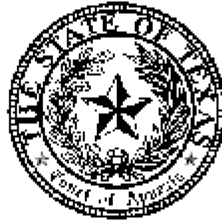
Affirmed and Opinion filed June 7, 2001.



In The

Fourteenth Court of Appeals

NO. 14-98-01392-CR
NO. 14-98-01393-CR

DESTRY ABDHL JARRETT, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause Nos. 666,456, & 94-10604

O P I N I O N

In Cause No. 14-98-01392-CR, Appellant, Destry Abduhl Jarrett, entered a plea of guilty, with an agreed recommendation, to the felony offense of burglary of a motor vehicle. In accordance with the plea agreement, which was entered on July 2, 1993, the trial court assessed punishment at five years deferred adjudication probation. Subsequently, on August 5, 1994, the trial court granted the State's motion to adjudicate guilt, and assessed punishment at ten years' probation. On September 8, 1998, the trial court revoked appellant's probation and sentenced him to seven years' confinement. In three points of error, appellant contends: (1) the trial court abused its discretion and denied appellant due process of law because there

was no evidence to substantiate his guilt prior to being placed on probation; (2) the trial court abused its discretion in revoking probation because the evidence was insufficient to do so; and (3) appellant's plea to the Motion to Revoke was involuntary.

In Cause No. 14-98-01393-CR, appellant was charged by indictment with the felony offense of aggravated robbery. He entered a guilty plea without an agreed punishment recommendation. On August 5, 1994, the trial court ordered deferred adjudication of guilt and sentenced appellant to ten years deferred adjudication probation. On September 8, 1998, the trial court adjudicated appellant's guilt and sentenced him to seven years' confinement. In one point of error, appellant argues the trial court denied him due process by finding him guilty of aggravated robbery, instead of robbery, where no express deadly weapon finding was entered. We affirm.

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In his first point of error, appellant argues the trial court abused its discretion and denied appellant due process of law because there was no evidence to substantiate his guilt prior to being placed on probation. Specifically, appellant argues that in August of 1994, the trial court improperly granted the State's motion to adjudicate because the motion alleged a violation of law, which occurred before appellant was originally placed on deferred adjudication. Thus, appellant's contention in essentially a challenge to the trial court's 1994 decision to adjudicate guilt for the original charge to which he pled guilty. This contention fails because there is no appeal from a trial court's determination to adjudicate guilt. *See* TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 5(b) (Vernon Supp. 2000); *Hardeman v. State*, 981 S.W.2d 773, 776 (Tex. App.—Houston [14th Dist.] 1998) *aff'd on other grounds* 1 S.W.3d 689 (Tex. Crim. App. 1999). When an appellant does challenge on direct appeal a trial court's decision to adjudicate guilt, we must dismiss the appeal. *See id*. Thus, because appellant is appealing the trial court's adjudication of guilt, we dismiss his first point of error.

In his second point of error, appellant argues the trial court abused its discretion by revoking his probation because there was insufficient evidence to do so. An order revoking

probation must be supported by a preponderance of the evidence. *See Scamardo v. State*, 517 S.W.2d 293, 298 (Tex. Crim. App. 1974); *Rodriguez v. State*, 2 S.W.3d 744, 746 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The greater weight of the credible evidence must create a reasonable belief that the defendant has violated a condition of his probation. *See id.* When the sufficiency of the evidence is challenged, the evidence is viewed in a light most favorable to the trial court's findings. *See Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981); *Montoya v. State*, 832 S.W.2d 138, 140 (Tex. App.—Fort Worth 1992, no pet.). The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See Naquin v. State*, 607 S.W.2d 583, 586 (Tex. Crim. App. [Panel Op.] 1980). Appellate review of an order revoking probation is limited to a determination of whether the trial court abused its discretion. *See Flournoy v. State*, 589 S.W.2d 705, 709 (Tex. Crim. App. [Panel Op.] 1979).

In its motion to revoke, the State alleged that appellant was unable to abide by the conditions of his probation because he violated three conditions:

> The State would further show the said Defendant did then and there violate terms and conditions of his probation by: Committing an offense against the state of Texas, to-wit; on or about JUNE 6, 1998 in Harris County, Texas, the Defendant did then and there unlawfully while intoxicated, namely, not having the normal use of his mental and physical faculties by the reason of the introduction of alcohol into his body, drive and operate a motor vehicle in a public place.
>
> It is further presented that in Harris County, Texas, DEDTRY [sic] ABDUHL JARRETT, hereafter styled the Defendant, heretofore on or about JUNE 6, 1998, did then and there unlawfully while intoxicated operate a motor vehicle in a public place.
>
> The State would further show the said Defendant did then and there violate terms and conditions of his probation by: Failing to report to the Probation Office, to -wit; the Defendant was ordered to report August 5, 1994, and thereafter on the 5th day of each month to his designated Probation Officer unless different dates within a calendar month were agreed to by him and his Probation Officer. He failed to report as instructed for the month of November 1997.
>
> The State would further show the said Defendant did then and there violate terms and conditions of his probation by: Failing to secure or maintain employment, to-wit: the Defendant has failed to maintain or secure employment for the monts

> of April 1995, May 1995, May 1996, June 1997, and July 1997 as ordered by the Court.
>
> The State would further show the said Defendant did then and there violate terms and conditions of his probation by: Failing to reimburse Harris County for compensation paid to appointed counsel, to-wit: the Defendant has failed to pay for compensation paid to appointed counsel as directed by the Court and is $170.00 in arrears as of June 8, 1998. The Defendant has never made a payment.

