In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00259-CR

JOHN PATRICK RAGER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 08-05084

MEMORANDUM OPINION

Pursuant to a plea bargain agreement, John Patrick Rager pleaded guilty to the offense of theft of service. *See* Tex. Penal Code Ann. § 31.04 (West 2011). The trial court found the evidence sufficient to find Rager guilty, but deferred further proceedings and placed Rager on community supervision for ten years with an undetermined amount of restitution. The record indicates that the trial court subsequently ordered Rager to pay $240,140.77 in restitution as a condition of his community supervision.

The State filed a motion to revoke Rager's community supervision, claiming Rager violated the terms of his community supervision. Rager pleaded "true" to violating a condition of his community supervision by failing to pay the required restitution payments. The trial court accepted the plea of "true," but allowed Rager three months to pay the required restitution.

At a hearing almost three months later, Rager's community supervision officer testified Rager was not current with the required restitution payments. The trial court found the evidence to be sufficient to revoke Rager's community supervision, found Rager guilty of theft of service, and assessed punishment at ten years' confinement. However, after speaking with defense counsel, the trial court immediately recalled the case, reinstated Rager on unadjudicated community supervision, and reset the hearing on the motion to revoke to permit Rager to pay the required restitution.

At a hearing approximately six months later, Rager admitted he was delinquent on his restitution payments. The trial court found that Rager violated a condition of his unadjudicated community supervision, revoked Rager's community supervision and found Rager guilty of theft of service. This time the trial court assessed punishment at fifteen years' confinement and ordered Rager to pay $238,595.77 in restitution. On appeal, Rager challenges the amount of restitution assessed by the trial court and the fifteen-year sentence assessed by the trial court.

Rager's second issue requires that we order a new sentencing hearing. In issue two, Rager argues that his sentence is invalid because it exceeded the statutory ten-year maximum for a third-degree felony. The caption of the indictment indicates that Rager was indicted for "Theft of Service" and then states "2nd Degree Felony[.]" The body of the indictment alleges a third-degree felony, however. *See* Tex. Penal Code Ann. § 12.34 (West 2011)[1] (punishment for a third-degree felony is confinement for not more than ten years or less than two years, and possible fine up to $10,000); *see also* Tex. Penal Code Ann. § 31.04(e)(5) (Theft of service is a third-degree felony where the "value of the service stolen is $20,000 or more but less than $100,000.").

Captions and other identifying information are not part of the indictment. *See Stansbury v. State*, 128 Tex. Crim. 570, 574, 82 S.W.2d 962, 968 (1935); *Adams v. State*, 222 S.W.3d 37, 53 (Tex. App.—Austin 2005, pet. ref'd). Where the caption lists a different offense from the one alleged in the body of the indictment, the body controls. *See Adams*, 222 S.W.3d at 52-53; 41 George E. Dix et al., *Texas Practice: Criminal Practice and Procedure* § 20.62 (2d ed. 2001) ("If . . . the caption identifies the charged offense as one different than what is actually charged in the charging instrument proper, this is of no significance. It does not constitute a defect in the charging instrument, nor does it give rise to some sort of fatal variance when the proof at trial shows the offense charged in the instrument proper rather than the offense specified by name in the

[1]Because amended section 12.34 contains no material changes applicable to the case, we cite to the current version of the statute.

caption."). In this case, the State concedes that the trial court was limited to assessing punishment for the third-degree offense.

A sentence not authorized by law is illegal. *See Ex parte Pena*, 71 S.W.3d 336, 336 n.2 (Tex. Crim. App. 2002) (per curiam); *Levy v. State*, 818 S.W.2d 801, 802 (Tex. Crim. App. 1991). Rager's fifteen-year sentence is outside the maximum range of punishment for a third-degree felony. We must vacate the sentence imposed and remand the case to the trial court for a new sentencing hearing. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) (affirming the appellate court's decision to vacate and remand an illegal sentence and remand for a new sentencing hearing); *see also Ex parte Seidel*, 39 S.W.3d 221, 225 n.4 (Tex. Crim. App. 2001). We sustain issue two.

Rager contends in his first issue that because the body of the indictment "alleged the amount of loss was a third-degree felony (at least $20,000 and less than $100,000)[,]" the trial court should not have ordered restitution in an amount over $100,000. Because the trial court must hold a new sentencing hearing, we need not address the amount of restitution in this appeal. *See Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006) ("restitution is punishment"); *see also* Tex. R. App. P. 47.1.

We reverse the trial court's judgment on punishment and remand the case to the trial court for a new sentencing hearing.

REVERSED AND REMANDED AS TO PUNISHMENT.

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DAVID GAULTNEY
Justice

Submitted April 18, 2011
Opinion Delivered July 13, 2011
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Before Gaultney, Kreger, and Horton, JJ.