TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00709-CR

Daryl Lyndon Fuller, Appellant

v.

The State of Texas, Appellee

FROM THE 26TH DISTRICT COURT OF WILLIAMSON COUNTY
NO. 15-0893-K26, THE HONORABLE DONNA GAYLE KING, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Daryl Lyndon Fuller was charged with the third-degree felony offense of evading arrest or detention with a vehicle, pled guilty to that offense, and was placed on deferred adjudication community supervision for six years. See Tex. Penal Code § 38.04(a) (defining offense of evading arrest or detention), (b)(2)(A) (stating that offense under section 38.04 is third-degree felony if "the actor uses a vehicle while the actor is in flight"); Tex. Code Crim. Proc. art. 42A.101 (addressing deferred-adjudication community supervision). The State subsequently filed a motion to adjudicate alleging that Fuller violated several terms and conditions of his community supervision. *See* Tex. Code Crim. Proc. art. 42A.751 (addressing detention and hearing after violation of community supervision). The district court revoked Fuller's community supervision, adjudicated his guilt for the offense of evading arrest or detention with a vehicle, and sentenced him to three years' imprisonment. *See id.* art. 42A.755

(addressing revocation of community supervision); Tex. Penal Code § 12.34 (providing punishment range of two to ten years' imprisonment for third-degree felony offenses).

On appeal, Fuller contends that his three-year sentence is void and illegal because his offense was a state-jail felony, not a third-degree felony, and he further contends that his sentence was disproportionate to the seriousness of his offense. We will affirm the district court's judgment adjudicating guilt.

BACKGROUND

According to the probable cause affidavit, the events leading to Fuller's offense began with a traffic stop. A police officer stopped Fuller after seeing his vehicle exit a parking lot without stopping before crossing a sidewalk and failing to properly signal before a turn. Fuller was the only occupant of the vehicle. The officer detected an odor of marijuana emitting from the vehicle that dissipated quickly, and he requested Fuller's consent to search the vehicle. Fuller refused. The officer asked Fuller to turn the vehicle off and advised him that when another officer arrived, a police canine would conduct an open-air sniff. Fuller initially complied with the officer's request to turn off the vehicle, but shortly afterward he started the vehicle and "sped off."

The officer notified dispatch that he was involved in a vehicle pursuit. Fuller accelerated to speeds of forty-five to fifty miles per hour in a posted thirty-mile-per-hour zone. The officer followed Fuller with the siren activated on his patrol car. During the pursuit, he saw Fuller disregard a stop sign at such a high rate of speed that "his car bottomed out and [the officer] observed sparks." Fuller eventually slowed the vehicle and stopped. The officer gave "High Risk Stop instructions" to Fuller, and when other officers arrived, Fuller was arrested for

evading arrest or detention with a vehicle. After the officer had "Mirandized" Fuller, Fuller stated that the reason he had fled was to "give [the officer] a reason to f—k with him."

Fuller was charged by information with evading arrest or detention with a vehicle. *See* Tex. Penal Code § 38.04(a) ("A person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him."). The charging instrument specified that the offense was a third-degree felony and included a deadly weapon notice that was crossed out with a handwritten diagonal line.[1] Fuller pled guilty to the offense of evading arrest or detention with a motor vehicle.

Fuller's plea agreement specified that the "State agrees to recommend: **6 MONTHS** [sic] **DEFERRED ADJUDICATION; $1,500.00 FINE;** [and] **10 DAYS WILLIAMSON COUNTY JAIL**" and that the "**STATE AGREES TO WAIVE DEADLY WEAPON FINDING**[.]" Fuller was placed on six years' deferred adjudication community supervision with a $1,500 fine, and ten days in the Williamson County jail as a condition of probation.[2] The deadly weapon finding was waived. Conditions of Fuller's deferred adjudication community supervision were subsequently modified twice in response to two prior motions to adjudicate.

The State filed a third motion to adjudicate in 2018, and the district court held a hearing on the motion. During the adjudication hearing, Fuller acknowledged—as he had at his

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[1] The notice alleged that Fuller "used or exhibited a deadly weapon, namely a motor vehicle, during the commission of a felony offense or during immediate flight therefrom."

