

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00086-CR

NO. 09-09-00087-CR

NO. 09-09-00088-CR

NO. 09-09-00090-CR

RODRICK FRANCIS HARTFIELD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court

Jefferson County, Texas

Trial Cause Nos. 07-02428, 07-02429, 08-03124 and 08-04101

MEMORANDUM OPINION

In these appeals from the revocation of his deferred adjudication community supervision and the imposition of sentence in four cases, Hartfield contends the trial court erred by ordering his sentences to run consecutively. In the first two cases, we affirm the trial court's judgments. We modify the trial court's judgments by deleting the cumulation orders in the two remaining cases and affirm the trial court's judgments as modified.

Pursuant to plea bargain agreements, appellant Rodrick Francis Hartfield pleaded guilty to possession of a prohibited weapon, burglary of a habitation, and two charges of engaging in organized criminal activity. The trial court found the evidence sufficient to find Hartfield guilty in each case, but deferred further proceedings and placed Hartfield on community supervision. The State subsequently filed a motion to revoke Hartfield's unadjudicated community supervision in each case. Hartfield entered a plea of "true" to one violation of the conditions of his community supervision in all four cases.

The trial court held a revocation and sentencing hearing in each case approximately one month later. In each case, the trial court found that Hartfield violated the conditions of his community supervision and found him guilty. In the possession of a prohibited weapon case (trial cause number 07-02428), the trial court assessed punishment at ten years of confinement. In the burglary of a habitation case, the trial court assessed punishment at twenty years of confinement and ordered that the sentence would run consecutively to the sentence in the possession of a prohibited weapon case. In the first engaging in organized criminal activity case (trial cause number 08-03124), the trial court assessed punishment at ten years of confinement and ordered that the sentence would run consecutively to the sentence in the burglary of habitation case. In the second engaging in organized criminal activity case (trial cause number 08-04101), the trial court assessed punishment at ten years of confinement and ordered that the sentence would run consecutively to the sentence in the

first engaging in organized criminal activity case (cause number 08-3124). Hartfield then filed these appeals, in which he contends that the trial court erred in ordering his sentences to run consecutively because his cases arose from the same criminal episode and were prosecuted in a single criminal action. *See* TEX. PEN. CODE ANN. § 3.03 (Vernon Supp. 2009).

Section 42.08 of the Code of Criminal Procedure grants the trial court the authority to order sentences to run consecutively or concurrently. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08 (Vernon Supp. 2009). However, the trial court’s discretion is limited by section 3.03 of the Penal Code, which provides as follows: “When the accused is found guilty of more than one offense *arising out of the same criminal episode prosecuted in a single criminal action*, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b),¹ the sentences shall run concurrently.” TEX. PEN. CODE ANN. § 3.03(a) (emphasis added).

We must first determine whether the offenses with which Hartfield was charged arose from the same criminal episode. A “criminal episode” is the commission of two or more offenses committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan or if “the offenses are the repeated

¹ Subsection (b) is not applicable to the instant case. *See* TEX. PEN. CODE ANN. § 3.03(b).

commission of the same or similar offenses.” TEX. PEN. CODE ANN. § 3.01(1)(2) (Vernon 2003).

As previously discussed, Hartfield was charged with possession of a prohibited weapon, burglary of a habitation, and two charges of engaging in organized criminal activity.² The State alleged that the possession of a prohibited weapon charge and the burglary of a habitation charge both occurred on or about November 9, 2007. With respect to both of the engaging in organized criminal activity charges, the State alleged that Hartfield “did then and there with the intent to establish, maintain, and participate in a combination and in the profits of a combination, collaborate in carrying on criminal activities by committing the offense of” burglary of a building. The State alleged that one of the charges occurred on or about January 22, 2008, and that the other occurred on or about January 13, 2008. We find that the burglary of a habitation charge, as well as the two charges of engaging in organized criminal activity, were repeated commission of the same or similar offenses and, therefore, constitute the same criminal episode. *See* TEX. PEN. CODE ANN. § 3.01.

