fine.[1] The State filed motions to revoke Welker's unadjudicated community supervision. The trial court held an evidentiary hearing on the motions to revoke, found that Welker violated the community supervision orders, found him guilty and sentenced him to twenty years of

[1] In appellate cause number 09-11-00064-CR, the trial cause number is No. 97646. In appellate cause number 09-11-00065-CR, the trial cause number is No. 97648.

confinement in cause number 97646 and ten years of confinement in cause number 97648. The trial court ordered the sentence in cause number 97648 to run consecutive with the sentence in cause number 97646. Welker appeals in both cases.[2]

THE ISSUES

In his appeal of cause number 97646, Welker raises five issues. In his first issue, he argues he has been denied a complete record on appeal. In his next four issues, he complains that he was indicted on a third-degree-felony offense but was sentenced to twenty years of confinement, a sentence that exceeded the statutory maximum. He maintains that because of this error, his plea was involuntary, he was improperly admonished concerning the applicable punishment range, and the sentence is void and unauthorized by law.

In his appeal of cause number 97648, Welker raises two issues. As in his appeal of the conviction in cause number 97646, he contends in his first issue that he was denied a complete record on appeal. In his second issue, he argues that the trial court abused its discretion in ordering Welker to serve his sentence in cause number 97648 upon completion of his sentence in cause number 97646.

THE PLEA

In his appeal in cause number 97646, Welker maintains in his fourth and fifth issues that his "plea was involuntary because he was improperly admonished and

[2] Welker filed two separate appeals. Because he raises an identical issue for our consideration in both appeals, and because the issue surrounding the stacking of his sentences concerns both, we address his two appeals in a single opinion.

misdirected concerning the applicable punishment range which would be considered by the court." He bases these arguments on the written admonishments included in the clerk's record for cause number 97646.

Apparently the written plea admonishments for cause number 97648 were erroneously included in the clerk's record for cause number 97646 and the written plea admonishments for cause number 97646 were erroneously included in the clerk's record for cause number 97648. The written plea admonishments for cause number 97646 state the correct applicable punishment range for the third-degree-felony offense for which he was indicted. Issues four and five in Welker's appeal of his conviction in cause number 97646 are overruled.

VOID SENTENCE IN 97646

In Welker's appeal in cause number 97646, he argues in his second and third issues that his twenty-year sentence exceeds the maximum authorized by law and is void. The indictment alleges a third-degree felony. *See* Tex. Penal Code Ann. § 12.34 (West 2011) (punishment for a third-degree felony is confinement for not more than ten years or less than two years, and possible fine up to $10,000); *see also* Tex. Health & Safety Code Ann. § 481.117(c) (West 2010). The written judgment indicates he was sentenced for a second-degree-felony offense. The State concedes that the offense was a third-degree felony, and that the trial court was limited to assessing punishment for the third-degree offense for which he was indicted and admonished, and to which he pleaded guilty.

A sentence not authorized by law is illegal. *See Ex parte Pena*, 71 S.W.3d 336, 336 n.2 (Tex. Crim. App. 2002) (per curiam); *Levy v. State*, 818 S.W.2d 801, 802 (Tex. Crim. App. 1991). Welker's twenty-year sentence is outside the maximum range of punishment for a third-degree felony. We modify the recitation of the conviction in the written judgment to a third-degree felony to make the judgment consistent with the record and the indictment. *See* Tex. R. App. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (An appellate court has authority to reform a judgment "to make the record speak the truth . . . ."). We vacate the sentence imposed and remand cause number 97646 to the trial court for a new sentencing hearing. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (affirming the appellate court's decision to vacate and remand an illegal sentence and remand for a new sentencing hearing); *see also Ex parte Seidel*, 39 S.W.3d 221, 225 n.4 (Tex. Crim. App. 2001). To that extent, issues two and three in Welker's appeal in cause number 97646 are sustained.

INCOMPLETE RECORD

Welker argues in both appeals that he has been denied a complete appellate record, even though he complied with all requirements for securing a record. In the trial court in both cause numbers 97646 and 97648, counsel timely filed a written designation of the record. Attached to the written designation of the record is a copy of counsel's written request of the official reporter for the preparation and filing of the reporter's record in each case. The reporter's record on appeal contains only the record from the

hearing on the motions to revoke unadjudicated probation. The record of the plea hearing and of the hearing at which the trial court placed Welker on deferred adjudication has not been filed in either case.

Appellate review of an order revoking probation ordinarily concerns 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);[3] *see also Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Antwine v. State*, 268 S.W.3d 634, 636 (Tex. App.—Eastland 2008, pet. ref'd). More specifically, except in limited circumstances, the original plea cannot be attacked on the appeal of the revocation proceedings. *See Nix v. State*, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001) (applying limitations on appeal to cases of deferred adjudication); *see also Daniels v. State*, 30 S.W.3d 407, 408 (Tex. Crim. App. 2000) ("Pursuant to *Manuel*, the reporter's record from the original deferred adjudication proceeding is not necessary to this appeal's resolution since appellant cannot now appeal any issues relating to the original deferred adjudication proceeding."). Furthermore, at the hearing on the motions to revoke, Welker made no objection to the process. *See* Tex. R. App. P. 33.1. The issue is overruled in cause number 97646.

