Affirmed as Modified; Majority and Concurring Opinions filed March 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00134-CR

DON WHATLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 30,731

MAJORITY OPINION

Appellant was charged by indictment with the offense of criminal solicitation to commit capital murder. *See* TEX. PEN. CODE ANN. § 15.03. A jury convicted appellant of the charged offense and assessed punishment at eighty years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises five points of error. We affirm as modified.

I. *DeGarmo* and *Leday*

Over the years, criminal jurisprudence developed a doctrine of waiver known as the *Degarmo* Doctrine for the infamous case of *DeGarmo v. State*, 691 S.W.2d 657 (Tex. Crim. App. 1985). Under that doctrine, error occurring at the guilt phase of the trial was deemed waived if the defendant voluntarily testified at the punishment phase of trial and admitted guilt. *See McGlothlin v. State*, 896 S.W.2d 183, 186 (Tex. Crim. App. 1995), *cert. denied,* 516 U.S. 882, 116 S.Ct. 219, 133 L.Ed.2d 150 (1995). However, the Court of Criminal Appeals discarded the *DeGarmo* Doctrine in *Leday v. State*, 983 S.W.2d 713 (Tex. Crim. App. 1998).

The first and second points of error contend the now-defunct *Degarmo* Doctrine deprived appellant of a fair sentencing hearing, and rendered his decision to not testify at the punishment phase of his trial involuntary. Before we can reach the merits of these points of error we must determine whether appellant was justified in believing the *DeGarmo* Doctrine was still viable at the punishment phase of his trial. If that belief was not justified appellant may not complain of his decision to not testify.

Appellant's trial began on Tuesday, December 15, 1998. The following day, Wednesday, December 16, the opinion in *Leday* was handed down. On Thursday, December 17, appellant was convicted of the charged offense. The punishment phase began and ended on Friday, December 18. At the conclusion of the State's punishment case-in-chief, appellant rested without offering any evidence. In his motion for new trial and at the hearing thereon, appellant claimed he would have testified but for his fear of waiving error under the *DeGarmo* Doctrine. Appellant did not make an offer of proof or bill of exception as to what his testimony would have been.

This issue presents the novel question of whether trial counsel is required to be aware of opinions handed down during trial. We believe that questions should be answered in the

negative. When the parties are actively engaged in trial, their time and attention is rightfully drawn to matters other than reading the most recent slip opinions of the appellate courts, assuming such opinions are available to counsel. To hold otherwise, would place an undue burden on counsel and prevent them from making the most efficient, effective and persuasive presentation of their case. Therefore, we hold appellant was justified in his belief that the *DeGarmo* Doctrine was still viable during the punishment phase of appellant's trial.

The issue now becomes whether counsel was required to have the record reflect what appellant's testimony would have been but for the *DeGarmo* Doctrine. This is also a novel issue. Rule 103 of the Texas Rules of Evidence provides that error may not be predicated on excluded evidence unless the substance of the evidence was made known to the court by offer of proof. Similarly, Rule 33.2 requires that when the complaint on appeal is about a matter that does not appear in the record, a party must file a formal bill of exception. These rules make it incumbent on the complaining party to prove that the excluded evidence existed and was capable of being offered at trial. However, both rules 103 and 33.2 are directed to an adverse ruling from the trial court. Therefore, the issue becomes whether those rules are applicable when evidence is excluded because of an appellate court ruling.

While there is no case on point, we recall an analogous situation in the Court of Criminal Appeals. In the landmark decision of *Penry v. Lynaugh*, 492 U.S. 302, 328, 109 S.Ct. 2934, 2952, 106 L.Ed.2d 256 (1989), the United States Supreme Court held the Texas capital sentencing scheme operated in an unconstitutional manner when the statutory punishment issues of Texas Code of Criminal Procedure article 37.071 failed to provide a vehicle for the jury to consider and give effect to potentially mitigating evidence. This holding was such a dramatic departure from established precedent the Court of Criminal Appeals held the failure to request such a vehicle in the trial court did not procedurally bar consideration of the issue on appeal. *See Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991) (Per Campbell, J., concurring with five judges joining); *Selvage v. Collins*, 816 S.W.2d

390 (Tex. Crim. App. 1991) (Opinion on Certified Question from the United States Court of Appeals for the Fifth Circuit). However, when the merits of those issues were considered, the defendant was required to show that such mitigating evidence had been offered in the trial court in order to prove a vehicle was required to give effect to that evidence. *See and compare Rios v. State*, 846 S.W.2d 310, 315 (Tex. Crim. App. 1992) (evidence of mental retardation required *Penry* instruction), and *Ex parte Tennard*, 960 S.W.2d 57, 61 (Tex. Crim. App. 1997) (*Penry* instruction not required because no evidence in record proving mental retardation.).

