NO. 12-11-00297-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

GILMORE F. COX, APPELLANT	***§***	***APPEAL FROM THE 217TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Gilmore F. Cox appeals his convictions for possession of a controlled substance and possession of certain chemicals with intent to manufacture a controlled substance. In two issues on appeal, Appellant contends that the trial court abused its discretion in overruling his motion to suppress evidence, and that his guilty and no contest pleas were involuntary. We dismiss the appeal for want of jurisdiction.

BACKGROUND

Appellant was arrested and indicted for possession of a controlled substance (the "possession charge") and also for possession of certain chemicals with intent to manufacture a controlled substance (the "intent to manufacture charge"). The indictment also contained four enhancement paragraphs for prior felonies alleged to have been committed by Appellant.

Appellant filed a motion to suppress, which the trial court denied at a pretrial hearing. Appellant then filed a waiver of his right to a jury trial on the advice of counsel. Apparently, Appellant's trial counsel inadvertently misadvised Appellant of the punishment range for his offenses. Upon discovering the error, Appellant filed a motion to withdraw his jury waiver. At the hearing on the motion, the trial court suggested that plea negotiations should take place. The

State indicated that it had an offer in mind, but it believed that Appellant would be unlikely to accept it. The trial court encouraged the parties to discuss the offer outside the court's presence, and stated that a jury trial would be held if no agreement was reached.

The parties reached an agreement, which was in writing and signed by Appellant, counsel for the parties, and the trial court. According to the agreement, the State would abandon all but one of the enhancement allegations. The State also agreed to a thirty-five year cap on Appellant's possible sentence, even though the maximum possible was imprisonment for life. Appellant also understood that this agreement made Appellant eligible for community supervision, even though he would not have otherwise been eligible. In exchange, Appellant agreed to plead guilty to the possession charge and *nolo contendere* to the intent to manufacture charge. He also agreed to waive his right to appeal.

In compliance with the agreement, Appellant executed a "Waiver of Right to Appeal" in which he affirmatively waived his right to appeal any issue with respect to the guilt/innocence phase of the trial. The document stated as follows: "Having been informed of whatever right to appeal may exist, and having agreed to waive my right to appeal both guilt/innocence ~~and punishment~~, and after having consulted with my attorney, I hereby voluntarily, knowingly and intelligently waive my right to appeal." Above the stricken words, the handwritten word "only" appears, meaning that Appellant expressly waived only his right to appeal guilt/innocence issues under the terms of the document.

After a hearing on punishment, the trial court assessed punishment at twenty years of imprisonment on the possession charge, and in accordance with the agreed "cap" on punishment, thirty-five years of imprisonment on the intent to manufacture charge. The sentences were to be served concurrently. The trial court certified Appellant's right to appeal and checked a box on the preprinted certification form stating that the case "is not a plea-bargain case, and [Appellant] has the right of appeal." The handwritten notation "punishment only" appears at the end of that sentence. This appeal followed.

JURISDICTION

In his first issue, Appellant argues that the trial court erred when it denied his motion to suppress evidence. In his second issue, he contends that he did not voluntarily, knowingly, and intelligently enter his guilty and *nolo contendere* pleas to the charged offenses. However, the

State argues that this court does not have jurisdiction to review these issues, because Appellant waived his right to appeal. We agree with the State.

Standard of Review and Applicable Law

A criminal defendant, generally speaking, has the right to appeal an adverse judgment. TEX. CODE CRIM. PROC. ANN. art. 44.02; TEX. R. APP. P. 25.2(a)(2). In a plea bargain case where the defendant pleads guilty or *nolo contendere* and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the defendant may appeal those matters that were raised by written motion filed and ruled on before trial, or after getting the trial court's permission to appeal. TEX. R. APP. P. 25.2(a)(2).

But in appropriate cases, the defendant may still contract away the right to appeal through an express waiver. *See* ***Ex parte Broadway***, 301 S.W.3d 694, 697-98 (Tex. Crim. App. 2009). In such a case, a valid waiver of appeal will prevent a defendant from appealing without the consent of the trial court. ***Monreal v. State***, 99 S.W.3d 615, 622 (Tex. Crim. App. 2003). If the right to appeal has been effectively waived, the notice of appeal gives the appellate court no jurisdiction and the appeal is to be dismissed. ***Johnson v. State***, 556 S.W.2d 816, 817-18 (Tex. Crim. App. 1977).

