Juvenile Law Case Summaries

By
Robert O. Dawson
Bryant Smith Chair in Law
University of Texas School of Law

2002 Case Summaries 2001 Case Summaries 2000 Case Summaries 1999 Case Summaries

---

Statement not in indictment of intent to enhance penalty with juvenile felony adjudication is sufficient notice in criminal proceedings [Parker v. State] (02-1-20).

On January 30, 2002, the San Antonio Court of Appeals held that written notice by the State in advance of trial of intent to use a juvenile felony adjudication and commitment to enhance punishment for second degree felony to that of a first degree felony was sufficient notice. That notice is customarily, but not necessarily, contained in an enhancement paragraph in an indictment.

02-1-20. Parker v. State, UNPUBLISHED, No. 04-00-00811-CR, 2002 WL112530, 2002 Tex.App.Lexis ___ (Tex.App.-San Antonio 1/30/02) [Texas Juvenile Law (5th Edition 2000)].

Facts: Appellant, Johnnie Parker ("Parker"), was convicted by a jury for conspiracy to commit aggravated robbery. On appeal, Parker presents several points of error. In his first, sixth, and seventh points of error, Parker contends that the evidence was legally and factually insufficient to support his conviction. In Parker's second point of error, he argues that his constitutional rights were violated because the State failed to properly notify him of its intent to seek an enhancement of his sentence. Parker complains, in this fourth and fifth points of error, that the trial court erred by enhancing his sentence with a previous state jail felony conviction which had not yet become final. Finally, Parker contends, in his third point of error, that the evidence is insufficient to support the conviction used to enhance his sentence.

On the evening of August 21, 1999, Justin Emerson, an assistant manager of a Pizza Hut in Helotes, Texas, went to the local bank to make a night deposit. As Emerson drove up to the bank's deposit box, he noticed two individuals standing on the roof of the garage. Although both persons were wearing masks at the time, Emerson could discern that both were male and that one was African American while his companion appeared to be Caucasian. According to Emerson, the African American, identified as Thomas Debrow, jumped off the roof and ran towards Emerson's car. Fearing for his life, Emerson quickly backed up his car so that he could leave the area. As he drove away, Debrow yelled "get back here" and then hit Emerson's car window with an object Emerson thought looked like "a small black gun, [with] a little snub nose." Emerson escaped with the money, and he was unharmed.

After leaving the bank parking lot, Emerson went back to the Pizza Hut and called the police. Officer Wayne Franklin Waggoner, Officer James Scoggins, and Alcohol, Tobacco, and Firearms (ATF") Agent James Brigance investigated the crime. During the course of their investigation Johnnie Parker emerged as a suspect. Scoggins and Brigance located Parker in jail and they interviewed him about the attempted robbery. During the interview, Parker gave a written statement confessing to the crime and naming Debrow as the other individual involved in the crime. A jury found Parker guilty, and the trial court concluded that Parker was a repeat offender and enhanced his sentence to thirty years of confinement. Parker now appeals both the jury's conviction and the court's enhancement of his sentence.

Held: Affirmed.

Opinion Text:

Parker has also lodged complaints regarding the enhancement of his sentence. More specifically, in his second point of error, Parker argues that because the State failed to notify him of its intent to seek an enhancement, his constitutional right to be "apprised of the accusations against him" was violated. Parker also asserts, in his fourth and fifth points of error, that the trial court erred because it enhanced his sentence with a state jail felony conviction that was not final. Parker contends further, in this third point of error, that there is insufficient evidence in the record to support an enhancement from a second degree felony to a first degree felony.

Texas law provides that the purpose of an enhancement allegation is to allow the accused notice of the prior conviction on which the

State relies. Brooks v. State, 957 S.W.2d 30, 33-34 (Tex.Crim.App.1997); Coleman v. State, 577 S.W.2d 486, 488 (Tex.Crim.App.1979). To provide proper notice, the State need not allege the enhancing offense in the indictment, though it is permissible and perhaps preferable to do so. Brooks, 957 S.W.2d at 34. In fact, it is sufficient for the State to plead the enhancement in a motion which is submitted subsequent to the indictment. Id. at 32. However, the State must prove beyond a reasonable doubt its enhancement case as it is alleged in the charging instrument. See Williams v. State, 899 S.W.2d 13, 14 (Tex.App.-San Antonio 1995, no writ.). In particular, the State must prove that the defendant is the same person who committed the prior offense and that the previous conviction was final before the commission of the primary offense. Johnson v. State, 784 S.W.2d 413, 414 (Tex.Crim.App.1990); Wilson v. State, 671 S.W.2d 524, 525 (Tex.Crim.App.1984); see Diremiggio v. State, 637 S.W.2d 926, 928 (Tex.Crim.App. [Panel Op.] 1982).

