Dismissed and Memorandum Opinion filed August 18, 2022.

In The

Fourteenth Court of Appeals

NO. 14-20-00717-CR

THE STATE OF TEXAS, Appellant

V.

JOHNNY EARNESTO ORTIZ, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 2255605

MEMORANDUM OPINION

Appellee pleaded guilty to "driving while intoxicated—second offense" and the trial court assessed punishment at one year in county jail, "probated" to one year of community supervision. The trial court credited appellee three days as time served in jail. On appeal, the State argues that appellee did not have such a credit available to "apply toward his sentence." The State appeals pursuant to Code of Criminal Procedure article 44.01(b) which entitles the State "to appeal a sentence in a case on the ground that the sentence is illegal." We conclude that

time credit is not a part of the "sentence" as that term is defined and, therefore, we lack jurisdiction to address the merits of the State's appeal.

I. BACKGROUND

The trial court's September 4, 2020 judgment reflects that appellee pleaded guilty to the offense and provided for the terms of the plea bargain. The punishment and place of confinement is one year in the county jail, but appellee's sentence of confinement was suspended while appellee was placed on community supervision for one year. The judgment further provides that he had a time credit of three days toward his sentence in county jail.

Following the judgment, the State filed on September 20, 2020 a "motion for judgment nunc pro tunc" requesting that the trial court correct the judgment to reflect that appellee had not served three days and did not have a time credit of three days as provided in the judgment.[1] There is no evidence of presentment in the appellate record, no ruling by written order in the appellate record, and no reporter's record of any hearing on the State's motion.

II. JURISDICTION

On appeal the State argues that appellee's sentence is illegal because it provides an "unearned credit" toward appellee's sentence and is, therefore, contrary to and unauthorized by law. The State argues that the time credit portion of the judgment is part of the "sentence" as that term is defined under the Code of Criminal Procedure and relevant case law interpreting the term "sentence."

"The State has no right to appeal in criminal cases unless it is authorized by statute." *State v. Yakushkin*, 625 S.W.3d 552, 558 (Tex. App.—Houston [14th

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[1] The State's "motion for judgment nunc pro tunc" was filed within the time for the State to file a motion for new trial on punishment. *See* Tex. R. App. P. 21.4.

Dist.] 2021, pet. ref'd) (citing Tex. Const. art. V, § 26). "The State is granted the right of appeal by Texas Code of Criminal Procedure article 44.01." *Id.* Under article 44.01(b) of the Code of Criminal Procedure, the "state is entitled to appeal a sentence in a case on the ground that the sentence is illegal." Tex. Code Crim. Proc. art. 44.01(b).

Appellate jurisdiction to determine whether a sentence is illegal "does not hinge on the legality of [the] sentence," but instead, "whether the State appeals a *sentence*." *State v. Ross*, 953 S.W.2d 748 749–50 (Tex. Crim. App. 1997). To properly invoke appellate jurisdiction under article 44.01(b), "the State must appeal the sentence and not something that merely affects the sentence." *State v. Wilson*, 349 S.W.3d 618, 619 (Tex. App.—Texarkana 2011, no pet.) (citing *Ross*, 953 S.W.2d at 750). Only once an appellate court "determines that the State is appealing a sentence and not something else, jurisdiction is properly invoked and questions of legality can be addressed on their merits." *Ross*, 953 S.W.2d at 750.

The sentence is only a *part* of the judgment. *See id.*; *Wilson*, 349 S.W.3d at 619. "The sentence is that part of the judgment . . . that orders that the punishment be carried into execution in the manner prescribed by law." Tex. Code Crim. Proc. art. 42.02. "The plain language thus indicates that a sentence is nothing more than the portion of the judgment setting out the terms of the punishment."[2] *Ross*, 953 S.W.2d at 750. While some things in a judgment may affect a sentence, like a deadly weapon finding, they "in no way become a 'sentence' as defined by the legislature." *Id.* at 751. Instead, the "sentence" consists of "the facts of the punishment itself, including the date of commencement of the sentence, its

[2] The *Ross* court then posited an example: "the sentence in this case would include the facts that appellant is to serve sixteen years in the penitentiary beginning July 28, 1995, that his term is concurrent and that he must pay a $500 fine. It would not incorporate . . . those aspects of the judgment merely affecting those facts." *Ross*, 953 S.W.2d at 750.

duration, and the concurrent or cumulative nature of the term of confinement and the amount of the fine, if any." *State v. Kersh*, 127 S.W.3d 775, 777 (Tex. Crim. App. 2004).