The substantive issue Welker raises in cause number 97648, however, concerns the punishment he received. In Welker's appeal of his conviction in cause number 97648,

[3] In this opinion we cite to the current version of the statutes as the amendments to the statutes do not apply to this appeal and the subsections pertinent here have not materially changed since the date of appellant's offenses.

he argues the trial court abused its discretion in ordering that he serve his sentence in cause number 97648 after he completes his sentence in cause number 97646. Section 42.08 of the Code of Criminal Procedure grants the trial court authority to order sentences to run consecutively or concurrently. Tex. Code Crim. Proc. Ann. art. 42.08 (West Supp. 2010). The trial court's discretion is limited by Section 3.03(a) of the Penal Code, which provides as follows: "When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently."[4] Tex. Penal Code Ann. § 3.03(a) (West 2011).

"[A] defendant is prosecuted in a 'single criminal action' whenever allegations and evidence of more than one offense arising out of the same criminal episode . . . are presented in a single trial or plea proceeding, whether pursuant to one charging instrument or several, and the provisions of Section 3.03 then apply." *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992). One treatise explains as follows:

> If the original offenses that led to community supervision were part of the same criminal episode and convictions were obtained as part of the same criminal action under Chapter 3 of the Texas Penal Code, then concurrent sentences must be employed if prison sentences are imposed. If community supervision is granted but later revoked, then any prison sentences imposed upon revocation must also be made to run concurrently. The test is whether the convictions were obtained in a single proceeding so that under Chapter 3 any sentences imposed must be concurrent. It makes

[4] Subsection (b) is not applicable to the instant case. *See* Tex. Penal Code Ann. § 3.03(b) (West 2011).

> no difference that community supervision terms were revoked in a single revocation proceeding.

43 George E. Dix & Robert O. Dawson, Texas Practice: Criminal Practice and Procedure § 38.211, at 822 (2d ed. 2001) (footnotes omitted).

It is undisputed that both offenses arose out of the same criminal episode; the question is whether the offenses were prosecuted in a single criminal action. Upon revocation of community supervision, an appellate court does consider the plea proceedings in determining whether ordering the sentences to run consecutively was permissible. *See id.* This Court requested the original plea records and was informed by the court reporter, who has since retired, that the records were destroyed. The untranscribed notes of the proceedings were not filed with the trial court clerk. *See* Tex. R. App. P. 13.6. Without a record of the plea proceedings, it cannot be determined in this appeal whether the plea proceedings were consolidated into a "single criminal action" for purposes of Section 3.03 of the Texas Penal Code. *See, e.g., Vallez v. State*, 21 S.W.3d 778, 784 (Tex. App.—San Antonio 2000, pet. ref'd).

Normally a defendant is entitled to a new trial if he timely requests a reporter's record and without his fault a significant portion has been destroyed, assuming the destroyed portion is necessary to the appeal's resolution and cannot be replaced by agreement of the parties. *See* Tex. R. App. P. 34.6(f). Welker's appellate counsel says the portion cannot be replaced by agreement because he cannot vouch for the accuracy of a replacement record for a hearing at which he was not present. Nevertheless, on the issue

raised, we do not believe Welker is entitled to a new plea or sentencing hearing. The only matter we consider here is the cumulation order; in this appeal, the only significance of the missing portion of the reporter's record is to the cumulation order. The Court of Criminal Appeals has noted that an unlawful cumulation order does not constitute reversible error, and that the appropriate remedy for an unlawful cumulation order is to delete the unlawful cumulation order. *See Morris v. State*, 301 S.W.3d 281, 295 (Tex. Crim. App. 2009).

The docket sheets indicate Welker pleaded guilty to both offenses on February 26, 2007. The trial court on April 9, 2007, placed him on deferred adjudication in both cases for nine years and assessed a fine in each case of $750.00. The State acknowledges "[i]t is apparent from a comparison of the Clerk's Record in each case that there was some sloppy paperwork when the plea agreement was reduced to writing." The State concludes that "[t]he result of Appellant's original pleas was the one intended by the parties; nine years deferred adjudication probation for two offenses, one second degree and one third degree. When the causes are examined in conjunction, this is obvious, and can most easily be ascribed to clerical error on the part of the attorney who filled out the plea paperwork." Considering these unusual circumstances, including the lack of a portion of the reporter's record through no fault of appellant, we conclude the appropriate remedy is to modify the judgment in cause number 97648 to delete the cumulation order. To that extent, Welker's second issue in his appeal in cause number 97648 is sustained. Welker

raises no other issue regarding his sentence in cause number 97648. The judgment in that cause number is therefore affirmed as modified.

CONCLUSION

We modify the judgment in cause number 97646 to reflect the conviction for a third-degree felony; we vacate the sentence imposed in cause number 97646 and remand that cause for a new sentencing hearing. We reform the judgment in cause number 97648 to delete the cumulation order, and as modified that judgment is affirmed.

REVERSED AND REMANDED IN PART; AFFIRMED AS MODIFIED IN PART.

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DAVID GAULTNEY
Justice

Submitted on August 25, 2011
Opinion Delivered October 12, 2011
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Before Gaultney, Kreger, and Horton, JJ.