IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0921-18

MICHAEL J. BUCK, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS
EL PASO COUNTY**

KELLER, P.J., filed a concurring opinion in which KEASLER, and YEARY, JJ., joined.

I agree with the Court that the court of appeals should have dismissed Appellant's appeal instead of affirming the judgment. But in affirming the judgment, the court of appeals was misled by some of this Court's own opinions. We should clear up the confusion that we ourselves created and explicitly hold that a defendant who signs a waiver of appeal may not challenge the voluntariness of that waiver by means of the very appeal that he waived.

As I will explain later, such a holding would be consistent with how we treat appeals in plea-

bargain cases under Rule 25.2: a defendant can litigate on appeal whether there *was* a plea bargain but cannot challenge the plea bargain as involuntary. Regarding waivers of appeal, a defendant ought to be able to litigate on appeal whether there was a waiver of appeal but should not be allowed to challenge the waiver as involuntary.[1]

BACKGROUND

On appeal, Appellant claimed that his waiver of appeal was ineffective. He relied on *Ex parte Broadway*[2] and *Ex parte Reedy*[3] and cited *Reedy* in particular for the proposition that an involuntary plea has the effect of invalidating a waiver of postconviction remedies. Saying that Appellant challenged "the voluntariness of his waiver of the right to appeal on the same grounds as the voluntariness of his guilty plea," the court of appeals addressed Appellant's claim on the merits.[4]

---

[1] On the trial court's appellate certification form, a checkbox was marked next to the statement "is not a plea bargain case, and the defendant has the right of appeal," but the phrase "the defendant has the right of appeal" was crossed out, with the initials of the trial judge, defense attorney, and prosecutor appearing beside the modification. The other checkboxes on the form were left blank, including a checkbox next to the statement "the defendant has waived the right of appeal." As a result, the trial court's certification form did not conform to any of the options set out in the model form in our appellate rules. *See* TEX. R. APP. P., Appdx. D. No amendments have been made to this certification.

The Rules of Appellate Procedure direct that "[t]he appeal must be dismissed if a certification that shows the defendant has the right of appeal has not been made part of the record under these rules." TEX. R. APP. P. 25.2(d). Because the language saying Appellant had a right of appeal was crossed out, the certification did not show that he had a right of appeal. The certification failed to show *why* Appellant had no right of appeal and, as such, may have been defective and subject to amendment. An amendment would not, however, have caused the certification to show a right of appeal because the record contains a signed waiver of appeal.

[2] 301 S.W.3d 694 (Tex. Crim. App. 2009).

[3] 282 S.W.3d 492 (Tex. Crim. App. 2009).

[4] *Buck v. State*, No. 08-16-00294-CR, 2018 Tex. App. LEXIS 6038, *12 (Tex. App.—El Paso August 2, 2018) (not designated for publication).

Ultimately, the court of appeals concluded that his plea was voluntary and, consequently, that his waiver of appeal was voluntary.[5] On discretionary review, Appellant relies upon *Broadway*, *Reedy*, *Ex parte Delaney*,[6] *Blanco v. State*,[7] and *Carson v. State*[8] for his claim that his waiver of appeal was involuntary.

PLEA-BARGAIN CASES

First, in *Cooper v. State*, which was a plea-bargain case, we held that a defendant may not challenge the voluntariness of his plea in an appeal from a plea bargain.[9] Later, in *Dears v. State*, we addressed the application of Rule 25.2's general prohibition against appealing in a plea-bargain case.[10] In a plea-bargain case, a defendant may appeal only matters that were raised by written motion filed and ruled on before trial or when the trial court gives permission to appeal.[11] Because the record in *Dears* showed that the appeal was from probation-revocation proceedings, and such proceedings are not subject to plea-bargaining within the contemplation of Rule 25.2, the defendant was entitled to appeal, and the certification saying otherwise was inaccurate.[12] The certification was

---

[5] *Id.* at *12-18.

