Affirmed and Opinion filed May 10, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00308-CR

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RODNEY KEITH CASH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 818,595

O P I N I O N

Appellant, Rodney Keith Cash, was convicted by a jury of murder and sentenced to serve 40 years in the Texas Department of Criminal Justice, Institutional Division. On appeal, appellant essentially raises two points. First, he complains that the trial court erred in refusing to submit a jury question on community supervision.[1] Second, he argues that a new trial is required due to juror misconduct. We affirm.

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[1] In regard to his first point of error, appellant also complains that the trial court's conclusion that his juvenile conviction rendered him ineligible for community supervision is against public policy or that, because article 51.13(e) of the Family Code is unconstitutional, the juvenile judgment of delinquency is void.

I. Introduction

On September 13, 1999, appellant was charged with the May 6, 1999 shooting death of Willis Williams. Although Williams was murdered 12 days before appellant's sixteenth birthday, appellant was certified to stand trial as an adult. The State did not add an enhancement paragraph to the indictment for a previous adjudication of delinquency.[2] On the day the jury were selected, appellant filed with the clerk's office an election to have the jury decide punishment and an application for the jury to consider community supervision.[3] After the jury found appellant guilty, the State called two witnesses during punishment, the victim's mother and his wife. The defense called five: appellant, his grandparents, his great aunt, and his mother. Neither party introduced evidence of appellant's eligibility for probation. The evidence in the punishment phase of the trial closed January 20, 2000, and the jury were sent home for the evening with instructions to return the following morning at 9:30 a.m. The record contains a handwritten request for a jury question on the issue of community supervision. It bears a date/time stamp of January 21, 2000, 9:25 a.m.

The following day's proceedings begin with the following statement by the judge:

> THE COURT: I'm submitting the case the way I said and he's not eligible for probation. If it turns out that we're all wrong and he is as a matter of fact eligible for probation I'll grant a new trial, if as a matter of fact he's eligible for probation. *We're sticking with the original charge* not eligible for probation under the *original charge* and I'm going to admonish [the jury] not to talk about anything they weren't supposed to talk about it in the first place. Clear counsel table we're about to bring the jury in. Ten minutes for argument. Will that be adequate?

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[2] In June of 1997, when appellant was just 14 years old, he was charged with the unauthorized use of a motor vehicle and was given probation. The probation was revoked, and appellant was adjudicated a delinquent.

[3] The application is a two-page document with an attached affidavit. Appellant's signature appears only on the first page of the document. A mark has been made above the line designated for the notary's signature, but it does not bear the notary's seal. Furthermore, the term "Notary Public" has been stricken and the document is dated January 18, 1999. Appellant was indicted September 13, 1999.

(Emphases our own).

The judge then proceeded to read the charge to the jury. Although no objection to the charge appears on the record, the italicized portions of the judge's statement make clear that the court was responding to a statement from appellant's counsel—either an objection that the court's charge did not include his question for community supervision or a request for his question on community supervision, *i.e.*, the document which is time-stamped 9:25 a.m.[4]

II. The Jury Charge

In his first point of error, appellant complains that the trial court erred in failing to submit the aforementioned question. We disagree. "A defendant is eligible for community supervision under this section *only if* before the trial begins the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony in this or any other state . . . ." TEX. CODE CRIM. PROC. ANN. art. 42.12, § (4)(e) (Vernon Supp. 2000) (emphasis added); *see also id.*, § (4)(d)(3) (providing that a defendant is not eligible for community supervision unless he files a sworn motion under subsection (e)). A properly executed affidavit qualifies for purposes of article 42.12. An affidavit is a statement "in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially *certified to by the officer under his seal of office*." TEX. GOV'T CODE ANN. § 312.011(1) (Vernon 1998) (emphasis added).

