Vacated, Remanded, and Memorandum Opinion filed January 7, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01011-CR

JULIO CESAR PUENTE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1153795

MEMORANDUM OPINION

Appellant Julio Cesar Puente challenges his conviction for aggravated sexual assault of a child. Appellant pleaded guilty pursuant to a plea agreement. The trial court accepted appellant's guilty plea and assessed punishment as confinement for 21 years. Appellant appeals contending that (1) the trial court erred in denying his motion to suppress his confession; and (2) the trial court's assessment of punishment was illegal. We vacate the trial court's judgment and remand.

Background

Appellant was in a romantic relationship with J.C.'s [1] mother and lived with her and J.C. While changing J.C.'s diaper on February 12, 2008, J.C.'s mother noticed that J.C.'s anus was red. She asked appellant if anything had happened while she was at work that day. Appellant stated that he inserted his finger into J.C.'s anus. J.C. was four years old at the time.

J.C.'s mother contacted the police and they interviewed appellant the following day. Appellant was not under arrest at the time of the interview and voluntarily spoke with the police. During the interview, appellant confessed to inserting his finger into J.C.'s anus and kissing J.C.'s penis.

Appellant was subsequently arrested and charged with aggravated sexual assault of "a child younger than six years of age." Appellant filed a motion to suppress his confession on October 20, 2008. The trial court held a hearing and denied appellant's motion to suppress on October 21, 2008.

After the trial court's denial of appellant's motion to suppress, the State amended the indictment to strike the words "a child younger than 6 years of age." Appellant then pleaded guilty to the amended indictment in exchange for the State's promise to recommend that the trial court assess punishment as confinement for 21 years. The trial court accepted appellant's guilty plea, and after confirming that the parties had "entered into a plea bargain for 21 years' confinement," assessed punishment as confinement for 21 years.

Analysis

Appellant presents two issues on appeal: whether (1) the trial court erred in denying appellant's motion to suppress his confession; and (2) the trial court's assessment of punishment as confinement for 21 years was illegal. We address each in turn.

[1] To protect the child victim's identity, he is referred to as "J.C."

I. Motion to Suppress

Appellant first challenges the trial court's denial of his motion to suppress his confession. Appellant filed a motion to suppress alleging that his confession was obtained in violation of federal constitutional law because it was involuntary and the result of coercion. Appellant does not argue that his confession was obtained in violation of Texas Code of Criminal Procedure article 38.22 or the Texas Constitution.[2]

We review a trial court's denial of a motion to suppress for abuse of discretion. *Oles v. State*, 993 S.W.2d 103, 106 (Tex. Crim. App. 1999); *State v. Vasquez*, 230 S.W.3d 744, 747 (Tex. App.—Houston [14th Dist.] 2007, no pet.). An abuse of discretion occurs when the trial court's decision is so clearly wrong as to lie outside the zone of reasonable disagreement. *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992) (en banc). We review the evidence in the light most favorable to the trial court's ruling. *Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007). The trial court is the exclusive factfinder and judge of the credibility of the witnesses. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000) (en banc); *Turner v. State*, 252 S.W.3d 571, 576 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). We afford almost total deference to the trial court's determination of historical facts supported by the record, especially when the trial court's findings are based on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) (en banc). We afford the same amount of deference to the trial court's ruling on mixed questions of law and fact if the resolution

[2] Because appellant does not assert a claim under the Texas Constitution or Texas statutory law, we do not conduct the separate analysis required to determine whether appellant's confession was involuntary under state law. *See Muniz v. State*, 851 S.W.2d 238, 251-52 (Tex. Crim. App. 1993) (en banc) (requiring state and federal claims of involuntariness to be argued on separate grounds with separate substantive analysis or argument provided for each ground); *see also Martinez v. State*, 127 S.W.3d 792, 794 (Tex. Crim. App. 2004) (applying four-prong test to determine whether a promise rendered a confession involuntary pursuant to Texas Code of Criminal Procedure article 38.21); *Herrera v. State*, 194 S.W.3d 656, 659-60 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (applying "totality of the circumstances" test to claim asserted under federal constitutional law, and four-prong test to claim asserted under state law).

of these questions turns on an evaluation of credibility and demeanor. *Id.* We review questions not turning on credibility and demeanor *de novo*. *Id.* If the trial court's decision is correct under any theory of law applicable to the case, the decision will be sustained. *Estrada v. State*, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005).

