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

No. 06-09-00230-CR

BRANDON DAVID RILEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 3rd Judicial District Court
Anderson County, Texas
Trial Court No. 28443

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

MEMORANDUM OPINION

Brandon David Riley appeals a trial court's judgment revoking community supervision because it imposed a greater sentence than originally assessed.[1] We affirm the trial court's judgment, as modified.

In 2006, Riley pled guilty to two counts of aggravated assault of a public servant.[2] The trial court found Riley guilty, did not make a deadly-weapon finding, and sentenced Riley to five years' confinement. This sentence was suspended, and Riley was placed on community supervision for five years, 180 days of which was shock community supervision. Although this was the trial court's oral pronouncement, the court mistakenly signed a deferred adjudication order.

Years later, though guilt was adjudicated, the State referenced the deferred adjudication order and sought a new adjudication of Riley's guilt. After the trial court made a deadly-weapon finding contrary to the previous finding in 2006, it sentenced Riley to twenty-five years' incarceration. Riley's complaint, that the trial court exceeded its authority in entering an

[1]Originally appealed to the Twelfth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (Vernon 2005). We are unaware of any conflict between precedent of the Twelfth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

[2]Simultaneously, Riley pled guilty to driving while intoxicated (DWI), and was sentenced to five years' confinement. This sentence was suspended, and he was placed on community supervision for a period of five years. Subsequently, the trial court revoked community supervision and imposed a five-year sentence of confinement. Although Riley appeals from this judgment in our related cause number 06-09-00230-CR, he states that we "should affirm the felony DWI." Our review of his brief clarifies that all arguments on appeal relate to this cause, and challenge the increased sentence of twenty-five years' imprisonment for assault of a public servant. Consequently, we do not reference the DWI in this opinion.

increased sentence, is reviewable for the first time on appeal. *Kimball v. State*, 119 S.W.3d 463, 465 (Tex. App.—Beaumont 2003, no pet.); *Weed v. State*, 891 S.W.2d 22, 24 (Tex. App.—Fort Worth 1995, no pet.).

We review a trial court's order revoking community supervision for an abuse of discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984); *In re T.R.S.*, 115 S.W.3d 318, 321 (Tex. App.—Texarkana 2003, no pet.). Texas courts have held that, once community supervision is revoked, a trial court exceeds its authority by imposing a term of confinement greater than the sentence originally assessed.[3] *Kimball*, 119 S.W.3d at 465; *Weed*, 891 S.W.2d at 24 ("The critical language from Article 42.12, § 23 of the Texas Code of Criminal Procedure reads '[i]f community supervision is revoked . . . the judge may proceed to dispose of the case as if there had been no community supervision' . . . we interpret Article 42.12, § 23(a) to require that when a trial court assesses criminal punishment, probates the sentence, then revokes that probation, the court may impose no greater punishment than was originally assessed").

In this case, we find, and the State concedes, that the trial court abused its discretion by imposing a twenty-five-year sentence of incarceration where the originally assessed sentence was for five years' confinement. Riley's point of error is sustained.

[3] We cite to the following cases, not as binding precedent, but as persuasive authority: *Newton v. State*, No. 13-01-321-CR, 2002 WL 1290048, at *1 (Tex. App.—Corpus Christi June 13, 2002, no pet.) (mem. op., not designated for publication); *Spence v. State*, Nos. 05-01-00268-CR & 05-01-00269-CR, 2001 WL 1590599, at *2 (Tex. App.—Dallas Dec. 14, 2001, no pet.) (mem. op., not designated for publication); *Finney v. State*, No. 07-99-0427-CR, 2000 WL 768855, at *1 (Tex. App.—Amarillo June 14, 2000, no pet.) (mem. op., not designated for publication).

The Texas Rules of Appellate Procedure give this Court authority to reform judgments to make the record speak the truth when the matter has been called to our attention by any source. TEX. R. APP. P. 43.2; *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Rhoten v. State*, 299 S.W.3d 349, 356 (Tex. App.—Texarkana 2009, no pet.). We modify the trial court's judgment to reflect a five-year sentence and remove the deadly-weapon finding, consistent with the original judgment of the trial court as set forth in the oral pronouncement from the 2006 hearing.

As modified, the trial court's judgment is affirmed.

Josh R. Morriss, III
Chief Justice

Date Submitted: November 23, 2010
Date Decided: November 24, 2010

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