In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-09-00227-CR

DONALD DEWAYNE HOOD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 202nd Judicial District Court
Bowie County, Texas
Trial Court No. 08F0188-202

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Carter

MEMORANDUM OPINION

I. Facts and Procedural Background

While intoxicated, Donald Dewayne Hood drove his vehicle off the roadway, striking and fatally injuring Paul Fisher. Hood later pled guilty to intoxication manslaughter. The trial court sentenced him to twenty years' imprisonment. The trial court also revoked his community supervision based on a burglary of a habitation offense and sentenced him to ten years for that offense, with the sentences to be served consecutively.[1]

On appeal, Hood argues that the trial court erred (1) by ordering the punishment to run consecutively to that of a previous, unrelated offense; (2) by entering a finding of a deadly weapon without proper notice to Hood; and (3) because there was insufficient evidence that Hood used a deadly weapon. We affirm the judgment of the trial court because (1) fulfilling a condition of community supervision does not commence a sentence; (2) Hood received proper notice of the State's intention to seek a deadly weapon finding; and (3) there is sufficient factual evidence that the vehicle was used as a deadly weapon.

II. Fulfilling a Condition of Community Supervision Does Not Commence a Sentence

Several years prior to the events that led to Fisher's death, Hood pled guilty to burglary of a habitation[2] and was placed on community supervision. As a condition of the community

[1]In his motion for new trial, Hood contended that the trial court erred in cumulating the sentences and that the punishment assessed was contrary to the law and evidence.

[2]Bowie County District Court, cause number 03F0601-202.

supervision, Hood completed a Substance Abuse Felony Program (SAFP). After pleading guilty to intoxication manslaughter, the trial court revoked his community supervision, sentenced him to ten years' imprisonment for the burglary of a habitation, and ordered the sentence be served consecutively with the twenty-year sentence for intoxication manslaughter. In his first point of error, Hood argues that the trial court abused its discretion by ordering the sentences to be served consecutively.

Our law accords trial courts with a great degree of discretion in deciding whether to order sentences to run consecutively or concurrently.

> [I]n the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases . . . .

TEX. CODE CRIM. PROC. ANN. art. 42.08 (Vernon Supp. 2009). "In light of the discretion granted to the trial court by Article 42.08(a), we review a complaint about consecutive sentences for an abuse of that discretion." *Malone v. State*, 163 S.W.3d 785, 803 (Tex. App.—Texarkana 2005, pet. ref'd) (citing *Macri v. State*, 12 S.W.3d 505, 511 (Tex. App.—San Antonio 1999, pet. ref'd)). A trial court abuses its discretion when it acts without reference to guiding rules or principles of law, or when it otherwise acts outside the wide zone of reasonable disagreement. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007); *Warren v. State*, 236 S.W.3d 844, 846 (Tex. App.—Texarkana 2007, no pet.).

Article 42.08 of the Texas Code of Criminal Procedure gives the trial court great discretion to cumulate a sentence with prior outstanding sentences if the later sentence is imposed for the first time following the revocation of community supervision. *See Pettigrew v. State*, 48 S.W.3d 769, 771 (Tex. Crim. App. 2001) (citing *Ex parte March*, 423 S.W.2d 916 (Tex. Crim. App. 1968)). However, if the applicant has already served a portion of his or her sentence before the sentence is suspended or probated, then a cumulation order may not be entered to stack the probated sentence on a subsequent sentence because such would violate the constitutional protection against being twice punished for the same offense. *Ex parte Townsend*, 137 S.W.3d 79 (Tex. Crim. App. 2004) (citing *Ex parte Barley*, 842 S.W.2d 694, 695 (Tex. Crim. App. 1992)).

Hood argues that the Legislature intended Article 42.12, Section 23(b) of the Texas Code of Criminal Procedure to mean that completing a substance abuse treatment program constituted serving part of the sentence, similar to shock probation under Article 42.12, Section 6 or boot camp under Article 42.12, Section 8.

Article 42.12, Section 23(b) states in part that:

> no part of the time that the defendant is on community supervision shall be considered as any part of the time that he shall be sentenced to serve, except that on revocation, the judge shall credit to the defendant time served by the defendant as a condition of community supervision in a substance abuse treatment facility . . . but only if the defendant successfully completes the treatment program in that facility.