Appellant filed a pre-trial motion for community supervision, but he did not swear to its contents. The affidavit is attached as the third page of a three-page document. Although there is a line designated for appellant's signature on the affidavit, appellant's signature appears nowhere on that page. Instead, it appears on the first page of the application, next to an "X" which appears to the left of his attorney's signature box. Similarly, appellant's election, a document which need not be verified, shows appellant's signature next to an "X" to the left of

[4] We, therefore, disagree with the State that appellant has not preserved this argument because he failed to make a timely *objection*.

the signature box.[5]

Moreover, the affidavit is defective because it was not properly notarized, because nowhere on the document does there appear the notary's seal of office. *See, e.g., Montgomery v. State*, 60 Tex. Crim. 304, 131 S.W. 1087, 1088 (1910) (applying Texas's "uniform rule" in striking as fatally defective a complaint without the jurat of the officer before whom it was made); *see also Clendennen v. Williams*, 896 S.W.2d 257, 260 (Tex. App.—Texarkana 1995, no writ) (holding that, because document purporting to be expert's affidavit is not verified, notary's certificate was left blank, and no seal appeared on the document, it is not an affidavit at all). Above the line designated for the notary's signature is someone's illegible mark. And immediately under that mark, the term "Notary Public" has been stricken, leaving only the phrase "State of Texas." Nothing suggests whose signature this is. Finally, the document indicates it was signed January 18, 1999, or over three months before Williams was murdered and almost eight months before appellant was indicted. Under these circumstances, we find that appellant did not comply with article 42.12 and thus, failed to preserve this point for our review.[6]

Appellant's first point of error is overruled.[7]

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[5] In fact, of all the affidavits requiring an affidavit in this record, the only one not complying with section 312.011(1) of the Government Code is this one.

[6] In his brief and at oral argument, appellant's counsel explained the irregularities of the motion. For instance, the date was probably off because it was made with a date stamp, it was January, and someone probably forgot to change the year. The term "notary public" was stricken because the document was signed by the court's clerk, who might not be a notary. But a court's clerk is authorized under the Government Code to administer the oath. TEX. GOV'T CODE ANN. § 602.002(2) (Vernon 1994). The presumption of regularity, however, exists only where procedural requirements were not violated, or stated differently, *only* when it appears the proper procedures were followed. *Jones v. State*, 646 S.W.2d 449, 449 (Tex. Crim. App. 1983) (per curiam). An appellate court cannot presume the existence of a fact necessary to support the presumption. *Hammond v. State*, 799 S.W.2d 741, 745 (Tex. Crim. App. 1990). The presumption of regularity does not apply here because to apply it would require us to presume the existence of facts necessary to support the presumption which are outside the record. In short, we cannot presume that the court's clerk signed the document simply because appellant has told us so.

[7] Moreover, this Court held not long ago that, "[f]or submission of probation to the jury, the issue (continued...)

III. Juror Misconduct

In his second point of error, appellant argues that the trial court erred in denying his motion for new trial based on juror misconduct during the punishment phase of trial. The denial of a motion for new trial is reviewed under an abuse of discretion standard. *Rent v. State*, 982 S.W.2d 382, 384 (Tex. Crim. App. 1998); *Gibson v. State*, 29 S.W.3d 221, 223 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). We do not substitute our judgment for that of the trial court; instead, we consider whether the trial court's decision was arbitrary or unreasonable. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). We will not overturn the trial court's ruling absent an abuse of discretion. *Gibson*, 29 S.W.3d at 223.

