

Affirmed and Opinion filed January 13, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00864-CR

LANCE PAUL JOHNSON , Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 94-28229**

OPINION

Lance Paul Johnson pleaded guilty to misappropriation of fiduciary property and was placed on deferred adjudication for seven years. The state later moved for revocation of probation and adjudication of the offense. The trial court granted the motion and sentenced Johnson to ten years' probation. In seven points of error Johnson contends he was improperly admonished in the original proceeding and complains about his counsel, his sentence and the trial court's failure to allow his attorney to withdraw. We affirm.

In his first two points of error Johnson complains that this court should consider all his points of error, and that he was not properly admonished when he was placed on deferred

adjudication. We may not consider complaints about the original proceeding not raised within thirty days of imposition of deferred adjudication community supervision. *Manuel v. State*, 994 S.W.2d 658 (Tex. Crim. App. 1999). We therefore overrule Johnson's first two points of error.

In his third and fourth points of error Johnson contends the trial court abused its discretion in not granting his attorney's motion to withdraw and that he was essentially without representation at his adjudication hearing. However, the statute which governs deferred adjudication community supervision provides that "no appeal may be taken" from the court's decision to adjudicate guilt. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 1999). In *Phynes v. State*, 828 S.W.2d 1 (Tex. Crim. App. 1992), the court of criminal appeals found the statute precludes a court of appeals from reviewing appellant's claim that he lacked representation at his adjudication hearing. *Id.* at 2. We overrule Johnson's third and fourth points of error.

In his fifth point of error Johnson contends the trial court erred in assessing punishment at ten years when he was on deferred adjudication for seven years. He complains that he is essentially being assessed ten years for public intoxication, a Class C misdemeanor. We disagree. Appellant is being sentenced for violating one of the terms of his probation, which provided that he not break the laws of this state. Our record also reflects that Johnson came before the trial court on a previous motion to adjudicate for another infraction, which the trial court denied. Finally, when a court proceeds to adjudication of the original offense it is limited in the range of punishment only by the statute governing the original offense. *Ditto v. State*, 988 S.W.2d 236, 239-240 (Tex. Crim. App. 1999). This sentence is within the statutory limits of the original offense. We therefore overrule Johnson's fifth point of error.

In his sixth and seventh points of error Johnson complains that his appellate counsel was ineffective because he filed a defective notice of appeal. Because the appeal was from his earlier plea of guilty on breach of fiduciary duty charges, the notice had to specify either that Johnson was appealing with the trial court's permission, that the appeal was from a

jurisdictional defect, or that the matter had been presented in a written motion before trial. TEX. R. APP. P. 25.2(b)(3). However, we have already determined that Johnson could not appeal his plea of guilty, and he was barred by statute from appealing the decision to adjudicate his guilt. Since Johnson could not appeal anything, he cannot satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We therefore overrule Johnson's sixth and seventh points of error and affirm the judgment of the trial court.

/s/ Ross A. Sears
 Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.