Opinion issued March 17, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00669-CR

LANCE ALLEN HOUSTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 05CR0888

MEMORANDUM OPINION

The trial court convicted Lance Allen Houston of the felony offense of stalking and assessed seven years' confinement as punishment. *See* TEX. PENAL CODE ANN. §42.072 (West 2003). The court suspended his sentence and placed

him on seven years' community supervision. The trial court later revoked Houston's community supervision and sentenced him to five years' confinement. Houston appeals the judgment revoking his community supervision and argues the trial court erred by not holding a separate punishment hearing at his revocation hearing and that his counsel was ineffective for not raising a due diligence defense. He also asks that the judgment be reformed to reflect his time-served credit and the trial court's modification of his original sentence.

We affirm as modified.

Background

In its motion to revoke Houston's community supervision, the State alleged that he failed to pay his supervision fee and court costs, failed to take a drug test, and failed to perform his monthly requirement of community service. In two amended motions to revoke Houston's community supervision, the State further alleged that Houston had failed to report to his probation officer for seven months in 2008. The trial court conducted a hearing on the State's motion, found all of the allegations true, and rendered judgment revoking Houston's community supervision. Before the trial court imposed sentence, Houston made an oral motion for rehearing asserting that the State had not served him with its second amended motion to revoke. The trial court granted the rehearing.

The trial court conducted a second hearing on the State's second amended motion to revoke. Houston pleaded true to all of the State's allegations of his violations of the terms of his community supervision. The trial court stated, "Okay. I have your—the entry of true on these alleged violations. Would the State like to proceed?" The complainant then testified to the lasting effects of Houston's stalking on her life and that she had no contact with Houston since November 2008. Houston testified that he did not have the money at the time his fees were due, but that, as of the hearing date, he could pay what he owed. He stated that he had missed one reporting appointment with his probation officer and was thus afraid to return to him. He also stated that he did not like performing the community service he was assigned. Houston's mother testified that she would help her son comply with the court's orders in the future.

The trial court revoked Houston's community supervision and sentenced him to five years' confinement. Houston filed a motion for new trial alleging that the punishment assessed was disproportionate to the crime. The trial court denied the motion and Houston appealed.

Separate Punishment Hearing

Houston argues that the trial court erred by failing to hold a separate punishment hearing after finding true the allegations in the State's motion to revoke. As a general rule, a criminal defendant must make a timely objection to

preserve a complaint for appellate review. *See* TEX. R. APP. P. 33.1(a); *Pearson v. State*, 994 S.W.2d 176, 179 (Tex. Crim. App. 1999). The Court of Criminal Appeals has noted a narrow exception to this general rule in *Issa v. State*, 826 S.W.2d 159, 161 (Tex. Crim. App. 1992), allowing a defendant to object in a motion for new trial to the lack of opportunity to present punishment evidence.[1] *Issa*, 826 S.W.2d at 160–61. *Issa*, however, does not stand, "for a general right to a separate punishment hearing, much less one on a different day." *Euler v. State*, 218 S.W.3d 88, 92 (Tex. Crim. App. 2007).

Houston did not request the trial court conduct a separate hearing on his punishment. He instead contends that he preserved error under *Issa* through his motion for new trial. In his motion for new trial, however, Houston only asserted that the trial court should have extended his community supervision after revocation and the reduced sentence of five years' confinement is disproportionate to his crime. He did not raise any of the punishment issues that he alludes to in his brief with the exception of his argument that stalking was a misdemeanor under a former iteration of the statute. Whether stalking was a misdemeanor in 2001 does not make the trial court's punishment under the current statute invalid. The

[1] *Issa* was a deferred adjudication case and in this case Houston was convicted and sentenced before being placed on community supervision. The Court of Criminal Appeals, however, cites *Issa* in *Euler v. State*, 218 S.W.3d 88, 92–93 (Tex. Crim. App. 2007), which is another case involving revocation of community supervision without deferred adjudication.

defendant in *Foster v. State*, 80 S.W.3d 639, 641 (Tex. App.—Houston [1st Dist.] 2002, no pet), similarly argued that the trial court erred in not allowing mitigating punishment evidence before sentencing him at the hearing adjudicating his guilt. This court held that the defendant failed to object or raise the issue of mitigating evidence or a separate punishment hearing in his motion for new trial and, therefore, failed to preserve error for review. *Id.* Houston likewise has failed to preserve error as to his separate punishment hearing complaint.

Additionally, a defendant who has already been convicted does not have a due process right to a *separate* punishment hearing in conjunction with the hearing revoking his community supervision. *Euler*, 218 S.W.3d at 91–92 (holding defendant who was convicted and placed on community supervision had opportunity to present punishment evidence at hearing to revoke supervision and was not entitled to separate punishment hearing). "Part of being prepared for a revocation hearing is being prepared to present evidence and argument on the question of the proper disposition in the event that the trial court finds that the conditions of probation have been violated." *Id.* at 91. In *Euler*, the Court of Criminal Appeals rejected the defendant's argument that he was entitled to a separate punishment hearing and noted that the defendant had the opportunity to, and did, present mitigating evidence. *Id.* at 91–92.

