Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-00895-CR

———————————

MARCUS EUGENE PRICE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 747721

O P I N I O N

Marcus Eugene Price (Appellant) was indicted for the first degree felony offense of aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B) (Vernon 1994 & Supp. 1999). Appellant's indictment contained an enhancement paragraph because of a prior felony conviction. Appellant pleaded not guilty and was tried by a jury. The jury found Appellant guilty and found his indictment's enhancement paragraph "true." The jury sentenced Appellant to ninety-nine years' confinement in the Institutional Division of the Texas Department of Criminal Justice. *See* TEX. PENAL CODE ANN. § 12.32 (Vernon 1994).

Appellant assigns two points of trial court error, contending that (1) his conviction is void because a juror in his case was disqualified because he has a felony conviction, and (2) article 42.12 and article 44.46 of the Texas Code of Criminal Procedure, concerning persons convicted of felonies serving on juries, are respectively unconstitutional as applied to him because of their conflict with Article IV and Article XVI of the Texas Constitution. We affirm.

Appellant does not challenge the sufficiency of the evidence to support his conviction. Thus, a review of the facts of this case in this opinion would serve no useful purpose.

In his first point of error, Appellant contends that his conviction is void and must be reversed because one of the jurors in his case has a felony conviction for burglary, which results in juror disqualification. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(a)2 (Vernon 1989). During voir dire examination of the venire, a prospective juror approached the bench and the following colloquy occurred:

> The Court: [Juror] No. 11, you had something to bring to our attention?
>
> [Juror No. 11]: In 1960 I was sentenced to two years for burglary, and served probation. For some reason they can't find it on the records. I've been in [sic] jury duty before, and they looked--
>
> The Court: Right now we are in kind of a flux because I was always under the impression if you have a felony conviction, even though it was a probation, that you would be disqualified, but there is case law that says you are not. So, if you have--it was a successful completion of your probation?
>
> [Juror No. 11]: That's correct.[1]
>
> The Court: Thank you, sir. Have your seat.

---

[1] A person who was convicted of a felony offense but successfully completes probation related to such conviction is permitted to serve on a jury if the requisites of article 42.12, section 20, are satisfied. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 20(a) (Vernon Supp. 1999); *Payton v. State*, 572 S.W.2d 677, 678 (Tex.Crim.App. 1978). Appellant contends that Juror No. 11's affirmative response, alone, to the trial judge's question concerning his successful completion of probation is not satisfactory proof. However, Appellant failed to challenge Juror 11's affirmative response during voir dire examination or at any other time before the verdict was entered. Appellant's contention is not preserved for appellate review. *See* TEX. R. APP. P. 33.1(a); TEX CODE CRIM. PROC. ANN. art. 44.46 (Vernon Supp. 1999).

No further discussion occurred on this issue. Neither side exercised any challenges against Juror No. 11. Further, the record does not show that Appellant raised Juror No. 11's disqualification before verdict, nor does Appellant demonstrate significant harm resulting from his service as a juror. *See* TEX. CODE CRIM. PROC. ANN. art. 44.46 (Vernon Supp. 1999).

It is clear from the record that Appellant's concern that Juror No. 11 was absolutely disqualified to serve on the jury was not raised by Appellant before the verdict was entered. While it is true that the possibility of disqualification was raised during voir dire, Appellant never asserted or even suggested that Juror No. 11 was disqualified. Indeed, Appellant raises this issue for the first time on appeal. At the very minimum, article 44.46(1) requires a defendant to assert in some fashion that a juror is absolutely disqualified before the verdict is entered. *See Hernandez v. State*, 952 S.W.2d 59, 71 (Tex.App.–Austin 1997), *vacated on other grounds*, 957 S.W.2d 851 (Tex.Crim.App. 1998); *see also* TEX. R. APP. P. 33.1(a). Appellant did not do so in this case. Consequently, Appellant has not preserved this issue for appellate review. *See Hoffman v. State*, 922 S.W.2d 663, 671 (Tex.App.–Waco 1996, pet. ref'd).

Further, the plain language of article 44.46(2) requires that when a defendant does not object nor otherwise challenge the presence of an absolutely disqualified juror until after the verdict is entered, the defendant is entitled to relief on appeal only if he demonstrates that the juror's service caused him significant harm beyond the mere fact of conviction. *See* TEX. CODE CRIM. PROC. ANN. art 44.46(2) (Vernon Supp. 1999); *Hernandez*, 952 S.W.2d at 71. Appellant makes no attempt to show such harm in this cause. Point of error one is overruled.

In his second point of error, Appellant contends that article 42.12 and article 44.46 of Texas Code of Criminal Procedure are respectively unconstitutional in so far as they purport to restore a person's right to serve on a jury who was convicted of felony and who successfully completes probation relative to such conviction. Appellant argues that such a restoration of

rights conflicts with the Texas Constitution and its mandatory exclusion from juries of those persons convicted of felonies. *See* TEX. CONST. art. XVI, § 2. We disagree.

First, article 44.46 does not purport to restore a convicted felon's ability to serve on a jury. *See* TEX. CODE CRIM. PROC. ANN. art. 44.46 (Vernon Supp. 1999). Article 44.46 pertains solely to the reversal of a conviction on the basis of service on a defendant's jury by a disqualified juror. *See id.* It simply puts the burden on the defendant to raise the disqualification of the juror before the verdict is entered or to show significant harm by the service of the disqualified juror. Thus, we need not address Appellant's argument as it relates to article 44.46 because it does not violate any constitutional provision concerning exclusion of convicted felons from jury service.

Second, the court in *Hoffman* held that article 42.12 was constitutional as it relates to the district court's authority to restore a person's right to sit on a jury who successfully completes the probation imposed by that court for a felony conviction. *See Hoffman*, 922 S.W.2d at 668-69; *see also Payton v. State*, 572 S.W.2d 677, 678-79 (Tex.Crim.App. 1978); TEX. CODE CRIM. PROC. ANN. art. 42.12 § 20(a) (Vernon Supp. 1999). The court in *Hoffman* rejected an argument identical to the one advocated by Appellant in his second point of error.[2] *See id.* We agree with the *Hoffman* court's holding that article 42.12 is constitutional and does not conflict with any constitutional provision relating to a person's ability to sit on a jury who was convicted of felony offense.[3] *See id.* Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

---

[2] The court in *Hoffman* also declined to follow a contrary holding reached by the court in *R.R.E. v. Glenn*, 884 S.W.2d 189, 193 (Tex.App.–Fort Worth 1994, writ denied), a civil case. We find the holding in *Hoffman* persuasive.

[3] For an expansive and detailed analysis of this issue, *see Hoffman*, 922 S.W.2d at 667-69.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Yates, Draughn, and Lee.[4]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] Senior Justices Joe L. Draughn and Norman Lee sitting by assignment.