In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00492-CR
NO. 09-16-00493-CR

LONNIE JACKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause Nos. 13-18343 and 13-17892

MEMORANDUM OPINION

Appellant, Lonnie Jackson,[1] pleaded guilty pursuant to a plea bargain in two separate cases. In trial cause number 13-18343 (No. 16-00492-CR on appeal) Jackson was indicted for aggravated assault, a second degree felony. *See* Tex. Penal

[1] In cause number 13-17892, the indictment names the defendant as "Lonnie Dean Jackson[,]" and in cause number 13-18343, the indictment names the defendant as "Lonnie Jackson[.]"

Code Ann. § 22.02(a)(1) (West 2011). In trial cause number 13-17892 (No. 16-00493-CR on appeal) Jackson was indicted for theft from an elderly person, a state jail felony.[2] *See id*. § 31.03 (West Supp. 2016). The terms of the order of deferred adjudication for each case included five years of community supervision, and each order listed the conditions of Jackson's community supervision. On August 18, 2016, the State filed a Motion to Revoke Unadjudicated Probation and on October 21, 2016, filed an Amended Motion to Revoke Unadjudicated Probation in both matters. The First Amended Motion to Revoke alleged that Jackson violated the following conditions:

> Condition (1): Commit no offense against the laws of this State or of any other State or of the United States.
>
> Condition (14): Probationer will dress appropriately and conduct himself/herself in a professional and courteous manner at all times, especially when interacting with court officers and staff, probation officers and staff, law enforcement officers and attorneys.

The State specifically alleged:

> That said Defendant, after receiving said unadjudicated probation violated the terms and conditions thereof in the following manner, to wit:

[2] According to the appellate record, at the time of the initial setting for the revocation hearing, a third charge was pending in a different trial cause number for a first degree felony offense of aggravated robbery that allegedly occurred on June 4, 2016.

> 1). The said LONNIE JACKSON, AKA LONNIE DEAN JACKSON failed to conduct himself in a professional and courteous manner, during his office visit on August 2, 2016, he displayed aggressive, combatant behaviors to the extent that his CSO felt unsafe and terminated the office visit, as directed by the Court, in violation of Condition (14) of Defendant's Deferred Adjudication order.
>
> . . . .
>
> 2). The said LONNIE JACKSON, AKA LONNIE DEAN JACKSON committed the offense of AGGRAVATED ROBBERY, in that on or about the 4th day of June, 2016, in the County of Jefferson, State of Texas, the said LONNIE JACKSON, AKA LONNIE DEAN JACKSON did then and there while in the course of committing theft of property owned by [B.R.], hereafter styled the Complainant, and with intent to obtain and maintaining control of said property, intentionally and knowingly and recklessly cause bodily injury to the Complainant, by dragging her with is [sic] body, and the Complainant was sixty-five years of age, against the peace and dignity of the State, in violation of Condition (1) of Defendant's Deferred Adjudication order.

The trial court held a hearing on the First Amended Motion to Revoke. Jackson pleaded "not true" to both count 1 (alleging a violation of condition fourteen) and count 2 (alleging a violation of condition one). The trial court found the allegation "true" that Jackson had violated condition fourteen and "not true" as to condition one. The trial court then proceeded to find Jackson guilty in cause number 13-17892, and sentenced him to eighteen months in state jail; and, the trial court found Jackson guilty in cause number 13-18343, and sentenced him to eight years in the Institutional Division of the Texas Department of Corrections. The trial

court ordered Jackson's sentences to run concurrently. Jackson filed a notice of appeal from both judgments.

ISSUES ON APPEAL

Jackson raises five issues on appeal.[3] In his first issue, he alleges probation condition fourteen was so vague and indefinite that it cannot be enforced. In his second issue, he contends that he was not put on notice that the probation condition required him to waive his First Amendment right to freedom of expression in order to comply with the condition. In his third issue, he argues the evidence was legally insufficient to support the revocation. In his fourth issue, he argues that the trial court revoked on grounds not alleged in the motion to revoke probation and not proven by a preponderance of the evidence. And, in his fifth issue, he argues that the judgment in cause number 13-17892 should be modified to delete court costs assessed because it was tried in the same criminal action as cause number 13-18343.

STANDARD OF REVIEW

An appellate court's review of an order adjudicating guilt is generally limited to a determination of whether the trial court abused its discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006) ("'Appellate review of an order

[3] Jackson raises four issues on appeal of the judgment in cause number 13-18343, and the same four issues on appeal of the judgment in cause number 13-17892. Jackson raises issue five only in the appeal of cause number 13-17892.

revoking probation is limited to abuse of the trial court's discretion.'") (quoting *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984)).

