Affirmed as Modified; Opinion Filed February 27, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00105-CR

TORRIANO WALPOOL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause No. F14-76467-J

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and O'Neill[1]
Opinion by Justice Myers

Appellant Torriano Walpool was convicted by a jury of sexual assault of a child under the age of 17 and sentenced by the trial court to thirty years in prison. In one issue, he challenges the sufficiency of the evidence to support enhanced punishment under section 12.42(d) of the Texas Penal Code. As modified, we affirm the trial court's judgment.

DISCUSSION

In his only issue, appellant contends the evidence is insufficient to support the trial court's enhancement of punishment under section 12.42(d) of the penal code. Specifically, he alleges that the evidence failed to show the second conviction occurred subsequent to the first conviction becoming final.

[1] The Hon. Michael J. O'Neill, Justice, Assigned

The record shows appellant was accused of sexually assaulting his biological daughter, a child younger than 17 years of age, by intentionally and knowingly causing the penetration of her sexual organ with his finger. *See* TEX. PENAL CODE ANN. § 22.011(a)(1). Appellant pleaded not guilty to the charged offense and the jury returned a verdict of guilty. Pursuant to appellant's pretrial election, the trial court assessed punishment. At the start of the punishment hearing, the State read from the State's "Notice of the State's Special Plea of Enhancement Paragraphs," which alleged that on January 21, 1994, in the district court of Comanche County, Oklahoma, cause number CRF–93–386, appellant was sentenced for the offense of robbery by force and fear; and that on August 26, 1998, in the district court of Comanche County, Oklahoma, cause number CRF–97–437, appellant was sentenced for the offense of unlawful possession of cocaine. Appellant pleaded not true to both enhancement allegations.

Darren Hodge, an investigator with the Dallas County District Attorney's Office, testified that he obtained fingerprints from appellant prior to the punishment hearing. The fingerprints were marked as State's exhibit 6. Hodge also identified State's exhibit 5, a penitentiary (pen) packet from the state of Oklahoma that contains two fingerprint cards. Hodge compared the fingerprint cards in the pen packet and the fingerprints he took from appellant and determined they belonged to the same person. He testified that he used the FBI standard of ten points of comparison. Exhibits 5 and 6 were admitted without objection. The State resubmitted its case-in-chief before closing.

The Oklahoma pen packet contains a certified copy of a judgment showing appellant was sentenced on February 24, 1994, for robbery by force and fear under cause number CRF–93–386. It was a split sentence in which appellant was assessed five years' confinement while the remaining five years were suspended. The Oklahoma trial court, in an order dated March 30, 1995 and filed April 17, 1995, revoked appellant's five-year suspended sentence and sentenced

him to serve an additional five years' confinement. Appellant's consolidated record card shows he was released from incarceration on July 30, 1997, although the court's order commuting the remainder of the sentence is dated July 31, 1997. The pen packet also contains a copy of a certified judgment for unlawful possession of cocaine showing appellant appeared and pleaded guilty to that offense on August 26, 1998, under cause number CRF–97–437.[2] *See Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007) (certified copy of a final judgment and sentence may be a preferred and convenient means to establish a prior final conviction). Appellant was sentenced to two years' confinement and a $1,000 fine for this offense. He completed the sentence and was released from confinement on July 2, 1999, according to a certificate of release from the Oklahoma Department of Corrections. The FBI fingerprint form pertaining to this conviction notes an offense date of "08/26/98" and an arrest date of "09/11/98." These dates are also found on appellant's consolidated record card under "Date Received."

Appellant testified at punishment. On cross-examination, the following exchange took place:

> Q. [STATE:] You admit that the prior convictions that were just presented to the Court are, in fact, prior convictions of you, right?
>
> A. [APPELLANT:] I mean, I said, yeah.
>
> THE REPORTER: I'm sorry?
>
> A. Yes. Yes.
>
> Q. [STATE:] I'm asking you now.
>
> A. Yes.
>
> Q. You were convicted of those two crimes in that penitentiary pack: robbery by fear and force, and possession of cocaine?
>
> A. Yes.

[2] The judgment is stamped received September 11, 1998.

> Q. You had some chances back then, didn't you? When you were arrested for that robbery case, they gave you kind of a split sentence: five years confinement followed by five years supervision.
>
> A. Yes. I was young and dumb. I wised up a lot since then.
>
> Q. While you were on that—you did your prison sentence and you were released on supervision. And you violated your supervision and you had to go back to prison, right?
>
> A. Yes, sir.
>
> Q. And when you finished that sentence, then you were convicted again for the possession of cocaine?
>
> A. Correct.

At the conclusion of punishment, the trial court ruled that "after having accepted the verdict of the jury and after having listened to evidence that was presented during the sentencing trial, the Court finds that both enhancement paragraphs are true." Appellant was sentenced to thirty years' confinement and ordered to register as a sex offender.

The law concerning sufficiency of the evidence to prove enhancement for habitual felony offenders is well settled. *See Ex parte Miller*, 330 S.W.3d 610, 624 (Tex. Crim. App. 2009) (op. on reh'g). Section 12.42(d) of the penal code governs punishment enhancement for habitual felony offenders, and provides in part as follows:

> [I]f it is shown on the trial of a felony offense other than a state jail felony punishable under section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years.

