In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00110-CR

PETE AGAPITO HERNANDEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 74,885-E; Honorable Richard Dambold, Presiding by Assignment

May 21, 2020

MEMORANDUM OPINION

Before QUINN, C.J. and PARKE and DOSS, JJ.

Appellant, Pete Agapito Hernandez, appeals his conviction and 25-year sentence for violating an order of civil commitment. He had previously been adjudicated a sexually violent predator and civilly committed per § 841.081 of the Texas Health and Safety Code.[1] His sentence was enhanced by two prior felony convictions, which convictions

[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 841.081(a) (West 2017) (stating that "[i]f at a trial conducted under Subchapter D the judge or jury determines that the person is a sexually violent predator, the judge shall commit the person for treatment and supervision").

were for aggravated sexual assault and an earlier violation of the civil commitment order. Through three issues, he asserts that 1) section 841.082(a)(4) of the Sexually Violent Predator Act (SVP) is unconstitutional; 2) his sentence was improperly enhanced; and 3) his sentence was illegal due to the improper enhancement. We affirm.

Issue One

Appellant first asserts that section 841.082(a)(4) of the SVP Act is unconstitutional on its face and as applied to him. Both arguments were raised on appeal for the first time. Consequently, they were not preserved for review. *See Reynolds v. State,* 423 S.W.3d 377, 383 (Tex. Crim. App. 2014) (holding that "'[a]s applied'" constitutional challenges must be preserved by objection or complaint to the trial court); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (stating that "a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute").

Issues Two and Three

Appellant's remaining issues relate to the enhancement of his sentence and its alleged impropriety and illegality. He contends that his sentence was improperly enhanced because the "State used appellant's conviction for the offense of aggravated sexual assault in . . . 2008, as both an elemental [sic] and general punishment enhancement in violation of appellant's right to due process." Had it not been improperly enhanced, he continues, the possible term of imprisonment would have ranged from 2 to 20 years. Being assessed a 25-year prison term, his sentence purportedly is illegal. We overrule the issues.

The argument underlying both issues is based on the rule that the "'use of a prior conviction to prove an essential element of an offense bars the subsequent use of that

prior conviction in the same indictment for enhancement purposes.'" *Ballard v. State*, 149 S.W.3d 693, 697 (Tex. App.—Austin 2004, pet. ref'd) (quoting *Wisdom v. State,* 708 S.W.2d 840, 845 (Tex. Crim. App. 1986). *Ballard* dealt with a prosecution for failing to register as a sex offender. In addition to alleging in the indictment that Ballard so failed to register, the State also attempted to enhance his punishment. The latter was attempted by alleging that he had been convicted for possessing a prohibited substance in a correctional facility and for sexual assault. *Id.* at 696. Furthermore, the sexual assault is what triggered his obligation to register as a sex offender and "did triple duty in this cause," according to the *Ballard* court. *Id.* It 1) served as the reportable conviction triggering the duty to register, 2) was the sexually violent offense that determined the term and frequency of appellant's duty to register, and 3) was one of the two previous felony convictions used to classify appellant as a habitual offender for punishment purposes. *Id.* These circumstances ran afoul of the bar against using a prior conviction to prove an essential element of the primary offense while also using it to enhance punishment for that same primary offense. *Id.* at 699. Yet, a pivotal circumstance in *Ballard* is missing here, as we now describe.

In *Bohannan v. State*, 546 S.W.3d 166 (Tex. Crim. App. 2017), the Texas Court of Criminal Appeals explained that being adjudicated and ordered to be civilly committed is the gravamen of the offense encompassed in § 841.085 of the Health and Safety Code. *Id.* at 173; *see* TEX. HEALTH & SAFETY CODE ANN. § 841.085 (West Supp. 2017) (stating that a "person commits an offense if, after having been adjudicated and civilly committed as a sexually violent predator under this chapter, the person violates a civil commitment requirement"). "It is the very circumstance that the person has been adjudicated a sexually violent predator resulting in a civil commitment order that renders otherwise legal

conduct criminal." *Bohannan*, 546 S.W.3d at 173. In other words, the accused is being prosecuted for violating a distinct order of civil commitment. Why he was subjected to that order or why he was adjudicated a sexually violent predator is unimportant to a § 841.085 prosecution. To gain a conviction, "[t]he State [is] not required to re-prove the offenses that originally supported the commitment." *Jones v. State*, 333 S.W.3d 615, 624 (Tex. App.—Dallas 2009, pet. ref'd) (citing *Adams v. State*, 222 S.W.3d 37, 55 (Tex. App.—Austin 2005, pet. ref'd)). So, unlike the situation in *Ballard*, the earlier conviction for a sexual offense is not an essential element of § 841.085. *Id.*; *Andrews v. State*, No. 05-13-00969-CR, 2014 Tex. App. LEXIS 11298, at *6 (Tex. App.—Dallas Oct. 10, 2014, pet. ref'd) (mem. op., not designated for publication) (reiterating that "prior convictions were not an essential element of the charged offense" and "it was only Jones's status as a person under a commitment order that needed to be proved"). Nor does its use to enhance punishment arising from a successful § 841.085 prosecution violate the rule against using a conviction to both establish the primary offense and enhance punishment for that offense. *Id.*

Having overruled each of appellant's issues, we affirm the trial court's judgment.

Brian Quinn
Chief Justice

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