Consistent with this reasoning, we hold that when a defendant is precluded from offering evidence because of an appellate court ruling, Rules 103 and 33.2 nevertheless require the defendant to make that evidence a part of the record. Only when this is done can the appellate court know that there is a basis for challenging the appellate ruling. Moreover, there would be no reason for discarding that appellate ruling unless there was some record evidence that proved the defendant would be entitled to relief should the ruling be discarded. Otherwise, you have the situation presented here, nothing more than a naked claim that but for the appellate court ruling, the excluded evidence would have been presented.

In the instant case, therefore, to predicate error on this issue, appellant was required to make an offer of proof or bill of exception setting forth the substance of what his testimony would have been at the punishment phase of his trial but for the *DeGarmo* Doctrine, which precluded such testimony. *See* TEX. R. EVID. 103(a)(2) and TEX. R. APP. P. 33.2. We further hold that had appellant made such an offer at the hearing on the motion for new trial, that offer would not have been timely. Rule 103(b) requires offers of proof be made "before the court's charge is read to the jury." This permits the trial court to consider the evidence outside the presence of the jury and to change its ruling if, after hearing the evidence, the trial court concludes the evidence is admissible. Because appellant did not take these steps, these points of error are not preserved for appellate review. The first and second

points of error are overruled.

II. Denial of Counsel

The third point of error contends appellant was constructively denied counsel. A brief summary of the facts is necessary to put this point in perspective. Appellant, an inmate in the Texas Department of Corrections, solicited Billy Joe Taylor to murder appellant's ex-wife, her husband, and a third person.[1] Taylor later met with appellant to discuss the murders. At this meeting, Taylor was wearing an audio recording device. During that conversation, appellant instructed Taylor on where to commit the murders, providing a diagram of the home, and a scheme for how Taylor would be paid. Appellant was later taken to the office of Captain David Quinn who interviewed appellant. Sergeant David Allen was present when appellant's audio statement was recorded. The conversation with Taylor and the statement to Quinn were made in June of 1995. Taylor's audio recording and appellant's statement to Quinn were played before the jury.

This case was scheduled for trial for the week of December 14, 1998, three and a half years after commission of the alleged offense. On Tuesday, December 15, the trial court heard several pretrial motions among which was a motion for continuance. That motion requested a continuance for the following reasons: (1) Quinn, a material witness, had died. Counsel learned of Quinn's death on December 13, 1998, in a conversation with the prosecutor. The absence of Quinn affected the defense's trial strategy and counsel needed additional time to reflect on new strategy; (2) Counsel had difficulty consulting with appellant due to appellant being in transit and in "lock down" on December 13, 1998; and, (3) Counsel was the sixth or seventh attorney to represent appellant in this matter and first met appellant on the evening of December 13, 1998. The trial court denied the motion for continuance. After the jury was impaneled and sworn, the trial court recessed the

[1] At the time of the commission of the alleged offense, appellant was serving the sentence relative to the conviction in *Whatley v. State*, 946 S.W.2d 73 (Tex. Crim. App. 1997).

proceedings until Thursday, December 17.

When an accused's Sixth Amendment right to counsel attaches to an offense for which adversarial proceedings have begun, he is entitled to the assistance of counsel at each "critical" stage of the prosecution, absent a valid waiver. *See Upton v. State*, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993). This is so because one accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him." *See Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932). Determining whether a particular event is a critical stage—thus triggering a Sixth Amendment right to counsel—depends on whether the accused requires aid in coping with legal problems or assistance in meeting his adversary. *See Green v. State*, 872 S.W.2d 717, 720-22 (Tex. Crim. App. 1994). By way of example, the time period for filing a motion for new trial is a critical stage of the proceedings during which a criminal defendant is constitutionally entitled to assistance of counsel. *See Prudhomme v. State*, 28 S.W.3d 114, 119 (Tex. App.—Texarkana 2000, no pet.). In the instant case, appellant contends he was constructively denied counsel when the trial court overruled the motion for continuance because appellant and counsel did not have sufficient time to revise their trial strategy in light of Quinn's death.

