TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00399-CR

The State of Texas, Appellant

v.

Edmund Koko Kahookele, Appellee

FROM THE 207TH DISTRICT COURT OF COMAL COUNTY
NO. CR2017-356, THE HONORABLE GARY L. STEEL, JUDGE PRESIDING

O P I N I O N

This is the State's pretrial appeal from an order quashing an indictment. *See* Tex. Code Crim. Proc. art. 44.01(a)(1). Edmund Koko Kahookele stands charged with two counts of possession of less than one gram of a controlled substance (cocaine and methamphetamine), enhanced by prior felony convictions. *See* Tex. Health & Safety Code §§ 481.102(3)(D), (6), .115(a), (b); Tex. Penal Code §§ 12.35(c), .42(d). Kahookele filed a motion to quash the indictment, contending that the State's use of a 1990 murder conviction to enhance his punishment violates the constitutional prohibition against ex post facto laws and that the State's use of the habitual-offender statute to further enhance his punishment violates the protections of due process and due course of law. The district court granted the motion, and the State challenges that ruling in six issues. For the following reasons, we will reverse the order quashing the indictment and remand this cause to the district court for further proceedings.

BACKGROUND

Kahookele's indictment charged him with two counts of the state-jail felony of possession of less than one gram of a controlled substance. *See* Tex. Health & Safety Code §§ 481.102(3)(D) (listing cocaine in penalty group 1), (6) (listing methamphetamine in penalty group 1), .115(a) (defining offense of possession of controlled substance listed in penalty group 1), (b) (stating that such offense is state-jail felony if amount possessed is less than one gram). Punishment for a state-jail felony is confinement in a state jail ranging from 180 days to two years. *See* Tex. Penal Code § 12.35(a). However, the indictment alleged that Kahookele had been convicted of murder in 1990, a "3g" offense, and sought to enhance the punishment range for his charged narcotics offenses to that of a third-degree felony. *See id.* § 12.35(c), *see also id.* § 12.34 (establishing punishment range for third-degree felony at two to ten years' imprisonment). Additionally, the indictment alleged that because of Kahookele's prior convictions for engaging in organized criminal activity and forgery by possession—both of which are non-state-jail felonies—the punishment range for his charged narcotics offenses should be further increased under the habitual-offender statute to a range of twenty-five to ninety-nine years or life. *See id.* § 12.42(d). Kahookele filed a "Motion to Quash the Indic[t]ment and Objections to the Enhancement Allegations" challenging the enhancement allegations under the 3g and habitual-offender statutes.

3g-enhancement allegations

Kahookele's motion noted that when he was convicted of murder in 1990, murder was not classified as a 3g offense. *See* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 4.01, sec. 3g(a)(1)(A), 1993 Tex. Gen. Laws 3586, 3718 (current version at Tex. Code Crim. Proc.

§ 42A.054(a)(2)) (adding murder to list of 3g offenses in former Tex. Code Crim. Proc. art. 42.12, § 3g(a)(1)).[1] He objected that the State's use of the 1990 murder conviction as a 3g offense to enhance the punishment range for the narcotics charges to a third-degree felony violated the constitutional protection against ex post facto laws.

Kahookele also contended that the murder conviction was pursuant to a plea bargain specifying that there would be no finding as to the use of a deadly weapon. He objected that the State's reliance on subsequent legislation to raise the maximum punishment violates his rights to due process and due course of law and deprives him of the understanding that he had concerning the collateral consequences of his plea to the murder charge when he made it.

Habitual-offender enhancement allegations

Further, Kahookele objected to the paragraphs of the indictment alleging that his punishment range should be enhanced under the habitual-offender statute. *See* Tex. Penal Code § 12.42(d). He contended that even if the district court found that his offenses should be punished as a third-degree felony, the charged offense of possession of a controlled-substance itself is still a state-jail felony and that such offense may not be further enhanced except as provided by subsection 12.425(c). *See Ex parte Reinke*, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012) (concluding that unless Legislature specifies otherwise, enhancement based on prior