[2] The Order of Commitment as a Condition of Community Supervision provided that in lieu of incarceration, Fuller was ordered "to serve 10 days with the Williamson County Community Service Restitution Program on consecutive weekends, Saturday and Sunday, beginning Dec. 6th, 2015 at 7:45 AM."

2015 hearings on his plea and sentencing—that he was charged with the third-degree felony offense of evading arrest or detention with a vehicle.

During his plea hearing in 2015, Fuller said that he understood the level of the charged offense and the range of punishment:

> Court: Mr. Fuller, I'm showing you these documents entitled Admonitions to Defendant for Plea to Court and Waivers, Consent, Judicial Confession & Plea Agreement. Did you review these documents with [defense counsel]?
>
> [Fuller]: Yes, ma'am.
>
> Court: You understand that you are charged with *the third degree felony offense* of evading in a motor vehicle. The range of punishment for that offense is *two to ten years' confinement* in the Institutional Division and up to a $10,000 fine.
>
> [Fuller]: Yes, ma'am.

[Emphases added.]

At the sentencing hearing following the guilty plea, the district court reiterated that the charged offense to which Fuller pled guilty was a third-degree felony, heard Fuller acknowledge the punishment range for that classification level, and confirmed that the plea bargain had been followed:

> Court: Mr. Fuller, you appeared before me back on October 12th, entered a plea of guilty to the State Jail—or *third-degree felony offense of evading arrest or detention in a motor vehicle*. I found at that time you were competent to stand trial. I find that your plea and your waivers were freely and voluntarily entered. I accept your plea of guilty.
>
> We recessed the matter so that a pre-sentence investigation report could be completed. Have you reviewed this report with [defense counsel]?
>
> . . .

Court: Mr. Fuller, at this time I do find it's in your best interest, as well as the best interest of society, to defer further proceedings on this matter and place you on community supervision *for a period of six years* subject to the terms and conditions of this order. . . . You are to perform 400 hours of community service restitution at a rate not less than eight hours per month. . . . Mr. Fuller, *six years* is a long time.

[Fuller]: Yes, it is.

Court: And you understand that if you fail to comply with the terms and conditions of this community supervision that a warrant can be issued for your arrest. You'll be brought back before me for a hearing to determine whether or not you have violated those conditions. And, if I do make that determination, you'll be subject to *the full range of punishment for this offense which is two to ten years' confinement in the Institutional Division*. Do you understand?

[Fuller]: Yes, your Honor.

Court: Have I followed the plea bargain agreement as you understood it, sir?

[Fuller]: Yes, ma'am.

[Emphases added.] Consistent with the district court's oral ruling, the "Terms of Plea Bargain" and "Period of Community Supervision" sections in the written order of deferred adjudication specify that Fuller's term of community supervision is six years.

Finally, at the hearing on the motion to adjudicate, the district court reminded Fuller about the applicable range of punishment:

Court: Mr. Fuller, you are the same individual who was placed on deferred adjudication community supervision by this Court on November 23rd, 2015 for the third degree felony offense of evading arrest in a motor vehicle. Is that correct?

[Fuller]: Yes, Your Honor.

Court: And, Mr. Fuller, the State filed a motion to adjudicate your community supervision. The most recent filing is April 10th, 2018. Is that correct?

[Prosecutor]: Yes, ma'am.

Court: Okay. Sir, it appears that you are reviewing or have reviewed that motion with [defense counsel], correct, sir?

[Fuller]: Yes, Your Honor.

Court: And so you understand the allegations in the motion to adjudicate?

[Fuller]: Yes, Your Honor.

Court: You understand that it's—this offense is punishable—we talked about back when I placed you—or took your guilty plea a couple of years ago that *the range of punishment is from two to ten years confinement in prison and up to a $10,000 fine*. I found back in 2015 that it was in your best interest to defer further proceedings and place you on community supervision.

[Emphases added.]

At the conclusion of the evidentiary hearing on the motion to adjudicate and after finding multiple allegations in the motion to be true, the district court issued its ruling: "[S]ir, at this time I set aside your community supervision. I find you guilty of the third degree felony offense of evading arrest or detention in a motor vehicle. And, sir, I also at this time sentence you to three years' confinement in the Institutional Division." The district court certified that Fuller had the right of appeal "as to the punishment phase of hearing on motion to adjudicate." This appeal followed.

