**In The**

# *Court of Appeals*

# *Ninth District of Texas at Beaumont*

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**NO. 09-11-00173-CR**
**NO. 09-11-00174-CR**

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**NIKKI NICOLE DAVIS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 252nd District Court**
**Jefferson County, Texas**
**Trial Cause Nos. 08-03198, 08-03656**

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## MEMORANDUM OPINION

Pursuant to plea agreements, Nikki Nicole Davis pleaded guilty to two offenses of felony driving while intoxicated.[1] In each case, the trial court sentenced Davis to ten years in prison, suspended the imposition of the sentence, and placed Davis on community supervision for ten years. The State filed motions to revoke Davis's community supervision. At the evidentiary hearing on the motions to revoke, Davis pleaded "true" to the violation of one condition of each community supervision order.

[1] In appellate cause number 09-11-00173-CR, the trial cause number is No. 08-03198. In appellate cause number 09-11-00174-CR, the trial cause number is 08-03656.

Finding that Davis violated the community supervision orders, the trial court revoked the community supervision and imposed a punishment of ten years in prison in each case. The trial judge cumulated the sentences. He also orally pronounced that, to the extent allowed by law, the sentences in the two cases would be stacked on whatever sentence Davis would receive in a pending case in Liberty County.

In both appeals, Davis argues the trial court abused its discretion in stacking the sentences in cause numbers 08-03198 and 08-03656 on a future sentence. *See Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006) (abuse-of-discretion standard in review of order revoking probation). The State agrees. Before the trial court may consider cumulation of sentences, the defendant must be convicted in two or more cases. *See* Tex. Code Crim. Proc. Ann. art. 42.08 (West Supp. 2010); *Barela v. State*, 180 S.W.3d 145, 147-48 (Tex. Crim. App. 2005) (At the time of sentencing, the court must have before it both evidence of the former conviction and evidence that the defendant was the same person previously convicted.). There was no indication that Davis had been convicted of the alleged offense in Liberty County. Although the trial court did not orally pronounce a cumulation order regarding the alleged Liberty County offense, the court held out the possibility of cumulating the cases with the Liberty County case. Apparently, the trial court later determined it could not stack the sentence in an undisposed-of case on the sentences here, because the written judgments do not contain a cumulation order

referencing any case in Liberty County. Because the court did not stack the sentence on the pending case in Liberty County, we overrule this issue in both cases.

In issue two in appellate cause number 09-11-00173-CR and issue three in appellate cause number 09-11-00174-CR, Davis argues the trial court erred in failing to follow a plea agreement or in failing to allow her to withdraw her plea. Davis contends that the plea agreement in each case provided that the sentences, if imposed, would run concurrently. In contrast, the State argues that Davis received the benefit of the plea agreement in each case when "she received probation on the two causes simultaneously."

The "judgment of conviction" in trial cause number 08-03656 states that Davis is convicted of felony DWI and that the plea bargain terms are as follows: "Confinement in the institutional division for a term of 10 years probated over 10 years. A fine amount of $500.00. To run concurrent with cause #3198." The judgment of conviction in trial cause number 08-03198 has a similar statement of the terms of the plea bargain.

Davis argues that the "concurrent" sentences referred to in the plea agreements cannot apply to the community supervision terms, because article 42.08 states that "the cumulative total of suspended sentences in felony cases shall not exceed ten years . . . ." The suspended sentences here are ten years each. The "judgment[s] of conviction" do not cumulate the suspended sentences. The suspended sentences are described as "concurrent." When the trial judge revoked the community supervision orders and imposed the sentence in each case, he was not cumulating the community supervision

orders. *See generally Medina v. State*, 7 S.W.3d 876, 879 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (noting distinction between cumulating suspended sentences and cumulating sentences on revocation).

Relying on article 26.13, Davis contends that when the trial judge cumulated the sentences upon revocation, and, in effect, rejected the plea agreement, she was entitled to withdraw her plea of guilty. *See* Tex. Code Crim. Proc. Ann. art. 26.13 (West Supp. 2010). The Court of Criminal Appeals has explained that "[t]he statutes governing probation do not make reference to article 26.13 or to any right of a plea-bargainer to withdraw a plea." *Gutierrez v. State*, 108 S.W.3d 304, 309 (Tex. Crim. App. 2003) (citing Tex. Code Crim. Proc. Ann. art. 42.12). "[I]n the context of revocation proceedings, the legislature has not authorized binding plea agreements, has not required the court to inquire as to the existence of a plea agreement or admonish the defendant pursuant to [article] 26.13, and has not provided for withdrawal of a plea after sentencing." *Gutierrez*, 108 S.W.3d at 309-10. We overrule issue two in appellate cause number 09-11-00173 and issue three in number 09-11-00174-CR.

In issue one in appellate cause number 09-11-00174, Davis argues the trial court abused its discretion, because it cumulated this sentence upon another sentence that arose out of the same criminal episode, and because she was prosecuted for both offenses in a single criminal action. Davis relies on article 42.08 of the Code of Criminal Procedure and section 3.03 of the Texas Penal Code. Article 42.08 grants the trial court authority to

order sentences to run consecutively or concurrently. *See* Tex. Code Crim. Proc. Ann. art. 42.08. Section 3.03(a) of the Penal Code, however, limits the trial court's discretion by requiring concurrent sentencing when the defendant is found guilty of more than one offense arising from the same criminal episode and the accused is prosecuted for the offenses in a single criminal action. Tex. Penal Code Ann. § 3.03(a) (West 2011).[2] "If either predicate is not proven, the sentences were properly cumulated." *Reese v. State*, 305 S.W.3d 882, 885 (Tex. App.—Texarkana 2010, no pet.) (citing *Ex parte McJunkins*, 954 S.W.2d 39, 40-41 (Tex. Crim. App. 1997)).

The Court of Criminal Appeals explained in *LaPorte v. State* that "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." *Id.*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992). The Court has held, however, that guilty pleas which follow one another and are adjudicated separately do not constitute a single criminal action. *See Ex parte Pharr*, 897 S.W.2d 795, 796 (Tex. Crim. App. 1995). Here, although each of the three hearings was conducted on the same day, the trial court dealt with the cases individually. The trial judge called each case separately. Davis pleaded guilty to each indictment separately. The trial judge adjudicated guilt separately for each offense, sentenced Davis, and then

[2] The exception referenced in section 3.03(a) does not apply here. *See* Tex. Penal Code Ann. § 3.03(a) (West 2011).

suspended the imposition of the sentence separately in each case. The community supervision orders were revoked separately, and the trial court sentenced the defendant separately in each case. The offenses were not prosecuted in a single criminal action, and the trial court did not abuse its discretion in cumulating the sentence in trial cause number 08-03656 upon the sentence in number 08-03198. Because prosecution in a single criminal action is not shown, we need not address the second requirement of section 3.03(a). We overrule issue one in appellate cause number 09-11-00174-CR.

We affirm the judgments in cause numbers 09-11-00173-CR and 09-11-00174-CR.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on September 13, 2011
Opinion Delivered October 5, 2011
Do Not Publish

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