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

No. 06-16-00197-CR

GABRIELA ORTIZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 354th District Court
Hunt County, Texas
Trial Court No. 30272

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

MEMORANDUM OPINION

Faced with multiple, serious charges of capital murder, injury to a child by act, and injury to a child by omission, Gabriela Ortiz and the State entered into a charge bargain, under which Ortiz pled guilty to one count of injury to a child by omission, in exchange for having the other charges dropped. The trial court accepted her plea and sentenced her to forty-two years' imprisonment.

On appeal, Ortiz argues that the trial court erred in accepting her plea because it was not freely and voluntarily made and that the trial court effectively denied her a hearing on her motion for new trial by refusing to review and consider evidence offered by Ortiz during the hearing, which had not been ruled on during her earlier trial. We affirm the trial court's judgment, because (1) we are without jurisdiction to address matters related to guilt/innocence and (2) the trial court held a hearing on Ortiz' motion for new trial.

(1) We Are Without Jurisdiction to Address Matters Related to Guilt/Innocence

We are without jurisdiction to address Ortiz' first point of error, challenging the voluntariness of her plea of guilt.

The record is clear that Ortiz was indicted for capital murder, injury to a child by act, and injury to a child by omission; that Ortiz and the State executed a document in which Ortiz agreed to plead guilty on the one count of injury to a child by omission in exchange for the State's agreement to abandon the other allegations in the indictment; that the State actually abandoned the other counts in the indictment at the plea hearing; that Ortiz simultaneously executed a waiver of

the right to appeal the issue of guilt/innocence;[1] and that the State later formally dismissed the additional counts in the indictment. Thus, the State and Ortiz entered into what is called a charge bargain, a type of plea agreement which "involves questions of whether a defendant will plead guilty to the offense that has been alleged or to a lesser or related offense, and of whether the prosecutor will dismiss, or refrain from bringing, other charges." *Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003).

Under the reasoning in *Shankle* and its progeny, charge-bargaining affects punishment and "effectively puts a cap on punishment at the maximum sentence for the charge that is not dismissed." *Id.* Accordingly, the charge bargain constitutes a plea agreement for purposes of Rule 25.2(a)(2). *See id.*; *Kennedy v. State*, 297 S.W.3d 338, 339 (Tex. Crim. App. 2009). The Texas Legislature has granted a very limited right of appeal in plea-agreement cases. Rule 25.2(a)(2) of the Texas Rules of Appellate Procedure details that right as follows:

> (2) . . . In a plea bargain case—that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant—a defendant may appeal only:
>
> (A) those matters that were raised by written motion filed and ruled on before trial, or
>
> (B) after getting the trial court's permission to appeal.

TEX. R. APP. P. 25.2(a)(2).

[1]The Texas Court of Criminal Appeals has held that a presentence waiver of the right to appeal is proper when the State has given adequate consideration for the waiver. *Ex parte Broadway*, 301 S.W.3d 694, 697–98 (Tex. Crim. App. 2009).

The trial court's certification of right of appeal filed in this matter shows that Ortiz had the right to appeal matters affecting punishment only. However, Ortiz' first point of error is related only to guilt/innocence. Because the trial court's certification does not grant Ortiz the right to appeal matters unrelated to punishment, we are without jurisdiction over the first point of error raised by Ortiz on appeal.

(2) The Trial Court Held a Hearing on Ortiz' Motion for New Trial

Ortiz does not argue or brief the issue of whether the trial court erred in overruling her motion for new trial. She also does not contend that any newly discovered evidence was presented at the hearing on the motion for new trial. Instead, she argues that she was effectively denied a hearing on the motion for new trial because the trial court did not consider evidence proffered solely for appellate purposes. To fully understand Oritz' complaint, we offer a brief recitation of the procedural history of this case.

Ortiz proffered a timeline of events to the trial court during the punishment hearing, held on a Friday. The State objected on the ground that it had no prior opportunity to review the voluminous exhibit.[2] The trial court decided to provide the State with time to review the document and adjourned after stating, "I'm not going to rule on that . . . until Monday . . . . [T]here may be

[2]In describing the exhibit, Ortiz stated,

> [T]he information contained in here is gathered from medical records that are in evidence, gathered from investigating records that are in evidence, gathered from cell phone extractions that are in evidence; and we have simply put it in a chronological order to try to address the very thing that you've talked about and to put it in a format where you didn't have to get that thumb drive out, which would take you probably about two weeks to go through all of the documents that are in evidence. But we have taken the time to put it in a chronological format for the convenience of the Court with respect to what is already otherwise in evidence.

parts that we can agree to." The timeline was not mentioned again, and Ortiz wholly failed to obtain a ruling regarding its admission. As a result, the timeline was not included as evidence to be considered during punishment. Further, any error in the exclusion of this evidence was not preserved. *See* TEX. R. APP. P. 33.1(a)(1).

Perhaps in an attempt to remedy the issue, Ortiz filed a "MOTION FOR NEW TRIAL (PUNISHMENT ONLY)," which argued that she was "greatly prejudiced by the fact that the Court did not make a ruling with respect to the timeline." Although Ortiz failed to secure a ruling on the admission of the timeline, precluding her ability to complain that the trial court did not admit it into evidence, she further argued that "the Court never reviewed and considered the timeline to more perfectly understand the exact sequence of events." In other words, she wished for the trial court to consider evidence that had not been before it at the punishment hearing. The trial court held a hearing on the motion for new trial, but the argument presented at the hearing resulted in Ortiz' assertions that she was not offering the timeline into evidence.

Instead, Ortiz proffered the timeline so that it could be included as a hearing exhibit "for appellate purposes." The State objected on the grounds that the document had no sponsoring witness, contained hearsay from witnesses who were not present at trial, and compiled evidence that was never previously admitted. At that point, Ortiz clarified that the only purpose for introducing the exhibit was to make "a bill for the Court of Appeals." The trial court then stated that it had not looked at the timeline and that it did not influence its decision. However, after overruling the motion for new trial, the court allowed the document to be "attached" as a part of the record.

On appeal, Ortiz first argues that the trial court failed to conduct a hearing. This argument is meritless. She next argues that, although the trial court heard the motion for new trial, she was "functionally denied a hearing on her motion because the trial court refused to even look at the evidence Appellant was offering as a basis for new trial." Ortiz' brief fails to contain any citation to authority which would support this point. Nevertheless, Ortiz did not offer the timeline into evidence for the trial court's consideration, but rather "for appellate purposes." It appears that, in doing so, Ortiz was attempting to preserve a point of error regarding the exclusion of this evidence when the court made no ruling on the matter at trial.

The record demonstrated that Ortiz received a hearing on her motion for new trial and did not ask the trial court to admit the timeline as evidence to consider in ruling on the motion. Therefore, we find her argument that she was "functionally denied a hearing on her motion because the trial court refused to even look" at the timeline meritless. We overrule Ortiz' second point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

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