Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00468-CR
NO. 14-98-00739-CR

CLIFFTON THOMAS HOLLIDAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 94-04029 & 699,219

O P I N I O N

Cliffton Thomas Holliday appeals his conviction for murder and his probation revocation for arson. In the murder case, appellant pleaded not guilty to the indictment and the case was tried before a jury. Upon a finding of guilty, the jury assessed punishment at ninety-nine years confinement. In the probation revocation case, the trial court found that appellant had violated the terms and conditions of his probation and assessed punishment at ten years confinement. We have consolidated the cases for disposition.

Appellant filed a separate brief in each of the numbered cases. In the murder case (our cause number 14-98-00468-CR), appellant contends that the trial court erred (1) by

refusing to discharge the jury panel so that he could file a motion for probation and (2) by failing to *sua sponte* submit a sudden passion issue in the punishment charge. In the arson case (our cause number 14-98-00739-CR), appellant argues that the trial court erred by revoking his probation. We affirm the judgments in both cases.

In his first point of error in the murder case, appellant contends that the trial court erred by denying his request to discharge the jury panel so that he could make a proper motion for probation.

During voir dire, appellant's trial counsel requested a conference at the bench. He informed the trial judge that he did not file an application for probation, because he believed that appellant had a felony conviction. However, for some reason not apparent from the record, counsel realized the conviction was either void or not a final conviction. He asked the trial judge to discharge the jury panel so that he could file the motion. The trial judge held a hearing on the matter and found that appellant had a final felony conviction. The judge did not discharge the panel.

The trial judge did not err in denying appellant's request to discharge the panel. The record shows that appellant had a final felony conviction for arson, which would make appellant ineligible for jury recommended community supervision. TEX. CODE CRIM. PROC. ANN. Art. 42.12, §4(e) (Vernon 1994). We overrule appellant's first point of error.

In his second point of error in the murder case, appellant contends that the trial court erred in not submitting an instruction on sudden passion in the jury charge during the punishment phase of the trial. Although appellant did not request the instruction, he contends that he suffered egregious harm and that *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) requires this court to remand the case for a new punishment hearing.

When evidence from any source raises a defensive issue and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury. *See Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993). The evidence which raises the issue may be strong, weak, contradicted, unimpeached, or unbelievable. *Id*. However,

there is no duty on a trial court to *sua sponte* instruct a jury on unrequested defensive issues even though the issues are raised by the evidence. *See Posey v. State*, 966 S.W.2d 57, 62-3 (Tex. Crim. App. 1998).

In *Posey*, the Court of Criminal Appeals specifically addressed the effect of *Almanza* to instances of alleged jury charge errors based on omitted defensive instructions. The Court stated that TEX. CODE CRIM. PROC. ANN. Art. 36.14 (Vernon 1994) required a defendant to object to claimed errors of commission and omission in the charge before he can complain on appeal. *Almanza* is limited to issues in the courts charge which the trial court has a duty to instruct, without a request from either party or issues that have been timely brought to the trial courts attention. *See Posey*, 966 S.W.2d at 63 (*citing Almanza*, 686 S.W.2d at 172).

Appellant did not request the sudden passion instruction, nor was its omission objected to at trial. Because the sudden passion instruction is a defensive instruction, we hold that there is no error in the charge and that the *Almanza* egregious harm standard does not apply. *See Rios v. State*, 990 S.W.2d 382, 385 (Tex. App.–Amarillo 1999, no pet.). We overrule appellant's second point of error.

In his sole point of error in the probation revocation case, appellant contends that the court erred in revoking his probation because clear evidence was presented to the court that neither the state nor the defendant knew whether regular probation or deferred adjudication probation had been assessed.

At the revocation hearing, appellant called three witnesses to show that appellant received deferred adjudication probation. Appellant's attorney during the initial plea agreement, Paul Justin, testified that he could not remember whether the ultimate result was deferred adjudication or regular probation. Mary Synnott, a court liaison probation officer, said that her file showed appellant was on deferred adjudication probation. She did not check the courts file, but probably copied the information from the district attorney's file. Synnott could not remember if appellant received regular probation or deferred adjudication.

Appellant believed he received deferred adjudication probation, even though he testified in an earlier proceeding that he had been convicted of arson.

The judgment and docket sheet clearly show that appellant was convicted of arson on March 16, 1994, and was placed on probation for a period of ten years. The recitations in the judgment are binding on the defendant in the absence of direct proof to the contrary. *Harvey v. State*, 485 S.W.2d 907, 909 (Tex. Crim. App. 1972). Appellant failed to offer proof that directly contradicted the judgment. Not one of the witnesses affirmatively stated that appellant received deferred adjudication probation. The trial court did not abuse its discretion in finding that appellant had been previously placed on regular probation.

We find that the trial court did not err in revoking appellant's probation. We overrule his final point of error.

Having ruled on all appellant's points of error, we affirm both judgments of the trial court.

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Norman Lee
Justice

Judgment rendered and Opinion filed March 30, 2000.
Panel consists of Justices Robertson, Sears, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justice Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.