[1] In 2015, the Legislature made a "nonsubstantive revision of certain laws concerning community supervision granted in criminal cases, including conforming amendments." *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 1.01, 2015 Tex. Gen. Laws 2321, 2321. This revision to the Code of Criminal Procedure renumbered article 42.12, containing section 3g, as article 42A. *See id.* The Penal Code references to article 42.12, section 3g were conformed to reflect the renumbering. *See, e.g.*, *id.* § 2.81, 2015 Tex. Gen. Laws at 2393 (current version at Tex. Penal Code § 12.35). We refer to the former article 42.12 because it was in effect when Kahookele's narcotics offenses allegedly occurred, and it is referenced in his indictment. *See id.* § 4.02, 2015 Tex. Gen. Laws at 2395 (providing Act's effective date of January 1, 2017).

offenses increases only punishment range). Thus, Kahookele contended that the maximum-punishment range for the charged narcotics offenses should be that of a second-degree felony. *See* Tex. Penal Code § 12.425(c) ("If it is shown on the trial of a state jail felony for which punishment may be enhanced under Section 12.35(c) that the defendant has previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the second degree.").

After a hearing, the district court issued an order granting Kahookele's motion.[2] This appeal by the State followed.

DISCUSSION

In six issues, the State challenges the district court's order quashing Kahookele's indictment. Specifically, the State contends that the district court erred because:

(1) the enhancement allegations in the indictment do not violate the ex post facto prohibition;

(2) there was no evidence in the record showing the terms of Kahookele's plea bargain as to the murder offense and no evidence about the inclusion of an agreement to omit a deadly weapon finding;

(3) regardless of whether there had been a plea-bargain agreement to omit a deadly weapon finding, a state-jail felony may be enhanced with a prior conviction of murder;

(4) a defendant's lack of knowledge of collateral consequences of his guilty plea does not render it involuntary;

(5) an aggravated state-jail felony under 12.35(c) of the Penal Code may be further enhanced under section 12.42(d) of the Penal Code; and

(6) there was no legal basis to quash the enhancements in paragraphs I and II alleging prior convictions that were not state-jail felonies.

[2] The district court's order did not specify whether all or only certain paragraphs of Kahookele's indictment were quashed.

We review a trial court's ruling on a motion to quash a charging instrument de novo. *State v. Ross*, 573 S.W.3d 817, 820 (Tex. Crim. App. 2019); *Smith v. State*, 309 S.W.3d 10, 13-14 (Tex. Crim. App. 2010).

As we have noted, Kahookele is charged with two counts of possession of less than one gram of a controlled substance. Possession of less than one gram of cocaine or methamphetamine is a state-jail felony. *See* Tex. Health & Safety Code §§ 481.102(3)(D), (6), .115(a), (b). The punishment for a state-jail felony is confinement in a state jail ranging from 180 days to two years. *See* Tex. Penal Code § 12.35(a).

However, a defendant convicted of a state-jail felony is eligible for harsher, third-degree felony punishment—as an "aggravated state-jail felony"—if he was previously convicted of a "3g offense."[3] *See id*. § 12.35(c)(2)(A) (providing that state-jail felony shall be punished as third-degree felony if it is shown at trial that defendant has prior, final conviction for 3g felony); *see also id*. § 12.34(a) (establishing punishment range for third-degree felony at imprisonment for not more than ten years or less than two years); *Ford v. State*, 334 S.W.3d 230, 233 (Tex. Crim. App. 2011) (addressing "aggravated" state-jail felonies enhanced under subsection 12.35(c)). A 3g offense is a felony that: (1) is listed among the more serious offenses under subsection 3g(a)(1) of former article 42.12 of the Texas Code of Criminal Procedure, or (2) involved an affirmative deadly weapon finding under subsection 3g(a)(2), indicating that the defendant used or exhibited a deadly weapon during the commission of the offense. *See* former

[3] Conviction of a "3g" felony has particular consequences. A person convicted of a 3g offense is ineligible for community supervision from a judge, *see* Tex. Code Crim. Proc. art. 42.12, § 3g(a)(1), and certain 3g offenses render a person ineligible for community supervision from a jury, *see id*. § 4(d). Conviction of a 3g offense also affects parole eligibility. *See* Tex. Gov't Code § 508.145(d)(1) (requiring inmate to serve half of sentence imposed or thirty calendar years' actual time before attaining eligibility for parole).

