Opinion issued July 30, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00630-CR

ADRIAN BARNES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Case No. 1494270

MEMORANDUM OPINION

After appellant, Adrian Barnes, without an agreed punishment recommendation from the State, pleaded guilty to the felony offense of burglary of a habitation,[1] the trial court deferred adjudication of his guilt and placed him on

[1] *See* TEX. PENAL CODE ANN. § 30.02(a), (c)(2).

community supervision for four years. The State, alleging numerous violations of the conditions of his community supervision, then moved to adjudicate appellant's guilt. After a hearing, the trial court found an allegation true, found appellant guilty, and assessed his punishment at confinement for five years. In four issues, appellant contends that he was deprived of due process of law, the trial court erred in assessing his punishment at confinement for five years and in ruling on the State's motion to adjudicate before ruling on his application for writ of habeas corpus, and appellant is entitled to a new trial based on a purported *Brady*[2] violation.

Background

On January 6, 2017, appellant pleaded guilty to the felony offense of burglary of a habitation. The trial court deferred adjudication of his guilt and placed appellant on community supervision, subject to certain conditions, including:

> Report to the Community Supervision Officer as directed for the remainder of the supervision term unless so ordered differently by the Court.

On November 10, 2017, the State moved to adjudicate appellant's guilt, alleging that he had violated numerous conditions of his community supervision, including:

> [Appellant] did then and there violate terms and conditions of Community Supervision by: Failing to report to the Community Supervision Officer, to-wit; [appellant] failed to report as directed for the month(s) of July 2017, August 2017 and September 2017.

---

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

At the hearing on the State's motion to adjudicate guilt, Harris County Probation Officer G. Pride testified. Following the hearing, the trial court found true the allegation that appellant had failed to report as directed, found appellant guilty, and assessed his punishment at confinement for five years.

Neutral and Detached

In his first issue, appellant argues that he was deprived of due process of law at the adjudication hearing because the trial court was not neutral or detached.

Trial courts have broad discretion to determine the proper punishment in an adjudication of guilt proceeding. *See* TEX. CODE CRIM. PROC. ANN. arts. 42A.108, 42A.751; *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). That said, the State may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV; *see also* TEX. CONST. art. I, § 19. Due process requires a hearing before a neutral and detached trial court that considers the full range of punishment and the evidence presented. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Grado*, 445 S.W.3d at 739. A trial court's arbitrary refusal to consider the entire range of punishment constitutes a denial of due process. *Grado*, 445 S.W.3d at 739. When the trial court assesses a predetermined sentence, it denies a defendant the right to due process by failing to consider the full range of evidence. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006); *Teixeira v. State*, 89 S.W.3d 190, 192 (Tex. App.—Texarkana 2002, pet. ref'd). Absent a clear showing

of bias, we presume that the trial court's actions were correct. *See Brumit*, 206 S.W.3d at 645.

Appellant asserts that during the hearing on the State's motion to adjudicate, the trial court made statements that "reflect[ed] the fact that the trial court was biased, partial, and did not consider the full range of punishment."

At the adjudication hearing, after finding appellant guilty of the felony offense of burglary of a habitation and hearing the evidence presented related to punishment, the trial court stated:

> [Appellant], I'd like to say this: I wish you would've chosen to work with us. I wish you would've chosen the programs that we thought would help you. Unfortunately, we're not able to.
>
> In the motion to adjudicate . . . you stopped reporting in July and again in August . . . .
>
> . . . I wish you would've taken the helping hand we tried to give to you. I wish you would've accepted the help that I tried to give you. I'm sorry that you're no longer on probation in this Court.

Nothing in the record indicates that the trial court arbitrarily refused to consider the full range of punishment.[3] And the trial court's comments, which occurred at the end of the adjudication hearing, do not reflect bias and partiality or

---

[3] *See* TEX. PENAL CODE ANN. §§ 12.33 ("An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years."), 30.02(c)(2) (burglary of habitation constitutes second-degree felony offense).

