In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00169-CR

JERMAINE DAMON DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 6th District Court
Lamar County, Texas
Trial Court No. 27761

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

A Lamar County jury found Jermaine Damon Davis guilty of unlawful possession of a firearm.[1] The trial court sentenced Davis to ten years' imprisonment, to be served concurrently with other sentences imposed at the same time.[2] This case was tried with two companion cases, which are the subjects of other appeals pending before this Court. In this appeal, Davis contends (1) that his constitutional and statutory rights were violated because he was absent when the jury was called, seated, and instructed by the trial court, (2) that the trial court erred by placing him in leg restraints during the trial, and (3) that the evidence was legally insufficient to support his conviction.

The argument raised in Davis's first issue is based exclusively on the argument brought before this Court in the companion appeal styled *Davis v. State*, cause number 06-19-00167-CR. In our opinion of this date disposing of that appeal, we found that this issue was without merit. For the reasons set out in that opinion, we overrule Davis's first issue as it applies to this appeal.

The argument raised in Davis's second issue is based exclusively on the argument brought before this Court in the companion appeal styled *Davis v. State*, cause number 06-19-00167-CR. In our opinion of this date disposing of that appeal, we found that, although the trial court erred, any error did not affect Davis's substantial rights. For the reasons set out in that opinion, we overrule Davis's second issue as it applies to this appeal.

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[1]*See* TEX. PENAL CODE ANN. § 46.04(a)(1) (Supp.).

[2]In cases that had been consolidated for trial with this case, Davis was also convicted of murder and possession of marihuana. Those convictions have also been appealed to this Court and are addressed in opinions released on the same date as this opinion.

In his third issue, Davis contends that the evidence was legally insufficient to support his conviction for unlawful possession of a firearm. We agree, and we will reverse the trial court's judgment.

"In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt." *Williamson v. State*, 589 S.W.3d 292, 297 (Tex. App.—Texarkana 2019, pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd)). "Our rigorous legal sufficiency review focuses on the quality of the evidence presented." *Id.* (citing *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring)). "We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury 'to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

"Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge." *Id.* at 298 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "The 'hypothetically correct' jury charge is 'one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Id.* (quoting *Malik*, 953 S.W.2d at 240).

Under the applicable statute and the indictment, to obtain a conviction, the State was required to prove beyond a reasonable doubt that Davis, (1) having been previously convicted of a felony, (2) intentionally and knowingly (3) possessed a firearm (4) before the fifth anniversary of his release from supervision under parole. *See* TEX. PENAL CODE ANN. § 46.04(a)(1). Davis only challenges the sufficiency of the evidence showing that he possessed a firearm before the fifth anniversary of his release from supervision under parole.

Section 46.04(a)(1) provides:

> (a) A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later.

TEX. PENAL CODE ANN. § 46.04(a)(1). In its indictment, the State only alleged that Davis had possessed a firearm before the fifth anniversary of his release from supervision under parole. Therefore, the State was required to prove the date of Davis's release from supervision under parole. *See Fagan v. State*, 362 S.W.3d 796, 799 (Tex. App.—Texarkana 2012, pet. ref'd).

The evidence at trial showed that a nine-millimeter handgun was seized on February 24, 2018, from Davis's bed during a search of the house Davis rented and occupied. At trial, the State established that Davis had been convicted of a second-degree felony offense of possession of a controlled substance and that he was sentenced to five years' imprisonment on September 5, 2008, (the 2008 Conviction). The judgment from the 2008 Conviction also showed that Davis was credited with time served from August 12, 2008, to September 4, 2008, making the maximum end

date of his sentence August 12, 2013. The State also introduced a document purportedly from the Texas Department of Criminal Justice (TDCJ) dated October 7, 2008, that referenced Davis and the 2008 Conviction. The document listed Davis's "Parole Eligibility Date" as March 10, 2009, his "Mandatory Release to Supervision" as December 2, 2010, and his "Discharge Date W/O Supervision" as August 12, 2013.

As Davis pointed out in his brief, the document from the TDCJ was a forward-looking document that showed anticipated dates; it did not show the actual date of his release from supervision under parole. In Texas, although a parolee must serve the entire period of parole,[3] he may be released from supervision at an earlier date. *See* TEX. GOV'T CODE ANN. §§ 508.155(a), 508.1555. Therefore, even if the TDCJ document arguably showed the maximum end date of Davis's parole,[4] it did not show the actual date of his release from supervision under parole. It was entirely possible that Davis could have been released from supervision under parole through early release, clemency, or pardon prior to February 23, 2013. *See Fagan*, 362 S.W.3d at 801.