[6] 207 S.W.3d 794 (Tex. Crim. App. 2006).

[7] 18 S.W.3d 218 (Tex. Crim. App. 2000).

[8] 559 S.W.3d 489 (Tex. Crim. App. 2018).

[9] (Absent the trial court's permission to appeal, of course). 45 S.W.3d 77, 78, 81, 83 (Tex. Crim. App. 2001). *See also Griffin v. State*, 145 S.W.3d 645, 646-47 (Tex. Crim. App. 2004) (discussing *Cooper*'s holding and concluding that even a jurisdictional claim cannot be raised if the defendant does not meet one of the exceptions in R. 25.2).

[10] 154 S.W.3d 610, 614-15 (Tex. Crim. App. 2005).

[11] R. 25.2(a)(2).

[12] 154 S.W.3d at 613-15.

"defective," and the court of appeals had an obligation to have it corrected.[13] This holding focused on whether there was in fact a plea bargain. It did not go behind the plea bargain to determine whether it was voluntary.

Dears did not overturn our holding in *Cooper*. The combined effect of *Dears* and *Cooper* is that, on appeal, a defendant can challenge the existence of a plea bargain but not the voluntariness of a bargain.

WAIVERS OF APPEAL

For several reasons, the logic of *Dears* and *Cooper* regarding the general inability to appeal in a plea-bargain case should also apply when there is a waiver of appeal. As with a waiver of appeal, the limitation on appeals in plea-bargain cases arises from an action of the defendant that cuts off his right to appeal. A defendant who waives appeal is explicitly foregoing that right, while a defendant who agrees to a plea bargain (without reserving any issues by pretrial motion and without the trial court's permission to appeal) accepts that he will not be able to appeal. Moreover, while Rule 25.2 does not refer to appellate waivers, the model certification form in the appellate rules contains an option that "the defendant has waived the right of appeal."[14] This language says nothing about the waiver being voluntary, just as the plea-bargain language in Rule 25.2 says nothing about the voluntariness of such a bargain.

Three of the four reasons given for the holding in *Cooper* apply to waivers of appeal.[15] First,

---

[13] *Id.* at 614 (citing TEX. R. APP. P. 37.1 and 34.5(c)).

[14] Appdx. D.

[15] The first reason in *Cooper*, which does not apply to waivers of appeal, is that the legislative enactment upon which the appellate rule was based did not permit a defendant to raise an involuntary-plea claim on appeal. *See Cooper*, 45 S.W.3d at 81.

we stated that allowing a challenge on appeal to the voluntariness of the plea in a plea-bargain case "would completely frustrate the statute."[16] Second, we explained that prohibiting such an appeal was supported by a "cost-benefit analysis," because the number of cases involving a meritorious involuntary-plea claim reflected in the appellate record would be exceedingly small:

> The number of cases in which the plea is involuntary when the trial court followed the plea agreement is therefore very small, and the number of cases in which the involuntariness would appear in an appellate record is even smaller. Experience has shown us that most cases of involuntary pleas result from circumstances that existed outside the record, such as misunderstandings, erroneous information, impaired judgment, ineffective assistance of counsel, and plea-bargains that were not followed or turn out to be impossible of performance. The legislature reasonably determined to eliminate a small number of meritorious appeals to prevent a much larger number of meritless appeals.[17]

Third, we said that a meritorious involuntary-plea claim may be raised by other procedures: motion for new trial and habeas corpus.[18] We explained that those procedures "are not only adequate to resolve claims of involuntary pleas, but they are superior to appeal in that the claim may be supported by information from sources broader than the appellate record."[19]

These three reasons apply with as much force when a defendant tries to challenge the voluntariness of his waiver of appeal by means of an appeal. First, if an appellant can appeal in order to raise a claim that his waiver was involuntary, then the point of waiving the appeal is lost. Under such circumstances, as much time and effort on appeal could be expended evaluating whether a waiver of appeal was voluntary as would be expended to evaluate substantive claims on appeal. In

---

[16] *Id.*

[17] *Id.*

[18] *Id.* at 82.

