NO. 12-16-00091-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

GENE DOUGLAS TOMLINSON, APPELLANT	***§***	***APPEAL FROM THE 104TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***TAYLOR COUNTY, TEXAS***

MEMORANDUM OPINION

Gene Douglas Tomlinson appeals the trial court's order adjudicating him guilty of aggravated sexual assault of a child. In three issues, Appellant argues that the trial court abused its discretion in determining that he violated the conditions of his community supervision, and that the trial court assessed an illegal sentence. We modify and affirm as modified.

BACKGROUND

Appellant was charged by indictment with continuous sexual abuse of a child.[1] Pursuant to a plea bargain agreement, he pleaded "no contest" to an offense. The trial court deferred a finding of guilt, placed Appellant on community supervision for a term of ten years, and imposed a fine of $1,500.

The State subsequently filed a motion to proceed with an adjudication of guilt, alleging twenty-seven violations of Appellant's conditions of community supervision. After a hearing on the motion, the trial court found nineteen of the allegations true. After a subsequent disposition

[1] Under penal code section 21.02, a person commits continuous sexual abuse of a child if, during a period that is thirty or more days in duration, he commits two or more acts of sexual abuse, and at the time of the acts, the actor is seventeen years of age or older and the victim is younger than fourteen years of age. TEX. PENAL CODE ANN. § 21.02(b) (West Supp. 2016).

hearing, the trial court adjudicated Appellant "guilty" of aggravated sexual assault of a child and assessed his punishment at imprisonment for fifty years. This appeal followed.

PROPRIETY OF REVOCATION

In Appellant's first issue, he argues that the evidence is insufficient to support ten of the trial court's findings that he violated terms of his community supervision. In Appellant's second issue, he argues that the trial court erred by finding he violated twelve of the terms of his community supervision because he was unable to comply with them.

Standard of Review and Applicable Law

The determination to proceed with an adjudication of guilt after a defendant is placed on deferred adjudication community supervision is reviewable in the same manner as a revocation hearing. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (West Supp. 2016). In revocation cases, the state has the burden to establish by a preponderance of the evidence that the terms and conditions of community supervision have been violated. ***Cardona v. State***, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). The preponderance of the evidence standard is met when the greater weight of the credible evidence before the trial court supports a reasonable belief that a condition of community supervision has been violated. ***Rickels v. State***, 202 S.W.3d 759, 764 (Tex. Crim. App. 2006). In a hearing on a motion to revoke community supervision, the trial court is the sole trier of fact, and is also the judge of the credibility of the witnesses and the weight to be given their testimony. ***Taylor v. State***, 604 S.W.2d 175, 179 (Tex. Crim. App. 1980).

When the state has met its burden of proof and no procedural obstacle is raised, the decision whether to revoke community supervision is within the discretion of the trial court. ***Flournoy v. State***, 589 S.W.2d 705, 708 (Tex. Crim. App. [Panel Op.] 1979). Thus, our review of the trial court's order revoking community supervision is limited to determining whether the trial court abused its discretion. ***Caddell v. State***, 605 S.W.2d 275, 277 (Tex. Crim. App. 1980). If there is some evidence to support the finding of even a single violation, the revocation order must be upheld. *See* ***Hart v. State***, 264 S.W.3d 364, 367 (Tex. App.—Eastland 2008, pet. ref'd); ***Cochran v. State***, 78 S.W.3d 20, 28 (Tex. App.—Tyler 2002, no pet.) (citing ***Moore v. State***, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980)).

Analysis

One of the terms of Appellant's community supervision was that he was to "[a]void persons or places of disreputable and harmful character" and "not associate with persons of Questionable Character, persons with Criminal Records or Inmates in Penal Institutions[.]" In the State's motion to revoke community supervision and adjudicate, it alleged that Appellant violated this term by failing to avoid seven different people. The trial court found three of these allegations true.

The evidence at the revocation hearing shows that while Appellant was on community supervision, he became involved in a business called the Texas State Community Council. Appellant testified that the purpose of the business was to help people with "legal problems" by "respond[ing] to concerns about their cases." Two of the allegations that the trial court found true involve clients of this business.

