Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00555-CR

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JUAN GUEVARA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd Judicial District Court
Brazoria County, Texas
Trial Court Cause No. 29,592

O P I N I O N

Appellant, Juan Guevara, was indicted for the offense of murder. He was incarcerated at the time of the offense and was found indigent by the trial court who appointed counsel to represent him. The jury subsequently found appellant guilty as charged and sentenced him to ninety-nine years confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant challenges his conviction with two points of error. We affirm.

Discussion

In his first point of error, appellant contends he was indicted in violation of article 32.01 of the Code of Criminal Procedure, and therefore, his conviction should be dismissed with prejudice.

Article 32.01 provides:

> When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation before the district court, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant on or before the last day of the next term of the court which is held after his commitment or admission to bail.

Tex. Code Crim. Proc. Ann. art. 32.01 (Vernon Supp. 1996). Appellant was incarcerated at the time he was arrested for the murder of a fellow inmate on January 8, 1994. The date of his arrest occurred during the October 1993–March 1994 term. The terms of court for the 23rd District Court of Brazoria County are from April to September and from October to March. Appellant was indicted during the April–September 1995 term, which was the third term following the term during which appellant was arrested. Appellant claims this violates article 32.01 and requires dismissal of the case with prejudice. However, we do not reach the merits of appellant's argument because he failed to preserve this issue for review.

Appellant raises his speedy trial issue for the first time on appeal. He neither made a habeas corpus motion to the presentation of the indictment nor brought the issue to the attention of the trial court. Texas courts have held that even where a writ is filed, if the defendant is indicted prior to the writ of habeas corpus being heard, article 32.01 cannot be

used to dismiss the indictment even though it is returned by a grand jury at a subsequent term of court. *See Tatum v. State*, 505 S.W.2d 548, 550 (Tex. Crim. App. 1974); *Uptergrove v. State*, 881 S.W.2d 529, 531 (Tex. App.—Waco 1984, pet. ref'd). It is a well-settled rule that if a defendant does not raise a speedy trial issue prior to indictment, his complaint under article 32.01 is rendered moot. *See Steinmetz v. State*, 968 S.W.2d 427, 432 (Tex. App.—Texarkana 1998, no pet.) (finding where defendant waited over eight months after filing of indictment to file writ of habeas corpus, objection was untimely filed and moot); *Ex Parte Crowder*, 959 S.W.2d 732, 733 (Tex. App.—Austin 1998, pet. ref'd); *Fisk v. State*, 958 S.W.2d 506, 509 (Tex. App.—Texarkana 1997, pet. ref'd). Our conclusion that appellant has waived his right to raise a speedy trial issue is further strengthened by the fact that appellant not only waited to complain until after the indictment was filed, but waited until after he was *convicted*. It is well established that a lengthy delay or lack of persistence in asserting the right attenuates a speedy trial claim. *See Emery v. State*, 881 S.W.2d 702, 709 (Tex. Crim. App. 1994). As appellant has failed to preserve error, he is not entitled to complain about it for the first time on appeal. Appellant's first point of error is overruled.

In his second point of error, appellant contends the jury was given an erroneous instruction on the applicable parole law. He further argues that the error was egregious in that it deprived him of a fair trial on punishment, and therefore, constituted reversible error.

The portion of the jury instruction about which appellant complains is as follows:

> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the time actually served *plus any good time earned* equals one-half of the sentence imposed or 30 years whichever is less. Eligibility for parole does not guarantee that parole will be granted.

Appellant was convicted of an offense governed by article 42.12, section 3g(a)(2) of the Code of Criminal Procedure, and thus, is required to serve one-half of his sentence in actual

calendar time before becoming eligible for parole. *See* Tex. Code Crim. Proc. Ann. art. 42.18, § 8(b)(3) (Vernon Supp. 1996). Therefore, appellant argues, the jury charge conflicted with the requirement set out in article 42.18, section 8(b)(3).

We agree with appellant's contention and note the State does not contest the fact that the inclusion of "good conduct time" language in the jury instruction amounts to error. However, this does not end our inquiry. We must first determine whether the error at issue is of a constitutional nature. Texas authority supports the conclusion that ambiguous or erroneous statements contained within a jury charge do not rise to the level of constitutional error. *See Guillory v. State*, 956 S.W.2d 135, 137 (Tex. App.—Beaumont 1997, no pet.). After acknowledging that the jury charge erroneously informed the jurors of the effects of parole and good conduct time, the court in *Guillory* stated "we do not believe the error implicates rights flowing from either the United States or Texas Constitutions." *Id.* at 137. We likewise find the error in this case is a nonconstitutional one.

