TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00802-CR

Michael Edward Osborne, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 426TH JUDICIAL DISTRICT
NO. 75684, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Michael Edward Osborne was charged with evading arrest or detention while using a vehicle, a third-degree felony. *See* Tex. Penal Code § 38.04(a), (b)(2)(A). The State gave notice of two enhancement paragraphs, one alleging that Osborne used a deadly weapon in the commission of the offense and the other alleging that he had previously been convicted of a felony. The enhancement paragraph alleging the prior felony conviction, if proven, would make Osborne's offense punishable as a second-degree felony. *See id.* § 12.42(a). Osborne entered into a plea agreement with the State, according to which Osborne pleaded guilty and the State abandoned the enhancement paragraphs but made no specific recommendation as to punishment. The trial court accepted Osborne's plea and sentenced him to eight years' imprisonment. Osborne now appeals, contending that his guilty plea was involuntary and that he received ineffective assistance of

counsel. Because Osborne waived his appellate rights as part of his plea bargain, we will dismiss his appeal for want of jurisdiction.

Rule 25.2 of the Texas Rules of Appellate Procedure limits a criminal defendant's appellate rights in plea-bargain cases:

> In a plea bargain case—that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant—a defendant may appeal only:
>
> (A) those matters that were raised by written motion filed and ruled on before trial, or
>
> (B) after getting the trial court's permission to appeal.

Tex. R. App. P. 25.2(a)(2). If, as part of a plea agreement, the State abandons an enhancement paragraph that would have increased the maximum punishment that the defendant could have received, the plea agreement effectively puts a "cap" on punishment, and the requirements of Rule 25.2(a)(2) apply. *See Gordon v. State*, No. 03-15-00240-CR, 2016 WL 3475179, at *1 (Tex. App.—Austin June 16, 2016, no pet.) (mem. op., not designated for publication) (per curiam) (noting that plea agreement effectively caps punishment when State waives enhancement allegation); *Randle v. State*, No. 01-10-00099-CR, 2011 WL 3359703, at *2 (Tex. App.—Houston [1st Dist.] Aug. 4, 2011, no pet.) (mem. op., not designated for publication) ("By abandoning the felony enhancement paragraphs, the State effectively capped Randle's potential sentence at two years, the maximum punishment for a state jail felony."); *Carender v. State*, 155 S.W.3d 929, 931 (Tex. App.—Dallas 2005, no pet.) (when State withdrew punishment enhancement allegation and thereby decreased defendant's maximum possible sentence, "the plea bargain agreements in

these cases effectively put a 'cap' on punishment," and Rule 25.2 applied); *see also Strimban v. State*, No. 14-15-00251-CR, 2015 WL 8246324, at *1 (Tex. App.—Houston [14th Dist.] Dec. 8, 2015, no pet.) (mem. op., not designated for publication) (per curiam) ("An agreement that places a cap on punishment is a plea bargain for purposes of Texas Rule of Appellate Procedure 25.2(a)(2)."); *Alba v. State*, Nos. 05-14-00020–21-CR, 2014 WL 6634137, at *1 (Tex. App.—Dallas Nov. 24, 2014, no pet.) (mem. op., not designated for publication) ("An agreement to a punishment cap is a plea agreement within the meaning of rule 25.2 of the Texas Rules of Appellate Procedure."); *Threadgill v. State*, 120 S.W.3d 871, 872 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (per curiam) ("Appellant pleaded guilty and agreed to the State's recommended punishment cap of 20 years; the punishment assessed by the trial court did not exceed it. This was therefore a plea-bargained case within the meaning of Rule 25.2(a)(2)."); *cf. Taplin v. State*, 78 S.W.3d 459, 461 (Tex. App.—Austin 2001, no pet.) (concluding that Rule 25.2 did not apply because "the State's agreement to abandon the enhancement paragraphs" was relevant only to defendant's *minimum* possible punishment, not *maximum* possible punishment, and was therefore not punishment "cap").

In a plea-bargain case under Rule 25.2, a defendant may not challenge the voluntariness of his guilty plea on direct appeal. *See Cooper v. State*, 45 S.W.3d 77, 81 (Tex. Crim. App. 2001) ("When we actually consider the issue of whether voluntariness of a guilty plea may be raised on appeal from a plea-bargained, felony conviction, we find that the answer must be that it may not."); *Theus v. State*, Nos. 14-15-01001–02-CR, 2017 WL 924507, at *1 (Tex. App.—Houston [14th Dist.] Mar. 7, 2017, no pet. h.) ("Voluntariness of a guilty plea from a plea-bargained, felony conviction may not be raised on appeal."); *Pirie v. State*, No. 03-15-00212-CR, 2015 WL 2066150, at *1 n.2 (Tex. App.—Austin Apr. 29, 2015, no pet.) (mem. op., not designated for publication)

("Pirie cannot raise such a complaint in this direct appeal. To the extent Pirie is attempting to challenge the voluntariness of his plea, his remedy, if any, would be through a petition for writ of habeas corpus.") (citation omitted). Nor may a defendant allege ineffective assistance of counsel on direct appeal in a plea-bargain case. *See Woods v. State*, 108 S.W.3d 314, 316 (Tex. Crim. App. 2003); *Chavez v. State*, 139 S.W.3d 43, 60 (Tex. App.—Corpus Christi 2004), *aff'd*, 183 S.W.3d 675 (Tex. Crim. App. 2006) ("Chavez waived in each case any appeal based on the ineffective assistance of counsel or the voluntariness of his plea when he pleaded guilty to a felony pursuant to an agreed punishment recommendation. The proper vehicle for ineffectiveness and voluntariness issues is a collateral attack that permits the development of facts concerning the claims.") (citation omitted).