Tex. Code Crim. Proc. art. 42.12, § 3g(a)(1), (2) (current version at Tex. Code Crim. Proc. § 42A.054(a)(2), (b)); Tex. Penal Code § 1.07(a)(17) (defining "deadly weapon").

Moreover, a defendant who has two prior sequential non-state-jail felony convictions is eligible for punishment enhancement under subsection 12.42(d) of the habitual-offender statute. *See* Tex. Penal Code § 12.42(d). The punishment range under subsection 12.42(d) is imprisonment for twenty-five to ninety-nine years or life. *Id*.

Kahookele's indictment contained these 3g and habitual-offender allegations:

§ 12.35(c) ENHANCEMENT PARAGRAPH

> THE GRAND JURORS aforesaid do further present in and to said Court at said term that EDMUND KOKO KAHOOKELE had previously been finally convicted of a felony listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure, to-wit: on or about the 12th day of March, 1990, in the 147th Judicial District Court of Travis, County, Texas, in No. 100,568, styled The State of Texas vs. Eddie Kahookele, EDMUND KOKO KAHOOKELE, defendant herein, was duly and legally convicted of the felony offense of Murder by Intending to cause Serious Bodily Injury, alleged to have been committed on or about the 22nd day of April, 1989, upon an indictment then pending in said Court and of which offense said Court had jurisdiction.

ENHANCEMENT PARAGRAPH I

> THE GRAND JURORS aforesaid do further present in and to said Court at said term that on or about the 14th day of July, 2004, in the 147th Judicial District Court of Travis County, Texas, in No. 945141, styled The State of Texas vs. EDMUND KAHOOKELE, EDMUND KOKO KAHOOKELE, defendant herein, was duly and legally convicted of the felony offense of ENGAGING IN ORGANIZED CRIMINAL ACTIVITY, alleged to have been committed on or about the 26th day of July, 1993, upon an indictment then pending in said Court and of which offense said Court had jurisdiction, and as alleged said offense occurred prior to and the conviction therefore became final prior to the commission of the offense alleged in Count I or the offense alleged in Count II above.

ENHANCEMENT PARAGRAPH II

> THE GRAND JURORS aforesaid do further present in and to said Court at said term that on or about the 9th day of July, 1987, in the 147th Judicial District Court of Travis County, Texas, in No. 87,396, styled The State of Texas vs. EDDY KAHOOKELE, EDMUND KOKO KAHOOKELE, defendant herein, was duly and legally convicted of the felony offense of Forgery by Possession, alleged to have been committed on or about the 7th day of February, 1987, upon an indictment then pending in said Court and of which offense said Court had jurisdiction, and as alleged said offense occurred prior to and the conviction therefore became final prior to the commission of the offense alleged in Enhancement Paragraph I above.

As we have noted, the district court's order did not specify whether all or only certain paragraphs of the indictment were quashed. Thus, the State challenges the order as to all arguments in Kahookele's motion requesting that the court quash the enhancement paragraphs. *See Marsh v. State*, 343 S.W.3d 475, 479 (Tex. App.—Texarkana 2011, pet. ref'd) ("An appellant must attack all independent grounds supporting a trial court's ruling."); *cf. State v. Goins*, No. 04-18-00392-CR, 2019 Tex. App. LEXIS 6788, at *14-15 (Tex. App.—San Antonio Aug. 7, 2019, no pet.) (mem. op. on reh'g, not designated for publication) (concluding that State procedurally defaulted its complaint on appeal by failing to challenge all independent grounds supporting trial court's order granting motion to quash indictment).

First issue: No ex post facto violation as to 3g enhancement

The State contends that the allegation of 3g enhancement under subsection 12.35(c) in the indictment does not violate the prohibition against ex post facto laws. Ex post facto laws are those that: (1) make an action done before the passing of the law, and which was innocent when done, criminal, and punish such action; (2) aggravate a crime, or make it greater than it was when committed; (3) change the punishment, and inflict a greater punishment, than

the law annexed to the crime when it was committed; and (4) alter the legal rules of evidence and require less, or different testimony than the law required at the time of the commission of the offense in order to convict the offender. *Carmell v. Texas*, 529 U.S. 513, 522 (2000); *Grimes v. State*, 807 S.W.2d 582, 584 (Tex. Crim. App. 1991) ("When interpreting our state constitution's Ex Post Facto Provision, Texas cases have followed the Supreme Court lead."); *see also* U.S. Const. art. I, § 10; Tex. Const. art. I, § 16.

