COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00379-CR

AMANDA KAY BOWIE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 43RD DISTRICT COURT OF PARKER COUNTY
TRIAL COURT NO. CR16-0252

MEMORANDUM OPINION[1]

In this appeal from the revocation of appellant Amanda Kay Bowie's deferred adjudication community supervision and 24-month sentence, we are asked to determine whether the trial court abused its discretion by failing to consider the full range of punishment or Bowie's mitigating evidence. We conclude that Bowie failed to make a clear showing of bias at sentencing and

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

overrule her two points. But because the trial court failed to orally pronounce the fine and restitution included in the revocation judgment, we modify the judgment and affirm it as modified.

On April 14, 2016, Bowie pleaded guilty to the state jail felony offense of possession of less than one gram of methamphetamine, which had occurred on February 11, 2016. *See* Tex. Health & Safety Code Ann. §§ 481.102(6), 481.115(a)–(b) (West 2017). Following the terms of her plea-bargain agreement with the State, the trial court deferred adjudicating her guilt, placed her on community supervision for five years, assessed a $750 fine with $90 in restitution, and required her to submit to urinalysis twice a week until approximately late May 2016.[2] At the guilty-plea hearing, the trial court stated what could happen if she failed a urinalysis test while pregnant:

> [I]f you fail a UA, and I don't care if it's from - - whatever it may be from that can cause you to fail a UA - -
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: - - if you fail a UA, I'm going to put you back in jail, I'm going to . . . tell them to file a motion to revoke your [community supervision] or a motion to adjudicate your [guilt]. I'm going to set a no bond on you. And I'm not going to let you out - - you will not be out of jail before you have your child.

[2]At the time of her arrest and guilty plea, Bowie was pregnant. The twice weekly urinalysis tests were to be done until Bowie had the baby, which occurred on May 26, 2016. The baby was adopted by her biological father—Bowie's former boyfriend—and his wife.

Bowie reported to her community-supervision officer, Brittany Sigman, on April 18, April 21, April 25, April 28, and May 3 for urinalysis tests and passed each one. On May 5, Bowie did not appear for her scheduled urinalysis. Sigman called Bowie twice that day but was not able to speak with her.

On May 10, the State filed a petition to proceed to adjudication based on the missed test. The trial court denied bond on the State's recommendation, and the district clerk issued an arrest warrant for Bowie on May 11. Bowie contacted Sigman on May 12 to ask about the warrant and to explain that she had been in jail after being arrested for theft of property on May 7. Sigman told Bowie to report for a urinalysis test as soon as possible. Bowie never showed up for further testing.

The trial court held a hearing on the State's petition on September 21, 2016, and Bowie pleaded true to the State's allegation in the petition without the benefit of a plea bargain. Sigman testified about the missed test, her unsuccessful attempts to contact Bowie, and Bowie's call seven days later. Bowie testified that she missed her May 5 test because her ride did not show up and that she did not call Sigman to tell her because she was "scared to go before a Judge" and possibly have her baby in jail. Before adjudicating Bowie's guilt and revoking her community supervision, the trial court explained its decision:

> Ms. Bowie, the court has heard from you today, and the court's heard a lot of poor choices you made. And a lot of poor choices that you continued to make.
>
> . . . .

> I can tell you that there's one person that has the power to put you in jail, and that's me, in this particular case. If you would have missed that May 5th UA and showed up on Friday [May 6], this - - you wouldn't be here right now.
>
> Last time you were here, I told you you were going to take two UA's a . . . week, and what I was going to do if you didn't do that.
>
> [Bowie's counsel] makes a good argument of why the court shouldn't do that. But, Ms. Bowie, the choices - - you know, the tears that you've shed, the tears that you're continuing to shed right now result from choices you made. Nobody else.
>
> Nobody else forced you to use any drugs while you were pregnant, or thinking you're in trouble and starting to run away. That's on you.
>
> What the court's going to do, is the court's going to . . . find those admissions true. I'm going to revoke your community supervision, and [I'm] going to sentence you to 24 months in a state jail facility. That's just what I told you I was going to do before. And that's just what we're going to do.

