



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-17-00268-CR

FELIX RIVERA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 391st District Court
Tom Green County, Texas¹
Trial Court No. D-12-0821-SB, Honorable Thomas J. Gossett, Presiding

December 10, 2018

MEMORANDUM OPINION

Before **CAMPBELL** and **PIRTLE** and **PARKER, JJ.**

In this appeal, appellant Felix Rivera contends that the trial court erred in convicting him of a count of the indictment which was abandoned by the State. We agree, and reform the judgment.

¹ Pursuant to the Texas Supreme Court's docket equalization efforts, this case was transferred to this Court from the Third Court of Appeals. See TEX. GOV'T CODE ANN. § 73.001 (West 2013).

Background

Appellant was charged in a two-count indictment. Both counts charged appellant with aggravated sexual assault of a child. Pursuant to a plea agreement, the State abandoned Count II of the indictment and appellant entered a plea of guilty on Count I. The trial court signed an order deleting Count II from the indictment. Appellant was placed on deferred adjudication community supervision for a period of ten years beginning in July of 2014.

In January of 2015, the State filed a motion to revoke appellant's deferred adjudication and to adjudicate guilt, alleging that appellant had violated nineteen terms of his community supervision. Appellant entered a plea of "not true" to the allegations. At the hearing on the State's motion, the trial court heard testimony from appellant, his wife, and his probation officer. The evidence concerned appellant's violations of his community supervision; no evidence was presented regarding the underlying offenses. At the conclusion of the hearing, the trial court found that appellant violated the terms of his community supervision, revoked appellant's probation, and stated that appellant was "found guilty on each count of Aggravated Sexual Assault of a Child." The trial court then sentenced appellant to confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of 20 years on Count I and 20 years on Count II.

Discussion

On appeal, appellant does not complain about the revocation of his probation or adjudication as to Count I. In his sole issue, he contends the trial court erred in convicting him of and sentencing him for Count II of the indictment, because the State abandoned

that charge.² Appellant asserts that by adjudicating guilt and sentencing him on Count II, the trial court violated his rights to due process and trial by jury. Appellant requests that the cause be reversed and remanded or, alternatively, that the judgment on Count II be vacated. The State, conceding that the trial court erred in entering judgment on Count II, urges that we vacate the conviction and sentence on Count II and affirm the conviction and sentence on Count I.

The record is clear that the State abandoned Count II and the trial court deleted Count II from the indictment prior to appellant's pleading guilty to Count I. The record further reflects that appellant never pleaded guilty to Count II, never waived his right to a jury trial on that count, and had no notice or hearing related to Count II of the indictment.

Conclusion

We conclude that the trial court's oral pronouncement of judgment erroneously encompassed Count II. See *Martinez v. State*, 225 S.W.3d 550, 554 (Tex. Crim. App. 2007) (observing that defendant's due-process right to notice is implicated when trial court permits more convictions than authorized by the indictment and holding trial court erred in entering judgment on counts not included in indictment or supported by evidence); see also *Bullock v. State*, No. 05-14-00560-CR, 2015 Tex. App. LEXIS 12335, at *1-2 (Tex. App.—Dallas Dec. 3, 2015, no pet.) (mem. op., not designated for publication) (where trial court accepted State's abandonment of four counts, trial court erred in later entering

² Although the judgment adjudicating guilt states that appellant was convicted of aggravated sexual assault of a child without mentioning multiple counts, the trial court's oral pronouncement clearly included both Count I and Count II. The Court of Criminal Appeals has held that "when there is a variation between the oral pronouncement of sentence and the written memorialization of the sentence, the oral pronouncement controls." *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998) (en banc).

judgments of conviction on those counts; appellate court vacated judgments of conviction on abandoned counts and affirmed judgment on remaining counts). We therefore reform the judgment of the trial court to delete the finding of guilt on Count II and the imposition of a sentence for Count II.

In all other respects, the judgment of the trial court is affirmed.

Judy C. Parker
Justice

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