



# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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NO. PD-1118-16

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**JAMIE HALLMARK, Appellant**

v.

**THE STATE OF TEXAS**

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**ON STATE'S PETITION FOR DISCRETIONARY REVIEW  
FROM THE TWELFTH COURT OF APPEALS  
HOUSTON COUNTY**

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**KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, RICHARDSON, YEARY, NEWELL, and KEEL, JJ., joined. WALKER, J., filed a dissenting opinion in which ALCALA, J., joined.**

Appellant and the State entered into a plea agreement. According to the plea papers, Appellant would be sentenced to three years unless she failed to show up for her sentencing hearing, in which case she would be sentenced within the full range of punishment. Appellant did not show up for her sentencing hearing, and she was later sentenced to ten years. The court of appeals determined that the “full range of punishment” part of the plea agreement was added by the trial court, that the trial court did not follow the parties’ plea bargain when it assessed the full range of

punishment, and that the trial court abused its discretion in refusing to permit Appellant to withdraw her plea. We conclude that the court of appeals erred in finding an abuse of discretion because the “full range of punishment” term was a part of the plea agreement and Appellant failed to timely complain about any participation by the trial judge in the plea-bargaining process.

## I. BACKGROUND

### A. Trial

Appellant was charged with hindering apprehension. The record contains a plea document titled “AGREED PLEA RECOMMENDATION–NO APPEAL.” That document lists the range of punishment as two to ten years for a third degree felony and contains a notation that punishment would be three years. The document also contains an “other conditions” section, with the following two notations: (1) “Sentencing 1-21-16” (a delayed sentencing date), and (2) “If Defendant does not show Judge will sentence within Range of Punishment.” This form was signed by Appellant, the State’s Attorney, and the trial judge. The agreement between the parties was discussed by the judge with Appellant during the plea proceedings:

THE COURT: Ms. Hallmark, let me tell you what the agreement is that you have agreed to, and you tell me whether that’s what you signed up for, okay. Your case is set a week from Monday, for jury trial, and today was the trial announcement, where you had to commit to what you want to do, and your lawyer and the D.A. said that y’all had worked a deal out that you wanted to plead guilty but be sentenced in January. And I said that I would do it on two things: One, you would have to waive a jury, so I could take it off the jury docket for later in the month; and that if you came at the time you were supposed to, then I would follow the plea bargain out. If you did not come, and chose not to show, then you would be looking at the full range of punishment on the third degree felony, and I would assess your range of punishment, and the plea would be off. So if you do your part, you get your deal. If you don’t, then I decide what you get, no jury.

Is that what you believed you signed up for?

THE DEFENDANT: Yes, ma'am.

Later, the trial judge summarized the plea agreement, which included the State's recommendation of three years of confinement if Appellant showed up for sentencing or the trial judge considering the full range of punishment if she did not. The trial judge then asked, "Is that the agreement that you made?" Appellant responded, "Yes, ma'am."

Appellant did not show up for her January sentencing date. When sentencing proceedings were eventually conducted in March, the trial judge asked whether Appellant had any valid excuse for her failure to show. She offered none. The trial judge then stated, "I am not following the plea bargain. You weren't here, so I am not—you are not getting three years." After hearing evidence and argument, the trial judge sentenced Appellant to ten years. Defense counsel then objected to the sentence as follows: "Judge, I would just object to the sentence that it's excessive, cruel, and unusual, and violation of the 8th Amendment. And given the Court's sentence, I would further object that it renders the Defendant's waivers of rights and plea of guilty involuntary." The trial judge overruled these objections but gave Appellant permission to appeal.

### **B. Appeal**

The court of appeals said that, even though the additional condition that Appellant appear for sentencing or be subjected to the entire range of punishment appeared in the memorandum of the plea bargain agreement, the trial court's statements at the plea hearing indicated that the condition did not exist until the plea agreement was presented to the trial court, at which point the trial court added the additional condition.<sup>1</sup> The appellate court further concluded that, when the trial court

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<sup>1</sup> *Hallmark v. State*, No. 12-16-00082-CR, 2016 Tex. App. LEXIS 8937, \*7 (Tex. App.—Tyler August 17, 2016) (not designated for publication).

