In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00192-CR

JOHN MORENO, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 140th District Court
Lubbock County, Texas
Trial Court No. 2011-430,543; Honorable Jim Bob Darnell, Presiding

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March 29, 2018

MEMORANDUM OPINION

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

In July 2012, Appellant, John Moreno, was granted deferred adjudication community supervision for four years and assessed restitution of $1,352.50 for the offense of aggravated assault with a deadly weapon.[1] In January 2015, the State moved

[1] *See* TEX. PENAL CODE ANN. § 22.02(a)(2), (b)(1) (West 2011) (a second degree felony).

to proceed with an adjudication of guilt and on July 22, 2015, filed its first amended motion to proceed with adjudication for multiple violations of the conditions of community supervision. After hearing testimony, the trial court found all allegations to be true and heard punishment evidence at a subsequent hearing. The trial court then pronounced Appellant guilty of the original offense and sentenced him to twelve years confinement and assessed restitution of $1,352.50.

On appeal, Appellant contends the trial court's comments at the close of the sentencing hearing (1) demonstrated bias and (2) showed that the trial court improperly refused to consider mitigation evidence. We reform the trial court's *Judgment Adjudicating Guilt* to correct a typographical error and affirm the trial court's judgment as corrected.

BACKGROUND

In March 2011, an indictment issued alleging that on or about November 19, 2010, Appellant intentionally, knowingly, or recklessly caused bodily injury to Marcus Estrello by striking him with a hard object, and using or exhibiting a deadly weapon, to wit: a club, during the commission of the assault. In July 2012, Appellant plead guilty to the offense and received a four-year term of deferred adjudication community supervision. At the same time, the trial court ordered Appellant to pay $1,352.50 in restitution as a condition of his community supervision. The State filed its original motion to proceed to adjudication in January 2015, and its first amended motion in July 2015.

In February 2016, the trial court held a one-day adjudication hearing and determined Appellant had violated the terms and conditions of his deferred adjudication

community supervision. In April 2016, the trial court held a punishment hearing, found Appellant guilty of the offense, and sentenced him to twelve years confinement, in addition to assessing restitution of $1,352.50. Based upon the evidence adduced at the adjudication/punishment hearings, the trial court found that Appellant had violated the terms of his community supervision by (1) assaulting a family/household member in December 2014, (2) committing the offense of aggravated assault against a public servant in July 2015, (3) committing the offense of evading arrest/detention in July 2015, and (4) failing to report to his community supervision officer as directed for the month of October 2012 and for the months of January through June 2015.

At the sentencing hearing, Appellant presented three witnesses. Christee Leatherwood, Appellant's mother, testified that Appellant had been sexually abused by his stepfather, was diagnosed with a learning disorder, suffered from anger management issues after his grandfather passed away in 2003, and had been seriously affected by the death of his newborn child in 2012. Kirsten Moreno, Appellant's ex-wife, also testified that he was seriously affected after the death of their newborn child. Tasha Oakley, Appellant's cousin, corroborated Leatherwood's testimony.

At the conclusion of the hearing, the following exchange occurred:

> THE COURT: Mr. Moreno, if you'll come up here. Mr. Moreno, I'm a cold-hearted son of a bitch and I don't—I don't understand why the hell you're crying right now. I really don't. Do you have any idea why I don't have sympathy for you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You do?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: January to June 2015, there was a warrant for your arrest twice, and what do you do when you get stopped? You take off. That's pathetic. And then you get all your family members to come in here and say what a great kid you are. Well, they build penitentiaries for people like you. The Court finds you guilty of the offense of aggravated assault with a deadly weapon, that being a club, that was committed on November the 19th of 2010. The Court sentences you to 12 years in the Texas Department of Corrections. And we'll be adjourned.

On appeal, Appellant contends that the trial court's remarks evidenced a lack of neutrality and a refusal to consider his mitigation evidence. As such, Appellant asserts his fundamental right to due process under the federal and Texas constitutions has been violated. *See* U.S. CONST. amend. XIV; TEX. CONST. art. 1, § 19.

