Affirmed and Opinion filed April 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-97-00915-CR

MICHAEL BELLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 29,809

O P I N I O N

A jury convicted Michael Belle, appellant, of aggravated assault during a disturbance at a Brazoria County prison where he was an inmate. He was acquitted of a charge of riot participation. The trial court sentenced him to twelve years in prison. In thirteen points of error Belle, proceeding *pro se*, argues he was denied a fair trial. We affirm.

Appellant was working the beet fields with a work gang of inmates at the Retrieve unit of the Texas Department of Criminal Justice. During the afternoon shift, one inmate was taken to the infirmary, complaining of chest pains. Another inmate, Stanley Smith, who was working with an injured hand, began complaining loudly because he also wanted to go to the

infirmary. The officer in charge, Jesse Rodriquez, instead offered him a chance to rest in a portable cell which had been brought into the field.[1] When Smith declined to either work or go into the portable cell, Rodriquez sought to handcuff him. The men tangled and fell to the ground; at that point appellant and another inmate jumped on Rodriquez's back and attacked him. Appellant's theory of defense was that Rodriquez was physically abusing Smith, and he was trying to get Rodriquez to stop. The excitement ended when another guard fired a warning shot into the air.

SUFFICIENCY

In his eighth point of error, appellant contends he was tried under the wrong statute. He argues that under the aggravated assault statute in effect at that time, the state had to prove serious bodily injury. Because the State produced no evidence of serious bodily injury, he argues, the evidence was legally insufficient to support his conviction. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). We disagree. Under the statute in effect at the time of the incident, the state had to prove assault and that the actor inflicted bodily injury against a "jailer, guard, or other employee of a municipal or county jail, the institutional division of the Texas Department of Criminal Justice . . . while the . . . jailer, guard, or other employee is lawfully discharging an official duty." Act of May 22, 1991, 72nd Leg., R.S., ch. 334, 1991 Tex. Gen. Laws 1380, 1381 (eff. September 1, 1991). The law was changed to its present form in 1994. *See* Act of May 29, 1993, 72nd Leg., R.S., ch. 900, 1993 Tex. Gen. Laws 3586, 3619 (eff. September 1, 1994). We find the evidence was sufficient and overrule his eighth point of error. Because appellant was sentenced under the law in force at the time of the incident, the *ex post facto* complaint which he includes under this point of error also has no merit. Appellant's eighth point of error is overruled.

Appellant's tenth point of error complains about the jury charge. He renews his argument that he was charged under the wrong law; he also complains that the jury was not

[1] The inmates called this the "monkey cage."

charged on his defense of a third party defense. We have already dealt with his complaint about the law in overruling his eighth point of error.

We find his defense of a third party defense was indeed submitted in the correct form. *See* TEX. PEN. CODE ANN. § 9.33 (Vernon 1994). We similarly find the court's instruction on "reasonable doubt" was sufficient. *See Geesa v. State*, 820S.W.2d 154, 162 (Tex. Crim. App. 1991).[2] Finally, it was not error to instruct the jury that their verdict had to be unanimous. *See, e.g.,* TEX. CODE CRIM. PROC. ANN. art. 37.05 (Vernon 1981). Appellant's tenth point of error is overruled.

In his fifth point of error, appellant contends, first, that he could not have been found guilty of aggravated assault if he was acquitted on riot participation charges; he also argues that because he was not convicted on both counts alleged in the indictment, he should be discharged. We disagree.

We note first that "an indictment . . . is sufficient if any one of its counts is sufficient." TEX. CODE CRIM. PROC. ANN. art. 21.24 (Vernon 1989). Texas law therefore foresees the case where one count of an indictment fails.

The State does not have to prove every element of the *indictment* beyond a reasonable doubt; it must prove each element of each *offense* beyond a reasonable doubt in order to obtain a conviction. *See, e.g., In re Winship*, 397 U.S. 358, 365, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). The state may allege that two crimes were committed simultaneously, as long as each crime required proof of at least one element not required by the other. TEX. PEN. CODE ANN. § 3.01 (Vernon 1994) *Parrish v. State*, 869 S.W.2d 352, 355 (Tex. Crim. App. 1994)(citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 2d 306 (1932)); *see also Parrish*, 889 S.W.2d 658, 661-662 (Tex. App.–Houston [14th Dist.] 1994,

[2] We also note that, even if the "reasonable hypothesis analytical construct" had not been overruled by *Geesa*, appellant would not be entitled to this instruction, since the evidence against him was direct and not circumstantial.

writ denied)(Texas Constitution does not provide greater protection than United States Constitution against double jeopardy). We therefore overrule his fifth point of error.

