**Opinion issued July 17, 2008**

**In The**
# Court of Appeals
**For The**
# First District of Texas

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**NO. 01-06-01084-CR**
**NO. 01-06-01085-CR**

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**JOSEPH TYRONE THOMPSON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 351st District Court**
**Harris County, Texas**
**Trial Court Cause Nos. 1064699 and 1064701**

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## MEMORANDUM OPINION

In trial court cause number 1064701,[1] a jury convicted appellant, Joseph Tyrone Thompson, of retaliation,[2] and the trial court assessed his punishment at 20 years imprisonment. In trial court cause number 1064699,[3] a jury convicted appellant of state jail felony theft[4] and sentenced him to 10 years imprisonment. In one point of error, raised in both appellate cause numbers, appellant argues that the State's notice of the convictions to enhance the state jail felony of theft was untimely and therefore violated his due process rights.[5]

We modify the judgment in trial court cause number 1064699, appellate cause number 01-06-01084-CR, and affirm as modified. We affirm the judgment in trial court cause number 1064701, appellate cause number 01-06-01085-CR.

**Facts**

On April 10, 2006, appellant entered a pawn shop in southeast Houston and stole a gun. In the process of stealing the gun, he struck Charles Nieto, a pawn shop employee, in the face, causing him to bleed. As appellant fled the store, Nieto

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1 Appellate cause number 01-06-01085-CR.

2 TEX. PENAL CODE ANN. § 36.06(a)(1)(A) (Vernon Supp. 2007).

3 Appellate cause number 01-06-01084-CR.

4 TEX. PENAL CODE ANN. § 31.03(a)(b)(1), (e)(4)(c) (Vernon Supp. 2007).

5 Appellant does not directly challenge the retaliation conviction, but claims "the error in allowing the improper enhancement of the theft case tainted the trial court's consideration of punishment in the retaliation case as well, because the court heard appellant's testimony regarding both cases at once and assessed the maximum possible (enhanced) punishment in each one."

pursued him. They had an altercation, in the store's parking lot, where Nieto kicked in the window of appellant's car, causing Nieto to cut his foot and ankle. Appellant eventually fled the scene in his car, but Officer K. Hett later apprehended him. While in police custody, appellant made several threats against Officer's Hett's life.

The State indicted appellant for robbery and retaliation, and both indictments contained enhancement paragraphs alleging a past conviction for possession of a weapon by a felon. On October 24, 2006, the State filed a "Notice of Intention to Use Evidence of Prior Convictions and Extraneous Offenses" with the trial court and served appellant with a copy. The notice contained a list of appellant's prior convictions,[6] and the State informed the trial court and appellant that it "intend[ed] to offer evidence of [p]rior [c]onvictions and [e]xtraneous [o]ffenses of [the] Defendant to impeach testimony and/or enhance the range of punishment." The day before trial, appellant stipulated to the list of prior convictions contained in the notice. After a jury trial on retaliation and robbery charges, the jury found appellant guilty of retaliation and the lesser-included offense of state jail felony theft.

Because the jury convicted appellant of the lesser-included offense of state jail felony theft, instead of robbery, the enhancement paragraph in the original indictment

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[6] Among the list were convictions for evading arrest on February 20, 2002 and delivery of a controlled substance on March 26, 2003.

for robbery could not be used to enhance the offense.[7] *See* TEX. PENAL CODE ANN. § 12.42(a)(1), (2), (3) (Vernon Supp. 2007). Therefore, at the beginning of the punishment hearing, the State informed the trial court that it wished to enhance appellant's punishment as a state jail felony habitual offender. The State asserted appellant's punishment could be enhanced with two prior state convictions,[8] which were listed in the October 24 notice provided to appellant and filed with the trial court. Appellant's trial counsel acknowledged that he had received the notice, but made the following objection:

> Doebbler: I have received it. And, Judge, responding to that, this case that they produced on Mr. Brooks, it said that prior convictions used for sentencing enhancement must be pled in some form, whether the indictment or notice, but they not need be pled in the indictment, although that's the preferable way, is to plead in the indictment. They did plead in the indictment one enhancement, and that's all they pled in the indictment.
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> . . .
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> And although that notice does say for extraneous offenses, offenses and/or for enhancement purposes, I would object, number one, to it being used for enhancement purposes for an additional reason, that number one, it was not pled in

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[7] The Penal Code does not allow a state jail felony to be enhanced by a single felony. *See* TEX. PENAL CODE ANN. § 12.42(a)(2) (Vernon Supp. 2007) ("If it is shown on the trial of a state fail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of *two felonies* . . . on conviction the defendant shall be punished for a second-degree felony.").

