In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00254-CR

JOSE ARMANDO FUENTES, JR., APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 222nd District Court
Deaf Smith County, Texas
Trial Court No. CR-16C-052; Honorable Roland Saul, Presiding

March 12, 2018

MEMORANDUM OPINION

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

In March 2016, pursuant to a plea bargain, Appellant, Jose Armando Fuentes, Jr., entered a plea of guilty to the offense of possession of marihuana, in an amount of five

pounds or less, but more than four ounces,[1] within 1,000 feet of a playground,[2] enhanced by a prior felony conviction.[3] Appellant's punishment was assessed at ten years confinement; however, his confinement was suspended in favor of community supervision for a period of ten years. He was also assessed a fine of $1,500. In addition, the judgment ordered that he pay $550 in court-appointed attorney's fees.

The following year, the State filed a motion to revoke Appellant's community supervision alleging solely that he had failed to participate in a drug or alcohol abuse treatment plan. At a hearing on the State's motion, Appellant entered a plea of true to the allegation. The trial court found that Appellant violated his community supervision and sentenced him to nine years confinement and assessed a $1,500 fine. The judgment also ordered that he pay $650 in court-appointed attorney's fees.

By two issues, Appellant maintains (1) the judgment of conviction and judgment revoking community supervision reflect an incorrect offense and (2) the evidence is insufficient to support the $650 assessment for court-appointed attorney's fees. In its brief, the State agrees with both issues and concedes the judgments should be reformed and the court-appointed attorney's fees deleted. Accordingly, we reform both judgments

[1] TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(3) (West 2017). An offense under this section is a state jail felony.

[2] TEX. HEALTH & SAFETY CODE ANN. § 481.134(d)(1) (West 2017). An offense otherwise punishable under section 481.121(b)(3) is punishable as a felony of the third degree if it is shown that the offense was committed in, on, or within 1,000 feet of a playground.

[3] TEX. PENAL CODE ANN. § 12.42(a) (West Supp. 2017). If it is shown on the trial of a third degree felony that the defendant has previously been finally convicted of a felony offense (other than a state jail felony punishable under section 12.35(a)), then the offense shall be punishable as a second degree felony.

and the *Order to Withdraw Funds.* As reformed, we affirm the trial court's judgment revoking Appellant's community supervision and imposing sentence.

BACKGROUND

Appellant was charged with possessing a usable quantity of marihuana in an amount of five pounds or less but more than four ounces in, on, or within 1,000 feet of a playground. Pursuant to his original plea agreement, Appellant waived an indictment and entered a plea of guilty to an information that also alleged the offense occurred within 1,000 feet of a playground. The range of punishment was also enhanced by two prior felony convictions for the offense of burglary of a habitation.[4] Appellant signed a stipulation to the indicted offense. The summary portion in the judgment of conviction, entered on March 23, 2016, incorrectly reflects that Appellant was convicted of "possession of a controlled substance under one gram in a drug-free zone." The judgment also incorrectly lists the statutes violated as being sections 481.115 and 481.134 of the Texas Health and Safety Code. On July 18, 2017, after the trial court found Appellant had violated a term of his community supervision, it entered a *Judgment Revoking Community Supervision,* assessing the punishment described above. The judgment again reflects the same errors as the original judgment concerning the offense committed and the statutory basis of prosecution. In addition, while the summary portion of the original judgment reflects the assessment of $550 in court-appointed attorney's fees, the summary portion of the judgment revoking community supervision reflects the assessment of $650 in court-appointed attorney's fees.

[4] The two convictions occurred on the same day.

REFORMATION OF JUDGMENTS

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). Appellate courts have the power to reform whatever the trial court could have corrected by a judgment *nunc pro tunc* where the evidence necessary to correct the judgment appears in the record. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). The power to reform a judgment is "not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court." *Id.* at 529-30.

ANALYSIS

As Appellant points out and the State agrees, both the original judgment and the *Judgment Revoking Community Supervision* should reflect that Appellant was convicted of possessing marihuana pursuant to section 481.121(b)(3) of the Texas Health and Safety Code. While that offense is punishable as state jail felony; TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(3) (West 2017), commission of the offense in a drug-free zone elevates punishment to that of a third degree felony. *Id.* at § 481.134(d)(1) (West 2017). Furthermore, the prior felony conviction of burglary of a habitation enhances the offense to an offense punishable as a second degree felony. TEX. PENAL CODE ANN. § 12.42(a) (West Supp. 2017).

Appellant concedes that under *Wiley v. State*, 410 S.W.3d 313, 320-21 (Tex. Crim. App. 2013), the assessment of $550 in court-appointed attorney's fees in the original judgment is correct; however, he challenges the $650 assessed in the judgment revoking

community supervision as erroneous under *Mayer v. State*, 309 S.W.3d 552, 555 (Tex. Crim. App. 2010) (requiring the State to prove a defendant's ability to pay for court-appointed attorney's fees). The State acquiesces. Accordingly, we sustain issues one and two.

CONCLUSION

The Offense for which Defendant Convicted in the summary portion of both judgments is reformed to reflect "possession of a usable quantity of marihuana in an amount of five pounds or less but more than four ounces in a drug-free zone." The Statute for Offense in the summary portion of both judgments is reformed to reflect "sections 481.121(b)(3) and 481.134(d)(1) of the Texas Health and Safety Code." The assessment of $650 for reimbursement of court-appointed attorney's fees in the *Judgment Revoking Community Supervision* entered on July 17, 2017, is deleted. As reformed, the trial court's judgment is affirmed.

Additionally, the *Order to Withdraw Funds* recites that $3,068 is to be withdrawn from Appellant's inmate account. We reform that order by reducing the amount by $650 for the deleted attorney's fees. This court directs that a corrected *Order to Withdraw Funds* be delivered to the Institutional Division of the Texas Department of Criminal Justice.

Patrick A. Pirtle
Justice

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