Opinion issued December 23, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00902-CR

MICHAEL GENE WALKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Case No. 1165264

MEMORANDUM OPINION

Appellant, Michael Gene Walker, challenges the trial court's judgment adjudicating him guilty of the offense of possession of child pornography and sentencing him to 10 years in prison. Tex. PENAL CODE ANN. § 43.26(a) (Vernon

2003). In two issues, appellant contends that the trial court erred in revoking his deferred adjudication community supervision and in denying his motion for shock probation.

We affirm the trial court's judgment as modified.

Background

Appellant pleaded guilty to the charged offense of child pornography. Pursuant to the plea agreement, the trial court deferred adjudication of appellant's guilt and placed him on community supervision for six years. The State later filed a motion to adjudicate appellant's guilt. The State alleged that appellant had violated the terms and conditions of his community supervision by "[c]ommitting an offense against the State of Texas, to-wit: on or about September 11, 2009, in Harris County, Texas, the Defendant did then and there unlawfully operate[] a motor vehicle in a public place while intoxicated." The State also alleged that appellant had violated a condition of community supervision "by failing to avoid persons or places of disreputable or harmful character."

The State presented a number of witnesses at the adjudication hearing to support the State's DWI allegation. Lisa Maldinado testified that on September 11, 2009, she was sitting at a stop light in her truck when she was struck from behind by a car driven by appellant. It was around 8:00 p.m. Maldinado testified that when he got out of his car, appellant could not walk and was stumbling.

Appellant told Maldinado that his foot had slipped off of the brake pedal. Although the damage to her vehicle was minor, Maldinado testified that she called the police because she thought appellant was drunk; she was concerned that he would hurt someone else if he continued to drive.

Appellant got in his car and told Maldinado that he wanted to move it to a safer place, specifically a nearby fast-food parking lot. To prevent him from moving his vehicle, Maldinado stood in front of appellant's car. In spite of Maldinado's actions, appellant moved his car. According to Maldinado, appellant "was steadily coming right at me and trying to run me over with his vehicle." Maldinado got out of the way, and appellant drove his car to the parking lot.

Officer L.R. Menendez-Sierra with the Houston Police Department was dispatched to the scene. Officer Menendez-Sierra located appellant standing next to his car in the restaurant parking lot. As appellant walked toward him, Officer Menendez-Sierra observed appellant swaying and staggering. Appellant told the officer, "I'm sorry. I dropped something on the floorboard and I took my foot off the pedal and I hit them just a little bit."

Upon questioning, appellant told the officer that he had not been drinking. Officer Menendez-Sierra testified that he did not smell any alcohol on appellant's breath. Appellant mentioned to Officer Menendez-Sierra that he had taken

medication. Appellant told Officer Menendez-Sierra, "I might have taken too much medication because I just got a new prescription."

Officer Menendez-Sierra administered the Horizontal Gaze Nystagmus (HGN) test to appellant. Officer Menendez-Sierra observed that appellant exhibited six out of six possible clues on the test. Officer Menendez-Sierra testified that he believed appellant was intoxicated. Because it did not appear that appellant had been drinking alcohol, Officer Menendez-Sierra contacted dispatch to send a drug recognition expert to the scene.

In response to Officer Menendez-Sierra's call for assistance, Officer R. Farias was dispatched to the scene around 10:00 p.m. Officer Farias testified that he is a member of the DWI Task Force.

At the scene, appellant told Officer Farias that he had not been drinking, but stated that he had taken three medications that day: Klonopin, Depakote, and Zoloft. Appellant told Officer Farias that he might have over-medicated himself.

Officer Farias, who is NHTSA certified to conduct field sobriety tests, administered field sobriety tests to appellant, including the HGN, the walk-and-turn, and one-leg stand tests. Appellant exhibited six out of six clues on the HGN, six out of eight clues on the walk-and-turn, and three out of four clues on the one-leg stand. Officer Farias testified that the results of the tests indicated to him that appellant was impaired.

Officer Farias also had appellant recite the alphabet from D to X to determine whether his mental faculties were impaired. Officer Farias testified that appellant was unable to accurately recite the alphabet in the manner the officer had instructed. This indicated to Officer Farias that appellant "had lost some of his mental faculties."

