



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-16-00429-CR

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**JORDAN BURRELL, APPELLANT**

**V.**

**THE STATE OF TEXAS, APPELLEE**

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On Appeal from the 140th District Court  
Lubbock County, Texas  
Trial Court No. 2015-407,504; Honorable Jim Bob Darnell, Presiding

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May 16, 2017

**MEMORANDUM OPINION**

**Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.**

Pursuant to an open plea of guilty, Appellant, Jordan Burrell, was convicted by the trial court of aggravated robbery with an affirmative finding on use of a deadly weapon,<sup>1</sup> a first degree felony, and sentenced to thirty-eight years confinement. By a single issue, he maintains the trial court violated his due process rights during trial by

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<sup>1</sup> TEX. PENAL CODE ANN. § 29.03(a)(2), (b) (West 2011).

refusing to consider the full range of punishment available. The State has filed a letter brief in response, candidly noting that Appellant correctly cites controlling precedent on the issue. We reverse the judgment of conviction and remand the cause to the trial court for further proceedings.

#### BACKGROUND

Appellant was charged by indictment with striking an individual with a “hard object,” thereby causing bodily injury, while in the course of committing theft of property and with the intent to obtain or maintain control of that property. He waived his right to a jury trial, entered an open plea of guilty, and elected to have the trial court assess his punishment. The trial court conducted a unitary proceeding.

During trial, just shortly after Appellant began testifying, the following exchange occurred between Appellant, his counsel, and the trial judge:

Q. You understand that this Judge has a big decision to make?

A. Yes, sir.

Q. He could give you what’s called deferred adjudication, or he can give you life in prison?

A. Yes, sir.

Q. And you’re asking, of course, for the deferred adjudication?

A. Yes, sir.

Q. Mr. Morrow [co-counsel for the defendant] and I have discussed with you what happens if you get a deferred adjudication?

A. Yes, sir.

Q. And if I – and I’ve explained to you –

THE COURT: Let me just cut you off here, I'm not considering deferred adjudication.

#### APPLICABLE LAW

A trial court's arbitrary refusal to consider the entire range of punishment constitutes a denial of due process. *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). Due process requires the right to a hearing before a neutral and detached hearing body. *Id.* In *Grado*, the Court found that the right to be properly sentenced is not forfeitable and cannot be surrendered by mere inaction. *Id.* at 741.<sup>2</sup>

#### ANALYSIS

Appellant argues that his due process rights were violated when the trial court refused to consider the entire range of punishment. The State, without explicitly conceding error, candidly acknowledges that Appellant has correctly cited controlling precedent and then asks "this Court to render an appropriate judgment and remand the cause for a new sentencing hearing."

Recently, when faced with an illegal sentence, the Texas Court of Criminal Appeals set aside the appellant's guilty plea and remanded the case in its entirety to return the parties to their original positions prior to entering into a plea bargain. *Thomas v. State*, No. PD-0295-16, 2017 Tex. Crim. App. LEXIS 373, at \*2 (Tex. Crim. App. April 5, 2017). Given the circumstances of the case before us, to ensure that Appellant's due process rights are protected, we reverse the trial court's judgment, set aside Appellant's

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<sup>2</sup> Even if preservation of error was required, we conclude that defense counsel's request to the trial court during closing arguments "to reconsider its decision not to consider deferred adjudication" and its refusal to do so adequately complies with the spirit of Rule 33.1(a) of the Texas Rules of Appellate Procedure. See *Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016) ("Error preservation . . . is not an inflexible concept," and the application of error preservation rules should not be mechanically applied. [footnote omitted] "The standards of procedural default are not to be implemented by splitting hairs in the appellate courts.").

conviction, and remand the entire case to the trial court to return the parties to their original positions prior to Appellant's decision to waive his right to a jury trial and enter an open plea of guilty. Appellant's issue is sustained.

CONCLUSION

The trial court's judgment is reversed and the cause is remanded to the trial court for further proceedings.

Per Curiam

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