AFFIRM; and Opinion Filed June 5, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00783-CR

ARMANDO ISAI MARTINEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court No. 4
Dallas County, Texas
Trial Court Cause No. MA1733686E

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Boatright

Armando Isai Martinez was charged with driving while intoxicated, second offense, a Class A misdemeanor. The jury found Martinez guilty "as charged in the information," and the trial court rendered judgment accordingly. However, no evidence of a prior DWI conviction was admitted in the guilt-innocence phase of Martinez's trial, nor did the court's charge make any reference to a prior conviction. On this basis, Martinez asks this Court to reform the judgment to reflect that the jury found him guilty only of driving while intoxicated, a Class B misdemeanor, and he also seeks to remand the cause for a new punishment hearing. Martinez's argument is foreclosed by a Texas Court of Criminal Appeals decision issued after the submission of this appeal. We therefore affirm.

Martinez's trial occurred in June 2017. At the commencement of the trial, the court asked whether defense counsel opposed the admission of evidence, during the State's case-in-chief,

regarding Martinez's prior DWI conviction. Martinez's counsel responded that the prior conviction had no bearing on whether Martinez was driving while intoxicated at the time of the charged offense and that the unfair prejudicial effect of the prior conviction outweighed its probative value. Defense counsel acknowledged that one Texas appellate court had held a prior DWI conviction to be an element of a Section 49.09(a) violation, *Oliva v. State*, 525 S.W.3d 286, 288, 292–93 (Tex. App.—Houston [14th Dist.] 2017), *rev'd*, ___ S.W.3d ___, No. PD-0398-17, 2018 WL 2329299 (Tex. Crim. App. May 23, 2018), but argued that most state courts in the trial of such an offense have declined to admit a prior conviction until the punishment phase. The State responded that *Oliva* was the only Texas authority on point, and it represented that it was prepared to inform jurors during voir dire that they should not consider Martinez's prior conviction "as proof of conformity" with the charged offense, but instead as proof of an element of such offense. The court ruled in Martinez's favor and directed the State not to offer the prior conviction until the punishment phase.

In accordance with the court's ruling, the State presented its case-in-chief without reference to the prior DWI. The court's charge also did not mention the prior offense, and the jury found Martinez guilty "as charged in the information." Thus, the jury had no knowledge of Martinez's prior DWI when it found him guilty of the charged offense. Later, during the punishment phase, Martinez plead "true" to the prior DWI, and the court admitted into evidence a certified copy of the prior judgment of conviction. The court also admitted evidence of three other prior offenses. It sentenced Martinez to 365 days' confinement and a fine of $3,000. The court rendered judgment convicting Martinez of "DWI 2ND," a "CLASS A MISDEMEANOR," and sentenced him as set forth above. This appeal followed.

Martinez raises four issues that distill into two complaints. His first and second issues contend that this Court should reform the judgment—to delete the reference to a DWI "2nd" and

to reflect that the offense is only a Class B misdemeanor—based upon the rule that an appellate court "has the power to correct and reform the judgment of the court below to make the record speak the truth when it has the necessary data and information to do so." *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). His third and fourth issues urge that the sentence and fine imposed by the judgment are illegal because they exceed the maximum punishment allowed for a Class B misdemeanor enhanced with a prior conviction. TEX. PENAL CODE ANN. § 12.43(b) (West 2011). The State counters that Martinez invited the error, and is estopped from complaining about it on appeal, by requesting the trial court to exclude all references to the prior conviction during the State's case-in-chief.

The court of criminal appeals recently reversed the *Oliva* decision. 2018 WL 2329299, at *12. The court held that the existence of a single prior conviction for misdemeanor DWI is a punishment issue, not an element of the offense. *Id.* at *1, *12. Thus, the State in this case was not required to prove Martinez's prior DWI during the guilt-innocence phase of the trial, nor was the absence of such evidence a basis to reform the judgment. In addition, since a reformation of the judgment was unnecessary, Martinez's sentence was within the range applicable to the misdemeanor of which he was convicted. *See* TEX. PENAL CODE ANN. § 12.21 (West 2011) (prescribing punishment for Class A misdemeanor as a fine not to exceed $4,000, conferment not to exceed one year, or both). In light of *Oliva*, we need not consider the State's contention that Martinez invited the purported error in his trial. We affirm the judgment of the trial court.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

Do Not Publish
TEX. R. APP. P. 47

170783F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ARMANDO ISAI MARTINEZ, Appellant	On Appeal from the County Criminal Court No. 4, Dallas County, Texas
No. 05-17-00783-CR V.	Trial Court Cause No. MA1733686E.
	Opinion delivered by Justice Boatright.
THE STATE OF TEXAS, Appellee	Justices Bridges and Brown participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 5th day of June, 2018.