Officer Farias also observed appellant staggering and stumbling at the scene. He testified that appellant was "unsteady at best." Based on his training and experience, Officer Farias formed the opinion that appellant was intoxicated. Officer Farias transported appellant to the police station.

Officer R. Montelongo, Jr. was working at the police station that night. Officer Montelongo is also assigned to the DWI Task Force. With regard to his training, Officer Montelongo testified that he had attended "DWI school," "intoxilyzer school," and "drug recognition expert school." According to Officer Montelongo, appellant was offered the opportunity to take a breath or blood test to determine his impairment level but refused. Appellant told Officer Montelongo that he had taken Klonopin, Depakote, and Zoloft. Officer Montelongo testified that he saw appellant's written prescriptions for these medications. Appellant told the officer that he had over-medicated. A video was also made of appellant at the station, which was shown at the adjudication hearing.

At around midnight, Officer Montelongo administered the HGN test to appellant. He testified that appellant exhibited all six clues. Officer Montelongo also noted that, upon testing, appellant's eyes were not able to "converge" as they should. Officer Montelongo testified that he was not able to conduct a drug recognition evaluation on appellant without first determining that alcohol was not in appellant's system. Alcohol could not be eliminated because appellant had refused the breath and blood testing.

Officer Montelongo testified that appellant did not have the normal use of his mental or physical faculties. Based on his observations, Officer Montelongo formed the opinion that appellant was impaired and intoxicated on drugs.

In support of his defense, appellant offered the testimony of his psychiatrist, Dr. Frank Chen. The doctor testified that appellant had been diagnosed with major depressive disorder, generalized anxiety disorder, and obsessive compulsive personality disorder traits. To treat these issues, Dr. Chen had prescribed Klonopin, Depakote, and Zoloft.

The doctor testified that he had given appellant a free sample of Depakote two days before the accident. He confirmed that the samples he gave his patients had written warnings included in the packaging. Dr. Chen stated that appellant took Depakote for impulse control. The doctor stated that appellant was very concerned about losing control of his emotions. Dr. Chen testified that

Depakote can have cognitive side effects such as disorientation, confusion and dizziness. Klonopin also has cognitive side effects.

Dr. Chen explained that he had increased appellant's dosage of Zoloft two days before the accident. Dr. Chen did not increase the dosage of appellant's other two medications. The doctor confirmed that it is possible to experience side effects from the medication when the dosage is increased even though the person had not previously experienced side effects.

Dr. Chen testified that he warns his patients of the side effects of the medication he prescribes. With regard to Zoloft, he warns his patients that the side effects can be nausea, vomiting, headache, diarrhea, and worsening of anxiety. Dr. Chen testified that a less common side effect of Zoloft is drowsiness, which occurs in approximately 10 percent of persons taking it.

When asked on cross-examination what he thought someone would mean if they said that they had "overmedicated," Dr. Chen stated that to him it meant that the person had taken more medication than prescribed.

Appellant also testified at the adjudication hearing. He confirmed that his car had hit the back of Maldonado's car while stopped at a red light. Appellant claimed that his foot had slipped off the brake while he was trying to pick up some papers from the floorboard.

Appellant stated that he had taken Zoloft in the morning, Klonopin midday,

and then had taken another Kloponin and Depakote in the afternoon. Appellant agreed that the video of him at the police station showed that he was not physically in a condition that a person should be to drive a car. Appellant admitted that he felt the same side effects at the time of the accident as he observed in the video.

Appellant's testimony indicated that he believed that he was impaired that night because of the increased dosage in medicine. He had never become impaired before his dosage of Zoloft was increased. Appellant claimed that he would not have gotten in his car to drive that night if he had realized that he was impaired.

On cross-examination, appellant stated that he believed that he was more impaired at the time the video was taken—four hours after the accident—because there would have been "additional effects of the drugs" that he had taken later in the day. Appellant also agreed that the term overmedicate indicates that he had taken more medicine than the doctor had prescribed.