Without testimony or other evidence establishing the date of Davis's release from supervision under parole, no reasonable jury could have found beyond a reasonable doubt that Davis possessed a firearm before the fifth anniversary of his release from supervision under parole.

[3]The State also points to the testimony of Billy Sheppard as supportive testimony. However, Sheppard testified after the State had rested its case and Davis moved for a directed verdict. Sheppard was asked, "Do you remember [Davis] not getting off parole until August of 2013?" Sheppard answered affirmatively, supporting the approximate date that Davis completed his parole. It does not provide any evidence of when Davis was released from supervision under parole.

[4]Under the statute, the relevant date is the date of "the person's release from supervision under . . . parole," not the date of release from parole. *See* TEXAS PENAL CODE ANN. § 46.04(a)(1).

Consequently, we find that the evidence was legally insufficient to support Davis's conviction for unlawful possession of a firearm, as alleged in the indictment. We sustain Davis's third issue.[5]

For the reasons stated, we reverse the trial court's judgment and render a judgment of acquittal for the offense of unlawful possession of a firearm.

Josh R. Morriss III
Chief Justice

Date Submitted: April 3, 2020
Date Decided: April 6, 2020

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[5]We note that the Texas Court of Criminal Appeals and the Fort Worth Court of Appeals have held that the predecessor statute to Section 46.02 of the Texas Penal Code was a lesser-included offense of the predecessor statute to Section 46.04. *See Hazel v. State*, 534 S.W.2d 698 (Tex. Crim. App. 1976); *Yeager v. State*, 737 S.W.2d 948, 953 (Tex. App. 1987, no pet.). Even if we assume, without deciding, that the current Section 46.02 is a lesser-included offense of Section 46.04(a)(1), the evidence in this case would not support a conviction under Section 46.02. Section 46.02 forbids the unlawful carrying of weapons and provides:

> (a) A person commits an offense if the person:
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> (1) intentionally, knowingly, or recklessly carries on or about his or her person a handgun; and
>
> (2) is not:
>
> (A) on the person's own premises or premises under the person's control; or
>
> (B) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

TEX. PENAL CODE ANN. § 46.02(a). The evidence in this case showed that, at the time of the alleged offense, Davis was not carrying the handgun on his person and that he was on premises under his control. Therefore, the evidence would not support a conviction under Section 46.02.

OPINION ON REHEARING

In its motion for rehearing to this Court, the State asserts that we misapplied the applicable standard of review by requiring evidence of an actual date that Jermaine Damon Davis was released from supervision under parole.[6] The State sets forth several arguments in support of its contention. We write to clarify some parts of our original opinion, but overrule the State's motion.

Initially, the State argues that requiring an actual date of release from supervision under parole both (1) was contrary to the applicable jury charge—because it was not authorized by the indictment and increased the State's burden (since the indictment did not allege an actual date)—and (2) did not accurately set out the law since other courts of appeals have not required an actual release date.

We agree that it is not always necessary for the State to establish an actual release date. In *Fagan v. State*, we agreed with the Austin Court of Appeals's explanation of why an exact date may not be required under Section 46.04(a) of the Texas Code of Criminal Procedure:

> Under section 46.04, the period during which firearm possession by a felon is forbidden begins on the date of conviction (the date one is "convicted of a felony") and ends on the fifth anniversary of the person's release from confinement or the person's release from any form of supervision or parole, whichever date is later. Thus, the minimum period that a felon will be prohibited from possessing a firearm—assuming the felon is released from confinement or supervision on the

[6]The State alleges that we required an actual date of "release from parole or mandatory supervision." However, the State's indictment charged Davis with possessing a firearm "before the fifth anniversary of [Davis's] release from supervision under parole," and the application paragraph of the trial court's charge to the jury instructed the jury that to find Davis guilty it must find that he "possess[ed] a firearm before the fifth anniversary of the defendant's release from supervision under parole." Therefore, the relevant date was the date of release from supervision under parole, not the date of release from parole or mandatory supervision. *See Saldana v. State*, 418 S.W.3d 722, 723, 726 (Tex. App.—Amarillo 2013, no pet.) (when indictment refers only to release from confinement, hypothetically correct jury charge requires State to show that defendant possessed a firearm before the fifth anniversary of his release from confinement); *Hall v. State*, Nos. 05-10-00084-CR, 05-10-00085-CR, 05-10-00086-CR, 05-10-00087-CR, 2012 WL 3174130, at *3, *5 (Tex. App.—Dallas Aug. 7, 2012, pets. ref'd) (not designated for publication) (when indictment refers only to release from confinement, State must show date of release from confinement).