[8] Appellant had prior convictions for evading arrest on February 2, 2002 and delivery of a controlled substance on March 26, 2003.

> the indictment. Number two, that they didn't officially plead it to me in writing, other than give me notice. And they did give me notice of that. There's no doubt about that. And I did receive that. And I would object that it was not properly plead [sic] that they would seek an enhancement on it.
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> They said enhancement or extraneous offenses, and/or. So, I would object to that being used to enhance the state jail felony from 6 months to 2 years to 2 to 10 years. With two prior state jail felonies, Your Honor, it would be on another state jail felony, it would be 2 to 20.

Court: Thank you, sir.

Doebbler: And so, I would object.

Court: Thank you, sir. The objection is overruled. The court does find true the two convictions cited by the State, one out of the 230th one out of the 248th.

After the trial court overruled his objection, appellant neither sought a continuance, nor did he claim surprise or an inability to defend against the State's ability to use the enhancement paragraphs. The trial court found the two enhancement paragraphs to be true[9] and subsequently sentenced appellant to 10 years imprisonment for the theft conviction.

The trial court also found true the punishment enhancement conviction that was alleged in the retaliation indictment and sentenced appellant to 20 years in prison to run concurrently with the theft. Appellant does not challenge the use of the

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[9] The record does not indicate that the trial court asked appellant whether he would plead true or not true to the enhancements.

enhancement in the retaliation.

**Sentence Enhancement**

A person convicted of a state jail felony faces punishment ranging from six months to two years' imprisonment in a state jail facility. *Id*. § 12.35(a) (Vernon Supp. 2007). That punishment, however, may be enhanced as a third-degree felony which increases the range of punishment to two to ten years imprisonment if the person had two final state jail felony convictions. *Id*. § 12.42(a)(1) (Vernon Supp. 2007).

A defendant is entitled to notice of the State's intention to use prior convictions for enhancement. *Brooks v. State*, 957 S.W.2d 30, 33 (Tex. Crim. App. 1997). It is well-settled law, however, that it is unnecessary to allege prior convictions for enhancement of punishment with the same particularity that is required in charging the primary offense. *See Freda v. State*, 704 S.W.2d 41, 42 (Tex. Crim. App. 1986); *Chavis v. State*, 177 S.W.3d 308, 312 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). The purpose of an enhancement allegation is to provide the accused with notice of the prior conviction upon which the State relies. *Chavis*, 177 S.W.3d at 312. The State, in alleging prior convictions for enhancement of punishment, should include in its allegations the court in which the conviction was obtained, the time of the conviction, and the nature of the offense. *Id.* Enhancement-of-punishment allegations, however, are sufficient when the prior convictions are described as

felonies, the exact nature of the offenses is given, the cause numbers of the convictions are obtained, and the dates of such convictions are set. *Id.* at 312–13.

Furthermore, it is not necessary that enhancement allegations be included in an indictment. *See Brooks*, 957 S.W.2d at 32. A defendant is entitled to notice of prior convictions to be used for enhancement, but alleging an enhancement in the indictment is not the only reasonable method of conveying such notice. *Id.* at 33. Prior convictions used as enhancements must be pleaded in some form, but they need not be pleaded in the indictment. *Id*. at 34. Simply mentioning prior offenses for no specified purpose, however, does not give the necessary notice that the convictions will be used for sentence enhancement. *Mayfield v. State*, 219 S.W.3d 538, 540 n.2 (Tex. App.—Texarkana 2007, no pet.) (citing *Fairrow v. State*, 112 S.W.3d 288, 290–92 (Tex. App.—Dallas 2003, no pet.) (finding that notice of extraneous offenses only notified defendant of State's intent to introduce prior convictions into evidence at trial and did not make any reference to sentence enhancement)). Moreover, an informal letter that is not filed with the court that gives written notice of intent to seek enhancement based on prior convictions does not constitute an acceptable form of pleading. *Throneberry v. State*, 109 S.W.3d 52, 59 (Tex. App.—Fort Worth 2003, no pet.).

