In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00297-CR

DANGO SHAWN MCLAIN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 072464-E, Honorable Abe Lopez, Presiding

May 9, 2018

MEMORANDUM OPINION

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

Dango Shawn McLain appeals his conviction for bail jumping and failing to appear. The substance of his only issue implicates the collateral estoppel aspect of double jeopardy. The circumstances underlying the contention include (1) a prior prosecution for possessing a controlled substance with intent to deliver; (2) the entry into a plea agreement in that prosecution; (3) the recommendation, via the agreement, that he be sentenced to twenty-seven years' imprisonment if he appeared at the final hearing whereat he would be sentenced; (4) the recommendation that he be sentenced within a

range between twenty-five to ninety-nine years if he did not appear; (5) his failure to appear at the sentencing hearing; (6) his eventual arrest and conviction for possessing controlled substances with the intent to deliver; and (7) the assessment of a forty-five-year prison term for committing that offense. According to appellant, "[s]ince the issue of an appropriate sentence for appellant's failure to appear was fully and fairly adjudicated at the punishment hearing in [the prior] cause . . . the State was collaterally estopped from re-litigating it in this, the bail jumping, case." Thus, the trial court should have granted his special plea of double jeopardy filed below. We affirm.

First, the basis for appellant's special plea of double jeopardy, as urged below, had nothing to do with collateral estoppel. Instead, he argued that his failure to appear at sentencing hearing resulted in a greater sentence. So, in his estimation, he had already been punished for that offense and could not be punished again via current prosecution. That argument differs from a collateral estoppel attack which focuses on the relitigation of issues previously found in appellant's favor. *See Ex parte Watkins*, 73 S.W.3d 264, 268 (Tex. Crim. App. 2002) (holding that the constitutionally based doctrine of collateral estoppel applies when an issue of ultimate fact has once been determined by a valid and final judgment and "[b]efore collateral estoppel will apply to bar relitigation of a discrete fact, that fact must *necessarily* have been decided in favor of the defendant in the first trial"); *accord Rollerson v. State*, 227 S.W.3d 718, 730–31 (Tex. Crim. App. 2007) (reiterating the holding of *Watkins* and holding the doctrine inapplicable because the fact at issue was found against the appellant in the first trial). And because the current ground was not urged below, it was not preserved for review. *Jaykus v. State*, No. 05-13-01497-CR, 2014 Tex. App. LEXIS 7329, at *6 (Tex. App.—Dallas July 8, 2014, no pet.) (mem.

op., not designated for publication) (holding that collateral estoppel issues must be preserved for review); *Gonzalez v. State*, 301 S.W.3d 393, 399–400 (Tex. App.—El Paso 2009, pet. ref'd) (holding the same); *Hughes v. State*, 16 S.W.3d 429, 431 (Tex. App.—Waco 2000, no pet.) (holding the same).

Second, even if the argument were preserved, it would be of no benefit to him here. As mentioned above, collateral estoppel implicates the relitigation of an issue previously determined in the accused's favor. *See Rollerson*, 227 S.W.3d at 730–31; *Ex parte Watkins*, 73 S.W.3d at 268. Assuming *arguendo* that the trial court's consideration of appellant's absence from the hearing was a factual issue subject to collateral estoppel analysis, we cannot see how the finding was in appellant's favor. Again, his argument below was that his absence not only had been factored into but also increased his punishment for possessing controlled substances with intent to deliver. If it increased said punishment, any finding concerning how his absence should be factored into punishment hardly favored him.

We overrule the issue and affirm the judgment.

Per Curiam

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