For this court to have jurisdiction under article 44.01(b), the time credited portion of the judgment must be part of the "sentence." Here, the State does not contend that appellee's one-year probated sentence is illegal—that it falls outside the maximum or minimum range of punishment. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (sentence outside the maximum or minimum range is illegal). Instead, the State argues that the trial court should not have credited three days to appellee in the judgment and that because the trial court is not authorized by law to credit unearned jail time, the sentence is illegal. *See State v. Baize*, 981 S.W.2d 204, 206 (Tex. Crim. App. 1998) (en banc) ("The State . . . contends that the plain meaning of 'illegal' is 'not according to or authorized by law.' From this it reasons that because the trial court's assessment of punishment was not according to or authorized by [law], an illegal sentence resulted. The State's analysis is flawed . . . .").

The State cites to *Ex parte Hayward* to support its argument that unearned jail time credit is part of the "sentence." 711 S.W.2d 652, 656 (Tex. Crim. App. 1986). However, in *Hayward* the State was not appealing under article 42.02(b) of the Code of Criminal Procedure—instead the convicted defendant filed a post-conviction writ of habeas corpus arguing that the judgment of conviction against him was void because it credited him unearned jail time. *Id.* at 653. The court in *Hayward* did not consider whether the time credit portion of a judgment is part of the "sentence" and that question was not before the court. *See id.* Instead, the court held that "the law does not authorize a court to give credit for non-custody time . . . [t]he trial court acted beyond its authority." *Id.* at 656. Thus we conclude

Hayward is unhelpful in deciding this issue because it involved an application for a writ of habeas corpus, brought by a defendant, and the court was not presented with and did not answer the question of whether time-credited is part of the "sentence."

The State also argues that "the date of commencement" is considered part of the "sentence" and that because "any credit for time served" is included with the date of commencement when listed in article 42.01, credit for time served is also properly considered part of the "sentence." *See* Tex. Code Crim. Proc. art. 44.02, § 18; *see also Kersh*, 127 S.W.3d at 777 ("We also noted that article 42.01 sets forth the elements of a proper judgment, and that deadly-weapon findings are 'listed separately from the portions regarding sentence.' For these reasons, we held that a deadly-weapon finding is not part of the sentence . . . ."). However, article 42.03 provides that "in all cases the judge of the court in which the defendant is convicted shall give the defendant credit *on the defendant's sentence* for the time spent . . . in jail." Tex. Code Crim. Proc. art. 42.03, § 2(a)(1); *see also Wilson*, 349 S.W.3d at 621 (considering article 42.03 and noting that the "language differentiates the sentence itself from credit given on the sentence"). The State's own argument recognizes this inherently when the State argues that appellee did not have time credit to "apply *toward* his sentence."

Duration of the punishment assessed is part of the sentence. *Kersh*, 127 S.W.3d at 777. Whether such duration is outside of the range of that authorized by law, and thus an illegal sentence, is determined without reference to any time credited. It would follow that time credited merely affects the sentence and is not part of the sentence itself. In *Ross*, the court explicitly rejected the State's argument that the "sentence" includes any aspect of the judgment that *affects* the sentence. *See Ross*, 953 S.W.2d at 750–51. The court concluded that this was an

unworkable interpretation because "almost everything in the judgment affects the 'sentence,' including the jury verdict." *See id*. at 750. "Like the jury verdict and the offense for which a defendant is convicted, a deadly weapon finding also impacts the sentence. Yet to consider any of these findings as part of the 'sentence' disregards the fact that the legislature has narrowed, not broadened, the definition of 'sentence.'" *Id*. at 751. "Even though the judgment must address any credit for time served, such credit does not reflect the actual terms or facts of punishment as we understand . . . *Ross*." *Wilson*, 349 S.W.3d at 620.

III. CONCLUSION

We conclude that the State is not appealing the sentence on the grounds that it was illegal. *See* Tex. Code Crim. Proc. art. 44.01(b). This court is without jurisdiction to hear the State's appeal. Accordingly, we dismiss this appeal for want of jurisdiction.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Spain, and Hassan.

Do Not Publish — TEX. R. APP. P. 47.2(b).