



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

No. 06-10-00174-CR

BRANDON DENNARD FRATER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 7th Judicial District Court
Smith County, Texas
Trial Court No. 007-0581-10

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

MEMORANDUM OPINION

After a Smith County¹ jury found Brandon Dennard Frater guilty of driving while intoxicated (DWI)—the offense enhanced to a third degree felony²—trial proceeded to the punishment phase, during which Frater pled “true” to a sentence enhancement.³ *See* TEX. PENAL CODE ANN. § 49.04(a) (Vernon 2003). The jury found the sole sentence-enhancement allegation to be true and assessed Frater’s punishment at seventeen years’ imprisonment and a \$5,000.00 fine.⁴ On appeal, Frater complains only that the trial court’s judgment reflects that Frater pled true to two sentence-enhancement allegations. The State has not filed a brief. Agreeing with Frater, we modify the judgment and affirm it.

The record reflects that Frater pled true to only one sentence-enhancement allegation—a felony conviction for DWI April 18, 2006, in Smith County, Texas, addressed in cause number 007-1827-05.⁵ The trial court’s charge on punishment described this same, sole enhancement

¹Originally 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.

²Because the indictment alleged Frater had two prior convictions for DWI, the charge was enhanced to that of a third degree felony. *See* TEX. PENAL CODE ANN. § 49.09(b)(2) (Vernon Supp. 2010).

³The sentence enhancement was a previous felony conviction for DWI, unrelated to those enhancements alleged in the indictment.

⁴This prior conviction increased the punishment range to that of a second degree felony. TEX. PENAL CODE ANN. § 12.42(a) (Vernon Supp. 2010).

⁵Frater signed a stipulation of evidence regarding this conviction as well, and does not contest his plea of true.

allegation, as did the jury's verdict and the trial court's recitation of that verdict in open court. The trial court's written judgment, therefore, incorrectly reflects a plea and finding of true to two enhancement allegations, rather than one.⁶

We have the authority to modify the judgment to make the record speak the truth when the matter has been called to our attention from 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.). The judgment does not accurately reflect what happened in open court. When an appellate court has the necessary data and evidence before it for correcting the judgment, the judgment may be modified and corrected on appeal. *Banks v. State*, 708 S.W.2d 460, 462 (Tex. Crim. App. 1986); see *Barecky v. State*, 639 S.W.2d 943, 945 (Tex. Crim. App. [Panel Op.] 1982) (when appellate court has same information for modifying judgment as trial court would have were judgment remanded or appeal dismissed, appellate court to modify judgment).

We modify the judgment to reflect only a plea of true and a finding of true to the first sentence-enhancement paragraph. We delete from the judgment the plea, and finding, of true to the second enhancement paragraph.

⁶The second enhancement finding that Frater is a habitual offender was erroneously included in the judgment and is not supported by the record.

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

Josh R. Morriss, III
Chief Justice

Date Submitted: March 25, 2011
Date Decided: March 28, 2011

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