In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00175-CR

ERIK LUIS SANTIAGO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court No. F-1614870-J

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Erik Luis Santiago passed fraudulent checks in 2016 to several Dallas County businesses to pay for a Super Bowl party for his friends and to purchase automobile tires. In the aftermath of those actions, Santiago confessed to one count of forgery of a financial instrument[1] and three counts of theft of property,[2] all state jail felonies. In a trial to the court, a Dallas County[3] district court found Santiago guilty on all four counts. After Santiago's sentence was enhanced with a pair of 2014 Tarrant County convictions, Santiago was sentenced to serve ten years' imprisonment for each count, with the sentences to run concurrently. In this appeal,[4] Santiago appeals his conviction for theft of property in the trial court case bearing cause number F16-14870-J, arguing that his sentence was improperly enhanced. Santiago asserts that the sentences he received are illegal because the two 2014 Tarrant County convictions should have been treated as one state jail felony conviction and the use of the 2014 state jail conviction for theft of services violated the prohibition against ex post facto laws.

Because (1) Santiago's Tarrant County convictions are legitimately used as two convictions for enhancement purposes and (2) the subsequent reclassification of theft of service,

[1]*See* TEX. PENAL CODE ANN. § 32.21(b), (d) (West 2016).

[2]*See* TEX. PENAL CODE ANN. § 31.03(a), (e)(4) (West Supp. 2016).

[3]Originally appealed to the Fifth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Fifth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[4]In his companion cause numbers 06-16-00176-CR, 06-16-00177-CR, and 06-16-00178-CR, Santiago appeals his convictions for two counts of theft of property and one count of forgery of a financial instrument. Those are addressed in separate opinions issued simultaneously with this opinion, using the reasoning and authorities set forth in this opinion.

one of Santiago's enhancement convictions, from a 2014 state jail felony to a 2016 misdemeanor does not reclassify its enhancement effect on Santiago, but (3) the degree of offense was improperly recited in the judgment being appealed, we modify the judgment of the trial court and affirm it, as modified.

(1) Santiago's Tarrant County Convictions Are Legitimately Used as Two Convictions for Enhancement Purposes

In 2014, before the offenses made the subject of this case and its companion appeals, Santiago had created and passed checks with unauthorized bank information to purchase goods and services in Tarrant and Dallas Counties. As a result, on May 30, 2014, Santiago had been convicted in Tarrant County of two state jail felonies, that is, fraudulent use/possession of identifying information and theft of service of the value $1,500.00 or more but less than $20,000.00.

After being released on parole from his Tarrant County convictions, Santiago committed the offenses dealt with in these appeals.

Santiago complains that he received an illegal sentence here because, he argues, the two 2014 Tarrant County convictions should be treated as one state jail felony conviction since they were entered by the same court on the same day. Santiago argues that, since Section 3.02 of the Texas Penal Code allows the State to prosecute a defendant in a single action for all offenses that arise out of the same criminal episode, then the separate convictions that result from that single action should be treated as one conviction for enhancement purposes. *See* TEX. PENAL CODE ANN. § 3.02(a) (West 2011). Santiago cites no case authority, and we have found none, in support of this argument. He also argues, again without case authority, that, if the Legislature had intended

to partition criminal episode conduct (joined or consolidated under Section 3.02) into separate offenses for enhancement purposes, it would have done so when it enacted Section 12.425(a) of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 12.425(a) (West Supp. 2016).

In this case, Santiago was charged with a state jail felony punishable under Section 12.35(a) of the Texas Penal Code. The punishment range for a Section 12.35(a) state jail felony is confinement in state jail for not less than 180 days and not more than two years. TEX. PENAL CODE ANN. § 12.35(a) (West Supp. 2016); *Thomas v. State*, 481 S.W.3d 685, 689 (Tex. App.—Texarkana 2015), *rev'd on other grounds*, No. PD-0295-16, 2017 WL 1244453 (Tex. Crim. App. Apr. 5, 2017). Under Section 12.425(a), a Section 12.35(a) state jail felony may be punished as a third degree felony only if it is shown at trial "that the defendant has been previously finally convicted of two" Section 12.35(a) state jail felonies. TEX. PENAL CODE ANN. § 12.425(a). A third degree felony is punishable by imprisonment for not less than two years or more than ten years. TEX. PENAL CODE ANN. § 12.34 (West 2014).

At trial, Santiago pled true to both of the 2014 Tarrant County convictions, and there was no evidence presented that he had previously been convicted of any other Section 12.35(a) state jail felony. Therefore, Santiago could have his current conviction for a Section 12.35(a) state jail felony punished as a third degree felony only if both of the 2014 Tarrant County convictions are available for enhancement purposes. If only one of the 2014 Tarrant County convictions is available for enhancement purposes, then Santiago's punishment of ten years' confinement would fall outside the maximum range of punishment authorized under Section 12.35(a). Santiago did not challenge the illegality of his sentence at trial.