TEX. PENAL CODE ANN. § 12.42(d). Thus, the statute requires the State to prove the following chronological sequence of events: "'(1) the first conviction becomes final; (2) the offense leading to a later conviction is committed; (3) the later conviction becomes final; (4) the offense for which defendant presently stands accused is committed.'" *Miller*, 330 S.W.3d at 624

(quoting *Jordan v. State*, 256 S.W.3d 286, 290–91 (Tex. Crim. App. 2008)). The State carries the burden of proving beyond a reasonable doubt that a defendant's second previous felony conviction was committed after the defendant's first previous felony conviction became final. *Jordan*, 256 S.W.3d at 291. A pen packet must contain a judgment and sentence, properly certified, in order to be considered as evidence of a final conviction. *Langston v. State*, 776 S.W.2d 586, 587 (Tex. Crim. App. 1989). When an out-of-state pen packet is introduced as evidence of a prior criminal record at the punishment phase of a trial, the State, as the proponent of the evidence, must establish, either by proof or request that the court take judicial notice of, what the foreign state considers sufficient documentary proof of a final conviction. *Id*. at 587–88. In the absence of such evidence or judicial notice, appellate courts presume the foreign state law and Texas law are the same. *Id*. at 588.

Appellant argues his robbery conviction continued until July of 1997, when the remainder of his sentence was commuted, and that the State therefore failed to prove finality under section 12.42. But the Texas Court of Criminal Appeals has long held that a probated sentence is not final for enhancement purposes unless it is revoked. *See Ex parte White*, 211 S.W.3d 316, 319 (Tex. Crim. App. 2007); *Ex parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992). In other words, if a defendant is placed on probation, has his probation revoked, and then is sent to prison, the conviction is final on the date probation is revoked. *See Jordan v. State*, 36 S.W.3d 871, 875 (Tex. Crim. App. 2001). Hence, admittance of the Oklahoma trial court's March 30, 1995 revocation order was proof appellant's partially suspended sentence became final for enhancement purposes on March 30, 1995, when it was revoked and appellant was sentenced to additional jail time.

Appellant also directs our attention to what he describes as the "back of the card" of one of the two FBI fingerprint forms in the record, which shows what appears to be a different

offense date for the cocaine conviction. Appellant contends there is ambiguity as to whether the cocaine conviction has an offense date of January 22, 1996, or August 26, 1998. However, the fingerprint form to which appellant refers, shown on page 18 of volume six of the reporter's record, is not the form associated with the cocaine conviction. It appears to be the back of the fingerprint form associated with the robbery conviction. In other words, pages 15 and 16 of volume six show the front of the fingerprint forms for the cocaine conviction and the robbery conviction, respectively, while pages 17 and 18 represent the back of those forms—again, the cocaine conviction and the robbery conviction. Furthermore, appellant testified during the guilt/innocence phase that he was convicted of possession of cocaine on August 26, 1998,[3] and that he was convicted of robbery in either 1993 or 1994. Appellant also testified during the punishment phase, as quoted earlier, that he was given a split sentence of five years' confinement followed by five years' supervision for the robbery offense; that after serving the prison sentence and being released on supervision, he violated supervision and was sent back to prison; and that when he finished that sentence he was convicted for the offense of possession of cocaine.

To support appellant's sentencing as a habitual offender, the evidence had to show that he committed a felony after being finally convicted of a previous felony. *See* TEX. PENAL CODE. ANN. § 12.42(d). The State introduced evidence of a robbery conviction and a subsequent possession of cocaine conviction from the state of Oklahoma, and the evidence shows the robbery conviction was final for enhancement purposes prior to commission of the possession of cocaine offense. Accordingly, we conclude the evidence is sufficient to prove appellant was subject to punishment as a habitual offender. We overrule appellant's issue.

One additional question we must address concerns the judgment, which fails to state that

[3] Appellant initially said the date of the cocaine possession conviction was August 26, 1996, but following a request for clarification from defense counsel, appellant testified the correct year was 1998, not 1996.

the sex offender registration requirements apply to appellant. When he was sentenced, appellant was ordered to register as a sex offender. Appellant's conviction for sexual assault of a child is among those defined as a "[r]eportable conviction or adjudication" for purposes of the sex offender registration statute. *See* TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A) (conviction based on violation of section 22.011, sexual assault, is a "[r]eportable conviction or adjudication"). As a person who has reportable conviction or adjudication, appellant is subject to the registration requirements of the sex offender registration statute. *See id*. art. 62.051.

We have the authority to correct the judgment of the court below to make the record speak the truth when we have the necessary information to do so. *See* TEX. R. APP. P. 43.2(b); *see also French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). We also have authority to modify incorrect judgments sua sponte when the necessary information is available in the record. *See Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd); *see also Tyler v. State*, 137 S.W.3d 261, 267–68 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Ruiz v. State*, No. 05–12–01703–CR & 05–12–01704–CR, 2014 WL 2993820, at *12 (Tex. App.—Dallas June 30, 2014, no pet.) (not designated for publication); *Medlock v. State*, No. 05–11–00668–CR, 2012 WL 4125922, *1–2 (Tex. App.—Dallas Sept. 20, 2012, no pet.) (mem. op., not designated for publication); *Johnson v. State*, No. 05–06–00037–CR, 2007 WL 60775, at *7 (Tex. App.—Dallas Jan. 10, 2007, no pet.) (not designated for publication).

Accordingly, we modify the judgment to show that the sex offender registration requirements apply to appellant and that the age of the victim at the time of the offense was under seventeen years of age.

As modified, we affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TORRIANO WALPOOL, Appellant

No. 05-16-00105-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3, Dallas County, Texas
Trial Court Cause No. F14-76467-J.
Opinion delivered by Justice Myers. Justices Lang-Miers and O'Neill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> "Sex Offender Registration Requirements do not apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62" should be changed to "Sex Offender Registration Requirements apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62"
>
> "The age of the victim at the time of the offense was N/A" should be changed to "The age of the victim at the time of the offense was younger than 17 years of age"

As **REFORMED**, the judgment is **AFFIRMED**. We direct the trial court to prepare a new judgment that reflects these modifications.

Judgment entered this 27th day of February, 2017.