

Affirmed as Reformed and Opinion filed May 18, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00708-CR

ROY FRANKLIN HEARN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 695,679**

O P I N I O N

Roy Franklin Hearn, appellant, pleaded guilty to the offense of aggravated assault. *See* TEX. PEN. CODE ANN. § 22.02 (Vernon Supp. 1999). The trial court deferred the finding of guilt and assessed punishment of ten years deferred adjudication community supervision. Subsequently, the State filed a motion to adjudicate appellant's guilt. The trial court found the allegations to be true, adjudicated appellant guilty, and assessed his punishment at ten years confinement. In his sole point of error, appellant contends that the trial court erred in denying his request for 90 days credit that he previously served in jail. We affirm the judgment as reformed to include the 90 days appellant spent in the county jail.

Background

The State filed a motion to adjudicate appellant guilty on December 9, 1996. Appellant was arrested and taken to jail. He remained in jail for 90 days. The State dismissed the motion on April 18, 1997, and appellant was released. The State filed a second motion to adjudicate guilt on January 26, 1998, alleging several new violations. The State amended the motion and a hearing was held on June 18, 1998. The trial judge found that appellant had violated the terms of his community supervision; the judge then found appellant guilty and sentenced him to ten years confinement. At the end of the hearing, the judge specifically denied appellant credit for the 90 days he spent in jail on the first motion to adjudicate. Appellant contends that he has not been given credit for all the time he was confined in this cause.

Credit for Time Served

A person confined pursuant to a motion to revoke probation is entitled to credit on the sentence assessed when his probation is revoked. *See Ex parte Canada*, 754 S.W.2d 660, 665 (Tex. Crim. App. 1988); *Ex parte Guerra*, 518 S.W.2d 815 (Tex. Crim. App. 1975). Article 42.03, § 2(a) provides that a judge shall give credit for all time a defendant spends in jail on a cause, from the time of his arrest to the time of confinement; time served as a condition of community supervision, however, is not credited. *See* TEX. CODE CRIM. PROC. ANN. Art. 42.03 (Vernon Supp. 1999); *Ex parte Roberts*, 987 S.W.2d 575, 576 (Tex. Crim. App. 1999). The 90 days that appellant spent in jail were not a condition of community supervision. The time resulted from appellant's detention after the State filed its first motion to adjudicate. Therefore, we hold that appellant's sentence must be credited for the 90 days he remained in jail while awaiting the State's first motion to adjudicate.

The State argues that appellant is not entitled to any jail credit in light of Article 42.12, § 23(b). *See* TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 23(b) (Vernon Supp. 1999). Section 23(b) provides that "no part of the time a defendant is on community supervision shall be considered as any part of the time he shall be sentenced to serve." TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 23(b) (Vernon Supp. 1999). The State contends that Article 42.12, § 23(b) is more specific than Article 42.03; therefore the specific provision should control the determination for jail credit during community supervision. We disagree.

The Court of Criminal Appeals considered the State's argument in *Guerra*. The language that the State relies on in Section 23(b) was previously listed in Section 8(b), of Article 42.12. The Court held that Article 42.03 effectively amended Article 42.12 to create a statutory right to time credit for pre-revocation of probation confinement. *Guerra v. State*, 518 S.W.2d at 817. The Legislature has not made a substantial amendment to the language since the Court's interpretation of the Article. The Legislature's silence implies their approval of the interpretation. *See Smith v. State*, 5 S.W.3d 673, 678 (Tex. Crim. App. 1999).

Having found that appellant is entitled to credit for the time he spent in jail while awaiting his revocation, we sustain appellant's sole point of error. We affirm the judgment as reformed to include the 90 days jail credit.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Justices Draughn, Lee and Hutson-Dunn.*

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

* Senior Justices Joe L. Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.