COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00205-CR

TAMRA LYNN ELLIS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1378786D

MEMORANDUM OPINION[1]

In a single issue, Tamra Lynn Ellis claims that the trial court erred by rendering an amended judgment instead of vacating her judgment of conviction and either granting a new trial or allowing her to withdraw her bargained-for guilty plea when she failed to turn herself into jail on the date ordered by the trial court. Because withdrawal of the guilty plea was a contractual default remedy inuring to

[1]*See* Tex. R. App. P. 47.4.

the State's benefit and not appellant's, we affirm the trial court's amended judgment.

On February 12, 2015, as part of a plea bargain agreement, appellant signed a judicial confession and pled guilty to possessing four or more but less than two hundred grams of GHB, a Penalty 1 substance. *See* Tex. Health & Safety Code Ann. §§ 481.102(9), 481.115(a), (d) (West 2017). She also pled true to a repeat offender notice in the indictment. *See* Tex. Penal Code Ann. § 12.42(b) (West Supp. 2016). In exchange, the State agreed to recommend a sentence of fifteen years' confinement and a plea in bar on another offense in a different cause number. Along with those two recommendations, the following is also listed on the plea recommendation line in the plea paperwork: "plea bargain is invalidated if Defendant does not turn herself in as ordered by [the] court."

Although the trial court held a hearing on the plea agreement that same day, there is no reporter's record of the hearing because appellant waived her right to have the proceedings recorded by a reporter. The trial court's original judgment signed February 17, 2015 showed the date of commencement of appellant's sentence as March 13, 2015, thus giving appellant twenty-nine days from the hearing date to turn herself into jail.

Appellant did not turn herself in on March 13, 2015, and the trial court issued a warrant for her arrest. Appellant was arrested in April 2015. Appellant hired an attorney, who filed a motion to set bond and a combined motion for new trial and motion in arrest of judgment. The trial court did not rule on these

motions but instead signed an order on May 18, 2016 amending the judgment to change the date of commencement of appellant's sentence to April 17, 2015. Appellant filed a request for permission to appeal pro se, which we construed as a notice of appeal. *See* Tex. R. App. P. 25.2(c)(2), 27.1(b). She later retained appellate counsel.

In her sole issue on appeal, appellant contends that the trial court erred by signing the amended judgment correcting the date her sentence commenced because—in accordance with the provision stating that the plea bargain "is invalidated" if she did not turn herself in—the trial court should have instead vacated the original judgment of conviction and either allowed appellant to withdraw her plea or granted a new trial.[2] According to appellant, the provision

[2]Because we previously questioned our jurisdiction over this appeal, and because the trial court originally signed a certification indicating this is a plea bargain case and there is no right of appeal, appellant alternatively asked us to consider her complaints as a mandamus petition. But because appellant's complaint is about the trial court's action in rendering the amended judgment—and not a complaint about the proceedings prior to the plea bargain—and because the trial court has signed an amended certification indicating appellant has a right to appeal the amended judgment, we conclude that we have jurisdiction to address her complaint in this appeal. *See Blanton v. State*, 369 S.W.3d 894, 904–05 (Tex. Crim. App. 2012); *Loftin v. State*, No. 02-11-00366-CR, 2012 WL 5512391, at *2 (Tex. App.—Fort Worth Nov. 15, 2012, no pet.) (mem. op., not designated for publication) (citing numerous court of criminal appeals cases regarding scope of jurisdiction over appeals from corrected judgments); *cf. Hargesheimer v. State*, 182 S.W.3d 906, 910–11 (Tex. Crim. App. 2006) ("In decisions following *Vidaurri*, we have affirmed that the limitations of Rule 25.2(a)(2) do not apply to appeals separate from a defendant's conviction.").

created a condition precedent and, thus, future performance of the entire bargain was dependent on her post-plea decision whether to turn herself in on time.

The court of criminal appeals has explained that plea agreements in criminal cases are contracts between the defendant and the State and, thus, are to be construed in accordance with general contract principles:

> The contract that results from the plea bargaining process is the product of a defendant's relinquishment of his right to go to trial in exchange for a reduction in the charge and/or sentence. . . . Appellate courts look to the written agreement, as well as the formal record, to determine the terms of the plea agreement, and we will imply a term only when necessary to effectuate the intention of the parties.

