NO. 12-10-00282-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

DWIGHT BAYONNE, APPELLANT	***§***	***APPEAL FROM THE 7TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Dwight Bayonne appeals his conviction for possession of less than one gram of cocaine, for which he was sentenced to imprisonment for fifteen years and ordered to pay restitution in the amount of one hundred forty dollars to the Texas Department of Public Safety. Appellant raises four issues on appeal. We modify and affirm as modified.

BACKGROUND

Appellant was charged by indictment with possession of less than one gram of cocaine, and pleaded "guilty." The indictment further alleged that Appellant previously had been convicted of two felonies. At the trial on punishment, Appellant pleaded "true" to the enhancement allegations in the indictment. Following the argument of counsel, the trial court found Appellant "guilty" as charged and found the enhancement allegations to be "true." Before sentencing Appellant, the trial judge explained that he would assess Appellant's punishment based upon his belief of what a Smith County jury would do. Ultimately, the trial court sentenced Appellant to imprisonment for fifteen years. The trial court also ordered that Appellant pay restitution in the amount of one hundred forty dollars to the Texas Department of Public Safety (DPS). This appeal followed.

FAILURE TO CONSIDER THE FULL RANGE OF PUNISHMENT

In his first issue, Appellant argues that the trial court did not consider the full range of punishment denying Appellant due process and due course of law. In his second issue, Appellant argues that the trial court improperly assessed what the court believed a Smith County jury would assess as punishment denying Appellant due process and due course of law. Because these two issues are interrelated, we address them together.

The Fourteenth Amendment provides that the state may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV; *see also* TEX. CONST. art. I, § 19. Due process requires that the trial court conduct itself in a neutral and detached manner. ***Gagnon v. Scarpelli***, 411 U.S. 778, 786, 93 S. Ct. 1756, 1762, 36 L. Ed. 2d 656 (1973); ***Brumit v. State***, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006); ***Jaenicke v. State***, 109 S.W.3d 793, 796 (Tex. App.–Houston [1st Dist.] 2003, pet. ref'd). "[A] trial court's arbitrary refusal to consider the entire range of punishment in a particular case violates due process." ***Ex parte Brown***, 158 S.W.3d 449, 456 (Tex. Crim. App. 2005); *see also* ***Brumit***, 206 S.W.3d at 645. However, absent a clear showing of bias, we presume the trial court's actions were correct. ***Brumit***, 206 S.W.3d at 645. Bias is not shown when (1) the trial court hears extensive evidence before assessing punishment, (2) the record contains explicit evidence that the trial court considered the full range of punishment, and (3) the trial court made no comments indicating consideration of less than the full range of punishment. *See* ***id***.

In the case at hand, prior to assessing Appellant's punishment, the trial court stated, in pertinent part, as follows:

> THE COURT: All right. Thank you, sir. Mr. Jarvis, if you and your client will stand. The Court takes judicial notice of the Court's file and the presentence and all the evidence that's contained in those documents.
>
> Mr. Bayonne, the Court - - the lawyers have heard this before because they've been here before, but you haven't. The Court takes open sentencings very seriously. I handle them just as if I were sitting over in the jury box with 11 other citizens hearing evidence and making a determination of what they think would be the appropriate punishment in the case.
>
> Because I think every defendant that comes in here, if they choose to go to the jury, that's what they'll end up having to assess their punishment. If they choose to plead guilty, waive the jury and have the Court assess punishment, I don't think the Court should assess a harsher punishment on a defendant just because the Court knows how the process works.
>
> I don't think that the defendant should be given a more lenient sentence just because the Court knows how things work. I don't think a defendant should be able to avoid what a Smith County jury would do based upon the facts by having the Court do it in lieu of the jury[']s] doing it.
>
> As I said, the lawyers have heard this before because that's my feelings. I think that's really -

- at least my own opinion - - of what the law requires a Court to do is take all the facts in, make an assessment, and make a just punishment in the case. That's the same thing that the law really requires of our juries that hear the evidence and make those determinations.

Unfortunately, for a lot of defendants, they have been in the criminal justice system before and had prior felony convictions, which makes them ineligible for probation from a jury. So that if the jury heard your case, they wouldn't be considering probation. That's the reason that you've heard the two lawyers argue for respective number of years in the penitentiary for you as a punishment. Because that's all the jury would be able to give you in the case.

One of the things the jury, I think, when I see cases come through here pay particular attention to is not only the facts of the case as to guilt/innocence of a particular person. But if they make it on to the punishment aspect, where they have to determine what an appropriate punishment is, they not only consider the underlying offense, such as a possession of a controlled substance in your case, but also look at what the history of that person is: Is it the first time they're here, where maybe they need to be lenient on them and give them a lighter sentence because maybe they, hopefully, will have learned their lesson?