PRESERVATION OF ERROR

To preserve a complaint for review, a party must have presented a timely objection or motion to the trial court stating the specific grounds for the ruling desired. TEX. R. APP. P. 33.1(a)(1)(A). Here, Appellant failed to object to the trial court's statements or file a motion for a new trial premised upon such objections. While we note that certain constitutional errors considered to be "fundamental" are not subject to procedural default, because the record in this case does not reflect partiality of the trial court or that a predetermined sentence was imposed, we need not decide whether an objection below was required to preserve an error of this nature on appeal. *Brumit v. State*, 206 S.W.3d 639, 644-45 (Tex. Crim. App. 2006).

ISSUES ONE AND TWO

The touchstone of due process is fundamental fairness. *Euler v. State*, 218 S.W.3d 88, 91 (Tex. Crim. App. 2007) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)). The Due Process Clause of the Fourteenth

Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Similarly, the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities . . . except by the due course of the law of the land." TEX. CONST. art. 1, § 19.

While due process requires a neutral and detached judge; *Brumit*, 206 S.W.3d at 645, a judge's critical, disapproving, or hostile remarks to a party will not ordinarily support a bias or partiality challenge unless they reveal an opinion based on extrajudicial information. *Youkers v. State*, 400 S.W.3d 200, 208 (Tex. App.—Dallas 2013, pet. ref'd). Neither will opinions formed by the judge on the basis of facts introduced or events occurring in the course of the proceedings constitute bias or impartiality unless the remarks display a deep-seated favoritism or antagonism that would make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (discussing extrajudicial source doctrine in the context of recusal motions). Further, "'expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women'" may display, do not establish bias or partiality. *Gaal v. State*, 332 S.W.3d 448, 454 (Tex. Crim. App. 2011) (quoting *Liteky*, 510 U.S. at 555-56).

As to Appellant's argument that the trial court refused to consider the full range of punishment, a trial court's arbitrary refusal to consider the entire range of punishment for an offense, its refusal to consider mitigating evidence, or its decision to impose a predetermined punishment without consideration of the evidence can constitute a violation of a defendant's right to due process of law. *See Gaal*, 332 S.W.3d at 457 n.27

(citing *Ex parte Brown*, 158 S.W.3d 449, 456 (Tex. Crim. App. 2005)). That said, absent a clear, contrary showing, we presume that a judge acted as a neutral and detached hearing officer. *Jaenicke v. State*, 109 S.W.3d 793, 796 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

While the trial court's comments may be regrettable, they do not evidence an opinion based on extrajudicial information. Instead, the trial court's remarks occurred at the end of the hearings and make specific reference to evidence adduced during the hearings. Although the trial court described Appellant's behavior during community supervision as "pathetic," Appellant apparently agreed with the trial court that the State's evidence did not engender sympathy. This is understandable when the evidence established that Appellant followed up his original assault with a deadly weapon in 2012, with an assault on a family/household member in 2014, and with an aggravated assault on a public servant while evading arrest/detention in 2015. As for the trial court's reference to "penitentiaries," the statement merely portends Appellant's sentence which is well within the statutory range and does not evidence any refusal by the trial court to consider the full range of punishment.

In sum, we cannot say from this record that the evidence reflects bias or partiality from extrajudicial sources or that the trial court failed to consider the full range of punishment. Appellant's two issues are overruled.

REFORMATION OF JUDGMENT

In reviewing the record, it has come to this court's attention that the trial court's written judgment includes a minor clerical error, i.e., it incorrectly identifies the "statute of

offense" as "§ 20.02(A)(2)" rather than "22.02(a)(2)." This court has the power to modify the judgment of the court below to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b). *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993).

CONCLUSION

We reform the trial court's *Judgment Adjudicating Guilt* to correct a typographical error by designating the "statute of offense" as "§ 22.02(a)(2)" rather than "20.02(A)(2)" and affirm the trial court's judgment as corrected.

Patrick A. Pirtle
Justice

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