In a hearing to revoke deferred adjudication, the State only needs to prove the violation of a condition of probation by a preponderance of the evidence. *Hacker v. State*, 389 S.W.3d 860, 864-65 (Tex. Crim. App. 2013); *Rickels*, 202 S.W.3d at 763-64; *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). The evidence meets this standard when the greater weight of the credible evidence creates a reasonable belief that the defendant has violated a condition of his community supervision. *Rickels*, 202 S.W.3d at 763-64 (quoting *Scamardo v. State*, 517 S.W.2d 293, 298 (Tex. Crim. App. 1974)). We must examine the evidence in the light most favorable to the trial court's order. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. 1981).

In determining whether the allegations in the motion to revoke are true, the trial court is the sole trier of facts, the judge of the credibility of the witnesses, and the arbiter of the weight to be given to the testimony. *Taylor v. State*, 604 S.W.2d 175, 179 (Tex. Crim. App. 1980); *Trevino v. State*, 218 S.W.3d 234, 240 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Reconciliation of conflicts and contradictions in the evidence is within the province of the factfinder, and such conflicts will not call for reversal if there is enough credible testimony to support the

conviction. *See Cooks v. State*, 844 S.W.2d 697, 708 (Tex. Crim. App. 1992); *Shah v. State*, 403 S.W.3d 29, 34 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). To support the trial court's order revoking community supervision, the State need only establish one sufficient ground for revocation. *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980).

When a trial court fails to make specific findings of fact and conclusions of law, it is presumed that the court made the necessary findings to support its decision. *Ice v. State*, 914 S.W.2d 694, 695 (Tex. App.—Fort Worth 1996, no pet.). The reviewing court does not engage in its own fact finding, but rather must review the entire record to determine whether there are any facts that lend support for any theory upon which the trial court's decision can be sustained. *Id.* at 695-96. If the implied or actual finding is supported by the record, it must be sustained. *Id.*

ANALYSIS

In his first two issues, Jackson contends that the language in condition fourteen was vague and indefinite and that it was insufficient to put him on notice that he was required to waive his First Amendment right to freedom of expression in order to comply with the condition. His first two issues attack a term of his community supervision, rather than the revocation of his community supervision.

In order to effectively preserve a complaint for appellate review, a party must first present the trial court a timely request, objection, or motion stating the specific grounds for the desired ruling if those grounds are not apparent from the context. Tex. R. App. P. 33.1(a)(1). Further, the trial court must have either ruled on the request, objection, or motion, either expressly or implicitly, or, in the absence of a ruling, the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2). A point of error on appeal must also comport with the objection made at trial. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *see also Swain v. State*, 181 S.W.3d 359, 367 (Tex. Crim. App. 2005). Even constitutional errors may be waived by the failure to object at trial. *See Curry v. State*, 910 S.W.2d 490, 496 n.2 (Tex. Crim. App. 1995).

Based upon the appellate record before us, it appears that Jackson did not lodge any objections or complaints regarding the conditions of his community supervision in the trial court when the conditions were imposed, nor did he file a timely appeal after he was placed on community supervision. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 23(b) (West Supp. 2016)[4]; *Anthony v. State*, 962 S.W.2d 242, 246 (Tex. App.—Fort Worth 1998, no pet.) (appellant's allegations that the

[4] Effective January 1, 2017, article 42.12, section 23 has been repealed and recodified as article 42A.755. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, §§ 1.01, 3.01, 4.01, 4.02, 2015 Tex. Gen. Laws 2320, 2363, 2394.

wording of his community supervision conditions failed to adequately inform him and the court of what constituted a violation should have been raised by timely appeal after appellant was placed on community supervision); *see also Armstrong v. State*, 340 S.W.3d 759, 764 (Tex. Crim. App. 2011) ("[B]ecause Appellant affirmatively accepted and waived any objections to the conditions [of community supervision], he cannot complain about them for the first time on appeal."); *Simpson v. State*, 772 S.W.2d 276, 277-78 (Tex. App.—Amarillo 1989, no pet.) (allowing an appeal of community supervision conditions directly after conditions were imposed).

