

Opinion of September 20, 2001 Withdrawn; Affirmed in part, Vacated and Remanded in part, and Corrected Opinion filed January 31, 2002.



In The

Fourteenth Court of Appeals

**NOS. 14-00-00514-CR and
14-00-00515-CR**

TIMOTHY EDWARD ROBERTS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 183rd Judicial District
Harris County, Texas
Trial Court Cause Nos. 673,979 and 673,980**

C O R R E C T E D O P I N I O N

The Court's opinion of September 20, 2001 is withdrawn, and this opinion is issued in its place. Appellant's motion for rehearing is overruled.

In this consolidated appeal, appellant, Timothy Edward Roberts, challenges a judgment nunc pro tunc purporting to change the offense to which he pled "no contest" from attempted murder to aggravated assault. We affirm the judgment of the trial court in cause number 673979. In cause number 673980, we vacate the trial court's nunc pro tunc order

and vacate the judgment and order which recite that appellant pled no contest to, and received deferred adjudication for, aggravated assault. We also order the trial court to reinstate its May 5, 1994, original order deferring adjudication of appellant's guilt for the offense of attempted murder. Finally, we remand cause number 673980 to the trial court for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

Appellant was charged by indictment with attempted murder of Sandi Roberts in cause number 673980.¹ On February 17, 1994, appellant entered a plea of no contest without an agreed punishment recommendation. The trial court withheld any finding of guilt and set a pre-sentence investigation hearing for May 5, 1994. On that date, the trial court deferred adjudication of appellant's guilt, found that the evidence substantiated his guilt for *attempted murder*, and placed him on ten years' probation. A condition of appellant's deferred adjudication was that he commit no offense violating the laws of Texas or any other state.

On June 25, 1997, the State filed a motion to adjudicate appellant's guilt for attempted murder, asserting that appellant had violated the terms and conditions of his probation by issuing checks with insufficient funds in his account on six occasions from July 7, 1994 through March 11, 1997. On December 6, 1999, the State filed its latest amended motion to adjudicate appellant's guilt but for the offense of *aggravated assault*. The trial

¹ Appellant was initially charged with the attempted murder of Frank Kellogg in cause number 673979 and the attempted murder of Sandi Roberts in cause number 673980. The attempted murder charge in cause number 673979 was reduced to aggravated assault. The State added an aggravated assault charge to the attempted murder charge in cause number 673980 on September 16, 1993, but later abandoned the aggravated assault charge.

Appellant complains of the judgment in cause number 673979 only in his first point of error and only as to the cumulation of the sentences in cause numbers 673979 and 673980. Because we vacate the trial court's order adjudicating appellant's guilt and assessing punishment in cause number 673980, we need not address appellant's cumulation of sentences complaints or the judgment in cause number 673979.

court heard the motion on June 9, 2000.

Appellant pled true to the six charges of issuing checks drawn on insufficient funds. The trial court found the allegations in the State's latest amended motion to adjudicate guilt true and adjudicated appellant guilty of aggravated assault. The trial court agreed to enter an affirmative finding of a deadly weapon and sentenced appellant to ten years' confinement in the Texas Department of Criminal Justice—Institutional Division, to run cumulatively with the ten year sentence appellant received in cause number 673979. Appellant now seeks a reversal and/or reformation of his sentences.

II. ISSUES PRESENTED FOR REVIEW

In appellant's first point of error, he asserts the trial court erred in cumulating his sentences in cause numbers 673979 and 673980 because they were originally prosecuted in a single proceeding. In his second point of error, appellant complains the trial court erred in cumulating a sentence upon which appellant already had served time. In his third and final point of error, appellant complains the trial court erred in modifying the original order deferring adjudication of guilt in cause number 673980, with a judgment nunc pro tunc, to reflect that appellant pled no contest to aggravated assault instead of attempted murder in the deferred adjudication hearing. Appellant's third point of error is dispositive.

III. JUDGMENT NUNC PRO TUNC

Appellant contends the trial court erred in granting the State's nunc pro tunc motion to change the original judgment/order deferring adjudication of guilt, from attempted murder to aggravated assault.² The State had abandoned the aggravated assault charge in 673980,

² The State's motion to correct the record nunc pro tunc, dated March 15, 2000, provides that the judgment contains the following erroneous entry:

“On this 5th day of May A.D. 1994 . . . defendant was assessed punishment at 10 years Deferred Adjudication on the offense of Attempted Murder.”

and the trial court had placed appellant on probation for the attempted murder charge, not the abandoned aggravated assault charge. Appellant contends this was an improper use of a nunc pro tunc correction because it altered the offense for which appellant pled “no contest” and for which appellant originally received probation. The State concedes that defending the legitimacy of the order is problematic because there is no record of the hearing on the motion to correct the judgment nunc pro tunc. The State also acknowledges that the judgment nunc pro tunc may be void.

