NOS. 14-24-00413-CR &
14-24-00415-CR

IN THE FOURTEENTH COURT OF APPEALS
OF THE STATE OF TEXAS

FREDERICK JACKSON,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal in Cause Numbers 1546496 and 1546498
From the 179th District Court of Harris County, Texas
Hon. Randy Roll, Judge Presiding

BRIEF FOR APPELLANT

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IDENTITY OF PARTIES AND COUNSEL

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STATEMENT OF THE CASE

Frederick Jackson (hereafter "Appellant") was indicted in cause numbers 1546496 (aggravated robbery), 1546497 (felon in possession of a weapon), and 1546498 (possession of a prohibited weapon), all three offenses alleged to have occurred on or about April 3, 2017 (1546496 C.R. at 14; 1546498 C.R. at 12). Cause number 1546497 (felon in possession of a weapon) was dismissed on July 5, 2017. Appellant pleaded guilty to the remaining two cases on March 8, 2018 (1546496 C.R. at 24; 1546498 C.R. at 18). The cases were reset pending completion of a presentence investigation.

On May 17, 2018, following a PSI hearing, the trial court sentenced Appellant to 18 years in prison for the aggravated robbery case and 10 years in prison for the possession of a prohibited weapon case, the sentences ordered to be served concurrently (1546496 C.R. at 49; 1546498 C.R. at 36).

A notice of appeal was timely filed in each case on June 5, 2024, following the grant of an out-of-time appeal in both cases by the Texas Court of Criminal Appeals (1546496 C.R. at 156; 1546498 C.R. at 156).

STATEMENT REGARDING ORAL ARGUMENT

The Appellant waives oral argument.

ISSUES PRESENTED

Issue One

The trial court abused its discretion in allowing the prosecutor to impeach the Appellant, over defense counsel's objection, with allegations that the Appellant had violated the terms of a previous probation, where the Appellant completed such probation successfully and the prosecutor provided no evidence to support his allegations

Issue Two

The Appellant was denied a fair and impartial punishment hearing where extraneous offenses and other misconduct were imputed to the Appellant in the presentence report without any evidence that proved that he was responsible for such acts

STATEMENT OF FACTS

A detailed recitation of the facts underlying these two convictions is unnecessary in resolving the issues presented: To the extent a summary of the facts of the underlying cases become necessary, they will be provided in the argument sections which follow.

SUMMARY OF THE ARGUMENT

The Appellant argues that he is entitled to a new punishment hearing for two reasons. First, the trial court erred in allowing the prosecutor to cross-examine the Appellant, over defense counsel's objection, regarding alleged violations of an earlier probation without providing any proof that such violations occurred. Additionally, the Appellant complains that he was denied a fair and impartial punishment hearing where extraneous offenses and other misconduct were imputed to the Appellant in the presentence report without any evidence that proved that he was responsible for such acts.

ARGUMENT UNDER ISSUE ONE

The trial court abused its discretion in allowing the prosecutor to impeach the Appellant, over defense counsel's objection, with allegations that the Appellant had violated the terms of a previous probation, where the Appellant completed such probation successfully and the prosecutor provided no evidence to support his allegations

At the sentencing hearing, defense counsel's strategy was to convince the trial court that Appellant, a 59-year-old retiree who had worked for 35 years at the United States Postal Service, was a suitable candidate for community supervision. Toward this end, counsel asked Appellant if he had successfully completed a prior deferred adjudication:

> DEFENSE COUNSEL): When you got felony deferred adjudication before, did you do what you were supposed to do?
> A: Yes, I did.
> Q: Did you successfully complete your deferred adjudication?
> A: Yes, I did. (R.R. at 31). [1]

As reflected in the "Supervision History" section of the PSI report, this was true. The Appellant satisfactorily completed the community supervision in his previous cases:

> Supervision History
>
> - The defendant has no supervision history as a juvenile.
> - The defendant has been placed on deferred adjudication community supervision for the misdemeanor offense of Unlawfully Carrying a Weapon and the felony offenses of Possession of a Controlled Substance and Evading Arrest with a Motor Vehicle. The defendant was

[1] The transcript of the sentencing hearing comprises pages 5-56 of the Reporter's Record in each case.