The trial court found all of the allegations were true except for the paragraph alleging appellant failed to pay court ordered compensation for appointed counsel.

Proof by preponderance of the evidence on any one of the alleged violations of the conditions of probation is sufficient to support the order of revocation. *See Rodriguez*, 2 S.W.3d at 746. When several violations are found by the court, the order revoking probation shall be affirmed if the proof of any allegation is sufficient. *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980); *McCollum v. State*, 784 S.W.2d 702, 704-05 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd).

Because proof of one violation is sufficient to support probation revocation, *see id.*, we will address appellant's failure to report to his probation officer as ordered by the trial court. The record shows that Probation Officer Ernest Gibson testified to the following:

1. Appellant failed to report to probation in November of 1997.

2. Appellant failed to show proof of employment and income for February, 1997, June, 1997, July 1997, April, 1995, May, 1995, and May, 1996.

The conditions of appellant's probation required appellant to report monthly to the probation officer and to provide proof of employment every month. Additionally, this testimony is sufficient to prove by a preponderance of the evidence that appellant failed to report to his probation officer on the month alleged in the State's motion to revoke, and that appellant failed to secure and maintain employment for the months alleged in the motion. *See Stephens v. State*, 983 S.W.2d 27, 29-30 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

Thus, because the record supports the trial court's finding that appellant violated a term of his probation, the trial court did not abuse its discretion in revoking appellant's probation. Accordingly, we overrule appellant's second point of error.

In his third point of error, appellant argues the plea of true he made in to the State's motion to adjudicate his guilt was involuntary. In 1994, appellant pled true to the motion to adjudicate guilt. He was then placed on probation. Four years later, appellant's probation was revoked. Appellant could have attacked the voluntariness of his plea if he had appealed from the order adjudicating his guilt and placing him on probation. *See Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999). This Court does not have jurisdiction to consider voluntariness claims coming from a guilty plea. *See id.*; *Hanson v. State*, 11 S.W.3d 285, 288 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Thus, because appellant did not challenge the voluntariness of his plea when he received probation, we are without jurisdiction to consider this point of error. Accordingly, we overrule appellant's third point of error.

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In his sole point of error in this appeal, appellant argues the trial court denied him due process by finding him guilty of aggravated robbery, instead of robbery, where no express deadly weapon finding was entered. Appellant claims he is not appealing the trial court's decision to adjudicate guilt, but rather is contending he should be convicted of the offense supported by the record.

Section 5(b) of Article 42.12, Texas Code of Criminal Procedure, provides that no appeal may be taken from the trial court's determination to adjudicate guilt. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 2000); *Hardeman*, 981 S.W.2d at 776. An appellant whose deferred adjudication probation has been revoked and who has been adjudicated guilty of the original charge may not raise contentions of error in the adjudication of guilt process on appeal. *See Connolly v. State*, 983 S.W.2d 738, 741 (Tex. Crim. App. 1999). Thus, the trial judge's decision to proceed with an adjudication of guilt is one of absolute, non-reviewable discretion. *See Burger v. State*, 920 S.W.2d 433, 436-37 (Tex.

App.—Houston [1st Dist.] 1996, pet. ref'd). Accordingly, appellant may not seek review by direct appeal. *See Connolly*, 983 S.W.2d at 741; *Phynes v. State*, 828 S.W.2d 1, 2 (Tex. Crim. App. 1992).

The Court of Criminal Appeals has addressed whether on appeal from an adjudication of guilt, a defendant may complain of error in the original plea proceeding. *See Manuel*, 994 S.W.2d 658. In affirming the Second Court of Appeal's finding that it lacked jurisdiction to hear Manuel's appeal, the Court of Criminal Appeals held that:

> a defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding, such as evidentiary sufficiency, only in appeals taken when deferred community supervision is first imposed. Certainly, it was not the Legislature's intent, in enacting Article 44.01(j), to permit two reviews of the legality of a deferred adjudication order, one at the time deferred adjudication community supervision is first imposed and another when, and if, it is later revoked.

Id., 994 S.W.2d at 661-62.

Here, appellant pleaded guilty and received deferred adjudication in August of 1994. Over four years later, his guilt was adjudicated and his probation was revoked. Because appellant did not appeal from the order placing him on deferred adjudication, we are without jurisdiction to hear this point of error. *See id*; *Hanson*, 11 S.W.3d at 288. Accordingly, we dismiss the appeal in Cause No. 14-98-01393-CR.

Having overruled each of appellant's points of error in Cause No. 14-98-01392, we affirm the trial court's judgment and dismiss Cause No. 14-98-01393-CR.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 7, 2001.

Panel consists of Justices Cannon, Lee, and Amidei.[*]

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

[*] Senior Justices Bill Cannon, Norman R. Lee, and Former Justice Maurice Amidei sitting by assignment.