that it did not consider the full range of punishment. *See Brumit*, 206 S.W.3d at 645; *see also Dutton v. State*, No. 06-17-00209-CR, 2018 WL 3447529, at *1–2 (Tex. App.—Texarkana July 18, 2018, no pet.) (mem. op., not designated for publication) (trial court's statement expressing its "wish[es]" did not indicate trial court refused to consider full range of punishment or that trial court was biased or partial); *Shaver v. State*, No. 06-17-00086-CR, 2017 WL 5180244, at *2–5 (Tex. App.—Texarkana Nov. 9, 2017, no pet.) (mem. op., not designated for publication) (trial court's statements to defendant that it "wish[ed]" defendant would have entered program or asked trial court for help while on community supervision did not show that trial court was not neutral or detached or that it did not consider full range of punishment). Instead, the record shows that the trial court considered the evidence and then assessed punishment against appellant. *Cf. Earley v. State*, 855 S.W.2d 260, 262–63 (Tex. Crim. App. 1993) (record revealed trial court decided to revoke community supervision and wanted to assess life sentence before it heard any evidence). We hold that appellant was not denied due process of law.

We overrule appellant's first issue.

Judicial Vindictiveness

In his second issue, appellant argues that the trial court erred in assessing his punishment at confinement for five years because the trial court engaged in judicial vindictiveness and the presumption of judicial vindictiveness applies to this case.

Sentencing discretion permits consideration of a wide range of information relevant to the assessment of punishment. *Alabama v. Smith*, 490 U.S. 794, 798 (1989); *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). We review a sentence imposed by a trial court for an abuse of discretion. *See Jackson*, 680 S.W.2d at 814. Generally, as long as a sentence is within the proper range of punishment, it will not be disturbed on appeal. *Id.*

Due process of law requires that judicial vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the assessment of punishment or the sentence the defendant receives after a new trial or new proceedings. *Wiltz v. State*, 863 S.W.2d 463, 464 (Tex. Crim. App. 1993); *Davila v. State*, 961 S.W.2d 610, 616 (Tex. App.—San Antonio 1997, no pet). If a trial court increases a defendant's sentence after a new trial, the reasons for the increase must affirmatively appear on the record. *Alabama*, 490 U.S. at 798; *Davila*, 96 S.W.2d at 616. The reasons must be based on objective information concerning the defendant's identifiable conduct occurring after the original sentencing proceeding. *Alabama*, 490 U.S. at 798; *Davila*, 96 S.W.2d at 616. Absent reasons affirmatively appearing in the record, a presumption of vindictiveness arises upon the increase of a defendant's sentence. *Wiltz*, 863 S.W.2d at 464; *Davila*, 96 S.W.2d at 616.

A review of the cases that have found judicial vindictiveness shows that nearly all cases deal with fact patterns when a defendant has successfully appealed a final conviction or otherwise lawfully requested a higher tribunal to provide a second trial and the defendant has received one. *Ortegon v. State*, 267 S.W.3d 537, 541 (Tex. App.—Amarillo 2008, pet. ref'd); *see also North Carolina v. Pearce*, 395 U.S. 711, 723–26 (1969) (holding announced practice of giving harsher sentence when defendant has previously successfully appealed violated due process). Thus, when a case does not involve a successful appeal, a new trial, and a reconviction, the presumption of vindictiveness does not arise. *See Alabama,* 490 U.S. at 799–800; *Dugan v. State*, No. 12-02-00134-CR, 2004 WL 857417, at *6 (Tex. App.—Tyler Apr. 21, 2004, pet. ref'd) (mem. op., not designated for publication). In such instances, a defendant must prove actual vindictiveness. *See Alabama,* 490 U.S. at 799–800; *Dugan*, 2004 WL 857417, at *6.

Appellant argues that the presumption of judicial vindictiveness applies here because he "initially received a four-year deferred adjudication sentence" and then "[a]fter a hearing on the State's motion to adjudicate guilt, the trial court imposed a more severe punishment: five years' imprisonment."

After appellant, without an agreed punishment recommendation from the State, pleaded guilty to the felony offense of burglary of a habitation, the trial court deferred adjudication of his guilt and placed him on community supervision for four

years. A deferred adjudication is not a conviction. *See Donovan v. State*, 68 S.W.3d 633, 636 (Tex. Crim. App. 2002) ("Under the deferred adjudication scheme, a judge does not make a 'finding of guilt'; instead the judge makes a finding that the evidence 'substantiates the defendant's guilt' and then defers the adjudication."); *Privette v. State*, 594 S.W.3d 629, 631–32 (Tex. App.—Texarkana 2019, no pet.); *Moreno v. State*, 944 S.W.2d 685, 689 (Tex. App.—Houston [14th Dist.] 1997), *aff'd*, 22 S.W.3d 482 (Tex. Crim. App. 1999). And in a trial court's deferred adjudication order, a sentence is neither imposed nor suspended. *Beedy v. State*, 250 S.W.3d 107, 114 (Tex. Crim. App. 2008); *Privette*, 594 S.W.3d at 631–32; *Hurley v. State*, 130 S.W.3d 501, 505–06 (Tex. App.—Dallas 2004, no pet.).