sentenced Appellant within the full range of punishment, it was not following the plea agreement, and so it abused its discretion by overruling Appellant’s objection and declining to permit her to withdraw her guilty plea.<sup>2</sup> The court of appeals reversed the judgment of the trial court.<sup>3</sup>

## II. ANALYSIS

The “other conditions” section of the plea form supports a conclusion that the “no-show / full-range-of-punishment” condition was part of the plea agreement between the parties and was not a condition imposed solely by the judge. The colloquy between Appellant and the trial judge does not show otherwise. This makes this case like *Joshua Moore v. State*, in which the parties agreed that the judge would delay sentencing and assess a specific sentence if the defendant did not commit a new offense in the interim, and also agreed that the judge could consider the full range of punishment if the defendant did commit a new offense.<sup>4</sup> The parties there called the sentencing-within-the-full-range part of the agreement an “open plea,” but we nevertheless concluded that it was a part of the plea agreement, a remedy for a partial breach of the agreement’s terms.<sup>5</sup>

Because the “commit-a-crime / full-range-of-punishment” condition was a part of Joshua Moore’s plea agreement, and he committed a crime before the sentencing hearing, the trial judge was following the plea agreement when he considered the full range of punishment during sentencing,

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<sup>2</sup> *Id.* at \*7-8.

<sup>3</sup> *Id.* at \*9.

<sup>4</sup> 240 S.W.3d 248, 249, 253 (Tex. Crim. App. 2007). Because there are two cases styled *Moore v. State* that are relevant to our discussion, we include the first names of the appellants to distinguish between them.

<sup>5</sup> *Id.* at 253-54.

and Joshua Moore had no right to withdraw his plea.<sup>6</sup> Likewise, because the “no-show / full-range-of-punishment” condition was a part of Appellant’s plea agreement, and she did not show up for sentencing as she agreed to do, the trial judge was following the plea agreement when she considered the full range of punishment, and Appellant had no right to withdraw her plea.<sup>7</sup>

It is not clear to us that the trial judge injected herself into plea negotiations. But even if she did, Appellant did not object at the time she entered her plea. We held in *Jonathan Moore v. State* that a defendant forfeits error if he fails to object to a trial judge’s improper participation in plea negotiations.<sup>8</sup> Any objection Appellant might have made at sentencing was untimely because the State had partially performed its part of the agreement by delaying sentencing and Appellant had partially breached the agreement by failing to show up for sentencing.<sup>9</sup>

And even if the objection at sentencing had been timely, Appellant’s complaint on appeal does not comport with the objection that was made. Appellant objected that the sentence was cruel and unusual in violation of the Eighth Amendment and that her waiver of rights and plea of guilty was involuntary. Neither of these objections conveyed to the trial judge a complaint that she had

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<sup>6</sup> *Id.* at 254 (“Part of the negotiated agreement included an express remedy in the event that the appellant should breach the agreement partially or totally. Therefore, when the appellant breached that part of the plea agreement for which a remedy had been expressly agreed upon, the State was released from its obligation to recommend a twenty-five year sentence. Instead, pursuant to the agreement, the State was permitted to, and did, stay silent on the sentencing recommendation.”).

<sup>7</sup> The dissent misreads the record when it claims that the “no show / full range of punishment” condition was not part of the plea agreement. As we explained earlier, the plea papers explicitly included this as a term of the plea agreement. *See also* Exhibit A.

<sup>8</sup> 295 S.W.3d 329, 333 (Tex. Crim. App. 2009).

<sup>9</sup> *See* TEX. R. APP. P. 33.1 (complaint must be made by a “timely” request, objection, or motion).

improperly participated in plea negotiations. Because the complaint on appeal does not comport with either of the trial objections, nothing is presented for review.<sup>10</sup>

Because the “no-show / full-range-of-punishment” condition was part of Appellant’s plea agreement and she forfeited any complaint about the trial judge’s participation in the plea negotiations, her complaints about the trial court’s judgment are without merit. The court of appeals was mistaken to hold otherwise.<sup>11</sup>

We reverse the judgment of the court of appeals and remand the case to that court to address Appellant’s remaining point of error.

