NUMBERS 13-17-00386-CR AND 13-17-00387-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

BYRON EARL BUSH, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 252nd District Court of Jefferson County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Justice Rodriguez

Appellant Byron Earl Bush challenges the revocation of his community supervision. We affirm.[1]

[1] This cause is before the Court on transfer from the Ninth Court of Appeals in Beaumont pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2017 1st C.S.). Because this is a transfer case, we apply the precedent of the Ninth Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

I. BACKGROUND

In 2007, a grand jury indicted Bush for one count of possession of cocaine on or about June 26, 2007 in the amount of at least four grams and less than 200 grams, a felony of the second degree (the "June 26 possession charge").[2] In a separate cause number, the grand jury also indicted Bush for one count of possession of cocaine on or about July 27, 2007 in the amount of at least four grams and less than 200 grams (the "July 27 possession charge"). Both indictments included enhancement paragraphs alleging that Bush was previously convicted of two felonies.[3]

In 2008, Bush pleaded guilty to both possession charges pursuant to a set of plea agreements with the State. In exchange, the State submitted punishment recommendations in each case stating that prosecution "should proceed only on count 1" and that the "defendant's punishment will not exceed a cap of 15 years in the Institutional Division." In each case, the trial court deferred adjudication and placed Bush on community supervision for a period of ten years.

In 2014, the State moved to revoke Bush's community supervision, alleging various violations of the terms of his probation. In 2017, the State amended its motion to revoke and raised three new grounds for revocation: that Bush had attempted to commit capital murder of two police officers and that he had committed the offense of unlawful possession of a firearm by a felon. The State presented its amended motion

[2] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D), 481.115(a), (d) (West, Westlaw through 2017 1st C.S.).

[3] *See* TEX. PENAL CODE ANN. § 12.42(b) (West, Westlaw through 2017 1st C.S.).

for hearing on May 9, 2017. Bush pleaded true to having a prior felony conviction, but not true to remaining allegations in the motion to revoke.

Ultimately, the trial court found it true that Bush had committed the lesser-included offense of attempted murder. The trial court also found it true that Bush committed unlawful possession of a firearm by a felon.

The trial court revoked Bush's community supervision and adjudicated guilt on the June 26 and July 27 possession charges. The trial court determined that the punishment for each of these second-degree felonies should be enhanced pursuant to his prior felony conviction, and the court sentenced Bush to forty years' confinement on each offense to run concurrently. Bush appeals from the revocation of his community supervision in each case.

II. INCOMPLETE RECORD ON APPEAL

By his first issue, Bush contends that reversal is required because he was denied a complete record on appeal. Bush points out that the court reporter was unable to produce a record of his original plea hearing from 2008. Bush contends that without the reporter's record, he is deprived of his right to contest matters related to the original plea proceedings.

Our appellate rules provide that a defendant is entitled to a reversal of his conviction and a new trial if, among other things, a lost or destroyed reporter's record is "necessary to the appeal's resolution." *See* TEX. R. APP. P. 34.6(f)(3). Under *Manuel v. State*, a defendant placed on deferred adjudication generally may not raise issues relating to the original plea proceeding in an appeal after his community supervision has been

revoked. 994 S.W.2d 658, 661–62 (Tex. Crim. App. 1999). Rather, the defendant generally must challenge any such issues after deferred adjudication is first imposed. *Id.*

Pursuant to *Manuel*, the reporter's record from Bush's original deferred adjudication proceeding is therefore not necessary to the resolution of this appeal from a revocation proceeding. *See Daniels v. State*, 30 S.W.3d 407, 408 (Tex. Crim. App. 2000) (en banc); *Diamond v. State*, 419 S.W.3d 435, 438 (Tex. App.—Beaumont 2012, no pet.).

We overrule Bush's first issue.

III. VOID SENTENCING

By his second and third issues, Bush argues that he was sentenced to a term of imprisonment not authorized by law, which was therefore void. Bush points out that the underlying offenses to which he pleaded guilty in 2008 were second-degree felonies that, if not enhanced, each carried a maximum term of twenty years' incarceration. Bush contends that pursuant to his plea agreements in 2008, the State recommended that prosecution "should proceed only on count 1" for each indictment, and the State thereby effectively dismissed the enhancement allegations that also appeared in the indictments. Accordingly, Bush reasons that the trial court unlawfully enhanced his sentences and rendered invalid forty-year sentences on second-degree felonies.

