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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

**ORLANDO BELL, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

Appeal from Burleson County

* * * * *

# STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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## NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Orlando Bell.

*The case was tried before the Honorable J.D. Langley, Presiding Judge, 21st District Court, Burleson County, Texas.

*Counsel for Appellant in the trial court was Elizabeth Zweiner, 218 North Main Street, Bryan, Texas 77803.

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No._____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ORLANDO BELL, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

**STATE'S PETITION FOR DISCRETIONARY REVIEW**

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

An error in the part of a charge that authorizes a greater punishment is still a charge error. This Court has a standard of review for that.

## STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

## STATEMENT OF THE CASE

Appellant was convicted of failure to register and sentenced as a habitual offender pursuant to TEX. PENAL CODE § 12.42(d). He did not challenge his sentence on appeal. The court of appeals reversed appellant's punishment, calling it an illegal sentence because the "habitual" jury instruction left out a sequencing detail.

## STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed in an unpublished opinion.[1] It issued a second unpublished opinion when it denied the State's motion for rehearing on November 19, 2019.[2] The State's petition is due on December 19, 2019.

## GROUNDS FOR REVIEW

1. **Should error in the punishment enhancement charge be reviewed as charge error rather than as an "illegal sentence"?**

2. **What standard of harm applies to charge errors that authorize a greater punishment?**

## ARGUMENT AND AUTHORITIES

I. What the court of appeals did.

The court of appeals reversed because the trial court's charge on habitual punishment failed to tell the jury that the second final felony conviction must have been committed after the first final felony conviction became final.[3] In its view, this meant "the State failed to meet its burden of proof concerning whether the offense was properly double-enhanced."[4] The court purported to review this error as both a

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[1] *Bell v. State*, No. 07-18-00173-CR, 2018 WL 2223364 (Tex. App.—Amarillo May 15, 2018) (not designated for publication).

[2] *Bell v. State*, No. 07-18-00173-CR, 2019 WL 6205460 (Tex. App.—Amarillo Nov. 19, 2019) (not designated for publication). It did not purport to withdraw its original opinion, and the opinion on rehearing does not repeat the court's analysis of the only issue appellant raised.

[3] Orig. slip op. at 3 n.4; Reh'g slip op. at 3 n.3; 1 CR 130. The charge is appended.

[4] Orig. slip op. at 3. *See also* Reh'g slip op. at 4 (casting it as a "failure to prove the chronological sequence") (quoting *Jordan v. State*, 256 S.W.3d 286, 292 (Tex. Crim. App. 2008)).

"void" illegal sentence and as "unassigned error."[5]

In response to this new argument, the State argued that *Niles v. State*[6] controls this case. In *Niles*, this Court held that the omission of an element of the offense from a charge is a charge-error case subject to a harm analysis, not an illegal-sentence case.[7] The court of appeals said *Niles* is "clearly distinguishable" on two bases:

- "Here, we are not dealing with an omitted element of the offense. Instead, we are dealing with the omission of a fact finding essential to the determination of the applicable range of punishment."[8]

- "Where the State has failed to request a finding essential to its claimed range of punishment, it waives any right to claim that punishment should be assessed within that range."[9]

The court of appeals alternatively held that, if a harm analysis is warranted, this kind of error is always harmful.[10]

II. The court of appeals missed the point.

Both of the court's distinctions were squarely rejected in *Niles*. This Court recognized that there is no practical difference between elements of an offense that

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[5] Orig. slip op. at 11. Its argument for trial preservation was an objection to a misstatement of law during closing arguments, which does not preserve charge error. Orig. slip op. at 11 n.12.

[6] *Niles v. State*, 555 S.W.3d 562 (Tex. Crim. App. 2018), reh'g denied (Sept. 12, 2018).

[7] *Id*. at 572-73.

[8] Reh'g slip op. at 4.

[9] Reh'g slip op. at 4.