"A sentence that is outside the maximum . . . range of punishment is unauthorized by law and . . . illegal." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (citing *Ex parte Pena*, 71 S.W.3d 336, 336 n.2 (Tex. Crim. App. 2002)). Further, a defendant may challenge an illegal sentence for the first time on direct appeal or by a writ of habeas corpus. *Id.* Generally, when an illegal sentence is challenged for the first time on appeal, the illegality of the sentence must be apparent on the face of the record. *See Bonilla v. State*, 452 S.W.3d 811, 818 n.30 (Tex. Crim. App. 2014) (unauthorized stacking order apparent on face of record resulting in illegal sentence may be raised for first time on appeal or by collateral attack); *Ex parte Rich*, 194 S.W.3d 508, 511 (Tex. Crim. App. 2006) ("Our precedents involving claims of illegal sentences have dealt with situations in which the illegality of the judgment was apparent from the facts before the trial court." (citation omitted)); *Gonzalez v. State*, 8 S.W.3d 640, 642 (Tex. Crim. App. 2000) (double jeopardy claim may be raised for first time on appeal or by collateral attack "when the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record"). This same rule applies to a claim of an illegal sentence based on the improper use of a prior conviction for enhancement purposes. *Rich*, 194 S.W.3d at 513.

In this case, the allegedly improper use of both of the 2014 Tarrant County convictions is not apparent on the record. At trial in this case, Santiago pled true to the following enhancement paragraphs:

> And it is further presented in and to said Court that prior to the commission of the offense or offenses set out above, the defendant was finally convicted of the state jail felony offense of FRAUDULENT USE/POSSESSION OF IDENTIFYING INFORMATION, in the 396TH JUDICIAL DISTRICT COURT of TARRANT County, Texas, in Cause Number 1370042001, on the 30TH day of MAY, A.D., 2014,

> And it is further presented in and to said Court that, prior to the commission of the primary offense, the defendant was finally convicted of the state jail felony offense of THEFT OF SERVICE OF THE VALUE OF $1500 OR MORE BUT LESS THAN $20,000, in the 396TH JUDICIAL DISTRICT COURT of TARRANT County, Texas, in Cause Number 1323747001, on the 30TH day of MAY, A.D., 2014.

Although evidence was introduced at the punishment hearing regarding the underlying facts of these two prior convictions, no further evidence of the convictions or the procedure by which they were obtained was proffered.[5] Thus, the record shows that the 2014 Tarrant County convictions were both entered May 30, 2014, and that the convictions were entered in two separate cases.

Santiago asserts that the 2014 Tarrant County convictions were prosecuted as a single criminal action under Section 3.02(a). However, the fact that the two convictions were entered on the same day does not establish that the offenses were prosecuted as a single criminal action. Further, on the face of the record, the convictions were obtained in two separate criminal actions. Because the record does not support Santiago's contentions under Section 3.02(a), he has failed to show that it is apparent on the record that his sentence is illegal. We overrule this point of error.

(2) The Subsequent Reclassification of Theft of Service, One of Santiago's Enhancement Convictions, from a State Jail Felony in 2014 to a Misdemeanor in 2016 Does Not Reclassify Its Enhancement Effect on Santiago

Santiago also argues that he received an illegal sentence because one of the Tarrant County convictions, while a state jail felony at the time, might now be classified as a misdemeanor. Santiago points out that, in 2014, theft of service was classified as a state jail felony if the value of

[5]When a defendant pleads true to an enhancement paragraph, the State is relieved of its burden to prove the enhancement allegation. *Hopkins v. State*, 487 S.W.3d 583, 586 (Tex. Crim. App. 2016).

the services stolen was $1,500.00 or more but less than $20,000.00. *See* Act of June 15, 2001, 77th Leg., R.S., ch. 1245, § 2, 2001 Tex. Gen. Laws 2934, 2935 (amended 2003, 2011, 2015) (current version at TEX. PENAL CODE § 31.04(e)(4)). At the time of the commission of his primary offense in this case, the range for a state jail felony for theft of service was $2,500.00 or more but less than $30,000.00. TEX. PENAL CODE ANN. § 31.04(e)(4) (West 2016). Santiago argues that since his 2014 conviction for theft of services might be classified as a misdemeanor in 2016 when his primary offense was committed, the use of this conviction for enhancement purposes is a violation against the prohibition against ex post facto laws. *See* U.S. CONST. art. I, § 10, cl. 1; TEX. CONST. art. I, § 16.

However, the record fails to support Santiago's contention that his 2014 theft of service conviction, if committed in 2016, would be classified as a misdemeanor rather than a state jail felony. At the punishment hearing, Santiago admitted that his theft of service conviction in Tarrant County related to using checks and securing debits on an account owned by Tuscany Automotive to obtain goods and services. Among the services Santiago admitted to obtaining by check or debit was rent in the amount of $3,750.00, and cable services in the amount of $650.81, for a total of $4,400.81.[6] Thus, the record shows that the same offense committed by Santiago in 2014, if committed in 2016, would be classified as a state jail felony. Consequently, the record does not support Santiago's contentions that the use of his 2014 conviction for theft of service was a

[6]For the purposes of theft, services include, inter alia, telecommunication services and lodging. TEX. PENAL CODE ANN. § 31.01(6)(B), (C) (West Supp. 2016)

violation of the prohibition against ex post facto laws, and he has failed to show that it is apparent on the record that his sentence is illegal. We overrule this point of error.

(3) The Degree of Offense Was Improperly Recited in the Judgment Being Appealed

Although Santiago was convicted of theft of property of a value of $2,500.00 or more but less than $30,000.00, a state jail felony, the judgment states that the degree of the offense is a third degree felony. We have the authority to modify the judgment to make the record speak the truth when the matter has been called to our attention by any source. *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *see* TEX. R. APP. P. 43.2(b). Therefore, we modify the trial court's judgment to reflect the degree of the offense as a state jail felony.

We affirm the trial court's judgment, as so modified.

Josh R. Morriss III
Chief Justice

Date Submitted: April 17, 2017
Date Decided: May 18, 2017

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