On appeal, Appellant argues that the evidence is insufficient to support these allegations because his community supervision officer testified that she was not sure whether these clients had criminal records, and there is no other evidence to show that they did. The record does not support Appellant's claim. Appellant's community supervision officer testified that the clients had criminal histories, and she knew this because she checked their histories. Furthermore, Appellant testified that he met with one of the clients to discuss whether he should agree to a plea bargain in his case. And he met with the other client, whom his company helped into a drug treatment program, when she was released from jail. Thus, we conclude there is sufficient evidence to support the trial court's finding that Appellant violated the terms of his community supervision by failing to "[a]void persons or places of disreputable and harmful character" and "not associate with persons of Questionable Character, persons with Criminal Records or Inmates in Penal Institutions[.]" *See* ***Caddell***, 605 S.W.2d at 277; ***Hart***, 264 S.W.3d at 367; ***Cochran***, 78 S.W.3d at 28.

Appellant further argues that in the same condition of community supervision, the trial court interpreted the word "associate" so broadly that compliance with the term was impossible. He contends that to include work contacts within that definition would make employment impossible. Appellant gives the example of a restaurant employee who cannot control who his customers are. We do not find this comparison persuasive. A restaurant employee's contacts with criminals are likely incidental and unknown to the employee. Appellant's contacts with accused

criminals were not only inevitable but invited by his choice of employment. We conclude that the trial court did not abuse its discretion by interpreting the condition to include these contacts and therefore finding that Appellant violated the terms of his community supervision.

Because we have concluded that the trial court did not err by finding two of the allegations true, we need not determine whether it erred by finding the other allegations true. *See* ***Hart***, 264 S.W.3d at 367; ***Cochran***, 78 S.W.3d at 28. We hold that the trial court did not abuse its discretion by revoking Appellant's community supervision and adjudicating his guilt. *See* ***id.*** Accordingly, we overrule Appellant's first and second issues.

LEGALITY OF SENTENCE

In Appellant's third issue, he argues that the trial court imposed an illegal sentence because he pleaded "no contest" to sexual assault but was punished for aggravated sexual assault.

Standard of Review and Applicable Law

A plea bargain is a contract between the state and the defendant. ***Ex parte De Leon***, 400 S.W.3d 83, 89 (Tex. Crim. App. 2013). When both parties have knowingly and voluntarily entered into a plea bargain, they are bound by the terms of that agreement once it is accepted by the trial judge. ***Moore v. State***, 295 S.W.3d 329, 331 (Tex. Crim. App. 2009). But where the parties bargain for an illegal sentence, the appropriate remedy is to return them to the positions they occupied prior to the plea bargain agreement. *See* ***Ex parte Rich***, 194 S.W.3d 508, 515 (Tex. Crim. App. 2006). An illegal sentence is one that is not authorized by law. ***Mizell v. State***, 119 S.W.3d 804, 806 n.7 (Tex. Crim. App. 2003).

Appellate courts apply general contract law principles to determine the intended content of a plea agreement. ***Ex parte De Leon***, 400 S.W.3d at 89. We look to the written agreement, as well as the formal record, to determine the terms of the plea agreement. ***Id.*** We will imply a term only when necessary to effectuate the intention of the parties. ***Id.***

Analysis

Appellant argues that the record indicates he pleaded "no contest" to second degree sexual assault of a child rather than aggravated sexual assault of a child, and that his fifty year

sentence is therefore illegal.[2] He so contends because (1) the trial court did not say "aggravated" during the plea hearing, (2) the docket sheet reads that Appellant pleaded to "lesser included sexual assault of a child," and (3) both the order of deferred adjudication and the judgment adjudicating guilt name the offense as "sexual assault of a child—a lesser included offense," along with the penal code number for the sexual assault statute.

The trial court and the parties used the phrase "sexual assault of a child" to refer to the offense during the plea hearing, but the trial court adjudicated Appellant guilty of "aggravated sexual assault of a child" at the disposition hearing. The failure of the trial court and the parties to use the word "aggravated" in the plea proceedings does not necessarily show that Appellant pleaded "no contest" only to sexual assault of a child. The offense to which a defendant will plead "guilty" or "no contest" is a term of a plea bargain agreement. Therefore, we look to the record as a whole to determine the offense to which Appellant pleaded "no contest." *See* ***Ex parte De Leon***, 400 S.W.3d at 89.