The State argues that it never agreed not to proceed on the enhancement paragraphs. Instead, the State contends that the phrase "proceed only on count 1" means that the State could proceed on count 1 *and* the attendant enhancements. The State asserts that even if it agreed to dismiss the enhancements, that agreement is no longer binding. The State reasons that because the enhancements were never formally

dismissed from the indictment, the State could nonetheless proceed on the enhancements when Bush's community supervision was revoked.

It is true that the indictments in this case were never formally modified to dismiss the enhancement paragraphs. However, the indictment need not be physically altered to accomplish an abandonment. *See Proctor v. State*, 841 S.W.2d 1, 4 n.1 (Tex. Crim. App. 1992) (en banc); *Hardie v. State*, 79 S.W.3d 625, 632 & n.1 (Tex. App.—Waco 2002, pet. ref'd); *see also Crawford v. State*, No. 05-17-00135-CR, 2018 WL 635992, at *5 (Tex. App.—Dallas Jan. 31, 2018, pet. ref'd) (mem. op., not designated for publication). Accordingly, the lack of a written abandonment is not dispositive.

We do conclude, however, that the State unambiguously agreed not to proceed on the enhancements. Because a plea agreement is considered to be a contract between the State and the defendant, courts use contract-law principles to construe plea agreements. *Ex parte De Leon*, 400 S.W.3d 83, 89 (Tex. Crim. App. 2013). To discern the meaning of a contract, we examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *In re Serv. Corp. Intern.*, 355 S.W.3d 655, 661 (Tex. 2011) (orig. proceeding) (per curiam). We presume that each word in a contract has some significance and meaning. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 240 (Tex. 2003). Here, in exchange for Bush's plea of guilty, the State agreed that prosecution "should proceed only on count 1." There was only one "count" in each of Bush's charging instruments, along with multiple enhancement paragraphs. For the State's agreement

to proceed "only on count 1" to have any meaning at all, we must presume that the State was thereby agreeing not to proceed on the enhancement paragraphs. *See id.*

But while the State agreed not to proceed on the enhancement, it is arguable that such a promise would not bind the trial court following revocation of deferred adjudication. Generally, when deferred adjudication is revoked, the judge has no further obligation to comply with a sentencing recommendation in a plea bargain; rather, any sentence bargain[4] has already been satisfied by the judge's original decision to impose community supervision. *Ex parte Broadway*, 301 S.W.3d 694, 698 (Tex. Crim. App. 2009); *Ex parte Huskins*, 176 S.W.3d 818, 819 (Tex. Crim. App. 2005) (en banc); *Ditto v. State*, 988 S.W.2d 236, 238 (Tex. Crim. App. 1999) (en banc). When a defendant's deferred adjudication probation is revoked, all proceedings continue as if the adjudication of guilt had never been deferred. *Ditto*, 988 S.W.2d at 239. The Fifth Court of Appeals has applied these rules to allow the State to proceed on an enhancement for prior convictions where the State had previously agreed not to proceed on the enhancement. *Warner v. State*, No. 05-99-00216-CR, 2001 WL 92701, at *1–2 (Tex. App.—Dallas Feb. 5, 2001, no pet.) (op., not designated for publication); *see also Thomas v. State*, 516 S.W.3d 498, 502 (Tex. Crim. App. 2017) ("[G]iven the functional similarity between sentence bargaining and charge bargaining, in general, our case law concerning the proper remedy

[4] The two basic kinds of plea-bargaining in the United States are charge-bargaining and sentence-bargaining. *Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003) (en banc). Charge-bargaining 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. *Id.* Sentence-bargaining may be for binding or non-binding recommendations to the court on sentences, including, for example, a recommended "cap" on sentencing and a recommendation for deferred-adjudication probation. *Id.*

when a plea bargain that was based on sentence bargaining is subsequently challenged applies to plea bargains based on charge bargaining as well.").

