NO. 12-09-00281-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

THOMAS RAY FERGUSON, JR., APPELLANT	***§***	***APPEAL FROM THE 2ND***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***CHEROKEE COUNTY, TEXAS***

MEMORANDUM OPINION

Thomas Ray Ferguson, Jr. appeals his conviction for two counts of forgery of a financial instrument. On original submission, Appellant's counsel filed a brief in compliance with ***Anders v. California***, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and ***Gainous v. State***, 436 S.W.2d 137 (Tex. Crim. App. 1969). After reviewing the record, we identified an arguable issue for appeal. Accordingly, we abated the appeal and remanded the case to the trial court to appoint new counsel to represent Appellant. Appellant's new counsel filed a brief on the merits, presenting nine issues on appeal. We affirm.

BACKGROUND

Appellant was charged by indictment with two counts of forgery of a financial instrument.[1] On October 18, 2006, Appellant entered a plea of guilty to the offense charged in the indictment. Appellant and his counsel signed a waiver of time to file a motion for new trial and arrest of judgment, and a plea of guilty waiver, stipulation, and judicial confession, admitting and judicially

[1] *See* TEX. PENAL CODE ANN. § 32.21(a), (b), (d) (West 2011). An offense under Section 32.21 is a state jail felony if the writing is or purports to be a will, codicil, deed, deed of trust, mortgage, security instrument, security agreement, credit card, check, authorization to debit an account at a financial institution, or similar sight order for payment of money, contract, release, or other commercial instrument. *See* ***id.*** § 32.21(d).

confessing to both counts of the offense alleged in the indictment. He also signed a plea bargain agreement and waiver along with written admonishments. The trial court accepted Appellant's plea, deferred further proceedings without adjudicating his guilt, and ordered that Appellant be placed on deferred adjudication community supervision for five years.[2] The trial court also ordered that Appellant pay court costs and restitution.

The State filed a motion to adjudicate, alleging that Appellant had violated the terms of his community supervision. At the hearing on the motion, Appellant pleaded "not true" to the State's allegations. After a hearing, the trial court granted the State's motion to adjudicate, revoked Appellant's community supervision, and adjudicated Appellant guilty of two counts of forgery of a financial instrument. The trial court assessed Appellant's punishment at twenty-four months of confinement, courts costs, and restitution.[3] This appeal followed.

INDICTMENT

In his first, second, and sixth issues, Appellant argues that both counts of the indictment for the underlying forgery conviction are fatally defective, and that there was no evidence introduced at trial to support the conviction.

Applicable Law

A charging instrument is constitutionally sufficient if the district court and the defendant can determine, from the face of the indictment, that the indictment intends to charge a felony or other offense of which the district court has jurisdiction. ***Teal v. State***, 230 S.W.3d 172, 181 (Tex. Crim. App. 2007). More specifically, the indictment must allege that (1) a person (2) committed an offense. ***Id***. at 179 (citing ***Cook v. State***, 902 S.W.2d 471, 477 (Tex. Crim. App. 1995)). Further, the offense charged must be one for which the trial court has subject matter jurisdiction. ***Id***. at 181. Article 1.14 of the Texas Code of Criminal Procedure provides that

> [i]f the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

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[2] *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a) (West Supp. 2010).

[3] An individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days and, in addition, a fine not to exceed $10,000. TEX. PENAL CODE ANN. § 12.35(a), (b) (West 2011).

TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (West 2005). According to ***Teal***, indictments charging a person with committing an offense, once presented, invoke the jurisdiction of the trial court and jurisdiction is no longer contingent on whether the indictment contains defects of form or substance. ***Teal***, 230 S.W.3d at 177. Thus, all substantive defects in indictments are waivable, and these defects do not render the indictment "void." *See* ***id***. at 178.

As a general rule, the original plea cannot be attacked on an appeal of the revocation proceedings in a deferred adjudication context. ***Nix v. State***, 65 S.W.3d 664, 667 (Tex. Crim. App. 2001). However, there are two exceptions to this rule: (1) the "void judgment" exception, and (2) the "habeas corpus" exception. ***Id***. The void judgment exception recognizes that there are some rare situations in which a trial court's judgment is accorded no respect due to a complete lack of power to render the judgment in question. ***Id***. A void judgment is a "nullity" and can be attacked at any time. ***Id***. at 667-68. Thus, a defendant who was placed on deferred adjudication may raise on appeal an error that would render the original judgment void, even if that appeal comes after the defendant's guilt is adjudicated. ***Id***. at 668.

But a judgment of conviction for a crime is void only 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, and 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 the right to counsel has not been waived. ***Id***.

A guilty plea is some evidence to support a conviction. ***Id***. at 668 n.14.

