In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00200-CR
No. 07-21-00201-CR

JAIMIE PARKER JERNIGAN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 31st District Court
Wheeler County, Texas
Trial Court No. 4897, 4898, Honorable Steven R. Emmert, Presiding

August 11, 2022

MEMORANDUM OPINION

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

By this appeal, appellant, Jaimie Parker Jernigan, presents a sole issue contending the trial court abused its discretion in cumulating two ten-year sentences after finding he had violated the terms of community supervision imposed on the original offenses of obstruction or retaliation in trial court cause number 4897, a third-degree felony,[1] and theft of cattle or exotic livestock in trial court cause number 4898, also a third-

[1] TEX. PENAL CODE ANN. § 36.06(a)(1)(B).

degree felony.[2] Appellant admitted a violation of the conditions of his community supervision when he testified at the hearing on the motions to revoke, so he does not challenge the trial court's discretion in revoking his community supervision.[3] We reform the judgment and affirm as modified.

PROCEDURAL BACKGROUND

In 2017, in exchange for pleas of guilty, the trial court convicted appellant of both offenses mentioned above. Pursuant to a plea bargain, he agreed to a sentence of ten years and a fine of $1,000, in each case, suspended in favor of four years community supervision. Appellant's conviction for theft included restitution of $1,475.12.

Three years later, the State filed two motions to revoke appellant's community supervision alleging numerous violations of the terms and conditions thereof. A hearing on both motions was held on May 27, 2021, at which appellant's counsel and the prosecutor announced a plea agreement had been reached in exchange for pleas of true. However, during the hearing, appellant began entering pleas of "not true" to some allegations and the prosecutor withdrew the plea agreement and abandoned the hearing.

Several months later, at a subsequent hearing on the State's motions, appellant attempted to enter pleas of "true" in exchange for a plea bargain. However, in a confusing dialogue, the trial court accused appellant of being untruthful at the previous hearing when he pleaded "not true" to some allegations and, consequently, refused to accept his pleas

[2] TEX. PENAL CODE ANN. § 31.03(e)(5)(A).

[3] The finding of a single violation of community supervision is sufficient to support revocation. *Garcia v. State*, 387 S.W.3d 20, 26 (Tex. Crim. App. 2012).

of "true." The trial court announced, "he lied. He's not going to plead true, just to get a deal, if he doesn't think it's true."

The trial court set the motions for a contested hearing and advised the parties, "I will decide whether or not they're true or not." The court then entered pleas of "not true" to all the State's allegations on behalf of appellant. Appellant's community supervision officer testified for the State and appellant testified in his defense. After hearing the testimony of the witnesses, the trial court revoked appellant's community supervision and sentenced him to consecutive ten-year sentences.

FACTUAL BACKGROUND

On October 7, 2015, by two separate instruments, appellant was indicted for theft of cattle[4] from Mike O'Gorman, committed on or about February 13, 2015, and for retaliation against O'Gorman committed on or about September 4, 2015. After the trial court granted a motion to consolidate the cases, a hearing was held in September 2017, at which the trial court accepted appellant's guilty pleas in each case and pronounced his sentences and granted him community supervision. In 2018, the conditions of appellant's community supervision were modified to include commitment in a residential treatment center, a program he successfully completed.

In November 2020, the State filed its *Motion to Revoke Community Supervision* in each case. In addition to alleging that appellant committed a new offense of driving while intoxicated, the State also alleged failure to report, failure to obtain permission to change

[4] Appellant stole a bull and sold it.

his residence, failure to obtain permission to leave Hale County, and failure to remain current in his fine, costs, and fees.

At the hearing on the State's motion on both cases, appellant's community supervision officer from Wheeler County offered testimony regarding the allegations. She testified that appellant was provided a copy of the conditions of his community supervision and that he signed an acknowledgement of his receipt and understanding of those conditions. At that time, appellant's only concern was that his employment in the cattle shipment industry required travel.

During his community supervision, appellant was transferred to Hale County and instructions were provided on how to report there. According to the supervision officer's testimony, her last contact with appellant was in May 2020, and he failed to report in Hale County beginning in June 2020 and for several months thereafter.

The Wheeler County supervision officer also testified that she was notified by the Hale County supervision office in August 2020 that appellant was no longer living at his residence and his phone number had been disconnected. The supervision officer learned that appellant had moved to Turkey, Texas, which is outside of Hale County. She further testified that appellant failed to remain current in payment of his fine, fees, costs, and restitution. According to her records, appellant's employment provided him the ability to pay on his delinquencies. She also testified that despite appellant's completion of the residential treatment program, he relapsed and was subsequently arrested for driving while intoxicated.

After her testimony, the State rested and appellant chose to testify in his defense. After being admonished, his counsel asked him if he understood that he had violated the conditions of his community supervision to which he answered, "Yes, sir." However, he wanted to offer his reasons for failing to report in 2020. He explained that before COVID-19, he was reporting in-person but was then advised by the Hale County Supervision Office that reporting by phone call would be sufficient. Regarding his failure to report a change of address, appellant claimed that his residence was always in El Paso, Texas, not Hale County. He also admitted being in Turkey, Texas, at one point but claimed he had a travel permit for work.

