AFFIRM IN PART; REVERSE AND REMAND IN PART; Opinion Filed December 15, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01026-CR
No. 05-19-01027-CR

JABARI MALIK LEWIS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F17-58166-R, F16-10864-R

MEMORANDUM OPINION

Before Justices Schenck, Osborne, and Partida-Kipness
Opinion by Justice Schenck

Jabari Malik Lewis appeals his conviction for possession with intent to deliver cocaine (appellate case no. 05-19-01026-CR, trial cause number F17-58166-CR) and his conviction for burglary of a habitation (appellate case no. 05-19-01027-CR, trial cause number F16-20864-R). In his first issue, appellant complains he was entitled to concurrent sentences. In his second issue, appellant argues the trial court lacked jurisdiction to grant shock probation in his burglary of a habitation case. In his third and fourth issues, appellant urges he is entitled to a new sentencing in each

case. In his fifth issue, appellant asserts he is entitled to have his time credit for his burglary of a habitation case corrected.

In the possession with intent to deliver cocaine case, we affirm the trial court's judgment. In the burglary of a habitation case, we set aside the trial court's orders granting and revoking shock probation and agree appellant is entitled to back time credit. Accordingly, we reverse and remand to the trial court for further determination of this issue. In all other respects, we affirm. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

In July 2016, a grand jury indicted appellant for burglary of a habitation with the intent to commit aggravated assault with a deadly weapon. In October 2016, the trial court accepted appellant's guilty plea and sentenced him to ten years' confinement. In April 2017, the trial court entered an order suspending execution of appellant's sentence and placing him on community supervision for seven years.

In December 2017, a grand jury indicted appellant for possession with intent to deliver cocaine. In January 2018, the trial court accepted appellant's guilty plea and sentenced him to ten years' confinement, but, again, suspended imposition of the sentence and placed appellant on community supervision for seven years.

The following year, the State moved to revoke appellant's community supervision in both cases. The State later moved to have any sentence imposed in the possession with intent to deliver case to run consecutively to appellant's sentence

in the burglary case. In August 2019, the trial court revoked appellant's community supervision in both cases and sentenced him to confinement for ten years in each case. The trial court ordered the sentence in the possession with intent to deliver case to begin only after appellant completes the sentence in his burglary case.

DISCUSSION

I. Appellant's Claimed Entitlement to Concurrent Sentences

In his first issue, appellant asserts he was entitled to concurrent sentences because the imposition of his sentence in his burglary case was not initially suspended.

Generally, the trial judge has absolute discretion to cumulate sentences, so long as the law authorizes the imposition of cumulative sentences. *Byrd v. State*, 499 S.W.3d 443, 446 (Tex. Crim. App. 2016). Article 42.08 of the Texas Code of Criminal Procedure governs the manner in which trial courts are to order consecutive sentences. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08.[1]

[1] (a) When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. Except as provided by Sections (b) and (c) of this article, in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases . . . .

(b) If a defendant is sentenced for an offense committed while the defendant was an inmate in the Texas Department of Criminal Justice and serving a sentence for an offense other than a state jail felony and the defendant has not completed the sentence he was serving at the time of the offense, the judge shall order the sentence for the subsequent offense to commence immediately on completion of the sentence for the original offense.

When a court grants shock probation under the provisions of article 42.12, section 3e, it suspends the execution rather than the imposition of the sentence. *O'Hara v. State*, 626 S.W.2d 32, 35 (Tex. Crim. App. 1981). In these circumstances, the defendant actually serves a portion of the sentence. *Id.* The convicting court may then suspend the execution of the remainder of the sentence. *Id.* It follows, therefore, that a new sentence is not imposed or executed if the probation is revoked; instead, the suspension of the execution of the sentence is lifted, and the defendant continues to serve the remaining portion of his previously ordered sentence. *See id.*; *see, e.g.*, *Stephens v. State*, No. 13-12-00284-CR, 2013 WL 1188066, at *2 (Tex. App.—Corpus Christi Mar. 21, 2013, no pet.) (mem. op., not designated for publication) (citing *O'Hara*, 626 S.W.2d at 35). A cumulation order increases the length of the term of a sentence; therefore, in the context of a shock probation revocation, a cumulation order violates the double jeopardy clause of the Fifth Amendment to the United States Constitution and article 1, section 14 of the Texas Constitution by inflicting additional punishment on a defendant who has already started serving a sentence for the same offense. *See Ex parte Reynolds*, 462 S.W.2d 605, 607–08 (Tex. Crim. App. 1970); *see also Nguyen v. State*, Nos. 01–01–01132–CR, 01–01–01222–CR, 2002 WL 31721691, at *2 (Tex.