DISCUSSION

Evading arrest or detention

In his first issue, Fuller contends that his sentence of three years' imprisonment is void because his offense was a state-jail felony, not a third-degree felony. Fuller acknowledges that we have previously rejected the contention that the offense of evading arrest or detention

with a vehicle is a state-jail felony, holding instead that the offense is a third-degree felony. *Warfield v. State*, No. 03-15-00468-CR, 2017 Tex. App. LEXIS 5380, at *33-34 (Tex. App.—Austin June 14, 2017, no pet.) (mem. op., not designated for publication). However, he requests that "this Court reconsider its prior holdings or not apply those holdings to the unique facts of his case." We decline to do so.

Because the determination of whether an offense is a state-jail felony or a third-degree felony requires interpretation of Penal Code statutes and presents a question of law, our review is de novo. *See Williams v. State*, 253 S.W.3d 673, 677 (Tex. Crim. App. 2008) (applying de novo standard of review in determining which of two statutes applied to defendant's sentencing); *Thompson v. State*, No. 12-13-00264-CR, 2014 Tex. App. LEXIS 7924, at *2 (Tex. App.—Tyler July 23, 2014, no pet.) (mem. op., not designated for publication) (concluding that preliminary question about whether defendant's charged offense of evading arrest or detention with vehicle was state-jail felony or third-degree felony was matter of statutory interpretation requiring de novo review).

The offense of evading arrest or detention is defined in subsection 38.04(a) of the Penal Code, which states that "[a] person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him." Tex. Penal Code § 38.04(a). Subsection (b) states that the offense level is a Class A misdemeanor, except under certain circumstances, such as when the accused has been previously convicted of evading arrest or detention or uses a vehicle or watercraft while in flight. *See id.* § 38.04(b). The use of "a vehicle . . . while in flight" is the factual circumstance applicable to the offense here.

As we discussed at length in *Warfield*, the Legislature passed three bills during the 2011 regular session amending the evading arrest or detention statute in section 38.04 of the Penal Code and resulting in the codification of two punishment provisions in subsection 38.04(b). *See* 2017 Tex. App. LEXIS 5380, at *29-30. One portion of subsection 38.04(b) classifies the offense of evading arrest or detention as a state jail felony when the actor uses a motor vehicle or watercraft in fleeing law enforcement and the actor has not been convicted previously of the offense. *Id*. at *30 (citing Tex. Penal Code § 38.04(b)(1)(B)). Another part of subsection 38.04(b) states that the offense of evading arrest or detention is a third-degree felony when the actor uses a vehicle, regardless of whether the actor has been previously convicted of the offense. *Id*. at *30 (citing § 38.04(b)(2)(A)).

In *Warfield*, we noted that the Fort Worth Court of Appeals had analyzed the apparent statutory conflict as to the offense level for evading arrest or detention when the accused uses a vehicle in flight, determined that the three bills could be harmonized, and concluded that even if the amendments were irreconcilable, the final amendment would be the prevailing amendment under the Texas Code Construction Act, which provides that "the latest in date of enactment prevails." *Id.* at *31-32 (citing Tex. Gov't Code § 311.025(b), (d) and *Adetomiwa v. State*, 421 S.W.3d 922, 924-27 (Tex. App.—Fort Worth 2014, no pet.)). The last legislative vote on all three bills was the vote on Senate Bill 1416, which amended the punishment scheme of section 38.04 to provide that "evading arrest is a third degree felony if the actor uses a vehicle in flight." *Adetomiwa*, 421 S.W.3d at 927 (citing Senate Bill 1416, Act of May 27, 2011, 82d Leg., R.S., ch. 920, § 3, sec. 38.04, 2011 Tex. Gen. Laws 2321, 2322 (current version at Tex. Penal Code § 38.04)). Thus, we summarized the Fort Worth Court's conclusion stating that "the offense of evading arrest or detention is a third-degree felony when the

defendant uses a vehicle in the flight, irrespective of prior convictions" and agreed with our sister court's conclusion. *Warfield*, 2017 Tex. App. LEXIS at *32-33.