Analysis

Here, according to Count I of the indictment, Appellant, with the intent to defraud or harm another, passed a forged writing purporting to be the act of "Ronald Joe Fryar," who did not authorize the act. According to Count II of the indictment, Appellant, with intent to defraud or harm another, passed a forged writing purporting to be the act of "Donald Ray Fryar," who did not authorize the act. The copies of the alleged forged writings in the indictment, however, purport to be the act of "Ronald J. Fryar." Both counts of the indictment also state that the financial instrument was a "cashier check."

On appeal, Appellant complains that the trial court lacked jurisdiction, and therefore the judgment is void, because the indictment does not satisfy the constitutional requisites of a charging instrument. *See* ***Nix***, 65 S.W.3d at 668. More specifically, he argues that the indictment is in "material conflict" with the names on the checks, and that the writings were not "cashier checks," but regular checks. Applying the test for the constitutional sufficiency of a charging instrument, the indictment in this case contains allegations that Appellant, with the intent to defraud or harm another, passed a forged writing purporting to be the act of another who did not authorize the act. *See* TEX. PENAL CODE ANN. § 32.21(a)(1)(A)- (B), (b) (West 2011). By this language, the indictment alleged that Appellant committed the offense of forgery. *See* ***Teal***, 230 S.W.3d at 179. Moreover, the indictment alleged that the writing is, or purports to be, a "cashier check," i.e., authorization to debit an account at a financial institution or similar sight order for payment of money, or other commercial instrument. *See* TEX. PENAL CODE ANN. § 32.21(d) (West 2011). As a result, the offense is a state jail felony, subject to the jurisdiction of a district court. *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (West 2005) (stating that district courts shall have original jurisdiction in felony criminal cases); ***Teal***, 230 S.W.3d at 181. Thus, the district court and Appellant could determine, from the face of the indictment, that the State intended to charge Appellant with the felony offense of forgery for which a district court has jurisdiction. *See* ***Teal***, 230 S.W.3d at 181. Consequently, the indictment met the constitutional requirements of a charging instrument. *See* ***Nix***, 65 S.W.3d at 668.

Because the indictment was constitutionally sufficient, any alleged defects in the indictment are not jurisdictional but are, instead, substance defects that must be raised before trial or be waived. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b); ***Smith v. State***, 309 S.W.3d 10, 17-18 (Tex. Crim. App. 2010); ***Teal***, 230 S.W.3d at 177-78. Appellant did not object to the alleged defects in the indictment before trial. *See* ***Teal***, 230 S.W.3d at 178. Therefore, his argument that the trial court lacked jurisdiction, and therefore the judgment is void, is waived. *See* ***id***.

However, Appellant also argues that there is no evidence or insufficient evidence to support the conviction, and thus the judgment is void.[4] A complaint about the sufficiency of the evidence to support a conviction must be brought after the trial court's decision to defer

[4] Appellant complains that the original checks were not introduced into evidence at the plea hearing. However, the record shows that copies of the checks were a part of Appellant's plea of guilty waiver, stipulation, and judicial confession admitted into evidence at the plea hearing.

adjudication of guilt and not after a subsequent revocation of community supervision and adjudication of guilt. *See* ***Manuel v. State***, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999) ("[A] defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding, such as evidentiary sufficiency, only in appeals taken when deferred adjudication community supervision is first imposed."). A judgment can be void if the record reflects that there is a complete lack of evidence to support the conviction. *See* ***Nix***, 65 S.W.3d at 668 n.14. However, a guilty plea, such as Appellant entered in the underlying cause, is some evidence to support the conviction. *See* ***id***. Thus, Appellant's conviction is not void for lack of evidence.

Because Appellant waived his argument that the trial court lacked jurisdiction, and therefore the judgment is void, and because his guilty plea is some evidence to support the conviction, Appellant's first, second, and sixth issues are overruled. Because we have overruled these issues, we need not reach his third issue relating to jeopardy.

REVOCATION OF COMMUNITY SUPERVISION

In his fourth, fifth, seventh, and eighth issues, Appellant argues that there is no evidence or insufficient evidence to support revocation of his community supervision, that there is no specific finding for one of the paragraphs in the State's motion to revoke, and that four of the conditions Appellant allegedly violated were unconstitutional.

Standard of Review

We review a trial court's order revoking community supervision under an abuse of discretion standard. *See* ***Rickels v. State***, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). In a community supervision revocation proceeding, the state has the burden of proving a violation of the terms of community supervision by a preponderance of the evidence. *See* ***id***. at 763-64; ***Cobb v. State***, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). The state meets its burden when the greater weight of the credible evidence creates a reasonable belief that the defendant violated a condition of community supervision as alleged. *See* ***Rickels***, 202 S.W.3d at 764; ***Jenkins v. State***, 740 S.W.2d 435, 437 (Tex. Crim. App. 1983). In a hearing on a motion to revoke community supervision, the trial court is the sole trier of fact, and is also the judge of the credibility of the witnesses and the weight to be given their testimony. ***Taylor v. State***, 604 S.W.2d 175, 179 (Tex. Crim. App. 1980); ***Trevino v. State***, 218 S.W.3d 234, 240 (Tex. App.–Houston [14th Dist.]

