Affirmed and Opinion filed September 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00911-CR

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ELVIN ADRIAN BONNER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 801,223

O P I N I O N

Appellant, Elvin Adrian Bonner, entered a plea of guilty to unlawful possession of a firearm by a felon. *See* TEX. PEN. CODE ANN. § 46.04 (Vernon 1994). Pursuant to an agreed recommendation, the trial court assessed appellant's punishment at thirty years in the Texas Department of Criminal Justice - Institutional Division. In one point of error, appellant complains the trial court accepted a plea agreement containing a void and illegal sentence.

In his sole point of error, appellant contends that his agreed sentence is void and illegal because the State used the same prior conviction to both prove the offense committed and to enhance the range of

punishment. In other words, appellant argues the indictment applied a prior felony conviction twice - first as an element of the charged offense (that he was a felon in possession of a firearm) and second to enhance his punishment for the charged offense. It is well established that the use of a prior conviction to prove an essential element of an offense bars the subsequent use of that prior conviction in the same indictment for enhancement purposes. *See Wisdom v. State*, 708 S.W.2d 840, 845 (Tex. Crim. App. 1986).

Initially, we confront the issue of whether appellant's complaint is properly before this Court. The State argues that appellant has waived his complaint because he claims a defect of form or substance in the indictment, which must have been raised before trial. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2000). While we agree with the State that objections to errors in the indictment are waived unless made before trial, we are also mindful that a complaint concerning a sentence that is not authorized by law may be raised at any time. *See Fullbright v. State*, 818 S.W.2d 808, 809 (Tex. Crim. App. 1991). In the face of these two competing sources of authority, we will in the interest of justice, address the merits of appellant's complaint.

The indictment charging appellant alleges:

> . . . in Harris County, Texas, ELVIN ADRIAN BONNER, hereafter styled the Defendant, heretofore on or about December 25, 1998, did then and there unlawfully, intentionally and knowingly possess a firearm, after having been convicted of a felony, namely, Attempted Murder in the 209th District Court of Harris County, Texas in Cause Number *41710**6*** on July 10, 1985, and said possession of a firearm occurred after the fifth anniversary of the Defendant's release from confinement following conviction on July 10, 1985.
>
> Before the commission of the offense alleged above, (hereafter styled the primary offense), on July 10, 1985, in Cause No. *41710**7*** in the 209th District Court of Harris County, Texas, the Defendant was convicted of the felony of attempted Murder.
>
> Before the commission of the primary offense and after the conviction in Cause No. 417107 was final, the Defendant committed the felony of forgery and was finally convicted of that offense on December 3, 1991, in Cause No. 611721, in the 351st District Court of Harris County, Texas.

(emphasis added).

Upon a cursory review of the indictment, appellant's point seems compelling. However, upon closer review, a distinction between the felony conviction used in the first and second paragraph becomes

apparent. The State alleged a prior felony conviction in Cause No. 41710***6*** to prove the charged offense and alleged another prior felony conviction in Cause No. 41710***7*** for punishment enhancement. The prior felony convictions relied on by the State are two separate offenses represented by two different cause numbers (both adjudicated in the 209th District Court on July 10, 1985).[1] As such, the State did not use the same prior felony conviction in the indictment to prove the charged offense and also to enhance punishment for that offense. Rather, the indictment shows two separate offenses - the first represented by Cause No. 41710***6*** and the second represented by Cause No. 41710***7***.[2] Accordingly, the enhanced sentence is not illegal, and Appellant's sole point of error is overruled.

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[1] The State may apply two separate convictions adjudicated on the same date in one indictment for purposes of proving the charged offense and enhancing punishment. *See Mena v. State*, 504 S.W.2d 410, 415 (Tex. Crim. App. 1974).

[2] There is further proof in the record that there were two separate offenses rather than one. In the State's Notice of Intent to Use Evidence of Prior Convictions, the State listed both Cause Numbers 41710***6*** and 41710***7*** as separate offenses.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed September 7, 2000.

Panel consists of Justices Yates, Fowler and Edelman.

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