Houston had a similar opportunity to, and did, present punishment evidence. Houston pleaded true to all of the State's allegations. The trial court stated, "Okay. I have your—the entry of true on these alleged violations." The State then called the complainant to testify as to the continued effect that Houston's stalking had on her life. Houston himself testified as did his mother regarding his desire to remain on community supervision. With his pleas of true, the only contested issue before the court was punishment and both parties had the opportunity during the proceedings to present punishment evidence. *Pearson*, 994 S.W.2d at 179. The complainant's testimony of the continued effect on her and the promises of future compliance were relevant to punishment and not the truth of the State's allegations. Houston was not entitled to a separate hearing on punishment. *See Euler*, 218 S.W.3d at 92.

We overrule Houston's first issue.

Ineffective Assistance of Counsel

In his second issue, Houston argues he received ineffective assistance of counsel because his attorney failed to raise a due diligence defense with regard to the State's execution of the *capias*. To show ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2064, 2068 (1984); *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005). A defendant has the burden to establish both of these prongs by a preponderance of the evidence, and a failure to make either showing defeats the ineffectiveness claim. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). If a defendant's claim for ineffective representation rests on counsel's failure to object or raise a motion, then the defendant must show that the motion or objection would have been granted. *See Lesso v. State*, 295 S.W.3d 16, 21 (Tex. App.—Houston [1st Dist.] 2009, pet. striken).

To revoke a defendant's community supervision, a motion to revoke must be filed and a *capias* ordering the defendant's arrest issued before the supervision expires. *See Peacock v. State*, 77 S.W.3d 285, 287 (Tex. Crim. App. 2002). Additionally, the State must exercise due diligence to apprehend the defendant and "hear and determine the allegations in the motion." *Id.* The due diligence requirement, however, "does not apply if the defendant is arrested within the community supervision period." *Ballard v. State*, 126 S.W.3d 919, 921 (Tex. Crim. App. 2004) (holding trial court correctly denied motion to dismiss

revocation proceedings challenging due diligence because defendant arrested before probation period expired). Here, Houston was arrested approximately seven months after the *capias* issued, but within the first three years of his seven years of community supervision. Therefore, the due diligence defense does not apply. *See id.* The record is silent as to counsel's strategy in not making a motion to dismiss asserting due diligence, but such a motion would have been futile. We cannot say either that his failure to raise due diligence fell below professional norms or that the result of the proceeding would have been different.

We overrule Houston's second issue.

Reformation of Judgment

Houston asserts that the judgment does not accurately reflect the record and asks that the judgment be reformed. "An appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source." *See* TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *accord Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("An appellate court has the power to correct and reform a trial judgment to make the record speak the truth when it has the necessary data and information to do so.").

Houston asserts that a box checked on the third page of the judgment

incorrectly indicates, "The Court **ORDERS** Defendant punished in accordance with the judgment and sentence originally entered in this cause." The record supports modification because the trial court modified the original sentence of seven years' confinement to five years' confinement. We modify the judgment to check the next box, which indicates, "Finding it to be in the interest of justice, the Court **ORDERS** Defendant punished in accordance with the reformed judgment and sentence indicated above."

Houston also asserts that the judgment should be modified to reflect two extra days of credit for time served. The State argues that Houston should have raised this issue to the trial court by requesting a judgment nunc pro tunc. "Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the judgment appears in the record." *Broussard v. State*, 226 S.W.3d 619, 621 (Tex. App.—Houston [1st Dist.] 2007, no pet) (quoting *McGregor v. State*, 145 S.W.3d 820, 822 n.1 (Tex. App.—Dallas 2004, no pet.)). When the record is clear, appellate courts modify the judgment to correct the credit for time served. *See Jones v. State*, No. 04-04-00526-CR, 2005 WL 2860016, at *1 (Tex. App.—San Antonio Nov. 2, 2005, no pet.); *see also Lawson v. State*, No. 05-99-00624-CR, 2003 WL 21659813, at *1 (Tex. App.—Dallas July 16, 2003, no pet.). The record here supports modification of the judgment. The officer's return on the *capias*

indicates he was arrested and put in Galveston County jail on November 21, 2008. The judgment on the second page under the heading "If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order" indicates Houston began his confinement on November 23, 2008. Accordingly, we modify the trial court's judgment under the heading to give Houston credit for two additional days of confinement after his arrest. The period labeled "From 11/23/08 to 06/18/09" should instead read "From 11/21/08 to 6/18/09."

Conclusion

As modified, we affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justice Jennings, Justice Higley, and Justice Brown.

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