A trial court may abuse its discretion by imposing conditions that are unreasonable or violate constitutional rights or statutory provisions; but such defects must be timely objected to in order to be raised on appeal. *See Speth v. State*, 6 S.W.3d 530, 534 n.10 (Tex. Crim. App. 1999); *Milum v. State*, 482 S.W.3d 261, 263 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The Court of Criminal Appeals has recognized an exception to the objection requirement when the condition was added and the defendant did not know about the condition in time to object or had no opportunity to object at the time the condition was imposed. *See Rickels v. State*, 108 S.W.3d 900, 902 (Tex. Crim. App. 2003); *Speth*, 6 S.W.3d at 534 n.9. Additionally, a defendant need not object to a condition at the time the condition was imposed if

the condition is one "that the criminal justice system finds to be intolerable and is therefore not a contractual option available to the parties." *See Gutierrez-Rodriguez v. State*, 444 S.W.3d 21, 23 (Tex. Crim. App. 2014).

Neither exception applies in this case. The appellate record clearly indicates that condition fourteen was included in the original deferred adjudication order in each case. Jackson makes no argument that he did not know about the condition or that he did not have an opportunity to object. Jackson signed a written copy of the conditions, providing evidence that he knew and accepted these restrictions without objection. *See Speth*, 6 S.W.3d at 534 n.10; *Milum*, 482 S.W.3d at 263-64; *Ivey*, 16 S.W.3d at 76; *Ledet v. State*, 177 S.W.3d 213, 221 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). Furthermore, Jackson makes no argument that the complained-of condition is an "intolerable" violation of an absolute constitutional right. Although Jackson generally claims in his second issue that condition fourteen violates his right to freedom of speech, such is not an absolute right. *See Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997) (concluding that not all constitutional rights are absolute rights, acknowledging three separate categories of rights); *see also Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014) ("In *Marin*, we held that the general preservation requirement's application turns on the nature of the right

allegedly infringed.") The Court of Criminal Appeals has separated a defendant's rights into three categories:

> The first category of rights are those that are "widely considered so fundamental to the proper functioning of our adjudicatory process . . . that they cannot be forfeited . . . by inaction alone." These are considered "absolute rights."
>
> The second category of rights is comprised of rights that are "not forfeitable"—they cannot be surrendered by mere inaction, but are "waivable" if the waiver is affirmatively, plainly, freely, and intelligently made. The trial judge has an independent duty to implement these rights absent any request unless there is an effective express waiver.
>
> Finally, the third category of rights are "forfeitable" and must be requested by the litigant. Many rights of the criminal defendant, including some constitutional rights, are in this category and can be forfeited by inaction.
>
> Rule 33.1's preservation requirements do not apply to rights falling within the first two categories. Barring these two narrow exceptions, all errors—even constitutional errors—may be forfeited on appeal if an appellant failed to object at trial.

Grado, 445 S.W.3d at 739 (footnotes omitted). We conclude that the First Amendment argument that Jackson now raises for the first time on appeal would not fall within category one because he is not complaining about a right that would be considered fundamental to the adjudicatory process. To the extent Jackson argues that his claim falls within the second category of rights, we conclude that Jackson waived such argument when he affirmatively, plainly, freely and knowingly agreed

to the terms and conditions of his community supervision which included condition fourteen. *See Gutierrez v. State*, 380 S.W.3d 167, 175 & n.39 (Tex. Crim. App. 2012); *Hart v. State*, 264 S.W.3d 364, 368 (Tex. App.—Eastland 2008, pet. ref'd). We overrule Jackson's first issue.

In his second issue, Jackson argues that he was not required to raise the deficiency of condition fourteen at the time the condition was imposed because "the terminology of the probation condition did not put Appellant on notice that he would have to waive his rights under the First Amendment in order to comply with the condition[.]" Jackson contends that he could not have known that the trial court would construe the "professional and courteous" condition in "such a manner that it violated his rights under the First Amendment." Jackson contends that under *Dansby v. State*, 448 S.W.3d 441 (Tex. Crim. App. 2014), he has not waived his challenge.

In *Dansby*, Dansby was initially charged with aggravated sexual assault of a child for offenses against his grandchild, but the charge was reduced to a second-degree felony of indecency with a child pursuant to a plea bargain and Dansby entered a plea of guilty. *Id.* at 444. The trial court placed Dansby on five years of deferred-adjudication community supervision and ordered Dansby to comply with "sex offender terms and conditions," described only in general terms and without any specific details as to what the conditions would require. *Id.* That same day, the

general conditions were modified through a written document acknowledged by Dansby outside of a formal courtroom proceeding. *Id.* That written modification order for the first time included conditions requiring Dansby to take and pass a polygraph examination "without any admissions" and to successfully complete a sex offender treatment program. *Id.* Although the amended conditions were not imposed in a formal courtroom setting, Dansby signed the modification order agreeing to comply with the conditions and waiving "formal hearing and appearance before the court." *Id.*