Appellant was charged by indictment with continuous sexual abuse of a child. The indictment alleged that Appellant

> during a period that was thirty or more days in duration, to-wit: from on or about September 1, 2007 through July 1, 2009, when the defendant was seventeen (17) years of age or older, commit two or more acts of sexual abuse against a child younger than fourteen (14) years of age, namely PSEUJT, by intentionally and knowingly causing his male sexual organ to penetrate the anus and sex organ of the said PSEUJT,
>
> And by intentionally and knowingly causing the male sexual organ of the said GENE DOUGLAS TOMLINSON to penetrate the mouth of the said PSEUJT[.]

Appellant signed a written plea bargain agreement. It reads, "Defendant will plead guilty to CONTINUOUS SEXUAL ABUSE OF A CHILD, found in Section _____ of the Penal Code and receive the following agreed sentence: 10 years deferred, plea to 16740-B; 17,903-B, no further prosecution in Taylor County."

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[2] Under penal code section 22.011, entitled "Sexual Assault," a person commits an offense if the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child under seventeen by any means, or causes the penetration of the mouth of a child under seventeen by the sexual organ of the actor. TEX. PENAL CODE ANN. § 22.011(a)(2) (West 2011). The offense is a second degree felony, but it is a first degree felony if the victim was a person whom the actor was prohibited from marrying. ***Id.*** § 22.011(f).

Under penal code section 22.021(a), entitled "Aggravated Sexual Assault," these same acts constitute an offense if the child is under fourteen years of age. TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016). The offense is a first degree felony. ***Id.*** § 22.021(e).

At the plea hearing, the following exchanges occurred:

PROSECUTOR: We are going under a lesser-included of sexual assault of a child. The stipulation reads with one incident of sexual assault of the pseudonym, which would occur on or about July 1st of 2009. And so, we believe that that would be a 5 to 99 or life case.

DEFENSE COUNSEL: That's my understanding of everything, Judge.

. . . .

TRIAL COURT: Okay. And, sir, in Cause No. 18504, that's the sexual assault of a child case.

. . . .

All right. Sir, how do you plead to that case?

DEFENDANT: No contest.

TRIAL COURT: And, sir, you've signed all the plea papers in all these cases?

DEFENDANT: Yes, sir.

TRIAL COURT: Do you understand the plea papers?

DEFENDANT: I do.

. . . .

PROSECUTOR: [O]ur agreement is to, number one, proceed under the lesser-included of first degree sexual assault of a child. . . . Our agreement is a $1,500 fine, costs of court, 10 years deferred adjudication on that lesser-included first-degree felony, all the standard terms and conditions of the sex offender probation section, Your Honor.

DEFENSE COUNSEL: Your Honor, that is our agreement. In the plea papers I forgot to insert the $1,500 fine, and so that needs to be inserted in there, but that is our agreement.

. . . .

TRIAL COURT: And this is your understanding of the agreement, [defense counsel]?

DEFENSE COUNSEL: Yes.

TRIAL COURT: Sir, is this your understanding of the agreement?

DEFENDANT: Yes, Your Honor.

The stipulation of evidence, signed by Appellant, states that he "commit[ted] sexual abuse against a child younger than fourteen (14) years of age, namely PSEUJT, by intentionally and knowingly causing the male sexual organ of the said GENE DOUGLAS TOMLINSON to penetrate the mouth of the said PSEUJT[.]" The deferred adjudication order states that the

offense is "SEXUAL ASSAULT OF A CHILD-A LESSER INCLUDED OFFENSE." It names "22.011(a)(2) Penal Code" as the statute for the offense. And it states that the degree of the offense is "1ST DEGREE FELONY."

At Appellant's disposition hearing, the trial court stated, "Mr. Tomlinson, back on December—in December of 2012 you pled no contest to the lesser-included offense of aggravated sexual assault of a child." No objection was made to that characterization. The trial court subsequently found Appellant guilty, assessed his sentence at imprisonment for fifty years, and asked if there was any legal reason why it should not pronounce the sentence. Defense counsel stated there was not.

After pronouncing the sentence, the trial court stated as follows:

> Sir, the judgment in this case will find you guilty of aggravated sexual assault of a child, which is a first-degree. The previous judgment—the deferred adjudication judgment incorrectly referred to sexual assault of a child, but you pled guilty to aggravated sexual assault of a child, and you signed a Stipulation of Evidence as to aggravated sexual assault of a child. And it's very clear to me that that's what you are guilty of. I'm going to sign a judgment to this effect.