Or is it, unfortunately, like you where you've been convicted a number of times and you've actually been to the penitentiary a number of times? My experience is that with each time that you come through the system, they tend to be heavier and heavier and heavier in the punishment range as to what an appropriate punishment would be.

And in your case[,] they're going to see from 1985 to 1986 to 1987 to 1988 to 1994 to 1996 to 2002, all the way up to the current charge, it's just a revolving door for you that you get in trouble, you get a deferred probation, looks like you barely get off that probation before you commit the next offense, which you get - - yet again - - another nice probation in the hopes that that will get your attention, keep you out of the system.

While you're on that probation, it shows that you had two more theft charges, which the State didn't elect to pursue a revocation on. Instead, they let you handle those without being revoked. And then[,] you get yet another theft charge. And at that point, it appears, as the lawyers have argued, that then you do get revoked on your probation, get a 5-year sentence in the penitentiary on the revocation, as well as a 4-year sentence in the penitentiary on the new theft charge.

Shows, presumably, that you didn't spend very long down there on those because by '96, you're getting your possession charge that sends you off to the state jail in '97 for the state jail conviction. Which, presumably, you get out and you spend a few years out of the system. And then[,] the two 10-year sentences that you're actually on parole for now that come about with you in 2003.

Shows in June of '09[,] you're paroled on those 10-year sentences. And while you're out on parole on those charges, you commit this new offense that you pled guilty on. I recover those things because I think very often, defendants in their mind think, "Well, really, I haven't done much to deserve much of a sentence in these cases."

And, very often, the facts, as I've just recounted, show a completely different picture than maybe what the defendants are thinking their history is, even though the history is pretty much black and white. The Court's not going to assess the 20-year sentence, even though I think, frankly, a jury, with this history, very likely would. Because they would know that 10 years didn't do it. They'd know that 10 years didn't do it and that barely out of the penitentiary[,] you're back committing offenses. I think that they would be pretty unhappy about that, frankly.

Based on these statements, Appellant argues that the trial court did not consider the full range of punishment in assessing Appellant's sentence. Specifically, Appellant contends that he could not have received deferred adjudication or regular community supervision from a jury. Therefore,

according to Appellant, the trial court's reference to its doing what a "Smith County jury would do" indicates that the court did not consider those options in assessing Appellant's punishment. We disagree.[1]

At the punishment hearing, the trial court heard argument from the State and Appellant. Appellant argued that the maximum sentence was not appropriate, but did not argue that he should receive community supervision. The trial court indicated that it had received a copy of the presentence investigation report and took judicial notice of it as well as the court's file and all of the evidence contained therein. Thereafter, the court recounted Appellant's extensive criminal history.

The trial court made the complained of statements after considering the evidence and arguments of counsel. Thereafter, the trial court sentenced Appellant, stating as follows:

> Court finds based upon your plea of guilty and pleas of true that you're found guilty of the charge set forth in your indictment. I find it's true both of the enhancement allegations that you pled true to and stipulated to. The Court on that finding of guilt believes a 15-year sentence would be appropriate, which the Court assesses . . . .

Throughout its protracted pronouncement of sentence, the trial court made no statements that clearly indicated bias or its refusal to consider the full range of punishment. The court addressed the fact that a jury could not assess deferred adjudication or regular community supervision, but did not explicitly indicate that it would decline to consider community supervision in its assessment of punishment.[2]

To prevail on his first and second issues, Appellant must show *clear* bias to rebut the presumption that the trial court's actions were correct. *See* ***Brumit***, 206 S.W.3d at 645 (holding judge's comments that earlier case made him think anybody who ever harmed a child should be put to death did not reflect bias, partiality, or failure to consider full range of punishment). In the case at hand, the trial court considered the evidence before assessing punishment. Appellant has not indicated in his brief any statement by the trial court that, in this court's view, indicates a clear bias or a failure to consider the full range of punishment. Having considered the entirety of the record, we

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[1] It is unclear to this court, despite the trial court's explanation, why the trial court has chosen to undertake this approach to assessing punishment. There is no basis for this methodology in the Texas Code of Criminal Procedure, which requires little more than that the judge "announce his decision in open court as to the punishment to be assessed." TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(d) (West Supp. 2011). The trial court's departure from the requirements of the Code of Criminal Procedure, well-intentioned though it may be, is unnecessary and may serve to invite the conclusion that the sentence imposed is not the considered opinion of the trial court judge.

[2] *Compare* ***Teixeira v. State***, 89 S.W.3d 190, 191–92 (Tex. App.–Texarkana 2002, pet. ref'd) (trial court explicitly stated it would not grant deferred adjudication).

decline to hold that the trial court's reference to what a "Smith County jury would do," without more, supports an inference that the trial court considered only confinement as punishment for Appellant.[3] Therefore, we conclude Appellant was not denied due process and due course of law. Appellant's first and second issues are overruled.[4]

RESTITUTION

In his fourth issue, Appellant contends that the trial court abused its discretion in ordering payment of restitution when there was no evidence before the court regarding any issue of restitution.