Appellant was indicted on January 11, 1996. Clearly then, adversarial proceedings had begun and were in place on the afternoon of December 13, 1998, when counsel learned of Quinn's death. From the statements in the motion for continuance, we know counsel met with appellant later that evening.[2] No action was taken on this case on Monday, December 14. On Tuesday, December 15, in overruling the motion for continuance, the trial court stated: "So, with all due respect, what I will do is deny your motion, but I'm going to give you the time, whenever I'm told we're finished with the State's case, we'll recess the trial . . . I'll give you the entire day tomorrow so you will have today, tonight and tomorrow." The

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[2] In certain instances, appellate courts are permitted to consider the undisputed statements of counsel. *See Resanovich v. State*, 906 S.W.2d 40, 42 (Tex. Crim. App. 1995).

court recessed at 3:45 p.m. after the jury was impaneled. No action was taken on this case on Wednesday, December 16. Trial resumed on Thursday, December 17. Before opening statements, appellant re-urged the motion for continuance.

While the development and revision of trial strategy is no doubt a critical stage of the adversarial proceeding, it is equally clear from the record that counsel and appellant had numerous opportunities to revise their trial strategy in light of Quinn's death. Accordingly, we hold appellant was not constructively denied counsel. The third point of error is overruled.

III. Cumulation Orders and Judgments *Nunc Pro Tunc*

The remaining points of error attack the cumulation order and judgment *nunc pro tunc*. Specifically, the fourth point of error contends the initial cumulation order is void, and the fifth point of error contends the trial court was without jurisdiction to enter the subsequent judgment *nunc pro tunc*.

On December 18, 1998, at the conclusion of the punishment phase of the trial, the trial court orally ordered that the sentence in the instant case would begin when the sentence in the case for which appellant was incarcerated ceased to operate. However, this oral statement was not made a part of the original judgment. Oral cumulation orders are void unless they are reflected in the written judgment. *See Perez v. State*, 831 S.W.2d 884, 887 (Tex. App.—Houston [14th Dist.] 1992, no pet); *Dutton v. State*, 836 S.W.2d 221, 228-229 (Tex. App.—Houston [14th Dist.] 1992, no pet.). Therefore, we sustain the fourth point of error.

We now turn to consider whether the trial court lacked jurisdiction to enter the judgment *nunc pro tunc*. Appellant's motion for new trial was timely filed on January 8, 1999. *See* TEX. R. APP. P. 21.4(a). The trial court timely considered and overruled the motion on February 22, 1999. *See* TEX. R. APP. P. 21.8(a). Appellant's notice of appeal was

filed on February 16, 1999. The fact that the notice of appeal was filed before the motion for new trial was overruled is of no moment. *See* TEX. R. APP. P. 27.1(b). The trial court entered a judgment *nunc pro tunc* on July 12, 1999, which cumulated the sentences.

Rule 23.1 of the Texas Rules of Appellate Procedure deals with judgments *nunc pro tunc* and provides that such a judgment may be entered "[u]nless the trial court has granted a new trial or arrested the judgment, *or unless the defendant has appealed*." *See* TEX. R. APP. P. 23.1 (emphasis supplied). The phrase "unless the defendant has appealed" has not been interpreted under Rule 23.1. However, before the rules of appellate procedure, the trial court had the authority to enter a judgment *nunc pro tunc* until the record was filed in the appellate court. *See* former TEX. CODE CRIM. PROC. art. 42.06 (repealed 1985); *Williams v. State*, 675 S.W.2d 754, 765 (Tex. Crim. App. 1984); *Perkins v. State*, 505 S.W.2d 563, 564 (Tex. Crim. App. 1974). For the purposes of this case, we will assume, without deciding, that the former interpretation is to be followed when applying Rule 23.1. Under this standard, we note the appellate record was filed in this court on May 23, 1999. The judgment *nunc pro tunc* was not entered until approximately seven weeks later on July 12, 1999. Therefore, we hold the trial court was without jurisdiction to enter the judgment *nunc pro tunc*. The fifth point of error is sustained.

Having sustained the fourth and fifth points of error, the question becomes the appropriate remedy. Under normal circumstances, if a cumulation order is held to be invalid, the remedy is for the appellate court to reform the judgment to delete the cumulation and to order the sentences to run concurrently. *See Perez*, 831 S.W.2d at 887. However, the instant case invokes the mandatory provisions of article 42.08(b) of the Code of Criminal Procedure which provides:

> If a defendant is sentenced for an offense committed while the defendant was an inmate in the institutional division of the Texas Department of Criminal Justice and the defendant has not completed the sentence he was serving at the time of the offense, the judge *shall* order the sentence for the subsequent

> offense to commence immediately on completion of the sentence for the original offense.

TEX. CODE CRIM. PROC. ANN. art. 42.08(b) (emphasis added). The intent of article 42.08(b) is to deter inmates from committing crimes during their incarceration and to more harshly punish those inmates who are not deterred. *See Cruz v. State*, 838 S.W.2d 682, 687 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd).