> satisfactorily terminated from community supervision in each of these cases. (R.R.-State's exhibit 1, at page 5)

On cross-examination, the prosecutor then asked the following:

PROSECUTOR: Thank you. Now, when you were on deferred for PCS -- which I think you've had multiple charges for PCS, right? [2]

A: Right.

Q: When you were on that deferred, they actually filed a motion to adjudicate your guilt on the PCS, right?

A: Right.

Q: Is this that motion?

A: Right.

Q: Do you remember if that's what it looked like?

A: That's what I told the interviewer about that. I told them that.

Q: Thank you. And the reason they filed that was because you were -- while on deferred, you were out there doing PCP?

DEFENSE COUNSEL: Judge, I object. Unless he was convicted of this charge, I'm going to object to the relevance of a dismissed motion to adjudicate.

THE COURT: I think you opened the door by talking about his prior convictions or prior deferreds. I think the State can go into it at this point.

DEFENSE COUNSEL: Yes, sir. Thank you.

PROSECUTOR: It says you did PCP August 21st, while you were on deferred?

[2] Multiple charges but no convictions. As reflected in the "Criminal History" section of the PSI, the Appellant had been charged three times for PCS, but two of the charges were dismissed and the third resulted in deferred adjudication (R.R.-State's exhibit 1, at page 4).

A: Uh-huh.

Q: August 29th?

A: Yes.

Q: February the next year and even July the next year, right?

A: That was -- that wasn't PCP.

Q: Right, that's cocaine.

A: Right. But I did tell him. I told him I made a -- made a mistake by saying it was once but that was back then. I –

Q: That's okay. Hold on. Because the reason I bring that up is, one, you're trying to downplay your substance abuse.

DEFENSE COUNSEL: Objection; argumentative.

THE COURT: Overruled.

PROSECUTOR: But this shows -- and were you ordered to do treatment when you were on this PCS?

A: Yes, I did, but I didn't try to downplay anything.

Q: Hold on. Did you do the treatment they told you to do?

A: Yes, I did.

DEFENSE COUNSEL: Judge, I'm going to object and ask for the best evidence of probation violations. That would be the probation file that the State could have obtained, has access to, and ask that rather than allegations in a legal document that was eventually dismissed, they get the evidence of the violations.

THE COURT: Overruled.

PROSECUTOR: Can you just read that line right there?

A: Failing to attend approved aftercare treatment program, mainly 12-step maintenance.

Q: So another reason they filed a motion to adjudicate your guilt was because you didn't do the treatment, right?

A: I did do the 12 steps. I have certificates for that.

Q: Did you only do the treatment after the judge put you in an inpatient treatment and then they dismissed the motion to adjudicate?

A: When I left the -- that was the -- the treatment -- the treatment facility, I thought that the treatment was over with. They didn't really tell me that I had to go to the 12-step. When I found out I had to go to the 12-step, that's when I completed the 12-step. (R.R. at 39-42).

From the above, it is clear that: 1) the prosecutor imputed criminal conduct and other violations of community supervision to the Appellant because he had been *alleged* to have done so in a motion to adjudicate, a motion that was then dismissed; 2) the prosecutor did not provide any actual proof that the Appellant violated the conditions of his community supervision; and 3) the trial court permitted such impeachment over defense counsel's objection simply because the Appellant testified that he had complied with the conditions of his community supervision and completed his probation, which testimony is confirmed in the PSI report.

When punishment is assessed by the trial court, it may determine that evidence of an extraneous offense or bad act is relevant to sentencing and admit it, but the trial court must find that the evidence was proven beyond a reasonable doubt before considering that evidence in assessing punishment. *Williams v. State,* 958 S.W.2d 844, 845 (Tex.App.-Houston [14th Dist.] 1997, pet. ref'd); *Ortega v. State,* 126 S.W.3d 618, 622 (Tex.App.-Houston [14th Dist.] 2004, pet. ref'd); *see also*, TEX.CODE CRIM.