[10] Reh'g slip op. at 4.

authorize greater punishment and sentencing factors that authorize greater punishment—both must be found by a jury beyond a reasonable doubt.[11] It also rejected Niles's multifaceted procedural default argument, which included the State's lack of objection at trial.[12]

The court's alternative argument that appellant was harmed because his punishment was greater than authorized by the erroneous charge[13] misses the point of a harm analysis. We know what the jury did with the errant charge. The question is what the jury would have done with a correct one.[14]

III. What is the proper standard for harm?

The court of appeals was wrong to address the error as an illegal sentence, but "unassigned error" includes review of unobjected-to charge errors that resulted in egregious harm.[15] Egregious harm is much harder to show than harm under the

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[11] *Niles*, 555 S.W.3d at 570 (discussing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

[12] *Id*. at 568-69.

[13] Reh'g slip op. at 4.

[14] *See Neder v. United States*, 527 U.S. 1, 17 (1999) ("where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."). *But see Niles*, 555 S.W.3d at 572 (framing inquiry as whether "the missing element was logically encompassed by the guilty verdict and . . . not in fact contested").

[15] *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006). *See also Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006) ("Thus, when jury-charge error is not raised at trial, an appellate court may review that asserted (or, as in this case, unassigned) error, but a much greater degree of harm is required for reversal when the error is not properly preserved.").

standards set out in *Neder* or *Niles*. This Court applies the egregious harm standard to unobjected-to claims of constitutional charge error.[16] It should do so with "*Niles*" error, as the court of appeals did on remand in *Niles*.[17]

IV. Appellant was not harmed.

Contrary to the court of appeals's persistent characterization of the situation as a failure of proof, no one claims the evidence was actually insufficient to prove habitualization. Appellant was adjudicated and sentenced on the first felony (Trial Cause No. 10,560) in 1994 and filed no notice of appeal.[18] In 1997, he pleaded guilty to a felony drug charge (Trial Cause No. 11,724) committed *that year*.[19] The State highlighted this sequence and properly stated the law in its closing argument:

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[16] *Olivas*, 202 S.W.3d at 145 ("Rule [of Appellate Procedure] 44.2(a) does not apply to jury-charge error. The appropriate standard for all errors in the jury-charge, statutory or constitutional, is that set out in *Almanza* [*v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (reh'g)]."). *But see Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000) ("That statutory standard of review does not apply to some kinds of charge errors that were objected to. If the error was a violation of the federal constitution that did not amount to a structural defect, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

[17] *Niles v. State*, No. 14-15-00498-CR, 2019 WL 3121781, at *1-2 (Tex. App.—Houston [14th Dist.] July 16, 2019, mot. for reconsideration *en banc* filed 7/29/19).

[18] State's Ex. 13; 1 CR 45, 50. The jury charge says "1991," which was the date of commission. Defense counsel pointed this out in closing, 4 RR 71-72, which prompted the exchange the court of appeals claims preserved their unassigned error. Regardless, the erroneous date is also harmless.

[19] State's Ex. 14; 1 CR 61-64. Had this claim been raised in a writ, appellant's sentence would be upheld because of an additional conviction that could have been used with either of the prior offenses. *Ex parte Parrott*, 396 S.W.3d 531, 536 (Tex. Crim. App. 2013) (providing a harm analysis for "illegal sentence" claims and finding no harm when another conviction could support the punishment range); 1 CR 58-60 (sexual assault committed in 2002, sentenced to five years in 2006; trial offense was committed in 2014).

> Our law says that a person commits a felony offense, goes to prison for that offense, gets out, commits a new felony offense, goes to prison for that offense, gets out and commits another, the minimum is 25 years. That's the law. And that's what the State is asking you to do.[20]
> . . .
> We're going to ask you to follow the law. Find that he's one and the same individual who's been to prison twice consecutively and after those two pen trips committed this offense.[21]

Under an *Almanza* analysis for unobjected-to charge error, a review of the record as a whole and arguments of counsel shows appellant suffered no egregious harm from the failure to instruct the jury that the second felony must have been committed after the first felony conviction became final.

## V. Conclusion

Appellant did not raise a sentence claim in any form at trial or on appeal. This is presumably because there was no doubt he was a habitual offender. It is definitely why reversal of his punishment as a "void sentence" would be a windfall. Under the proper standard, appellant was not harmed by the charge error.

