



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0513-19

DUSTIN WADE HESTAND, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND COURT OF APPEALS
HOOD COUNTY**

YEARY, J., filed a dissenting opinion in which SLAUGHTER, J., joined.

DISSENTING OPINION

This case represents yet another incarnation of an issue I have been urging the Court to take up for some time now. The Second Court of Appeals held that Appellant forfeited any appellate claim that his enhanced sentence was illegal because he did not raise an objection to the validity of the enhancement during the punishment phase of trial, and that his attempt to raise the issue for the first time in a motion for new trial was untimely. *Hestand v. State*, No. 02-18-00334-CR, 2019 WL 1830642, at * (Tex. App.—Ft. Worth, del. Apr. 25, 2019)

(mem. op., not designate for publication). Today, the Court grants Appellant’s petition for discretionary review, summarily reverses the court of appeals’s holding with respect to forfeiture, and remands the cause to the court of appeals to address the merits of Appellant’s challenge to the enhancement. I respectfully dissent to the summary remand. In my view, the Court should take a closer look at whether Appellant should have objected at the punishment phase of trial, as the court of appeals held, rather than waiting to complain of the validity of the enhancement for the first time in a motion for new trial.

In reversing the court of appeals, the Court relies upon the proposition, expressed in *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003), that “[a] trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence.” Majority Opinion at 2.¹ I have elsewhere argued that “the principle that an ‘illegal sentence’ may be raised ‘at any time,’ regardless of whether there was a contemporaneous objection lodged at trial, does not apply with respect to improper enhancement claims—or at least not *all* (and maybe not even *most*) improper-enhancement claims.” *Rodriguez v. State*, 578 S.W.3d 92, 94 (Tex. Crim. App. 2019) (quoting *Ex parte*

¹ Literally speaking, of course, this is an overstatement. There is at least one context in which a trial or appellate court with jurisdiction to review a criminal conviction might not be free to correct an illegal sentence. An inmate who challenged his sentence as illegal for the first time in a successive post-conviction application for writ of habeas corpus, but who could not satisfy the requirements of Article 11.07, Section 4, of the Texas Code of Criminal Procedure, would not be able to obtain relief—even if his claim was meritorious. See *Ex parte Sledge*, 391 S.W.3d 104, 106 (Tex. Crim. App. 2013) (applicant’s claim that the trial court lacked jurisdiction to proceed to adjudication could not be raised in subsequent post-conviction writ application because it did not satisfy Article 11.07, Section 4’s abuse-of-the-writ provisions); TEX. CODE CRIM. PROC. art. 11.07, § 4; *Smith v. State*, 463 S.W.3d 890, 901 n.5 (Tex. Crim. App. 2015) (Yeary, J., concurring and dissenting) (noting *Sledge*).

Pue, 552 S.W.3d 226, 240 (Tex. Crim. App. 2018) (Yeary, J., dissenting), which cites George E. Dix & John M. Schmolesky, 43B TEXAS CRIMINAL PRACTICE: CRIMINAL PRACTICE AND PROCEDURE §59:55, at 886–87 (3d ed. 2011), and *Ex parte Clay*, 539 S.W.3d 285, 287 (Tex. Crim. App. 2018) (Yeary, J., dissenting)). It is not at all clear to me that the defect Appellant identifies in the State’s enhancement in this case should suffice to render his sentence illegal in contemplation of *Mizell*. In the above cases I argued that claims of defective enhancements should not ordinarily be cognizable in post-conviction applications for writ of habeas corpus or when raised for the first time on appeal. Likewise, in the instant case, the Court ought to analyze at greater depth whether the court of appeals was correct that Appellant could not make his challenge for the first time in a motion for new trial, *Mizell* notwithstanding.

Appellant was prosecuted for possession of methamphetamine in an amount that rendered his possession a state-jail felony. His punishment for that offense was subject to enhancement under the provisions of Section 12.425 of the Penal Code. TEX. PENAL CODE § 12.425. Under Section 12.425(b), he could be “punished for a felony of the second degree” upon a showing of two prior felony convictions, one of which becomes final before the other is committed.² The State alleged and proved three convictions in its attempt to justify a

² Section 12.425(b) reads:

(b) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies other than a state jail felony punishable under Section 12.35(a), and the second previous felony conviction is for an offense that occurred subsequent to the first

second-degree felony sentence. It showed that Appellant had been convicted of two felonies in 2008, but it could not use both of these felony convictions because they were not sequential as required by the statute—one was not committed after the other had become final. For this reason, the State was constrained to rely upon the third conviction, which was, literally speaking, not a conviction at all. Rather, it was a 2001 juvenile delinquent-conduct adjudication for the offense of unlawful use of a motor vehicle. Prior to 1994, this offense was classified as a third degree felony. Acts 1973, 63rd Leg., ch. 399, § 1, p. 932, eff. Jan. 1, 1974. But with the advent of state-jail felonies, unlawful use of a motor vehicle was reclassified, and has been a state-jail felony since that time. Acts 1993, 73rd Leg., ch. 900, § 1.01, p. 3640, eff. Sept. 1, 1994. It was a state jail felony at the time that Appellant committed it, on or about October 9, 2000.

