



Carrillo v. State

2009 | Cited 0 times | Court of Appeals of Texas | August 20, 2009

Before Morriss, C.J., Carter and Moseley, JJ.

MEMORANDUM OPINION

Jose Angel Carrillo had earlier been convicted of driving while intoxicated with a child under fifteen years of age, a state-jail felony, and his punishment had been assessed at two years' confinement, probated for five years. A short time later, based on Carrillo's plea of true to allegations that he had subsequently violated the terms of his community supervision, the trial court revoked his community supervision and sentenced him to two years' confinement in a state-jail facility.

Carrillo argues on appeal that the trial court abused its discretion in sentencing him because it refused to consider the entire range of punishment and, instead, imposed a predetermined sentence.

Such a complaint is not preserved for review unless a timely objection is raised. *Teixeira v. State*, 89 S.W.3d 190, 192 (Tex. App.--Texarkana 2002, pet. ref'd); *Washington v. State*, 71 S.W.3d 498, 499 (Tex. App.--Tyler 2002, no pet.); *Cole v. State*, 757 S.W.2d 864, 866 (Tex. App.--Texarkana 1988, pet. ref'd). No objection was made on this basis during the proceeding below; thus, the complaint was not preserved for our review.

Even if it had been preserved, there was no error here. A trial court denies due process where it arbitrarily refuses to consider the entire range of punishment for an offense, or refuses to consider mitigating evidence, and imposes a predetermined punishment. *Ex parte Brown*, 158 S.W.3d 449, 454 (Tex. Crim. App. 2005); *McClenan v. State*, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983), overruled on other grounds by *DeLeon v. Aguilar*, 127 S.W.3d 1 (Tex. Crim. App. 2004). If a trial court, when community supervision is granted, announces a predetermined sentence it will impose in the event of a future violation of the terms of community supervision, and then, at revocation, imposes the sentence thus previously threatened, this denies due process. *Sanchez v. State*, 989 S.W.2d 409, 411 (Tex. App.--San Antonio 1999, no pet.). Here, the trial court had not, at the earlier trial, threatened Carrillo with a particular sentence in the event of revocation.¹ Instead, the court, at the time of revocation, recalled a comment made, at trial, by one of the attorneys that "this judge sitting on this bench is going to enforce whatever sentence you impose." The court indicated at that time that it was going to honor the two-year sentence assessed by the earlier jury. That comment by the trial court is not the prejudgment forbidden by law.

Counsel seeks to circumvent the lack of preservation of error by asserting that this error was



Carrillo v. State

2009 | Cited 0 times | Court of Appeals of Texas | August 20, 2009

structural. "Structural error" affects the "conduct of the trial from beginning to end" and is not subject to a harm analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); see *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). Structural error has been found, for example, in the deprivation of the right to an impartial judge, *Fulminante*, 499 U.S. at 309-10; the total deprivation of the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); and total deprivation of expert assistance to which the defendant was entitled, *Rey v. State*, 897 S.W.2d 333, 345 (Tex. Crim. App. 1995).

Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. at 577-78 (citation omitted).

Fulminante, 499 U.S. at 310.

While Carrillo categorizes the trial court's utterances, at the time it assessed his punishment, as showing that the trial court lacked impartiality, we disagree. Assessing punishment, even if it is done erroneously, would not ordinarily, alone, demonstrate that the trial court lacked impartiality. The comments made by the trial court, at the time it imposed a sentence, provided no such demonstration here. We can find no structural error.

We affirm the judgment.

Date Submitted: August 19, 2009

Do Not Publish

1. The trial court had commented to the jury that, in the event of a revocation, "I would think it would be a safe investment that it's going to be addressed, and your will carried out for any violation." The court continued, "That probably won't be during my tenure as judge. . . . [T]his is the last year of my service." In context, the court was not promising any particular sentence for Carrillo in the event of a revocation.