PROC., art. 37.07, § 3(a). The Court of Criminal Appeals has held, "We think it obvious that it would violate due process for a trial court to consider evidence of extraneous misconduct, even contained in a PSI, if there was no evidence from any source from which it could be rationally inferred that the defendant had any criminal responsibility for that extraneous misconduct." *Smith v. State*, 227 S.W.3d 753, 764 (Tex. Crim. App. 2007).

Other than the prosecutor's apparent reliance on allegations in a motion to adjudicate that was later dismissed, the record does not contain any documents indicating that the Appellant was "doing PCP" as the prosecutor alleged, such as lab reports or other documentation from the Appellant's prior probation file. The prosecutor did not bother to call the Appellant's probation officer to testify about the Appellant's performance while on probation or call the prosecutor from the Appellant's previous case to explain why the motion to adjudicate was dismissed, or even introduce the motion to adjudicate itself. Apparently unwilling or unable to provide actual evidence, the prosecutor instead relied on allegations, which may or may not have been true.

Is this Court also content to simply assume that the prosecutor had it right? Prosecutors sometimes make allegations that are found to be unsupported, as they did by indicting the Appellant for possession of a weapon by a felon in cause number 1546497, a case that had to be dismissed because the Appellant had no connection to

that case. Should the prosecutor in this case have been allowed to impute criminal conduct to the Appellant in that case too, since, after all, he had been indicted for it?

Apparently providing documentation or witnesses to support the prosecutor's claim that the Appellant had violated the conditions of his previous probation was too much trouble. The trial court erred in allowing, over defense counsel's timely objection, what amounted to mere conjecture that the Appellant had violated his previous probation.

In order to show reversible error resulting from improperly admitted extraneous offense evidence, an appellant must present the appellate court with a record that affirmatively reflects that the trial court, *acting as a fact finder,* considered such evidence when assessing appellant's punishment. Otherwise, the appellate court cannot determine whether appellant was harmed by such evidence. *Lockett v. State,* 16 S.W.3d 504, 506 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd). Here, in overruling defense counsel's objection, the trial court indicated that he believed that the prosecutor's questions were relevant because the defense had opened the door "by talking about (the Appellant's) prior convictions or prior deferreds." Obviously the trial judge wanted to hear the prosecutor's impeachment of the Appellant regarding his performance on the prior probation. Moreover, when the prosecutor again referenced, in his closing argument, without anything in the record reflecting it, that the Appellant had "tested positive for PCP three times, cocaine once" the trial court overruled defense counsel's

objection (R.R. at 52). Clearly, the trial court considered the unsubstantiated evidence of drug use in determining the Appellant's punishment.

Because the trial court abused its discretion in allowing the prosecutor to impeach the Appellant with mere allegations of extraneous misconduct, without establishing through any evidence that the Appellant had actually committed such acts, these convictions should be remanded for a new punishment hearing.

ARGUMENT UNDER ISSUE TWO

> The Appellant was denied a fair and impartial punishment hearing where extraneous offenses and other misconduct were imputed to the Appellant in the presentence report without any evidence that proved that he was responsible for such acts

The Presentence Investigation Report (PSI) contains references to several offenses that the Appellant was charged with, but which were dismissed.

First, in the "Police/Court Information" section at page 2 of the PSI report, it states that the district attorney's office accepted "a charge of Aggravated Robbery with a Deadly Weapon, *Felon in Possession of a Firearm* and Possession of a Prohibited Weapon…" The Felon in Possession of a Firearm charge (cause number 1546497) is also listed in the "Criminal History" chart at page 4 of the PSI report. That same charge was also apparently considered in concluding that the Appellant was a "Moderate Risk" in the "Texas Risk Assessment System (TRAS)-Results" section, where the PSI report states that "(H)is criminal history also includes arrests for seven felony cases which resulted in two deferred adjudications and three dismissals." In the "Overall Summary"

section of the PSI report at pages 7-8, the author states that "Mr. Jackson has no juvenile history; however, as an adult, his criminal history includes arrests for three misdemeanor and seven felony offenses." Thus, once again the Appellant's arrest for possession of a firearm by a felon was apparently deemed to be an appropriate matter for the court to consider in sentencing.

