Crystal Yvette Roberson v. the State of Texas

2012 | Cited 0 times | Court of Appeals of Texas | June 7, 2012

DISSENTING OPINION

I respectfully and reluctantly dissent because I believe this case is controlled by the Fourteenth Court's opinion in Mikel v. State, 167 S.W.3d 556 (Tex. App.- Houston [14th Dist.] 2005, no pet.).

In her first issue, Roberson contends that the evidence to support the jury's findings on the enhancement paragraphs-to which she plead true-was legally insufficient. The enhancement paragraphs in the indictment recite the following:

Before the commission of the offense alleged above, (herein styled the primary offense), on JULY 8, 1991, in Cause Number 0590710, in the 177TH DISTRICT COURT of HARRIS County, Texas, the Defendant was convicted of the felony of POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE.

Before the commission of the primary offense, and after the conviction in Cause Number 0590710 was final, the Defendant was convicted of the felony of AGGRAVATED ASSAULT and was finally convicted of that offense on AUGUST 28, 1989, in Cause Number 475567, in the 232ND DISTRICT COURT of HARRIS County, Texas.

Roberson points out the obvious chronological impossibility of the 1989 conviction occurring after the 1991 conviction. She also acknowledges the general rule that when a defendant pleads true to an enhancement paragraph, the State is relieved of the burden of proving the enhancements, and the defendant cannot complain on appeal that the evidence is insufficient to support the enhancements. See Harvey v. State, 611 S.W.2d 108, 111 (Tex. Crim. App. 1981).

Roberson contends her case falls into the Sanders exception, whichallows a defendant to challenge an enhancement if the record"affirmatively reflects" that a prior conviction was not final. SeeSanders v. State, 785 S.W.2d 445, 448 (Tex. App.-San Antonio 1990, nopet.); see also Ex parte Rich, 194 S.W.3d 508, 513-- 14 (Tex. Crim.App. 2006). In a 2001 opinion that was not designated forpublication, and therefore not precedential, this Court expanded theSanders exception in a case in which the trial court improperly used astate jail felony as a prior conviction for enhancement.[1] Cruz v. State, No. 01-00-00463-CR, 2001 WL 1168273 (Tex.App.-Houston [1st Dist.] Oct. 4, 2001, no pet.) (not designated forpublication); see TEX. R.APP. P. 47.7(a) (allowingcitation of criminal opinions not designated for publication).

The Fourteenth Court of Appeals in Mikel agreed with our statement inCruz that the Sanders exception applies to any case in which adefendant pleads true to an enhancement paragraph and the recordaffirmatively reflects that the prior conviction should not have beenused for enhancement purposes. Mikel, 167 S.W.3d at 559--60 (citingCruz, 2001 WL 1168273, at *1). The Fourteenth Court, however, usedCruz as a basis for reversing the sentence because "the offense didnot occur in the sequence alleged by the indictment." [2] Mikel, 167 S.W.3d at 560.

The Mikel Court discussed a second problem in the case, noting that even if the prior convictions were to have been put in the proper sequence, the record revealed that the primary offense for which the defendant was convicted was committed on January 30, 2000 and could not have been committed after the February 9, 2000 and May 23, 2002 convictions became final. Id. at 559 n.2. While this second level of error made an enhancement under Penal Code section 12.42(d) impossible, the Fourteenth Court's explicit reason for reversing was the legal insufficiency of the sequence in which the prior convictions were alleged in the indictment. Mikel, 167 S.W.3d at 560.

This Court has cited Mikel for the more general proposition that we discussed in Cruz. See Magic v. State, 217 S.W.3d 66, 71 (Tex. App.-Houston [1st Dist.] 2006, no pet.). I would distinguish Mikel and acknowledge that the judgment in that case was correct for the reasons discussed in footnote 2. I also disagree with the holding in Mikel, which is that a mere mistake in the sequence in [2nd] Before the commission of the primary offense and after the conviction in cause number 00199814 was final, the Defendant committed the felony offense of escape and was finally convicted of that offense on February 9, 2000 in Cause No. 835844, in the 182nd District Court of Harris County, Texas.

Mikel, 167 S.W.3d at 558. Obviously the defendant in Mikel could not have committed "the second" offense, which resulted in a February 9, 2000 conviction, after "the first" offense became final on May 23, 2002.

which prior convictions are alleged constitutes an exception to the Sanders rule and requires that mistake to be analyzed under legal sufficiency. See Mikel, 167 S.W.3d at 560. But my opinion is not a basis on which to affirm, because the Court of Criminal Appeals has expressly agreed with the rationale of Mikel. See Ex parte Rich, 194 S.W.3d at 514.

As an intermediate appellate court, we are not free to disregard pronouncements from higher courts. See In re K.M.S., 91 S.W.3d 331, 331 (Tex. 2002); Purchase v. State, 84 S.W.3d 696, 701 (Tex. App.-Houston [1st Dist.] 2002, pet. ref'd). Because the Court of Criminal Appeals has agreed with the rationale of Mikel, I believe we must follow it, even though I welcome the Court of Criminal Appeals to reconsider its approval of Mikel.[3]

Accordingly, I would sustain Roberson's first issue and would not reach the remaining two issues that address the order that her sentence run consecutively beginning from the completion of a prior judgment and sentence. I would reverse the portion the judgment regarding Roberson's sentence and

remand the case to the trial court for a new punishment hearing. See TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (West Supp. 2011).

Panel consists of Justices Keyes, Bland, and Sharp. Justice Sharp, dissenting.

Publish. TEX. R. APP. P. 47.2(b).

1. Act of May 29, 1995, 74th Leg., R.S., ch. 318, § 1, sec. 12.42(e), 1995 Tex. Gen. Laws 2734, 2735 (former TEX. PENAL CODE § 12.42(e), since repealed) (prohibiting use of state jail felony for enhancement purposes).

2. The enhancement paragraphs were as follows: [1st]Before the commission of the offense alleged above (hereafter styled the primary offense) on May 23, 2002, in Cause No. 00199814, in the 16th District Court of St. Martin Parish, Louisiana, the Defendant was convicted of the felony of attempted possession with intent to distribute marihuana.

3. I certainly do not agree-as does the majority-that we should follow a four-page, no pet., nonprecedential memorandum opinion written eight months before the Mikel opinion issued, which affirmed the defendant's conviction based on waiver due to his failure to object in the trial court to the indictment. See Wilson v. State, No. 14-03-00182-CR, 2004 WL 2360011 (Tex. App.-Houston [14th Dist.] Oct. 21, 2004, no pet.) (mem. op., not designated for publication). The author of Mikel was Justice Seymore, who was also on the panel that decided Wilson. In deference to our sister court of appeals and in recognition of our duty to follow the jurisprudence of the Court of Criminal Appeals, I do not place such great stock in Wilson's belt-and-suspenders nonprecedential dicta.