14-24-00227-CR

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

Joseph Refat Elborno

vs.

The State of Texas

On Appeal from the 230TH District Court
of Harris County, Texas
Trial Court No. 1721761

JOSEPH ELBORNO'S BRIEF ON APPEAL

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Oral Argument Not Requested

IDENTITY OF PARTIES AND COUNSEL

1. The parties are Appellant Joseph Refat Elborno and Appellee the State of Texas.

2. Counsel for Mr. Elborno before the district court was Raymundo Vazquez, 405 Main Street, Ste. 751, Houston, Texas 77002.

3. Counsel for Mr. Elborno on appeal is Jonathan D. Landers.

4. Counsel for the State before the District Court was John Hyde, Assistant District Attorney, 1201 Franklin, Houston, Texas 77002.

5. Counsel for the State on appeal is currently Jessica Alane Caird, Assistant District Attorney, 1201 Franklin, Houston, Texas 77002.

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STATEMENT OF THE CASE

Mr. Elborno was charged by complaint with the sexual assault of N.D. on May 6, 2021. CR at 7. He was indicted for the same offense on March 14, 2022. CR at 57. He pleaded guilty to that offense on November 11, 2023, and the case was reset for preparation of a pretrial sentencing report and sentencing hearing. CR at 321-332. A sentencing hearing was held before the district court, where the court failed to provide Mr. Elborno with his statutory and common-law right to allocation and sentenced Mr. Elborno to 10 years in prison. 1 RR at 114-15. The trial court certified his right to appeal. CR at 333. Mr. Elborno timely filed a notice of appeal. CR at 398.

STATEMENT REGARDING ORAL ARGUMENT

Although this case raises an issue for which there is no binding precedent upon the Court, whether the statutory and common-law right to allocution is a waivable only right, Mr. Elborno believes the issue can be sufficiently presented by the parties' briefs.

ISSUES PRESENTED

1. Did the district court reversibly err by violating Mr. Elborno's statutory right to allocution?

2. Did the district court reversibly err by violating Mr. Elborno's statutory right to allocution?

STATEMENT OF FACTS

Mr. Elborno pleaded guilty to the sexual assault of his girlfriend, N.D., and his case was set for a sentencing hearing. In his opening statement, the prosecutor drew "the Court's attention to the statements that the defendant made to the PSI report as part of this plea bargain where he took little or no responsibility for what he did." 1 RR at 8. The prosecutor told the court he would be asking for a sentence of eight years in prison. *Id.*

The presentence investigation report (PSI) was introduced into evidence. *See* 2 RR, State's Ex. 2. According the PSI writer, Mr. Elborno believed what had happened was "more of a misunderstanding." *Id.* at 3. He and his girlfriend had been arguing, and she came over to his apartment to continue the argument. Once inside of his apartment, things improved and Mr. Elborno thought she wanted to

make up with him by having sex. "When she did not want to, [he] asked to her leave." *Id.*

The complainant testified to a different series of events at the punishment hearing. She had been dating Mr. Elborno, and on May 4, 2021, she had ended the relationship. 1 RR at 46-57. She broke up with him at his apartment and the left, but when Mr. Elborno started sending her racist text messages,[1] she returned to confront him. *Id.* When she arrived back at the apartment she went inside with Mr. Elborno and went into his bedroom. *Id.* at 57-64. Once in the bedroom, Mr. Elborno began to try and pull down her pants, and when she would stop him he would grab her breast. *Id.* Eventually, he was able to remove her pants, and for about eight minutes had non-consensual sex with her, penetrating both her vagina and anus. *Id.* Eventually, Mr. Elborno became frustrated and stopped, and N.D. left his apartment. *Id.* She went and sat in her car until a good Samaritan spoke with her and called the police. *Id.* at 64-66. She also reported that she was choked during the assault. *Id.* at 69-70. The defense cross examined her, suggesting that any bruising around her neck was the result of forceful kissing and not choking. *Id.* at 87-91.

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[1] *See* 2 RR, State's Ex.'s 4-6.