Here, we agree with the State that there is no ex post facto violation. Although murder was not added to the list of 3g offenses until 1993, the Court of Criminal Appeals has stated:

> [i]t is well settled that a conviction which occurred prior to the enactment of a statute providing for increased punishment upon a subsequent conviction may be used for enhancement purposes under that statute, and that such usage is not unconstitutional as being ex post facto application of the statute. . . . The reason that a conviction which occurred before the statute was enacted may be used for enhancement is that the statute providing for a greater penalty upon a subsequent conviction does not seek to punish the offender for the original criminal act a second time, but rather, "The repetition of criminal conduct aggravates . . . guilt and justifies heavier penalties."

Vasquez v. State, 477 S.W.2d 629, 632 (Tex. Crim. App. 1972); *see Scott v. State*, 55 S.W.3d 593, 597 (Tex. Crim. App. 2001) (noting that punishment is for new crime only but is heavier if defendant is habitual criminal and that statute imposing punishment on future crimes is not ex post facto law); *see, e.g.*, *McGriff v. State*, No. 05-96-00223-CR, 1998 Tex. App. LEXIS 3616, at *6-7 (Tex. App.—Dallas June 15, 1998, no pet.) (mem. op., not designated for publication) (citing *Vasquez* and rejecting McGriff's contention that use of his 1990 murder conviction to punish his burglary as third-degree felony was ex post facto application of section 3g). The 3g-enhancement paragraph of this indictment does not seek to punish Kahookele for the 1990

murder a second time and does not affect that crime or its punishment. *See Vasquez*, 477 S.W.2d at 632; *see also Carmell*, 529 U.S. at 522; *Grimes*, 807 S.W.2d at 587. Rather, the 3g-enhancement paragraph increases the available punishment range because Kahookele is alleged to have engaged in criminal conduct again. *See Vasquez*, 477 S.W.2d at 632. Further, when Kahookele was convicted of murder in 1990, murder was a punishable offense, not an act that "was innocent when done." *See Carmell*, 529 U.S. at 522; *Grimes*, 807 S.W.2d at 587. Finally, the addition of murder to the statutory list of 3g offenses did not alter the rules of evidence or change the testimony that the law required to convict him of murder when it was committed. *See Carmell*, 529 U.S. at 522; *Grimes*, 807 S.W.2d at 584.

Because the characteristics of an ex post facto law are not present here, we sustain the State's first issue.

Second, Third, and Fourth issues: No due-process violation as to 3g enhancement

In its next three issues, the State contends that the allegation of 3g enhancement under section 12.35(c) in the indictment does not present a due-process violation given Kahookele's plea bargain as to the murder offense. According to Kahookele, his murder conviction was pursuant to plea bargain specifying that there would be no finding as to the use of a deadly weapon. He contends that the State's reliance on subsequent legislation making murder a 3g offense to enhance his punishment for the charged narcotics offenses deprives him of the understanding that he had concerning the collateral consequences of his plea to the murder charge when he made it.

"Due process of law" in the Fifth and Fourteenth Amendments to the United States Constitution and "due course of law" in the Texas Constitution have the same meaning.

Jimenez v. State, 32 S.W.3d 233, 242 (Tex. Crim. App. 2000); *see also* U.S. Const. amends. V, XIV; Tex. Const. art. I, § 19. Due process under the Texas and United States Constitutions "means that an accused shall, in a criminal case, be accorded that fundamental fairness necessary to the due administration of justice." *See Reese v. State*, 877 S.W.2d 328, 333 (Tex. Crim. App. 1994); *Webb v. State*, 278 S.W.2d 158, 160 (Tex. Crim. App. 1955) (op. on reh'g); *see also McGriff*, 1998 Tex. App. LEXIS 3616, at *9.