Here, appellant was not convicted of the offense of burglary of a habitation when the trial court signed its deferred adjudication order. Instead, appellant was convicted of that offense when the trial court later revoked his community supervision and found him guilty. *See, e.g.*, *Robinson v. State*, Nos. 05-03-01664-CR to 05-03-01666-CR, 2004 WL 2164089, at *1 (Tex. App.—Dallas Sept. 28, 2004, no pet.) (mem. op., not designated for publication) ("The convictions arose after the trial court revoked appellant's deferred adjudication community supervision and adjudicated him guilty."); *see also Conviction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining conviction as "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty";

and "[t]he judgment . . . that a person is guilty of a crime"). In other words, the trial court has only assessed punishment against appellant once in this case—after it revoked his community supervision and found him guilty of the felony offense of burglary of a habitation. The presumption of judicial vindictiveness does not apply.

Nothing in the record shows that the trial court engaged in judicial vindictiveness when it adjudicated appellant guilty and assessed his punishment at confinement for five years. *See Alabama*, 490 U.S. at 799–800; *Dugan*, 2004 WL 857417, at *6 (defendant must prove actual vindictiveness). When a trial court revokes a defendant's community supervision and adjudicates the defendant guilty, the trial court may consider any punishment within the range allowed by law. *Vidaurri v. State*, 49 S.W.3d 880, 885 (Tex. Crim. App. 2001); *Ditto v. State*, 988 S.W.2d 236, 237 (Tex. Crim. App. 1999); *Reynolds v. State*, No. 11-05-00096-CR, 2006 WL 648331, at *3 (Tex. App.—Eastland Mar. 16, 2006, no pet.) (not designated for publication) ("[A]s to punishment, the defendant is subject to the entire range of punishment for the offense once he is adjudicated guilty."); *cf. Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (sentence outside maximum or minimum range of punishment is unauthorized by law and illegal). The trial court's sentence of five years' confinement is within the applicable punishment range for a second-degree felony offense. *See* TEX. PENAL CODE ANN. §§ 12.33 ("An individual adjudged guilty of a felony of the second degree shall be punished

by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years."), 30.02(c)(2) (burglary of habitation constitutes second-degree felony offense).

We hold that the trial court did not err in assessing appellant's punishment at confinement for five years.

We overrule appellant's second issue.

Motion to Adjudicate

In his third issue, appellant argues that the trial court erred in ruling on the State's motion to adjudicate before ruling on his application for writ of habeas corpus[4] because "[u]pon [the] filing of a habeas, the trial court is only endowed with the jurisdiction to rule on the habeas; nothing else."

To support his position, appellant directs this Court to Texas Code of Criminal Procedure article 11.32, titled "Custody pending examination," which provides:

> When the return of the writ has been made, and the applicant brought before the court, he is no longer detained on the original warrant or process, but under the authority of the habeas corpus. The safekeeping of the prisoner, pending the examination or hearing, is entirely under the direction and authority of the judge or court issuing the writ, or to which the return is made. He may be bailed from day to day, or be remanded to the same jail whence he came, or to any other place of safekeeping under the control of the judge or court, till the case is finally determined.

[4] *See* TEX. CODE CRIM. PROC. ANN. art. 11.072.

TEX. CODE CRIM. PROC. ANN. art. 11.32. This provision does not apply to appellant's issue on appeal. *See, e.g.*, *Ex parte Reposa*, 541 S.W.3d 186, 192 (Tex. Crim. App. 2017) (Alcala, J., dissenting to denial of request for bond) (article 11.32 provides court authority to release person on bond who has pending habeas proceeding before it); *Ex parte Eureste*, 725 S.W.2d 214, 216 (Tex. Crim. App. 1986).