> (c) If a defendant has been convicted in two or more cases and the court suspends the imposition of the sentence in one of the cases, the court may not order a sentence of confinement to commence on the completion of a suspended sentence for an offense.

TEX. CODE CRIM. PROC. ANN. art. 42.08.

App.—Houston [1st Dist.] Dec. 5, 2002, pet ref'd) (mem. op., not designated for publication). Accordingly, under Texas law, a court may not add a cumulation order onto a sentence already imposed after a defendant has suffered punishment under the sentence as originally imposed. Such an attempted cumulation order is null and void and of no legal effect. *O'Hara*, 626 S.W.2d at 35.

Appellant argues that because he served a portion of his sentence in his burglary case before his release on shock probation, the trial court could not order that the sentence in his possession with intent to deliver case would not commence until he completed his sentence in the burglary case. The State responds that the cumulation order applied to the possession with intent to deliver case, not the burglary case. We agree with the State.

Appellant served a portion of the sentence in his burglary case before the trial court placed him on shock probation. But the trial court suspended the sentence in his possession with intent to deliver case without actually imposing it. Thus, appellant never served any portion of that sentence before the trial court revoked his community supervision. Therefore, when the trial court revoked appellant's probation in each case, it could not order the burglary sentence to run consecutively to the sentence in the possession with intent to deliver case. *See O'Hara*, 626 S.W.2d at 35. Because appellant never served any portion of the sentence on his possession with intent to deliver case, the trial court acted within its discretion to order the

sentence in that case to run consecutively to the sentence in the burglary case. *See id.*

We overrule appellant's first issue.[2]

II. Trial court's Jurisdiction to Grant Shock Probation

In his second issue, appellant argues the trial court lacked jurisdiction to grant shock probation in his burglary of a habitation case. The State agrees the trial court lacked jurisdiction to enter its order suspending execution of appellant's sentence and placing him on community supervision. It also concurs with appellant that the controlling sentence in appellant's burglary of a habitation case is the October 11, 2016 sentence of ten years' confinement.

A trial court's jurisdiction to impose a sentence requiring imprisonment "continues for 180 days from the date the execution of the sentence actually begins." *See* CRIM. PROC. art. 42A.202(a). Before the expiration of that 180-day period, the trial court may suspend further execution of the imposed sentence and place the defendant on community supervision under certain circumstances. *See id.* art. 42A.202(b). Appellant's sentence in his burglary of a habitation case began on October 11, 2016. On April 14, 2017, 185 days later, the trial court entered an order

[2] As part of his first issue, appellant requests this Court modify both judgments to delete all references to consecutive sentences or, alternatively, delete all references to consecutive sentences from the burglary case judgment. The record reflects the trial court ordered only the possession with intent to deliver case sentence to run consecutively to the burglary sentence, which we have concluded was proper. The record further reflects that although the burglary case judgment included a requirement that the sentence should run consecutively to the possession with intent to deliver case sentence, the trial court entered a nunc pro tunc order on December 16, 2019, deleting the cumulation order from the burglary case judgment. Accordingly, we need not address that request for modification.

suspending execution of appellant's sentence and placing him on community supervision for seven years.

We agree the trial court lacked jurisdiction to enter the April 14, 2017 order suspending appellant's sentence in the burglary of a habitation case and placing him on community supervision and further conclude that order is void. *See Rice v. State*, 971 S.W.2d 533, 535 (Tex. App.—Dallas 1997, no pet.).

As part of his second issue and in his fifth issue, appellant asserts he is entitled to have his time credit for his burglary of a habitation case corrected. Having concluded the April 14, 2017 order is void, we will address appellant's request to reform the original judgment as part of our discussion of appellant's fifth issue *infra*.