Numerous Texas courts, in addition to ours, have reached the same conclusion. *See, e.g.*, *Ex parte Carner*, 364 S.W.3d 896, 899 n.5 (Tex. Crim. App. 2012) (citing subsection 38.04(b)(2) and noting that "now it is a third-degree felony if an offender used a vehicle or watercraft to evade arrest, regardless of whether he has a prior conviction for evading"); *Copeland v. State*, No. 09-19-00194-CR, 2020 Tex. App. LEXIS 2235, at *8 (Tex. App.—Beaumont Mar. 18, 2020, no pet.) (mem. op., not designated for publication); *Allgood v. State*, 05-17-00875-CR, 2018 Tex. App. LEXIS 6416, at *6 (Tex. App.—Dallas Aug. 15, 2018, no pet.) (mem. op., not designated for publication); *Warfield*, 2017 Tex. App. LEXIS 5380, at *31; *Jackson v. State*, No. 05-15-00414-CR, 2016 Tex. App. LEXIS 7843, at *19 n.1 (Tex. App.—Dallas July 22, 2016, no pet.) (mem. op., not designated for publication); *Whitfield v. State*, No. 01-15-00336-CR, 2016 Tex. App. LEXIS 6184, at *7-8 (Tex. App.—Houston [1st Dist.] June 9, 2016, no pet.) (mem. op., not designated for publication); *Moorhead v. State*, 483 S.W.3d 246, 247-48 (Tex. App.—Texarkana 2016, no pet.); *Salazar v. State*, 474 S.W.3d 832, 839-40 (Tex. App.—Corpus Christi 2015, no pet.); *State v. Sneed*, No. 09-14-00232-CR, 2014 Tex. App. LEXIS 10615, at *9-10 (Tex. App.—Beaumont Sept. 24, 2014, pet. ref'd) (mem. op., not designated for publication); *Thompson*, 2014 Tex. App. LEXIS 7924, at *5; *Wise v. State*, No. 11-13-00005-CR, 2014 Tex. App. LEXIS 6688, at *13-14 (Tex. App.—Eastland Jun. 19, 2014, pet. ref'd) (mem. op., not designated for publication); *Mims v. State*, 434 S.W.3d 265, 270 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Scott v. State*, No. 10-13-00159-CR, 2014 Tex. App. LEXIS 3380, at *6 (Tex. App.—Waco Mar. 27, 2014, no pet.) (mem. op., not designated for

publication); *Peterson v. State*, No. 07-13-00155-CR, 2014 Tex. App. LEXIS 1447, at *5 (Tex. App.—Amarillo Feb. 10, 2014, pet. ref'd) (mem. op., not designated for publication).

We continue to agree with the reasoning and holdings of these cases stating that an actor need only use a motor vehicle in flight to make the offense of evading arrest or detention a third-degree felony. *See* Tex. Penal Code § 38.04(b)(2)(A).

a. Deadly weapon allegation

Fuller contends that the State's abandonment of the deadly weapon allegation in the charging instrument reduced his charge from a third-degree felony to a state-jail felony. But he points to nothing in the 2011 amendments to section 38.04 showing that an affirmative finding of a deadly weapon increases the punishment range for the offense of evading arrest or detention in a motor vehicle. Rather, as we have discussed, the offense of evading arrest or detention is a third-degree felony when the accused uses a motor vehicle in flight. *See id.* The presence or absence of a deadly weapon allegation has no effect on the punishment range for this offense. Thus, Fuller's contention that the deadly weapon allegation originally in his charging instrument increased his punishment range from a state-jail felony to a third-degree felony is unpersuasive. Because Fuller pleaded guilty to the charged offense of evading arrest or detention in a motor vehicle, he was properly convicted of a third-degree felony. *See id.* And because the range of punishment for a third-degree felony is two to ten years' imprisonment, the three-year sentence that Fuller received was within the proper statutory range of punishment. *See id.* § 12.34.

b. Term of deferred adjudication community supervision

Relying on the portion of the written plea agreement stating that he is to be placed on "six months" deferred adjudication community supervision, Fuller also contends that the parties intended that he plead guilty only to a state-jail felony, and not a third-degree felony.

A plea-bargain agreement is a contract between the State and the defendant, and we apply general contract-law principles in interpreting such agreements. *Thomas v. State*, 516 S.W.3d 498, 501-02 (Tex. Crim. App. 2017). To determine the terms of the plea agreement, we look to the written agreement as well as the formal record. *Id.* at 502. "Contract construction is a matter of law." *Hatley v. State*, 206 S.W.3d 710, 718 (Tex. App.—Texarkana 2006, no pet.) (construing terms of written, negotiated plea agreement).