The purpose of a nunc pro tunc order is to correct the trial court’s records to reflect the judgment the court actually made, but which, for some reason, did not enter of record at the proper time. *Smith v. State*, 15 S.W.3d 294, 298 (Tex. App.—Dallas 2000, no pet.). A nunc pro tunc order is improper when it makes a new and independent order. *Id.* at 299. The nunc pro tunc entry may be made to correct a judgment to properly reflect the actual order but may not be used to modify or add provisions to an order previously entered. *Id.* In other words, a judgment nunc pro tunc may correct only clerical errors in a judgment, not judicial omissions or errors. *Id.* A clerical error is one that does not result from judicial reasoning or determination. *Id.*; see *Jones v. State*, 795 S.W.2d 199, 202 (Tex. Crim. App. 1990) (finding that omission of the trial court’s written declaration to recite in judgment that “the defendant is adjudged guilty” constitutes merely a failure to record that which occurred in fact, and may, therefore, be corrected by a judgment nunc pro tunc, without necessity of any further judicial action); *English v. State*, 592 S.W.2d 949, 954–55 (Tex. Crim. App. 1980) (finding trial court’s mistaken signing of order form granting a new trial was clerical

The judgment nunc pro tunc ordered entry of the following judgment in the minutes of the Court:

On this the 5th day of May A.D. 1994 the above styled and numbered cause defendant pled to Aggravated assault with a deadly weapon and not Attempted Murder and punishment was assessed at 10 years Deferred Adjudication and no fine.. [sic]

We note that the “judgment” referred to in the motion to correct the record nunc pro tunc is not in the record. However, the State concedes, and an order in the record shows, that appellant pled no contest to the offense of attempted murder, not aggravated assault, and that the State abandoned the aggravated assault paragraph in the indictment.

error); *Galvan v. State*, 995 S.W.2d 764, 765 (Tex. App.—San Antonio 1999, no pet.) (finding clerical error where court orally denied plea of double jeopardy, but signed a written order with the “granted” line checked-off, and “evidence in the record indicate[d] that the oral pronouncement was the correct manifestation of the court’s intention”); *Jiminez v. State*, 953 S.W.2d 293, 295 (Tex. App.—Austin 1997, pet. ref’d) (finding clerical error where “record clearly reflect[ed] that the district court overruled the motion to quash and that the written order granting the motion was mistakenly signed by the court”).

The record reflects that the State abandoned the aggravated assault paragraph of the indictment, that appellant pled “no contest” to attempted murder, that the trial court found facts which substantiated a finding of guilt for attempted murder, and that the trial court, in fact, deferred adjudication of appellant’s guilt on the attempted murder charge, placing him on ten years’ probation. The State’s last amended motion to adjudicate guilt incorrectly recited that appellant pled guilty to aggravated assault and that the trial court placed appellant on probation for that offense. Consequently, the judgment adjudicating guilt incorrectly recites that appellant was convicted of aggravated assault. In its appellate brief, the State concedes that its motion to adjudicate guilt “mistakenly” recounted that appellant pled no contest to, and the evidence was found to substantiate his guilt for, aggravated assault instead of attempted murder. The State also asserts that “aside from the nunc pro tunc judgment itself, the record contains nothing undermining the apparent legitimacy of the original order deferring guilt as to attempted murder, and not aggravated assault.”

The trial court utilized the nunc pro tunc order to modify the offense for which appellant pled no contest, and consequently the offense for which appellant could be convicted and punished, from attempted murder to aggravated assault. As such, the order purported to correct judicial, not clerical, error. The trial court was not authorized to take such action. Therefore, the nunc pro tunc order is void. *See Smith v. State*, 15 S.W.3d 294, 298-99 (Tex. App.—Dallas 2000, no pet.).

Because we conclude the trial court erred in entering a judgment nunc pro tunc to

correct a judicial error, appellant's third point of error is sustained. This finding renders consideration of appellant's remaining points of error unnecessary.

IV. CONCLUSION

In cause number 673980, to restore appellant to the position he occupied when he received deferred adjudication probation for the offense of attempted murder (1) we vacate the trial court's March 15, 2000 nunc pro tunc order, which changed the offense for which appellant pled no contest from attempted murder to aggravated assault; (2) we vacate the March 9, 2000 judgment adjudicating appellant's guilt, and sentencing him to ten years' confinement, for aggravated assault; (3) we vacate the March 9, 2000 order cumulating appellant's sentence in cause number 673980 with the sentence assessed in cause number 673979; (4) we vacate the May 5, 1994 order deferring adjudication of guilt for aggravated assault; (5) we order the trial court to reinstate its May 5, 1994 order deferring adjudication of guilt for attempted murder; and (6) we remand this cause to the trial court for further proceedings consistent with this opinion.

Having found no error in the trial court's judgment in cause number 673979, we affirm that judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 31, 2002.

Panel consists of Justices Edelman and Frost and Senior Chief Justice Murphy.³

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³ Senior Chief Justice Paul Murphy is sitting by assignment.