III. Alleged Prejudgment of the Sentence

In his third and fourth issues, appellant urges he is entitled to new sentencing in each case, arguing the trial court prejudged his revocations and terms of confinement or its requirement for appellant to serve his possession with intent to deliver case consecutively to his burglary case. Appellant complains of comments made by the trial judge at a January 5, 2018 combined hearing on his open plea of guilty in the possession with intent to deliver case and the State's September 27, 2017 motion to revoke his community supervision in the burglary case. Appellant also complains of the comments and rulings of a successor trial judge who conducted an August 19, 2019 hearing on the State's motions to revoke his community supervision in the burglary and possession with intent to deliver cases. Appellant

contends the trial judges abandoned their roles as neutral arbiters during the hearing on the State's motions for revocations, thus depriving appellant of his right to due process under the Fourteenth Amendment of the United States Constitution and his right to due course of law under Article I, § 19 of the Texas Constitution.

The State responds that because the trial court's order granting shock probation in the burglary case was void, the order revoking that same probation is also void. The State further argues that because appellant was never legally on shock probation, he cannot complain of matters pertaining to its revocation.

As for the possession with intent to deliver case, the State responds the trial judge's comments at the January 5, 2018 hearing may not be used to infer intent of the successor trial judge at the August 19, 2019 hearing. The State also argues the successor trial judge's complained-of comment constituted admonishment of the full range of punishment appellant faced and was made after all evidence was presented, and that the record reflects the successor trial judge considered the merits of the State's motion to revoke.

Due process, as it is embraced in the federal and Texas constitutions, requires a neutral and detached hearing officer. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006). A "neutral and" detached hearing officer is not synonymous with a silent observer, however. This is especially true where the judge is charged with developing facts to inform his exercise of discretion. *Marshall v. State*, 297 S.W.2d

135, 136–37 (Tex. Crim. App. 1956). Absent a clear showing of bias, the court's actions will be presumed to have been correct. *Brumit*, 206 S.W.3d at 645.

To reverse a judgment based on improper conduct by the trial court, we must conclude the judicial impropriety occurred and prejudice probably resulted to the complaining party. *Dockstader v. State*, 233 S.W.3d 98, 108 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); *see also Hill v. State*, No. 05-14-01445-CR, 2016 WL 1554932, at *2 (Tex. App.—Dallas Apr. 14, 2016, no pet.) (mem. op., not designated for publication). Our review encompasses the entire record. *Dockstader*, 233 S.W.3d at 108. Judicial remarks during the course of a trial will support a bias or partiality challenge if "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Litekey v. United States*, 510 U.S. 540, 555 (1994) (discussing bias in the context of recusal).

A. Complained-of Comments and Rulings

In the hearing on January 5, 2018, the trial court stated to appellant that it was sending him to "another program" where "hopefully [he would] get it." The trial court continued: "[p]robably any other judge down here would have sent you to the pen already, so *this is your last chance*" (emphasis added by appellant). The trial court further stated that appellant needed to "break the cycle, my friend" and re-stated "[t]his is your *last chance*, [be]cause *no one's going to give you a third chance*" (emphasis added by appellant).

The State filed its second revocation motion in appellant's burglary case and its first motion to revoke in his possession with intent to deliver case on April 1, 2019. The clerk's record reflects that on August 7, 2019, while the revocation motions were still pending, the trial court admonished appellant that he was subject to the "possibility of stacking sentences" if the trial court granted the revocation motions.

At the August 19, 2019 revocation proceedings, the trial court heard evidence concerning appellant's involvement in an aggravated robbery involving two complainants. In revoking appellant's probations, the trial court stated it would "stack these sentences." The trial court concluded by stating: "I think you were given so many chances, Mr. Lewis."

B. Conclusions Regarding Trial Judges' Comments and Rulings

In his third issue, appellant argues the foregoing comments indicate the trial court predetermined revocation and prejudged appellant's term of confinement in the burglary case. As we have already concluded the trial court's shock probation order was void, we further conclude his complaints regarding the trial court's revocation of the community supervision granted by that order to be moot. *See Rice*, 971 S.W.2d at 535 ("Because appellant was never legally on shock probation, he cannot complain of matters pertaining to its revocation.").

In his fourth issue, appellant argues the foregoing comments indicate the trial court predetermined revocation and prejudged his term of confinement in the

possession with intent to deliver case, and predetermined the consecutive sentences order in his possession with intent to deliver case. First, as the State points out, the trial judge who ultimately decided to revoke appellant's community supervision in the possession with intent to deliver case was a different judge than the judge who conducted the January 5, 2018 hearing. Although appellant urges the record here reflects a trial judge who failed to consider the full punishment range, he does not cite, and we have not found, any authority to support his argument that the trial judge's comments at a plea hearing may be used to infer intent of a different judge at a later revocation hearing. Moreover, the successor judge's comments and rulings were made after all the evidence was presented to her. *See Brumit*, 206 S.W.3d at 645. After review of the record, we conclude the comments of the trial court here do not reflect bias, partiality, or that the trial judge did not consider the full range of punishment. *See id.*

Accordingly, we overrule appellant's fourth issue.

