Affirmed and Opinion filed September 23, 1999.

In The

Fourteenth Court of Appeals

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NOS. 14-97-00726-CR
& 14-97-00727-CR

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WILLIE CLYDE WALKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause Nos. 725356, 725355

O P I N I O N

Willie Clyde Walker appeals a revocation of probation for possession of a controlled substance on the ground that the State failed to meet its burden of proof to show that appellant violated the terms of his probation. Appellant also appeals an adjudication of guilt for aggravated assault with a deadly weapon on the grounds that: (1) the information was insufficient to vest the trial court with subject matter jurisdiction; and (2) appellant's non-negotiated plea was involuntary due to his trial counsel's ineffective assistance. We affirm

Background

In connection with a single event, appellant was charged separately with the felony offenses of aggravated assault on a peace officer and possession of a controlled substance. He entered a plea of nolo contendere to both without agreed punishment recommendations. On the possession charge, appellant was found guilty and sentenced to two years confinement, probated for four years. On the assault charge, the trial court accepted the plea but entered a four-year deferred adjudication.

The State thereafter filed motions to revoke probation on the possession conviction and to adjudicate guilt on the assault charge. After conducting a single hearing on both motions, the trial court: (a) found that appellant violated several conditions of his possession probation, revoked his probation, and sentenced him to two years confinement, and (b) found true the allegations in the motion to adjudicate guilt on the assault charge, found appellant guilty, and assessed punishment at five years confinement. Although appellant has appealed these determinations separately, we will address both in this opinion.

Revocation of Probation on Possession Conviction

Standard of Review

To sustain a motion to revoke probation, the State must prove by a preponderance of the evidence that the defendant violated the terms of his probation. *See Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). When multiple grounds for revocation are alleged, proof of any one of the alleged violations is sufficient to support an order revoking probation. *See Moses v. State*, 590 S.W.2d 469, 470 (Tex. Crim. App. 1979). An order revoking probation is reviewed for abuse of discretion. *See Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984).

Use of Alcoholic Beverages

Appellant's first point of error on the revocation of his probation argues that the State failed to prove that he violated the probation terms because it proved only that he used alcohol on a single occasion and not that he habitually or routinely used alcohol.

The terms of appellant's probation state, in part, that appellant should:

> (2) Avoid injurious or vicious *habits*. [Appellant is] forbidden to use, possess, or consume *any* controlled substance, dangerous drug, marijuana, *alcohol* or prescription drug not specifically prescribed to you by lawful prescription. *You are forbidden to use, consume, or possess alcoholic beverages.*

(emphasis added).

Citing *Morales*, appellant asserts that the State was required to prove that he *habitually* used alcohol in order to prove the he violated this condition of his probation. *See Morales v. State*, 538 S.W.2d 629, 630 (Tex. Crim. App. 1976). In *Morales*, the appellant's condition of probation stated that he should "avoid injurious or vicious habits, such as drinking intoxicating beverages, gambling, etc." *See id*. at 629. The *Morales* court held that a single act of drinking could not be characterized as a habit, and was therefore insufficient to prove that Morales violated this condition of his probation. *See id*. at 630.

However, the condition of probation in *Morales* stated only that injurious or vicious *habits* should be avoided. In the present case, although the heading of the condition 2 contains the word "habit," the text of the condition specifically states that the appellant is forbidden to use, possess, or consume *any* alcohol. Because a single use, possession, or consumption of any alcohol is sufficient to violate this condition, the State did not have to prove that appellant routinely or habitually used alcohol in this case, unlike *Morales*.

Because the State was not required to prove habitual use and because appellant has not challenged the sufficiency of the evidence to show a single use, this point of error does not demonstrate that the trial court abused its discretion in determining that appellant violated this condition of his probation. Therefore, we overrule appellant's first point of error and need not address his remaining points which challenge the revocation of his probation on other grounds because proof of one violation was sufficient to support the revocation. *See Moses v. State*, 590 S.W.2d at 470.

Adjudication of Guilt on Aggravated Assault

Sufficiency of the Information

Appellant's first point of error on his adjudication of guilt argues that the information was insufficient to vest jurisdiction in the trial court because it failed to allege enough elements of an offense to determine which penal provision had allegedly been violated. In particular, appellant contends that the information failed to allege that the complainant was a peace officer, that appellant knew he was a peace officer, or that the complainant was lawfully discharging an official duty.

In an appeal from a non-negotiated plea bargained conviction, a knowing and voluntary guilty plea waives all nonjurisdictional defects, including deprivations of federal due process, occurring before the plea. *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). Jurisdiction vests in a trial court only upon the filing of a valid indictment in an appropriate court. *See Cook v. State*, 902 S.W.2d 471, 476 (Tex. Crim. App. 1995). Because a valid indictment is essential to jurisdiction, it is not subject to waiver. *See id*. at 480.[1]

To constitute a valid information, an instrument must charge a person with the commission of an offense. *See Ex parte Patterson*, 969 S.W.2d 16, 19 (Tex. Crim. App. 1998). A charging instrument is not constitutionally void for omitting one or more elements of an offense, and even an indictment that is substantively defective for omitting such elements is nevertheless sufficient to vest the trial court with jurisdiction. *See Cook*, 902 S.W.2d at

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[1] The duty of a defendant to object to defects of form or substance in a charging instrument under article 1.14(b) of the Texas Code of Criminal Procedure arises only *after* jurisdiction vests upon the filing of a valid indictment. *See Ex parte Long*, 910 S.W.2d 485, 486 (Tex. Crim. App. 1995). Similarly, a defendant who pleads guilty to a felony offense and is placed on deferred adjudication community supervision may appeal errors in the original plea proceeding only when the deferred adjudication is first imposed, and not after the defendant is later adjudicated guilty. *See Manuel v. State*, 994 S.W.2d 658, 659, 661-662 (Tex. Crim. App. 1999). However, because appellant's challenge to the indictment in this case is jurisdictional and therefore not subject to waiver, it is not a mere error in the plea proceeding that comes under the holding of *Manuel*.