Dansby complied with most of the requirements of his community supervision, except that he refused to answer questions about his victims other than the complainant in his case. *Id.* Based on his refusal to answer questions about other victims, he was determined to have failed to participate fully in his sex offender treatment. *Id.* at 444-45. The State filed a motion to revoke Dansby's community supervision and alleged that he violated a condition "in that he refused to obtain a sexual history polygraph" as requested by his community-supervision officer and that he violated another condition "in that [he] failed to attend and successfully complete the Sex Offender Treatment Program." *Id.* at 445. Dansby entered a plea of "not true." *Id.* Dansby also filed a motion to quash the State's motion to revoke and the order modifying the conditions of community supervision asserting, in

pertinent part, that the conditions he had allegedly violated "infringe[d] on [his] right under the United States and Texas Constitution to remain silent and to be protected from self[-]incrimination as provided for in the Fifth Amendment of the United States Constitution." *Id.*

In the sole question presented for review to the Court of Criminal Appeals, Dansby argued that the intermediate court of appeals erred by determining that his failure to raise a Fifth Amendment objection to the conditions of community supervision at the time that they were imposed resulted in a procedural default of his complaint on appeal. *Id.* at 443. Dansby maintained that he could not be faulted for failing to object to the conditions on the basis that they violated his Fifth Amendment constitutional right because he was not placed on notice that he would be required to "incriminate himself" as part of those conditions. *Id*. The Court of Criminal Appeals agreed, reversed the judgment of the court of appeals, and remanded the case to the appellate court to address the merits of Dansby's Fifth Amendment complaint. *Id.* at 443, 452.

Even if we were to accept Jackson's argument that he could not be faulted for failing to object to condition fourteen on the basis that he was not placed on notice that he would be required to forfeit his right to freedom of speech as part of the complained-of condition, we find this case distinguishable from *Dansby* because

Jackson still failed to timely preserve his complaint for appellate review. Unlike the defendant in *Dansby*, Jackson failed to file a motion to quash or otherwise raise any such constitutional complaints with the trial court at the revocation hearing. In order to effectively preserve his complaint for appellate review, Jackson should have first presented it to the trial court in a timely request, objection, or motion stating the specific grounds for the desired ruling. Tex. R. App. P. 33.1(a)(1). Further, the trial court must have either ruled on the request, objection, or motion, either expressly or implicitly, or, in the absence of a ruling, the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2). A point of error on appeal must also comport with the objection made at trial. *Swain*, 181 S.W.3d at 367; *Wilson*, 71 S.W.3d at 349; *Hunt v. State*, 5 S.W.3d 833, 835 (Tex. App.—Amarillo 1999, pet. ref'd) (complaints about deficiencies in the motion to revoke were forfeited when appellant failed to raise them at or before trial). Therefore we conclude that Jackson has also waived his complaint as outlined in his second issue. *See* Tex. R. App. P. 33.1. We overrule Jackson's second issue.

In his third issue, Jackson argues that the trial court abused its discretion in revoking his probation because there was legally insufficient evidence to support the revocation.

The State alleged in its First Amended Motion to Revoke that Jackson violated condition fourteen and condition one of the terms of his community supervision. Because the trial court only found the allegations as to condition fourteen to be "true," we limit further discussion herein to that condition. Condition fourteen required Appellant to "dress appropriately" and conduct himself in a "professional and courteous manner at all times, especially when interacting with court officers and staff, probation officers and staff, law enforcement officers and attorneys." In the First Amended Motion to Revoke, the State specifically alleged that Appellant "failed to conduct himself in a professional and courteous manner, during his office visit on August 2, 2016, he displayed aggressive, combatant behaviors to the extent that his CSO felt unsafe and terminated the office visit[.]"

At the revocation hearing, the State presented the testimony of Judy Morris, who testified that she was the probation officer assigned to Jackson.[5] According to Morris, on August 2, 2016, Jackson was in her office and Morris was reviewing with Jackson the conditions of his probation when Jackson was "resistant" to the conditions and displayed "some level of aggression" during the office visit.

[5] We further note that copies of the typewritten notes from the August 2, 2016 office visit, and a report with allegations, findings, and recommendations from the Administrative Hearing held on that date were also filed in the clerk's record on August 3, 2016.

