Review of Recent Juvenile Cases (2012)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Missing court reporter's record of hearing placing defendant on deferred adjudication was not error where appeal was from defendant's violation of his community supervision.[Diamond v. State](12-2-3A)

On April 25, 2012, the Beaumont Court of Appeals held that a defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding only in an appeal timely filed after the imposition of the deferred adjudication.

12-2-3A. **Diamond v. State**, Nos. 09–11–00478–CR, 09–11–00479–CR, --- S.W.3d ----, 2012 WL 1431232 (Tex.App.-Beaumont, 4/25/12).

Facts: Terrell Dewayne Diamond appeals from the trial court's revocation of his deferred adjudication community supervision and imposition of sentence in two cases. Because Diamond was under the age of seventeen years, the cases were initially referred to the juvenile court. That court waived its jurisdiction and transferred the matters to the district court for trial as an adult.

In accordance with a plea-bargain agreement, Diamond entered a plea of guilty to the offense of the unauthorized use of a motor vehicle. *See* Tex. Penal Code Ann. § 31.07 (West 2011). The trial court found the evidence sufficient to find Diamond guilty, deferred further proceedings, and placed Diamond on community supervision for five years. In the second case, Diamond entered a plea of guilty to the offense of aggravated robbery. *See* Tex. Penal Code Ann. § 29.03 (West 2011). The trial court found evidence sufficient to find Diamond guilty, deferred further proceedings, placed Diamond on community supervision for ten years, and assessed a $1,000 fine. The State subsequently filed motions to revoke Diamond's unadjudicated community supervision in both cases. At the hearing on the motion to revoke, Diamond pled "true" to four violations of the conditions of his community supervision. The trial court found that Diamond violated the terms of his community supervision, found him guilty of aggravated robbery, and assessed his punishment at 99 years' confinement. The trial court further found Diamond guilty of the unauthorized use of a motor vehicle, and assessed his punishment at 2 years' confinement, to run consecutive to his sentence for the aggravated robbery charge.

Diamond filed a motion to reconsider the imposition of his state jail sentence. In both cases Diamond also filed a motion for new trial and motion in arrest of judgment wherein Diamond argued that the verdict is contrary to the law and the evidence, and that his sentence is inappropriate and unreasonable. As there is not a signed order in the record denying Diamond's motions for new trial, we deem they were denied by operation of law. *See* Tex.R.App. P. 21.8. Diamond appealed both cases.

In his appeal in cause numbers 7889 and 7890, Diamond argues that he has been denied a complete record. In his appeal in cause number 7890, Diamond raises three additional issues. He argues that the record fails to establish that the trial court had proper jurisdiction, that the trial court erred in failing to grant his motion for new trial, and that his sentence for aggravated robbery constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 1.09 of the Texas Code of Criminal Procedure.

Held: Affirmed

Opinion: For both cause numbers 7889 and 7890, Diamond contends he was denied a complete record on appeal despite his compliance with the rules to secure a complete record. *See* Tex.R.App. P. 34.6(b) (reporter's record request); Tex.R.App. P. 35.3(b) (reporter's record filing).

In both cases, Diamond timely filed a written designation of the record. The designations request a "[c]omplete transcription of court reporter's notes of all proceedings in this cause as requested in the attached written request pursuant to Rule 34.6." However, the designations in the appellate record do not include the written request referenced in the designation.

The reporter's record in both cases contains only the record from the revocation hearing and sentencing. The record of the transfer proceeding, the original plea hearing, and the hearing placing Diamond on deferred adjudication are not part of the appellate record. Diamond asserts that without the records from these hearings, he is unable to determine if the trial court committed reversible error in the transfer proceedings, or if the trial court pre-determined the sentence at the time of the entry of the original plea, or if the trial court made other comments that would render the ultimate sentence insupportable.

A defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding only in an appeal timely filed after the imposition of the deferred adjudication community supervision. *Manuel v. State*, 994 S.W.2d 658, 661–62 (Tex.Crim.App.1999). An appellate court's review of an order adjudicating guilt is generally limited to whether the trial court abused its discretion in determining that the defendant violated the terms of his community supervision. *See Staten v. State*, 328 S.W.3d 901, 904–05 (Tex.App.-Beaumont 2010, no pet.); Tex.Code Crim. Proc. Ann. art. 42.12, § 5(b) (West Supp.2011). A court of appeals lacks jurisdiction over an appeal of an earlier order of deferred adjudication community supervision unless the trial court gives permission to appeal. *See* Tex.Code Crim. Proc. Ann. art. 44.02 (West 2006); *Chavez v. State*, 183 S.W.3d 675, 680 (Tex.Crim.App.2006).

Diamond did not timely appeal the trial court's order placing him on deferred adjudication community supervision. *See* Tex.R.App. P. 33.1. As the potential issues Diamond is concerned with raising are related solely to his original plea proceeding, the reporter's record from the original plea proceedings is unnecessary to the resolution of this appeal. Those issues were required to be appealed, if at all, within the allowable time period immediately after the trial court imposed community supervision. *See Manuel*, 994 S.W.2d at 661–62. Diamond did not obtain the trial court's permission for an appeal from the plea proceeding, but rather waived his right to an appeal. We overrule this issue.

Conclusion: Having overruled Diamond's issues in cause numbers 7889 and 7890, we affirm the trial court's judgment in both cases.

Dissent: This Court does not have any reporter's record on appeal other than of the last hearing, and appellant complains of the incomplete record. Appellant argues that denying him the entire record prevents him from reviewing whether the sentence was impermissibly predetermined when the plea was entered. *See Steadman v. State,* 31 S.W.3d 738, 741 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd) ("It is a denial of due process for the court to arbitrarily refuse to consider the entire range of punishment for an offense or refuse to consider the evidence and impose a predetermined punishment."); *Jefferson v. State,* 803 S.W.2d 470, 471 (Tex.App.-Dallas 1991, pet. ref'd). The State responds that "[w]hile counsel's inability to ascertain whether the trial court took some action or made a remark that would provide a challenge could be remedied by providing the requested records, the trial court has opted not to do so." This Court should order the filing of the complete record and allow the parties to provide supplemental briefs after a review of the record.

At the plea hearing, the trial judge apparently thought the appropriate resolution at that time was community supervision, because the judge deferred adjudication and placed appellant on community supervision. Appellant subsequently obtained his high school diploma after he completed the up-front time. At the revocation hearing, the probation officer and defense counsel mentioned the SAFPF program. Defense counsel stated "We would ask the Court, Your Honor, to send Mr. Diamond to SAFPF and all of the aftercare programs that are available, and give him an opportunity, Your Honor, to kick his dependence upon marijuana." The probation officer said "[w]e've tried to get him into different programs for him for anger management—I think he attended that once—and J.C.D.I. I[t] took me about three appointments to get him into that. Only thing I would recommend, if he is continued on probation, is to keep him locked up for SAFPF."

The Supreme Court has noted that "[f]ew, perhaps no, judicial responsibilities are more difficult than sentencing." *See Graham,* 130 S.Ct. at 2031. In rejecting a sentence of life without parole for juvenile nonhomicide offenders, the Court questioned whether "a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 2032. Ninety-nine years is not a sentence of life without parole, but similar sentencing difficulties and considerations are present in this case. Appellant should be granted a complete record for review, and if then shown to be necessary, another hearing before the trial court at which the State and the defense can present evidence concerning an appropriate disposition.