Some juvenile delinquent-conduct adjudications will count as “final convictions” for purposes of Section 12.425’s enhancement-of-state-jail-offenses provisions—the Texas Juvenile Justice Code expressly so provides. *See* TEX. FAM. CODE § 51.13(d) (providing that a juvenile adjudication that a child committed what amounts to a felony offense that results in commitment “is a final felony conviction only for purposes of . . . Section 12.425, Penal

previous conviction having become final, on conviction the defendant shall be punished for a felony of the second degree.

TEX. PENAL CODE § 12.425(b). *See* Acts 2011, 82nd Leg., ch. 834, § 5, p. , 2105, eff. Sept. 1, 2011. As I have indicated in another context, I do not believe that the language of this provision requires that the offense to be enhanced have been *committed* after the prior two felony convictions have become final. *Ex parte Westerman*, 570 S.W.3d 731, 735–39 (Tex. Crim. App. 2019) (Yeary, J., dissenting).

Code”). Appellant has never argued that the use of his juvenile adjudication to enhance his punishment to a second-degree felony was improper because it was only a juvenile adjudication *per se*. His position on appeal has been, consistently, that even if a juvenile adjudication may count as a “final felony conviction” for purposes of Section 12.425(b), a juvenile adjudication for what amounts to a *state-jail felony* does *not*.³ In reply, the State argued in the court of appeals that state-jail felonies ought to be construed to count as full-blown felony offenses in contemplation of the Juvenile Justice Code and, hence, Section 12.425(b). The court of appeals did not have to address this question, having resolved the case on the basis of procedural default. Presumably it will have to address it now in light of the Court’s remand.

The fact that the validity of Appellant’s enhancement turns on this complex and esoteric question of statutory construction, however, suggests to me that we ought not to regard it as so manifestly “illegal” as to be subject to *Mizell*’s “illegal sentence” exception to our usual contemporaneous objection rule. Under Rule 33.1(a)(1) of the Texas Rules of Appellate Procedure, an appellant must make a *timely* objection in the trial court in order to

³ Appellant relies upon *Fortier v. State*, 105 S.W.3d 697, 701–02 (Tex. App.—Amarillo 2003, pet. ref’d) (op. on State’s motion for reh’g), for this proposition. The court of appeals in *Fortier* held that a state-jail felony could not be used to enhance a second degree felony offense so that it “shall be punished for a first-degree felony” under Section 12.42(b) of the Penal Code as it read at that time. Thus, *Fortier* did not speak to the enhancement of primary offenses that are state-jail felonies. Moreover, this holding occurred before Section 12.425 even existed, and largely relied upon former Section 12.42(e), which was repealed in 2011, in the same legislative act that created Section 12.245. *See* Acts 2011, 82nd Leg., ch. 834, § 6, p. 2105, eff. Sept. 1, 2011. *Fortier* notwithstanding, whether a state-jail felony should count as a felony for purposes of enhancing a state-jail felony to a second degree felony under Section 12.245(b) remains an unsettled question.

preserve error for appeal. TEX. R. APP. P. 33.1(a)(1). An objection is timely when it is made at the earliest opportunity that the trial court is in a position to correct or ameliorate the error that is asserted, if it is indeed erroneous. That is to say, an objection is required “as soon as the grounds for it become apparent[,]” which “in turn, means as soon as the party knows or should know that error has occurred.” George E. Dix & John M. Schmolesky, 43A TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 53:53, at 1021 (3d ed. 2011).

It would have been apparent during the punishment hearing, if not before, that Appellant’s juvenile delinquent-conduct adjudication was for an offense that was only a state-jail felony. Had Appellant’s trial counsel objected to the State’s use of his juvenile adjudication under Section 12.425(b), and assuming the trial court had agreed that it was not available for that purpose, the case could have proceeded to a proper punishment disposition.⁴ Instead, by waiting to raise the issue only for the first time in a motion for new trial, Appellant assured that the only way the defect could be remedied would be for the trial court to impanel a new jury and conduct a new punishment hearing.⁵ This creates an

⁴ I do not rule out the possibility, of course, that Appellant may ultimately be entitled to post-conviction habeas corpus relief on a theory of ineffective assistance of trial counsel for failing to raise such an objection. That question is obviously not before us now.