ALLEGATIONS OF ATTORNEY MISCONDUCT

In his eleventh point of error appellant contends his appointed counsel conspired with the State to deprive him of his constitutional rights. This complaint is so inherently tied in with his fourth point of error, that he was denied his right to a speedy trial, that we will consider them together.

Our record reflects that this incident happened on April 22, 1993; appellant was not indicted until July 1995. Appellant was first appointed counsel from Inmate Legal Services that same month. On May 14, 1996, the trial court held a *Faretta*[3] hearing at which appellant's appointed attorney was permitted to withdraw and appellant was permitted to proceed *pro se*. At that time the following colloquy took place:

> THE DEFENDANT: May I make a statement?
>
> THE COURT: All right.
>
> THE DEFENDANT: I'd like to ask the Court to have it on the record that, according to the Code of Criminal Procedure, I'm to be tried within the 180-days[sic] from the time I was indicted and I've made several efforts to have Inmate Legal Services file a Motion for Speedy Trial, but they have not done so in almost a year and they've never given any reason why they haven't filed that motion.
>
> THE COURT: You've already stated that the matter has not gone to trial within a 180-days[sic] and they are not connected with this case any more at all, so there is no point in beating that dead horse. Okay? See what I mean?
>
> THE DEFENDANT: Yes, I see what you mean.
>
> THE COURT: That's the basis of that affidavit right there and again, I'm not really making a fact finding regarding the allegations in there whatsoever.
>
> THE DEFENDANT: Okay.

[3] *See Feretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

In the affidavit referred to, appellant charged that his appointed attorney was conspiring with the State to ensure his conviction. He also argues that, because Inmate Legal Services is a division of the Texas Department of Criminal Justice, he could not get a fair trial with a lawyer from Inmate Legal Services.

Appellant's own attempts to assert his right to a speedy trial were fatally defective because they relied exclusively on the statutory remedies found in the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. arts. 32A.02 and 32.01 (Vernon 1989). These statutes are inapplicable to his case, but for two very different reasons. A speedy trial motion based on article 32.01 of the code of criminal procedure has no effect if it is presented after indictment. *Brooks v. State*, 990 S.W.2d 278, 285 (Tex. Crim. App.), *cert. denied*, — US —, 120 S.Ct. 384, 145 L.Ed.2d 300 (1999); *Tatum v. State*, 550 S.W.2d 548, 550 (Tex. Crim. App. 1974). It also has no application to inmates already incarcerated for another offense. *See Anderson v. State*, 986 S.W.2d 811 (Tex. App.–Amarillo 1999, pet. ref'd). The other statutory basis for this point of error, article 32A.02, was declared unconstitutional and so is of no effect. *See Meshall v. State*, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987). Because appellant failed to assert his speedy trial complaint on constitutional grounds, any constitutional complaint was waived. *See Dunn v. State*, 819 S.W.2d 510, 526 (Tex. Crim. App. 1991); 41 GEORGE E. DIX AND ROBERT O. DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 23.44 (West 1995). We therefore overrule appellant's fourth point of error.

As evidence to support his eleventh point of error, appellant points us to entries on the court's docket sheet. The notations referring to his former counsel state simply that she had been granted permission to withdraw and that she had given appellant all the evidence in her possession. The record of the hearing reflects the accuracy of those docket entries. Appellant also states that he was abused by his appellate counsel, but offers no evidence to back up this assertion. Finally, appellant's argument that his *pro se* motion to dismiss the indictment was given to the prosecutor, and never given to the trial court, and that this is evidence of collusion between the state and his former counsel, is belied by the fact that this

motion is in the clerk's record. We find no evidence in this record that supports his charge of collusion between his Inmate Legal Services attorney and the State.

In light of this, the only relevant complaint before us is that appellant's former attorney failed to move for dismissal based on constitutional speedy trial grounds. Because appellant represented himself for most of the trial, we must focus on the period of time she represented him – roughly, from July 1995 to May 1996. However, even if we view this as a complaint that his prior counsel rendered ineffective assistance, appellant's argument would still fail, for two different reasons.

First, once appellant discharged his court-appointed attorney, the onus fell on him to render effective assistance. Appellant is not entitled to hybrid representation. *Landers v. State*, 550 S.W.2d 272, 279 (Tex. Crim. App. [Panel Op.] 1980). Presumably part of the reason she was fired is because she did not assert a speedy trial motion on his behalf. Spurning the trial court's offer of an attorney not attached to Inmate Legal Services, appellant undertook to represent himself. And while this may well have constituted ineffective assistance of counsel under normal circumstances, we will not extend this complaint to cases where a defendant represents himself. We also believe that, since appellant could have timely asserted a speedy trial claim, and his failure to do so cannot be attributed to his prior counsel, he is unable to show prejudice resulting from her conduct.