The test to be applied to a nonconstitutional error depends upon whether the charge error was properly preserved at the trial level. *See id.* If the error in the charge was the subject of a timely objection in the trial court, then reversal is required upon a showing of "some" harm. *See id.* However, if the charge error was not preserved, the defendant must show the error resulted in such egregious harm that the accused has not had a fair and impartial trial. *See id.* It is undisputed that there was no objection to the charge error in the trial court in this case. Appellant must therefore demonstrate that the error resulted in egregious harm.

In addition to the complained of language in the jury charge, we note that the charge also contains language instructing the jury that it may consider the existence of parole law but may not consider the extent to which good conduct time or parole may be applied to appellant. Other courts have found instructions similar to these to be curative and a

mitigating factor in considering whether the erroneous instruction caused harm to the appellant. *See Guillory*, 956 S.W.2d at 137; *Love v. State*, 909 S.W.2d 930, 935 (Tex. App.—El Paso 1995, pet. ref'd); *Roberts v. State*, 849 S.W.2d 407, 410 (Tex. App.—Fort Worth 1993, pet. ref'd). Moreover, there is a longstanding presumption that the jury followed the instructions in a jury charge. *See Love*, 909 S.W.2d at 935. Absent evidence to the contrary, we presume the jury followed the law provided by the charge. *See Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). As there is no evidence that the jury did not follow the instruction not to consider how parole or good time would be applied to appellant, we presume they followed it. Further, we also observe that defense counsel stressed the proper use of good conduct time and parole in his closing argument to the jury at the punishment stage. Defense counsel explained to the jury that good conduct time would only be considered after appellant served one-half of his sentence. We find these circumstances to be mitigating factors in our determination of whether the charge error resulted in egregious harm to appellant.

Additionally, the state of the evidence at trial can demonstrate a lack of harm from an error in a jury charge. *See Guillory*, 956 S.W.2d at 138. In *Guillory*, two witnesses heard screaming and banging through a common wall of the victim's apartment on the night of the rape. *See id.* The defendant was seen leaving the victim's apartment, and a police officer subsequently observed a bruise on the victim's face, and semen was later found in the victim. *See id.* The court concluded that "the evidence presented at trial also belies any indication of egregious harm." *Id.* In the present case, Oscar Juarez was stabbed numerous times while in a locked cell with appellant. Upon arriving at the cell, prison authorities saw the victim lying on the floor and appellant perched on the toilet holding the murder weapon, a crudely crafted shank. A fellow inmate testified that he had spoken to appellant prior to the murder and was told by appellant that he planned to kill his cellmate as part of an initiation rite to the prison gang, the Mexican Mafia. This testimony was

corroborated by appellant's admission that he was currently a member of the Mexican Mafia as well as by a paper he signed with Mexican Mafia gang markings. In light of these facts, we find the state of the evidence demonstrates a lack of harm resulting from the jury charge error.

Finally, the severity of the sentence may also be taken into account when performing a harm analysis stemming from jury charge error. In *Holt v. State*, 899 S.W.2d 22 (Tex. App.—Tyler 1995, no pet.) the trial court placed an incorrect punishment range of twenty-five to ninety-nine years in the jury charge, where the correct range was fifteen to ninety-nine years. *See id.* at 24–25. Noting the jury assessed the appellant's punishment at eighty years, the appeals court held that "the erroneously charged minimum sentence, in light of the actual sentence given by the jury, was harmless beyond a reasonable doubt." *See id.* at 25. In the present case, the jury assessed appellant a maximum sentence of ninety-nine years. We find the jury's decision to punish appellant to the fullest extent of the law indicative that the jurors did not consider the impact of parole or good conduct time on appellant's sentence. In light of the factors discussed above, we hold that while the inclusion of "good conduct time" language in the jury instruction amounted to error, it did not result in egregious harm depriving appellant of a fair trial on the issue of punishment. We consequently overrule appellant's second point of error.

Accordingly, we affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Chief Justice Murphy and Justices Yates and Fowler (J. Fowler concurs in the result only).

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