In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00108-CR

NATHAN JOEL NICHOLS JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 12-14453

MEMORANDUM OPINION

In two issues, Nathan Joel Nichols Jr. (Nichols or Appellant) appeals his conviction for aggravated assault. *See* Tex. Penal Code Ann. § 22.02(a)(1) (West 2011). In his first issue, Appellant argues that the trial court committed reversible error in failing to grant his request for a new trial based on the fact that the sentencing judge was the fourth judge to preside over his case. In his second issue, Appellant argues he was denied due process because his sentence was determined by a tribunal

that was "far removed from the fact-finder in the case" and by the fourth judge to preside over his case. We affirm.

Procedural Background

Nichols's issues on appeal pertain to the fact that while his case was pending and prior to final judgment four different trial court judges presided over his case. A grand jury indicted Nichols in July of 2012 for the offense of aggravated assault for conduct occurring on or about March 19, 2011. Nichols waived his right to a jury trial at a hearing before the Honorable Layne Walker on November 4, 2013. A bench trial occurred on February 6, 2014, before the Honorable Bob Wortham, at which Nichols pleaded not guilty, and the court found Nichols guilty and ordered a presentencing investigation report (PSI). On April 2, 2014, after the PSI was prepared, Nichols appeared before the Honorable Lindsey Scott, and the court assessed punishment at twenty years of confinement. Nichols appealed his conviction to this Court. *See generally Nichols v. State*, No. 09-14-00167-CR, 2016 Tex. App. LEXIS 792 (Tex. App.—Beaumont Jan. 27, 2016, no pet.).[1] We affirmed the portion of the judgment finding Nichols guilty of aggravated assault and remanded for a new punishment hearing because Nichols had erroneously been sentenced for a first-degree, rather than second-degree, felony. *See generally id.*

[1] Our Memorandum Opinion is included in the clerk's record in this matter.

On remand, Nichols appeared before the Honorable Raquel West on April 1, 2016, for a new hearing on punishment. At the punishment hearing before Judge West, the court first summarized the history of the case to date. Nichols's attorney requested that the court take judicial notice of "all the records, all the transcripts" in the case and renewed the defense's motion for new trial, which had originally been filed in April of 2014. In his motion for new trial filed prior to his original appeal, Nichols argued in relevant part:

> In a bench trial as in a jury trial it is crucial the trier of facts be able to consider guilt or innocence based on the totality of the cases presented by both the prosecution and defense.
>
> A new judge not being able to have that opportunity has created an unfair disadvantage for Mr. Nichols which violates due process and protection and his absolute right to have his case presented to a fair and impartial trier of fact that has full personal knowledge of the total procedure.
>
> Defendant would further present that a true picture or evaluation of the proceedings cannot be obtained by reviewing Presentence Report or transcripts of the trial.

At the hearing after remand, Nichols's attorney argued as follows:

> And so, at this point, Your Honor, my basis for the Motion for New Trial is, as it was in front of Judge Scott, is that you, as along with Judge Scott, respectfully, did not hear from all the witnesses, did not hear from Mr. Nichols, did not hear the totality of the case. And so, to render a just punishment based on that just as a jury would, after hearing all the evidence I would ask that this case or this Motion For New Trial be granted at this time so that he may try it in front of somebody either with a judge or a jury so that they can get a sense of the witnesses.

The court agreed to take judicial notice of records and transcripts in the matter and denied the motion for new trial. The court noted that "[t]here was testimony regarding another incident with guns being drawn and things like that[]" and "other cases with the prohibited weapon." And the court sentenced Nichols to twenty years of confinement. After the court certified Nichols's right to appeal, Nichols timely filed his notice of appeal.

