In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00097-CR

BARBARA ANN TURNER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 181st District Court
Potter County, Texas
Trial Court No. 47,052-B, Honorable John B. Board, Presiding

February 28, 2018

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PARKER, JJ.

Appellant Barbara Ann Turner appeals from the trial court's order adjudicating her guilty of the offense of possession of cocaine in an amount greater than 400 grams with the intent to deliver,[1] revoking her deferred adjudication community supervision, and sentencing her to fifteen years of imprisonment. Through several issues, appellant contends the trial court erred. We will affirm the judgment as modified.

[1] TEX. HEALTH & SAFETY CODE ANN. § 481.112(f) (West 2018).

Background

Appellant does not challenge the sufficiency of the evidence to support the ground on which her community supervision was revoked. We will set forth only those facts necessary to a disposition of appellant's appellate issues. TEX. R. APP. P. 47.1.

In 2002, appellant, a California resident, was arrested in Potter County. She was a passenger in a car stopped for a traffic violation. During the stop, officers found 2.96 kilograms of cocaine in the car. In 2003, she pled guilty to the possession of cocaine with intent to deliver offense and was placed on deferred adjudication community supervision for a period of ten years. One of the terms of her community supervision required that appellant "[r]eport to the supervision officer as directed by the Court or supervision officer, but at least once each calendar month and obey all rules and regulations of the Community Supervision and Corrections Department." Other terms required her to pay a fine and other fees and costs.

2010 Adjudication Hearing

Appellant returned to California, and Potter County submitted a request to transfer her supervision to that state. Appellant was already being supervised in California for an offense committed there. Although the details are unclear from the record before us, Potter County learned some time later that appellant was no longer being supervised in California. Eventually a motion to proceed with adjudication was filed in August 2008, and amended in December 2009. The State alleged appellant failed to pay as required and failed to report during many months of the years 2004 through 2009. When appellant was arrested in California and returned to Potter County, the trial court heard the motion for adjudication in February 2010. Appellant pled "true" to the State's allegations. After

the trial court heard appellant's explanations of the events in California and heard the Potter County community supervision officer acknowledge the department had "dropped the ball" with regard to her supervision, the court allowed appellant to remain on community supervision. The order the court signed states its order of community supervision should be "reinstated." In remarks from the bench, the court instructed the Potter County Community Supervision and Corrections Department to determine with certainty whether California would supervise appellant for the remaining years of her probation.

2016 Adjudication Hearing

The State filed a second motion to proceed to adjudication in September 2010, alleging appellant failed to report to her community supervision officer as required for the months of April through August 2010 and that she failed to pay required fines and fees. Appellant was arrested in California in October 2014 and returned for the hearing set for December 2014. After a continuance, and later scheduling issues, the hearing on the State's second motion was held in February 2016. A visiting judge in the trial court heard the motion, at which appellant pled "not true" to the allegations.

Evidence at the hearing demonstrated appellant had returned to California after the February 2010 hearing, but that California authorities had declined to accept supervision of her after Potter County's renewed application for transfer. The Potter County supervision officer, Steven Riley, testified he told appellant in a telephone conversation on March 30, 2010, that California had denied the transfer, and that she must return to Potter County and report at 3:00 p.m. on April 9, 2010. Appellant did not do so.

After hearing the evidence, the trial court found "true" the allegation that appellant failed to report as required.[2] The court adjudicated her guilty of the cocaine possession offense and sentenced her to the minimum term of imprisonment, fifteen years. Appellant now appeals.

Analysis

Standard of Review

We first note that a defendant whose community supervision is revoked may appeal only from the revocation, not the validity or invalidity of the terms and conditions of the order entered months or years before. *Gonzales v. State,* No. 14-12-00423-CR, 2013 Tex. App. LEXIS 4025, at *4 (Tex. App.—Houston [14th Dist.] March 28, 2013, pet. ref'd) (mem. op., not designated for publication) (citations omitted). When reviewing an order revoking community supervision, the only question before this Court is whether the trial court abused its discretion. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984); *Jackson v. State*, 645 S.W.2d 303, 305 (Tex. Crim. App. 1983). In a revocation proceeding, the State must prove by a preponderance of the evidence that the probationer violated a condition of community supervision as alleged in the motion to revoke. *Cobb v. State,* 851 S.W.2d 871, 874 (Tex. Crim. App. 1993) (citing *Cardona,* 665 S.W.2d at 493-94). If the State fails to meet its burden of proof, the trial court abuses its discretion in revoking community supervision. *Cardona,* 665 S.W.2d at 494. When more than one violation of the conditions of community supervision has been alleged, an order

[2] The court found the State had not shown appellant's ability to pay, and for that reason found the State's allegation she violated the condition requiring her to pay the fine "not true."

revoking community supervision shall be affirmed if at least one sufficient ground exists. *Black-Thomas v. State,* No. 07-14-00434-CR, 2015 Tex. App. LEXIS 6942, at *4 (Tex. App.—Amarillo July 7, 2015, no pet.) (mem. op., not designated for publication) (citing *Moore v. State,* 605 S.W.2d 924, 926 (Tex. Crim. App. 1980); *Jones v. State,* 571 S.W.2d 191, 193 (Tex. Crim. App. 1978)).