Delivered: November 8, 2017

Publish

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<sup>10</sup> The dissent claims that Appellant preserved error regarding whether the ten year sentence must be withdrawn. But that is not the alleged error that we hold was not preserved. Rather, our preservation holding is directed at the question of whether the trial court impermissibly intruded on plea negotiations. That sort of error (if it was error) must be preserved—if Appellant perceived that the trial court had impermissibly involved itself in the plea bargain process, Appellant should have said so and explained what the allegedly improper involvement was. Appellant’s objection at trial did neither of these things. And even if it had, error was still not preserved because the objection was untimely.

<sup>11</sup> A recent law review article challenges the “nefarious image” associated with judicial involvement in plea bargaining. The authors report “surprising findings” after numerous interviews about judicial participation in felony pleas in ten states:

[J]udicial involvement in negotiations is now institutionalized and embedded in the very structure of many court systems in ways never dreamed of in the 1970s. With no fanfare from scholars, ‘managerial judging,’ the philosophy that transformed civil litigation in the late twentieth century, has finally taken hold in criminal litigation[.]

Nancy J. Kind & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV., 153, 325 (2016). It is unnecessary for us to consider here the proper extent (if any) of judicial participation in plea bargaining in Texas.

# Exhibit A

Cause No.: 15 CR 064  
 Defendant: Jamie Hallmark  
 TRN # 9159544686  
 SID # 08494395

349th JUDICIAL DISTRICT COURT  
 HOUSTON COUNTY, TEXAS

FILED  
 HOUSTON COUNTY  
 DISTRICT CLERK

AGREED PLEA RECOMMENDATION-NO APPEAL

15 DEC 3 PM 5:16

Offense: Count One: <u>Hindering Apprehension</u>	Count Two:
Statute: <u>38.05 PC</u>	Statute:
Range of Punishment	Offense Date: <u>12-12-14</u>
<input type="checkbox"/> First Degree	Plea Date:
<input type="checkbox"/> 5 years to 99 years or life/ \$10,000 fine	Second Degree
<input checked="" type="checkbox"/> Third Degree	State Jail
<input type="checkbox"/> 2 years to 10-years/ \$10,000 fine	180 days to 2 years/ \$10,000 fine
<input type="checkbox"/> Reduced to a lesser included offense of Class A Misdemeanor or Felony	
<input type="checkbox"/> Indicted Causes taken into consideration	<input type="checkbox"/> Un-indicted cases taken into consideration
<input type="checkbox"/> Count(s) taken into consideration	
<input type="checkbox"/> State Jail to be punished as misdemeanor 12.44 PC:	<input type="checkbox"/> True pleas to enhancements or multiple Counts
<input type="checkbox"/> Community Supervision	<input type="checkbox"/> Deferred Adjudication of Guilt
____ Years probated for ____ years	____ YEARS probation
<input checked="" type="checkbox"/> TDCJ-ID <u>3</u> years	<input type="checkbox"/> TDCJ-State Jail months/years
<input checked="" type="checkbox"/> Time Credit: <u>12-12-14 to 12-31-14</u>	

CAROLYN RAINS  
 DEPUTY

- Standard Probation Terms
  - \_\_\_\_ Fine
  - 500 Court Costs
  - \$100.00 Crime Victims Compensation
  - \$50.00 to Crimestoppers
  - Urinalysis Testing
  - \_\_\_\_ Hours of Community Service
  - \$60.00 Monthly Probation Fee
  - \_\_\_\_ Court Appointed Attorney's Fees
  - Complete Substance Abuse Evaluation
  - S.T.E.P. Program
  - \_\_\_\_ Restitution to Victim
  - \_\_\_\_ Restitution to DPS Lab
  - Drug Offenders Program

- Sex Offender Program and Conditions
  - \_\_\_\_ Days in Jail as a Condition
  - DWI Conditions
    - Install ignition Interlock for \_\_\_\_
    - \_\_\_\_ DL Suspension Length
    - Repeat Offenders Program
  - SAFFP as a Condition
  - Complete Substance Abuse Sanction Program (Outpatient)

Other Conditions: (sentencing 1-21-16)  
If defendant does not show  
Judge will sentence within Range of punishment

X Jamie Hallmark Defendant  
 X \_\_\_\_\_ Defendant's Attorney  
 X \_\_\_\_\_ State's Attorney  
 X Pam Fletcher Presiding Judge