Dismissed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00685-CR

MICHELE LYNN JENNINGS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 777,550

O P I N I O N

Pursuant to a plea bargain, Appellant entered a plea of no contest to a charge of possession of less than one gram of cocaine. TEX. HEALTH & SAFETY CODE § 481.115(b) (Vernon Supp. 1998). She was sentenced to two years in the institutional division based on enhancement paragraphs in the indictment. On appeal, appellant challenges the trial court's enhancement as improper. Because appellant failed to properly present her appeal to us, however, we must dismiss her appeal for want of jurisdiction.

The State's indictment, charging appellant with possession of a controlled substance, contained two enhancement paragraphs alleging that appellant had two prior convictions of possession of a controlled

substance. After being admonished by the trial court, appellant plead true to these paragraphs, waived her right to trial by jury, and entered a plea of no contest to the present charges. The appellant, her attorney, and the prosecutor signed a written stipulation of evidence, which agreed to the sentence of two years in the institutional division. The judge acquiesced to this agreement and assessed a two-year sentence.

Appellant asserts in her sole point of error that her sentence was improperly enhanced under TEX. PENAL CODE § 12.42(a)(2) (Vernon Supp. 1998). Appellant contends that the term "felony" in § 12.42(a)(2) does not include state jail felonies, which are addressed in § 12.42(a)(1).[1] Under this interpretation, appellant argues, the particular combination of her two prior convictions, one a state jail felony and the other a "regular" felony, does not fit within the ambit of the statute, making her sentence void.

Though this issue is both interesting and compelling, we need not reach it since appellant failed to properly perfect her appeal.

Appellant perfected her appeal by filing a general notice of appeal. Though this is usually sufficient to perfect an appeal, when the appellant pleads guilty or no contest in the trial court and the punishment assessed does not exceed that agreed upon by the appellant and recommended by the prosecutor, the notice of appeal must be more specific. TEX. R. APP. P. 25.2(2) & (3) (Vernon Pamph. 1999). In such cases, the notice of appeal must "specify that the appeal is for a jurisdictional defect, specify that the substance of the appeal was raised by written motion and ruled on before trial, or state that the trial court granted permission to appeal." TEX. R. APP. P. 25.2(3). Here, appellant's notice contains none of these

---

[1] The pertinent sections of this statutes state:

(a)(1) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of *two state jail felonies*, on conviction the defendant shall be punished for a third-degree felony.

(2) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of *two felonies*, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony. TEX. PEN. CODE ANN. § 12.42 (emphasis added).

allegations. We, therefore, can only reach the issue of appellant's sentencing if the matter is jurisdictional. *Coleman v. State*, 955 S.W.2d 360, 362 (Tex. App.–Amarillo 1997, no pet.).

Jurisdiction concerns the power of a court to hear and determine a case. *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996). In Texas, criminal and civil courts must have both subject matter and personal jurisdiction before they can decide a case. *Id*. In criminal cases, subject matter jurisdiction is conferred on a district trial court by virtue of the Texas constitution or by statute. *See State ex rel. Holmes v. Denson*, 671 S.W.2d 896, 898 (Tex. Crim. App.1984). Likewise, personal jurisdiction is conferred by virtue of the indictment or information. *Fairfield v. State*, 610 S.W.2d 771, 779 (Tex. Crim. App.1981). The question of whether or not a court has jurisdiction is an issue that cannot be waived. *See Lopez v. State*, 756 S.W.2d 49, 50 (Tex. App.–Houston [1st Dist.] 1988, pet. ref'd).

Here, appellant does not challenge either element of the court's jurisdiction to sentence her. Rather, she challenges the punishment given by the trial court. While we acknowledge that the issue of whether or not a punishment exceeds the amount authorized by law, like the issue of jurisdiction, cannot be waived, *Heath v. State*, 817 S.W.2d 335, 336 (Tex. Crim. App. 1991), we do not find that the legality of the punishment necessarily implicates the jurisdiction of the trial court.

We are bound by the Texas Rules of Appellate Procedure. These rules clearly provide that a criminal defendant pleading no contest or guilty who wishes to appeal a non-jurisdictional issue in the trial court's judgment, where the sentence given does not exceed that agreed upon by the appellant and the prosecutor, must file a specific notice with the appellate court. TEX. R. APP. P. 25.2(3). This notice must state, *inter alia*, the trial court granted the defendant permission to appeal the issue or that the issue was raised in a pretrial motion ruled on by the trial judge. *Id*. Because appellant failed to do so[2] and her sentence of two years did not exceed that agreed upon by the appellant and recommended by the prosecutor, we find that the issues presented to this court are not jurisdictional in nature and have not been

[2] Appellant contends that she filed an amended notice of appeal that would comply with TEX. R. APP. P. 25.2(b)(3). However, after a diligent search of the record, we could not find this amended notice.

properly perfected. *Cf. Coleman v. State*, 955 S.W.2d 360, 363 (Tex. App.–Amarillo 1997, no pet.) (reaching a similar conclusion); *but see Jackson v. State*, 990 S.W.2d 879, 881 (Tex. App.–Beaumont 1999, no pet. h.) (reaching the opposite conclusion based on the similarity between the issues of improper punishment and jurisdiction). Rather, appellant's proper remedy is asserting this error through a writ of habeas corpus. *Ex parte McIver*, 586 S.W.2d 851, 854 (Tex. Crim. App.1979); *Jackson*, 990 S.W.2d at 882 (Walker, C. J. dissenting).

Accordingly, we dismiss appellant's appeal for want of jurisdiction.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed December 2, 1999.

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

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