The issue of whether the possession of a prohibited weapon charge was also part of the same criminal episode presents a somewhat more difficult question. As previously stated, the weapon offense occurred on the same day as the burglary of a habitation charge, but did

² Hartfield also appealed his conviction for burglary of a building in trial cause number 08-03945, and we address that appeal (No. 09-09-089-CR) in a separate opinion.

not occur on the same date as any of the other charges. However, the record before us does not reveal whether Hartfield committed the possession of a prohibited weapon offense pursuant to the same transaction or pursuant to two or more transactions that were connected or constitute a common scheme or plan. *See id.* The pre-sentence investigation report in the possession of a prohibited weapon case indicates that two stolen firearms were found in the trunk of Hartfield's vehicle, while the prohibited weapon (a sawed-off twelve-gauge shotgun) was found under the seat of Hartfield's vehicle. The pre-sentence report in the burglary of a habitation case does not connect the possession of the prohibited weapon to the burglary of a habitation. In addition, possession or use of a weapon is not one of the elements of the offense of burglary. *See* TEX. PEN. CODE ANN. § 30.02 (Vernon 2003). Therefore, we determine that on this record, the possession of a prohibited weapon offense was not part of the same criminal episode as the other offenses. Accordingly, the general provision in section 3.03(a) concerning offenses arising from the same criminal episode did not apply, and the trial court was authorized to order another offense to run consecutively to the possession of a prohibited weapon offense. *See id.* § 3.01 (Vernon 2003), § 3.03 (Vernon Supp. 2009); *see also id.* § 30.02 (Vernon 2003).

With respect to the burglary of a habitation and engaging in organized criminal activity charges, we now turn to the issue of whether Hartfield was prosecuted in a single criminal action. The Court of Criminal Appeals has explained that "a defendant is

prosecuted in ‘a single criminal action’ whenever allegations and evidence of more than one offense arising out of the same criminal episode . . . are presented in a single trial or plea proceeding, whether pursuant to one charging instrument or several, and the provisions of Section 3.03 then apply.” *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992). Offenses are not prosecuted in a single criminal action when the trial court calls each case separately and deals with each individually even if one case is called immediately after the other. *Ex parte Pharr*, 897 S.W.2d 795, 796 (Tex. Crim. App. 1995). “[W]hen the record does not show that each case was dealt with separately, but instead reflects that multiple cases were considered together, the offenses are considered as having been prosecuted in a single criminal action.” *Green v. State*, 242 S.W.3d 215, 220 (Tex. App.--Beaumont 2007, no pet.) (citing *Polanco v. State*, 914 S.W.2d 269, 271-72 (Tex. App.--Beaumont 1996, pet. ref’d)).

During the hearing at which the trial court revoked Hartfield’s community supervision in each case, adjudicated him guilty, and assessed punishment, the trial court initially called trial cause number 07-02428 (the possession of a prohibited weapon case). The trial judge noted that Hartfield had five cases, and asked counsel, “[A]re your comments going to be applicable to each case?” Trial counsel responded “Yes, Your Honor.” Hartfield’s counsel then argued various factors in mitigation of punishment, including Hartfield’s youth, family

support system, and lack of a juvenile record, and the Court engaged in an extended colloquy with Hartfield.

At one point during the Court's exchange with Hartfield, the Court stated, "you are exposed to . . . 52 years in the penitentiary, and what I'm trying to do is get a read for you, because if I continue down the road I'm going down, you are going to get the higher end of that. And right now I don't have a real good feel for you." Hartfield then mentioned the burglary of a habitation case and stated that he helped friends and family with the property he stole. The trial court asked the prosecutor for his response, and, without specifying to which case he was referring, the prosecutor said, "[The] State asks for revocation, Your Honor." Based upon the transcript, we surmise that the State desired revocation of the deferred adjudication orders in all of Hartfield's cases.