On re-direct, appellant denied taking his medicine in a manner that deviated from that prescribed by Dr. Chen. He testified that he believed that taking the Kloponin and Depakote in the afternoon together could have impaired him. Appellant testified that he normally took the medications separately. Appellant reiterated that he did not realize that he was impaired while he was driving on the night of the accident.

Aside from the testimony regarding the DWI charge, evidence was also

presented to support the State's allegation that appellant had failed to avoid persons or places of disreputable or harmful character. Appellant's probation officer testified that a member of a therapy group appellant had attended contacted her to report that appellant had spoken to him outside of the group setting. Appellant did not deny that he had done this, but testified that it was not clear to him that he could not have such contact. Appellant claimed that, at the time he had made the contact, he was not aware that it was not appropriate. He stated that other group members had communicated outside of the group setting. Appellant testified that, at the time of the hearing, he realized that it is forbidden for therapy participants to have contact with one another outside of group therapy.

At the end of the adjudication hearing, the trial court stated,

> [F]or the record, I find [appellant's] Mr. Walker's testimony regarding the DWI allegation not to be credible. Upon that, I'm going to find the first allegation of the DWI law violation to be true. I'm going to find the second violation regarding associating with a disreputable, harmful person or person of that character, I'm going to find that to be true. . . .
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> Upon that, I'm going to find you guilty of possession of child pornography and revoke your probation.

The trial court then conducted the punishment phase. The trial court sentenced appellant to 10 years in prison.

Nearly six months after the trial court signed its judgment adjudicating his guilt, appellant filed a motion for shock probation. The trial court denied the

motion the same day that it was filed.

Appellant appeals the trial court's judgment raising two issues.

Adjudication of Guilt

In his first issue, appellant contends that the trial court abused its discretion in adjudicating him guilty because the evidence was insufficient to show that he violated the terms and conditions of his community supervision**.**

A. Standard of Review

A trial court's determination on a motion to adjudicate is reviewable in the same manner as a determination of a motion to revoke community supervision. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 2010). A revocation proceeding is neither criminal nor civil in nature; rather, it is an administrative proceeding. *Canseco v. State*, 199 S.W.3d 437, 438 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). At a revocation hearing, the State must prove by a preponderance of the evidence that the defendant has violated a condition of his community supervision. *Id*. at 438–39. Proof of a single violation is sufficient to support a revocation. *Id*. at 439.

Appellate review of an order revoking community supervision is limited to abuse of the trial court's discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006. We view the evidence in the light most favorable to the trial court's judgment. *Canseco*, 199 S.W.3d at 439. The trial court is the exclusive

judge of the credibility of the witnesses and must determine whether the allegations in the motion to revoke are sufficiently demonstrated. *Id*.

B. Analysis

Appellant contends that the trial court abused its discretion when it found that he violated the terms of his community supervision by committing the offense of driving while intoxicated. We disagree.

To establish the offense of driving while intoxicated, the State must prove the defendant was intoxicated while operating a motor vehicle in a public place. TEX. PENAL CODE ANN. § 49.04(a) (Vernon 2003); *Stoutner v. State*, 36 S.W.3d 716, 721 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). The Penal Code defines "intoxicated" as (1) "not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body," or (2) "having an alcohol concentration of 0.08 or more." TEX. PENAL CODE ANN. § 49.01(2) (Vernon 2003).

Appellant offers two arguments to show that the trial court abused its discretion when it found, by a preponderance of the evidence, that appellant had committed the offense of driving while intoxicated. Appellant does not argue that the evidence failed to show he was intoxicated. Indeed, as discussed above, there is ample evidence in the record showing that appellant's physical and mental

faculties were impaired that night. Instead, appellant first argues that the State failed to establish the offense because the evidence does not show "the manner and means" by which appellant became intoxicated.

Significantly, the substance that causes intoxication is not an element of driving while intoxicated, *see* TEX. PENAL CODE ANN. § 49.04(a), and thus, the State can prove intoxication without proof of the type of intoxicant, *see Gray v. State*, 152 S.W.3d 125, 132 (Tex. Crim. App. 2004). Here, the evidence showed that appellant had taken Klonopin, Depakote, and Zoloft on the day of accident. Appellant testified that, late in the afternoon, he had taken Klonopin and Depakote at the same time. He testified that he normally did not take the two drugs together.