A sane nurse also testified that she had attended to N.D. later the same day, and records supporting her testimony were admitted. 1 RR at 10-31; 2 RR, State's Ex. 3. She testified that N.D. had bruises on her neck, bruising inside her vagina, and multiple tears around her anus. *Id.* These injuries could have been caused by a sexual assault as described by N.D. *Id.* On cross-examination, the nurse agreed that the injuries in question could also have been caused by consensual sex or other non-criminal acts. 1 RR at 31-39.

The defense offered an email from Mr. Elborno and from other character witnesses who had positive things to say about Mr. Elborno. 2 RR, Defense Ex. 1. The email from Mr. Elborno, addressed to the trial judge, offered an apology for what he had done, took responsibility, and noted an apparent misunderstanding about these issues in the PSI. *Id.* When admitting these exhibits, defense counsel noted that Mr. Elborno was "very soft-spoken" and suggested that "maybe some things were not being relayed appropriately and may be misinterpreted the way they were being relayed to in the [PSI] report." 1 RR at 95-96. Defense counsel also noted he had told Mr. Elborno "to be careful what he said on there, not to go into too much detail" and that this might have affected what was said to the PSI writer. *Id.* The defense called Mr. Elborno's mother, who discussed her son's good character and positive life path, as its only witness. *Id.* at 97-103.

The defense argued that the prosecution failed to prove this was violent attack, and asked for deferred adjudication. 1 RR at 106-110. Defense counsel once again discussed whether or not Mr. Elborno had accepted responsibility:

> Just really the -- the issue with the moderate risk is again where they say he didn't accept responsibility, but he did accept responsibility, Judge. I just don't think it was properly relayed during the interview, but obviously he's -- he's written a letter indicating as such.

Id. at 108-09.

The prosecutor once again argued that deferred adjudication was for "those people who accept responsibility for what they did, who are ripe to give back to their community, support it, to be a productive member of that community." *Id.* at 110. The State highlighted the messages sent to N.D. on the day of the assault, argued the facts proved a violent sexual assault, and once again reaffirmed its argument that Mr. Elborno had not accepted responsibility by specifically discussing portions of the PSI. *Id.* at 110-12. The prosecutor noted Mr. Elborno never took responsibility until the defense offered Exhibit 1 into evidence. *Id.* at 113-14. The prosecutor asked for an eight-year prison sentence.

The court went straight into the sentencing colloquy, reproduced here in its entirety:

> THE COURT: Please rise.
>
> At this time I'm entering a finding of guilt.
>
> Mr. Elborno, I'm sentencing you to 10 years to the Texas Department of Criminal Justice. You're not going back to Florida. You'll be staying with us. You will do 10 years in the Texas Department of Criminal Justice Institutional Division.
>
> I will never forget when I was 18 years old, I was sitting in MEPS in Charlotte, North Carolina about to go to basic training. And on the news it was reported that the supreme court decided that a man cannot rape his wife. I was floored. Because at 24 years of life, I didn't know that that wasn't a crime.
>
> It does not matter if you've been in a relationship. It does not matter if you've been married to the woman. You cannot rape them. Think about that while you're in prison.
>
> We're off the record.

1 RR at 114-15.

The court never provided Mr. Elborno with the opportunity to allocate, as required by statute and common law. Neither party notified the court about its failure.

SUMMARY OF THE ARGUMENT

Texas statutory law and the common law guarantee a criminal defendant the right to allocution prior to sentencing. Both sources of law create a *sua sponte* duty on a sentencing court to allow allocution prior to sentencing, and, for this reason,

both the statutory and common law right are waivable only. As a result, Mr. Elborno asks this Court find that right to allocation is waivable only, and not subject to forfeiture on appeal by the failure to object. In this case the trial court failed to give Mr. Elborno the opportunity to allocute prior to announcing sentence, an error that affected his substantial rights. Mr. Elborno prays that this Court reverse his sentence and remand for a new sentencing proceeding.