In the past, Texas courts have required that the defendant receive notice of the State's intent to enhance 10 days prior to trial. *See Fairrow*, 112 S.W.3d at 295;

*Sears v. State*, 91 S.W.3d 451, 455 (Tex. App.—Beaumont 2002, no pet.). Recently, however, the Texas Court of Criminal Appeals has held that there is no specific time requirement. *Villescas v. State*, 189 S.W.3d 290, 294 (Tex. Crim. App. 2006). In *Villescas*, the Court stated that the time requirement for notice of enhancement is of constitutional origin, and therefore, the question becomes whether the notice was constitutionally adequate. *Id*. Due process does not require that the enhancement notice be given before the guilt phase begins, much less a specific number of days before trial. *Id*. (citing *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501 (1962)). Moreover, if the "defendant has no defense to the enhancement allegation and has not suggested the need for a continuance in order to prepare one, notice given at the beginning of the punishment phase satisfies the federal constitution." *Id*. (holding that appellant received "more than the notice minimally required to satisfy due process" when appellant had no defense to enhancement, stipulated to prior conviction, and did not request continuance to prepare defense).

***Notice Prior to Trial***

Appellant argues that the notice he received almost three months before trial from the State was not sufficient notice that the State planned to use prior convictions to enhance his sentence. Specifically, he asserts that the notice filed by the State was intended to notify appellant that the State knew of his prior criminal record and intended to use it for evidentiary purposes and that the passive references to

enhancement do not satisfy the requirements of a proper enhancement. Appellant relies heavily on *Throneberry*, in which the court concluded that a letter explicitly stating the defendant's prior convictions and the State's intent to use those convictions for enhancement purposes was not sufficient notice of enhancement when there were no other pleadings or motions in the record indicating the State's intent to enhance the sentence. *Throneberry*, 109 S.W.3d at 59.

In *Throneberry*, the State mailed Throneberry's counsel a letter of its intent to enhance. *Id*. at 58. The letter in *Throneberry* said, "This letter will serve as notice that the State will seek to enhance [Throneberry's] punishment under Chapter 12 of the Texas Penal Code with evidence of prior convictions. . . ." *Id*. The court of appeals concluded that the State's notice of its intent to enhance Throneberry's sentence was not proper. *Id*. at 59.

Like *Throneberry*, the notice here specifically lists the offenses, counties in which the offenses occurred, and courts and cause numbers in which the offenses were tried. Here also, like *Throneberry*, the notice referred to the use of the convictions to enhance punishment. Unlike *Throneberry*, however, here, the record contains the State's "Notice of Intention to Use Evidence of Prior Convictions and Extraneous Offenses," which explicitly states that the State "intends" to offer evidence of appellant's past convictions and extraneous offenses for impeachment purposes and/or to "enhance the range of punishment of the Defendant." Thus, the

notice does not merely refer to the use of the convictions as evidence, but rather mentions their use to "enhance the range of punishment." Furthermore, the notice here was formally filed with the trial court, as compared to the informal letter sent to Throneberry's counsel, and this is more like a formal pleading then an informal letter. Thus, the State's intention to enhance appellant's sentence was clear, pleaded properly, and filed with the court, constituting much more notice than the informal letter used in *Throneberry*. *See Brooks*, 957 S.W.2d at 34; *Chavis*, 177 S.W.3d at 312.

We therefore conclude that the State's notice of its intent to enhance appellant's sentence was sufficient notice.

***Notice at Punishment Hearing***

Appellant next argues that he first received notice of the State's intent to enhance his theft sentence at the beginning of the punishment hearing and the notice was therefore untimely.