Our review of the record shows that Kahookele's judgment of conviction for murder was based on a plea of guilty, that there was no deadly weapon finding, and that—under the terms of a plea bargain—he received a sentence of ten years' imprisonment. As the State correctly notes, there is no evidence in this record that the specific terms of such plea bargain included an agreement to omit a deadly weapon finding. *See Ex parte Moussazadeh*, 64 S.W.3d 404, 411 (Tex. Crim. App. 2001) (noting that contract-law principles apply to determine content of plea agreement in criminal case and that courts generally look to written contract or plea hearing to discern contracting parties' obligations); *cf. Ex parte Garcia*, 682 S.W.2d 581, 582 (Tex. Crim. App. 1985) (striking affirmative deadly weapon finding based on trial judge's comments during admonishment that offense did not include firearm, plus defendant's sworn allegations and trial counsel's affidavit stating that omission of deadly weapon finding was part of terms of plea bargain that defendant relied on when entering his plea of guilty).

Further, we agree with the State that even if Kahookele had a plea-bargain agreement to omit a deadly weapon finding from the judgment of conviction for murder, the prior conviction of murder itself provides an independent basis for enhancing a state-jail felony. *See* Tex. Penal Code § 12.35(c). Subsection 12.35(c) of the Penal Code states that "[a]n individual adjudged guilty of a state jail felony shall be punished for a third degree felony if . . .

(2) the individual has previously been finally convicted of any felony: (A) . . . listed in Article 42A.054(a) [formerly Section 3g(a)(1), Article 42.12], Code of Criminal Procedure." *Id*. As we have noted, a 3g offense may be based on a prior conviction for a felony including an affirmative deadly weapon finding or on a prior conviction for a felony listed among the more serious offenses in under subsection 3g(a)(1) of article 42.12. *See* former Tex. Code Crim. Proc. art. 42.12, § 3g(a)(1), (2). Thus, Kahookele's state-jail felony narcotics charges may be enhanced, based on his prior conviction for the 3g offense of murder, regardless of whether he had a plea agreement to omit a deadly weapon finding. *See id*.

Finally, the State correctly contends that Kahookele's lack of knowledge about future collateral consequences of his guilty plea did not change the voluntariness or validity of that plea. *See United States v. Shepherd*, 880 F.3d 734, 740 (5th Cir. 2018) (noting that test for determining validity of plea is whether it represents voluntary and intelligent choice among defendant's alternative courses of action). Generally, a plea of guilty will stand and is considered voluntary if it is entered by one who is "fully aware of the direct consequences" of the plea. *Brady v. United States*, 397 U.S. 742, 755 (1970); *Ex parte Barnaby*, 475 S.W.3d 316, 322 (Tex. Crim. App. 2015); *Hernandez v. State*, 986 S.W.2d 817, 821 (Tex. App.—Austin 1999, pet. ref'd) (concluding that if defendant is fully advised of direct consequences of his plea, his ignorance of collateral consequence does not render plea involuntary). Direct consequences of a guilty plea are those that are "definite, immediate and largely automatic." *Mitschke v. State*, 129 S.W.3d 130, 134 n.4 (Tex. Crim. App. 2004) (citing *United States v. Kikuyama*, 109 F.3d 536, 537 (9th Cir. 1997)). Conversely, a consequence is collateral if it is not a definite, practical consequence of a defendant's guilty plea. *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997); *see also Mitschke*, 129 S.W.3d at 134 n.4 (citing *Kikuyama*, 109 F.3d at 537)

(noting that consequence is collateral when it may be imposed at court's discretion or where imposition of consequence is controlled by agency operating beyond trial judge's direct authority). Courts have characterized the possible enhancement of punishment as a collateral consequence of which a defendant need not be knowledgeable before his plea is considered knowing and voluntary. *Ex parte Morrow*, 952 S.W.2d at 536; *see Stafford v. State*, No. 06-10-00048-CR, 2011 Tex. App. LEXIS 554, at *7 (Tex. App.—Texarkana Jan. 27, 2011, no pet.) (mem. op., not designated for publication) (noting lack of legal authority requiring trial court or defense counsel to inform defendant that his guilty plea could be used to enhance future punishments or affect any possibility of parole); *Ex parte Giovannangeli*, No. 05-03-00377-CR, 2003 Tex. App. LEXIS 5610, at *2-3 (Tex. App.—Dallas July 2, 2003, no pet.) (mem. op., not designated for publication) (affirming denial of habeas relief and noting that "[t]he possibility of an enhanced punishment in a subsequent prosecution is a collateral rather than a direct consequence of a guilty plea").

