

Affirmed and Opinion filed October 14, 1999.



In The

Fourteenth Court of Appeals

NO. 14-97-00595-CR

PATRICIA ANN DRIVER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 569823**

O P I N I O N

Appellant, Patricia Ann Driver (Driver), pleaded no contest to possession of cocaine, weighing less than 28 grams. The trial court deferred a finding of guilt and placed Driver on community supervision for ten years. When Driver failed to report to her supervision officer on several occasions, the trial judge adjudicated her guilty and sentenced her to five years confinement in the Texas Department of Criminal Justice, Institutional Division.

In three points of error, Driver challenges the actions of the trial court. In her first point of error, Driver asserts the trial court abused its discretion by failing to afford her a “proper” punishment hearing.

Driver's second point of error, related to her first, alleges the trial court failed to provide an impartial forum for the assessment of her punishment in violation of her Texas constitutional rights. Driver's final point of error alleges the trial court abused its discretion by denying her motion for new trial without first holding a hearing. We affirm.

I. Factual Background

Briefly, the facts pertinent to this appeal are the following. Driver pleaded no contest to possession of a controlled substance in March of 1991. The trial judge deferred an adjudication of guilt, instead placing Driver on community supervision for ten years. As a condition of her community supervision, the trial court required Driver to report monthly to her supervision officer. The record demonstrates the trial judge admonished Driver concerning the seriousness with which she was to approach her community supervision conditions.

Six years later, the State moved to adjudicate Driver's guilt for repeated violations of the reporting condition. At the hearing on the State's motion, the trial court asked Driver to admit or deny that she had failed to timely report to her supervision officer on five separate occasions, and she admitted that she had not reported as directed on those five occasions. At the conclusion of this stage of the proceeding, the trial court found that she had plead true to the allegations in the motion to adjudicate, and that the allegations were true.

Immediately after making those findings, the court proceeded to the punishment stage. At the conclusion of the punishment hearing, during which the State and Driver each provided one witness, the trial judge adjudicated her guilty and sentenced her to five years confinement in the Texas Department of Criminal Justice, Institutional Division.

II. Punishment Hearing

In the interest of efficiency, we will address Driver's first and second points of error together. It appears from her brief that Driver is contending in her first two points of error that the trial court failed to afford her a "proper" punishment hearing, and that the punishment phase of the proceeding was not an impartial forum in violation of her right to the due course of law under the Texas Constitution.

First, the reporter's record demonstrates there was a hearing at which Driver was permitted to introduce evidence in mitigation of punishment. After finding the allegations in the motion to adjudicate "true," the trial judge asked if both the State and Driver were ready to proceed on punishment, and both parties responded in the affirmative. During the punishment hearing, the State presented Driver's supervision officer who testified, and was cross-examined, concerning Driver's repeated violations of her reporting condition. Also during this hearing, Driver testified and was cross-examined concerning her failure to report and gave the court several reasons for her failures. The trial court specifically inquired whether Driver or the State desired to call witnesses other than those that had been specified, and both parties waived the right to introduce additional evidence.

Neither the Texas Code of Criminal Procedure nor case law require a separate hearing held solely for the assessment of punishment. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, §5(b) (Vernon Supp. 1999); *see also Duhart v. State*, 668 S.W.2d 384, 387 (Tex. Crim. App. 1984). However, even though there is no legal right to a separate hearing on punishment, fairness requires that the defendant have an opportunity to offer appropriate mitigating evidence before punishment is determined, either during the proceedings for revocation of probation and adjudication of guilt or afterwards upon request. *See Cole v. State*, 757 S.W.2d 864, 865 (Tex. App.—Texarkana 1988, pet. ref'd) (citing *Duhart*, 668 S.W.2d at 387). Thus, the need for a separate hearing on punishment does not arise where the evidence on mitigation of punishment has already been elicited during the revocation or adjudication proceedings. *See Duhart*, 668 S.W.2d at 387. Here, it appears from the record that the trial court specifically advised the parties, following the brief questioning of Driver regarding her five violations of her community supervision conditions, that the punishment stage of the proceeding was commencing. It was during this phase of the proceeding that Driver was accorded the opportunity to provide the court with evidence in mitigation of punishment. The trial court had advised the parties prior to entering this stage of the proceeding that