ARGUMENT

I. DID THE DISTRICT COURT REVERSIBLY ERR BY VIOLATING MR. ELBORNO'S STATUTORY RIGHT TO ALLOCUTION?

II. DID THE DISTRICT COURT REVERSIBLY ERR BY VIOLATING MR. ELBORNO'S STATUTORY RIGHT TO ALLOCUTION?[2]

A. The district court violated Mr. Elborno's statutory and common law rights to allocution before sentencing.

The common law right to allocution, as recognized by the United States Supreme Court, requires "that the defendant be personally afforded the opportunity to speak before imposition of sentence." *Green v. United States*, 365 U.S. 301, 304 (1961) (explaining the right to allocution arose in common law). "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to

[2] Because these two grounds are closely related, both legally and factually, they are briefed together for the sake of brevity and readability.

say before sentence was imposed required reversal." *Id*. In *Green,* the Supreme Court discussed the creation of Federal Rule of Criminal Procedure 32(a), the changes in criminal proceedings since the seventeenth century, and found that the common law right to allocution continued to hold an important role in criminal cases:

> But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

Id. at 304.

The Supreme Court discussed *Green* in *Hill v. United States*, where the Court held that a district court's failure to permit allocution could not be raised for the first time during collateral proceedings. 368 U.S. 424, 426 (1962) ("We hold that the failure to follow the formal requirements of Rule 32(a) is not of itself an error that can be raised by collateral attack, and we accordingly affirm the judgment of the Court of Appeals."). The Court noted that although the right existed at common law, its violation "is an error which is neither jurisdictional nor constitutional." *Id.* at

428.[3] In federal law, the right exists as it did at common law, and as a statutory right.[4]

Like the federal system, Texas Code of Criminal Procedure has codified a version of the right of allocution. *See* Tex. Code Crim. Proc. art. 42.07. The statute reads:

> Before pronouncing sentence, the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him. The only reasons which can be shown, on account of which sentence cannot be pronounced, are:
>
> 1. That the defendant has received a pardon from the proper authority, on the presentation of which, legally authenticated, he shall be discharged.
>
> 2. That the defendant is incompetent to stand trial; and if evidence be shown to support a finding of incompetency to stand trial, no sentence shall be pronounced, and the court shall proceed under Chapter 46B; and

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[3] Interestingly, in 1971, the Supreme Court stated it had never decided whether allocation related to punishment was a constitutional right. *McGautha v. California,* 402 U.S. 183, 218–19 (1971) ("This Court has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so. Assuming, without deciding, that the Constitution does require such an opportunity, there was no denial of such a right in Crampton's case.") (footnote omitted), *judgment vacated by, Crampton v. Ohio,* 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972). It should also be noted that a Texas defendant has "the right of being heard by himself or counsel, or both. . ." Tex. Const. art. I, § 10.

[4] "While the right of allocution is not constitutionally grounded, the United States Supreme Court has recognized that the right to allocution is a common-law right." *Decker v. State*, No. 05-18-01259-CR, 2020 WL 614100, at *4 (Tex. App.—Dallas Feb. 10, 2020, no pet.) (*citing Green*, 365 U.S. at 304).

> 3. When a person who has been convicted escapes after conviction and before sentence and an individual supposed to be the same has been arrested he may before sentence is pronounced, deny that he is the person convicted, and an issue be accordingly tried before a jury, or before the court if a jury is waived, as to his identity.

Tex. Code Crim. Pro. Ann. art. 42.07.

At least one Court has found that the statute encompasses both the broader common law right to allocate generally before sentencing, and the more specific right to explain why, under the statute, sentence should not be pronounced. *See Decker v. State*, 2020 WL 614100, at *4 (Tex. App.—Dallas Feb. 10, 2020, no pet.) ("the statute is framed in two parts, with the first appearing to impose no limit on what the defendant might say, and the second constraining what the judge might act upon, limiting him or her to the enumerated legal bars to the pronouncement of sentence."). In any event, if article 42.07 only requires the sentencing court to inquire into reasons why a sentence should not be pronounced, then the common law right to allocate generally still stands. *See* Tex. Code Crim. Pro. Ann. art. 1.27 ("If this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern.").