> date of conviction or is never confined—is five years from the date of conviction. The date of release from confinement is necessary to determine the maximum length of this period specifically when the period extends beyond five years from the date of conviction. The date of release from confinement is not necessary when the alleged possession occurs within five years of the date of conviction because the period of prohibition extends for this duration in any event.

Fagan v. State, 362 S.W.3d 796, 800 (Tex. App.—Texarkana 2012, pet. ref'd) (quoting *Tapps v. State*, 257 S.W.3d 438, 445 (Tex. App.—Austin 2008), *aff'd on other grounds*, 294 S.W.3d 175 (Tex. Crim. App. 2009)).

In *Tapps*, the defendant possessed a firearm just over a year after his prior felony conviction; therefore, there was no need to show an actual date of his release from confinement. *Tapps v. State*, 257 S.W.3d 438, 445 (Tex. App.—Austin 2008), *aff'd on other grounds*, 294 S.W.3d 175 (Tex. crim. App. 2009)). Likewise, in the other cases cited by the State in its motion for rehearing, the proof was such that showing an actual date was unnecessary because the proof necessarily showed the defendant possessed a firearm before the fifth anniversary of the event alleged in the indictment. *See Harris v. State*, 521 S.W.3d 426, 428–29 (Tex. App.—Amarillo 2017, no pet.) (evidence showed Harris possessed a firearm on October 27, 2012, and that Harris admitted that he was released from prison in 2009); *George v. State*, No. 03-14-00673-CR, 2015 WL 6122358, at *1–2 (Tex. App.—Austin Oct. 16, 2015, pet. ref'd) (mem. op., not designated for publication) (indictment alleged George possessed firearm on February 10, 2014, and that the date "fell before the fifth anniversary of his release from confinement or parole," and testimony showed that he was still in confinement on February 18, 2009). In those cases, the proof showed that the defendant had been in confinement during a period that was within five years of his possession of a firearm. Therefore, proof of an actual date of release from confinement was unnecessary.

However, in cases in which there is no such proof, and the date of the defendant's possession of the firearm is beyond five years from the date of conviction, it is "necessary for the State to prove the date of release from confinement or supervision" as alleged in its indictment. *Fagan*, 362 S.W.3d at 800 (citing *Tapps*, 257 S.W.3d at 445; *Wright v. State*, Nos. 05-08-00778-CR, 05-08-00779-CR, 05-08-00780-CR, 2009 WL 1887127, at *8–9 (Tex. App.—Dallas July 2, 2009, pet. ref'd); *McClure v. State*, No. 12-05-00209-CR, 2006 WL 1791628, at *4 (Tex. App.—Tyler June 30, 2006, no pet.) (mem. op., not designated for publication)).[7] In this case, the evidence showed that Davis had been convicted of a second degree felony on September 5, 2008, for which he was sentenced to five year's imprisonment, and that he possessed a firearm on February 24, 2018. Since the possession date was after the fifth anniversary of his prior felony conviction, and there was no evidence that Davis was still in confinement within five years of February 24, 2018, the State was required, under its indictment, to show either the date that Davis was released from supervision under parole or to produce some evidence that Davis remained in supervised parole on a date within five years of possessing the firearm.

The State also contends that we ignored the testimony of Billy Sheppard. However, as we noted in our original opinion, Sheppard's affirmative answer when asked if he remembered Davis not getting off parole until August 2013 would support only the conclusion that Davis had not been released from parole until sometime in August 2013. The testimony does not provide any evidence

[7]"Although unpublished cases have no precedential value, we may take guidance from them 'as an aid in developing reasoning that may be employed.'" *Rhymes v. State*, 536 S.W.3d 85, 99 n.9 (Tex. App.—Texarkana 2017, pet. ref'd) (quoting *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd)).

of when Davis was "released from supervision under parole" as required by the indictment and the statute.

The State also complains that our opinion points out that the State's lack of evidence as to when Davis was released from supervision under parole would necessarily cause the jury to base its verdict on speculation. It argues that, by giving examples of other possibilities that would have resulted in Davis's release from supervision more than five years before possessing the firearm, such as early release, we have impermissibly required it to disprove these other possibilities. This argument ignores the State's burden to prove beyond a reasonable doubt that Davis possessed a firearm before the fifth anniversary of his release from supervision under parole. Assuming that Davis was either in confinement or under supervision within five years of possessing the firearm, the State could have easily established that fact by introducing Davis's penitentiary packet or his records from the Pardons and Parole Division related to the 2008 Conviction. Establishing that fact by sufficient proof is all that our opinion requires of the State.

