

**Judgment Nunc Pro Tunc Vacated, Original Judgment Affirmed, and Majority and Dissenting Opinions filed December 7, 2010.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-09-00332-CR**

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**CHRISTOPHER DANTE LOUD, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 66th District Court  
Hill County, Texas  
Trial Court Cause No. 34,448**

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**MAJORITY OPINION**

Appellant, Christopher Dante Loud, appeals from the trial court's judgment nunc pro tunc convicting him of aggravated assault with a deadly weapon and affirmatively finding a deadly weapon was used during the offense. Because we conclude that the trial court corrected judicial errors and omissions by making the changes at issue, we vacate the judgment nunc pro tunc, and reinstate and affirm the original judgment and sentence.<sup>1</sup>

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<sup>1</sup> Appellant has not challenged the original judgment and sentence.

## I. Background

In 2006, appellant was indicted for the offense of aggravated assault with a deadly weapon. However, the caption on the indictment reflects that the charged offense was “aggravated assault – bodily injury.” Under the terms of a plea agreement, he pleaded no contest, and was placed on deferred-adjudication community supervision. At the plea hearing, held on July 3, 2006, the trial court orally admonished appellant that he was pleading guilty to the offense of aggravated assault – serious bodily injury. Appellant waived the reading of the indictment. The trial court affirmed that appellant stipulated to the allegations contained in the charging instrument. Additionally, appellant’s written stipulation of evidence provides: “At the trial of this cause the State could and would produce witnesses who would testify and establish, beyond a reasonable doubt, the truth of all of the material allegations in the indictment . . . .” The written admonishments signed by appellant and the trial court list the offense as “Aggravated Assault w/Serious Bodily Injury.” Both the admonishments and the stipulation of evidence were signed at the plea hearing. The order of deferred adjudication indicates appellant was charged with aggravated assault – bodily injury, with the statute for the offense listed as Texas Penal Code Section 22.02(a)(1).<sup>2</sup> The order imposing conditions of community supervision similarly lists the offense for which appellant was placed on community supervision as “aggravated assault – bodily injury.”

In December 2006, the State filed an application to proceed to adjudication, listing the offense to which appellant entered a plea as “aggravated assault – bodily injury.” Appellant entered into another plea agreement with the State and continued on community supervision for a longer term, with some additional restrictions and increased fees. In its order on the State’s application, the trial court stated:

HERETOFORE, on the 3rd day of July 2006, as reflected by a prior order of this Court, this case was tried and Christopher Dante Loud, hereinafter

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<sup>2</sup> This statute provides that a person commits aggravated assault if he commits assault and causes serious bodily injury to another. Tex. Penal Code Ann. § 22.02(a)(1) (Vernon Supp. 2009).

called defendant, entered a plea of Nolo Contendere to the offense of *Aggravated Assault-Bodily Injury*. The Court after hearing the evidence introduced thereunder accepted the plea of Nolo Contendere, deferred further proceeding without entering an adjudication of guilt and placed the defendant on probation for a term of six (6) years and cost of Court. Thereafter, the State filed a motion in which it alleged that the defendant has violated the terms of probation, moving the Court to proceed to an adjudication of guilt, the assessment of punishment and all other actions necessary in this cause, a copy of which motion was served upon the defendant, and on the 16th day of January 2007, came on to be heard the Motion heretofore filed by the State, and the defendant appeared in person with counsel and the State appeared through her Assistant District Attorney and after proper admonishment the defendant entered a plea of true to violation 3, 8 and 10 of the allegations contained in the Motion filed by the State alleging a violation of the terms of probation.

(emphasis added).

The State filed another application to proceed to adjudication in November 2008.

In this application, the State alleged:

Christopher Dante Loud, the defendant in this cause, entered a plea of Nolo Contendere to the offense of *Aggravated Assault-Bodily Injury*, a felony, on the 3rd day of July 2006. The Court after hearing the evidence introduced thereunder and accepting the plea of Nolo Contendere, deferred further proceedings without entering an adjudication of guilt and placed the defendant on probation on reasonable terms and conditions for a period of six (6) years, and the said defendant was then and there probated to said Hill County Community Supervision and Corrections Department as aforesaid.