Issues One, Two and Three

Appellant's first three issues are related, and we will address them together. The first asserts it was impossible for appellant to fulfill the condition of reporting in Potter County from April to August 2010. The second and third issues assert her sentence of incarceration is fundamentally unjust and, alternatively, that she was deprived of due process "when the trial court was prevented by state action from using accurate information in judging [her] impossibility defense."

All three issues stem from the trial court's directions to the Potter County community supervision department, given from the bench at the conclusion of the February 2010 adjudication hearing, and the California authorities' subsequent denial of the transfer of her supervision to that state.

Appellant's counsel on appeal construes the court's directions to include permission for appellant to return to California, report by mail and phone, and await the decision of the California authorities. At the February 2016 adjudication hearing, however, Riley, the Potter County supervision officer, testified the California authorities

refused the transfer of supervision because they found appellant in California without permission.[3]

The court in *Cox v. State*, 446 S.W.3d 605 (Tex. App.—Texarkana 2014, pet. ref'd), reversed an order that revoked community supervision when the defendant tried but was unable to get a SoberLink device within the specified time period. The court said that when "[f]aced with conflicting instructions and at least extreme difficulty, if not impossibility, of performance, due process is offended in finding a violation." *Cox,* 446 S.W.3d at 613. This Court has acknowledged that in some circumstances "principles of due process and equal protection may require that impossibility of performance serve as a defense to revocation." *Garcia v. State,* No. 07-15-00268-CR, 2016 Tex. App. LEXIS 6483, at *6 n.3 (Tex. App.—Amarillo June 17, 2016) (mem. op., not designated for publication) (citing *Clay v. State,* 361 S.W.3d 762, 772-73 (Tex. App.—Fort Worth 2012, no pet.) (Dauphinot, J., dissenting)).

As noted, appellant's argument the evidence demonstrates the impossibility, or at least the extreme difficulty, of her compliance with the reporting requirement during the months of April through August 2010 is intertwined with her contention that California authorities declined to accept her supervision because of a misunderstanding over her permission to be present in that state after the February 2010 hearing. For several reasons, we decline to join appellant in a collateral attack on the decision of the California authorities.

[3] Riley told the court, "They [the California authorities] were investigating the transfer, the address she was going to live at. Then they went to the home and they found out she was there, and that's a violation of the interstate compact. So when that happened they denied the transfer."

First, it is unclear to us that the reasons behind California's refusal to accept supervision of appellant had any bearing on the issue of appellant's violation of the reporting requirement. It is undisputed that Riley, the Potter County supervision officer, advised appellant on March 30, 2010, that she no longer had permission to be in California and must return to Texas. Riley testified he told appellant "she needed to come back. I gave her appointments. I sent her letters. I left her messages." He testified that appellant did not "come back," and agreed he lost contact with her, causing him to file a report of violation in September 2010, and leading to the motion to proceed filed later that month. During her testimony at the 2016 revocation hearing, appellant acknowledged Riley told her California rejected the transfer of her supervision, and that she knew she was "going to have to return to Amarillo." As we have noted, in this Court appellant does not challenge the sufficiency of the evidence supporting the court's finding of a violation of her community supervision.

Second, appellant's theory that California's misunderstanding of her permission to be in that state somehow excuses her failure to report was at no time presented to the trial court. The argument is made for the first time in appellant's brief in this Court. At the 2016 adjudication hearing, Riley testified he did not give appellant permission to travel to California after the February 2010 hearing and in argument the prosecutor blamed appellant for traveling to California without permission. Appellant made no objection or response asserting she had permission. Nor did appellant testify to a contrary version of those events in her testimony.

Appellant told the court her health was "poor." She presented evidence, primarily through her own testimony,[4] of treatment stemming from a 2001 accident and of conditions requiring radiation treatments. She testified to her impoverished financial condition following her 2004 divorce, loss of her home and inability to work because of poor health. She testified she lived with her sister, had income only of a Social Security disability payment of $532 per month and survived with the help of family members. Summarizing her impossibility argument, appellant argues that "due to her documented and undisputed health problems, undisputed want of funds, and the mistaken impression created by the probation office, it was impossible—or at least extremely difficult—for her to return to Texas in April to August 2010."[5]

We cannot agree that the record demonstrates the impossibility for appellant to meet her reporting obligations during April through August 2010. In its evaluation of the evidence, the trial court could have seen it as depicting that appellant's reporting as required during those months would cause her, at most, difficulty or inconvenience; the court also could have seen the evidence as depicting a probationer who simply did not take her Potter County community supervision requirements seriously. Nothing in the evidence of her health problems shows it was impossible, or even nearly impossible, for her to report. Even if her testimony regarding her want of funds is accepted, the record

[4] Riley described two items of medical correspondence appellant had provided him at some point. One, dated in March 2010 from a community hospital in California, stated appellant was "going to undergo a diagnostic procedure at their facility" but it did not specify the procedure. The second, in June 2010 from a chiropractor indicated appellant was "being treated for an accident involving her head, neck and back."