Bowie now appeals from the revocation judgment, arguing that the trial court abused its discretion in sentencing her because it failed to consider the entire range of punishment, instead relying on the sentence decided at her prior guilty-plea hearing. She also contends that the trial court abused its discretion by failing to consider the mitigating evidence she offered at the revocation hearing—her "transportation issues" and "the almost complete absence of support from her family."

The State argues that Bowie did not preserve the error, if any, for our review because she did not raise this objection at the revocation hearing. But the right to have a neutral and detached trial judge who will consider the full range of

authorized punishment is a "waiver-only" right that is not forfeitable by mere inaction. *Grado v. State*, 445 S.W.3d 736, 737, 739, 743 (Tex. Crim. App. 2014); *see Austin v. State*, No. 05-16-00531-CR, 2017 WL 1245420, at *2 (Tex. App.—Dallas Apr. 5, 2017, no pet.) (mem. op., not designated for publication). Accordingly, Bowie's failure to object did not waive this right. *See Cabrera v. State*, 513 S.W.3d 35, 38 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *Ray v. State*, No. 02-16-00040-CR, 2016 WL 3977377, at *3 n.5 (Tex. App.—Fort Worth July 21, 2016, no pet.) (mem. op., not designated for publication).

Even so, Bowie has failed to show an abuse of the trial court's broad discretion. If a trial court arbitrarily refuses to consider the entire range of punishment, the defendant's due process rights are violated. *See Grado*, 445 S.W.3d at 739. Due process requires the trial court to conduct itself in a neutral and detached manner. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006). But absent a clear showing of bias, we presume the trial court's actions were correct. *Id.* Although the court stated that the revocation and sentence were "what I told you I was going to do before," the trial court did not impermissibly rely on a predetermined sentence. *See, e.g.*, *Howard v. State*, 830 S.W.2d 785, 787–89 (Tex. App.—San Antonio 1992, pet. ref'd). The trial court previously had stated that if Bowie failed a urinalysis while still pregnant, she would be held without bond until she had her baby. However, a careful reading of the colloquy at Bowie's guilty-plea hearing shows that was the only reference the court made to what would happen if she tested positive for drugs

again.[3] The trial court did not predetermine her sentence when she was placed on community supervision nor did the trial court guarantee that it would revoke her community supervision if she returned. *See, e.g.*, *Jimenez v. State*, No. 03-02-00733-CR, 2003 WL 21087604, at *2 (Tex. App.—Austin May 15, 2003, pet. ref'd) (mem. op., not designated for publication); *Hernandez v. State*, No. 14-96-00564-CR, 1998 WL 3641, at *2–3 (Tex. App.—Houston [14th Dist.] Jan. 8, 1998, pet. ref'd) (not designated for publication). These statements do not equate to a clear showing that the trial court failed to consider the full range of punishment at the revocation hearing. *See Sandlin v. State*, No. 06-16-00075-CR, 2016 WL 5956069, at *3–4 & n.4 (Tex. App.—Texarkana Oct. 14, 2016, no pet.) (mem. op., not designated for publication); *see also Parker v. State*, No. 03-15-00369-CR, 2016 WL 3974584, at *2 (Tex. App.—Austin July 20, 2016, no pet.) (mem. op., not designated for publication) ("A trial court's statement attempting to demonstrate the seriousness of the need for compliance with the terms and conditions of community supervision, without more, does not constitute a due-process violation."); *Sanchez v. State*, 989 S.W.2d 409, 411 (Tex. App.—San Antonio 1999, no pet.) (explaining due-process violation "occurs when a trial court actually assesses punishment at revocation consistent with the punishment it has previously announced it would assess upon revocation"). Bowie has failed to make a clear showing of bias by the trial court on the basis of

[3]Bowie did not test positive for drugs and was no longer pregnant at the time of her revocation hearing.

its comments at the guilty-plea hearing or the revocation hearing. We overrule point one.