(emphasis added).

At the beginning of the hearing on the State's application, held on February 11, 2009, the trial court confirmed that appellant was "the same person that entered a plea of no contest to a charge of aggravated bodily assault - - or aggravated assault bodily injury back on July the 3rd, 2006." The trial court found the State's allegations that appellant violated the terms of his community supervision true and found appellant guilty of the "offense alleged in the indictment." After a punishment hearing, the trial court sentenced

appellant to 15 years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a \$10,000 fine. The judgment adjudicating appellant guilty listed the offense as Texas Penal Code Section 22.02(a)(1), and the trial court entered "N/A" under the deadly-weapon finding.

Later that month on February 20,<sup>3</sup> the State filed a motion to enter a judgment nunc pro tunc adjudicating appellant's guilt. The State alleged:

1. In a February 9, 2009 hearing on the State's Application to Proceed to Final Adjudication, the Court found the allegations in the Application to be true, found the Defendant guilty of the offense as charged in the Indictment, and after a punishment hearing, sentenced the Defendant to 15 years in prison, and a fine of \$10,000.
2. The Judgment signed by the Court on February 13, 2009 contains clerical errors, including:
  - a. The "Statute for Offense" is erroneously entered as §22.02(a) (1). Defendant was indicted for and found guilty of Aggravated Assault under Tex. Penal Code §22.02(a) (2),<sup>4</sup> so the entry should be corrected.
  - b. The code for the "Offense for which Defendant Convicted" is incorrectly entered as 13150004. It should be the code for Aggravated Assault - Deadly Weapon - 13150005.
  - c. The "Findings on Deadly Weapon" is erroneously shown as N/A. The Defendant was indicted for aggravated assault by using or exhibiting a deadly weapon during the commission of the offense. He was found guilty as charged in the Indictment. The deadly weapon is an element of the offense, so the record should be corrected to show the Court's finding.

Appellant filed "Defendant's Motion in Arrest of Judgment and Motion for New Trial" on February 27, 2009. Appellant requested a new trial, contending the judgment "is contrary to law and the evidence," and "revocation of deferred adjudication

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<sup>3</sup> Appellant timely filed his notice of appeal on February 27, 2009.

<sup>4</sup> This statute provides that a person commits aggravated assault if he commits assault and uses or exhibits a deadly weapon during the commission of the assault. Tex. Penal Code Ann. § 22.02(a)(2).

community supervision is an abuse of discretion.” There is no indication in the record that the trial court considered or acted upon appellant’s motion. Moreover, the State did not pursue correction of judicial, rather than, clerical, errors.

The trial court conducted a hearing on the State’s motion for entry of judgment nunc pro tunc on March 9, 2009. The reporter’s record does not reflect any indication that the trial judge independently recalled that he made a deadly-weapon finding during the hearing on final adjudication of appellant’s guilt. At the conclusion of the hearing, the trial court requested additional briefing from the State and appellant regarding whether a judgment nunc pro tunc was available to correct these errors. After the parties submitted briefing, the trial court changed the order of deferred adjudication to reflect the offense as “Aggravated Assault w/Deadly Weapon,” the offense statute as “22.02(a)(2) Penal Code,” and the findings on deadly weapon as “Yes, Not a Firearm.” The trial court further changed the caption of the indictment, the order imposing conditions of community supervision, and the criminal docket sheet to reflect the offense of “Aggravated Assault w/Deadly Weapon.” Finally, the trial court entered a Nunc Pro Tunc Judgment Adjudicating Guilt reflecting these same changes and including a finding of “Yes, Not a Firearm” on the deadly weapon section of the judgment.

## **II. Analysis**

In a single issue, appellant contends the trial court erred in adjudicating him guilty of aggravated assault – deadly weapon and entering an affirmative finding of a deadly weapon through a judgment nunc pro tunc.