As a matter of due process, a defendant is entitled to notice of the charges against him. *Buxton v. State*, 526 S.W.3d 666, 677 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *see* Tex. Code Crim. Proc. art. 21.11 (addressing sufficiency of indictments generally). Here, when Kahookele allegedly committed the charged narcotics offenses, the criminal statute on state-jail felonies and their associated enhancements had been in effect for decades, supplying fair notice that a prior murder conviction could enhance criminal conduct classified as a state-jail felony. *See* Tex. Penal Code § 12.35(c); *State v. Cannady*, 913 S.W.2d 741, 744 (Tex. App.—Corpus Christi 1996), *aff'd*, 11 S.W.3d 205 (Tex. Crim. App. 2000) (concluding that defendant had "fair notice" of possible punishment where statute at issue became effective one month before offense was committed).

In sum, Kahookele's lack of knowledge about the possibility that his punishment for a future crime could be enhanced in a subsequent prosecution involved a collateral, not direct, consequence of his plea of guilt. *Ex parte Morrow*, 952 S.W.2d at 536; *see also Ex parte Giovannangeli*, 2003 Tex. App. LEXIS 5610, at *2-3. The voluntariness or validity of his plea was not affected by his lack of knowledge about the collateral consequences that his guilty plea could have under a subsequent amendment to the statutory list of 3g offenses in the Code of Criminal Procedure. *See Ex parte Morrow*, 952 S.W.2d at 536; *Hernandez*, 986 S.W.2d at 821; *see also Ex parte Giovannangeli,* 2003 Tex. App. LEXIS 5610, at *2-3. Moreover, Kahookele had fair notice that his prior murder conviction could be used to enhance criminal conduct classified as a state-jail felony, such that this record does not show the absence of "fundamental fairness necessary to the due administration of justice." *See Reese*, 877 S.W.2d at 333; *Webb*, 278 S.W.2d at 160.

Accordingly, we conclude that the 3g-enhancement paragraph in Kahookele's indictment does not present a due-process or due-course-of-law violation under the United States or Texas Constitution given his plea bargain as to the murder offense. We sustain the State's second, third, and fourth issues.

Fifth issue: Further enhancement under habitual-offender statute

Next, the State contends that the punishment for Kahookele's aggravated state-jail felony offenses—two counts of possession of a controlled substance with a prior conviction for a 3g offense—may be further enhanced under the habitual-offender statute for his convictions of engaging in organized criminal activity and forgery by possession. *See* Tex. Penal Code

§ 12.42(d). This further enhancement increases the applicable punishment to the habitual-offender range of twenty-five to ninety-nine years or life. *See id*.

Kahookele contends that if a charged offense is eligible for enhancement under subsection 12.425(c) of the Penal Code, that statute applies to the exclusion of any enhancement under the habitual-offender statute in subsection 12.42(d): "Since the *Tex. Penal Code* provides specific punishment enhancements for state jail felonies enhanced under 12.35(c) by raising the punishment level to a second degree felony, it should be assumed that § 12.42(d) is not applicable to them and cannot be further enhanced." *Cf. Terrell v. State*, No. 01-14-00746-CR, 2016 Tex. App. LEXIS 8875, at *15 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.) (mem. op., not designated for publication) (rejecting this premise because "nothing in the text of section 12.425 supports Terrell's contention that it is the exclusive means of enhancing state-jail felony punishments on the basis of habitual offenses"). Under subsection 12.425(c), an aggravated state-jail felony may be punished within the range of a second-degree felony "when it is shown at trial that a defendant has previously been finally convicted of *a* felony other than a state jail felony punishable under Section 12.35(a)." *Id*. § 12.425(c) (emphasis added), *see also id*. § 12.35(c). By its terms, subsection 12.425 applies when a defendant has one prior felony conviction that is not a state-jail felony. *Id*. § 12.425(c); *see also Terrell*, 2016 Tex. App. LEXIS 8875, at *17-18 (noting that defendant charged with state-jail felony of possession of less than one gram of controlled substance would have been sentenced under subsection 12.425(c) if he had only one prior felony conviction that was not for state-jail felony). But Kahookele's indictment charges him with an aggravated state-jail felony and alleges that he had *two* prior felony convictions that were not for state-jail felonies.