The rules of appellate procedure authorize appellate courts to modify the trial court's judgment and affirm it as modified when the necessary data and information is available to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). This limitation permits a modification only when the actions of the trial court were non-discretionary. *See Easterling v. State*, 710 S.W.2d 569, 582 (Tex. Crim. App.1986). (modifying the trial court's judgment to correct the trial court's erroneous *entrance* of an affirmative finding); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd) (modifying trial court's judgment to correct erroneous *omission* of an affirmative finding). We hold that because of the mandatory nature of article 42.08(b), the failure to cumulate the sentences was not discretionary, this is an appropriate situation to invoke rule 43.2(b) and modify the trial court's judgment.

Appellant contends the State has procedurally defaulted the possibility that the judgment be modified because the State did not appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(b) ("The State is entitled to appeal a sentence in a case on the ground that the sentence is illegal.").[3] However, the authority of an appellate court to address the merits of

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[3] For the following reasons, we agree with appellant that the State has not instituted an appeal under Tex. Code Crim. Proc. Ann. art. 44.01. First, we are concerned with the sentence in the instant case, which is governed by article 44.01(b), which provides the State "is entitled to appeal a sentence in a case on the ground that the sentence is illegal." To raise such an issue on appeal, the State must file a notice of appeal. *See* Tex. Code Crim. Proc. Ann. art. 44.01(d). The State has not filed a notice of appeal. Without the appropriate notice, we are without jurisdiction. *See State v. Riewe*, 13 S.W.3d 408 (Tex. Crim. App. 2000). Second, the State's brief may not be read as an appeal under Tex. Code Crim. Proc. Ann. art. 44.01(c)

this type of complaint is not dependent upon the request of any party. *See Asberry*, 813 S.W.2d at 529- 530; *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (Court of Criminal Appeals adopted the reasoning of *Asberry*, holding an appellate court has authority to reform a judgment when the matter has been called to its attention by any source.). The rationale for our action was best explained by the *Asberry* Court:

> For an appellate court to ignore its duty to correct the record to speak the truth when the matter has been called to its attention by any source, and when it has the necessary data to do so, and to force a later *nunc pro tunc* proceeding in the trial court ensuring the possibility of another appeal in the same case, . . . , does nothing to aid judicial economy.

Asberry 813 S.W.2d at 531.[4]

Accordingly, we order the trial court's judgment of December 15, 1998, be modified to have the punishment in the instant case begin when the judgment and sentence in Cause No. 17,007, from the 12th Judicial District Court of Walker County, Texas wherein appellant was convicted of the felony of Criminal Solicitation to Commit Capital Murder on or about the 21st day of September, 1992, has ceased to operate.

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because the State is not appealing "a ruling on a question of law" because there has been no adverse ruling by the trial court. Rather the trial court ruled in the State's favor on December 18, 1998, by orally cumulating the sentences, and again on July 12, 1999, by entering the judgment *nunc pro tunc*. *See and compare Moffatt v. State*, 930 S.W.2d 823, 828 (Tex. App.—Corpus Christi 1996, no pet.) (adverse ruling in granting motion for instructed verdict); *Armstrong v. State*, 805 S.W.2d 791 (Tex. Crim. App. 1991) (adverse ruling in quashing enhancement allegation).

[4] The Austin Court of Appeals was confronted with a similar situation in *Rodriguez v. State*, 939 S.W.2d 211 (Tex. App.—Austin 1997, no pet.). The *Rodriguez* Court held that it was without jurisdiction to consider the State's "cross appeal" but considered the issue under the doctrine of unassigned error. *Id.* at 219-20 (citing *Carter v. State*, 656 S.W.2d 468, 468-70 (Tex. Crim. App. 1983); *Lopez v. State*, 708 S.W.2d 446, 448 (Tex. Crim. App. 1986); *Barney v. State*, 698 S.W.2d 114, 123 (Tex. Crim. App. 1985); *State v. Lara*, 924 S.W.2d 198, 201 n. 3 (Tex. App.—Corpus Christi 1996, no pet.); *State v. Shepard*, 920 S.W.2d 420, 422 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd); *Kieschnick v. State*, 911 S.W.2d 156, 163 (Tex. App.—Waco 1995, no pet.); *Garza v. State*, 676 S.W.2d 185, 187 (Tex. App.—Corpus Christi 1984, pet. ref'd)). Such action prevented an illegal sentence even though that issue was not appropriately raised by a State's appeal or "cross-appeal."

The judgment of the trial court is affirmed as modified. *See* TEX. R. APP. P. 43.2(b).

/s/ Charles F. Baird
Justice

Judgment rendered and Majority and Concurring Opinions filed March 8, 2001.

Panel consists of Justices Fowler, Edelman, and Baird.[5]

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

[5] Former Judge Charles F. Baird sitting by assignment.