In his brief, appellant contends: “on the one hand the original [g]uilty plea is involuntary or on the other hand the judgment should be modified to remove the deadly-weapon finding and adjudicate the Appellant Guilty of either Aggravated Assault-Bodily Injury under Texas Penal Code Section 22.02(a)(1) or Aggravated Assault Serious Bodily Injury.” However, we will not consider appellant’s argument that his guilty plea was involuntary because appellant did not voice this complaint in the trial court. *See Wright*

*v. State*, 295 S.W.3d 685, 691–92 (Tex. App.—Eastland 2009), *aff'd* 312 S.W.3d 34 (Tex. Crim. App. 2010); *Salinas v. State*, 282 S.W.3d 923, 924 (Tex. App.—Fort Worth 2009, pet. ref'd). We confine our analysis and disposition to whether the trial court properly changed the judgment to reflect a deadly-weapon finding and a conviction under Texas Penal Code section 22.02(a)(2) (hereinafter “Aggravated Assault with a Deadly Weapon”).

A judgment *nunc pro tunc* is appropriate to correct clerical errors when the court’s records do not mirror the judgment actually rendered. *Collins v. State*, 240 S.W.3d 925, 928 (Tex. Crim. App. 2007). However, such an order is not appropriate to correct judicial errors or omissions. *Ex parte Poe*, 751 S.W.2d 873, 876 (Tex. Crim. App. 1988) (en banc). “The trial court cannot, through a judgment *nunc pro tunc*, change a court’s records to reflect what it believes should have been done.” *Collins*, 240 S.W.3d at 928 (citing *Ex parte Dopps*, 723 S.W.2d 669, 671 (Tex. Crim. App. 1986) (en banc) (per curiam)). The dispositive issue in this case is thus whether the changes made by the trial court resulted from judicial reasoning or were simply corrections of clerical errors. Such a determination is a matter of law. *See Poe*, 751 S.W.2d at 876.

As discussed above, appellant pleaded no contest to the allegations in the indictment. The indictment, in turn, alleged aggravated assault with a deadly weapon. *See* Tex. Penal Code Ann. § 22.02(a)(2). However, appellant waived the reading of the indictment, and the trial court, both orally and in writing, admonished appellant that the offense with which he was charged was aggravated assault – serious bodily injury. *See id.* § 22.02(a)(1). There is no mention in any of the documents contained in the clerk’s record—except the body of the indictment—or any discussion in any of the reporter’s records of a deadly weapon until the State filed its motion for judgment *nunc pro tunc*. Indeed, the record makes clear that everyone, including the State and the trial court, was operating under the assumption appellant had pleaded no contest to aggravated assault – serious bodily injury. At the beginning of three separate hearings over the course of three years, the trial court verified appellant had pleaded no contest to aggravated assault –

bodily injury. In fact, the trial court requested briefing at the conclusion of the hearing on the State's motion for a judgment nunc pro tunc; such a request certainly suggests the use of judicial reasoning in determining whether to correct the numerous errors apparent in this record. *Cf. Collins*, 240 S.W.3d at 928 (noting a nunc pro tunc order may only be used to correct a clerical error that was not the result of judicial reasoning).

The cases cited by the State to support its proposition that a judgment nunc pro tunc is appropriate to correct clerical errors made in a deadly-weapon finding are factually distinguishable from this case. First, in *Curry v. State*, the jury found the defendant had used or exhibited a deadly weapon; thus the trial court was required to enter the finding on the judgment. 720 S.W.2d 261, 263 (Tex. App.—Austin 1986, pet. ref'd). Here, we have no such jury finding. Next, in *Rabsatt v. State*, No. 03-06-00668-CR, 2007 WL 3390877, at \*2 (Tex. App.—Austin Nov. 15, 2007, pet. struck) (mem. op., not designated for publication), the trial court orally pronounced an affirmative deadly-weapon finding. Again, the trial court made no such oral pronouncement in this case. Finally, in *Ex parte Huskins*, the trial court properly admonished the defendant prior to accepting his guilty plea to the allegations in the indictment. 176 S.W.3d 818, 820 (Tex. Crim. App. 2005). Thus, the Court of Criminal Appeals concluded that the trial court was not required to orally announce a deadly-weapon finding at sentencing to include such a finding in the judgment and sentence. *Id.* at 820–21. But here, the trial court did not properly admonish the defendant regarding a deadly weapon; as explained above, the trial court instead admonished the defendant that he was pleading no contest to and being placed on deferred adjudication for aggravated assault – serious bodily injury.