Punishment for an aggravated state-jail felony may be enhanced under the habitual-offender statute in subsection 12.42(d) when an indictment alleges that a defendant has two prior, sequential convictions for felonies not classified as state-jail felonies:

> [I]f it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. A previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this subsection.

Id. § 12.42(d); *Smith v. State*, 960 S.W.2d 372, 375 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (concluding that aggravated state-jail felony that had been enhanced to second-degree felony for 3g offense could be further enhanced to habitual offender status, under similar version of 12.42(d), by two additional prior convictions for non-state-jail felonies in proper sequence); *see also Lopez v. State*, No. 01-98-01076-CR, 1999 Tex. App. LEXIS 6722, at *4 (Tex. App.—Houston [1st Dist.] Sept. 2, 1999, pet. ref'd) (mem. op., not designated for publication) (same). As we have stated:

> It is clear that the legislature could have exempted all state jail felonies from the habitual criminal status in section 12.42(d). The legislature, however, expressly exempted only those state jail felonies punishable under section 12.35(a), often described by case law as non-aggravated offenses. By doing so, the legislature made aggravated state jail felonies punishable under the provisions of section 12.35(c) subject to the habitual criminal provisions of section 12.42(d).

Bunton v. State, 136 S.W.3d 355, 363 (Tex. App.—Austin 2004, pet. ref'd); *see Washington v. State*, 326 S.W.3d 302, 315 (Tex. App.—Fort Worth 2010, pet. ref'd) (rejecting defendant's

contention that he was improperly sentenced as first-degree felon for state-jail felony of evading arrest, noting that "section 12.42(d) does not exclude any state jail felonies other than those punishable under 12.35(a) [i.e., non-aggravated state jail felonies]" and concluding that trial court properly enhanced defendant's punishment range under section 12.42(d) where defendant had been previously convicted of two non-state-jail felonies and deadly weapon finding was made); *see also Terrell*, 2016 Tex. App. LEXIS 8875, at *17-18 (noting that defendant charged with state-jail felony offense of possession of less than one gram of cocaine would have been sentenced under subsection 12.425(c) if he had only one prior felony conviction; "however, the State proved two prior sequential felony convictions; thus Terrell was subject to sentencing under subsection 12.42(d), for a period of confinement in prison of 25 years to life").[4] Although the Legislature amended section 12.42 in 2011 and recodified provisions of the statute in section 12.425, the Court of Criminal Appeals has noted that the change to 12.42(d) was "nonsubstantive" and that the amendment of 12.42 sought "to specify that the felonies [referenced in the statute] do not include state jail offenses that are not aggravated." *Samaripas v. State*, 454 S.W.3d 1, 7 n.4 (Tex. Crim. App. 2014); *see* Act of May 25, 2011, 82d Leg., R.S., ch. 834, §§ 1, 4, 5, 2011 Tex. Gen. Laws 2104, 2105 (amending subsection 12.42(d), adding subsection 12.425, and providing new headings for both); *see also* Tex. Gov't Code § 311.024 (providing that heading of section does not limit or expand statute's meaning).[5] Because the

[4] Similarly, in *Henderson v. State*, 582 S.W.3d 349, 350 (Tex. App.—Amarillo 2018, pet. ref'd), where the defendant had only one prior non-state-jail-felony conviction, the court applied subsection 12.425(c) and not 12.42(d) of the Penal Code.

[5] By its terms, subsection 12.42(d) applies only to the enhancement of aggravated state-jail felonies and has no application to ordinary state-jail felonies. *See Crawford v. State*, 509 S.W.3d 359, 364 n.9 (Tex. Crim. App. 2017).

2011 change to the statute was nonsubstantive, the holdings in *Bunton*, *Washington*, and *Smith* discussing application of 12.42(d) retain their authority.