Here, the record contains a "Written Plea Agreement" signed by Osborne, the State, and the trial court. This agreement informed Osborne, "When the Court follows a plea agreement, you must obtain permission of the Court before you can prosecute an appeal on any matter in the case, except for matters raised by written motion filed prior to trial." In the agreement, Osborne also acknowledged, "I give up and waive . . . any and all rights of appeal in this case." Although the written agreement has "Open" written under the punishment recommendation section, the reporter's record reveals that the State waived its enhancement paragraphs as part of the plea agreement.[1]

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[1] At the hearing on the guilty plea, the following exchange occurred:

> [Defense attorney]: I think I just wanted to put on the record, Your Honor, that while it's not in the plea papers, the state's going to waive any enhancements as a part of this plea agreement.
>
> [Prosecutor]: That's correct, Your Honor. We filed a motion of enhancement in terms of both punishment as well as 3G. We are waiving those as part of the plea agreement.

If the State had proven the allegations in these enhancement paragraphs, the maximum sentence Osborne could have received would have been 20 years. *See* Tex. Penal Code § 12.33(a) (providing punishment range for second-degree felony). Without these enhancements, the maximum sentence Osborne could have received was 10 years. *See id.* § 12.34(a) (providing punishment range for third-degree felony). Therefore, by agreeing to abandon the enhancement paragraphs, the State effectively "capped" the punishment that Osborne could receive. *See Carender*, 155 S.W.3d at 931. Accordingly, Rule 25.2(a)(2) governs Osborne's appellate rights. *See* Tex. R. App. P. 25.2(a)(2) (defining "plea bargain case" as "a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant"); *Threadgill*, 120 S.W.3d at 872.

Nothing in the record before us indicates that Osborne is attempting to appeal matters raised in a pre-trial motion or that he obtained the trial court's permission to appeal. *See* Tex. R. App. P. 25.2(a)(2)(A), (B). Therefore, Osborne's notice of appeal did not trigger our jurisdiction. *See* Theus, 2017 WL 924507, at *1 ("Appellant's notice of appeal, coming after entry of a plea bargain agreement and his waiver of the right to appeal, did not trigger this court's jurisdiction."); *Alba*, 2014 WL 6634137, at *2 (dismissing appeals for want of jurisdiction because appellant had plea agreement under Rule 25.2); *Daniels v. State*, No. 09-05-019 CR, 2005 WL 2562611, at *3 (Tex. App.—Beaumont Oct. 12, 2005, no pet.) (mem. op., not designated for publication) (dismissing appeal because appellant "had no right of appeal under Rule 25.2(a)(2)").

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[The Court]: All right. I'll make note of that waiver.

Although the trial court's certification states that this case "is not a plea-bargain case, and the defendant has the right of appeal," we conclude, based on the analysis above, that this certification is defective and should have indicated that this was a plea-bargain case and Osborne has no right of appeal. *See Dears v. State*, 154 S.W.3d 610, 614–15 (Tex. Crim. App. 2005) ("We conclude that an appellate court has the ability to examine a certification for defectiveness . . . . If the court chooses to examine a certification after the record is filed, it has the ability to compare the certification to the record and, in that instance, a duty to do so."); *Alba*, 2014 WL 6634137, at *1 ("In plea bargain cases, we review the record to determine our jurisdiction and whether the trial court's certification is correct."); *Miranda v. State*, Nos. 03-13-00182–85-CR, 2013 WL 3481535, at *1 (Tex. App.—Austin July 3, 2013, no pet.) (mem. op., not designated for publication) ("We are required to examine a certification for defectiveness . . . ."); *Daniels*, 2005 WL 2562611, at *2 ("When a complete record is present, an appellate court is obligated to examine that record so as to ascertain whether the trial court's certification is defective."). Therefore, we do not have jurisdiction to consider the issues Osborne brings on appeal—whether his guilty plea was involuntary and whether his trial counsel's assistance was ineffective. *See Cooper*, 45 S.W.3d at 81; *Chavez*, 139 S.W.3d at 60.

Moreover, because the record before us shows that Osborne has no right of appeal, contrary to the trial court's defective certification, we are not required to obtain an amended certification before dismissing this appeal. *See Briggs v. State*, No. 01-15-00269-CR, 2015 WL 6935565, at *1 (Tex. App.—Houston [1st Dist.] Nov. 10, 2015, pet. ref'd) (mem. op., not designated for publication) ("If, in a plea bargain case, the certification incorrectly represents that the defendant has the right to appeal, dismissal is appropriate."); *Wickman v. State*,

No. 05-08-00652-CR, 2009 WL 2622393, at *3 (Tex. App.—Dallas Aug. 27, 2009, no pet.) (mem. op., not designated for publication) ("Because no permission was given, we agree with the State that appellant is bound to his waiver and the appeal should be dismissed."); *Pena v. State*, No. 14-05-00453-CR, 2006 WL 2254357, at *2 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, no pet.) (mem. op., not designated for publication) (dismissing appeal in plea-bargain case without obtaining amended certification); *Barcenas v. State*, 137 S.W.3d 865, 866 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (per curiam) ("[W]hen the trial court's certification states that there is a right to appeal and the record is clear that the appellant has no such right, we know of nothing that would require an appellate court to obtain an amended certification before dismissing the appeal.").

Accordingly, we dismiss Osborne's appeal for want of jurisdiction.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Dismissed for Want of Jurisdiction

Filed: April 5, 2017

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