IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0135-13

DAVID SAMARIPAS, JR., Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS BRAZOS COUNTY

KELLER, P.J., filed a dissenting opinion in which PRICE, J., joined.

I disagree with the Court's conclusion that appellant's prior state jail felony conviction can be used to enhance his punishment under § 12.42(d). The court says that the language of the statute is plain, but I think that the language is ambiguous and that extratextual factors resolve that ambiguity in appellant's favor.

A. The Issue

One of the two felonies used by the State as a prior conviction for enhancement purposes under § 12.42(d) was a state jail felony under § 12.35(a). The punishment for this state jail felony

had been enhanced to that of a second-degree felony under former § 12.42(a)(2).[1] Appellant contends that, even though punishment was enhanced to that of a second-degree felony, the offense itself was still a state jail felony offense for the purpose of determining whether it could be used for enhancement. He further contends that the applicable statute—former § 12.42(e)—prohibited using a § 12.35(a) state jail felony offense for enhancement under § 12.42(d). The State, the court of appeals, and now this Court contend that § 12.42(e) did not prohibit using appellant's state jail felony offense because § 12.42(e) prohibited only the use of an offense that was "punished" under § 12.35(a) and appellant's offense was "punished"—via enhancement—under § 12.42(a)(2).[2]

B. Standards

We construe a statute in accordance with its literal text unless the language is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended.[3] If, however, the language is ambiguous, or leads to absurd results, then we can examine extratextual factors in construing the meaning of the text.[4] Statutory language is ambiguous if it "is reasonably susceptible to more than one understanding."[5] Extratextual factors that may be examined include, but are not limited to, the object sought to be attained, the legislative history, prior statutory

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[1] *See* TEX. PENAL CODE § 12.42(a)(2) (West 2008) (allowing punishment for a state jail felony under § 12.35(a) to be enhanced to a second-degree felony if defendant had two prior, sequential state jail felony convictions).

[2] *See Samaripas v. State*, 2013 Tex. App. LEXIS 430, *30-32 (Tex. App.–Corpus Christi-Edinburg January 17, 2013).

[3] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[4] *Id.*

[5] *Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013).

provisions, and the consequences of a particular construction.[6]

C. Ambiguity

Appellant committed the current offense in October of 2007. At that time, § 12.42(e) provided:

> A previous conviction for a state jail felony punished under Section 12.35(a) may not be used for enhancement purposes under Subsection (b), (c), or (d).[7]

The question here is: What does it mean for an offense to be "punished under Section 12.35(a)"? One possible construction of that phrase is the construction advocated by the State—that an offense is "punished" under § 12.35(a) only if the punishment is not enhanced under some other provision. If this construction is correct, then enhancement of appellant's prior state jail felony under § 12.42(a)(2) would mean that he was punished under that section instead of under § 12.35(a).

But there is another possible construction of §12.42(e). The statute that sets forth the initial punishment for state jail felonies—§ 12.35—creates a two-tiered system. The first tier is a plain-vanilla state jail felony, punished under § 12.35(a):

> Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be *punished* by confinement in a state jail for any term of not more than two years or less than 180 days.[8]

The second tier is an aggravated state jail felony, punished under § 12.35(c):

> An individual adjudged guilty of a state jail felony shall be *punished* for a third degree felony . . .

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[6] *Ex parte Rieck*, 144 S.W.3d 510, 512 (Tex. Crim. App. 2004).

[7] TEX. PENAL CODE § 12.42(e) (West 2008).

[8] *Id.* § 12.35(a) (emphasis added).

if certain facts are proven at trial.[9] Notice that § 12.35(a) refers *only* to subsection (c); it does *not* say "Except as provided by Subsection (c) or any other statute" or "Except as provided by Subsection (c) or § 12.42." In isolation, § 12.35 indicates that there are only two ways in which state jail felonies may be punished: under § 12.35(a) or under § 12.35(c). At the time applicant committed his prior state jail felony offense (and even at the time his current offense was committed), the legislature had also chosen to provide enhanced penalties in § 12.42 for some state jail felony offenders, even when the offense had not been aggravated under § 12.35(c).[10] Obviously, these enhanced penalties could be imposed in appropriate cases despite the apparent exclusivity of the language of § 12.35(a).

But the language of § 12.35 suggests that a state jail felon is punished as an initial matter under this two-tiered system, with the exclusive options being punishment as a § 12.35(a) offense or punishment as a § 12.35(c) offense. The language in § 12.42(e) could be read as following this convention, so that a state jail felon is considered punished under either § 12.35(a) or § 12.35(c), though other provisions may then allow punishment to be enhanced. If that construction of § 12.42(e) is correct, then appellant was punished under § 12.35(a), though his punishment was enhanced under § 12.42(a)(2). Because he was punished under § 12.35(a), rather than § 12.35(c), his prior state jail felony conviction would not be available for enhancement under § 12.42(d). This construction would give effect to the two-tiered structure of § 12.35 and assume that the legislature understood this two-tiered structure when it drafted § 12.42(e).