In this case, the district court failed to allow Mr. Elborno to allocate prior to sentencing, a clear violation of his statutory and common law rights. However, this error was not brought to the district court's attention, and the Rules of Appellate

Procedure generally require both a timely objection and ruling to preserve issues for appeal. Tex. R. App. P. 33.1. As a result, the issue is not preserved for review unless the error falls into one of the limited areas of rights for which preservation is not required. Mr. Elborno argues the right is a *Marin* category two waivable only right, and, therefore, the issues are preserved for review.

B. The statutory and common law rights to allocution are waivable only rights.

First, it must be stated that every court to have decided this issue has held that a violation of a defendant's right to allocution is waived by the failure to timely object.[5] However, Justice Schneck, in a concurrence on this issue, explained why he believed this precedent should be reconsidered:

> The right to allocution is fundamental, ministerial, and easily remedied by remand where it has been denied. Meanwhile, demanding that the prostrate defendant, seeking mercy and leniency in a discretionary sentencing decision, start that effort by telling the decision-maker that he has erred is unrealistic and unfair.

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[5] *See, e.g., McClintick v. State*, 508 S.W.2d 616, 618 (Tex. Crim. App. 1974) (Argument that art. 42.07 does not replace common law right not preserved for review); *Casselberry v. State*, No. 05-22-00014-CR, 2022 WL 14381667, at *2 (Tex. App.—Dallas Oct. 25, 2022, no pet.) ("To complain on appeal of the denial of the right of allocution, whether statutory or one claimed under the common law, controlling precedent requires that a defendant timely object."); *Hall v. State*, No. 05-18-00442-CR, 2019 WL 3955772, at *1 (Tex. App.—Dallas Aug. 22, 2019, pet. ref'd) (same); *Vasquez v. State*, 605 S.W.3d 734, 738 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (same); *Norton v. State*, 434 S.W.3d 767, 771 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Hall, 2019 WL 3955772, at *1 (J. Schneck, concurring). After discussing the importance of the right in question, the concurrence noted that "[i]n the years since [our precedent] was decided, courts across the country have faced the question of whether the error in denying the right to allocution is worth fixing and have overwhelmingly decided that it should be redressable as some form of "plain," "fundamental" or, less often, "structural" error, depending on the local lexicography." *Id.* (footnotes and citations omitted).

Mr. Elborno argues that the general preservation requirements do not apply to the issues at hand because the statutory and common law rights to allocution are waivable only rights. The Court of Criminal Appeals has explained that the general preservation "rule does not apply to rights which are waivable only or to absolute systemic requirements, the violation of which may still be raised for the first time on appeal." *Mendez v. State*, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004) (internal citation omitted).

"The general preservation requirement's application turns on the nature of the right allegedly infringed." *Grado v. State*, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). Three categories of rights have been identified:

> • The first category of rights are those that are "widely considered so fundamental to the proper functioning of our adjudicatory process ...

> that they cannot be forfeited ... by inaction alone." These are considered "absolute rights."
>
> • The second category of rights is comprised of rights that are "not forfeitable"—they cannot be surrendered by mere inaction, but are "waivable" if the waiver is affirmatively, plainly, freely, and intelligently made. The trial judge has an independent duty to implement these rights absent any request unless there is an effective express waiver.
>
> • Finally, the third category of rights are "forfeitable" and must be requested by the litigant. Many rights of the criminal defendant, including some constitutional rights, are in this category and can be forfeited by inaction.

Id. (internal citations omitted).

Mr. Elborno argues that the right at issue falls in the second category of waivable only rights. "A law that puts a duty on the trial court to act *sua sponte,* creates a right that is waivable only. It cannot be a law that is forfeitable by a party's inaction. This was the precise holding of *Marin.*" *Mendez*, 138 S.W.3d at 342; *see also Proenza v. State*, 541 S.W.3d 786, 797 (Tex. Crim. App. 2017) (same). Both the statutory and common law right to allocution fits neatly into the *Marin* category two framework. As the Supreme Court noted in *Green,* the common law right of allocution required a sentencing judge to allow allocution prior to sentencing, and a court's failure to ask "required reversal." *Green*, 365 U.S. at 304. And, article 42.07 mandates that "[b]efore pronouncing sentence, the defendant shall be asked whether he has anything to say. . ." Tex. Code Crim. Pro. Ann. art. 42.07. Both versions of

the right require that the sentencing court *sua sponte* inquire whether or not the defendant has anything to say prior to sentencing, and for that reason are waivable only rights not subject to the general preservation requirement.

