IN THE
TENTH COURT OF APPEALS

No. 10-14-00291-CR

JAVIER RIOS MARTINEZ,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 12th District Court
Walker County, Texas
Trial Court No. 22614

MEMORANDUM OPINION

In one issue, appellant, Javier Rios Martinez, challenges his conviction for intoxication assault with a motor vehicle causing serious bodily injury. *See* TEX. PENAL CODE ANN. § 49.07 (West 2011). Specifically, Martinez contends that the underlying indictment is fundamentally defective because it does not allege an essential element—"in a public place." We affirm.

I. BACKGROUND

Martinez was charged by indictment with committing the offense of intoxication assault with a motor vehicle causing serious bodily injury to Linda Oliver based on an incident that allegedly transpired on or about August 20, 2004. Pursuant to an agreement with the State, Martinez pleaded guilty to the charged offense and waived his right to appeal. The trial court accepted Martinez's guilty plea, sentenced Martinez to confinement in the Institutional Division of the Texas Department of Criminal Justice for eight years, suspended the sentence and placed Martinez on community supervision for eight years, and assessed a $1,000 fine.[1] The trial court also indicated that Martinez did not have the right of appeal at this point because the case was a plea-bargain case.

Thereafter, the State filed a motion to revoke Martinez's community supervision, alleging numerous violations of the terms and conditions of his community supervision. After a hearing, the trial court concluded that Martinez had violated his community supervision and sentenced Martinez to five years' confinement in the Institutional Division of the Texas Department of Criminal Justice with a $1,000 fine. The trial court

[1] The judgment placing Martinez on community supervision recited the terms of the plea agreement as follows:

> EIGHT (8) YEARS CONFINEMENT IN TDCJ-ID PROBATED FOR EIGHT (8) YEAR, FINE, COURT COSTS, ATTORNEY FEES, 30 DAYS IN WALKER COUNTY JAIL, COMMUNITY SERVICE, CRIME VICTIM, CRIMESTOPPERS, INTERLOCK DEVICE[,] LETTER OF APOLOGY TO VICTIM, RESTITUTION.

certified Martinez's right to appeal only "the revocation and sentence." This appeal followed.

II. ANALYSIS

A plea-bargaining defendant may only appeal: (1) matters that were raised by written motion filed and ruled on before trial or (2) after getting the trial court's permission to appeal. *See* TEX. R. APP. P. 25.2(a)(2). In every criminal case in which the defendant appeals, the trial court must certify whether the defendant's appeal falls within one of the two categories listed in rule 25.2(a)(2). *See id.* at R. 25.2(d).

Generally, a defendant who is placed on community supervision may raise issues relating to the original plea proceeding only in an appeal taken when the community supervision is first imposed. *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999). Issues with the imposition of community supervision may not be raised in an appeal from an order revoking community supervision and adjudicating guilt. *Id.* However, in *Nix*, the Court of Criminal Appeals articulated two exceptions to the general rule in *Manuel*: the "void judgment exception" and the "habeas corpus exception."[2] *See Nix v. State*, 65 S.W.2d 664, 667 (Tex. Crim. App. 2001); *Jordan v. State*, 54 S.W.3d 783, 785 (Tex. Crim. App. 2001).

[2] Because the record does not reflect that Martinez filed an application for writ of habeas corpus before his community supervision was revoked, the "habeas corpus exception" is not applicable.

The "void judgment exception" applies in "rare situations" in which the trial court had no power to render the judgment. *Nix*, 65 S.W.3d at 667.

> A judgment of conviction for a crime is void when (1) the document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument, thus the trial court has no jurisdiction over the defendant, (2) the trial court lacks subject matter jurisdiction over the offense charged, such as when a misdemeanor involving official misconduct is tried in a county court at law, (3) the record reflects that there is no evidence to support the conviction, or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel, when such has not been waived, in violation of *Gideon v. Wainwright*.

Id. at 668 (internal citations & footnotes omitted). The *Nix* Court further opined that "[w]hile we hesitate to call this an exclusive list, it is very nearly so." *Id.*

Here, Martinez complains that his conviction is based on a "fundamentally defective" indictment and that the subsequent revocation of his community supervision and resulting incarceration is error. "Except for certain circumstances outlined by *Duron* and *Cook*, 'fundamental' indictment errors have been eliminated by constitutional and statutory amendment." *Id.* at 668 n.12 (citing *Studer v. State*, 799 S.W.2d 263, 271-72 (Tex. Crim. App. 1990); *see Duron v. State*, 956 S.W.2d 547, 550-51 (Tex. Crim. App. 1997) (noting that "a written instrument is an indictment or information under the Constitution if it accuses someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the instrument is otherwise defective"); *Cook v. State*, 902 S.W.2d 471, 479-80 (Tex. Crim. App. 1995) ("[A] charging instrument must at least charge '*a person*,' with the commission of an offense. If the

charging instrument fails to charge 'a person[,]' then it is not an indictment and does not vest the trial court with jurisdiction." (emphasis in original)).

In the instant case, the charging instrument substantially tracked the language contained in section 49.07 of the Penal Code—the operative statute. However, despite being included in section 49.07 of the Penal Code, the indictment did leave out the language "in a public place." Nevertheless, we cannot say that the indictment is "fundamentally defective" and in violation of the Texas Constitution because the indictment accused Martinez, a person, of intoxication assault causing serious bodily injury with enough clarity and specificity to identify the penal statute under which the State intended to prosecute—section 49.07 of the Penal Code. *See Duron*, 956 S.W.2d at 550-51; *see also Cook*, 902 S.W.2d at 479-80. And because the indictment in this case does not fall within the circumstances outlined in *Duron* and *Cook*, we cannot say that the judgment in this case is void. *See Nix*, 65 S.W.3d at 668; *see also Duron*, 956 S.W.2d at 550-51; *Cook*, 902 S.W.2d at 479-80. Therefore, the record does not establish that Martinez has met the "void judgment exception" in *Nix*. *See* 65 S.W.3d at 668. We overrule Martinez's sole issue on appeal.

III. CONCLUSION

We affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed March 31, 2016
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