In The

Court of Appeals

Ninth District of Texas at Beaumont

No. 09-16-00221-CR
No. 09-16-00222-CR
No. 09-16-00223-CR

THOMAS LEE JALUFKA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 14-12-13034-CR (Counts 1, 2, 5)

MEMORANDUM OPINION

Appellant, Thomas Lee Jalufka, appeals the punishments that the trial court assessed following his guilty pleas on two counts of aggravated sexual assault of a child and one count of indecency with a child. Jalufka asks this Court to reform his sentences to run concurrently, as specified in the terms of his plea bargain agreement and the trial court's post-conviction order to reform the judgments. Jalufka also asks

this Court to delete the trial court's "special" order that Jalufka pay for his victims' counseling from his wages earned during incarceration.

Background

A Montgomery County grand jury indicted Jalufka on four counts of aggravated sexual assault of a child and one count of indecency with a child by contact. The State and Jalufka negotiated a plea bargain whereby Jalufka agreed to plead guilty to two of the charges for aggravated sexual assault of a child (Counts 1 and 2) and the charge for indecency with a child (Count 5), and in exchange, the State agreed that Jalufka's sentences would run concurrently and that the State would dismiss the remaining two charges for aggravated sexual assault of a child (Counts 3 and 4).

On May 4, 2016, the trial court conducted a plea hearing during which the parties recited the terms of the plea bargain agreement on the record. Before ascertaining Jalufka's pleas, the trial court admonished Jalufka as to the ranges of punishment associated with the charges against him. The trial court further admonished Jalufka that by pleading guilty, he would waive his right to a jury trial and would not be allowed to appeal the determination of guilt. Then, on the record, Jalufka pleaded guilty to Counts 1, 2, and 5, and the trial court accepted and entered Jalufka's pleas. The trial court, however, announced that it was "not going to

pronounce judgment" at that time and was instead "going to withhold that until [the] sentencing hearing . . . where we will reconvene, and I will have a PSI in front of me at that time." The trial court then dismissed the two remaining counts of aggravated sexual assault of a child (Counts 3 and 4).

On June 3, 2016, at the nonjury sentencing hearing, both sides presented witness testimony. During closing statements, the trial judge clarified: "My records have a plea of guilty to count one, aggravated sexual assault of a child; count two, aggravated sexual assault of a child, and three and four were dismissed in exchange for the plea; and then in count five, also plea of guilty."

At the conclusion of the sentencing hearing, the trial court pronounced Jalufka's punishment as follows: a term of life in prison and a $10,000 fine for Count 1; a term of life in prison and a $10,000 fine for Count 2; and a term of twenty years in prison and a $10,000 fine for Count 5. The trial court ordered the three sentences to run consecutively, rather than concurrently. The trial court also ordered that any wages Jalufka earned during his incarceration were to "be used to cover any restitution for counseling or therapy for [the complaining witness in Counts 1 and 2] or any other . . . complaining witness that comes forward in the meantime."

That same day, the trial court entered judgments for Counts 1, 2, and 5 that reflect the sentences pronounced in open court. The judgment for Count 1 states that

the sentence for Count 1 "shall run consecutively[;]" the judgment for Count 2 states that the sentence for Count 2 "shall run consecutively" to the sentence for Count 1; and the judgment for Count 5 states that the sentence for Count 5 "shall run consecutively" to the sentence for Count 2. Further, the judgment for Count 1 states that "[a]ny wages earned during incarceration are to be used for the benefit of [the complaining witness in Count 1]'s counseling or any other victim that may come forward." Similarly, the judgment for Count 5 states that "[a]ny wages earned by defendant while incarcerated are to be used for the benefit of [the complaining witness in Count 5]'s counseling or any other victim that may come forward."[1]

Jalufka filed a motion to reform the judgments, requesting that the sentences run concurrently in accordance with the plea agreement. The trial court granted Jalufka's motion. The trial court also held a brief post-sentence hearing on Jalufka's objection to the order in the judgments for Counts 1 and 5 requiring Jalufka to pay for his victims' counseling through his wages earned while incarcerated. Jalufka objected to the order as unauthorized and asked that the court remove the provision. The trial court denied his request.