The State presented testimony that appellant admitted to the police officers that he had overmedicated himself. The witnesses, including appellant and his psychiatrist, agreed that the term "overmedicated" indicates that more medication was taken than had been prescribed. Even though appellant testified that he had taken the medication as prescribed, the trial court was free to disbelieve appellant's testimony in this regard. *See Casey v. State*, 519 S.W.2d 859, 861 (Tex. Crim. App. 1975) (explaining that as the trier of fact in a revocation hearing, trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony; trial court may accept or reject all or any part of witnesses' testimony).

Moreover, the evidence showing that appellant was unsteady on his feet and performed poorly on the sobriety tests is circumstantial evidence indicating that appellant's intoxication resulted from his ingestion of medication, which he admitted to have taken several times that day, including late in the afternoon. In short, the record contains ample evidence from which the trial court could have inferred that appellant's intoxication resulted from his ingestion of the prescription medication.

Appellant also contends that he "proved that he was involuntarily intoxicated due to prescription drugs." Appellant argues that his intoxication resulted from Dr. Chen's increasing of the dosage of his Zoloft two days earlier. Appellant contends that he took the increased dosage as prescribed without knowledge that it would cause him to lose control of his physical and mental faculties.

Texas courts have held that involuntary intoxication is not a defense to DWI because the offense of DWI does not require a culpable mental state. *See, e.g.*, *Brown v. State*, 290 S.W.3d 247, 250 (Tex. App.—Fort Worth 2009, pet. ref'd); *Stamper v. State*, No. 05-02-01730-CR, 2003 WL 21540414, at *1 (Tex. App.—Dallas July 9, 2003, no. pet.) (mem. op., not designated for publication) (emphasizing that involuntary intoxication is not defense to DWI and that correct defense is involuntary act); *Bearden v. State*, No. 01-97-00900-CR, 2000 WL

19638, at *4 (Tex. App.—Houston [1st Dist.] Jan. 13, 2000, pet. ref'd) (not designated for publication) (declining to extend involuntary intoxication defense to offense of driving while intoxicated); *Aliff v. State*, 955 S.W.2d 891, 893 (Tex. App.—El Paso 1997, no pet.) (holding that proof of culpable mental state is not required for DWI conviction, thus, involuntary intoxication cannot be defense to such charge). Moreover, the voluntary taking of prescription drugs, which impair mental or physical faculties, is not a defense to DWI.[1] TEX. PENAL CODE ANN. § 49.10 (Vernon Supp. 2010).

In any event, the evidence in this case supports a finding by the trial court that appellant voluntarily took an intoxicant for which he was aware of the side effects or which he did not take as prescribed. The evidence showed that appellant admitted to the police officers that he had overmedicated himself that day. Dr. Chen testified that he warns his patients of the side effects of the medication.

As he points out, appellant testified that he took the medication as prescribed and that he was not aware of his impairment when he got in his car. Nonetheless,

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[1] Several courts of appeals have, however, considered an involuntary act, i.e., automatism, as a defense to DWI. *See, e.g., Peavey v. State*, 248 S.W.3d 455, 465 (Tex. App.—Austin 2008, pet. ref'd) (discussing automatism as a defense to DWI); *see also Stamper v. State*, No. 05-02-01730-CR, 2003 WL 21540414, at *1 (Tex. App.—Dallas July 9, 2003, no. pet.) (mem. op., not designated for publication) (recognizing that appellant incorrectly argued involuntary intoxication when she should have argued involuntary act); *Waters v. State*, No. 01-96-00631-CR, 2001 WL 754759, at *3 (Tex. App.—Houston [1st Dist.] June 29, 2001, no pet.) (not designated for publication) (analyzing whether appellant voluntarily became intoxicated).

the trial court was free to disbelieve appellant's testimony in these respects. *Casey*, 519 S.W.2d at 861.

We conclude that the record supports the trial court's finding that appellant had violated the terms and conditions of his community supervision by committing the offense of driving while intoxicated.[2] We hold that the trial court did not abuse its discretion in revoking appellant's community supervision and adjudicating his guilt. *See Rickels*, 202 S.W.3d at 763–64.