TEX. CODE CRIM. PROC. ANN. art 42.12, § 23(b) (Vernon Supp. 2009). The statute unambiguously contemplates that completion of a substance abuse treatment program (SAFP) will

be a condition of community supervision and that credit for the time spent completing the program is the only credit the defendant is to receive should his or her community supervision be revoked. *Id.*

In the case of *Barley*, the Texas Court of Criminal Appeals explained that "shock probation" and "boot camp" are alternative incarcerations that take place prior to being placed on community supervision, and effectively commence the sentence. 842 S.W.2d at 694–95. Here, however, Hood merely completed a drug program after he had been placed on community supervision and did nothing more than comply with a condition of his community supervision. He had not commenced serving the underlying sentence. Hood does not direct our attention to any cases supporting his position that compliance with a condition of community supervision is tantamount to commencing to serve a sentence and, indeed, we are not aware of any such cases. *See Barnes v. State*, Nos. 14-97-01390-CR & 14-98-00910-CR, 2000 Tex. App. LEXIS 6280 (Tex. App.—Houston [14th Dist.] Sept. 14, 2000, no pet.) (not designated for publication); *Washington v. State*, No. 06-98-00067-CR, 1998 Tex. App. LEXIS 6140 (Tex. App.—Texarkana Oct. 1, 1998, no pet.) (not designated for publication) (trusty camp confinement as condition of community supervision did not commence period of confinement).[3] Therefore, the trial court did not err in ordering the sentences to be served consecutively.

III. Notice of the State's Intention to Seek a Deadly Weapon Finding

[3]Although these unpublished cases have no precedential value, we may take guidance from them as an aid in developing reasoning that may be employed. *Carillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

The indictment alleges that while intoxicated, Hood "caused the death of another, namely, Paul Fisher . . . by driving [a] motor vehicle into the person . . . . " Hood argues that the trial court erred in finding that Hood used a deadly weapon because the State failed to give Hood proper notice that it would seek such a finding.[4]

An accused is entitled to some form of written notice at the time of prosecution that the use of a deadly weapon will be a fact issue at his or her trial. *Ex parte Minott*, 972 S.W.2d 760, 761 (Tex. Crim. App. 1998); *Luken v. State*, 780 S.W.2d 264, 266 (Tex. Crim. App. 1989); *Ex parte Beck*, 769 S.W.2d 525, 526–27 (Tex. Crim. App. 1989). Such notice can be contained in the indictment, or the indictment "necessarily implies the use of a deadly weapon, which is anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Blount v. State*, 257 S.W.3d 712, 714 (Tex. Crim. App. 2008); *Brooks v. State*, 847 S.W.2d 247, 248 (Tex. Crim. App. 1993); *see also Flenteroy v. State*, 187 S.W.3d 406, 411 (Tex. Crim. App. 2005). A pleading notifying the defendant that the State will seek a finding as to the use of a deadly weapon is a proper notice. *Ex parte Patterson*, 740 S.W.2d 766, 776 (Tex. Crim. App. 1987).

Looking first at the indictment, we find that Hood was given notice of the charge that his operation of a motor vehicle while intoxicated caused the death of Fisher "by driving said motor vehicle into the person of the said injured party." Our highest court has held that any allegation

[4]Hood did not argue unfair surprise, prejudice, or inadequate time to prepare at trial and likewise does not raise such arguments on appeal.

which avers that a death was caused by a named instrument necessarily includes an allegation that the named instrument was "in the manner of its use . . . capable of causing" (since it did cause) death. *Ex parte McKithan*, 838 S.W.2d 560, 561 (Tex. Crim. App. 1992) (citing *Beck*, 769 S.W.2d at 526. So in this case, the indictment itself gave notice of the deadly weapon allegation.

As to the more specific notice, neither statute nor caselaw specifically defines what constitutes timely notice for intent to seek the finding of a deadly weapon. The timing requirements depend upon the facts of each case. *Hocutt v. State*, 927 S.W.2d 201, 203 (Tex. App.—Fort Worth 1996, pet. ref'd). Written notice given several days in advance of a punishment hearing has been held to be sufficient, while a notice faxed late on a Friday for a jury trial set to begin on Monday was held to be insufficient. *Spelling v. State*, 825 S.W.2d 533, 535 (Tex. App.—Fort Worth 1992, no pet.); *Hocutt*, 927 S.W.2d at 203. In a concurring opinion, Judge Overstreet suggested that notice is adequate if it is given any time prior to trial. *See Johnson v. State*, 815 S.W.2d 707, 715 (Tex. Crim. App. 1991) (Overstreet, J., concurring); *see also Nolasco v. State*, 970 S.W.2d 194, 197 (Tex. App.—Dallas 1998, no pet.) (written notice received hours before trial held sufficient when defendant admitted knowing about weapon and filing motion to suppress it).

Here, eight days before trial, the State filed a motion of its intent to seek affirmative findings as to the use of a deadly weapon. Nothing in the record indicates that the State withdrew

or altered its intention to seek a deadly weapon finding.[5] At trial, Hood entered an open plea of guilty and stated that he understood that he was entering his plea without a negotiated plea agreement.[6] The trial court found that the vehicle Hood was driving in, "and the manner and the means that [he was] using that vehicle was a deadly weapon and did in fact cause[] the death of an individual."

Under the circumstances of this case, the indictment and the State's motion provided sufficient notice of the State's intent. Hood failed to object or move for a continuance. The motion plainly indicated the State's intention, and nothing in the record indicates that the State withdrew or altered its intention to seek a deadly weapon finding. Accordingly, we overrule Hood's second point of error.

