In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00327-CR

DANGO SHAWN MCCLAIN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 70,294-E, Honorable David Gleason, Presiding

March 9, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, Dango Shawn McClain, appeals his conviction for possession with intent to deliver a controlled substance. Through a single issue, he contends that the trial court erred by not allowing him to withdraw his guilty plea after rejecting the plea bargain. Because the trial court actually followed the negotiated plea, we affirm.

Background

Appellant was indicted for the above referenced offense and, prior to trial, negotiated a plea agreement with the State. The plea was described in the following exchange that occurred when the trial court was admonishing appellant in open court:

> THE COURT: I do not have to follow any agreements that have been made in the case, but if there is a plea agreement and if I do choose to follow that agreement, you will not be permitted to appeal. Do you understand that also?
>
> THE DEFENDANT: Yes, sir.
>
> * * * * *
>
> THE COURT: Has the State made a plea agreement in the case?
>
> MR. MARTINDALE [Prosecutor]: We have, Your Honor. The State is recommending confinement in TDC for a period of 27 years. As we have discussed earlier with the Court in chambers, the State does not oppose the Defendant's request, that he will make here shortly, to delay his sentencing in this matter until such time as July 27th at 9:00 a.m. Contingent upon that, his return on the 27th, the State will tender the 27-year offer. Should he fail to return to court on the 27th at 9:00 a.m., then my understanding is the Defendant will proceed to the Court without a recommendation as to punishment, still waiving all rights. With those stipulations, the State will make that offer, Your Honor.
>
> THE COURT: All right. Mr. Herrmann, is that agreed?
>
> MR. HERRMANN [Defense Counsel]: We have agreed to those - to the 27 years and we agree to the terms, as far as him not showing up - if he doesn't show up - which he will, on the 27th of July. So those are all agreed - agreed to.
>
> THE COURT: So if sentencing is delayed until July 27th and if Mr. McClain appears on July 27th before this Court for sentencing, the offer will be made for 27 years at that time.
>
> MR. MARTINDALE: That is correct, Your Honor.

MR. HERRMANN: And we've accepted that.

THE COURT: And if you do not appear, there will be a bond jumping charge, I guess filed, as well as the agreement for 27 years being gone. Would you then be –

THE DEFENDANT: I understand.

THE COURT: According to what he's saying, *would you then agree that the Court may then assess punishment somewhere between 25 and 99 or life?*

THE DEFENDANT: Yes, sir.

THE COURT: Without the intervention of a jury?

THE DEFENDANT: Correct.

* * * * *

THE COURT: Can I trust you to be back here on July 27th?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

* * * * *

THE COURT: The matter of punishment will be under advisement until July 27th at 9:00 a.m. On the issue of guilt, however, I find that you are guilty of this offense and I find both enhancements are true; however, sentencing will be delayed until July 27th at 9:00 a.m. of this year. Your bail bondsman, whoever that is, needs to be advised that their bond money is in jeopardy in case you don't show up.

(Emphasis added). As indicated in the last quoted paragraph, appellant pled guilty to the charged offense and true to the two enhancement paragraphs included in the indictment.

Needless to say, appellant failed to appear for the July 27th punishment hearing. Eventually, he was arrested and appeared for sentencing on August 29, 2016. The court began that hearing by stating the following:

> The record will reflect that on [June 20, 2016] Mr. McClain entered his plea of guilty, and also after full admonishments, pleas of true to both enhancements. He was found guilty and the enhancements were both found to be true. By agreement, the State and Defense agreed to postpone the sentencing portion of the hearing until July 27th, at which time Mr. McClain did not appear for sentencing or for the sentencing hearing. And so today he is back here with Counsel for the purpose of the punishment phase of the trial. The agreement that was entered at the time we recessed was that he would - that there would be no plea agreement if he did not appear, and so I take it at this time there is no plea agreement.