Standard of Review

We review a trial court's denial of a motion for new trial for an abuse of discretion, reversing only if the trial court's ruling was clearly erroneous and arbitrary. *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013) (citing *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012)). A trial court abuses its discretion if no reasonable view of the record could support its ruling. *Id.* We view the evidence in the light most favorable to the trial court's ruling and presume that that the trial court made all findings, express and implied, in favor of the prevailing party. *Id.*

The trial court is the sole judge of the credibility of the witnesses at a hearing on a motion for new trial, whether presented through live testimony or affidavit. *Id.* We defer to a trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor. *Id.*

Denial of New Trial

It is not improper for a different judge to sit at the punishment hearing, and the sentencing judge's decision as to punishment will not be disturbed on appeal absent a showing of an abuse of discretion and harm. *See Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984) (citing *Hogan v. State*, 529 S.W.2d 515, 517 (Tex. Crim. App. 1975); *Ben-Schoter v. State*, 634 S.W.2d 28, 30 (Tex. App.—Beaumont 1982), *rev'd on other grounds*, 638 S.W.2d 902 (Tex. Crim. App. 1982)); *Benjamin v. State*, 874 S.W.2d 132, 134 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (explaining that defendants are not afforded the judge of their choice and that it is proper for a different judge to pronounce sentence from the judge who heard the defendant's plea); *Webb v. State*, 755 S.W.2d 222, 223 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd). A defendant's due process rights are violated, however, if after a successful appeal, the defendant is resentenced vindictively in response to the defendant's rightful assertion of his right to appeal. *See Johnson v. State*, 930 S.W.2d 589, 592 (Tex. Crim. App. 1996) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)). Where a defendant claims a due process violation resulting from vindictive resentencing, part of the analysis is whether the defendant's punishment was increased on resentencing. *Id.*; *see also, e.g.*, *Bingham v. State*, 523 S.W.2d 948, 949 (Tex. Crim. App. 1975) (remanding for resentencing where a different judge

imposed an increased punishment after appeal and remand and the record contained no factual data to support the increased sentence). In this case, however, the record does not reflect that Nichols's punishment was increased when he was resentenced following appeal.

Where no presumption of vindictiveness arises under *Pearce* because there is no increased punishment following remand, a defendant may obtain relief if he can show actual vindictiveness upon resentencing. *See Ex parte Miller*, 330 S.W.3d 610, 631 (Tex. Crim. App. 2010) (quoting *Texas v. McCullough*, 475 U.S. 134, 138 (1986)). Here, Appellant does not allege actual vindictiveness nor does Appellant cite to any facts in the record that would support such an argument. We decline to infer vindictiveness or to find a due process violation simply because a different judge presided at the resentencing and chose to impose the maximum punishment.

Appellant does not allege any particular abuse of discretion, but relies solely upon the fact that a different judge presided over the punishment phase. Because it is proper for one judge to preside at the guilt/innocence phase of the trial and a different judge to preside over sentencing, and because Appellant has not shown actual vindictiveness (nor does the record support such an inference), nor has he shown that there was an abuse of discretion, we conclude that the trial court did not

abuse its discretion in denying the motion for new trial. We overrule Appellant's first issue.

Punishment Assessed

As a general rule, if a sentence is within the proper range of punishment, it will not be disturbed on appeal. *Jackson*, 680 S.W.2d at 814; *Nunez v. State*, 565 S.W.2d 536, 538 (Tex. Crim. App. 1978); *Diamond v. State*, 419 S.W.3d 435, 440 (Tex. App.—Beaumont 2012, no pet.). A trial court abuses its discretion if there is no evidence or factual basis for the punishment imposed. *See Jackson*, 680 S.W.2d at 814; *Benjamin*, 874 S.W.2d at 135.

Here, Appellant argues that he "in essence received absolutely no relief from the reversal by this Court of the prior improper sentence." The record reflects that trial court took judicial notice of all records and transcripts in the case and the record reflects that the judge who pronounced the punishment at sentencing had reviewed the history of and records in the case. Appellant does not argue that there is no evidence or insufficient evidence to support the punishment imposed.

The range of punishment for a second-degree felony is "not more than 20 years or less than 2 years." *See* Tex. Penal Code Ann. § 12.33(a) (West 2011). The punishment actually assessed was twenty years of confinement. Therefore, the sentence actually imposed reflects no abuse of discretion. *See Jackson*, 680 S.W.2d

at 814. Finding no abuse of discretion, we overrule Appellant's second issue on appeal.

Having overruled Appellant's issues, we affirm the trial court's judgment of conviction.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on April 26, 2017
Opinion Delivered May 31, 2017
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.