When determining whether a confession should have been excluded as a matter of federal constitutional law, a court must decide whether the confession was voluntary or coerced. *Arizona v. Fulminante*, 499 U.S. 279, 285-86 (1991). A confession is coerced if the defendant's will was overborne by the circumstances surrounding the confession. *Dickerson v. United States*, 530 U.S. 428, 434 (2000). To make this determination, a court must examine the totality of the circumstances surrounding the interrogation including the characteristics of the accused and the details of the interrogation. *Id.*; *Fulminante*, 499 U.S. at 286. Coercive police activity is a necessary predicate to finding a confession involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

Appellant argues that the trial court abused its discretion in denying his motion to suppress because the trial court "refus[ed] to consider [appellant's] evidence of physical abuse." During the motion to suppress hearing, appellant argued that his confession was involuntary because he was physically impaired after being assaulted by J.C.'s mother, resulting in injuries to his head and left arm. Appellant also claimed that he had not slept the night before he was interviewed by the police and his lack of sleep contributed to his failure to make a knowing and intelligent waiver of his rights. During the hearing on appellant's motion to suppress, appellant's attorney instructed him to show the trial court scars on his head and left arm allegedly caused by J.C.'s mother on February 12, 2008. The trial court looked at appellant's head, but stated "I don't care about the arm" and did not look at appellant's arm. The trial court also heard evidence from two police officers who testified that appellant (1) was not under arrest when he confessed, (2) was read his legal rights, and (3) did not claim he did not understand his legal rights. After hearing all

of the evidence, the trial court denied appellant's motion to suppress, finding the officers' testimony credible and appellant's testimony not credible.

Appellant argues that the trial court refused to consider "appellant's legal argument by stating that 'I don't care about the arm.'" Contrary to appellant's argument, the trial court heard appellant's arguments regarding physical abuse. The trial court also looked at appellant's head.

Furthermore, appellant does not contend that his injuries were caused by the police. He also does not contend that his alleged lack of sleep was caused by the police. For a confession to be involuntary under federal constitutional law, there must have been coercive police activity. *See id.*; *Perry v. State*, 158 S.W.3d 438, 446 (Tex. Crim. App. 2004) (evidence of appellant's intoxication and injury did not render confession involuntary because it did not involve police coercion or other official overreaching). Appellant does not advance any arguments alleging that his confession was the result of coercive activity by the police.

Viewing the evidence in the light most favorable to the trial court's ruling, we cannot say that the trial court abused its discretion in finding that appellant's confession was not involuntary or the result of police coercion. *See Connelly*, 479 U.S. at 167; *Perry*, 158 S.W.3d at 446. Thus, the trial court did not err in denying appellant's motion to suppress his confession.

We overrule appellant's first issue.

II. Illegal Sentence

Appellant next challenges the legality of his sentence. Appellant argues that the amended indictment charged him with the offense of sexual assault, but did not allege that the victim was a child. The maximum penalty for sexual assault is confinement for 20 years. *See* Tex. Penal Code Ann. §§12.33(a), 22.011(f) (Vernon 2003). Accordingly,

appellant argues that his 21 year sentence is illegal because it exceeds the statutory maximum penalty.

Initially we must determine whether there was a proper amendment to the indictment. An indictment may be amended at any time before trial begins or after trial begins if the defendant does not object. Tex. Code Crim. Proc. Ann. art. 28.10(a)-(b) (Vernon 2006). An indictment may be amended by interlineation on the original or a copy of the indictment. *Riney v. State*, 28 S.W.3d 561, 565 (Tex. Crim. App. 2000). Interlineation is "the actual, physical alteration of the face of the charging instrument." *Id.* An amendment to an indictment must be memorialized in writing and granted by the trial court. *See id.* at 565-66.