The State agreed with the trial court's statement. In turn, appellant said that it was his "position that our 27 years is a plea agreement." The trial court responded to appellant's comment with: "A-ha. I'm sorry, but the agreement is on the record. Mr. McClain, in fact, agreed to proceed without a plea agreement, which is what we are doing at this time." Ultimately, the trial court sentenced appellant to serve forty-five years in prison.

Issue, the Law and Analysis

Appellant contends the trial court erred by not allowing him to withdraw his guilty plea once the trial court decided it no longer was going to follow the State's recommendation of twenty-seven years in prison. In responding to the argument, we make the following observations.

First, a plea agreement is nothing more than a contract between the State and defendant. *See Ex parte Cox,* 482 S.W.3d 112, 116 (Tex. Crim. App. 2016) (stating that because plea bargains are contractual agreements between the State and defendant, general "contract-law principles" are used to construe it). And in determining its terms, the reviewing court must look at not only the written agreement but also the formal record of the plea hearing. *Ex parte Moussazadeh*, 64 S.W.3d 404, 411 (Tex. Crim.

App. 2001); *Waterfield v. State*, No. 05-13-00017-CR, 2014 Tex. App. LEXIS 9559, at *11 (Tex. App.—Dallas Aug. 27, 2014, pet. ref'd) (mem. op., not designated for publication).

Second, the appellate record at bar contains both the written plea agreement and a transcript of the plea hearing. The former reveals that in exchange for appellant's plea of guilty, the State would recommend that punishment be assessed at twenty-seven years imprisonment. The latter reveals the same term of imprisonment plus an additional condition. The addition involved a postponement of the punishment hearing to July 27th coupled with the concession that if appellant failed to appear at the July 27th proceeding, the trial court was free to sentence him up to ninety-nine years. Moreover, appellant voiced his acceptance of that to the trial court.

Third, the circumstances before us are akin to those in *State v. Moore*, 240 S.W.3d 248 (Tex. Crim. App. 2007). There, the State and defendant struck an agreement. Under it, the State would recommend a twenty-five year sentence and agree to postpone sentencing for six weeks. *Id*. at 249. In exchange, Moore agreed to plead guilty, appear at the sentencing hearing, and forgo the commission of other crimes during the interim. If appellant did not appear or he committed another crime, "the agreement expressly provided that the State would not recommend a punishment." *Id.* The terms of the agreement were discussed with Moore in open court, and he evinced his understanding that a violation of them would result in an open plea. *Id.* at 254. When the day of sentencing arrived, Moore appeared, but it was revealed that he had committed an assault in violation of the plea agreement. *Id.* So, the State informed the trial court that it was not making any recommendation as to punishment, and the trial court eventually sentenced Moore to forty years imprisonment. The Court of

Criminal Appeals upheld the sentence after concluding that the terms of the plea agreement provided its own remedy. *Id*. The remedy consisted of appellant forgoing the twenty-five year recommendation and presenting himself for sentencing as if he simply entered an open plea. *Id.* at 254-55.

Fourth, though the trial court at bar did not use the words "open plea" like the trial court in *Moore*, the tenor of the agreement and the trial court's conversation with the accused was the same. As long as appellant appeared at the delayed punishment hearing, the State would recommend a certain prison term. If he violated the condition, his pleas would stand and the trial court was free to sentence him for any term of years up to ninety-nine. In effect, the agreement provided its own remedy should the condition be violated, as in *Moore*. Not only was this explained to appellant but he also expressly agreed to it. So, as in *Moore*, appellant's failure to abide by the condition triggered the agreed to remedy, that being that the trial court was free to treat the situation as an open plea and levy a sentence of up to ninety-nine years imprisonment. No one alleges that the forty-five years assessed fell outside that range.

Simply because the trial court followed the bargain to which appellant agreed, we overrule his issue and affirm the judgment.

Brian Quinn
Chief Justice

Pirtle, J.,concurs in the result.

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