In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00192-CR
NO. 09-16-00196-CR

LEROY WAYNE GARDINER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause Nos. 16-05-05554-CR, 15-07-06736-CR

MEMORANDUM OPINION

Appellant Leroy Wayne Gardiner appeals his two convictions for arson. In one issue, Gardiner argues that his sentences should be reversed and that his cases should be remanded for a new punishment hearing because his counsel was not present immediately before or during his formal sentencing. We affirm the trial court's judgments.

BACKGROUND

In two separate indictments, a grand jury charged Gardiner with the offense of arson. In cause number 15-07-06736-CR, the indictment alleges that on or about July 4, 2005, Gardiner committed arson, a second degree felony. In cause number 16-05-05554-CR, the indictment alleges that on or about March 11, 2015, Gardiner committed arson, a first degree felony. Both indictments include an enhancement paragraph alleging that Gardiner has a prior felony conviction. In each case, Gardiner pleaded guilty without a plea agreement and elected to have the trial court assess punishment. In both cases, Gardiner pleaded "true" to the enhancement paragraph.

The trial court conducted a punishment hearing, and at the end of the hearing, the trial court recessed to review the evidence. The record shows that the trial court reconvened the following day and pronounced Gardiner's sentence. The trial court assessed punishment in cause number 16-05-05554-CR at thirty-five years in prison, and in cause number 15-07-06736-CR, the trial court assessed punishment at twenty years in prison. At that point, the trial court took a short recess to allow the prosecutor time to prepare the judgments. The record shows that when the trial court reconvened to again sentence Gardiner, Gardiner's attorney was not present in the courtroom. The trial court noted on the record that "[t]he defendant is here, but his

attorney is not for the formal sentencing not knowing – believing he needed to be here." The trial court again sentenced Gardiner in accordance with the oral pronouncement that it had made when Gardiner's attorney was present.

ANALYSIS

In his sole issue, Gardiner argues that he was denied the right to assistance of counsel at a critical stage of his prosecution because his counsel was not present immediately before or during his formal sentencing. According to Gardiner, because his attorney was not present at his formal sentencing, the trial judge was unable to ask whether there was any reason why the sentences should not have been pronounced, and this caused him to receive fundamentally unfair sentences. *See* Tex. Code Crim. Proc. Ann. art. 42.07 (West 2006).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to have counsel present at all "critical" stages of his prosecution. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *see* U.S. Const. amend. VI. Sentencing is a critical stage in the criminal proceeding during which substantial rights may be affected, and a sentence cannot stand if the defendant is totally deprived of the assistance of counsel at sentencing. *See Perez v. State*, 578 S.W.2d 753, 754 (Tex. Crim. App. 1979) (op. on reh'g).

If the defendant shows that he was deprived of counsel during a critical stage of his prosecution, the error is reviewed to determine whether it was harmful. *Carnell v. State*, No. 01-15-00519-CR, 2017 WL 1352129, at *2 (Tex. App.—Houston [1st Dist.] Apr. 13, 2017) (not yet released for publication). If the defendant was deprived of counsel for all of the critical stage, then the deprivation is total and harm is presumed. *Id.* "[I]f the defendant was deprived of counsel for some but not all of the critical stage, then the deprivation was only partial and the defendant must show harm." *Id.*; *see Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007) (concluding that defendant had to show harm when appellate counsel represented defendant for the last ten days of the thirty-day period for filing motion for new trial). A partial deprivation of the right to counsel is subject to the "harmless beyond reasonable doubt" standard. *Cooks*, 240 S.W.3d at 911-12; *see Massingill v. State*, 8 S.W.3d 733, 737-38 (Tex. App.—Austin 1999, pet. ref'd). If the defendant can show harm, the proper remedy is to remand for a new sentencing hearing, because the absence of counsel at sentencing does not invalidate the judgment of guilt. *Perez*, 578 S.W.2d at 754.

The record shows that Gardiner's counsel was present when the trial court originally assessed and orally pronounced Gardiner's punishment in both cases, and that Gardiner's counsel made no objections. The record further shows that the trial

court recessed to allow the prosecutor to prepare the written judgments, and when the trial court reconvened to formally sentence Gardiner, Gardiner's counsel was not present. Although the trial court proceeded without Gardiner's counsel present, the sentences that Gardiner received at his formal sentencing were in accordance with the prior oral pronouncement that the trial court made when Gardiner's attorney was present. On this record, we conclude that Gardiner has failed to show that he was deprived of counsel during the entire critical stage of sentencing. Because Gardiner was deprived of counsel for some but not all of the sentencing stage, we conclude that the deprivation of counsel was only partial and that Gardiner must show harm. *See Carnell*, 2017 WL 1352129 at *2; *Cooks*, 240 S.W.3d at 911. Because the sentences in the written judgments are identical to those orally pronounced by the court when Gardiner's attorney was present, we conclude that Gardiner has failed to show harm.

Concerning Gardiner's complaint that the trial court failed to follow article 42.07, our review of the record shows that when the trial court originally pronounced Gardiner's sentence with Gardiner's counsel present, Gardiner's counsel did not object to the trial court's failure to inquire whether there was any reason why Gardiner's sentences should not be pronounced. *See* Tex. R. App. P. 33.1(a); *Tenon v. State*, 563 S.W.2d 622, 623 (Tex. Crim. App. [Panel Op.] 1978); *see also* Tex.

Code Crim. Proc. Ann. art. 42.07. We further note that Gardiner does not contend that any of the statutory reasons set out in article 42.07 to prevent the pronouncement of his sentences existed. *See Tenon*, 563 S.W.2d at 623; *Hernandez v. State*, 628 S.W.2d 145, 147 (Tex. App.—Beaumont 1982, no pet.). We conclude that Gardiner failed to preserve his article 42.07 complaint for our review. *See* Tex. R. App. P. 33.1(a); *Tenon*, 563 S.W.2d at 623; *Hernandez*, 628 S.W.2d at 147. We overrule Gardiner's sole issue and affirm the trial court's judgments.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on June 6, 2017
Opinion Delivered June 21, 2017
Do Not Publish

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