In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00132-CR
NO. 09-11-00133-CR

DENNIS PAYNE CLEAVER A/K/A FATS A/K/A DENNIS PAYNE CLEAVER, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause Nos. 09-05430 and 09-05431

MEMORANDUM OPINION

Pursuant to plea bargain agreements, Dennis Payne Cleaver a/k/a Fats a/k/a Dennis Payne Cleaver Jr. pleaded guilty to evading arrest/detention with a motor vehicle and robbery. In each case, the trial court found the evidence sufficient to find Cleaver guilty, but deferred further proceedings, placed Cleaver on community supervision for five years, and assessed a fine of $500. The State subsequently filed a motion to revoke Cleaver's unadjudicated community supervision in both cases. In each case, Cleaver pleaded "not true" to violating a condition of his community supervision. In both cases,

the trial court found that Cleaver violated a condition of his community supervision, found Cleaver guilty of evading arrest/detention with a motor vehicle and robbery, sentenced Cleaver to two years in state jail for evading arrest/detention with a motor vehicle, and sentenced Cleaver to twenty years in prison for robbery. The trial court ordered Cleaver's robbery sentence to run consecutively with his sentence for evading arrest/detention with a motor vehicle. On appeal, Cleaver challenges the trial court's cumulation order and the trial court's deadly weapon finding. We affirm the trial court's judgment as modified.

Consecutive Sentence

In issues one and two, Cleaver contends that his robbery sentence must run concurrently with his sentence for evading arrest/detention with a motor vehicle because, according to Cleaver, the two offenses were part of the same criminal episode and were prosecuted in a single criminal action.

Section 42.08 of the Code of Criminal Procedure authorizes a trial court to order sentences to run either concurrently or consecutively. *See* Tex. Code Crim. Proc. Ann. art. 42.08(a) (West Supp. 2010). Section 3.03 of the Penal Code, however, provides that sentences shall run concurrently in cases where the defendant "is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action[.]"[1] Tex. Penal Code Ann. § 3.03(a) (West 2011).

[1] Section 3.03 lists exceptions that are inapplicable to this case. *See* Tex. Penal Code Ann. § 3.03(b)-(b-1) (West 2011).

The first question we must answer is whether Cleaver's two offenses arose out of the same criminal episode. "Criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, that are: (1) committed pursuant to the same transaction or to two or more transactions that are connected or constitute a common scheme or plan; or (2) the repeated commission of the same or similar offenses. *Id*. § 3.01 (West 2011).

According to the indictments in this case, the offenses of robbery and evading arrest/detention with a motor vehicle allegedly occurred on the same day. These offenses do not amount to the repeated commission of the same or similar offense. *See* Tex. Penal Code Ann. §§ 29.02, 38.04 (West 2011). Moreover, the record does not reveal whether Cleaver committed the offenses pursuant to the same transaction or pursuant to two or more transactions that were connected or constitute a common scheme or plan.[2] Based on the record before us, we cannot conclude that the offenses of robbery and evading arrest/detention with a motor vehicle are part of the same criminal episode. Clever has failed to satisfy his burden of proving entitlement to concurrent sentencing. *See Reese v.*

[2] Cleaver filed a motion with this Court, wherein he requested that the court reporter be ordered to prepare the record of his original plea hearing at no cost to Cleaver. Attached to this motion is the probable cause affidavit for Cleaver's arrest warrant. Cleaver urges us to consider this affidavit in order to determine whether the two offenses are part of the same criminal episode. "An affidavit attached to a motion filed in the appellate court is not part of the appellate record concerning events or actions in the trial court and it cannot be considered for the truth of the matters asserted." *Jack v. State*, 149 S.W.3d 119, 121 n.1 (Tex. Crim. App. 2004). Because the affidavit is outside the official appellate record, we decline to consider it. *See Pharris v. State*, 165 S.W.3d 681, 687 n.5 (Tex. Crim. App. 2005).

State, 305 S.W.3d 882, 885 (Tex. App.—Texarkana 2010, no pet.); *see also Trevino v. State*, 218 S.W.3d 234, 241 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Under these circumstances, section 3.03(a) does not apply and the trial court was authorized to order that Cleaver's sentence for evading arrest/detention with a motor vehicle run consecutively with his sentence for robbery. We overrule issues one and two.

Deadly Weapon Finding

In issues three, four, five, and six, Cleaver challenges the trial court's deadly weapon finding on the robbery offense. Cleaver contends that dropping the deadly weapon allegation was part of the plea bargain agreement, the evidence is insufficient to support a deadly weapon finding, the evidence is legally insufficient to establish a deadly weapon finding beyond a reasonable doubt, and the State gave no notice of its intent to seek a deadly weapon finding.

We review a trial court's revocation of deferred adjudication community supervision for abuse of discretion. *Staten v. State*, 328 S.W.3d 901, 904-05 (Tex. App.—Beaumont 2010, no pet.). A trial court may make a deadly weapon finding if the defendant used or exhibited a deadly weapon during the commission of a felony offense or during immediate flight therefrom, and the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. Tex. Code Crim. Proc. Ann. art. 42.12 § 3g(a)(2) (West Supp. 2010). A deadly weapon finding is not applicable to an order of deferred adjudication. *Sampson v.*

State, 983 S.W.2d 842, 843 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). "If a trial court determines a defendant has violated the terms of his deferred adjudication and assesses imprisonment as punishment, it is then appropriate to make an affirmative deadly weapon finding in the order adjudicating guilt." *Kinkaid v. State*, 184 S.W.3d 929, 930 (Tex. App.—Waco 2006, no pet.); *see* Tex. Code Crim. Proc. Ann. art. 42.12 § 3g(a)(2).