Appellant initially was indicted for aggravated sexual assault of "a child younger than six years of age." On October 21, 2008, the State submitted an amendment to the indictment by physically striking through the words "a child younger than six years of age" on a copy of the indictment. Appellant did not object to the amendment. The trial court subsequently approved the amendment. Therefore, the indictment was properly amended. *See id.*; Tex. Code Crim. Proc. Ann. art. 28.10(a)-(b).

The amended indictment reads as follows:

> . . . JULIO CESAR PUENTE, hereafter styled the Defendant, heretofore on or about February 12, 2008, did then and there unlawfully, intentionally and knowingly cause THE PENETRATION OF THE ANUS of [J.C.], who was not the spouse of the Defendant, hereafter styled the Complainant WITH FINGER . . . .

The State argues that the parties intended to delete the words "younger than six years of age," leaving the allegation that the victim was "a child." A defendant is to be tried only on the crimes alleged in the indictment. *Abdnor v. State*, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994) (en banc). When the indictment facially alleges a complete offense, the State is bound by the theory alleged in the indictment. *See Fisher v. State*, 887 S.W.2d 49, 55, 57 (Tex. Crim. App. 1994) (en banc), *overruled on other grounds by*

Malik v. State, 953 S.W.2d 234 (Tex. Crim. App. 1997) (en banc). This is true regardless of whether the State intended to charge that offense. *See Thomason v. State*, 892 S.W.2d 8, 11 (Tex. Crim. App. 1994) (en banc); *Castillo v. State*, 7 S.W.3d 253, 258 (Tex. App.—Austin 1999, pet. ref'd). The indictment alleges the complete offense of sexual assault. *See* Tex. Penal Code Ann. § 22.011(a). Therefore, the State is bound by the indictment regardless of its intentions.[3] *See Thomason*, 892 S.W.2d at 11; *Castillo*, 7 S.W.3d at 258.

A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal. *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (en banc); *Ex parte Seidel*, 39 S.W.3d 221, 225 n.4 (Tex. Crim. App. 2001) (en banc). A defendant may obtain relief from an unauthorized sentence on direct appeal or by a writ of habeas corpus. *Mizell*, 119 S.W.3d at 806. Appellant was sentenced to confinement for 21 years. Because the amended indictment only alleged the offense of sexual assault, the maximum penalty appellant could have been sentenced to is confinement for 20 years. *See* Tex. Penal Code Ann. §§ 12.33(a), 22.011(f). Therefore, appellant's sentence is illegal. *See Mizell*, 119 S.W.3d at 806; *Ex parte Seidel*, 39 S.W.3d at 225 n.4. When punishment pursuant to a negotiated plea agreement exceeds the statutory maximum, the proper relief is to return the parties to their respective positions before the guilty plea was entered. *Ex parte Rich*, 194 S.W.3d 508, 515 (Tex. Crim. App. 2006); *Ex parte Beck*, 922 S.W.2d 181, 182 (Tex. Crim. App. 1996) (per curiam).

We sustain appellant's second issue.

[3] The State also argues that the parties' intent is evidenced by the trial court's acceptance of appellant's guilty plea to the crime of "aggravated sexual assault of a child as charged in the indictment as amended." But the trial court may not enlarge the offense alleged in the indictment and convict the defendant on a basis or theory not alleged in the indictment. *See Reed v. State*, 117 S.W.3d 260, 265 (Tex. Crim. App. 2003); *Castillo*, 7 S.W.3d at 258-59.

Conclusion

We conclude that the trial court did not abuse its discretion in denying appellant's motion to suppress. We further conclude that appellant's sentence to confinement for 21 years is illegal. Therefore, we vacate the trial court's judgment in cause number 1153795 in the 262nd District Court of Harris County, order the parties returned to their respective positions before the "guilty" plea was entered, and remand this case to the trial court for further proceedings consistent with this opinion.

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
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