Affirmed and Memorandum Opinion filed March 22, 2011

In The

Fourteenth Court of Appeals

NO. 14-09-00743-CR

MICHAEL DEWAYNE THOMPSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1154570

MEMORANDUM OPINION

In this appeal from an adjudication of guilt, the appellant, Michael Dewayne Thompson, contends that he never stipulated in his "guilty" plea to possession of cocaine "with intent to deliver" and therefore his forty-five-year sentence exceeded the appropriate range of punishment. We affirm.

I

In February 2008, the appellant was charged with the felony offense of possession with intent to deliver cocaine weighing at least 400 grams. The State later reduced the offense to possession with intent to deliver cocaine weighing 4 to 200 grams, a first-

degree-felony offense. The appellant pleaded "guilty" to the charge. The trial court deferred proceedings without entering an adjudication of guilt, placed the appellant on community supervision for seven years, and assessed a fine of $300.

In November 2008, the State moved to adjudicate guilt. In July 2009, the State amended its motion to adjudicate and the appellant pleaded "not true" to the motion. After a hearing, the trial court found the appellant had violated the terms and conditions of community supervision, granted the State's motion to adjudicate guilt, found the appellant guilty of possession with intent to deliver cocaine, weighing 4 to 200 grams, and sentenced appellant to forty-five years' confinement in the Texas Department of Criminal Justice, Institutional Division. This appeal followed.

II

In a single issue, the appellant contends he stipulated to possession of cocaine weighing 4 to 200 grams, but he did not stipulate to intent to deliver, and therefore his forty-five-year sentence exceeded the maximum punishment of twenty years for the second-degree felony of possession.[1]

Prior to accepting a plea of "guilty," the trial court must admonish the defendant of the range of punishment attached to the offense. Tex. Code Crim. Proc. art. 26.13(a)(1). Substantial compliance is sufficient unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or

[1] Within this issue, the appellant also claims the trial court's failure to admonish him of the correct range of punishment, as required by article 26.13 of the Code of Criminal Procedure, means his plea was obtained in violation of the Due Process Clause of the Fifth Amendment. Because the appellant never stipulated to possession with intent to deliver, he maintains, his "guilty" plea was not "freely, voluntarily or knowingly" given. To the extent the appellant contends his plea was involuntary, we may not address his complaint in this appeal. Under Texas law, a judge may defer the adjudication of guilt of particular defendants and place them on "community supervision" if they plead "guilty" or "nolo contendere." Tex. Code Crim. Proc. art. 42.12 § 5(a). If such a defendant wishes to raise issues related to his "guilty" plea or deferred adjudication, he must do so on direct appeal from the deferred-adjudication order immediately after it is imposed; he may not wait until after he violates the terms of his probation and is found guilty. *See Manuel v. State*, 994 S.W.2d 658, 661–62 (Tex. Crim. App. 1999).

harmed by the admonishment of the court. *Id.* art. 26.13(c). An affirmative showing requires more the appellant's "bare, subjective assertion" in his appellate brief that he did not know the correct range of punishment, that he would not have entered the plea in question had he been correctly admonished, or that he was misled or harmed by the trial court's admonishment. *Grays v. State*, 888 S.W.2d 876, 878 (Tex. App.—Dallas 1994, no pet.).

In this case, there is no more than a "bare, subjective assertion" in the appellant's brief concerning the alleged excessive punishment, and it is contradicted by the record. To support his assertion that he pleaded "guilty" only to the second-degree offense of possession of 4 to less than 200 grams of cocaine, the appellant points to the following handwritten notation on his plea agreement: "I hereby admit, agree, and stipulate that, on the above date, I intentionally and knowingly possessed the 22 grams of cocaine seized after that amount was observed thrown by my hand." The appellant also stipulated that he was not in possession of 564 grams of cocaine recovered from the bedroom of a residence or another 125 grams of cocaine found in a shoebox. The appellant contends that this shows that he stipulated only to possession—but not intent to deliver—and therefore his sentence exceeded the twenty-year maximum for a second-degree felony offense.

The entirety of the record, however, does not support the appellant's assertion. The plea agreement, entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," reflects the State's motion to reduce the offense to the first-degree felony offense of possession with intent to deliver cocaine weighing 4 grams or more but less than 200 grams. The appellant also confessed, "I understand the above allegations and I confess that they are true and that the acts alleged above were committed on February 19, 2008." In context, it is apparent that the appellant's handwritten statements were directed to the amount of cocaine possessed, and simply did not address the intent-to-deliver allegation. Moreover, the appellant expressly denied

possessing greater quantities of cocaine, but he did not expressly deny that he possessed the lesser amount of cocaine "with intent to deliver."

Further, the written admonishments, which the appellant signed, provide that he is "charged with the felony offense of PCS wID 4-200 g" with the following range of punishment:

> FIRST DEGREE FELONY: a term of life or any term of not more than 99 years or less than 5 years in the Institutional Division of the Texas Department of Criminal Justice, and in addition, a fine not to exceed $10,000.00 may be assessed; if enhanced with one prior felony conviction, a term of life or any term of not more than 99 years or less than 15 years in the Institutional Division of the Texas Department of Criminal Justice, and in addition, a fine not to exceed $10,000.00 may be assessed[.]

Similarly, the Order of Deferred Adjudication recites that the appellant entered a plea of "guilty" to the offense of "POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE 4-200 GRAMS, NAMELY COCAINE," a "1ST DEGREE FELONY." The "Conditions of Community Supervision," which the appellant also signed, recites that the appellant was "granted 7 years community supervision for the felony offense of Possession With Intent [to] Deliver A Controlled Substance."

The State's original and amended motions to adjudicate guilt also recited that the appellant "entered a plea of guilty for the felony offense of "POSSESSION WITH INTENT [TO] DELIVER A CONTROLLED SUBSTANCE." At the start of the trial on the State's motion, the appellant's counsel questioned him as follows:

> [Defense counsel]: You're before the Court, you understand, charged with a motion to adjudicate, a first-degree felony offense; is that right?
>
> [The appellant]: Yes, ma'am.
>
> [Defense counsel]: You understand the punishment range is 5 to 99 or life in this case; is that correct?

[The appellant]: Yes, ma'am.

Consistent with the appellant's understanding, the trial court's judgment recites that the trial court found the appellant guilty of "POSSESSION WITH INTENT TO DELIVER COCAINE 4 <200 GRAMS," a "1ST DEGREE FELONY."

It is evident from the record that all of the parties below, including the appellant, understood that he was pleading "guilty" to a first-degree felony offense of possession "with intent to deliver." Contrary to the appellant's assertion in his appellate brief, his stipulation is not inconsistent with this plea and does not invalidate it. This court is not required to accept as fact allegations or assertions in an appellant's brief which are not supported by the record. *See Beck v. State*, 573 S.W.2d 786, 788 (Tex. Crim. App. 1988); *Grays*, 888 S.W.2d at 878. The trial court properly admonished the appellant concerning the range of punishment for the first degree felony offense of possession with intent to deliver cocaine in an amount weighing 4 grams or more but less than 200 grams, and the appellant's forty-five-year sentence did not exceed the maximum sentence. We therefore overrule the appellant's issue.

* * *

The trial court's judgment is affirmed.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Frost, and Brown.
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