Bowie's argument that the trial court violated due process and was clearly biased based on a failure to consider her mitigating evidence likewise affords her no relief. The trial court stated on the record that it had considered the evidence presented at the revocation hearing, including her "poor choices." Nothing in the record supports Bowie's assertion, and the trial court's imposition of the maximum sentence, without more, is not de facto evidence that the trial court did not consider the entire, available range of punishment for a state jail felony. *See Terrill v. State*, No. 04-14-00571-CR, 2015 WL 4116005, at *4 (Tex. App.—San Antonio July 8, 2015 no pet.) (mem. op., not designated for publication); *Hernandez v. State*, No. 05-13-00076-CR, 2014 WL 1047263, at *4 (Tex. App.—Dallas Mar. 17, 2014, no pet.) (mem. op., not designated for publication); *cf. Easterling v. State*, No. 12-12-00197-CR, 2012 WL 6218437, at *4 (Tex. App.—Tyler Dec. 12, 2012, no pet.) (mem. op., not designated for publication) (in non-revocation appeal, holding imposition of maximum sentence did not, by itself, support inference that trial court did not consider full range). *See generally* Tex. Penal Code Ann. § 12.35(a) (West Supp. 2016) (delineating available range of confinement for state jail felonies). We overrule point two.

Although we have overruled Bowie's appellate points, our review of the record reveals that we must modify the trial court's written judgment with regard to the assessment of a $750 fine and $90 in restitution. The trial court did not

orally assess a fine or order restitution during its oral pronouncement of Bowie's sentence at the revocation hearing, but the written judgment adjudicating guilt and imposing sentence includes the fine and restitution amounts. Although a $750 fine and $90 in restitution were included in the order of deferred adjudication, the judgment adjudicating Bowie's guilt necessarily set aside the prior order deferring adjudication, including the fine and restitution. *See Taylor v. State*, 131 S.W.3d 497, 499–502 (Tex. Crim. App. 2004); *Alexander v. State*, 301 S.W.3d 361, 363 (Tex. App.—Fort Worth 2009, no pet.); *Abron v. State*, 997 S.W.2d 281, 282 (Tex. App.—Dallas 1998, pet. ref'd); *see also Wordlaw v. State*, Nos. 02-14-00286-CR, 02-14-00287-CR, 2015 WL 505231, at *1 (Tex. App.—Fort Worth Feb. 5, 2015, no pet.) (mem. op., not designated for publication) (noting that written judgment could not include fine or restitution order because neither were orally pronounced). Of course, the trial court's oral pronouncement of sentence generally controls over its written judgment to the extent they conflict. *Taylor*, 131 S.W.3d at 500, 502. Accordingly, because the trial court did not include a fine or order of restitution in its oral pronouncement of sentence at Bowie's revocation hearing, we modify the trial court's judgment adjudicating guilt to delete the $750 fine and $90 in restitution.[4] *See id.* at 502;

[4]The written judgment also included assessments for court costs and a legal-fee reimbursement, which were not orally pronounced during sentencing at the revocation hearing. But these assessments do not need to be deleted from the written judgment because they are compensatory in nature, not punitive. *See Montez v. State*, No. 02-16-00269-CR, 2017 WL 1289358, at *2 n.2 (Tex. App.—

Cox v. State, No. 02-13-00596-CR, 2015 WL 831544, at *1 (Tex. App.—Fort Worth Feb. 26, 2015, no pet.) (mem. op., not designated for publication) (reforming judgment adjudicating guilt to delete fine not included in oral pronouncement of sentence); *Alexander*, 301 S.W.3d at 364 (reforming judgment adjudicating guilt to delete restitution not included in oral pronouncement of sentence).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: GABRIEL, SUDDERTH, and KERR, JJ.

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

DELIVERED: June 29, 2017

Fort Worth Apr. 6, 2017, no pet.) (mem. op., not designated for publication) (citing *Armstrong v. State*, 340 S.W.3d 759, 766–67 (Tex. Crim. App. 2011)).