[5] Appellant testified that even her disability payment was cut off in September or October 2010 after a warrant for her arrest was issued. This event, we note, was after the April-to-August 2010 reporting violation period alleged in the State's motion.

shows also that family or friends provided assistance. Appellant's brother paid the cost of her bond after her 2014 arrest, and others transported appellant to or from Potter County on more than one occasion during the pendency of her community supervision. As the prosecutor argued to the trial court at the adjudication hearing, when the court directed her to be present on that day for the hearing, she was present.

Particularly with respect to appellant's third issue, we note that appellant's brief asserts that Riley testified the California authorities rejected appellant's transfer "in the mistaken belief that her presence there was unauthorized. This unnecessarily created a requirement that she return to Texas despite her ill health and lack of funds." We do not agree with this characterization of Riley's testimony. Riley did testify California authorities turned down the transfer because they found appellant already in California; we do not read his testimony to say their belief her presence was unauthorized was "mistaken." Appellant further surmises that the misunderstanding persisted into the adjudication hearing because a visiting judge heard the revocation and a new prosecutor presented the State's case, neither of whom were present at the 2010 hearing. We do not engage in such speculation.

For the reasons discussed, we reject appellant's contention reporting was impossible or nearly so, and reject her contentions the record demonstrates a fundamentally unjust outcome to the adjudication hearing or a deprivation of due process. Appellant's first, second and third issues are overruled.

Issue Four

In appellant's fourth issue, she contends the trial court had no jurisdiction to revoke her community supervision because she was arrested pursuant to a capias rather than an arrest warrant.[6] The State contends appellant waived her complaint because she failed to raise it at either of the adjudication hearings. The State also points out appellant appeared at the 2016 hearing voluntarily and it is from the order after that hearing from which she appeals.

We agree with appellant that a motion to revoke and a capias must be timely issued in order for the trial court to have jurisdiction over the matter. *Ex parte Moss,* 446 S.W.3d 786, 791-92 (Tex. Crim. App. 2014) (citing TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(h)). However, appellant does not argue the untimeliness of either the motion to revoke or the capias. *See Selby v. State,* 525 S.W.3d 842, 846-47 (Tex. App.—Beaumont 2017, no pet.) (discussing jurisdiction to hold a hearing and to proceed with an adjudication of guilt). And, if she is challenging some defect in the capias, failure to challenge such a defect waives error and does not impair jurisdiction. *Rodriguez v. State,* 951 S.W.2d 199, 204 (Tex. App.—Corpus Christi 1997, no pet.). Appellant had more than one opportunity to assert her complaint concerning the capias. By waiting until this appeal, appellant waived any defect and has presented nothing for our review. *Id.* (citations omitted). We overrule appellant's fourth issue.

[6] A capias is a writ, "directed 'To any peace officer of the State of Texas'," and "commanding the officer to arrest a person accused of an offense . . ." TEX. CODE CRIM. PROC. ANN. art. 23.01 (West 2015). A "warrant of arrest" on the other hand, "is a written order from a magistrate, directed to a peace officer or some other person specially named," and "commanding him to take the body of the person accused of an offense . . ." TEX. CODE CRIM. PROC. ANN. art. 15.01 (West 2015).

Issue Five

In appellant's last issue, she challenges the sum for "sheriff's transportation expenses" set forth in the Bill of Costs. Appellant asserts the transportation fee should be $1,198.28, reflecting the multiplication of the mileage between Amarillo, Texas and Rancho Cucamonga, California, 2,066 miles, by the statutory 29 cents per mile for two round trips. *See* TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(2), (5) & (b) (West 2015). The State acknowledges there is no evidence of the actual mileage or other expenses involving appellant's transportation and thus, "will not quibble about the transportation fee assessed as costs."

Finding no basis supporting the sum appearing in the Bill of Costs, we sustain appellant's last issue and modify the judgment and the Bill of Costs to remove the sum of $1,911.41 and reflect instead a sum of $1,198.28 for "Sheriff Transportation Expense-per statement." *See Johnson v. State,* 423 S.W.3d 385, 389-90 (Tex. Crim. App. 2014) (setting forth proper review of challenge to court costs).

Conclusion

We affirm the judgment of the trial court as modified herein.

James T. Campbell
Justice

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