Second, we have no evidence before us as to why appellant's former trial counsel failed to assert his speedy trial complaint. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Here we find a dearth of evidence as to why former counsel did not file this motion. This is a record which could be developed in a post-trial writ of habeus corpus proceeding; in the current state of the record, we simply do not have enough evidence to sustain an inference of ineffective assistance. Appellant's eleventh point of error is overruled.

In his seventh point of error appellant contends that prosecutorial misconduct permeated his trial. Although appellant's seventh point of error is multifarious, we will address its points in the interest of justice.

First, appellant contends that the State delayed indictment in order to gain a tactical advantage. He contends the State knew that if no criminal action was taken within a two-year period, tapes of the administrative proceeding against him would be destroyed. He contends these tapes, if preserved, would have enabled him to impeach Officer Rodriquez because he changed his story at that hearing. The state contends that the tapes were routinely destroyed as part of the department's document management practice.

A defendant must show that the police acted in bad faith to establish that the failure to preserve potentially useful evidence constitutes a denial of due process. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). The duty to preserve evidence is limited to evidence that possesses an exculpatory value that was apparent before the evidence was destroyed. *Mahaffey v. State*, 937 S.W.2d 51, 53 (Tex. App.–Houston [1st Dist.] 1996, no pet.)(citing *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984)). The complaining defendant must therefore show that the lost evidence was both favorable and material to his cause. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873, 102 S.Ct. 3440, 3449, 73 L.Ed.2d 1193 (1982); *Mahaffey*, 937 S.W.2d at 53. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 681, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

It is curious that these tapes were destroyed when the State was contemplating criminal charges against appellant and others. However, to establish that the failure to preserve the tapes constitutes a violation of due process or due course of law rights, appellant must demonstrate the State erased the tapes in bad faith. *See Hebert*, 836 S.W.2d at 254.

Appellant was offered the opportunity to try and establish that these tapes were erased in bad faith; he declined. He has therefore failed to carry his burden.

Appellant's contention that his delayed indictment violated his rights under the Speedy Trial Act was decided under a previous point of error. His contention that the State lacked probable cause to bring this case before the grand jury is not adequately briefed; it is therefore waived. *See Lawton v. State*, 913 S.W.2d 542, 554 (Tex. Crim. App. 1995).

Appellant next contends that he was prevented from obtaining a hearing on his motions for discovery, and that he did not receive all the items contained therein. We note that appellant had at least two opportunities to present pretrial motions to the trial court, and was offered a third. Appellant merely filed this motion and did not urge it in open court.

A motion must be "presented" to the trial court to preserve a complaint for appellate review, and presentment means more than mere filing. *Guevara v. State*, 985 S.W.2d 590, 592 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd); *Dowler v. State*, 777 S.W.2d 444, 448 (Tex.App.-El Paso 1989, pet. ref'd). The movant must make the trial judge aware of the motion by calling the judge's attention to it in open court and requesting a ruling thereon. *Id*. Because appellant did not do this, we find he has waived his complaint.

Appellant next complains that his subpoena for prison records was ignored. We note that this part of his point of error does not comport with his objection at trial; therefore nothing is presented for review. *See, e.g., Gardner v. State*, 733 S.W.2d 195, 203 (Tex. Crim. App. 1987).

We have previously overruled appellant's contention that his former appointed counsel conspired with the State to ensure a conviction and that appellant was denied due process because the audio tapes of his disciplinary hearing were not available at trial. Appellant also complains that at a pretrial hearing he was prevented from having his affidavit in support of his motion to proceed *pro se* read into the record. However,

appellant did not make any such request at the complained-of hearing. The affidavit is also in the clerk's record. We therefore find that appellant's complaint has no merit.

Appellant next argues the State engaged in factually false jury argument. However, appellant failed to object to this argument. If a litigant does not object in a timely and specific fashion, and obtain either a ruling or a refusal to rule from the trial court, nothing is preserved for our review. TEX. R. APP. P. 33.1. Therefore any error in the State's argument to the jury is waived. Appellant also failed to object to the State's questions on voir dire; these complaints are likewise waived.

Appellant's brief goes on to assert that prosecution witnesses, jurors and state attorneys freely mingled with the jurors, and that the state suborned perjury from witness Robert Cochran. Like his argument that his former trial counsel conspired with the state, and that the trial judge conspired with the State to produce a conviction, these are "bald-faced assertions in appellant's brief which we shall not deign to review in our opinion." *Deeb v. State*, 815 S.W.2d 692, 707 (Tex. Crim. App. 1991).