The indictment in this case alleges that Cleaver committed aggravated robbery by using and exhibiting a deadly weapon, to-wit: a firearm. At the plea hearing, Cleaver pleaded guilty to the lesser-included offense of robbery. The first-degree offense of aggravated robbery was deleted from the indictment and replaced by the second-degree offense of robbery, but the deadly weapon language was not deleted from the indictment. At the revocation hearing, the trial court found Cleaver guilty of robbery, but orally pronounced a deadly weapon finding at the State's request. However, the judgment states, in pertinent part:

> Findings on Deadly Weapon:
> **N/A**

Cleaver cites *Ex parte Garcia*, 682 S.W.2d 581 (Tex. Crim. App. 1985), *Johnson v. State*, 233 S.W.3d 420 (Tex. App.—Fort Worth 2007, pet. ref'd), and *Tellez v. State*, 170 S.W.3d 158 (Tex. App.—San Antonio 2005, no pet.) for the proposition that he is entitled to have the trial court's deadly weapon finding struck. In *Garcia*, Garcia was indicted for aggravated robbery, but pleaded to the lesser-included offense of robbery and

sentence was imposed. *See Garcia*, 682 S.W.2d at 581-82. The trial court included a deadly weapon finding in its judgment. *See id*. at 582. The indictment did not contain a deadly weapon allegation and the record showed that, as part of the plea agreement, there would be no deadly weapon finding. *See id*. at 581-83. Accordingly, the Court of Criminal Appeals deleted the deadly weapon finding from the trial court's judgment. *See id*. at 583.

In *Johnson*, Johnson was charged with attempted capital murder with a deadly weapon, but pursuant to a plea agreement, pleaded guilty to attempted capital murder and sentence was imposed. *See Johnson*, 233 S.W.3d at 422, 427. The trial court made no oral pronouncement of a deadly weapon finding and did not make a deadly weapon finding in the original judgment, but several years later, the trial court signed a judgment *nunc pro tunc* to add a deadly weapon finding. *See id*. at 427-28. The Fort Worth Court determined that the trial court erred by adding the deadly weapon finding:

> It is clear from the transcript of the plea hearing that the trial court made no oral affirmative finding that Appellant used or exhibited a deadly weapon and did not necessarily find Appellant used a deadly weapon by finding him guilty "as alleged in the indictment," and there is no evidence he intended to do so. Instead, the trial court merely found him guilty of the offense of "attempted capital murder" pursuant to the plea bargain agreement.

Id. at 427.

In *Tellez*, the trial court revoked Tellez's deferred adjudication community supervision for possession of a controlled substance and made a deadly weapon finding.

See Tellez, 170 S.W.3d at 160. The indictment did not contain a deadly weapon allegation. *See id*. On Appeal, Tellez complained that "'the trial court . . . entered a deadly weapon finding that had not been charged or requested prior to the original plea.'" *Id*. at 163. The San Antonio Court found that the trial court erred by making a deadly weapon finding because the State gave no notice that it intended to seek a deadly weapon finding. *See id.*

Unlike *Garcia* and *Johnson*, this case involves the revocation of deferred adjudication community supervision. In deferred adjudication community supervision cases, a deadly weapon finding is properly made at the time of revocation. *See Sampson*, 983 S.W.2d at 843; *see also Kinkaid*, 184 S.W.3d at 930. At the time of revocation, the trial court orally pronounced its deadly weapon finding. Moreover, the record does not demonstrate that the State intended to abandon the deadly weapon allegation in the indictment as part of the plea bargain agreement. A deadly weapon finding is proper where a deadly weapon was used or exhibited during the commission of a felony offense. Tex. Code Crim. Proc. Ann. art. 42.12 § 3g(a)(2); *see Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989) (Stating that "*all* felonies are theoretically susceptible to an affirmative finding of use or exhibition of a deadly weapon."). Robbery is a felony offense and, unlike *Tellez*, the indictment in this case did contain a deadly weapon allegation and that allegation was not deleted from the indictment. *See* Tex. Penal Code Ann. § 29.02. The inclusion of a deadly weapon allegation in the indictment was

sufficient notice that the State still intended to seek a deadly weapon finding. *See Ex parte Huskins*, 176 S.W.3d 818, 820 (Tex. Crim. App. 2005). Cleaver's judicial confession, in which he pleaded guilty to the allegations in the indictment, supports a deadly weapon finding. *See Pitts v. State*, 916 S.W.2d 507, 510 (Tex. Crim. App. 1996).

Additionally, unlike regular community supervision, upon a violation of deferred adjudication community supervision, a trial court has no further obligation to comply with the plea bargain agreement. *Huskins*, 176 S.W.3d at 819. Even if the deadly weapon allegation was not part of the plea agreement, the trial court was not required to follow the existing plea agreement before adjudicating Cleaver's guilt. *See id*.

Under the circumstances of this case, we cannot say that the trial court abused its discretion by orally pronouncing a deadly weapon finding at the revocation hearing. For this reason, we reform the written judgment to reflect a deadly weapon finding in accordance with the trial court's oral pronouncement. *See Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003). We overrule issues three, four, five, and six. We affirm the trial court's judgment as modified.

AFFIRMED AS MODIFIED.

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STEVE McKEITHEN
Chief Justice

Submitted on August 5, 2011
Opinion Delivered August 24, 2011
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Before McKeithen, C.J., Gaultney and Horton, JJ.