The trial court then called cause number 07-02428 again, stated that he found the evidence sufficient to find count one of the motion to revoke true, revoked Hartfield's unadjudicated community supervision, found him guilty of possession of a prohibited weapon, and assessed punishment at ten years of confinement. The trial court then called cause number 07-02429, stated that he found the evidence sufficient to find count one of the motion to revoke true, revoked Hartfield's unadjudicated community supervision, found him guilty of burglary of a habitation, assessed punishment at twenty years of confinement, and ordered that the sentence would run consecutively to the sentence in cause number 07-02428.

The trial court next called cause number 08-03124, stated that he found the evidence sufficient to find count one of the motion to revoke true, revoked Hartfield's unadjudicated community supervision, found him guilty of engaging in organized criminal activity, assessed punishment at ten years of confinement, and ordered that the sentence would run consecutively to the sentence in cause number 07-02429. Lastly, the trial court called cause number 08-04101, stated that he found the evidence sufficient to find count one of the motion to revoke true, revoked Hartfield's unadjudicated community supervision, found Hartfield guilty of engaging in organized criminal activity, assessed punishment at ten years of confinement, and ordered that the sentence would run consecutively to the sentence in cause number 08-03124.

Although the trial court began the revocation and sentencing hearing by calling the possession of a prohibited weapon case, the trial court conducted the remainder of the hearing jointly. The transcript of the hearing demonstrates that the trial court asked defense counsel whether his arguments would pertain to all of Hartfield's cases and then accepted counsel's arguments that pertained to every case. In addition, during its extended colloquy with Hartfield, the trial court discussed the total range of punishment facing Hartfield if all of the sentences were to run consecutively. Furthermore, the State simply requested revocation without specifying to which case it was referring.

When plea proceedings “are conducted in a manner that they are ‘so intertwined that we are left only to conclude they are a single criminal action[,]’ a court may not order consecutive sentences.” *Green*, 242 S.W.3d at 220 (quoting *Polanco*, 914 S.W.2d at 272). We conclude that the trial court conducted the punishment hearings in all four cases in a single proceeding, and was not authorized to cumulate the sentences that arose from a single criminal episode. *See* TEX. PEN. CODE ANN. § 3.03.

Because the possession of a prohibited weapon offense was not part of the same criminal episode as the other offenses, the trial court was authorized to order that Hartfield’s sentence in the burglary of a habitation case run consecutively to it.³ *See id.* Accordingly, we affirm the trial court’s judgments in the possession of a prohibited weapon case (trial cause number 07-02428) and the burglary of a habitation case. However, because the burglary of a habitation case and the two engaging in organized criminal activity offenses were part of the same criminal episode, and the trial court conducted a joint revocation and punishment hearing, section 3.03 prohibits the trial court from ordering the sentences to run consecutively. *See id.* Accordingly, we modify the trial court’s judgment in the first engaging in organized criminal activity case (trial cause number 08-03124) to state, “THIS SENTENCE SHALL RUN CONCURRENTLY” and by deleting the trial court’s cumulation

³ In his brief in the possession of a prohibited weapon case, Hartfield argues that the trial court ordered that case to run consecutively to the burglary of a habitation case. However, the record does not support Hartfield’s contention. The trial court’s judgment in the possession of a prohibited weapon case does not contain a cumulation order. The trial court ordered the burglary of a habitation case to run consecutively to the weapon case, not vice versa as Hartfield contends.

order, which provides that the sentence will not commence until Hartfield's sentence in the burglary of a habitation case has ceased to operate. For the same reasons, we modify the trial court's judgment in the second engaging in organized criminal activity case (trial cause number 08-04101) to state, "THIS SENTENCE SHALL RUN CONCURRENTLY" and by deleting the trial court's cumulation order, which provides that the sentence will not commence until Hartfield's sentence in the first engaging in organized criminal activity case (trial cause number 08-03124) has ceased to operate.

AFFIRMED IN PART; AFFIRMED AS MODIFIED IN PART.

STEVE McKEITHEN
Chief Justice

Submitted on November 12, 2009
Opinion Delivered February 24, 2010
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Before McKeithen, C.J., Gaultney and Kreger, JJ.