



NUMBER 13-16-00353-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

MISTY ELLES,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the 94th District Court
of Nueces County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Longoria and Hinojosa
Memorandum Opinion by Chief Justice Valdez**

Appellant Misty Elles appeals from the revocation of community supervision. By two issues, Elles contends that the trial court failed to give her credit for time that she served in jail and failed to give her credit for time she served in a residential substance abuse treatment facility.¹ We modify the trial court's judgment and affirm as modified.

¹ We have renumbered and reorganized Elles's issues.

I. BACKGROUND

On January 30, 2009, pursuant to a plea agreement with the State, Elles pleaded guilty to aggravated robbery and unauthorized use of a motor vehicle occurring in the same criminal transaction. The trial court deferred adjudication and placed Elles on community supervision for a term of six years for the aggravated robbery offense and five years for the unauthorized use of a motor vehicle offense. In addition, the trial court ordered as a condition of community supervision that Elles serve sixty days in jail, with credit for twenty-nine days she had spent in jail pending her guilty plea.

In September 2009, the State filed a motion to revoke (MTR) Elles's community supervision, and she was arrested pursuant to a MTR warrant. The trial court ordered Elles to attend a substance abuse felony program facility (SAFPF) for drug rehabilitation. Elles waited in jail for a bed to become available for thirty-five days. Elles was in the SAFPF for 180 days, released, and continued on community supervision.

On November 1, 2010, the State filed another motion to revoke alleging that Elles's urine sample had tested positive for cocaine, she failed to report to her probation officer, and she had been discharged for noncompliance from the drug treatment aftercare program. The trial court issued a MTR warrant, and on January 16, 2011, the State discovered that Elles was in custody in the San Patricio County Jail on unrelated charges. The trial court issued a detainer, and she was brought to Nueces County for a MTR hearing. The trial court did not revoke community supervision on the aggravated robbery charge. However, the trial court revoked community supervision for the unauthorized use of a motor vehicle charge, adjudicated her guilty, and sentenced her to eighteen months in state jail to run concurrent with community supervision on the aggravated robbery

charge. Elles spent eighteen days in jail from the time the detainer was placed until she was sentenced on the unauthorized use of a motor vehicle charge. In its judgment for the unauthorized use of a motor vehicle, the trial court credited Elles for 230 days of time served.

Elles served her sentence for the unauthorized use of a motor vehicle offense and was discharged from jail. The State filed another MTR in August 2014 alleging that Elles, now on community supervision for the aggravated robbery charge only, violated various terms of community supervision. On October 9, 2014, Elles was arrested on a MTR warrant regarding the aggravated robbery offense, and on December 4, 2014, she was sanctioned and continued on community supervision. Elles spent fifty-six days in confinement. On January 21, 2016, Elles was arrested on another MTR warrant, and continued on probation. She spent twenty-eight days in confinement.

On May 16, 2016, Elles was arrested on another MTR warrant. This time, the trial court revoked Elles's community supervision, adjudicated her guilty of aggravated robbery, and sentenced her to ten years' confinement. Elles spent thirty-eight days in confinement prior to the sentence. The trial court awarded Elles 355 days of credit for time served in its original judgment. Elles filed her notice of appeal on June 28, 2016. On August 8, 2016, the trial court entered a judgment nunc pro tunc to correct the trial court's clerical error omitting its affirmative deadly weapon finding on the first page of the judgment.² However, the trial court stated that the judgment was entered on June 3, 2016, instead of on June 26, 2016, and it omitted the 355 days of credit awarded to Elles for time served.

² The second page of the original judgment correctly included the deadly weapon finding.

II. TIME SERVED

By her first issue, Elles contends that the trial court must give her credit for the time she spent in jail for the unauthorized use of a motor vehicle charge.³ Elles relies on section 3.03(a) of the Texas Penal Code stating that when a defendant is found guilty of two or more offenses that arise out of the same criminal episode and are prosecuted in a single criminal action, the sentences shall run concurrently. See TEX. PENAL CODE ANN. § 3.03(a) (West, Westlaw through Ch. 49, 2017 R.S.). According to Elles, section 3.03(a) requires the trial court to give her credit for the time she spent in jail on her conviction of unauthorized use of a motor vehicle.

Article 42.03A of the Texas Code of Criminal Procedure sets out when the trial court must give a defendant credit for time served. See TEX. CODE CRIM. PROC. ANN. art. 42.03 § 2(1), (2) (West, Westlaw through Ch. 49, 2017 R.S.). It states that the trial court “shall give the defendant credit on the defendant’s sentence for [(1)] the time that the defendant has spent . . . in jail for a case” and (2) time spent in a substance abuse treatment facility. *Id.* There is nothing in article 42.03 supporting Elles’s assertion and section 3.03(a) does not address or mention credit for time served. Elles cites no other authority to support her assertion, and we find none. Accordingly, we are not persuaded by Elles’s assertion that the trial court was required to give her credit for the time she spent in jail on the unauthorized use of a vehicle conviction. We overrule Elles’s first issue.

³ As previously stated, Elles was continued on community supervision for the aggravated robbery charge. The community supervision ran concurrent to her time in jail for her conviction of unauthorized use of a motor vehicle.

The State concedes Elles is entitled to the time she served in SAFPF, the time she served in jail while on community supervision, and the time she spent in jail awaiting a bed in the SAFPF. The State points out that the record shows a total of 355 days, which is calculated as follows: (1) Elles spent thirty-five days in jail waiting for a bed at the SAFPF in 2009; (2) Elles spent 180 days in SAFPF; (3) Elles spent eighteen days in jail for this case on a detainer in 2011; (4) Elles spent fifty-six days on a MTR warrant in 2014; (5) Elles spent twenty-eight days in jail on another MRT warrant in this case in 2016; and finally, (6) Elles spent thirty-eight days in jail in this case prior to the revocation and adjudication of the aggravated robbery charge in 2016. Thus, this accounts for the trial court's original award of 355 days credit for time served.

“This court has the power to correct and reform the judgment of the court below to make the record speak the truth when it has the necessary data and information to do so, or make any appropriate order as the law and the nature of the case may require.” *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd); see TEX. R. APP. P.43.2(b). And, as noted by the Fifth Court of Appeals, “[a]ppellate courts have frequently reformed judgments to correct improper recitations or omissions relating to punishment.” *Asberry*, 813 S.W.2d at 530 (citing *Banks v. State*, 708 S.W.2d 460, 462 (Tex. Crim. App. 1986); *Tamez v. State*, 620 S.W.2d 586, 590 (Tex. Crim. App. [Panel Op.] 1981); *Harris v. State*, 565 S.W.2d 66, 70 (Tex. Crim. App. 1978); *Garza v. State*, 705 S.W.2d 818, 820 (Tex. App.—San Antonio 1986, no pet.); *Norman v. State*, 642 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1982, no pet.)). We agree with the State that the record shows that the proper amount of days that Elles is entitled to receive as credit for time served is 355. Accordingly, we modify the judgment to reflect that Elles

is entitled to 355 days of time credited, and we modify the judgment to reflect that it was signed on June 26, 2016.⁴

III. CONCLUSION

We modify the judgment and affirm as modified.

/s/ Rogelio Valdez

ROGELIO VALDEZ

Chief Justice

Do not publish.

TEX. R. APP. P. 47.2(b).

Delivered and filed the
17th day of August, 2017.

⁴ We need not address Elles's second issue arguing that she was not credited for the 180 days she spent in the SAFPF because as explained above, she is entitled to such credit, and we have modified the judgment to so reflect that she gets credit for those days in SAFPF. See TEX. R. APP. P. 47.3.