Further, the procedural background in this case is not unique. *See Kniatt v. State*, 206 S.W.3d 657, 660–62 (Tex. Crim. App. 2006) (trial court did not rule on defendant's application for writ of habeas corpus until after defendant adjudicated guilty). On January 6, 2017, appellant pleaded guilty to the felony offense of burglary of a habitation. The trial court then deferred adjudication of appellant's guilt and placed him on community supervision for four years, subject to certain conditions.

On November 10, 2017, the State moved to adjudicate appellant's guilt, alleging that he had violated numerous conditions of his community supervision. On June 14, 2019, the trial court held a hearing on the State's motion to adjudicate guilt. At the end of the hearing, the trial court found true the allegation that appellant failed to report as directed, found appellant guilty, and assessed his punishment at confinement for five years.

Also, on June 14, 2019, appellant filed an application for writ of habeas corpus, challenging his plea of guilty from January 6, 2017 that led to the trial court's deferred adjudication order placing him on community supervision. The trial court held a hearing on appellant's application on July 12, 2019 and denied habeas relief.

Appellant directs this Court to no relevant authority to support his position that the method and procedure used by the trial court to address the State's motion to adjudicate and appellant's application for writ of habeas corpus was improper.[5] *Cf. Kniatt*, 206 S.W.3d at 660–62 (trial court did not rule on defendant's application for writ of habeas corpus until after defendant adjudicated guilty). And appellant's habeas proceeding was a separate proceeding before the trial court and distinct from the trial court's adjudication of appellant's guilt.[6] *See Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.*, 159 S.W.3d 645, 649–50 (Tex. Crim. App. 2005) (holding "a habeas corpus action is separate from the underlying criminal prosecution"); *Jordan v. State*, 54 S.W.3d 783, 786 (Tex. Crim. App. 2001) (trial court may consider application for writ of habeas corpus at same time as motion to

---

5 *See* TEX. R. APP. P. 38.1(i).

6 The trial court cause number for appellant's habeas proceeding was 1494270A. Appellant's appeal from the denial of his application for writ of habeas corpus was filed separately in this Court in appellate cause number 01-19-00644-CR. *See Lancaster v. St. Yves*, No. 01-17-00250-CV, 2018 WL 6175311, at *1 n.2 (Tex. App.—Houston [1st Dist.] Nov. 27, 2018, pet. denied) (mem. op.) ("An appellate court may take judicial notice of its own records in the same or related proceedings involving the same or nearly the same parties.").

revoke community supervision; one need not precede other); *Patrick v. State*, No. 11-17-00075-CR, 2018 WL 1867055, at *3 (Tex. App.—Eastland Apr. 19, 2018, pet. ref'd) (mem. op., not designated for publication) (trial court not required to halt adjudication proceeding while defendant appealed denial of application for writ of habeas corpus); *Ex parte Matthews*, 452 S.W.3d 8, 12 (Tex. App.—San Antonio 2014, no pet.) ("[A] habeas corpus proceeding is not merely another motion within the criminal prosecution . . . ."). We hold that the trial court did not err in ruling on the State's motion to adjudicate before ruling on appellant's application for writ of habeas corpus.

We overrule appellant's third issue.

Brady Violation

In his fourth issue, appellant argues that he is entitled to a new trial because on December 16, 2019, after he was found guilty and while this appeal was pending, "the State handed a disclosure notice to [a]ppellant's counsel indicating that one of the [law enforcement] officers involved in [appellant's] case engaged in misconduct and ultimately resigned as a peace officer."

The State has an affirmative duty to disclose evidence favorable and material to a defendant's guilt or punishment under the due process clause of the Fourteenth Amendment. *See Brady v. Maryland*, 373 U.S. 83, 87–88 (1963). To establish a due process violation under *Brady*, a defendant must show that (1) the State failed

to disclose evidence in its possession, (2) the withheld evidence is favorable to the defendant, and (3) the evidence is "material," that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Webb v. State*, 232 S.W.3d 109, 114 (Tex. Crim. App. 2007). The evidence may be material to either guilt or punishment. *Brady*, 373 U.S. at 87. Evidence that could be used effectively to impeach a State's witness is evidence favorable to the defendant for *Brady* purposes. *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *Arroyo v. State*, 117 S.W.3d 795, 796 n.1 (Tex. Crim. App. 2003).

