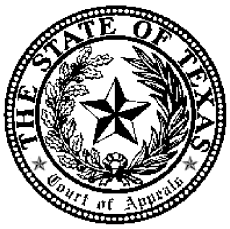
Dismissed and Opinion filed September 27, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00996-CR

JACQUELINE G. STEVENSON-GRAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 85th District Court
Brazos County, Texas
Trial Court Cause No. 27,342-85

O P I N I O N

Appellant pled guilty to the offense of theft greater than $200,000. TEX. PEN. CODE ANN. § 31.03 (Vernon Supp. 2001). The court subsequently assessed punishment as follows: confinement for 10 years in the institutional division of the Texas Department of Criminal Justice, suspended under the following conditions; 120 days in jail, $10,000 fine, successful completion of ten years community supervision to include 320 hours community service and payment of $250,000 as restitution. Raising six issues for review, appellant challenges the court's restitution award. We dismiss for want of jurisdiction.

Background

From 1985 through 1997, appellant worked as a bookkeeper for an automobile dealership in Bryan, Texas. Appellant began embezzling money from the dealership's bank accounts sometime during 1988. In 1997, appellant's theft was discovered during an Internal Revenue Service audit. Also, accountants discovered misappropriation of funds after the dealership was sold. According to the State's calculations, appellant had stolen an amount in excess of $600,000. Appellant's father owned twenty percent of the dealership during the relevant period. He relinquished his twenty percent interest in proceeds of the sale ($279,000) to the majority owner before appellant was sentenced. The court heard testimony supporting the majority owner's estimate that his net loss exceeded $250,000 notwithstanding the contribution from appellant's father. In consideration of the applicable five-year statute of limitations, the State further calculated that appellant embezzled approximately $267,986 between November 1994 and the date of arrest.

At the plea hearing, appellant pled guilty to the offense of theft greater than $200,000. The parties presented a limited plea agreement with the following parameters: the State wanted local jail time and probation; appellant wanted deferred adjudication and no jail time. During the hearing, appellant's counsel requested that the court consider restitution in lieu of incarceration. The trial judge acknowledged the limited plea agreement but did not verbally agree with or describe terms of community supervision before pronouncing the sentence. Upon verbal confirmation from each side regarding terms of the limited plea agreement, the court sentenced appellant to ten years imprisonment, probated for ten years, 120 days in jail, 320 hours community service, and a $10,000 fine. The trial judge did not directly address the subject of restitution during the hearing; however, he made the following statement: "That means you've got to push some other things aside or cancel them to get them out of the way, because it is not an option to cancel showing up to probation or to not do the community service or *to not make reasonable payments toward your obligations*. Those are nonnegotiable." Appellant discovered the court had assessed

$250,000 restitution as a condition of community supervision when she obtained a copy of the judgment. Appellant did not withdraw her guilty plea or request a hearing to seek clarification from the court. The record on appeal does not reveal any effort to apprize the trial judge of appellant's disagreement regarding specific terms of community supervision. Appellant's Motion For New Trial was based on limited grounds as follows: (1) "the verdict is contrary to the law and the evidence," and (2) "[t]he Court has committed reversible error which has been calculated to injure the rights of the accused." The motion was denied by operation of law.

Jurisdiction

Appellant complains the trial court erred by including restitution as a condition of probation. Specifically, appellant contends the court's restitution order: (1) was an abuse of discretion; (2) violated the five-year limitations period for theft; (3) was unsupported by fact in the record; (4) was unjust and unreasonable in amount; (5) failed to provide the restitution beneficiary's name and address as required by article 42.01 of the Code of Criminal Procedure; and (6) was outside the boundaries of the plea agreement. Before addressing appellant's issues, however, we must determine whether this Court has jurisdiction.

Appellant filed a general notice of appeal. She contends the trial court's addition of restitution to conditions of probation constitutes an increase in punishment. When an appeal is from a judgment rendered on a defendant's plea of guilty or nolo contendere and the punishment assessed does not exceed the punishment recommended by the State and agreed to by the defendant, the notice of appeal must: (1) specify that the appeal is for a jurisdictional defect; (2) specify that the substance of the appeal was raised by written motion and ruled on before trial; or (3) state that the trial court granted permission to appeal. TEX. R. APP. P. 25.2(b)(3). We find the trial court's restitution order does not exceed terms of the limited plea agreement; therefore, appellant's notice of appeal is not sufficient to invoke this court's jurisdiction.

Even if we assume the limited plea agreement covered or incorporated the terms of community supervision, we conclude that ordering appellant to pay restitution does not constitute an increase in "punishment". TEX. R. APP. P. 25.2(b)(3). After conviction or plea, the court may "suspend the imposition of the sentence and place the defendant on community supervision." TEX. CODE CRIM. PROC. ANN. Art. 42.12 § 3(a) (Vernon Supp. 2001). In addressing the concept of community supervision, the Court of Criminal Appeals has recently concluded that "community supervision is not a sentence or even part of a sentence," but rather "an arrangement in lieu of the sentence." *Speth v. State*, 6 S.W.3d 530, 532 (Tex. Crim. App. 1999). While community supervision is part of the judgment, it is not part of the "sentence," as defined in the Code of Criminal Procedure. *Cf. State v. Ross*, 953 S.W. 2d 748 (Tex. Crim. App. 1997). The term "sentence" is nothing more than an order requiring punishment to be carried into execution. It is synonymous with "punishment." *See* TEX. CODE CRIM. PROC. ANN. Art. 42.02 (Vernon Supp. 2001) (providing that "[t]he sentence is that part of a judgment . . . that orders that the punishment be carried into execution in the manner prescribed by law"). We note appellant's citation to the decision in *Cabla v. State* as authority for the assertion that restitution is a form of punishment. 6 S.W.3d 543, 545 (Tex. Crim. App. 1999) (citing *Kelly v. Robinson*, 479 U.S. 36, 50 (1986), for the proposition that "[s]ociety is benefitted by punishment, *including restitution*, that is directly related to the offenses for which a defendant has been charged and convicted.") (emphasis added). The decisions in both *Cabla* and *Kelly* are distinguishable because those courts were dealing with restitution in the context of indebtedness discharge in bankruptcy proceedings, not jurisdiction under Rule of Appellate Procedure 25.2(b)(3). Accordingly, we hold the trial court's restitution order does not constitute increase in punishment contemplated under Rule 25.2(b)(3).

Appellant acknowledges the fact that she was fully cognizant of restitution terms in the trial court's final judgment before filing her Motion For New Trial. She did not attempt to withdraw her guilty plea or include any specific objection to restitution as a condition of

community supervision in her motion. Therefore, appellant has not invoked jurisdiction of this court. *See Bounharith v. State*, 28 S.W. 3d 51, 52 (Tex. App.-Texarkana 2000); *Speth*, S.W.3d at 535. For all the reasons stated above, we dismiss this appeal for want of jurisdiction.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed September 27, 2001.

Panel consists of Justices Yates, Anderson, and Seymore.

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