Finally, the State argues that, under Section 46.04(a)(1) of the Texas Penal Code, "released from supervision under . . . parole" should be construed as "released from parole." Relying primarily on the definition of "parole" contained in the Texas Government Code, the State maintains that, if a convicted felon has not completed his period of parole, he has not been released from supervision under parole. *See* TEX. GOV'T CODE ANN. § 508.001(6).[8]

[8]"'Parole' means the discretionary and conditional release of an eligible inmate sentenced to the institutional division so that the inmate may serve the remainder of the inmate's sentence under the supervision of the pardons and paroles division." TEX. GOV'T CODE ANN. § 508.001(6).

When we interpret a statute, we construe it "according to its plain language, unless the language is ambiguous or the interpretation would lead to absurd results that the [L]egislature could not have intended." *Tapps v. State*, 294 S.W.3d 175, 177 (Tex. Crim. App. 2007) (quoting *Williams v. State*, 253 S.W.3d 673, 677 (Tex. Crim. App. 2008) (citing *Thompson v. State*, 236 S.W.3d 787, 792 (Tex. Crim. App. 2007))). "To do so, we focus on the literal text of the statutory language in question, reading it in context and construing it 'according to the rules of grammar and common usage.'" *Id*. (quoting TEX. GOV'T CODE ANN. § 311.011(a) (Supp.)). "[W]e assume that every word has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Id*. (quoting *Campbell v. State*, 49 S.W.3d 874, 876 (Tex. Crim. App. 2001) (citing *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997))). "Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Id*. (quoting *Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991)).

Section 46.04(a)(1) provides:

> (a) A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's *release from supervision under community supervision, parole, or mandatory supervision*, whichever date is later.

TEX. PENAL CODE ANN. § 46.04(a)(1) (Supp.) (emphasis added). Thus, under the statute, the relevant time period is before the fifth anniversary of either (1) the person's release from

confinement or (2) the person's *release from supervision under* (a) community supervision, (b) parole, or (c) mandatory supervision.

Significantly, the Legislature did not provide that the significant period was before the fifth anniversary of the person's *release from* community supervision, parole, or mandatory supervision. Yet, this is how the State urges the statute should be construed. Such a construction runs counter to the clear language of the statute, and it gives no effect to the phrase "release from supervision under." Yet we must give effect to every word, phrase, or clause if reasonably possible. *Tapps*, 294 S.W.3d at 177.

The clause to be construed here is "release from supervision under . . . parole." An examination of the relevant statutes regarding parole helps illuminate the meaning of this phrase. The State recognizes the following language of Section 508.155:

> (a) To complete a parole period, a releasee must serve the entire period of parole;
>
> . . . .
>
> (c) The division may allow a releasee to serve the remainder of the releasee's sentence without supervision and without being required to report if a parole supervisor at the regional level has approved the releasee's early release from supervision under Section 508.1555.
>
> (d) The division may require a person released from supervision and reporting under Subsection (c) to resubmit to supervision and resume reporting at any time and for any reason.

TEX. GOV'T CODE ANN. § 508.155(a), (c)–(d). Under an associated statute titled "Procedures for the Early Release from Supervision," a person who is under parole may be "released from

supervision" at a time before the expiration of his parole period.[9] TEX. GOV'T CODE ANN. § 508.1555.

By using this same language in Section 46.04(a)(1) of the Texas Penal Code, rather than "release from parole," the Legislature chose to include in the relevant time period those persons who obtained an early release from supervision under Section 508.155, even though they remained on parole until the parole period was completed. In such a case, the relevant time period would begin when the person obtained early release from supervision, not when completing the parole period. At the same time, this language would also encompass those persons who did not obtain early release from supervision. However, in such a case the relevant time period would begin when the person completed the parole period, since supervision continued for the entirety of the parole period.

We overrule the motion for rehearing.

Josh R. Morriss III
Chief Justice

Date: July 8, 2020

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[9]We recognize that Section 46.04(a)(1) was added in 1993 and that Section 508.155 was enacted in 1997 as part of the codification of the Texas Government Code. *See* Act of May 29, 1993, 73rd Leg., R.S, ch. 900, § 1.01, sec. 46.04, 1993 Tex. Gen. Laws 3586, 3688 (current version at TEX. PENAL CODE § 46.04(a)(1)); Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 12.01, sec. 155, 1997 Tex. Gen. Laws 327, 429 (amended 2007) (current version at TEX. GOV'T CODE § 508.155). Section 508.155 codified Section 15, subsections (b) and (c), of the former Article 42.18 of the Texas Code of Criminal Procedure, which in 1993 contained substantially the same language as the current Section 508.155, subsections (c) and (d). *See* Act of May 28, 1993, 73rd Leg., R.S., ch. 988, § 10.09, 1993 Tex. Gen. Laws 4274, 4310 (repealed 1997).