DISMISS and Opinion Filed June 10, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00658-CR

DUNCAN ERIC GORDON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-12-61468-P

MEMORANDUM OPINION
Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

Appellant, Duncan Eric Gordon, was indicted for the offense of murder.[1] In exchange for appellant's plea of guilty, the State reduced the charge to the lesser

[1] The indictment alleged as follows:

> unlawfully then and there intentionally and knowingly cause the death of . . . (the complainant) . . . an individual, hereinafter called deceased, by CAUSING THE DECEASED'S HEAD TO STRIKE THE GROUND, a deadly weapon,
>
> And further did unlawfully then and there intend to cause serious bodily injury to . . . (the complainant) . . . and did then and there commit an act clearly dangerous to human life. to-wit: by CAUSING THE DECEASED'S HEAD TO STRJKE THE GROUND, a deadly weapon, and did thereby cause the death of . . . (the complainant) . . . an individual,
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> And it is further presented to said Court that prior to the commission of the offense or offenses set out above, the defendant was finally convicted of the felony offense of

included offense of aggravated assault with a deadly weapon and abandoned the enhancement paragraph in the indictment. The State also agreed to "cap" the maximum punishment at fifteen years' imprisonment.[2]

Appellant waived a jury and judicially confessed to the lesser offense. Trial was before the court. At the conclusion of the evidence the trial court found appellant guilty and sentenced him to five years' imprisonment. The trial court's judgment also included a deadly weapon finding.

The trial court certified that this was not a plea bargain and that appellant had the right to appeal.

Claims on Appeal

In a single issue on appeal, appellant seeks to have the deadly weapon finding deleted from the trial court's judgment.

In two separate paragraphs, the indictment alleged that appellant caused the complainant's head to "STRIKE THE GROUND, a deadly weapon." Despite his written confession that he caused "serious bodily injury to . . . (the complainant) . . . by causing the complainant's head to 'strike the ground a deadly weapon',"

> AGGRAVATED ASSAULT WITH A DEADLY WEAPON, in the CRIMINAL DISTRICT COURT No. 5 of DALLAS County, Texas, in Cause Number F-06SSSS3, on the 25TH day of MARCH, 2009,

[2] Aggravated assault is a second degree felony with a punishment range from two to twenty years' imprisonment and the possibility of a fine up to $10,000. TEX. PENAL CODE ANN. §§ 12.33(a); 22.02(a)(2).

appellant claims that "the ground" does not fit the statutory definition of a deadly weapon.

The State responds, in alternative arguments, that (1) this appeal should be dismissed for lack of jurisdiction; (2) because appellant confessed that "the ground" was a deadly weapon he should be estopped from arguing otherwise on appeal; (3) appellant failed to preserve the deadly weapon argument in the trial court; and/or (4) "the ground" can be a deadly weapon.

In addition to filing a response brief in this case, the State has filed a motion to dismiss. In this motion, the State claims that this was a plea bargained case and appellant waived his right to appeal as part of the plea bargain. Appellant has filed a response to this motion in which he claims that (1) this was an "open plea" because there was no express agreement on punishment; (2) the trial court admonished appellant that the range of punishment was two to twenty years with an optional fine up to $10,000; (3) appellant was not properly admonished that he was waiving his right to appeal; and (4) the trial court "expressly found" that the case was not a plea bargain case and that the appellant had the right to appeal.

We have considered all the briefs, motions, and responses filed by counsel for both parties in resolving this appeal.

Jurisdiction

A criminal defendant cannot appeal from a plea bargain except in specific, limited circumstances:

> A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial.

TEX. CODE CRIM. PROC. ANN. art. 44.02. The Texas Rules of Appellate Procedure sets out further limitations:

> In a plea bargain case – that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant – a defendant may appeal only:
>
> (A) those matters that were raised by written motion filed and ruled on before trial,
>
> (B) after getting the trial court's permission to appeal, or
>
> (C) where the specific appeal is expressly authorized by statute.

TEX. R. APP. P. 25.2(a)(2).

There are two kinds of plea bargains: (1) charge-bargains and (2) sentence-bargains. *Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003). Charge-bargains occur in cases where a defendant pleads guilty to the offense that has been alleged or to a lesser or related offense, and when the prosecutor agrees to dismiss, or refrain from bringing, other charges. *Id*. Sentence-bargains may be for either binding or non-binding recommendations to the trial court on sentences; this includes a recommended "cap" on sentencing and a recommendation for deferred-

adjudication probation. *Id*. Either type of plea bargain may affect a defendant's right to appeal. *Hodge v. State*, No. 05-18-00549-CR, 2019 WL 3212150, at *2 (Tex. App.—Dallas July 9, 2019, no pet.) (mem. op., not designated for publication).