⁵ As professors Dix and Schmolesky have observed:

Preservation of error is required, the Court of Criminal Appeals has frequently indicated, in order to provide trial courts or opposing counsel with opportunities to prevent or cure errors so as to permit trial proceedings to continue to a final conclusion free from attack and reversal on appeal. This means, of course, that preservation of error furthers the policy of avoiding fruitless trial court proceedings. It conserves the resources that would otherwise be expended to reconduct the proceeding following after-the-fact identification of error.

incentive for defendants to “lay behind the log”—to allow a readily-apparent and easily-remedied error to occur and yet still obtain relief for it later, necessitating the gratuitous expenditure of additional judicial resources. This consideration obviously animated the court of appeals’s procedural default holding, as evidenced by its citation to our opinion in, *e.g.*, *Burt v. State*, 396 S.W.3d 574, 577 & n.4 (Tex. Crim. App. 2013) (observing that “[a] sentencing issue may be preserved by objecting at the punishment hearing, or when the sentence is pronounced[,]” while also noting that “an appellant may raise a sentencing issue in a motion for new trial for the first time only if the appellant did not have an opportunity to object in the punishment hearing”).⁶ *Hestand*, 2019 WL 1830642, at *2.

Should we nevertheless excuse Appellant’s failure to object because his argument, if upheld on appeal, would ultimately result in a determination that his punishment should not have been enhanced to a second-degree felony? Not necessarily. As I argued in *Pue*:

I have no quarrel with the notion that an “illegal sentence”—that is to say, a sentence that on its face falls outside the range of punishment authorized by law—should be regarded as cognizable even if complained of for the first time in post-conviction habeas proceedings. A trial court judge who sentences a third degree felon to a term of life in the penitentiary, for example, has imposed a sentence that far exceeds that which is authorized by law. Quite apart from the wishes of the parties themselves, society simply will not tolerate the imposition of any punishment beyond the legal maximum. *See Gutierrez*

George E. Dix & John M. Schmolesky, 43A TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 53:3, at 955 (3d ed. 2011).

⁶ *See also* George E. Dix & John M. Schmolesky, 43A TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 53:32, at 988 (3d ed. 2011) (“As a general rule, a defendant who has failed to comply with ordinary rules of preservation of error cannot cure this deficiency by raising the matter in a motion for new trial.”).

v. State, 380 S.W.3d 167, 175 (Tex. Crim. App. 2012) (observing that “the requirement that a defendant be sentenced within the statutorily applicable range of punishment is an ‘absolute and nonwaivable’ feature of the system within the *Marin* rubric, the contravention of which can be raised at any time”) (referencing *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993)). I agree that the flouting of any such systemic requirement or prohibition ought to be subject to a judicial remedy even if not raised until initial post-conviction habeas corpus proceedings. *Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014). But not every claim of “illegal sentence” rises to this level of systemic requirement or prohibition so as to justify entertaining it when it is only raised for the first time in an initial habeas corpus collateral attack.

552 S.W.3d at 239 (Yeary, J., dissenting).

I went on in *Pue* to elaborate why I thought the challenge to the enhancement in *Pue* did not rise to the level of a systemic requirement or prohibition which was immune from procedural default principles. *Id.* at 239–241. I later applied the same line of thought to question whether an appellant should be able to challenge an enhancement provision for the first time on appeal. *Rodriguez v. State*, 578 S.W.3d at 94–96 (Yeary, J., dissenting). I will not fully reiterate those thoughts here. Suffice it to say that it seems to me they apply with equal force to the question whether a challenge to the validity of an enhancement ought to be available when raised for the first time in a motion for new trial. That is especially so when, as here, the basis for Appellant’s claim that the juvenile delinquent-conduct adjudication was not available for use under Section 12.425—because it was only for a state-jail felony offense—was readily evident during the punishment hearing. Appellant could and should have raised it then and thus obviated any need to impanel a new jury and hold a new punishment hearing.

The Court declines to bring sufficient scrutiny to bear on this question before summarily reversing the court of appeals' procedural default holding and remanding the cause for consideration of the merits. I would grant the petition for discretionary review and schedule the case for oral argument. Because the Court does not, I respectfully dissent.

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