[1] The judgment for Count 2 does not contain an order requiring Jalufka to pay for his victims' counseling with the wages he earns while incarcerated.

The State filed a motion for judgment *nunc pro tunc* to correct a clerical error in the judgment for Count 5 (the original judgment for Count 5 stated that the degree of offense was "not applicable," rather than "second degree felony"). That same day, the trial court entered a judgment *nunc pro tunc* for Count 5, which corrected the clerical error. The judgment *nunc pro tunc* also modified the sentence for Count 5 to run concurrently with the sentence for Count 2 and deleted the language requiring that Jalufka's prison wages be used to pay counseling expenses. The trial court did not enter modified judgments for Counts 1 or 2.

Cumulative Sentences

In his first issue, Jalufka argues that the trial court erred when it ordered Jalufka's sentences to run consecutively, rather than concurrently as the plea bargain agreement specifies.

Texas law provides trial judges with broad discretion to accept or refuse a plea agreement between the State and the defendant. *Rodriguez v. State*, 470 S.W.3d 823, 828 (Tex. Crim. App. 2015) (plurality op.). Before accepting a plea of guilty or a plea of *nolo contendere*, the trial court must inform the defendant whether the court will follow or reject a plea bargain agreement. Tex. Code Crim. Proc. Ann. art. 26.13(a)(2) (West Supp. 2016). A trial judge can be viewed as having "informed the defendant" of his intent to follow the plea-bargain agreement when the agreement is

comprised of one or two simple terms, the trial judge's actions comport exactly with those terms, and no party objects or indicates an understanding that the trial judge is rejecting the agreement. *Ditto v. State*, 988 S.W.2d 236, 238 n. 4 (Tex. Crim. App. 1999).

If the trial court accepts the defendant's guilty plea and approves the plea agreement, "the defendant is entitled to specific enforcement if the agreement can be enforced, or, if not enforceable, is entitled to withdraw his plea." *Perkins v. Court of Appeals for Third Supreme Judicial Dist. of Tex., at Austin*, 738 S.W.2d 276, 283 (Tex. Crim. App. 1987); *see also Blanco v. State*, 18 S.W.3d 218, 220 (Tex. Crim. App. 2000) ("It also is well-settled that a defendant is entitled to insist on the benefit of his bargain."); *Ex parte Rogers*, 629 S.W.2d 741, 742 (Tex. Crim. App. 1982) ("The appropriate relief for the failure to keep a plea bargain is either specific enforcement of the agreement or withdrawal of the plea, depending upon the circumstances of each case."). In the alternative, if the trial court rejects the agreement, the trial court shall permit the defendant to withdraw his plea of guilty. Tex. Code Crim. Proc. Ann. art. 26.13(a)(2).

Therefore, the trial court must both accept the terms of the plea agreement and the defendant's guilty plea before it is bound by the terms of the agreement:

> [T]here are two types of "acceptance" by the trial court: (1) acceptance of the guilty plea when the trial court finds that the defendant was

> competent and that he entered his plea freely and voluntarily and (2) acceptance of the recommended sentence and terms of the agreement when the trial court finds the defendant guilty, or defers adjudication, and imposes the agreed upon sentence.

In re Duffey, 459 S.W.3d 216, 222 (Tex. App.—Texarkana 2015, no pet.).

Here, the trial court never expressly stated whether it would "follow or reject" the plea bargain agreement. Nonetheless, we find that by its actions, the trial court informed the parties that it would follow the terms of the agreement. *See Ditto*, 988 S.W.2d at 238 & n.4. At the plea hearing, the parties presented the terms of the plea bargain to the trial court. Then, on the record, the trial court accepted and entered Jalufka's guilty pleas for Counts 1, 2, and 5, and signed dismissal papers for Counts 3 and 4, in accord with the plea agreement. At the sentencing hearing, the trial judge confirmed that Counts 3 and 4 had been dismissed "in exchange" for Jalufka's guilty pleas to Counts 1, 2, and 5. At the conclusion of the sentencing hearing, the trial court sentenced Jalufka to the maximum range of punishment for Counts 1, 2, and 5, but ordered that the terms run consecutively, without allowing Jalufka an opportunity to withdraw his guilty pleas. Later, the trial court granted Jalufka's motion to reform the judgments so that Jalufka's sentences would run concurrently per the plea agreement. Based on the entire record, we conclude that the trial court's actions sufficiently demonstrated its intent to follow the terms of the plea agreement. *See id*. Jalufka is therefore entitled to specific performance of the plea agreement.

