Affirmed and Opinion filed October November 4, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00328-CR

JOSE ANGEL GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 739,471

O P I N I O N

Jose Angel Garcia appeals a conviction for aggravated robbery on the grounds that: (1) the trial court failed to include a definition of reasonable doubt in the jury charge on punishment; (2) the trial court erred in instructing the jury at punishment that his sentence could be reduced through the award of good time; and (3) the jury charge requirement in article 37.07 of the Texas Code of Criminal Procedure is unconstitutional. We affirm.

Reasonable Doubt Instruction

Appellant was charged with the aggravated robbery of a pawn shop, entered a guilty plea, was found guilty by a jury, and was sentenced by the jury to seventeen years confinement. During the punishment hearing, the State called a witness who testified that appellant had previously robbed another pawn shop at gunpoint. The jury instructions on punishment did not instruct the jury that it could not consider the testimony of the extraneous offense unless it found beyond a reasonable doubt that appellant had committed it. Nor did appellant request such an instruction. Appellant's first point of error argues that the failure to include such a reasonable doubt instruction allowed the jury to consider evidence of the extraneous offense without determining that it was proven beyond a reasonable doubt.

A reasonable doubt instruction must be included in the jury charge at the punishment phase of trial *when requested*. *See Mitchell v. State*, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996). However, a reasonable doubt instruction is not required to be given at the punishment phase absent a request. *See Fields v. State*, No. 792-98, 1999 WL 715017, at *1 (Tex. Crim. App. Sept. 15, 1999). Because appellant made no request in his case for a reasonable doubt instruction in the punishment phase, this point of error presents nothing for our review and is overruled.[1]

Parole Instruction

Appellant's second point of error argues that the trial court erred in instructing the jury at punishment that his sentence might be reduced through the award of good conduct time because a person convicted of aggravated robbery is not eligible for such a reduction. His third point of error similarly argues that section 37.07 of the Texas Code of Criminal Procedure violates his constitutional rights to due course of law and due process by requiring such an instruction because it did not apply to his offense. Appellant

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[1] In the present case, the State elicited testimony from appellant during the punishment phase concerning his involvement in the extraneous offense. In that testimony, appellant readily admitted robbing the other pawn shop and discussed the property that he had stolen. Appellant's attorney not only did not object to this testimony, he openly discussed appellant's participation in that pawn shop robbery, without denial, during his closing argument. Because both appellant and his attorney freely admitted that appellant committed the extraneous offense, we also conclude beyond a reasonable doubt that the failure to instruct the jury on reasonable doubt did not contribute to appellant's punishment.

contends that the instruction did not apply to his offense because good conduct time cannot reduce either his full sentence or the time in which he could become eligible for parole.

The jury charge at the punishment phase in this case contained the following language: "*Under the law applicable in this case*, the defendant, if sentenced to a term of imprisonment, *may* earn time off the period of incarceration imposed through the award of good conduct time." (emphasis added). As appellant's brief acknowledges, this instruction was mandated by article 37.07. *See* TEX. CODE CRIM. P. ANN. art. 37.07 § (4)(a) (Vernon 1998). Therefore, we have no basis to conclude that the trial court erred by complying with that statutory requirement. *See Boston v. State*, 965 S.W.2d 546, 549-50 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd).

As to appellant's constitutional challenge, even assuming that good conduct time could not affect his period of incarceration, as he contends, the instruction was not incorrect or misleading. The instruction did not inform the jury specifically that appellant *would* earn good conduct time, but only stated generically that he *might* do so, *subject to applicable law*. In appellant's situation, if his initial premise is correct, good conduct time is simply not available under applicable law.

Moreover, even if appellant had been eligible for good conduct time, it could not be predicted at the time of sentencing whether he would actually earn any. Therefore, the instruction merely alerted the jury to the *possibility* of good conduct time, subject to such variables as applicable law and circumstances that could occur when he served his sentence. We do not believe that such a conditional instruction violated appellant's constitutional rights. *See Martinez v. State*, 969 S.W.2d 497, 499-501 (Tex. App.—Austin 1998, no pet.); *see also Muhammad v. State*, 830 S.W.2d 953, 955-56 (Tex. Crim. App. 1992). Accordingly, appellant's second and third points of error are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 4, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

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