Here, appellant entered into a charge–bargain agreement with the State when he agreed to plead guilty in exchange for the State's agreement to reduce the murder charge to the lesser included offense of aggravated assault with a deadly weapon. *See, e.g.*, *Maldonado-Rojas v. State*, No. 06-19-00184-CR, 2019 WL 5090339, at *1 (Tex. App.—Texarkana Oct. 11, 2019, no pet.) (mem. op., not designated for publication) (holding that a defendant indicted for engaging in organized criminal activity entered into a charge-bargain with the State by pleading guilty to the lesser included offense of fraudulent use or possession of identifying information); *Jeffery v. State*, No. 05-19-00129-CR, 2019 WL 1499363, at *1 (Tex. App.—Dallas Apr. 5, 2019, no pet.) (mem. op., not designated for publication) (holding that the defendant entered into a charge plea bargain with the State when he agreed to plead guilty to manslaughter in exchange for the State dismissing a murder charge); *see also Sotelo v. State*, No. 05-19-00639-CR, 2019 WL 4027077, at *1–2 (Tex. App.—Dallas Aug. 27, 2019, no pet.) (mem. op., not designated for publication) (holding that the defendant entered into charge-bargain agreements with the State when he agreed to plead guilty to both of the underlying offenses in these appeals in exchange for the State dismissing several other charges, refraining from charging several offenses, and giving up its right to a jury trial).

Appellant also entered into a sentence-bargain. In exchange for appellant's guilty plea, the State (1) reduced the charge against him to a lesser included offense which carried a lesser punishment, (2) abandoned an enhancement paragraph which would have increased the minimum possible punishment,[3] and (3) agreed to a fifteen year "cap" on the available punishment. *See Harper v. State*, 567 S.W.3d 450 (Tex. App.—Fort Worth 2019, no pet.) (holding that where the State agreed to drop the enhancement paragraphs in exchange for a defendant's guilty plea for aggravated assault with a deadly weapon the plea bargain effectively capped the maximum punishment by dropping the enhancements to the charge); *Smith v. State*, No. 05-19-00007-CR, 2019 WL 1449793, at *2 (Tex. App.—Dallas Apr. 1, 2019, no pet.) (mem. op., not designated for publication) (holding that the defendant entered into a sentence-bargain with the State when he agreed to plead guilty in exchange for the State's recommendation of a fifteen-year-cap in third-degree offenses that were enhanced to second-degree felony punishment and the State's agreement to abandon the enhancement paragraph that would have raised the range of punishment from state jail to third-degree felony).

[3] Had the State retained and proved the enhancement paragraph on the murder charge, the minimum punishment that appellant could have faced would have been fifteen years' imprisonment. TEX. PENAL CODE ANN. § 12.42 (c) (1). Had the State retained and proved the enhancement paragraph on the aggravated assault charge, appellant could have faced the full range of punishment for a first degree felony, *i.e.*, five to ninety-years' or life imprisonment plus a $10,000 fine. *Id*. §§ 12.32, 12.42 (b).

Because appellant's case qualifies as a plea bargain, under either type of plea bargain, he can appeal only matters raised by written motion and ruled upon before trial or with the trial court's permission. TEX. R. APP. P. 25.2(a)(2)(B); *Shankle*, 119 S.W.3d at 812–13. Appellant does not predicate this appeal on any pre-trial motion and the record does not reflect any pre-trial motion on which an appeal could be based. Further, his appeal of the correctness of the deadly weapon finding is not expressly authorized by statute. TEX. R. APP. P. 25.2(a)(2)(C).

Nor does the appellate record reflect that the trial court gave appellant permission to appeal. The trial court's certification reflects that "this is not a plea bargain case, and the defendant has the right of appeal." However, a trial court's certification must be true and supported by the record. *See Dears v. State*, 154 S.W.3d 610, 613 (Tex. Crim. App. 2005) (holding that a certification not supported by the record is defective); *Carender v. State*, 155 S.W.3d 929, 931 (Tex. App.—Dallas 2005, no pet.) (same). When a trial court's certification is contradicted by the record, as it is in this case, that certification will not authorize an appeal beyond what is expressly permitted under Rule 25.2(a)(2) and article 44.02 of the Code of Criminal Procedure. *See Carender*, 155 S.W.3d at 931; *Smith v. State*, No. 05-19-00368-CR, 2020 WL 1283929, at *2 n. 1 (Tex. App.—Dallas Mar. 17, 2020, no pet. h.) (mem. op., not designated for publication).

Here, appellant's plea of guilty was the result of both a charge-bargain and a sentence-bargain. Because either type of plea bargain will affect a defendant's right

to appeal, the trial court's certification that "this is not a plea bargain case" is incorrect. Despite the incorrect certification, we do not have jurisdiction of this appeal. *See Waters v. State*, 124 S.W.3d 825, 826–27 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding that a reviewing court lacked jurisdiction where the defendant pled guilty with a sentencing cap of ten years, even though the trial judge mistakenly certified defendant had right of appeal); *Interiano v. State*, No. 05-19-01280-CR, 2020 WL 2124172, at *2 (Tex. App.—Dallas May 5, 2020, no pet. h.) (mem. op., not designated for publication) (holding that a reviewing court lacked jurisdiction where the State struck enhancement language from the indictment and noting the trial court's certification that defendant had right of appeal was defective).

Because we lack jurisdiction over this case, we dismiss the appeal without further action. *See Chavez v. State*, 183 S.W.3d 675, 680 (Tex. Crim. App. 2006).

Conclusion

The appeal is dismissed for lack of jurisdiction.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DUNCAN ERIC GORDON, Appellant	On Appeal from the 203rd Judicial District Court, Dallas County, Texas Trial Court Cause No. F-12-61468-P.
No. 05-19-00658-CR V.	Opinion delivered by Justice Osborne. Justices Whitehill and Carlyle participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the appeal is **DISMISSED**.

Judgment entered June 10, 2020