The State has conceded error to this Court in its appellate brief. We sustain issue one and reform the judgments to state that Jalufka's sentences are to run concurrently. *See Morris v. State*, 301 S.W.3d 281, 295–96 (Tex. Crim. App. 2009); *see also McCray v. State*, 876 S.W.2d 214, 216–17 (Tex. App.—Beaumont 1994, no pet.) ("[W]hen the court has the necessary data and evidence before it for reformation, the judgment and sentence may be reformed on appeal.").

Restitution

In his second issue, Jalufka argues that the trial court did not have authority to order Jalufka to pay for his victims' counseling with the wages he earned during his incarceration. Jalufka argues that we should find this order invalid and delete it from the judgment. The State, in its initial response brief, conceded that the trial court did not have authority to impose this order. We requested supplemental briefing from the parties to address the appropriate action this Court should take regarding this restitution order. In their supplemental responses, the parties agree that the order is invalid and should be vacated.

We hold the restitution order was invalid, strike such language from the judgment, and we sustain issue two.

Judgment *Nunc Pro Tunc* (Count 5)

A trial court "may enter a judgment *nunc pro tunc* to correct any mistakes or misrecitals in the judgment only if the errors to be corrected are clerical rather than judicial." *Cohen v. Midtown Mgmt. Dist.*, 490 S.W.3d 624, 627 (Tex. App.—Houston [1st Dist.] 2016, no pet.). However, a trial court cannot use a judgment *nunc pro tunc* to change the court's records to reflect what it believes it should have done. *Collins v. State*, 240 S.W.3d 925, 928 (Tex. Crim. App. 2007). A change to correct a judicial error, rather than a clerical error, is void. *Dep't of Transp. v. API Pipe & Supply*, 397 S.W.3d 162, 167 (Tex. 2013).

A trial judge commits a clerical error if he or she unintentionally fails to do some required, ministerial action. *Collins v. State*, 240 S.W.3d 925, 928 (Tex. Crim. App. 2007). Conversely, a judicial error is an error arising from a mistake of law or fact in the judgment as rendered that requires judicial reasoning to correct. *Id*. (citing *Butler v. Cont'l Airlines, Inc*., 31 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

Here, the trial court issued a judgment *nunc pro tunc* for Count 5 to make several changes: (i) to correct a misrecital that the degree of offense was "not applicable," rather than a "second degree felony"; (ii) to change the sentence for Count 5 to run concurrently with the sentence for Count 2; and (iii) to delete the

language requiring that Jalufka's prison wages be used to pay counseling expenses. We find the third change—the deletion of the restitution order—attempted to alter the orally pronounced and written judgment for count 5, outside the presence of the parties and without a hearing. Therefore, the judgment *nunc pro tunc* is void, and we reinstate the original judgment, as modified below.

Conclusion

We modify the judgment for Count 1 to delete the cumulation order and to reflect that the sentence for Count 1 shall run concurrently with the sentences for Counts 2 and 5 in Cause No. 14-12-13034. We further modify the judgment for Count 1 to vacate the restitution order.

We modify the judgment for Count 2 to delete the cumulation order and to reflect that the sentence for Count 2 shall run concurrently with the sentences for Counts 1 and 5 in Cause No. 14-12-13034.

We hold the *nunc pro tunc* judgment for Count 5 is void and modify the original judgment for Count 5 to change the degree of offense from "not applicable," to "second degree felony." We further modify the original judgment for Count 5 to reflect that the sentence for Count 5 shall run concurrently with the sentences for Counts 1 and 2 in Cause No. 14-12-13034, and also to vacate the restitution order.

AFFIRMED AS MODIFIED.

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CHARLES KREGER
Justice

Submitted on February 17, 2017
Opinion Delivered April 19, 2017
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Before McKeithen, C.J., Kreger and Johnson, JJ.