During closing, defense counsel asked the trial court to consider the previous agreement that had been made with the State for a five-year sentence. The State argued that appellant should be sentenced to the ten years he originally agreed to at his plea hearing.

At the conclusion of the hearing, the trial court found that appellant had violated the conditions of his community supervision. In announcing that "a deal is a deal," the trial court sentenced appellant to the original agreement of ten years' confinement and $1,000 fine. The trial court further announced that the sentences in the two causes would "run consecutive."

While acknowledging a trial court's absolute discretion to cumulate sentences, by a single issue, appellant maintains the trial court abused its discretion by cumulating his

sentences because the offenses were part of the "same criminal episode" and his convictions arose from the "same criminal action."[5]

ANALYSIS

The trial court has broad discretion to cumulate sentences. *Byrd v. State*, 499 S.W.3d 443, 446 (Tex. Crim. App. 2016); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.08(a). That discretion, however, is limited when an accused is found guilty of more than one offense arising out of the "same criminal episode" prosecuted in a "single criminal action." TEX. PENAL CODE ANN. § 3.03(a). In such a scenario, the sentence for each offense for which the defendant is found guilty shall be pronounced and the sentences "shall run concurrently" except under certain statutory exceptions not applicable here. *Id.* "Criminal episode" is defined as follows:

> the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:
>
> (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
>
> (2) the offenses are the repeated commission of the same or similar offenses.

TEX. PENAL CODE ANN. § 3.01. As appellant contends, "It is unnecessary that the offenses that make up a criminal episode occur on a single date, at a single place, or against a single complainant." *Rojo v. State*, Nos. 11-17-00225-CR, 11-17-00226-CR, 11-17-00227-CR, 11-17-00228-CR, 2019 Tex. App. LEXIS 6941, at *9 (Tex. App.—Eastland

[5] A complaint that a cumulation order is improper can result in a void sentence and may be raised for the first time on appeal. *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992) (en banc).

Aug. 8, 2019, pet. ref'd) (mem. op., not designated for publication). A "single criminal action" is a single trial or plea proceeding during which the State presents both the allegations and evidence of more than one offense. *Middleton v. State*, 634 S.W.3d 46, 50 (Tex. Crim. App. 2021) (citing *LaPorte*, 840 S.W.2d at 415).

In the underlying cases, it is undisputed that the cases were joined together and prosecuted in a single criminal action: first in 2017, at the hearing on appellant's pleas, and again in 2021, when his community supervision was revoked. Thus, the critical question is whether the theft that occurred in February 2015, and the retaliation that occurred in September 2015, constitute the same "criminal episode."

Appellant argues that the theft of cattle and retaliation against the complainant constitute one criminal episode because, but for the theft charge, he could not have been charged with obstruction or retaliation. This Court recently rejected this same argument in *Green v. State*, Nos. 07-19-00411-CR, 07-19-00412-CR, 07-19-00413-CR, 2021 Tex. App. LEXIS 5589, at *13–15 (Tex. App.—Amarillo July 14, 2021, pet. ref'd) (mem. op., not designated for publication). In *Green*, the defendant was charged with burglary of a habitation, retaliation, and tampering with evidence. *Id*. at *2–3. Pursuant to a plea agreement, he was placed on deferred adjudication community supervision. *Id.* at 3. On the State's motion to adjudicate, Green was convicted of all three offenses and the trial court ordered the sentences to run consecutively. *Id*. at *13. As in the instant case, Green argued that the trial court abused its discretion in ordering the sentences to run consecutively. *Id*.

This Court rebuffed Green's argument for two reasons. First, his plea and sentencing hearings were not conducted as a single criminal action which could have required concurrent sentences under section 3.03(a) of the Penal Code. *See* TEX. PENAL CODE ANN. § 3.03(a). Second, his argument that he would have had no need to threaten to kill the victim but for the victim's reporting of Green's commission of the burglary was rejected because he did not show that he was engaging in transactions with a common scheme or plan or that the offenses were the same or similar. Id. at *14–15. As noted in *Green*, the cumulative sentences should not be reduced "because his subsequent crimes were merely attempts to prevent the evidence of his first crime from being discovered and adjudicated." *Id.* at *14. In line with *Green,* we reject appellant's argument that his convictions resulted from the same criminal episode. The elements of each offense differ considerably, and the two offenses were not committed pursuant to the same transaction, nor are they connected in a way that constitutes a common scheme or plan. Furthermore, the offenses in question are not the repeated commission of the same or even a similar offense. We conclude the trial court did not abuse its discretion in cumulating the sentences. Appellant's sole issue is overruled.

REFORMATION OF JUDGMENTS

As appellant notes, the trial court's judgments revoking community supervision contain clerical errors. Both judgments reflect that appellant entered pleas of "true" to the State's motions to revoke. However, the revocations were contested and appellant pleaded "not true." Also, the third page of each judgment incorrectly reflects that appellant waived the right to appeal.

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) (en banc). 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. Thus, we modify the trial court's judgments revoking community supervision to reflect the following modifications: deletion of "True" and insertion of "Not True" in the summary portion of each judgment under the heading "Plea to Motion to Revoke" and deletion of the "X" mark on page three of each judgment beside "APPEAL WAIVED."

CONCLUSION

As modified, the trial court's judgments are affirmed.

Judy C. Parker
Justice

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