The Felon in Possession of a Firearm case, which alleged that the Appellant had been convicted of Felony Menacing in Denver, Colorado in 2011, was dismissed in 2017, as reflected in the chart on page 4 of the PSI report. As the Appellant explained in the interview for the PSI report at page 3, "They had me charged with three offenses but on the 3rd offense of Menace threat Felon Possession from Denver, Colorado was not me. They were trying to say I spent prison time in Denver while I was still working at the post office." The Felon in Possession of a Firearm case (no. 1546497) was dismissed for insufficient evidence, in the summer of 2017, presumably because in fact, the Appellant had never been convicted of a menacing charge in Denver.

Second, the PSI also lists in the "Criminal History" chart at page 4 of the PSI report, an "Assault Causing Bodily Injury" charge from 1984, also dismissed. The arrest for this offense, which the report states was committed when the Appellant was 20 years old, was included in the "Texas Risk Assessment System (TRAS)-Results" section, and so was apparently a factor in concluding that the Appellant was a "Moderate Risk." The Appellant reported to the PSI author that he was arrested after a fight, but that the

case was ultimately dismissed. There is no explanation for why it was dismissed; perhaps it was discovered that the Appellant was attacked and was simply defending himself. In any case, simply being charged with an offense was apparently sufficient to be counted against him in the PSI report.

In addition to including the dismissed 1984 assault charge, and the erroneously-charged felon in possession of a weapon charge, the PSI also lists in the "Criminal History" section two other dismissed possession of controlled substance charges, one from May 1, 2013 and another from June 1 of 2013. His four dismissed charges are listed where it is concluded that he is a "Moderate Risk," under the "Criminal History Domain" category in the "Texas Risk Assessment System (TRAS)-Results" section of the PSI, at page 5.

As to whether the judge considered these dismissed charges, he stated, prior to assessing the Appellant's punishment "This isn't your first time. You've been arrested one, two, three, three more times but that was dismissed." (R.R. at 54).

The express authority of the trial court to admit evidence of any extraneous offense it deems relevant to sentencing is not unconditional. The Court of Criminal Appeals has held, "that a PSI does not necessarily have to establish beyond a reasonable doubt that the defendant is responsible for extraneous misconduct before a court may consider it in assessing punishment. However…the PSI must provide the trial court with some basis from which it can rationally infer that the defendant was responsible

before using it to inform its normative judgment of what punishment to assess within in the statutorily prescribed range." *Smith v. State*, 227 S.W.3d 753, 758-759 (Tex. Crim. App. 2007).

Why were four of the charges against the Appellant dismissed?

Including dismissed charges in a presentence report betrays the presumption of innocence by suggesting that simply because a person has been arrested, there must have been some merit to the charge. However, as to four of the Appellant's arrests, mentioned by the sentencing judge as he delivered his sentence, a prosecutor had found them to lack merit.

Dismissed charges should not be part of the "Criminal History" section of a presentence report. Unless this Court is of the opinion that arrests should be viewed as tantamount to guilt, then they are not probative of a defendant's criminal character or his likelihood to reoffend. Because the trial court was presented with such information in the presentence report, and apparently considered the Appellant's previous arrests in assessing his sentence, the Appellant was denied his right to due process under the 14th amendment to the United States Constitution and to due course of law under article 1.04 of the Texas Code of Criminal Procedure.

These convictions should be remanded for a new punishment hearing.

PRAYER

The Applicant requests that this Court reverse the trial court's sentence and remand this case back to the trial court for a new punishment hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 27, 2024, a copy of this brief was e-served on counsel for the state (through texfile.com) at the following address:

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CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4, I certify that this computer-generated document complies with the typeface requirements of Rule 9.4(e). This document also complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i) because this document contains 2,475 words (excluding the items exempted in Rule 9.4(i)(1)).

/s/ Bob Wicoff
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