477.[2] Thus, even if an indictment alleges facts that arguably evidence a defendant's innocence, it will be sufficient to vest jurisdiction in the trial court if it reflects a clear intent to accuse the defendant of the charged offense. *See id*. Therefore, to be an indictment, a written instrument must, at a minimum, accuse someone of a crime with enough clarity and specificity to identify the penal statute under which the State intends to prosecute, even if the instrument is otherwise defective. *See Duron v. State*, 956 S.W.2d 547, 550-51 (Tex. Crim. App. 1997).

In this case, the information listed the felony charge as "aggravated assault" and alleged that:

> [Appellant] . . . did then and there unlawfully, while a public servant, to-wit: A PEACE OFFICER, acting under color of his office and employment, intentionally and knowingly threaten [complainant] with imminent bodily injury by using and exhibiting a deadly weapon, namely, A FIREARM.

A person commits the offense of (ordinary) assault if he intentionally or knowingly threatens another with imminent bodily injury. *See* TEX. PEN. CODE ANN. § 22.01(a)(2) (Vernon 1994). A person commits the offense of aggravated assault if he commits (ordinary) assault and uses or exhibits a deadly weapon. *See id*. § 22.02(a)(2). In that the information named aggravated assault as the charged offense and clearly alleged these two elements, it was sufficient to vest jurisdiction in the trial court.

Although the information incorrectly alleged that appellant committed the offense *as* a public servant rather than *against* a public servant, each of these alternatives constitutes aggravated assault.[3] The fact that the State alleged a valid offense based partly on incorrect

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[2] *See also Ex parte Gibson*, 800 S.W.2d 548, 551 (Tex. Crim. App. 1990) (holding that the failure of the indictment to allege the date of the offense was not a fundamental defect); *Ex parte Morris*, 800 S.W.2d 225, 227 (Tex. Crim. App. 1990) (noting that the forgery indictment was still an indictment despite failing to allege the element that the writing purported to be the act of another who did not authorize it); *Rodriguez v. State*, 799 S.W.2d 301, 303 (Tex. Crim. App. 1990) (commenting that despite failing to allege that the defendant knew that the complainant was a police officer attempting to arrest him, the information for evading arrest still invested the trial court with jurisdiction).

[3] *Compare* TEX. PEN. CODE ANN. § 22.02(b)(1) (providing that aggravated assault is a first degree felony if committed *by* a public servant under color of his office) *with id.* § 22.02(b)(2) (providing that aggravated assault is a first degree felony if committed *against* a person the actor knows is a

facts affects only its ability to prove its case and not the jurisdiction of the trial court to hear it. Therefore, the discrepancy was a non-jurisdictional defect that was waived by the entry of appellant's nolo contendere plea, and this point of error is overruled.

Ineffective Assistance

Appellant's second point of error concerning his adjudication of guilt argues that his plea was not voluntary because it resulted from the ineffective assistance of his counsel in failing to inform appellant that the information did not charge him with the "intended" offense but with an offense to which he could never be found guilty.[4]

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) deficient performance, and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the context of a plea of guilty or nolo contendere, the prejudice element requires a defendant to show a reasonable probability that, but for counsel's errors, he would not have pled guilty but would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kober v. State*, 988 S.W.2d 230, 536 (Tex. Crim. App. 1999). The appellant has the burden to develop a record sufficient to prove these elements by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956-57 (Tex. Crim. App. 1998).

In the present case, appellant claims that he believed he was pleading nolo contendere to aggravated assault *on* a police officer, not aggravated assault *as* a police officer, and that his trial counsel did not inform him that the indictment charged him with an offense different from that to which he thought he was being charged.[5] However, although appellant's information alleges that he committed aggravated assault *as* a police officer, his plea of nolo contendere and the judgment on the motion to adjudicate both indicate that his plea and conviction were

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public servant while the public servant is lawfully discharging an official duty).

4 *See Bousley v. U.S.*, 118 S.Ct. 1604, 1609 (1998) (noting that unless a defendant receives real notice of the true nature of the charge against him, a plea is not intelligently made, and that unless a defendant, his counsel, or the trial court correctly understands the essential of the charged offense, the defendant's guilty plea will be invalid under the due process clause).

5 *See supra*, note 2.

for aggravated assault *against* a police officer,[6] the offense with which appellant believed he was being charged. More importantly, appellant has failed to point to any evidence in the record showing either that he was not aware of the discrepancy or that he received no advice or erroneous advice from his lawyer about it. Appellant has thus failed to meet his burden to develop a record showing that his counsel's performance was deficient. Accordingly, this point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 23, 1999.

Panel consists of Justices Hudson, Edelman, and Wittig.

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[6] Appellant does not challenge the sufficiency of the evidence to support his plea on the ground that the evidence presented proves a different offense than the one charged. *See, e.g., Burke v. State*, 589 S.W.2d 411, 412 (Tex. Crim. App. 1979).