So, the text of §12.42(e) is reasonably susceptible to two constructions: (1) the State's

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[9] *Id.* § 12.35(c) (emphasis added).

[10] *Id.* § 12.42(a)(1)-(3).

construction, which says that a person is punished under § 12.35(a) only if his punishment is not enhanced under any other provision, and (2) the two-tiered construction, which says that a person is punished under § 12.35(a) if he is not punished under § 12.35(c). Consequently, § 12.42(e) is ambiguous, and it is appropriate to examine the legislative history.

D. Extratextual Factors

When § 12.42(e) was first enacted in 1994, it provided unambiguously that only aggravated state jail felonies, under § 12.35(c), could be used for enhancement under § 12.42:

> A previous conviction for a state jail felony may be used for enhancement purposes under this section only if the defendant was *punished* for the offense under Section 12.35(c).[11]

From this language, two things become apparent. First, the legislature initially had a two-tiered approach to using § 12.35 convictions under § 12.42: § 12.35(c) convictions could be used, but § 12.35(a) convictions could not. Second, the 1994 version of the statute used the word "punished." As I will explain below, these two observations support employing the "two-tiered" construction in appellant's case.

Let's begin with the first observation: In 1994, the legislature had a two-tiered approach to the use of state jail felony convictions under § 12.42: § 12.35(c) convictions could be used, but § 12.35(a) convictions could not. Effective January 1, 1996, § 12.42(e) was changed to reflect the version applicable in appellant's case.[12] Along with this change to § 12.42(e), the legislature changed § 12.42(a) to allow state jail felony convictions under § 12.35(a) to be used to enhance other

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[11] TEX. PENAL CODE § 12.42(e) (West 1994) (emphasis added).

[12] TEX. PENAL CODE § 12.42(e) (West 1996) (Text of subsec. (e) effective January 1, 1996).

state jail felony convictions.[13] The bill analysis for the 1996 amendment states that "[t]he current requirement that only state jail felony convictions for which the punishment was enhanced to a third degree felony could be used for enhancement purposes would be changed so that state jail felony convictions that were not enhanced could be used in some situations to enhance later *state jail felony* convictions."[14] This statement indicates that the legislature wanted to change the absolute rule that only state jail convictions under § 12.35(c) could be used for enhancement to allow § 12.35(a) convictions to sometimes be used for enhancement. But the contemplated exception was a narrow one: it allowed a § 12.35(a) conviction to be used only to enhance another state jail felony. This passage suggests that the legislature never contemplated that § 12.35(a) convictions would be used to enhance non-state-jail felonies under § 12.42(d).

I turn now to the second observation about the 1994 version of § 12.42(e): that version of the statute, like the version applicable to appellant, contains the word "punished." So, what would happen if we applied the State's approach to the 1994 statute? As we shall see, the State's analysis unravels. To understand why this is so, we need to look at another aspect of § 12.42 as it existed in 1994. In addition to allowing § 12.35(c) offenses to be used as prior convictions for enhancement purposes, the 1994 amendments to § 12.42 allowed § 12.35(c) offenses to be primary offenses subject to punishment enhancement by prior convictions under § 12.42(a).[15] A § 12.35(c) offense

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[13] *Id.* § 12.42(a).

[14] House Research Organization, Bill Analysis, CSSB 15, 74th Leg., R.S. (May 22, 1995) (emphasis added).

[15] TEX. PENAL CODE § 12.42(a) (1994).

was treated exactly like a third-degree felony in this regard.[16]

If a defendant repeatedly committed third-degree felonies, the following could occur, under any version of § 12.42, from 1994 onward, assuming the felonies were in proper sequence: The first third-degree felony conviction would subject the defendant to the 2-to-10 year sentencing range that applies to third-degree felonies.[17] If the State availed itself of § 12.42(a), the second third-degree felony conviction would subject the defendant to the 2-to-20 year sentencing range for a second-degree felony.[18] If the State availed itself of the most serious available enhancement on the next conviction, the defendant's third conviction for a third-degree felony would subject him to the 25-to-99-years-or-life sentencing range under § 12.42(d).[19]

But the State's proposed construction of the word "punished" would disrupt the way § 12.35(c) felonies were treated in 1994. Let's change the above hypothetical of a defendant who repeatedly commits third-degree felonies so that his second felony is a § 12.35(c) felony. The § 12.35(c) felony could be enhanced by the prior third-degree felony under § 12.42(a) so that the offender would be subject to a second-degree punishment range.[20] So far, so good. Could the State later, under § 12.42(d), use the defendant's two prior felony convictions to enhance the defendant's third felony conviction (as it could in the above hypothetical)? Not if the State's construction is correct, because the § 12.35(c) conviction that was enhanced under § 12.42(a) would have been

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[16] *Id.*

[17] TEX. PENAL CODE § 12.34(a).