2007, no pet.). Furthermore, on appeal, we examine the evidence in the light most favorable to the trial court's ruling. ***Garrett v. State***, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981); ***Duncan v. State***, 321 S.W.3d 53, 57 (Tex. App.–Houston [1st Dist.] 2010, pet. ref'd).

In cases where the trial court revokes a defendant's community supervision based on findings that a defendant violated more than one condition of probation, the revocation does not constitute an abuse of discretion where any single finding of a violation is held to be valid. *See* ***Moore v. State***, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980) ("We need not address [the] appellant's other contentions since one sufficient ground for revocation will support the [trial] court's order to revoke probation."); ***Cochran v. State***, 78 S.W.3d 20, 28 (Tex. App.–Tyler 2002, no pet.).

Analysis

Here, one of the terms and conditions of Appellant's community supervision provided that Appellant commit no offense against the laws of Texas, any other state, or the United States. The State's motion to adjudicate alleged that, on August 20, 2007, Appellant committed the offense of driving while intoxicated in Cherokee County, thereby violating the terms and conditions of his community supervision. Accordingly, the State was required to prove that Appellant was intoxicated while operating a motor vehicle in a public place. *See* TEX. PENAL CODE ANN. § 49.04(a) (West 2011).

At the hearing on the motion to adjudicate, Jamie Beene, a narcotics property crime investigator for the Cherokee County Sheriff's Department in August 2007, stated that he was traveling southbound in an unmarked vehicle on Highway 69 near Seven Mile Hill towards Rusk, Texas. Although Beene was traveling at the posted speed of seventy miles per hour, a gold Hyundai passed him at a high rate of speed. He began following the vehicle, and stated that it consistently traveled at approximately eighty-five miles per hour.

Beene requested that an officer with the Rusk Police Department stop the vehicle for speeding. He stated that when the vehicle entered the Rusk city limits, it traveled to the shoulder side lane and crossed the white fog line on the outer edge before being stopped by an officer with the Rusk Police Department. According to Beene, he assisted the other officer, made contact with the driver, identified the driver as Appellant, and informed Appellant that he had been stopped for speeding. Beene observed an open can of beer in the vehicle's center console between Appellant and a passenger. He asked Appellant if he had anything to drink, and Appellant admitted that he

"had had a few to drink." Beene testified that he performed a field sobriety test and that Appellant failed the one-leg stand by swaying back and forth. He also stated that the portable breath test, conducted on the side of the road, showed that Appellant's alcohol level was more than .08. On cross examination, Appellant admitted that he "drank a couple of beers" before he left the house.

Based on the foregoing evidence, which we consider in the light most favorable to the trial court's order, we conclude that the State met its burden to prove by a preponderance of the evidence that Appellant committed an offense under the laws of the State of Texas in violation of the terms and conditions of his community supervision. Therefore, the trial court did not abuse its discretion in revoking Appellant's community supervision. Accordingly, Appellant's fifth issue is overruled. Because we have overruled Appellant's fifth issue, we need not address Appellant's fourth, seventh, and eighth issues. *See* ***Moore***, 605 S.W.2d at 926; ***Cochran***, 78 S.W.3d at 28.

MENTAL EXAMINATION

In his ninth issue, Appellant argues that he should be evaluated by a mental health expert to determine if he effectively assisted his counsel at trial. More specifically, he requests that this court order a mental examination "if more information is produced to merit an examination." Appellant has not provided this court with the additional information he alludes to in his brief. Further, the portion of the Texas Code of Criminal Procedure cited by Appellant allows either party or the trial court to suggest that a defendant is incompetent to stand trial and, if the trial court determines there is evidence to support a finding of incompetency, it should stay all other proceedings in the case. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.004(a), (d) (West 2006). If the trial court determines there is evidence to support a finding of incompetency, the trial court shall order an examination to determine whether the defendant is incompetent to stand trial in a criminal case. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.005(a) (West 2006). Neither section authorizes an appellate court to order a competency examination. Because there is no support for the proposition that this court may order an examination to determine Appellant's competency, we conclude that his argument is without merit. Accordingly, Appellant's ninth issue is overruled.

DISPOSITION

The judgment of the trial court is ***affirmed***.

JAMES T. WORTHEN
Chief Justice

Opinion delivered November 23, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

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