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[20] 4 RR 73.

[21] 4 RR 74.

## PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review, reverse the decision of the court of appeals on both grounds, and affirm appellant's conviction and sentence.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool the applicable portion of this document contains 1,368 words.

/s/ John R. Messinger
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## CERTIFICATE OF SERVICE

The undersigned certifies that on this December 3, 2019, the State's Petition for Discretionary Review was served electronically on the parties below:

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# APPENDIX

# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-18-00173-CR

ORLANDO BELL, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 21st District Court
Burleson County, Texas
Trial Court No. 14,753; Honorable J. D. Langley, Presiding

July 24, 2019

## MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Following a plea of not guilty, Appellant, Orlando Bell, was convicted by a jury of failure to comply with the sex offender registration requirements of chapter 62 of the Texas Code of Criminal Procedure.[1] Because Appellant was required to register as a sex

[1] TEX. CODE CRIM. PROC. ANN. art. 62.102(a) (West 2018). A person commits the offense of failure to comply with sex offender registration requirements if the person is required to register and fails to comply with any requirement of chapter 62 of the Texas Code of Criminal Procedure.

offender based upon his prior conviction for the offense of sexual assault pursuant to section 22.011 of the Texas Penal Code,[2] his "duty to register expires under article 62.101(a) [of the Texas Code of Criminal Procedure]." *See* TEX. CODE CRIM. PROC. ANN. art. 62.101(a)(1) (West 2018). *See also* art. 62.001(6)(A) (defining an offense under section 22.011 of the Texas Penal Code as a "sexually violent offense"). As such, because he was required to verify his registration once each year under article 62.058 of the Texas Code of Criminal Procedure, the offense in question was a third degree felony. *Id*. at art. 62.102(b)(2).

The State attempted to enhance the applicable range of punishment by alleging two prior felony convictions.[3] A proper double-enhanced felony conviction requires the State to prove beyond a reasonable doubt that the second previous felony conviction was both final and "for an offense that occurred subsequent to the first previous felony conviction having become final." *See* TEX. PENAL CODE ANN. § 12.42(d) (West 2018). *See also Ex parte Pue,* 552 S.W.3d 226, 230-31 (Tex. Crim. App. 2018); *Jordan v. State*, 256 S.W.3d 286, 291 (Tex. Crim. App. 2008) (finding that "when the State seeks to enhance a defendant's sentence for the primary offense by alleging that a defendant has a prior conviction, and the defendant enters a plea of not true, *the factfinder must decide*

[2] TEX. PENAL CODE ANN. § 22.011(a) (West 2019).

[3] The indictment failed to properly allege a double-enhanced felony because it alleged two prior felony convictions that occurred on the same day. *See Myhand v. State*, No. 03-09-00488-CR, 2010 Tex. App. LEXIS 6358, at *4 (Tex. App.—Austin Aug. 4, 2010, pet. ref'd) (mem. op., not designated for publication). The State attempted to remedy this problem by subsequently filing *State's Notice of Intent to Use Prior Convictions for Enhancement of Punishment* alleging the two prior felony convictions offered into evidence during the punishment phase of trial.

*whether the State has sustained its burden* by entering a finding that the enhancement allegation is true or not true"). (Emphasis added).

In the underlying case, the court's charge failed to require a jury finding that the second prior felony conviction was both final and for an offense that occurred subsequent to the first prior felony conviction having become final.[4] As such, the State failed to meet its burden of proof concerning whether the offense was properly double-enhanced. Based on this erroneous punishment charge, the jury assessed Appellant's sentence at fifty years confinement. Accordingly, because the offense was not a properly double-enhanced third degree felony, the punishment assessed exceeded the maximum punishment allowed by law.[5] *See* § 12.42(a).

By a sole issue, Appellant challenges the sufficiency of the evidence to support his conviction and judgment.[6] Although he does not raise an issue addressing the illegal sentence, a void sentence cannot be waived; *Scott v. State*, 988 S.W.2d 947, 948 (Tex. App.—Houston [1st Dist.] 1999, no pet.), and must be reversed even if it is not raised as error on appeal. *Barton v. State*, 962 S.W.2d 132, 139 (Tex. App.—Beaumont 1997, pet.

