

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-17-00131-CR

BOBBY JOE HICKMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 09-02-01908-CR**

MEMORANDUM OPINION

A Montgomery County grand jury indicted Bobby Joe Hickman¹ for the offense of aggravated sexual assault of a child, a first degree felony. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B), (a)(2)(B), (e) (West Supp. 2017).² Hickman pled

¹ We note that the record also refers to the defendant as Bobby Joe Hickman, Jr.

² We cite to the current versions of the applicable statutes and code, as any amendments do not affect the outcome of this appeal.

guilty to the offense of injury to a child, a third degree felony. *See* Tex. Penal Code Ann. § 22.04 (West Supp. 2017). Pursuant to the terms of the plea agreement, Hickman received five years deferred adjudication and had to perform 250 hours of community service. Under the plea agreement, Hickman additionally had to pay restitution in the amount of \$223.55, a fine of \$1,000.00, \$686.00 in court costs, and \$5,280.00 in legal fees. Due to several violations during his community supervision period, the State filed a motion to revoke Hickman's community supervision and adjudicate his guilt. The trial court held a hearing, at which Hickman pled "true" to the State's allegations of the various violations of the terms and conditions of his community supervision. The trial court revoked its order placing him on community supervision and found him guilty and sentenced him to seven years in a Texas Department of Criminal Justice (TDCJ) facility. The written judgment included a provision that Hickman was to pay restitution in the amount of \$1,000.00. In one issue on appeal, Hickman complains the trial court erred by ordering him to pay restitution in the written judgment because the trial court did not order him to pay restitution when it orally pronounced his sentence following the adjudication of guilt.

Background

During the hearing to adjudicate, Hickman pled “true” to paragraphs 1–11 of the State’s motion. After hearing testimony from several witnesses, including Hickman, the trial court found

the allegations in the State’s motion to adjudicate in paragraphs 1 through 11 to be True. And it’s the judgment of the Court that he be sentenced to TDCJ for a period not to exceed 7 years. So he will be remanded into the custody of the sheriff where he’ll be transferred to TDCJ. A fine will carry over from the original judgment as well as any outstanding costs.

There was no mention of restitution at any point during the trial court’s oral pronouncement of sentencing. Consistent with the trial court’s oral pronouncement, the written judgment accurately reflected the sentence of seven years, the fine carried over from the original judgment, and court costs of \$265.00. However, the \$1,000.00 restitution amount contained in the written judgment did not have any basis in the trial court’s oral pronouncement.

Analysis

It is well-settled that a trial court must orally pronounce a defendant’s sentence in the defendant’s presence. *See* Tex. Code Crim. Proc. Ann. art. 42.03, § 1(a) (West 2018); *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004).

Restitution has been deemed as punishment. *See Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006). Because sentencing encompasses the

measure of punishment to be meted out and restitution is a part of that punishment, restitution must be included in the oral pronouncement. *See Taylor*, 131 S.W.3d at 502; *Sauceda v. State*, 309 S.W.3d 767, 769 (Tex. App.—Amarillo 2010, pet. ref'd); *Alexander v. State*, 301 S.W.3d 361, 364 (Tex. App.—Fort Worth 2009, no pet.). “The judgment, including the sentence assessed, is just the written declaration and embodiment of that oral pronouncement.” *Taylor*, 131 S.W.3d at 500. If there is a conflict between the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. *Id.*

Because the trial court did not order restitution in its oral pronouncement, the restitution award of \$1,000.00 in the written judgment was in error.³

Conclusion

We conclude the \$1,000.00 restitution amount included in the judgment did not comport with the trial court’s oral pronouncement of sentencing. Therefore, including restitution in the judgment was error. We modify the trial court’s written judgment to delete the restitution award of \$1,000.00 and affirm the judgment as modified.

³ In its brief, the State concedes a clerical error in the judgment and agrees with Hickman that the judgment should be modified to delete the \$1,000.00 restitution award.

AFFIRMED AS MODIFIED.

CHARLES KREGER
Justice

Submitted on August 2, 2018
Opinion Delivered August 29, 2018
Do Not Publish

Before McKeithen, CJ, Kreger and Horton, JJ.