In this case, the State requested an enhancement of Parker's sentence under Section 12.42(b) of the Texas Penal Code, which states that "[i]f it is shown on the trial of a second-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a first-degree felony ." Tex. Penal Code Ann. § 12.42(b) (Vernon 1994). To provide notice of its intent to seek this enhancement, the State sent Parker its "Notice of Intent to Seek Repeat Offender Status," on July 3, 2000. That document provides the following:

NOW COMES Susan D. Reed, Criminal District Attorney for Bexar County, Texas ... hereby gives notice that the State of Texas will seek to prove the Repeat Offender status of Johnnie Parker ... if and when the Defendant is found guilty in the above numbered cause. Specifically, the State will prove that:

Before the Commission of the offense alleged in 2000 CR 3369 ... on or about the 12th day of February, 1998, in Cause No. 97JUV03749, in Bexar County, Texas, the Defendant was adjudicated by a juvenile court under Section 54.03, Texas Family Code, for delinquent conduct constituting a felony offense for which the Defendant was committed to the Texas Youth Commission under Section 54.05(f), for the felony offense of Escape; against the peace and dignity of the State.

Be aware that if the Defendant is convicted of the primary offense and is found to be a Repeat Offender, the Defendant would face a punishment range of a first degree felony. [See Tex. Penal Code Ann. § 12.42 and Brooks v. State, 957 S.W.2d 30 (Tex.Crim.App.1997)].

Further, to support its evidentiary burden regarding the enhancement, the State presented several witnesses at the punishment phase of the trial. More specifically, the State introduced the testimony of Brent Houdmann, a juvenile probation officer with Bexar County Juvenile Probation. Houdmann stated that in July 1997 (cause number 97-JUV-01553) Parker engaged in the delinquent conduct of public intoxication and was ordered to live in a residential treatment facility for eighteen months. Parker, however, attempted to escape from the facility and was found delinquent on that charge as well (cause number 97-JUV- 03749). A few months later, Parker was found guilty for failure to comply with his probation conditions. Therefore, on February 9, 1998, Parker's probation was revoked, on his felony escape charge, and he was ordered to serve the rest of his sentence at the Texas Youth Commission. The State also introduced into evidence the "Judgments" and "Orders of Adjudication" for these violations (cause numbers 97-JUV-01553 and 97-JUV-03749).

We find, based on this evidence, that the State properly notified Parker of its intent to seek repeat offender status when it sent its notice on July 3, 2000. This document was sent approximately two months before trial and provides the particular offense it relied on for enhancement. However, even if the notice was, for some reason, inadequate there is nothing in the record to indicate that Parker objected to the form or timing of the notice. Parker, therefore, failed to preserve any error regarding the notification of the enhancement of his sentence. See Turner v. State, 805 S.W.2d 423, 431 (Tex.Crim.App.1991). Accordingly, Parker's second point of error is overruled.

In addition, we find that the offense the trial court relied upon for enhancement was final. At the punishment phase, the State presented evidence that Parker was originally ordered to live in a state facility as a condition for probation. However, while he was living there, he attempted to escape, which was a felony charge. Despite his escape attempt, the State chose to allow Parker to remain in the facility to serve the duration of his probation. Parker, however, again violated his probation, and so on February 9, 1998, the court revoked his probation and sentenced him to confinement in the Texas Youth Commission (cause number 97-JUV-03749). It is well-settled that although a probated sentence is not final, it becomes so when the probation is revoked. Ex Parte Langley, 833 S.W.2d 141, 143 (Tex.Crim.App.1992). Here, Parker's probation was revoked on March 9, 1988, and his sentence became final at that time. Parker's contention that the prior conviction used for the enhancement of his sentence was not final, therefore, must fail. Accordingly, Parker's fourth point of error is overruled.

In addition, we find that there is no merit to Parker's argument that the court relied on a state jail felony to enhance his sentence. It is clear that to enhance Parker's sentence the State relied on his conviction for escaping from the correctional facility, under cause number 99 JUV 03479. Under Texas Law, escaping from a correctional facility is a felony offense under section 38.06 of the penal code. Tex. Penal Code Ann. § 38.06 (Vernon 1994). That section provides specifically as follows:

(a) A person commits an offense if he escapes from custody when he is:
(1) under arrest for, charged with, or convicted of an offense; or
(2) in custody pursuant to a lawful order of a court.
* * *
(c) An offense under this section is a felony of the third degree if the actor:
(1) is under arrest for, charged with, or convicted of a felony;
(2) is confined in a secure correctional facility; or
(3) is committed to a secure correctional facility, as defined by Section 51.02, Family Code, other than a halfway house, operated by or under contract with the Texas Youth Commission.
(d) An offense under this section is a felony of the second degree if the actor to effect his escape causes bodily injury.

Tex. Penal Code Ann. § 38.06 (Vernon 1994). Although Parker argues that the trial court relied on the state jail felony, in cause number 99-CR-5063W, to enhance his sentence, there is nothing in the record to indicate that the trial court relied on that offense for the enhancement of his sentence. We find, therefore, that Parker's fifth point of error should be overruled.

Finally, we find that based on the evidence the State presented at the punishment phase, particularly the testimony of Brent Houdmann, and the accompanying exhibits, there is legally and factually sufficient evidence in the record to support the enhancement. Therefore, Parker's third point of error is overruled.

2001 Case Summaries 2000 Case Summaries 1999 Case Summaries