Thomas v. State, No. PD-0295-16, 2017 WL 1244453, at *3 (Tex. Crim. App. Apr. 5, 2017) (citations omitted). Generally, conditions precedent in contracts are disfavored, *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990) (op. on reh'g), and courts will not construe a contract to contain a condition precedent leading to forfeiture unless there is no other way to construe the contract language, *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987). Additionally, like any contract, a plea agreement contains mutual promises and benefits:

> Once a plea agreement is finalized and the trial court binds itself to the terms, both the defendant and the prosecutor are entitled to the benefit of the agreement. At the same time, both the defendant and the prosecutor are also bound to uphold their ends of the bargain. . . . Ordinarily, when one side fails to abide by the plea agreement, two potential remedies exist. First, pertaining mainly to the defense, a plea may be withdrawn. Second, the non-breaching party may demand specific performance of the remainder of the plea agreement.

State v. Moore, 240 S.W.3d 248, 251–52 (Tex. Crim. App. 2007) (footnote omitted). Under general contract law, parties are free to specify remedies available upon a breach. *See Weaver v. Jamar*, 383 S.W.3d 805, 812 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("Parties to a contract are free to limit or modify the remedies available for breach of their agreement."); *Limestone Grp., Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793, 797 (Tex. App.—Amarillo 2003, no pet.) ("[P]arties to an agreement may contractually specify the remedies available to redress its breach and, thereby, modify the legal and equitable remedies generally applicable.").

Here, as in *Moore*, it was appellant who benefitted from the State's agreement to recommend a deferral of the commencement date of her sentence. Appellant received her benefit of the bargain; therefore, the more likely construction of the invalidation language is that it was intended to create a penalty for appellant's failure to abide by her agreement to turn herself in at the ordered time. This remedy inured to the State, and the right to demand that remedy lay with the State and not appellant. *See* 240 S.W.3d at 253. That the State failed to avail itself of its remedy upon appellant's default did not obligate the trial court to apply that penalty sua sponte. *See id.* at 253–54; *see also Pelto Oil Corp. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583, 586–87 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (noting, in context of holding that agreement did not provide exclusive remedy, that "[r]emedies provided in a contract may be

permissive or exclusive, and the mere fact that the contract provides a party with a particular remedy does not necessarily mean that such a remedy is exclusive"); *cf. Costilow v. State*, 318 S.W.3d 534, 539–40 (Tex. App.—Beaumont 2010, no pet.) (holding that trial court actually upheld terms of plea bargain by refusing to allow Costilow to withdraw plea when she and State had agreed on thirty-day deferment of sentencing part of trial that would convert to open plea if she did not return for sentencing). Although the language used in the plea agreement could have been drafted to more carefully clarify that invalidation of the plea agreement was a default penalty inuring only to the State, we will not construe language in a plea agreement to lead to an absurd result. *See Ferrant v. Indep. Order of Foresters*, No. 02-16-00098-CV, 2017 WL 218287, at *4 (Tex. App.—Fort Worth 2017, pet. denied) (mem. op.); *SLT Dealer Grp., Ltd. v. AmeriCredit Fin. Servs., Inc.*, 336 S.W.3d 822, 830 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("[W]hen . . . a condition would create an absurd or impossible result, courts should interpret agreements as creating covenants and not conditions."); *Dorsett v. Cross*, 106 S.W.3d 213, 220 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("A party to a contract may not set up his own breach to relieve himself of his contractual obligations; nor may he set up his breach as the basis for rescission of the contract or as the ground for his own recovery.").

Accordingly, we conclude and hold that the trial court did not err by rendering an amended judgment adjusting the sentence commencement date rather than vacating the original judgment of conviction and granting a new trial

or allowing appellant to withdraw her guilty plea. We overrule appellant's sole issue and affirm the trial court's amended judgment.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; SUDDERTH and KERR, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: June 15, 2017