Opinion issued December 29, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00796-CR

IN RE FRANK GARCIA, JR., Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

By petition for writ of mandamus, relator, Frank Garcia, Jr., seeks mandamus relief compelling the trial court to vacate its judgment nunc pro tunc or, in the alternative, compelling the trial court to rule on his "Application Requesting Judicial Notice to Vacate Judgment and Order of Commitment Nunc Pro Tunc."

Background

On April 16, 1998, a jury found relator guilty of aggravated assault and assessed his punishment at confinement for 32 years. Four years later, on September 16, 2002, the trial court entered a judgment nunc pro tunc, stating that the original judgment erroneously reflected, "No" for the jury's finding on whether relator had used a deadly weapon in the commission of the offense, and the trial court changed the judgment to reflect an "Affirmative" finding. The trial court also issued an order of commitment nunc pro tunc, reflecting the same change in the original order of commitment.

On May 19, 2011, relator filed in the trial court an application requesting that it vacate the judgment nunc pro tunc and reinstate the original judgment.[1]

Analysis

Relator argues that the trial court erred in entering its judgment nunc pro tunc because it corrected a judicial error which was beyond the jurisdiction of the trial court.

A trial court has plenary power for 30 days after a judgment is signed to grant a new trial or to vacate, modify, correct, or reform its judgment. TEX. R. CIV. P. 329b(d). Once a trial court's plenary power expires, it cannot set its judgment aside except by a bill of review for sufficient cause. TEX. R. CIV. P. 329b(f).

[1] Although relator asserts that he filed the application on April 23, 2011, court records indicate that the application was filed on May 19, 2011.

However, a trial court may at any time correct a clerical error in the judgment by entering a judgment nunc pro tunc. TEX. R. CIV. P. 316; 329b(f); *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986); *Barton v. Gillespie*, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered. *Barton*, 178 S.W.3d at 126 (citing *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986)); *Butler v. Cont'l Airlines, Inc.*, 31 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). A clerical error does not result from judicial reasoning, evidence, or determination. *Barton*, 178 S.W.3d at 126. In contrast, a judicial error arises from a mistake of law or fact that requires judicial reasoning to correct. *Id.* "A judicial error occurs in the rendering, rather than the entering of the judgment." *Id.* (citing *Escobar*, 711 S.W.2d at 231).

A trial court can only correct the entry of a final written judgment by a judgment nunc pro tunc if the final written judgment incorrectly states the judgment actually rendered. *Id.* Even if a trial court incorrectly renders judgment, it "cannot alter a written judgment that precisely reflects the incorrect rendition." *Id.* If a trial court corrects a judicial error after its plenary power has expired, its judgment is void. *Id.* (citing *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973)).

Here, the record shows that the judgment rendered at trial included an affirmative finding on the use of a deadly weapon during the commission of the offense, but the written judgment, under "Findings on the Use of a Deadly Weapon," stated, "No." The jury found relator guilty of aggravated assault "as charged in the indictment," in which it was alleged that relator "did then and there use and exhibit a deadly weapon, to-wit: AN UNKNOWN OBJECT during the commission of [the] assault." On direct appeal to this Court, relator argued that the evidence was insufficient "to prove appellant used or exhibited a deadly weapon" and that the jury verdict was incomplete on the issue of a deadly weapon because the jury had not answered the special issue concerning use of a deadly weapon. *Garcia v. State*, 17 S.W.3d 1, 4–5 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). The Court held that it was unnecessary for the jury to answer the special issue because it found appellant guilty as charged in the indictment, which necessarily included a deadly weapon finding. *Id.* at 5; *see also Johnson v. State*, 6 S.W.3d 709, 714 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (holding that, where indictment alleged use of deadly weapon and jury found defendant guilty "as charged in the indictment," jury had made affirmative finding on use of deadly weapon).

When a jury makes an affirmative finding on the use of a deadly weapon, "entering an affirmative finding in the judgment is mandatory; the trial court has

no discretion." *Johnson*, 6 S.W.3d at 714 (citing *State ex rel. Esparza v. Paxson*, 855 S.W.2d 170, 172 (Tex. App.—El Paso 1993, no pet.)); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3g(a)(2) ("On an affirmative finding [on use of a deadly weapon], the trial court shall enter the finding in the judgment of the court."). In *Curry v. State*, the Austin Court of Appeals held that the changing of a judgment nunc pro tunc to include a deadly weapon finding constitutes the correction of a clerical error when the jury made an affirmative finding on the use of a deadly weapon that was left out of the original judgment. 720 S.W.2d 261, 263 (Tex. App.—Austin 1986, pet. ref'd). In *Curry*, the jury made an affirmative finding on the use of a deadly weapon by answering a special issue. *Id.* at 262.

Here, although the jury did not answer a special issue, it, by finding appellant guilty as charged in the indictment, still made an affirmative finding on the use of a deadly weapon. *See Johnson*, 6 S.W.3d at 614. Therefore, the trial court was required to enter an affirmative finding in the judgment. *Id.* "Because the entry of the affirmative finding in the judgment is mandatory, the trial court's failure to make the entry cannot be the product of judicial reasoning." *Curry*, 720 S.W.2d at 263. Accordingly, we hold that the trial court, in its judgment nunc pro tunc, entered an affirmative finding on the use of a deadly weapon, which constituted a permissible correction of a clerical error, and the judgment is not

void. *See Barton*, 178 S.W.3d at 126. Having so held, relator's pending application to the trial court is moot.

We deny the petition for writ of mandamus.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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