Here, the record as a whole contains multiple references showing that Fuller's plea agreement was for six years' deferred adjudication community supervision and that he was not pleading guilty to a mere state-jail felony. At his plea hearing, Fuller answered, "Yes, ma'am" when the district court asked him whether he understood that he was "charged with the third degree felony offense of evading in a motor vehicle" and that "[t]he range of punishment for that offense is two to ten years' confinement in the Institutional Division and up to a $10,000 fine." The court ordered Fuller "to perform 400 hours of community service restitution at a rate not less than eight hours per month," which is a rate of service that would have been impossible if Fuller's term of community supervision were merely six months.

Further, when the case was called for sentencing, the district court specified that it was placing Fuller on community supervision "for a period of six years" which "is a long time," and Fuller acknowledged, "Yes, it is." The district court asked Fuller whether he understood that if he violated the terms and conditions of his community supervision and if the court determined

that he had done so, he would be "subject to the full range of punishment for this offense which is two to ten years' confinement in the Institutional Division," and Fuller replied, "Yes, your Honor." The court then asked Fuller, "Have I followed the plea bargain agreement as you understood it, sir?" Fuller answered, "Yes, ma'am." Consistent with the district court's oral ruling, the order of deferred adjudication identifying the "Terms of Plea Bargain" and "Period of Community Supervision" state that Fuller's term of community supervision is six years. Fuller's contention here—that under the terms of his plea agreement the parties intended him to plead guilty only to a state-jail felony—is contrary to the multiple references in this record showing otherwise. *See Thomas*, 516 S.W.3d at 502.

The record demonstrates that Fuller was charged with evading arrest or detention using a vehicle while in flight, that he pleaded guilty to that charge with the express understanding that it was a third-degree felony, and that he agreed to a six-year term of deferred adjudication community supervision for that offense. *See* Tex. Penal Code § 38.04(b)(2)(A). Fuller has not shown that his three-year sentence for this third-degree felony offense was void or illegal. Accordingly, we overrule Fuller's first issue.

Eighth Amendment disproportionate-sentence issue not preserved

In his second issue, Fuller contends that his punishment was disproportionate to the seriousness of his offense, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *See* U.S. Const. amends. VIII, XIV. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.* amend. VIII; *see Robinson v. California*, 370 U.S. 660, 675 (1962); *Meadoux v. State*, 325 S.W.3d 189, 193 (Tex. Crim. App. 2010). The Eighth Amendment's

prohibitions are made applicable to state-court punishments by the Due Process Clause of the Fourteenth Amendment. *Robinson*, 370 U.S. at 675; *Meadoux*, 325 S.W.3d at 193.

"A sentencing issue may be preserved by objecting at the punishment hearing, or when the sentence is pronounced." *Burt v. State*, 396 S.W.3d 574, 577 (Tex. Crim. App. 2013). Failure to complain about an allegedly disproportionate sentence in the trial court forfeits the error on appeal. *See, e.g.*, *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (concluding that defendant failed to present complaint that his sentence violated Texas Constitution's protection against cruel or unusual punishment); *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (concluding that Eighth Amendment complaints are forfeited if not raised in trial court); *Williams v. State*, 191 S.W.3d 242, 262 (Tex. App.—Austin 2006, no pet.) (noting that "[c]laims of cruel and unusual punishment must be presented in a timely manner" and "[b]ecause the complaint was not timely made, the claim has been waived"); *see also* Tex. R. App. P. 33.1(a).

Here, as the State correctly notes, Fuller failed to present any complaint about his sentence—that his sentence was disproportionate to the seriousness of his offense, or about the disparity, cruelty, unusualness, or excessiveness of his sentence—to the district court at the adjudication hearing when he was sentenced. Accordingly, we conclude that this issue was not preserved for our review. *See* Tex. R. App. P. 33.1(a). We overrule Fuller's second and final issue.

CONCLUSION

We affirm the district court's judgment adjudicating guilt.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Triana and Smith

Affirmed

Filed: June 25, 2020

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