IV. Back Time Credit

In his fifth issue, appellant asserts he is entitled to correction of his time credit for his burglary of a habitation case. As discussed in the resolution of appellant's second issue, the trial court lacked jurisdiction to grant shock probation more than 180 days after "the date the execution of the sentence actually begins" and thus its order granting shock probation is void. We set aside that order and the judgment revoking the shock probation, thus leaving the original judgment of October 11,

2016. *See Rice*, 971 S.W.2d at 536. Appellant further argues the judgment in his burglary case should grant him credit for the time he served during the following periods:

- June 20, 2016, the date of his arrest for burglary, through April 14, 2017, the date of his release pursuant to the shock probation order (299 days);
- August 15, 2017, the date of his re-arrest, through January 5, 2018, when his community supervision was continued (144 days); and
- March 18, 2019, the date of his re-arrest, through the date of the appealed of revocation judgment on August 19, 2019 (155 days).

The State agrees that appellant is entitled to credit on his burglary case sentence from the date of his initial arrest until the date the trial court revoked his void shock probation, but the State does not offer any calculations for how many days appellant should be credited.

A defendant is given credit on his sentence for the time that he has spent in jail for the case from the time of his arrest and confinement until his sentence by the trial court. *See* CRIM. PROC. art. 42.03 § 2(a)(1). The October 11, 2016 judgment does not include any back time credit. We agree with appellant that he is entitled to back time credit. Although an appellate court may reform a judgment to "speak the truth" when it has the necessary information, appellant's calculations of his time spent in jail include the date of September 15, 2017, the date the indictment and arrest warrant in the possession with intent to deliver case allege appellant possessed

with intent to deliver more than four grams but less than 200 grams of cocaine. Thus, it is unclear from this record which days appellant spent in jail for his burglary case.

Accordingly, we conclude the record is insufficient for this Court to reform the judgment. We therefore reverse and remand this matter to the trial court for a determination of the amount of back time credit required by Texas Code of Criminal Procedure article 42.03, section 2(a)(1) and for reformation of the judgment in accordance with that determination. *See Largher v. State*, No. 05-14-00440-CR, 2015 WL 6781933, at *4 (Tex. App.—Dallas Nov. 6, 2015, no pet.) (mem. op., not designated for publication) (citing *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App—Dallas 1991, pet. ref'd)).

CONCLUSION

We affirm the trial court's judgment in the possession with intent to deliver cocaine case (appellate cause no. 05-19-01026-CR, trial court no. F17-58166-R).

In the burglary of a habitation case (appellate cause no. 05-19-01027-CR, trial court no. F16-10864-R), we set aside the order granting shock probation and the judgment revoking the shock probation, thus leaving the original judgment of October 11, 2016. Further, we reverse and remand to the trial court for determination of the amount of back time credit required by Texas Code of Criminal Procedure article 42.03, section 2(a)(1) and for reformation of the judgment in accordance

therewith. In all other respects, we affirm the trial court's judgment of October 11, 2016.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Tex. R. App. P. 47
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JABARI MALIK LEWIS, Appellant	On Appeal from the 265th Judicial District Court, Dallas County, Texas
No. 05-19-01026-CR V.	Trial Court Cause No. F17-58166-R.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Schenck. Justices Osborne and Partida-Kipness participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 15th day of December, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JABARI MALIK LEWIS, Appellant	On Appeal from the 265th Judicial District Court, Dallas County, Texas
No. 05-19-01027-CR V.	Trial Court Cause No. F16-10864-R.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Schenck. Justices Osborne and Partida-Kipness participating.

Based on the Court's opinion of this date, we **SET ASIDE** the order granting shock probation and the judgment revoking the shock probation, thus leaving the original judgment of October 11, 2016.

Further, we **REVERSE** and **REMAND** to the trial court for determination of the amount of back time credit required by Texas Code of Criminal Procedure article 42.03, section 2(a)(1) and for reformation of the judgment in accordance therewith.

In all other respects, we **AFFIRM** the trial court's judgment of October 11, 2016.

Judgment entered this 15th day of December, 2020.