[19] *Id.*

the present case, for instance, the court of appeals addressed Appellant's substantive claims in full. Doing so defeats the purpose of a waiver of appeal. And if the State cannot rely on the effectiveness of waivers of appeals, then both it and defendants in general will be at a disadvantage in negotiations at trial: the State will lose its incentive, and defendants will lose a bargaining chip.

Second, allowing such challenges on appeal would only slightly expedite review of the few meritorious claims of involuntary appellate waivers while opening the door to appellate review of unmeritorious claims. If a defendant can always challenge a waiver of appeal as involuntary, then it is likely that many defendants will do so, regardless of the merit of such claims, and that courts will be forced to expend significant resources evaluating such claims.

Third, if a defendant wants to challenge a waiver of appeal as involuntary, he can do so by means of habeas corpus.[20] This gives both the State and the defendant the opportunity to elicit evidence on the issue and develop a complete record regarding the appellant's state of mind at the time he signed the waiver. Given the availability of habeas, we need not allow the purpose of appellate waivers to be frustrated by entertaining attacks on those waivers in appeals.

OUR PRIOR OPINIONS

Most of our prior cases are consistent with our holding today but, more to the point, in none of our opinions did we specifically address the question of whether the voluntariness of a waiver of appeal was an appropriate subject for appellate consideration. *Broadway*, *Reedy*, and *Delaney* were all habeas cases, where it was appropriate to consider the voluntariness of the waiver. *Blanco* and *Carson* were direct appeal cases, but in those cases we held that the defendant was not entitled to

---

[20] Whether a defendant can raise a challenge to an appellate waiver in a motion for new trial, if a motion for new trial has not been waived, is not before us. I express no opinion on that question.

appeal.[21] I am aware of two other cases in which we addressed, on direct appeal, the voluntariness of an appellate waiver: *Jones v. State*[22] and *Washington v. State*.[23] As in *Carson* and *Blanco*, *Jones* also held that the defendant was not entitled to appeal.[24] Importantly, *Jones* assumed that involuntariness of a waiver of appeal is something that would render a certification inaccurate under *Dears* without actually addressing whether that is so,[25] and the cases we relied on for granting relief on such a claim were habeas cases, not direct appeal cases.[26] And while *Washington* did hold that the defendant was entitled to appeal,[27] it was a short per curiam opinion that, without elaboration and without accounting for the procedural differences, uncritically relied on *Delaney* and, in a footnote, on our decision in *Dears*.[28] Although the grant of relief in *Washington* might be said to support the notion that we implicitly held that a court of appeals could consider the voluntariness of a waiver of appeal on direct appeal, that issue was not litigated by the parties and the fact of the matter is that we did not consider it at all. We should now address the issue head-on and hold that, when a

---

[21] *Blanco*, 18 S.W.3d at 219 (court of appeals dismissed appeal), 220 (affirming the court of appeals); *Carson*, 559 S.W.3d at 496 (concluding that waiver of right to appeal was valid but remanding to court of appeals to address the defendant's claim that there was an exception to the waiver rules).

[22] 488 S.W.3d 801 (Tex. Crim. App. 2016).

[23] 363 S.W.3d 589 (Tex. Crim. App. 2012).

[24] 488 S.W.3d at 808 (affirming court of appeals's dismissal of the appeal).

[25] *See id.* at 804-05.

[26] *See id.* at 805 (citing *Delaney* and *Broadway*).

[27] 363 S.W.3d at 589 (during adjudication proceedings and before sentencing, the defendant waived appeal without an agreed recommendation, and waiver was found to be invalid).

[28] *Id.* at 590 nn.2, 4 (citing *Delaney* and *Dears*).

defendant has signed a waiver of appeal, a court of appeals cannot address a claim that the waiver was involuntary by means of the appeal that was purportedly waived.

I concur in the Court's judgment.

Filed: June 10, 2020

Publish