In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00408-CR

ALEJANDRO GAMBOA, APPELLANT

V.

STATE OF TEXAS, APPELLEE

On Appeal from the 100th District Court of
Childress County, Texas
Trial Court No. 5913, Honorable Stuart Messer, Presiding

July 13, 2020

MEMORANDUM OPINION

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

Alejandro Gamboa appeals from a final judgment memorializing the adjudication of his guilt for possessing a controlled substance. Upon so adjudicating his guilt, the trial court assessed a $4,000 fine and 20-year prison sentence. Appellant's two issues concern whether 1) amendments to the conditions of his community supervision supplanted the conditions upon which the State relied in moving to adjudicate his guilt and 2) his sentence was grossly disproportionate to the gravity of the offense and, therefore, cruel and unusual. We affirm.

Issue One

It is undisputed that 1) the adjudication of appellant's guilt was initially deferred, 2) the trial court placed him on community supervision and imposed conditions upon his continued release, 3) he had signed the order imposing the conditions and represented he understood them, 4) the conditions were subsequently amended twice by the trial court, 5) he violated one or more of the conditions originally imposed by the trial court and which were not encompassed within the amendments, and 6) the State sought to have his guilt adjudicated for his violating one or more of those original, unamended conditions. Appellant contends, however, that the original conditions were vitiated, and, thus, his probation could not be revoked for violating any of them. They were so vitiated by the trial court ordering amendments thereto and stating in those ensuing orders that he remained obligated "to abide by all other conditions of probation listed on the original Judgment which placed the defendant on probation and all subsequent amended orders thereafter." Yet, he continues, the "original Judgment" deferring the adjudication of guilt and placing him on community supervision mentioned no conditions since they were itemized in a separate order. "Therefore, the initial terms of probation could not form the basis of adjudication of Appellant's guilt because the initial terms of probation had been superseded by the Orders Amending Conditions of Probation." We overrule the issue.

The two orders amending the initial conditions of appellant's community supervision opened by referring to "such conditions of probation listed on the defendant's Judgement [sic] rendered on the 21st day of March, 2016." They also closed with the directive that "the defendant will continue to abide by all other conditions of probation listed on the original Judgment which placed the defendant on probation and all

subsequent amended orders thereafter." And, in each, the trial court clearly expressed its intent to modify the supposed conditions within the March 21, 2016 judgment "by ***adding*** the following ***additional*** conditions of probation." (Emphasis added).

Assuming *arguendo* that appellant was correct, and the subsequent amendments somehow supplanted the original ones, the only conditions affected were those appearing in a March 21, 2016 judgment. Yet, as appellant recognizes, no "judgment" of record dated March 21, 2016, itemizes any conditions. Indeed, the conditions underlying the State's attempt to have his guilt adjudicated appeared not in a judgment but rather in a separate edict labelled "ORDER IMPOSING CONDITIONS OF COMMUNITY SUPERVISION." Moreover, nothing in the two orders amending the conditions within the "judgment" mentioned the conditions within the distinct "Order Imposing Conditions of Community Supervision." So, if we are to apply appellant's argument in the literal sense, the actual order imposing the conditions of his community supervision cannot be said to have been modified and supplanted since the subsequent orders said nothing of it.

Now, the foregoing is the "cute" way of disposing of appellant's argument. The legally sound way rests on the absence, on the criminal side of a court's docket, of any rule that says an amendment of a prior pleading or document *ipso facto* supplants the initial pleading or document. As acknowledged in *Ex parte Streater*, 154 S.W.3d 216 (Tex. App.—Fort Worth 2004, pet. ref'd), though the general rule in civil cases is that amended pleadings supersede prior pleadings, there is no analogous rule in criminal law. *Id.* at 218 n.3; *see Smith v. State*, No. 07-14-00091-CR, 2014 Tex. App. LEXIS 11633, at *4 (Tex. App.—Amarillo Oct. 22, 2014, no pet.) (mem. op., not designated for publication) (acknowledging the same). So, to the extent that the trial court issued two subsequent

orders ***adding*** conditions to appellant's community supervision, those orders did not supersede any prior ones. This is especially so given that the two orders clearly evinced the trial court's intent that all of the original conditions were to remain binding. So, the violation of those original conditions lawfully could result in the adjudication of his guilt

Issue Two

That appellant was convicted of a second-degree felony, that the maximum prison term for such a felony is 20 years, and that he received the maximum term is undisputed. Yet, because he "was convicted of the offense of possession of a controlled substance" and "[n]o person was directly harmed or directly placed in danger as a result of the crime," the sentence allegedly was "grossly disproportional to the crime committed." We overrule the issue.

To paraphrase Vern Gosdin, "this ain't [appellant's] first rodeo."[1] Appellant admitted that he already had been convicted twice. One was for the felony offense of aggravated assault and the other for the state jail felony of possessing a controlled substance. Both convictions resulted in prison terms. Yet, he continued to offend. In addition to his possessing the controlled substance underlying his current conviction, he also engaged in another instance of possessing a controlled substance. The latter consisted of the offense utilized by the State as grounds to adjudicate his guilt. These multiple instances of criminal conduct may be considered in assessing the constitutionality of his current sentence. *See Lara v. State*, No. 13-14-00396-CR, 2016 Tex. App. LEXIS 5272, at *5–6 (Tex. App.—San Antonio May 19, 2016, no pet.) (mem.

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[1] VERNE GOSDIN, *This Ain't My First Rodeo, on* 10 YEARS OF GREATEST HITS (Columbia Records 1990).

op., not designated for publication) (involving a conviction for a second-degree felony wherein the court considered prior convictions when concluding that the 20-year sentence assessed was not grossly disproportionate). And, in considering them, we, like the court in *Lara*, cannot say that the sentence was grossly disproportionate to the crime or otherwise cruel and unusual.

Moreover, missing from the record before us is evidence of what courts have imposed for like crimes. This is problematic. The absence of such evidence preempts us from making the comparative analysis elemental to the cruel and unusual allegation at bar. *Id.* at *3–4 (noting that in addition to assessing the gravity of the offense relative to the harshness of the penalty, the sentences imposed for other crimes in the jurisdiction and imposed for like crimes in other jurisdictions are factors necessitating consideration).

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

Brian Quinn
Chief Justice

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