No objection was made.

We conclude that the record as a whole supports the trial court's assessment of the plea bargain agreement. The written plea agreement states that Appellant would plead guilty to continuous sexual abuse of a child. However, the statements at the plea hearing make clear that he was pleading no contest to a lesser included offense. Furthermore, they make clear that Appellant was pleading to a first degree felony offense.[3] Appellant acknowledged that he had read and understood the plea paperwork. And the facts provided in the stipulation of evidence constitute aggravated sexual assault of a child. Thus, the parties likely agreed that Appellant would plead "no contest" to aggravated sexual assault of a child, regardless of whether they used the correct offense name during plea negotiations or at the plea hearing.

Furthermore, Appellant did not object when the trial court stated that he had pleaded guilty to aggravated sexual assault of a child. When a trial court improperly intrudes into the plea bargaining process, the defendant must preserve his error for review by a timely objection in

[3] Sexual assault of a child is a lesser included offense here. But it is a first degree felony only when the defendant and the victim have a special relationship such as father and daughter. Although the record shows that the victim is Appellant's daughter, that fact is not included in the indictment or in the stipulation of evidence. Therefore, first degree sexual assault of a child under this theory would neither be a lesser included offense of the indicted offense, nor could it be said that it is the offense that was the subject of the plea bargain agreement.

the trial court. ***Moore***, 295 S.W.3d at 333; TEX. R. APP. P. 33.1. Here, if the parties agreed that Appellant would plead to only sexual assault of a child, Appellant was required to object to preserve his error when the trial court improperly intruded into the plea bargaining process by adjudicating him guilty of and sentencing him for aggravated sexual assault of a child. *See* ***id.*** Because he did not object, Appellant failed to preserve error. Accordingly, we overrule Appellant's third issue.

JUDGMENT ERROR

As both parties noted in their briefs, the trial court's oral pronouncement adjudicating Appellant guilty of aggravated sexual assault of a child conflicts with the judgment, which states that Appellant was convicted for sexual assault of a child. Neither party has requested that we reform the incorrect judgment. But our authority to reform an incorrect judgment is not dependent on the request of any party. ***Rhoten v. State***, 299 S.W.3d 349, 356 (Tex. App.—Texarkana 2009, no pet.).

An appellate court has the authority to correct a trial court's judgment to make the record speak the truth when it has the necessary data and information. TEX. R. APP. P. 43.2(b); ***Banks v. State***, 708 S.W.2d 460, 462 (Tex. Crim. App. 1986) (reforming judgment to reflect trial court's pronouncement cumulating sentences); ***St. Julian v. State***, 132 S.W.3d 512, 517 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (reforming judgment to reflect offense named in jury's signed verdict); ***Asberry v. State***, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). Here, we have the necessary information to correct the judgment and make it speak the truth regarding Appellant's offense and statute of conviction. We conclude the judgment should be ***modified*** to reflect that Appellant was convicted of aggravated sexual assault of a child, and that the relevant statute is Texas Penal Code section 22.021.

DISPOSITION

We have overruled Appellant's first, second, and third issues, and have concluded there is error in the judgment that was not raised by either party. Accordingly, we ***modify*** the judgment of the trial court to reflect that Appellant was convicted of aggravated sexual assault of a child, and that the relevant statute is Texas Penal Code section 22.021. We ***affirm*** the judgment ***as modified***.

BRIAN HOYLE
Justice

Opinion delivered November 30, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

NOVEMBER 30, 2016

NO. 12-16-00091-CR

GENE DOUGLAS TOMLINSON,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 104th District Court
of Taylor County, Texas (Tr.Ct.No. 18504-B)

THIS CAUSE came on to be heard on the appellate record and the briefs filed herein; and the same being inspected, it is the opinion of this Court that the trial court's judgment below should be **modified and, as modified, affirmed**.

It is therefore ORDERED, ADJUDGED and DECREED that the trial court's judgment below be **modified** to reflect that Appellant was convicted of aggravated sexual assault of a child, and that the relevant statute is Texas Penal Code section 22.021; **and as modified**, the trial court's judgment is **affirmed**; and that this decision be certified to the trial court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.