Here, enhancement paragraphs I and II of the indictment allege that Kahookele has final convictions for engaging in organized criminal activity and forgery by possession, and the judgments in the record indicate that these are sequential, non-state-jail-felony convictions. *See* Tex. Penal Code §§ 71.02(a) (defining offense of engaging in organized criminal activity), 32.21(b) (defining offense of forgery by possession). Under the habitual-offender statute in subsection 12.42(d), the two sequential felonies further enhance Kahookele's range of punishment for the charged narcotics offenses because they are state-jail felonies "other than a state jail felony punishable under Section 12.35(a)"—that is, the charged offenses are aggravated state-jail felonies, not punishable under subsection 12.35(a). *See id*. § 12.42(d); *Washington*, 326 S.W.3d at 315; *Bunton*, 136 S.W.3d at 363; *Smith*, 960 S.W.2d at 375; *see also Terrell*, 2016 Tex. App. LEXIS 8875, at *15, *17-18.

Thus, we agree with the State that Kahookele's punishment for the charged aggravated state-jail felony offenses—two counts of possession of a controlled substance with a prior conviction for a 3g offense—could be further enhanced under the habitual-offender statute based on his convictions of engaging in organized criminal activity and forgery by possession. This habitual-offender enhancement increases the applicable punishment range, which is twenty-five to ninety-nine years or life. *See* Tex. Penal Code § 12.42(d). Accordingly, we sustain the State's fifth issue.

Sixth issue: No basis for quashing enhancement paragraphs alleging non-state-jail felonies

In its sixth and final issue, the State contends that there was "no legal basis" for the district court to quash the enhancements in paragraphs I and II alleging prior convictions that were not state-jail felonies. We agree.

As we have noted, Kahookele's motion sought to quash: (1) the 3g-enhancement allegation allowing his state-jail felony offenses to be punished as third-degree felonies based on the State's use of his 1990 murder conviction, and (2) the further enhancement of punishment for his aggravated state-jail-felony offenses from the third-degree-felony range of punishment to habitual-offender status using two additional, non-state-jail-felony convictions: engaging in organized criminal activity and forgery by possession. Relying on subsection 12.425(c) of the Penal Code, Kahookele's motion specified that "the maximum punishment range applicable to [his] case should be that for a second degree felony." *See* Tex. Penal Code § 12.425(c). As we have noted, subsection 12.425(c) allows an aggravated state-jail felony to be punished within the range of a second-degree felony "when it is shown at trial that a defendant has previously been finally convicted of *a felony other than a state jail felony* punishable under Section 12.35(a)." *Id*. (emphases added); *see also id*. § 12.35(c). Thus, Kahookele's argument to the district court implicitly recognized the validity of punishment enhancement under paragraphs I and II, which alleged his prior convictions for additional offenses that were *not* state-jail felonies. At the hearing on his motion, Kahookele contended that "it's still a state jail felony even if it [the punishment] is raised under 12.35(c). . . . it is improper, unless provided for by statute, to raise this all of the way to the level of a 25-to-life case because the statutes do not permit it." Kahookele stated that "at least the enhancement paragraphs of the indictment should be quashed and we object to the State proceeding in the manner that they propose to proceed."

Kahookele did not challenge the habitual-offender enhancement paragraphs themselves, only the State's use of them in combination with the 3g-enhancement paragraph. There is no contention that the allegations as to the convictions for engaging in organized criminal activity and forgery by possession are inaccurate or untrue. To the extent that the order quashed all the enhancement paragraphs and precluded any enhancement of Kahookele's charged narcotics offenses, the order granted greater relief than Kahookele requested. *See Ferguson v. State*, 506 S.W.3d 113, 114 n.1 (Tex. App.—Texarkana 2016, no pet.) (noting that by making change to indictment, trial court granted relief that was not requested and exceeded its authority in doing so). Accordingly, we sustain the State's sixth issue.

CONCLUSION

We reverse the district court's May 24, 2018 order granting Kahookele's "Motion to Quash the Indic[t]ment and Objections to the Enhancement Allegations" and remand this cause for further proceedings consistent with this opinion.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Triana and Kelly
Dissenting Opinion by Justice Kelly

Reversed and Remanded

Filed: June 9, 2020

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