Appellant recognizes *Villescas*, the recent Court of Criminal Appeals opinion, which states "that when a defendant has no defense to the enhancement allegation and has not suggested the need for a continuance in order to prepare one, notice given at the beginning of the punishment phase satisfies the federal constitution," and he urges this Court not to apply *Villescas* to his case. Appellant cites Justice Dauphinot's dissent in *Fugate v. State*, in which Justice Dauphinot argued that the Texas Court of

Criminal Appeals made a mistake in adopting the reasoning of *Oyler v. Boyles*, 368 U.S. 448, 82 S. Ct. 501 (1962), a United States Supreme Court case arising out of Virginia, and applying it to Texas due process. *Fugate v. State*, 200 S.W.3d 781, 784 (Tex. App.—Fort Worth 2006, no pet.) (Dauphinot, J., dissenting). Even if we agreed with appellant's argument, "as an intermediate appellate court, we must follow the binding precedent of the Court of Criminal Appeals." *Gonzales v. State*, 190 S.W.3d 125, 130 n.1 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). Thus, we must apply *Villescas* in this case.

Upon receiving notice at the beginning of the punishment hearing, appellant objected only to the timeliness of the notice. He neither offered a defense to the enhancements nor requested a continuance in order to prepare a defense.[10] Furthermore, not only did appellant not offer a defense to the prior convictions, he stipulated to them the day before the trial. Thus, under these circumstances, appellant had "more than the notice minimally required to satisfy due process." *Villescas*, 189 S.W.3d at 295. Accordingly, we conclude that the State's notice to enhance appellant's sentence with his prior convictions at the beginning of the punishment hearing satisfied constitutional due process requirements and was therefore timely.

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[10] Appellant argues that the allegedly insufficient notice negatively impacted the decisions he made prior to trial and, had he known of the State's intent to enhance, he would have attempted a plea bargain with the State. Appellant's objection, made for the first time on appeal, however, was never made in the trial court, and appellant therefore has waived his right to appeal on those grounds. *See* TEX. R. APP. P. 33.1.

*Id*.

Finally, because we have found no error, we need not address whether appellant suffered harm pursuant to Rule 44.2(a). *See* TEX. R. APP. P. 44.2(a); *Villescas*, 189 S.W.3d at 294.

We overrule appellant's sole point of error.

**Modification of Judgment**

In a sub-issue, appellant requests that this Court modify the trial court's judgment to accurately reflect the record. Appellant argues that the theft judgment reflects that he pleaded true to both enhancement paragraphs, when in fact he did not plead anything to the enhancement paragraphs.

In our review of the record, we have determined that the oral pronouncements in open court conflict with the written judgment. The record reflects that the trial court did not ask appellant whether he would plead true or not true to the enhancement paragraphs, but that the trial court found the enhancement paragraphs to be true. The judgment, however, indicates that the appellant pleaded true to both enhancement paragraphs.

When the oral pronouncement of the sentence in open court conflicts with the written judgment, the oral pronouncement controls. *Donovan v. State*, 232 S.W.3d 192, 197 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The solution in such a case is to modify the written judgment to conform to the sentence that was orally

pronounced in open court. *See id.*; *see also Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003); *Ex parte Madding*, 70 S.W.3d 131, 137 (Tex. Crim. App. 2002)). An appellate court has the power to correct a trial court's written judgment if the appellate court has the information necessary to do so. *Cobb v. State*, 95 S.W.3d 664, 668 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

The written judgment is incorrect because it does not reflect appellant's plea on the enhancement paragraphs. Because the oral pronouncements control over the written judgments, and we have the information necessary to correct the written judgments of the trial court, we accordingly modify the judgment in the trial court cause number 1064699 to conform with the record showing that appellant did not plead true to the enhancement paragraphs but that they were found true by the trial court. *Id*.

## Conclusion

We modify the judgment in trial court cause number 1064699, appellate cause number 01-06-01084-CR, and affirm as modified. We affirm the judgment in trial court cause number 1064701, appellate cause number 01-06-01085-CR.

Evelyn V. Keyes
Justice

Panel consists of Justices Taft, Keyes, and Alcala.

Do not publish. TEX. R. APP. P. 47.2(b).