According to the findings from the administrative hearing, Jackson had maintained a belligerent and at times openly hostile attitude toward the Court and th[e] department. Morris testified that she asked Jackson to leave but he refused, and then she had to ask him again to leave. Ms. Morris testified that before leaving, "he made a comment stating that his daughter was going to put [Morris's] supervisor on blast on social media because of his dislike to addressing noncompliance with conditions of probation." Morris also testified that there had been other issues with his probation because he was ordered not to contact the victim, but Morris had received several calls from the victim and the victim's mother that Jackson had contacted the victim in violation of his probation. According to Morris, Jackson's aggressive behavior caused her to feel unsafe. On cross-examination, Morris agreed that she did not call the police for assistance, and that Jackson did not make any verbal or physical threats towards her.

Jackson contends that whether the "'professional and courteous' condition of probation is considered clear and definite or not, there was insufficient evidence that Appellant violated the condition." According to Jackson, Morris did not testify that Jackson's conduct during the meeting was "unprofessional or discourteous[]" but rather Morris only described Jackson as "aggressive" and "combatant" in her testimony. Viewing the evidence in the light most favorable to the trial court's

ruling, we conclude that the trial court did not abuse its discretion in concluding that the State proved, by a preponderance of the evidence, that Jackson violated at least one of the conditions of his community supervision. *See Rickels*, 202 S.W.3d at 763-64; *Cardona*, 665 S.W.2d at 493; *Moore*, 605 S.W.2d at 926.

There was legally sufficient evidence before the trial court from which the court could have formed a reasonable belief that Jackson failed to meet condition fourteen and that he engaged in conduct as alleged in the motion to revoke. *See Rickels*, 202 S.W.3d at 764. The trial judge was the sole trier of the facts, and determined the credibility of the witnesses, and the weight to be given to the witnesses' testimony. *See Taylor*, 604 S.W.2d at 179; *Trevino*, 218 S.W.3d at 240. Although Morris may not have specifically used the words "professional" or "courteous," the trial court could have reasonably inferred from the testimony of Morris, the records on file pertaining to the incident of August 2, 2016, and the evidence within the province of the factfinder, that Jackson failed to act in a "professional and courteous manner" toward Morris which was a violation of condition fourteen. We overrule his third issue.

In his fourth issue, Jackson argues that the trial court abused its discretion in revoking his unadjudicated probation based upon grounds that were not alleged in the motion to revoke, or if alleged, not proven by a preponderance of the evidence.

Appellant argues that his probation was revoked because the State offered proof regarding a second allegation contained within the First Amended Motion to Revoke Unadjudicated Probation, regarding an alleged theft of a wallet.[6] We have already concluded that the State met its burden of showing by a preponderance of the evidence that Jackson violated at least one condition of the community supervision order. Proof of one violation is sufficient to support a revocation order. *See Moore*, 605 S.W.2d at 926. Therefore, we need not address Jackson's fourth issue.

Finally, in his fifth issue on appeal Jackson argues that the trial court erroneously assessed court costs in violation of Article 102.073 of the Texas Code of Criminal Procedure, and he requests that we reform the judgment in cause number 13-17892 accordingly. The State concedes error on this point.

The assessment of court costs in situations in which multiple cases are tried in a single criminal action is governed by Article 102.073 of the Texas Code of Criminal Procedure, which provides that in a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same

[6] The State also called another witness, B.R., who testified that some unidentified man came to her house wanting to sell her a wheelchair, she invited the man inside and during their conversation, the man asked to use the restroom. B.R. explained that, upon returning, she noticed that the man had her billfold in his pocket. B.R. testified that she grabbed her billfold out of his pocket, the man asked her not to call the police, but she did, and to her knowledge they never caught the man. B.R. did not identify Jackson as the man who tried to take her billfold.

offense, the court may assess each court cost or fee only once against the defendant, and the amount is determined according to the category of offense, using the highest category possible based on the defendant's convictions. Tex. Code Crim. Proc. Ann. art. 102.073(a), (b) (West Supp. 2016).

Appellant's aggravated assault offense in cause number 13-18343 is the higher category of offense. *See id*. This Court has the authority to modify the judgment to delete erroneously included amounts of court costs in judgments. *See* Tex. R. App. P. 43.2(b); *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). We therefore modify the judgment entered in cause number 13-17892 to delete the court costs. We further note that the judgments in both cases indicate that Jackson pleaded "not true" only to count 1, but the record reflects that he pleaded "not true" to both count 1 and count 2. We further modify the judgments to reflect that he pleaded "not true" to both counts.

We affirm as modified the trial court's judgments in cause number 13-18343 and cause number 13-17892.

AFFIRMED AS MODIFIED.

LEANNE JOHNSON
Justice

Submitted on June 7, 2017
Opinion Delivered June 21, 2017
Do Not Publish

Before Kreger, Horton and Johnson, JJ.