punishment issues were to be considered, and it is obvious from the record that Driver and her counsel understood the punishment phase had begun because Driver presented punishment mitigation evidence. Because the record before us reflects that the trial court held a hearing limited to punishment issues during which Driver had the opportunity to present, and did present, her mitigation evidence, we hold the trial court held a “proper” punishment hearing.

Second, Driver alleges the trial court failed to provide her an impartial punishment forum, and she cites several cases in support of her argument. However, each of these cases is distinguishable from Driver’s hearing. The distinguishing characteristic of each of the cases is the trial judge told the appellant, at the original hearing, what the sentence would be if the appellant violated a condition of probation, and then later sentenced the appellant exactly as promised. *See Howard v. State*, 830 S.W.2d 785, 787 (Tex. App.—San Antonio 1992, pet. ref’d) (holding trial judge’s threat and subsequent sentence of 99 years imprisonment for burglary amounted to prejudgment of sentence and violated appellant’s due process rights); *see also Jefferson v. State*, 803 S.W.2d 470, 471-72 (Tex. App.—Dallas 1991, pet. ref’d) (holding “promise” and subsequent sentence of 20 years imprisonment for burglary was prejudgment of sentence in violation of appellant’s due process rights); *see also Fielding v. State*, 719 S.W.2d 361 (Tex. App.—Dallas 1986, pet. ref’d) (holding trial judge’s threat and subsequent sentence of 60 years confinement constitutional because the judge announced the actual sentence was based on evidence presented at punishment hearing).

The record here demonstrates that at the original hearing the trial judge threatened Driver with the prospect of two “stacked” ten year sentences.¹ However, contrary to the threatened punishment six years earlier, at the conclusion of the punishment phase the trial judge assessed Driver’s punishment at five years imprisonment. This sentence is well within the range prescribed for this crime. *See TEX. PEN. CODE ANN. § 12.33(a)* (Vernon 1994) (imprisonment for second degree felony ranges from not less than two to twenty years). It appears from the record the trial judge weighed the evidence presented and sentenced

¹ Driver was on community supervision for possession of a controlled substance when she committed the second offense resulting in the deferred adjudication that is the genesis of this appeal. The two ten year sentences related to punishment for the two separate possession charges.

Driver based on that evidence rather than on an earlier assessment. Therefore, neither the trial judge's actions nor the sentence matches the conduct of the trial courts' or the sentences imposed in the cited cases. Because nothing in the record before us even suggests that Driver received anything less than a fair and impartial hearing on punishment, we do not find that the trial court's actions violated Driver's rights under Article I, Section 19 of the Texas Constitution. Accordingly, we overrule Driver's first and second points of error.

III.
Motion for New Trial

Driver's third point of error alleges the trial court abused its discretion by denying her Motion for New Trial without first holding a hearing. However, the record demonstrates that Driver did not support her Motion for New Trial with an affidavit specifically showing the truth of the grounds of attack. The Texas Court of Criminal Appeals has held that in order to obtain a hearing, a Motion for New Trial must be accompanied by an affidavit. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. (Tex. Crim. App. 1994) (citing *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993)). Because Driver did not include an affidavit with her Motion for New Trial, the trial court properly denied the motion without first holding a hearing. Driver's third point of error is overruled.²

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

² Assuming, arguendo, that Driver had properly supported her Motion for New Trial with an affidavit, she could not have challenged on appeal the voluntariness of her original plea nor the actions of her trial counsel at the original hearing. *See Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999) (holding defendant may challenge issues relating to original plea proceeding only when community supervision is first imposed).

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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