An appellate court reviews challenges to restitution orders under an abuse of discretion standard. ***Cartwright v. State***, 605 S.W.2d 287, 289 (Tex. Crim. App. [Panel Op.] 1980); *see* ***Drilling v. State***, 134 S.W.3d 468, 469 (Tex. Crim. App. 2004); ***Riggs v. State***, No. 05-05-01689-CR, 2007 WL 969586, at *3 (Tex. App.–Dallas Apr. 3, 2007, no pet.) (op., not designated for publication). An abuse of discretion by the trial court in setting the amount of restitution will implicate due process considerations. ***Campbell v. State***, 5 S.W.3d 693, 696 (Tex. Crim. App. 1999).

In addition to any fine authorized by law, a sentencing court may order the defendant to make restitution to any victim of the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 42.037(a) (West Supp. 2011). If the offense results in personal injury to the victim, the court may order the defendant to make restitution to the victim for any expenses incurred by the victim as a result of the offense or to the compensation fund for payments made to or on behalf of the victim. *See* TEX. CODE CRIM. PROC. ANN. art. 42.037(b)(2) (West Supp. 2011). The standard of proof for determining restitution is a preponderance of the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 42.037(k) (West Supp. 2011). The burden of proving the amount of loss sustained by the victim is on the prosecuting attorney. ***Id.*** The trial court may not order restitution for a loss if the victim has or will receive compensation from another source. *See* TEX. CODE CRIM. PROC. ANN. art. 42.037(f)(1) (West Supp. 2011). Due process places three limitations on the restitution a trial court can order: (1) the amount must be just

[3] *But compare* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3(a) (West Supp. 2011) *with* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 4(e) (West Supp. 2011).

[4] The State contends that Appellant failed to properly preserve error by making a timely objection to the trial court. Appellant argues that failure to consider the entire range of punishment is a structural error and need not be preserved by contemporaneous objection. We need not decide whether an objection in the trial court was required to preserve this type of error on appeal because the record in this case does not reflect bias or that the trial judge did not consider the full range of punishment. *See* ***Brumit v. State***, 206 S.W.3d 639, 644–45 (Tex. Crim. App. 2006) (declining to reach the preservation issue because, addressing the merits, it found that the record did not reflect partiality of the trial court).

and supported by a factual basis within the record; (2) the restitution ordered must be for the offense for which the defendant is criminally responsible; and (3) the restitution must be for the victim or victims of the offense for which the defendant is charged. *See* ***Drilling***, 134 S.W.3d at 470; ***Campbell***, 5 S.W.3d at 696–97; ***Martin v. State***, 874 S.W.2d 674, 677–78 (Tex. Crim. App. 1994). Further, there must be sufficient evidence in the record to support the trial court's order. *See* ***Cartwright***, 605 S.W.2d at 289. A party is not required to object to preserve evidentiary sufficiency of a restitution order. *See* ***Mayer v. State***, 309 S.W.3d 552, 555 (Tex. Crim. App. 2010).

Here, the State concedes that there is no evidence in the record to support the amount ordered paid as "restitution" by the trial court. Additionally, the State requests that we modify the trial court's judgment by deleting the restitution order. Based on our review of the record, there is no indication that the State was precluded from presenting evidence and being heard on the issue the amount of fees charged by the DPS drug lab. Accordingly, we hold that because the trial court's "restitution" order lacks evidentiary support, it is improper and should be deleted. *See* ***id.*** at 557. Appellant's fourth issue is sustained.[5]

DISPOSITION

We have sustained Appellant's fourth issue. Having done so, we ***modify*** the trial court's judgment by deleting the order that Appellant pay restitution to the DPS in the amount of one hundred forty dollars. Having overruled Appellant's first and second issues, and having determined that we need not address his third issue, we ***affirm*** the trial court's judgment as modified.

JAMES T. WORTHEN
Chief Justice

Opinion delivered April 4, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

[5] Having sustained Appellant's fourth issue, we need not consider Appellant's third issue pertaining to the trial court's authority to order the reimbursement of a drug lab fee. *See* TEX. R. APP. P. 47.1.

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

APRIL 4, 2012

NO. 12-10-00282-CR

DWIGHT BAYONNE,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 7th Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 007-0110-10)

THIS CAUSE came to be heard on the appellate record and briefs filed herein; and the same being considered, it is the opinion of this court that the judgment of the trial court below should be modified and as modified, affirmed.

It is therefore ORDERED, ADJUDGED and DECREED by this court that the judgment of the court below be **modified** to delete the order that Appellant pay restitution to the DPS in the amount of one hundred forty dollars, and as modified, the judgment of the trial court is **affirmed**; and that this decision be certified to the trial court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.