IV. There Is Sufficient Factual Evidence that the Vehicle Was Used as a Deadly Weapon

In his final point of error, Hood argues that the trial court lacked legally sufficient evidence to find that he used a deadly weapon.[7] We disagree.

In conducting a legal sufficiency review, we consider the evidence in the light most

[5]The trial court rejected a previously negotiated plea agreement. The record does not mention whether the rejected plea agreement included or otherwise referenced the finding of a deadly weapon. In his brief, Hood cites a letter that indicates that the State abandoned its intention to find the use of a deadly weapon as a part of the plea agreement. Hood attached a copy of the letter to his brief. However, the letter was not presented to the trial court or otherwise included in the record at trial. An appellate court may not consider factual assertions that are outside the record, and a party cannot circumvent this prohibition by submitting evidence for the first time on appeal. *See Whitehead v. State*, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004). Therefore, we do not consider the letter for any purpose.

[6]Hood intended to plead guilty for "quite some time" prior to the hearing.

[7]In his brief, Hood does not specifically state whether he is arguing legal sufficiency or factual sufficiency. However, he does argue that "the State offered no evidence" regarding the use of a deadly weapon. Therefore, we find that Hood is arguing legal sufficiency's "no evidence" point of error.

favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003). We must give deference to "the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)). We are not required to determine whether we believe that the evidence at trial established guilt beyond a reasonable doubt; rather, when faced with conflicting evidence, we must presume that the trier of fact resolved any such conflict in favor of the prosecution.

To hold evidence legally sufficient to sustain a deadly weapon finding, the evidence must demonstrate that (1) the object meets the statutory definition of a dangerous weapon, TEX. PENAL CODE ANN. § 1.07(a)(17)(B) (Vernon Supp. 2009); (2) the deadly weapon was used or exhibited "during the transaction from which" the felony conviction was obtained, *Ex parte Jones*, 957 S.W.2d 849, 851 (Tex. Crim. App. 1997); and (3) other people were put in actual danger,[8] *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003).

Hood only challenges the third requirement—that other people were put in actual danger. The authorities cited by Hood are *Mann v. State*, 13 S.W.3d 89 (Tex. App.—Austin 2000), *aff'd*, 58 S.W.2d 132 (Tex. Crim. App. 2001); *Ochoa v. State*, 119 S.W.3d 825 (Tex. App.—San

[8]Specific intent to use a motor vehicle as a deadly weapon is not required. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000); *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995).

Antonio 2003, no pet.); and *Davis v. State*, 964 S.W.2d 352 (Tex. App.—Fort Worth 1998, no pet.). *Mann* was a DWI case in which the defendant drove in a dangerous manner, but was not involved in a collision. *Mann*, 13 S.W.3d at 91. Likewise, the offense in *Ochoa* was a DWI case and so it was necessary to prove other people were endangered by Ochoa's action. *Ochoa*, 119 S.W.3d at 828. The *Davis* case also involved a DWI not involving any actual injury or harm to others. *Davis*, 964 S.W.2d at 354. In each of those cases, the defendant committed the offense of DWI and in so doing endangered others, even though no one was actually harmed, so it was necessary to prove such actual endangerment. Those cases are distinguishable from the facts where Hood was charged with intoxication manslaughter: the elements of proof are that he drove a vehicle while intoxicated and by reason of such intoxication Hood caused the death of another person. The basic facts of the offense, which he admitted by his guilty plea, prove beyond question that the manner in which Hood operated the vehicle endangered others—Fisher was killed by Hood's actions. When one uses a vehicle and actually causes the death of another, no greater proof could ever be provided that the vehicle was used as a deadly weapon. Actually causing the death of another person supplies all the proof necessary that the vehicle is capable of causing death and that another person was actually endangered. The Texas Court of Criminal Appeals has recognized that anything, including a motor vehicle, which is actually used to cause the death of a human being is a deadly weapon. *Tyra v. State*, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995); *McKithan*, 838 S.W.2d at 561. This is necessarily so because a thing which actually

causes death is by definition "capable of causing death." *Tyra*, 897 S.W.2d at 798.

If anything else could possibly be necessary to prove, the stipulated facts here are plentiful. There is undisputed evidence that Hood's actions while behind the wheel of his vehicle put others, besides the victim who was killed, in actual danger. Officer William Buttram was traveling in his personal vehicle with his wife and child when he saw Hood traveling at a "high rate of speed" and "almost hit [a] white chevy extended cab truck who was waiting to turn." When Hood cut into Buttram's lane of travel, Buttram had to slam on his brakes to avoid colliding with Hood. A westbound truck had to "swerve extremely hard into the outside lane to prevent a head on collision" with Hood.

There is more than ample evidence to support the trial court's finding that a deadly weapon was used during the commission of this offense. Therefore, we overrule Hood's third point of error and affirm the trial court's judgment.

Jack Carter
Justice

Date Submitted: July 28, 2010
Date Decided: August 13, 2010

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