



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00708-CR

Louis Angelo **DAVILA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 81st Judicial District Court, Atascosa County, Texas
Trial Court No. 08-01-0031-CRA
Honorable Donna S. Rayes, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: September 13, 2017

AFFIRMED IN PART, REVERSED AND REMANDED IN PART

Louis Angelo Davila appeals from a judgment revoking his deferred adjudication community supervision, adjudicating him guilty of the offense of aggravated assault, and sentencing him to twenty years in prison. Because we conclude the trial court erred by failing to consider the entire range of punishment, we reverse the portion of the judgment assessing punishment and remand this case to the trial court for a new sentencing hearing. We affirm the judgment in all other respects.

BACKGROUND

Davila was indicted for aggravated assault, a second degree felony. Included in the indictment was an allegation that Davila had a prior conviction for the felony offense of burglary of a habitation. After Davila pleaded nolo contendere to the charge in the indictment, the trial court deferred adjudication and placed Davila on community supervision for a period of eight years. Subsequently, the State filed a motion to revoke Davila's community supervision and to adjudicate guilt. Davila pleaded "true" to one of the violations in the State's motion to revoke, but the parties did not reach an agreement on punishment. After holding a punishment hearing, the trial court sentenced Davila to twenty years in prison. The trial court signed a judgment revoking Davila's community supervision, adjudicating him guilty of the offense of aggravated assault, and sentencing him to twenty years in prison. This appeal followed.¹

DISCUSSION

In his first issue, Davila argues that the trial court erred by failing to consider the entire range of punishment and, therefore, the portion of the judgment sentencing him to twenty years in prison must be reversed and this case remanded to the trial court for re-sentencing. The State agrees that the record shows that the trial court, the prosecutor, and Davila's trial counsel all thought that Davila was subject to a fifteen-year minimum sentence when Davila was in fact subject to a five-year minimum sentence. The State agrees that the trial court did not consider the full range of punishment and, therefore, Davila is entitled to a new sentencing hearing. Notwithstanding the State's concessions, we are required to independently examine the merits of Davila's claim of error. *See Saldano v. State*, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002) (explaining that a confession of error by the State is important but not conclusive in deciding an appeal).

¹Davila did not timely appeal the trial court's judgment; however, he was granted an out-of-time appeal by the Texas Court of Criminal Appeals.

The Texas Court of Criminal Appeals has acknowledged that a trial court's arbitrary refusal to consider the entire range of punishment constitutes a denial of due process. *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). "The unfettered right to be sentenced by a sentencing judge who properly considers the entire range of punishment is a substantive right necessary to effectuate the proper functioning of our criminal justice system." *Id.* at 741. Furthermore, the trial court has an independent duty to implement this right unless there is an effective express waiver. *Id.*

Here, the trial court adjudicated Davila guilty of the offense of aggravated assault, a second degree felony. The record does not show that Davila engaged in any conduct that would have elevated this offense from a second degree felony to a first degree felony. However, the record does show that the indictment alleged that Davila had a prior felony conviction for burglary of a habitation. Davila's prior conviction elevated his punishment range to that of a first degree felony. *See* TEX. PENAL CODE ANN. § 12.42 (West Supp. 2016); *Ford v. State*, 334 S.W.3d 230, 234 (Tex. Crim. App. 2011) (noting that section 12.42 of the Texas Penal Code increases the range of punishment applicable to the primary offense, but it does not increase the severity level or grade of the primary offense). The range of punishment for a first degree felony is imprisonment for life or for any term of not more than ninety-nine years or less than five years. *See* TEX. PENAL CODE ANN. § 12.32 (West 2011). Therefore, the proper range of punishment for Davila was imprisonment for life or for any term between ninety-nine and five years.

The record indicates that the trial court mistakenly believed that Davila faced a fifteen-year minimum sentence, when he actually faced a five-year minimum sentence. At the revocation hearing, the trial court twice told Davila that the range of punishment for the offense in question was not less than *fifteen* nor more than ninety-nine years or life in prison. Neither the prosecutor nor defense counsel corrected the trial court's erroneous statements. At the punishment hearing,

the prosecutor referred to the proper punishment range, but the trial court did not indicate that it understood the proper punishment range, nor did it make any other statements about the punishment range. The trial court sentenced Davila to twenty years in prison. Based on this record, we conclude the trial court erred by failing to consider the entire range of punishment.

Next, we consider whether Davila was harmed by the error. The error in question is non-constitutional in nature. *See Grado v. State*, No. 07-11-00468-CR, 2013 WL 3355743, at *5 (Tex. App.—Amarillo June 28, 2013), *aff'd*, 445 S.W.3d 736 (Tex. Crim. App. 2014). Under Rule 44.2(b) we must disregard non-constitutional error unless it affected the appellant's substantial rights. TEX. R. APP. P. 44.2(b). However, when we have a "grave doubt" that the result was free from the substantial influence of the error, then we must treat the error as if it did affect the appellant's substantial rights. *Burnett v. State*, 88 S.W.3d 633, 637-38 (Tex. Crim. App. 2002).

The trial court sentenced Davila to twenty years, which was only five years above what it thought was the minimum sentence. Thus, the trial court sentenced Davila at the low end of the punishment range. In addition, the trial court had previously placed Davila on deferred adjudication for eight years. Under these circumstances, we have a grave doubt that Davila's sentence was free from the substantial influence of the error. *See id.* "We cannot say that the trial court would not have assessed a lesser sentence had the full range of punishment been properly understood and considered." *Grado*, 2013 WL 3355743, at *5. We, therefore, conclude the error in failing to consider the entire range of punishment was harmful. We sustain Davila's first issue.

Having sustained Davila's first issue, we need not address Davila's second issue in which he argues that his trial counsel was ineffective by failing to object to the trial court's mistaken belief that Davila faced a fifteen-year minimum sentence instead of a five-year minimum sentence. *See* TEX. R. APP. P. 47.1 (providing that appellate courts must issue an opinion that is as brief as practicable while addressing every issue raised and necessary to the final disposition of the appeal).

CONCLUSION

The portion of the judgment assessing punishment is reversed, and this case is remanded to the trial court for a new sentencing hearing. The judgment is affirmed in all other respects.

Karen Angelini, Justice

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