[18] *Id.* § 12.42(a); § 12.33(a).

[19] *Id.* § 12.42(d).

[20] TEX. PENAL CODE § 12.42(a) (West 1994).

"punished" under § 12.42(a) rather than § 12.35(c). Since the 1994 version of § 12.42(e) says that only convictions that are "punished" under § 12.35(c) can be used, the § 12.35(c) conviction that was enhanced under § 12.42(a) could *not* be used.

But if the State refrained from availing itself of the second-degree felony punishment for the § 12.35(c) conviction, then the § 12.35(c) conviction would unquestionably be available later for enhancement purposes under § 12.42(d).[21] In essence, under the State's construction, if the State enhances a § 12.35(c) offense under § 12.42, it loses the ability to use the § 12.35(c) offense for enhancement purposes at a later date. No other felony is treated this way under § 12.42 and there is no good reason to think that the legislature intended to treat § 12.35(c) offenses in such an anomalous manner.

The Court also notes that the legislature amended § 12.42(e) to replace the word "punished" with the word "punishable."[22] The bill analysis to this amendment characterized the change as nonsubstantive and intended only to clarify the law.[23] Although this Court gives little weight to subsequent enactments in interpreting prior law, the legislative pronouncement of this change as nonsubstantive is some additional support for the conclusion that the legislature never intended for § 12.35(a) offenses that were enhanced under § 12.42 to be available for enhancement under §

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[21] *Id.* § 12.42(e).

[22] And the passage was moved into § 12.42(d). *See* Acts 2011, 82nd Leg., R.S., ch. 834 §§ 4, 6.

[23] Senate Research Center, Bill Analysis, H.B. 3384, 82nd Leg., R.S., *Author's/Sponsor's Statement of Intent*, 2nd paragraph & *Section-by-Section Analysis*, § 4 (May 19, 2011).

12.42(d).[24]

Finally, as the following example will show, the State's construction of the statute would essentially allow "double-dipping"—the use of § 12.42 two times in a single enhancement—first to bump up the plain-vanilla state jail felony to make it eligible for use as a prior conviction for enhancement purposes and a second time to actually use the bumped-up state jail felony for enhancement purposes. That is not how § 12.42 has ever operated for any other felonies.

For example, suppose a defendant was convicted of two third-degree felonies at the same time and later committed another third-degree felony after the first two convictions were final. Due to sequencing requirements, only one of the prior convictions could be used to enhance the later third-degree felony to second-degree punishment.[25] If the fact that the new offense is now punished as a second-degree felony could be a further basis for enhancement under § 12.42, the State could theoretically use the unused prior third-degree felony conviction to further enhance the defendant to a first-degree felony.[26] But such a result is not allowed because a § 12.42 enhancement changes only the punishment, not the degree of the original offense,[27] so a § 12.42 enhancement of a

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[24] *See Ex parte Ervin*, 991 S.W.2d 804, 816 (Tex. Crim. App.) ("Although we have held that subsequent enactments by the Legislature may be some evidence of their intent in a prior version of the statute, we nevertheless give little weight to those subsequent enactments in interpreting the prior law." *Comparing Brown v. State*, 943 S.W.2d 35, 40 (Tex. Crim. App. 1997) (finding later version of statute relevant to interpreting earlier version, combined with a number of other factors) *with Ex Parte Schroeter*, 958 S.W.2d 811, 813 (Tex. Crim. App. 1997 (rejecting Legislature's attempt to interpret prior law in subsequent legislation)).

[25] TEX. PENAL CODE § 12.42(a).

[26] TEX. PENAL CODE § 12.42(b).

[27] *Ford v. State*, 334 S.W.3d 230, 234-35 (Tex. Crim. App. 2011) ("Penal Code § 12.42 increases the range of punishment applicable to the primary offense; it does not increase the severity or grade of the primary offense.").

conviction has no effect on how that conviction can itself be used for enhancement purposes. Under the State's construction, however, a § 12.42 enhancement does affect the usability of a state jail felony conviction. The fact that such a construction is simply out of step with how we treat other felonies under § 12.42 is another reason to reject it. I conclude that the extratextual factors favor the "two-tiered" approach to construing § 12.42(e), so that, by "punished," the statute means punished under § 12.35(a) instead of § 12.35(c). Under that construction, appellant's prior conviction was not usable for enhancement purposes.

I respectfully dissent.

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