Mr. Elborno is not aware of any binding precedent that would prevent the Court from holding that the right of allocution is a waivable only right. In *Amador v. State*, this Court noted that the "Appellant also argues that *McClintick* predates *Marin v. State,* 851 S.W.2d 275, 278–79 (Tex.Crim.App.1993), which acknowledged the existence of certain legal rights that must be waived expressly, and he urges this Court to hold the right of allocution is such a right." 2015 WL 4548967, at *2 (Tex. App.—Houston [14th Dist.] 2015).[6] However, it appears the argument was inadequately briefed.[7] Other Courts discussing the issue have not discussed the issue in detail. *See Groves v. State*, 2021 WL 2908677, at *6 (Tex. App.—Amarillo 2021) (noting that other court's had not conducted an in depth analysis, but "respectfully disagree[ing] with Appellant's argument that the right of allocution is a right that must be expressly waived.");

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[6] "(a) *Criminal Cases.* Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication).'" Tex. R. App. P. 47.7.

[7] "Appellant makes no argument that we should hold differently when the statutory right to allocution is invoked for the first time on appeal, and we decline to do so." *Id.*

Arguellez v. State, 2009 WL 3210934, at *3 (Tex. App.—Corpus Christi–Edinburg 2009) (briefly discussing *Marin*).

Mr. Elborno request that the Court find the right to allocution is waivable only and address this issue on its merits.

C. The trial court's error affected Mr. Elborno's substantial rights.

As the trial court's error was non-constitutional in nature, harm is considered under Texas Rule of Appellate Procedure 44.2(b). Mr. Elborno must show the error affected his substantial rights. Tex. R. App. P. 44.2. "In this context, error affects a substantial right when it has a substantial and injurious effect or influence in determining the trial court's sentencing decision." *Crain v. State*, 373 S.W.3d 811, 816 (Tex. App.—Houston [14th Dist.] 2012).

As discussed in the fact section, *supra*, the prosecution repeatedly justified a lengthy sentence based upon the idea that Mr. Elborno had not accepted responsibility. The prosecution highlighted Mr. Elborno's comments to that effect in PSI. It is true that defense counsel admitted, as Defense Exhibit 1, an email from Mr. Elborno explaining that he took "full responsibility for this," and that defense counsel attempted to explain why the PSI suggested Mr. Elborno had not accepted responsibility for his actions in both his opening comments to the court and closing

argument. 1 RR at 95-96; 108-09. However, the prosecution seized upon the idea that Mr. Elborno was unworthy of mercy because probation "is for those people who accept responsibility for what they did," and that "[t]he important part is, the defendant has to take responsibility for what he did if he's going to show the Court that he will not re-offend." *Id.* at 110, 112. That both parties argued about whether or not Mr. Elborno had accepted responsibility shows the affect of this factual finding on the court's ultimate sentencing determination.

Mr. Elborno was denied his one opportunity to speak with the court free from cross-examination, and his only opportunity to personally assure the court he accepted responsibility for his actions and was deserving of mercy. As the Supreme Court tells us, "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green*, 365 U.S. at 304. Mr. Elborno requests that this Court reverse his sentence and remand his case for resentencing.

PRAYER FOR RELIEF

Mr. Elborno request that this Court reverse his sentence and remand his case for resentencing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Brief on Appeal has been sent to all counsel on appeal by electronic service on June 28, 2024.

/s/ Jonathan Landers
Jonathan D. Landers

CERTIFICATE OF COMPLIANCE

I certify that this Brief is 3,606 words according to the Microsoft Word count, with headings, quotations, and footnotes included, in which conforms with the limit found in Texas Rule of Appellate Procedure 9.4(i)(2)(C).

/s/ Jonathan Landers
Jonathan D. Landers

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