When a defendant's waiver of the right to appeal is entered before he becomes aware of the punishment to be assessed, the waiver typically is ineffective. ***Ex parte Delaney***, 207 S.W.3d 794, 797 (Tex. Crim. App. 2006). However, presentencing waivers of the right to appeal are enforceable if they are part of a plea bargain or if the State has given some consideration for the waiver. ***Ex parte Broadway***, 301 S.W.3d at 699. An agreed upon "cap" on punishment is a species of plea bargain. ***Shankle v. State***, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003). Moreover, a "charge" bargain that results in lesser charges or an agreement to remove enhancements from the indictment can become a plea bargain. *See* ***id.***

Finally, the waiver of the right to appeal must be made voluntarily, knowingly, and intelligently in order to be effective. ***Ex parte Broadway***, 301 S.W.3d at 697 ("A waiver of the right to appeal made voluntarily, knowingly, and intelligently will prevent a defendant from appealing without the consent of the trial court.").

Discussion

In the instant case, the State gave consideration for Appellant's guilty plea and presentencing waiver of appeal through a plea bargain agreement. The thirty-five year cap on

punishment and the modifications to the indictment resulted in a plea bargain. *See* ***Shankle***, 119 S.W.3d at 813; *see* ***Ex parte Broadway***, 301 S.W.3d at 699 (stating that "our opinion [in ***Delaney***] endorsed a [presentencing appeal waiver executed as part of a] plea agreement that identified the actual punishment or *maximum punishment*") (emphasis added). Without the agreement, Appellant could have been subjected to a sentence of imprisonment for life because of his prior felony convictions alleged in the enhancement paragraphs of the indictment. The State agreed to a maximum sentence of thirty-five years, and after abandoning all but one of the enhancements, Appellant would be eligible for community supervision. In exchange, Appellant pleaded guilty and waived his right to appeal. All the relevant documents were signed on the same day, as part of the same plea bargain, prior to the trial court's acceptance of Appellant's guilty and *nolo contendere* pleas and the sentencing hearing. In accordance with the agreement, the trial court certified that Appellant could appeal punishment issues only.

Next, as we have stated, in order for the presentencing waiver of appeal to be valid, not only must it be part of a plea bargain agreement or the result of consideration provided by the State for the waiver, but the waiver also must be executed voluntarily, knowingly, and intelligently. ***Ex parte Broadway***, 301 S.W.3d at 697. Appellant contends that because he only knew the maximum punishment and did not know the precise sentence prior to making the plea, the waiver of his right to appeal could not have been executed voluntarily, knowingly, and intelligently. But the analysis in ***Ex parte Broadway*** refutes his conclusion. In that case, the court stated that if the agreement for a maximum sentence is simply a regurgitation of the ordinary statutory range of punishment, then the trial court could have imposed any sentence within the range of punishment, and there is not really any bargain at all, because the defendant does not benefit by entering the plea. *See* ***id.*** at 698. Here, without the agreement, the trial court could have sentenced Appellant to imprisonment for life, and there was no possibility of community supervision. With the agreement, the maximum sentence was thirty-five years of imprisonment, and Appellant conceivably could have been placed on community supervision. The trial court ultimately sentenced Appellant to thirty-five years of imprisonment, which was within the cap. As ***Ex parte Broadway*** makes clear, under these circumstances, it cannot be said that Appellant did not execute the waiver voluntarily, knowingly, and intelligently. *See* ***id.***

Appellant seeks review of the trial court's denial of his motion to suppress evidence, and also complains that his guilty and *nolo contendere* pleas were not made voluntarily, knowingly,

and intelligently. However, Appellant made a plea bargain agreement and, as part of that agreement, voluntarily executed a valid waiver of his right to appeal as to the guilt/innocence phase of the trial. Since his issues on appeal relate to the guilt/innocence phase of the trial, he is precluded from raising those issues and we have no jurisdiction of this appeal, notwithstanding Texas Rule of Appellate Procedure 25.2. *See* ***Ex parte Broadway***, 301 S.W.3d at 699; ***Johnson***, 556 S.W.2d at 817-18.

DISPOSITION

Having held that Appellant executed a valid presentencing waiver of his right to appeal as part of a plea bargain, and that he did so voluntarily, knowingly, and intelligently, we ***dismiss*** the appeal for ***want of jurisdiction***.

JAMES T. WORTHEN
Chief Justice

Opinion delivered June 29, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JUNE 29, 2012

NO. 12-11-00297-CR

GILMORE F. COX,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 217th Judicial District Court of
Smith County, Texas. (Tr.Ct.No. 29,938)

THIS CAUSE came to be heard on the appellate record; and the same being considered, it is the opinion of this court that this court is without jurisdiction of the appeal, and that the appeal should be dismissed.

It is therefore ORDERED, ADJUDGED and DECREED by this court that this appeal be, and the same is, hereby **dismissed for want of jurisdiction**; and that this decision be certified to the court below for observance.

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