Appellant's seventh point of error is therefore overruled.

In his twelfth point of error appellant complains that a Texas Department of Criminal Justice guard served on his panel, and that the state concealed this fact from him. We disagree. The state is under no duty to disclose any fact which was readily available to the defense on voir dire. *Armstrong v. State*, 897 S.W.2d 361 (Tex. Crim. App. 1995). Appellant did not ask if anyone on the venire was an employee of the prison system. We therefore overrule his twelfth point of error.

DUE PROCESS ISSUES

In his first point of error Belle contends the trial court committed "fundamental 'plain error'" in dismissing the jury before sentencing him. The gist of Belle's argument is that his right to trial by jury is compromised by Texas law, which requires him to elect jury sentencing prior to trial. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon

Supp. 2000). However, there is no constitutional right to have a jury assess punishment. *Tinney v. State*, 578 S.W.2d 137, 138 (Tex. Crim. App. [Panel Op.] 1979). Because appellant failed to file his election in writing before trial, the trial court was automatically assigned the task of sentencing. *Id*. We therefore overrule Belle's first point of error.

In his second point of error appellant argues the trial court failed to make a finding of "true" to the enhancement paragraph. We disagree. The judgment and sentence reflect this finding and the record supports this finding. And the prior conviction was properly proved up through use of a "pen packet." *See, e.g., Reed v. State*, 811 S.W.2d 582, 587 (Tex. Crim. App. 1991). Appellant also has failed to show us that he is not getting proper credit for his "stacked" sentences under *Ex parte Wickware*, 853 S.W.2d 571 (Tex. Crim. App. 1993), a claim which in any case is best raised in the context of a habeus corpus proceeding. *See Wickware*, 853 S.W.2d at 572-573. We therefore overrule his second point of error.

In his thirteenth point of error appellant argues the trial court erred in admitting a video which depicted the area where the incident occurred. We note that appellant said he had no objection to admission of the video at trial; therefore nothing is presented for review. *See* TEX. R. APP. P. 33.1.

In his third point of error appellant argues the trial court erred in not granting his request to bringing inmate witnesses to testify. However, appellant did not seek to subpoena witnesses until the day before his trial. If a defendant does not apply for process of a witness until a day or two before his trial, he has failed to exercise due diligence, which is necessary to support any motion for a continuance. *Peoples v. State*, 477 S.W.2d 889, 891 (Tex. Crim. App. 1972). Further, in order to successfully complain of the court's failure to grant a motion for continuance or deny an attachment of a conflict witness, a defendant must 1) file a motion for new trial and 2) attach to the motion either an affidavit from the missing witness, stating what his testimony would have been, or a statement under oath, showing why the testimony was not secured before the motion was

filed. *Id*. We find that nothing is presented for our review; we therefore overrule appellant's third point of error.

CREDIT FOR TIME SERVED

Finally, in his sixth and ninth points of error appellant contests the credit he received for time served on his sentence.

In his sixth point appellant contends his credit for time served was incorrectly computed. In awarding presentence credit for periods when inmate was simultaneously confined on more than one cause, presentence jail credit reflected in each judgment of stacked sequence should be added together, then "backdated" from sentencing date for first conviction of stacked sequence to create new "calculated begin date"(CBD) applicable to the entire sequence. *Ex parte Wickware*, 853 S.W.2d 571, 574 (Tex. Crim. App. 1993). The sum of these "stacked" sentences may then be added to new CBD to determine the proper "maximum expiration date" (MED). *Id*. As was done in *Wickware*, we believe the best vehicle for this challenge would be a petition for writ of habeus corpus. We therefore dismiss petitioner's sixth point of error.

Appellant argues in his ninth point that TEX. CODE CRIM. PROC. ANN. art. 42.08(b) (Vernon Supp. 2000), which mandates "stacking" of sentences when an inmate is sentenced for a crime committed while incarcerated by the Texas Department of Criminal Justice, is unconstitutional. The authority cited by appellant pertains to superseded indictments, a situation which does not confront us here. *See Ex parte Martinez*, 845 S.W.2d 913 (Tex. Crim. App. 1993). Finding this point inadequately briefed, we overrule his ninth point of error.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn

Justice

Judgment rendered and Opinion filed April 20, 2000.

Panel consists of Justices Cannon, Draughn, and Hutson-Dunn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Bill Cannon, Joe L. Draughn and D. Camille Hutson-Dunn sitting by assignment.