Regardless, even assuming that the trial court erred in enhancing Bush's sentence on revocation, any error is harmless. *See Wright v. State*, 506 S.W.3d 478, 482 (Tex. Crim. App. 2016). In *Wright*, a defendant appealed from the revocation of his community supervision, complaining for the first time on appeal that his sentence had been illegally enhanced for prior convictions. *Id.* at 479. The court rejected the appellant's position holding that an illegal sentence could, in appropriate circumstances, nonetheless be upheld if the defendant's "actual criminal history supported the range of punishment within which he was sentenced and admonished." *Id.* at 482. If the appellant's criminal history supported a repeat-felony-offender enhancement, any error in enhancing the sentence would be harmless. *Id.*

In so holding, the court emphasized several facts which resemble those present here. The *Wright* court emphasized that (1) the appellant pleaded true to having prior convictions; (2) in his testimony at the original plea proceedings, the appellant acknowledged his prior convictions; (3) along with his original plea, the appellant had signed a document waiving any defects in his indictment; (4) appellant's counsel agreed that the trial court was correctly applying an enhancement to his sentence; and (5) the appellant did not object at any point to having his sentence enhanced for prior convictions, but instead raised his concerns for the first time on appeal from revocation. *See id.* at 479–80.[5]

[5] We acknowledge a critical point of distinction between *Wright* and this case: in *Wright*, the defendant complained that his sentence had been illegal since his original plea proceeding, which brought

At the revocation hearing, Bush pleaded true to having prior convictions that qualified for enhancement, similar to *Wright*. *See id.* at 480.[6] In 2008, Bush signed a stipulation that he had "committed each and every element alleged" in his indictment, which included the enhancement paragraph describing his prior convictions. Bush's stipulation to his prior convictions is roughly analogous to the appellant's testimony acknowledging his prior convictions in *Wright*. *See id.* at 479. Also like *Wright*, Bush's counsel agreed that the trial court was correctly applying an enhancement for prior convictions:

> Trial Court: In [cause number 07-1499], that conviction was possession of cocaine, a second-degree felony, *with a previous conviction alleged, two previous convictions* alleged; and that would be a first-degree felony.
>
> And in [cause number 07-1730], Mr. Bush was convicted of second-degree felony possession of a controlled substance, cocaine, with *two prior felony convictions alleged*, which would make this a first-degree felony. But what I'm dealing with and I want somebody to correct me if I'm wrong is four first-degree felonies and two second-degree felonies. Does anybody disagree with that?
>
> Counsel for Bush: I think that sounds right, Judge.
>
> Trial Court: Sir?

into play the rule that an appellant may not challenge issues related to the original plea proceedings on appeal from revocation. *Wright v. State*, 506 S.W.3d 478, 481 (Tex. Crim. App. 2016) (citing *Nix v. State*, 65 S.W.3d 664, 667 (Tex. Crim. App. 2001)). Here, Bush instead argues that his sentence was wholly legal at his original plea proceeding, but the trial court erred by rendering an illegal sentence at his revocation proceeding. However, in our view, the spirit of *Wright*'s harmless error reasoning nonetheless applies here. The requirement to show harm is not unique to probation-revocation cases; it is a broadly applicable constant in appellate review of criminal cases, including this one. *See* TEX. R. APP. P. 44.2.

[6] A plea of true to an enhancement paragraph relieves the State of its burden to prove a prior conviction alleged for enhancement and forfeits the defendant's right to appeal the insufficiency of evidence to prove the prior conviction. *Ex parte Rich*, 194 S.W.3d 508, 513 (Tex. Crim. App. 2006).

Counsel for Bush: I said I think that sounds right, Judge.

(Emphasis added). The trial court then sentenced Bush to forty years for each possession-of-cocaine offense. Bush did not object in the trial court. Instead, like the appellant in *Wright*, Bush raised his complaint for the first time on appeal. *See id.* at 480.

Due to these many points of similarity, we believe that *Wright* shows that any error in the enhancement of Bush's sentence was harmless. *See id.* at 482. We therefore overrule Bush's second and third issues.

IV. INVOLUNTARY PLEA

By his fourth and fifth issues, Bush asserts that his plea in 2008 was involuntary, and the trial court improperly admonished him concerning the applicable range of punishment.

Pursuant to *Manuel*, the proper time to raise these matters was following the initial plea proceedings in 2008. *See* 994 S.W.2d at 661–62. Since we hear this case on appeal from revocation, that avenue is now closed. *See id.*

We overrule Bush's fourth and fifth issues.

V. CONCLUSION

We affirm the judgments of the trial court.

NELDA V. RODRIGUEZ
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
16th day of August, 2018.