A juror is not permitted to converse with anyone about the case on trial except in the presence, and with the permission, of the court. TEX. CODE CRIM. PROC. ANN. art. 36.22 (Vernon 1981). "When jurors converse with unauthorized persons about a case, injury to the accused is presumed and a mistrial may be warranted." *Robinson v. State*, 851 S.W.2d 216, 230 (Tex. Crim. App. 1991). The State, however, may rebut this presumption. *Id.* (citing *Thomas v. State*, 699 S.W.2d 845, 853 (Tex. Crim. App. 1985)). If the evidence shows that the case was not discussed or that nothing prejudicial about the accused was said, then the defendant has suffered no injury, and a new trial is not warranted. *Alba v. State*, 905 S.W.2d

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[7] (...continued)
must stand on both legs: a sworn motion, and record evidence to support the defendant's eligibility for probation." *Beyince v. State*, 954 S.W.2d 878, 880 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (citing *Mercado v. State*, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981)); *see also Palasota v. State*, 460 S.W.2d 137, 140–41 (Tex. Crim. App. 1970) (holding that a court should not submit an issue of probation where no evidence is introduced indicating defendant's eligibility for the same; mere filing of motion is insufficient). This is because the Code requires the jury to "enter[] in the verdict a finding that the information in the defendant's motion is true." TEX. CODE CRIM. PROC. ANN. art. 42.12 § (4)(e) (Vernon Supp. 2000).

In *Mercado*, the case upon which this Court relied in deciding *Beyince*, the defendant argued on appeal that his attorney was ineffective for failing to file a motion for probation. 615 S.W.2d at 228. The Court of Criminal Appeals held that, even assuming Mercado's lawyer was ineffective, "the jury would not have reached the consideration of any motion for probation, even if one had been filed" where the jury assessed a punishment of 17 years. *Id.* Probation may not be given where the sentence imposed is more than ten years. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(d)(1) (Vernon Supp. 2000). Here, the jury sentenced appellant to 40 years. Accordingly, even if it were error for the trial court to deny appellant's request for community supervision, no harm occurred as a result thereof.

581, 587 (Tex. Crim. App. 1995).

After the jury returned its verdict on sentencing, one of the jurors, Dan Gobal, came forward and told the judge and the parties that he had discussed the case with two of his co-workers and two more of his neighbors, identified as Don and Denise.[8] Gobal, an elementary school teacher, was placed under oath, and testified that he told his co-workers "that today was going to be the last day," referring to the fact that the jurors were deciding appellant's punishment that day. He stated that he told them this because no one likes missing school. Regarding his conversation with his neighbors, Gobal further testified that he spoke with them at the same time, that he asked them whether they knew "anything about when a sentence is given down[,] how much it might be reduced, if any, and they couldn't give me any information." Gobal explained that he wanted to know how much of a sentence do defendants actually serve. Finally, Gobal testified that he did not relate this information to any other juror and that none of the conversations he had influenced his assessment of punishment against appellant.

Turning first to Gobal's conversation with his fellow school teachers. Nothing about appellant's case was discussed; thus, the trial court did not abuse its discretion in finding that the State rebutted the presumption of harm as to this conversation. *Alba*, 905 S.W.2d at 587. As for Gobal's conversation with his neighbors, we look to *Robinson* for guidance. In that case, the Court of Criminal Appeals found that a juror's conversation with her sister *was* prejudicial to the defendant. 851 S.W.2d at 230. Nevertheless, the juror in *Robinson* testified—as did Gobal in this case—that she did not discuss the prejudicial comments with the other jurors and that she did not allow the prejudicial statements to influence her decision in reaching a verdict. *Id.* In holding that the trial court did not abuse its discretion in denying Robinson's motion for mistrial, the Court of Criminal Appeals noted that the judge was in the best position to observe the juror's testimony. *Id.*

[8] Gobal testified he did not know Don and Denise's last name or address, but provided his own address and testified that they live in the house directly across the street from his.

The salient facts of the *Robinson* holding are indistinguishable from those in the present case. Based on the state of the evidence in this case, and in light of *Robinson*, we do not find that the trial court abused its discretion in denying appellant's motion for new trial. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed May 10, 2001.

Panel consists of Justices Fowler, Wittig, and Amidei.[9] (Wittig, J., concurs in the result only.)

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

[9] Former Justice Maurice Amidei sitting by assignment.