Dismissed in Part; Affirmed in Part; and Opinion filed January 31, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00967-CR
NO. 14-00-00968-CR

INNOCENT OGUAGHA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 183rd District Court
Harris County, Texas
Trial Court Cause Nos. 680,601 and 680,631

O P I N I O N

Appellant Innocent Oguagha appeals the trial court's adjudication of his guilt for possession of a prohibited weapon and tampering with a government record, offenses for which appellant originally received five years' deferred adjudication probation. Although not clearly numbered as issues in his *pro se* brief, appellant complains that (1) the indictments in his case were fatally flawed; (2) he was erroneously adjudicated based upon violations of his probation that the trial court had addressed years earlier; (3) he was erroneously adjudicated after the term of his deferred adjudication probation expired; (4) he

was denied a prompt revocation hearing; (5) the trial court erroneously denied his motion to suppress; and (6) there was insufficient evidence of the probation violations for which the trial court revoked his deferred adjudication. We do not have jurisdiction to address issues two, four, five, and six. We overrule issues one and three and affirm the trial court's judgment.

Background

In December 1993, the State indicted appellant for possession of a prohibited weapon (a short-barrel shotgun) and tampering with a government record (selling a blank license plate). In June 1994, he received five years' deferred adjudication probation for the offenses. In September 1997, the trial court extended the term of appellant's deferred adjudication for one year. In June 2000, the trial court adjudicated appellant's guilt for failing to report to his probation officer for twenty-one months and for driving while intoxicated, both violations of the conditions of his deferred adjudication probation.

Indictments

First, appellant brings the following arguments that the indictments for his original offenses were fatally flawed: (1) failure to allege required elements, including mental culpability and that one or both were felony offenses; and (2) failure to negate exceptions. The State argues that none of these complaints has been preserved for appellate review.[1] Even if appellant failed to preserve error for these complaints, they lack merit.

A review of both indictments shows that they adequately encompass the elements of mental culpability. The indictment for possession of a short-barrel firearm states, "[Appellant] unlawfully, intentionally and knowingly" possessed the shotgun. The indictment for tampering with a government record states, "[Appellant] did then and there

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[1] The State cites the Code of Criminal Procedure: "If the defendant does not object to a defect, error, or irregularity . . . in an indictment . . . before the date on which trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal . . . ." TEX. CODE CRIM. PROC. ANN. Art. 1.14(b) (Vernon Supp. 2002).

unlawfully, with the intent that it be used unlawfully . . . and with the intent to defraud and harm another" sell a blank cardboard license plate. These indictments track the language of the applicable sections of the penal code. *See* TEX. PEN. CODE ANN. §§ 37.10(a)(4), 37.10(d)(3), & 46.05(a) (Vernon 1994 and Supp. 2002).

Next, appellant argues the indictments should have negated exceptions to prosecution for possession of an unauthorized firearm and tampering with a government record. Specifically, he contends the indictments should have stated that (1) his short-barrel shotgun was not solely an antique or curio and (2) his tampering with a government record was unauthorized. The State must negate, in the charging instrument, an exception to an offense if the exception is delineated in the penal code with the phrase, "It is an exception to the application of . . . ." TEX. PEN. CODE ANN. § 2.02 (Vernon 1994). Possession of a short-barrel firearm solely as an antique or curio is an affirmative defense to prosecution, not an exception to the application of the law. *See* TEX. PEN. CODE ANN. § 46.05(d)(1). Also, while authorization is an exception to the application of penal code section 37.10(a)(3) (destruction of a government record), appellant was indicted for violation of 37.10(a)(4). *See* TEX. PEN. CODE ANN. § 37.10(b).

Appellant's arguments pertaining to the indictments lack merit and are overruled.

Prior Violations of Conditions of Probation

Second, appellant argues the trial court erroneously adjudicated his guilt based on a violation of probation that had been addressed several years earlier. However, a defendant may not appeal a determination to adjudicate his guilt. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5 (b) (Vernon Supp. 2002); *Connolly v. State*, 983 S.W.2d 738, 741 (Tex. Crim. App. 1999). Because we have no jurisdiction to address the merits of appellant's argument, we dismiss it.

Adjudication After Expiration of Probationary Term

Third, appellant complains that the trial court adjudicated his guilt after the term of his probation expired. The record reveals that on June 29, 1994, appellant received five years

of deferred adjudication. In 1997, the trial court extended the probationary term for one year. The trial court adjudicated appellant's guilt on June 12, 2000, sixteen days before the term expired. We overrule appellant's third issue.

Prompt Hearing

Fourth, appellant claims that the trial court erred in failing to hold a hearing within twenty days of his request for a prompt hearing. Under the Code of Criminal Procedure, a defendant who has been arrested for violating the conditions of his probation, and has not been released on bail, may file a motion for a hearing within twenty days. TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 21(b) (Vernon Supp. 2002). Appellant filed a long and rambling "Motion for Prompt Disposition" on January 31, 2000, several months before his hearing was actually held. However, a defendant "may not await the revocation of his probation and then present a violation of the twenty-day requirement . . . as a ground of error on appeal." *Aguilar v. State*, 621 S.W.2d 781, 786 (Tex. Crim. App. 1981). Instead, the appropriate method to challenge the continued confinement is by means of writ of habeas corpus. *Id.* Accordingly, we do not have jurisdiction to address this portion of appellant's appeal. We dismiss issue four.

Motion to Suppress

Fifth, appellant contends that the trial court erred in denying his motion to suppress evidence before placing him on deferred adjudication in 1994. The time to appeal this issue was after the trial court placed him on deferred adjudication. *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999). Appellant cannot appeal the denial of his motion to suppress after his deferred adjudication probation has been revoked. *Id.* We thus do not have jurisdiction to address the merits of this issue. *See Connolly*, 983 S.W.2d at 741.

Sufficiency of Evidence

Lastly, appellant contends the State failed to provide sufficient evidence that he violated the conditions of his deferred adjudication probation. Specifically, appellant complains that (1) there was no evidence of his blood alcohol concentration to show that he

drove while intoxicated and (2) the probation officer failed to appear as a witness to testify about appellant's failure to report. These arguments are an impermissible appeal of the trial court's decision to adjudicate his guilt, and we do not have jurisdiction to address them. *Connolly*, 983 S.W.2d at 741. We dismiss appellant's sixth issue.

Conclusion

In conclusion, we have overruled appellant's complaints pertaining to flaws in the indictments and untimely adjudication after expiration of his probationary term. Further, we do not have jurisdiction to address appellant's issues pertaining to adjudication of guilt for an earlier-addressed violation of his probation, whether he was improperly denied a prompt hearing, whether the trial court erred in denying a motion to suppress, and whether there was insufficient evidence of probation violations. Accordingly, we partially dismiss this appeal as to issues two, four, five, and six. We overrule issues one and three and affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed January 31, 2002.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
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