We overrule appellant's first issue.

Modification of Judgment

As mentioned, the trial court stated on the record that it found to be true the State's allegations that appellant violated the terms and conditions of his community supervision by committing the DWI offense and by failing to avoid persons of disreputable character. The trial court's judgment recites that the court found that appellant violated his community supervision by committing an offense against the laws of the State of Texas. The judgment did not recite that the trial court found that appellant had violated his community supervision terms by failing

[2] Because this ground supports the trial court's judgment, we do not reach appellant's other challenge in which he argues that the trial court's finding that he violated the terms of his community supervision by failing to avoid persons or places of disreputable or harmful character. *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980) (explaining that single ground supporting trial court's action ends inquiry into appellant's challenge); *Canseco v. State*, 199 S.W.3d 437, 439 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

to avoid persons of disreputable character. The State requests that we modify the judgment to reflect that the trial court's finding regarding appellant's association with person of disreputable character

When there is a conflict between the trial court's oral pronouncement of the findings supporting revocation and the written judgment, the oral pronouncement controls. *See Smith v. State*, 290 S.W.3d 368, 377 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003)). We may modify the trial court's written judgment to correct such a clerical error when we have the necessary information before us to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). Accordingly, we modify the judgment to show that appellant also violated the terms and conditions of his community supervision by failing to avoid persons or places of disreputable or harmful character. *See* TEX. R. APP. P. 43.2(b); s*ee also Smith*, 290 S.W.3d at 377 (modifying order of adjudication to include trial court's oral pronouncement that defendant violated six conditions of his deferred adjudication); *Smith v. State*, 790 S.W.2d 366, 368 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (modifying order revoking probation to include trial court's oral pronouncement that defendant failed to maintain employment).

Shock Probation

In his second issue, appellant contends that the trial court erred in denying his motion for shock probation.

Section 6(a) of article 42.12 of the Code of Criminal Procedure governs shock probation. That section provides:

> For the purposes of this section, the jurisdiction of a court in which a sentence requiring imprisonment in the institutional division of the Texas Department of Criminal Justice is imposed by the judge of the court shall continue for 180 days from the date the execution of the sentence actually begins. Before the expiration of 180 days from the date the execution of the sentence actually begins, the judge of the court that imposed such sentence may on his own motion, on the motion of the attorney representing the state, or on the written motion of the defendant, suspend further execution of the sentence and place the defendant on community supervision under the terms and conditions of this article, if in the opinion of the judge the defendant would not benefit from further imprisonment and:
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> (1) the defendant is otherwise eligible for community supervision under this article; and
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> (2) the defendant had never before been incarcerated in a penitentiary serving a sentence for a felony.

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6 (Vernon Supp. 2010).

Here, appellant filed a motion for shock probation less than 180 days after the trial court signed the judgment adjudicating guilt. In the motion, appellant asserted that he was no longer a danger to society and that he had been truthful when he testified that he had not intentionally or knowingly overmedicated

himself. In support of his claim of truthfulness, appellant attached a report from a polygraph examiner reporting the results of a polygraph test appellant had taken.

Appellant asserts that the trial court abused its discretion in denying his motion for shock probation because the motion addressed the trial court's concerns expressed at the adjudication hearing and because the polygraph examiner found him to be truthful.

The language of article 42.12, section 6 makes clear that the decision whether to grant shock probation is committed to the discretion of the trial court. *See id.* It is not mandatory. Moreover, as the trier of fact in a revocation hearing, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Casey*, 519 S.W.2d at 861. The trial court may accept or reject all or any part of a witness's testimony. *Id.* It was the trial court's prerogative to disbelieve appellant, in spite of the polygraph examination. *See id.*; *see also Nesbit v. State*, 227 S.W.3d 64, 66 n.4 (Tex. Crim. App. 2007) (recognizing general rule that results of polygraph test are not admissible in a Texas criminal proceeding).

Appellant has not shown that the trial court abused its discretion in denying his motion for shock probation.

We overrule appellant's second issue.

Conclusion

The judgment of the trial court is affirmed as modified.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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