Further, when the trial court is the trier-of-fact, it has discretion to withhold entry of a deadly-weapon finding from its judgment, even when such a finding is supported by the evidence. *See Guerrero v. State*, 299 S.W.3d 487, 490 (Tex. App.—Amarillo 2009, no pet.); *Johnson v. State*, 233 S.W.3d 420, 425 (Tex. App.—Fort Worth 2007, pet. denied); *Dickson v. State*, 988 S.W.2d 261, 263 (Tex. App.—Texarkana 1998, pet. ref'd); *Campos v. State*, 927 S.W.2d 232, 235 (Tex. App.—Waco 1996, no pet.).

Notwithstanding the trial court's decision to grant the State's motion to enter a judgment nunc pro tunc, we must glean its original intent by reviewing the entire record. On multiple occasions, the State and the trial court (orally and in writing) denominated the charge as "aggravated assault-bodily injury." During the hearing on final adjudication of guilt, the trial court asked appellant if he was the same person charged with "aggravated assault-bodily injury." Moreover, any doubt regarding the trial court's original intent is removed by its express finding of "N/A" on the original judgment. The deadly weapon finding was within the trial court's discretion and required judicial reasoning; accordingly the "N/A" entry was not merely a clerical error. *Johnson*, 233 S.W.3d at 428. Based on this record, we cannot conclude that the trial court's inscription of "N/A" in the judgment under the topic "Findings on a Deadly Weapon" was simply a clerical error, particularly when coupled with a record that indicates the judge was operating under the assumption that appellant had pleaded no contest to aggravated assault – serious bodily injury. Again, we find no basis in this record for the State's contention that in contemplating the merits of the State's motion for entry of judgment nunc pro tunc, the trial judge independently recalled his intent to enter a deadly-weapon finding when he adjudicated appellant's guilt.

We acknowledge that on the day the trial court signed the judgment nunc pro tunc it retained plenary power over the case. We are also cognizant of authority supporting the contention that a trial court, in exercise of its plenary power, may vacate, modify or amend certain of its own rulings. *See Awadelkariem v. State*, 974 S.W.2d 721, 728 (Tex. Crim. App. 1998) (determining trial court had authority to rescind order granting new trial). There is ample authority supporting the contention that the trial court may modify or amend the defendant's sentence while it has plenary power over a case. *See State v. Aguilera*, 165 S.W.3d 695, 697–98 (Tex. Crim. App. 2005) (explaining trial courts have plenary power to modify a sentence); *Junious v. State*, 120 S.W.3d 413, 417 (Tex. App.—Houston [14th Dist.] 2003 pet. ref'd) (holding, notwithstanding erroneous grant of partial new trial pertaining to punishment, trial court properly exercised plenary power to



alter sentence); *Ware v. State*, 62 S.W.3d 344, 353–55 (Tex. App.—Fort Worth 2001, pet. ref’d) (holding trial court had inherent power to correct judgment).

However, enhancement findings are made and entered during final adjudication of guilt, and we have not identified any authority supporting the contention that the trial court may alter or amend enhancement findings without granting a motion for new trial. Here, the State merely requested that the trial court correct a clerical error. Accordingly, under the unique circumstances presented in this case, we conclude the trial court acted to correct judicial errors and omissions; in fact, it appears as though the trial court changed its record to reflect what it believed should have been done, not to what actually occurred. *See Collins*, 240 S.W.3d at 928 (“The trial court cannot, through a judgment nunc pro tunc, change a court’s records to reflect what it believes should have been done.”). The trial court was not authorized to enter the judgment nunc pro tunc. *See Dopps*, 723 S.W.2d at 671. We sustain appellant’s sole issue.

Having sustained appellant’s issue, we order the judgment nunc pro tunc vacated and set aside. We further order the original judgment and sentence reinstated. We affirm the original judgment of the trial court.

/s/ Charles W. Seymore  
Justice

Panel consists of Justices Anderson, Frost, and Seymore.(Frost, J., dissenting.)

Publish — Tex. R. App. P. 47.3(b).