Brady claims are typically raised in a motion for new trial. *See, e.g.*, *Keeter v. State*, 175 S.W.3d 756, 760–61 (Tex. Crim. App. 2005); *Hall v. State*, 283 S.W.3d 137, 154 (Tex. App.—Austin 2009, pet. ref'd). This is because "a *Brady* claim requires that the defendant show by a preponderance of the evidence that evidence was withheld, that it was favorable to the defense, and that the evidence was material." *Keeter*, 175 S.W.3d at 760. Such a showing can be made with evidence presented at a hearing on a motion for new trial. *See Hall*, 283 S.W.3d at 175–79 (reversing defendant's sentence and remanding for new trial on punishment based on evidence presented at hearing on motion for new trial).

In a December 2019 abatement hearing in the trial court, while this appeal was pending, appellant's counsel stated:

> . . . [T]he State [just] handed me a disclosure notice for one of the deputies -- or, excuse me -- one of the Precinct 4 constables who was

> involved and apparently resigned from his post in December of 2017. And I never received this before, so I didn't get to investigate this before . . . .
>
> . . . .
>
> He resigned because he choked someone while on duty, and then that case was later no-billed.
>
> . . . .
>
> And it also says: "He was sustained for violation of department policies and procedures regarding abiding by laws; conduct and behavior; availability while on duty; and domestic violence, failure to report."

Appellant's other counsel present at the hearing also explained:

> There's also a statement in here that [the law enforcement officer] left his assigned work area under false pretenses, leaving the boundaries of his precinct while on duty in a county vehicle. And my reading of the two documents together is that he committed this violent act while he was on duty, basically.

Based on the representations in appellant's brief, appellant's counsel did not receive the purported *Brady* information until well after the trial court had adjudicated appellant guilty. Thus, the purported disclosure by the State and documents that appellant now relies on for his *Brady* complaint are not in the appellate record for this case. *See Leza v. State*, 351 S.W.3d 344, 362 (Tex. Crim. App. 2011); *Farese v State*, No. 04-12-00574-CR, 2014 WL 667509, at *3–4 (Tex. App.—San Antonio Feb. 19, 2014, no pet.) (mem. op., not designated for publication). For that reason, we cannot grant appellant any appellate relief based on the purported *Brady* information. *See Leza*, 351 S.W.3d at 362–63 (holding

because letters informing defendant's appellate counsel of possible *Brady* violation were not part of appellate record, defendant's point of error overruled without prejudice to him pursuing any *Brady* claim in initial application for post-conviction writ of habeas corpus that further investigation might turn up); *Farese*, 2014 WL 667509, at *3–4; *Nash v. State*, No. 03-12-00456-CR, 2013 WL 4516182, at *5–6 (Tex. App.—Austin Aug. 21, 2013, pet. ref'd) (mem. op., not designated for publication); *see also Whitehead v. State*, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004) ("An appellate court may not consider factual assertions that are outside the record . . . ."). Appellant does not direct this Court to any portion of the appellate record supporting his complaint of a *Brady* violation. Based on the record before this Court on direct appeal, we hold that appellant is not entitled to a new trial.

We overrule appellant's fourth issue, without prejudice to any appropriately filed application of writ of habeas corpus.[7]

---

[7] *See Leza v. State*, 351 S.W.3d 344, 362–63 (Tex. Crim. App. 2011); *Farese v State*, No. 04-12-00574-CR, 2014 WL 667509, at *3–4 (Tex. App.—San Antonio Feb. 19, 2014, no pet.) (mem. op., not designated for publication); *Nash v. State*, No. 03-12-00456-CR, 2013 WL 4516182, at *5–6 & n.3 (Tex. App.—Austin Aug. 21, 2013, pet. ref'd) (mem. op., not designated for publication); *see also* TEX. CODE CRIM. PROC. ANN. art. 11.07; *Ex parte Kimes*, 872 S.W.2d 700, 701–04 (Tex. Crim. App. 1993) (post-trial allegation of *Brady* violation may be raised through writ of habeas corpus); *Harvin v. State*, No. PD-0634-13, 2013 WL 5872844, at *2 n.23 (Tex. Crim. App. Oct. 30, 2013) ("Habeas corpus proceedings under [a]rticle 11.072 would have been appropriate had appellant filed his writ application while he was on community supervision. But because appellant has since been adjudicated [guilty], he must file a post-conviction writ application under [a]rticle 11.07 instead."). We express no opinion on whether appellant has a cognizable *Brady* complaint.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Lloyd, Landau, and Countiss.

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