Affirmed as Modified and Opinion filed November 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00454-CR
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KERRI QUENTEL GUIDRY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 790,136; 790,137 and 760,496

O P I N I O N

In December of 1997, under cause number 760496, appellant received seven years deferred adjudication after pleading guilty to robbery. On August 25, 1997, the State indicted appellant for aggravated robbery in cause numbers 790136 and 790137. On March 10, 1999, a jury returned a guilty verdict for aggravated robbery against appellant in cause numbers 790136 and 790137. After the jury retired to deliberate appellant's sentence, the trial court considered the State's motion to adjudicate guilt. The trial court found that appellant violated

the terms and conditions of his deferred adjudication by possessing a firearm, and committing the offense of robbery. The trial court then assessed appellant's punishment at twenty years confinement in the Texas Department of Criminal Justice.

On March 11, 1999, under cause number 790136, the jury returned a sentence of twelve years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Under cause number 790137, the jury sentenced appellant to ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice, and recommended that the sentence be probated. The trial court, on the State's motion for cumulative sentences, ordered that appellant's twelve year sentence under cause number 790136 would begin after appellant's twenty year sentence under cause number 760496.

Appellant complains on appeal that the trial court abused its discretion in cumulating his sentences. Appellee asserts that appellant waived this argument by failing to object at trial to the cumulation order. We find this argument without merit. "An improper cumulation order is, in essence, a void sentence, and such error cannot be waived." *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992). In *Ex Parte McJunkins*, the court did find waiver of a right to concurrent sentences when the defendant accepted a plea bargaining agreement that imposed consecutive sentences in a single criminal action. 954 S.W.2d 39, 41 (Tex. Crim. App. 1997). The court, however, stated: "We should not be understood as holding that *LaPorte* . . . was wrongly decided." *Id*. *Ex Parte McJunkins*, is limited to instances when defendant makes a counseled, intelligent, and voluntary waiver of his right to consecutive sentences. *See id*.

A complaint about consecutive sentences is reviewed under an abuse of discretion standard. *See Macri v. State*, 12 S.W.3d 505, 511 (Tex. App.—San Antonio 1999, pet. ref'd); *Harvey v. State*, 821 S.W.2d 389, 392 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). "The legislature has by statute given the trial judge the discretion to cumulate the sentences for two or more convictions." *Harvey*, 821 S.W.2d at 392. Article 42.08 provides:

> Except as provided by Sections (b) and (c) of this article, in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended in the shall run concurrently with the other case or cases, and sentence and execution shall be accordingly;. . . .

TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (Vernon Supp. 2000).

The language of article 42.08(a) focuses on subsequent convictions, not subsequent sentences. *See id*. Appellee argues interpreting article 42.08(a) as only applying to subsequent convictions would lead to absurd consequences. We disagree. The language of article 42.08(a) does not require that a sentence be announced before the subsequent conviction. *See id*. Article 42.08 provides instruction for the trial judge on how to cumulate. *See id*.

In the present case, a jury returned a verdict of guilty for aggravated robbery in cause numbers 790,136 and 790,137. The court then found that appellant violated the terms of his deferred adjudication in cause number 760496. When a defendant is placed on deferred adjudication, his community supervision suspends entry of his conviction. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 §5(a) (Vernon Supp. 2000) ("the judge may . . . defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision."); *see also Faerman v. State*, 966 S.W.2d 843, 847 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (finding that "[u]nlike a defendant who is placed on community supervision after his guilt has been adjudicated and his sentence suspended, a defendant who is granted deferred adjudication will have no record of conviction if he successfully completes the term of community supervision"). Appellant's conviction under cause number 760496, therefore, constitutes a subsequent conviction for cumulation purposes. The trial court erred, however, in ordering that appellant's conviction under cause number 790,136 would begin following his sentence in cause number 760,496.

The language in article 42.08(a) is clear. The court has discretion to do two things with a subsequent conviction under article 42.08(a). The court can either, order the sentence on the subsequent conviction to begin after the sentence on the preceding conviction has ceased to operate, or, the court can run the sentences concurrently. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08(a). The court has no other options under article 42.08(a). *See id*. The trial court, however, ordered the sentence on the preceding conviction to begin after the subsequent conviction had ceased to operate. The trial court had the discretion to cumulate the sentences under cause numbers 790,136 and 760,496, but failed to do so correctly. Accordingly, the trial court's cumulation order is modified to allow appellant's sentence under cause number 760,496 to begin after appellant's sentence under cause number 790,136 has ceased to operate. Appellant's sole point of error is overruled.

As reformed, the trial court's judgment is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed November 2, 2000.

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

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