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[4] The State did obtain a jury finding that (1) prior to the commission of the primary offense, Appellant had been finally convicted of the felony offense of delivery of a controlled substance and (2) after *the commission* of the offense of delivery of a controlled substance, Appellant had been finally convicted of the felony offense of engaging in organized criminal activity. What the State did not obtain was a jury finding that the second previous felony conviction (engaging in organized criminal activity) was for an offense that occurred subsequent to the first previous felony conviction (delivery of a controlled substance) having become *final*.

[5] An offense "punished as" a higher offense raises the level of punishment, not the degree of the offense. *Oliva v. State,* 548 S.W.3d 518, 526-27 (Tex. Crim. App. 2018).

[6] Originally appealed to the Tenth Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Tenth Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

ref'd). We affirm Appellant's conviction; however, we reverse the judgment and remand the cause to the trial court for a new hearing on punishment.

**BACKGROUND**

In 2006, pursuant to a plea agreement, Appellant was convicted of sexual assault and sentenced to five years confinement. Upon his release from prison in August 2011, he submitted his sex offender registration as required by chapter 62 of the Texas Code of Criminal Procedure. At the time, he moved in with his sister who lived in a family-owned house in Caldwell, Texas. Three years later, pursuant to a sex offender compliance check, an investigator with the Texas Department of Public Safety, Robert Neuendorff, attempted to locate Appellant at his registered address in Caldwell on October 29, 2014.[7] When he arrived, he observed that the structure at that address had burned down and was uninhabitable. Based on the condition of the house, Neuendorff began surveillance to determine where Appellant was residing.

On that same day, Neuendorff saw three vehicles on the Caldwell property. One of the vehicles, an SUV, was covered by a tarp. Neuendorff peeked through a hole in the tarp and did not see any signs that a person was living in the SUV. He canvassed the neighborhood and spoke with a distant cousin of Appellant's who would come by daily to care for an elderly relative who was Appellant's neighbor. She told Neuendorff that she saw Appellant "come and go once [sic] a while, but he didn't live there" after the house burned down. Neuendorff did not see Appellant at the registered address on that day.

[7] Neuendorff testified that Appellant was selected for a compliance check because he had not updated his driver's license to reflect that he was a registered sex offender upon being released from prison.

On November 4, 2014, Neuendorff again went to the Caldwell address and did see Appellant tending to his animals. He did not, however, alert Appellant to his presence. He noticed that Appellant was in a different vehicle than those that were usually parked on the property. When Appellant left, Neuendorff followed him to an address outside the city limits in Tunis, Texas. Neuendorff made another visit to the Caldwell address on November 19th and did not see Appellant there. This time he did encounter a gentleman in the neighborhood and inquired about Appellant. The gentleman was Appellant's cousin and neighbor. He told Neuendorff that after the fire, Appellant came by the Caldwell address "off and on, but he don't live with us." The gentleman believed Appellant was living with his girlfriend. He mentioned that Appellant was at the Caldwell address daily to feed his dogs and tend to other animals and would sometimes sleep in his vehicle, on the premises, at night.

Based on his investigation, Neuendorff began surveillance of the Tunis address and Appellant became suspicious that someone was following him. On November 22, 2014, Neuendorff made a final visit to the Caldwell address but did not see Appellant there on that day. Two days later, Neuendorff concluded that Appellant was not in compliance with his sex offender registration requirements for failing to timely inform his primary registration authority of a change of address. Appellant was arrested on November 25th and Neuendorff conducted a custodial interrogation.

During the interrogation, Appellant claimed the Caldwell address was still his residence. Despite the structure having burned down, he claimed he was living in one of the vehicles located on his property and that he visited his girlfriend's Tunis address for meals and for personal hygiene reasons. He admitted the vehicle he had been driving

belonged to his girlfriend and that he sometimes visited the Tunis address. But he claimed he regularly slept in one of his vehicles at the Caldwell address between 3:00 a.m. and 7:00 a.m. because his girlfriend's grandmother did not want him staying at the Tunis address.[8]

Following a jury trial, Appellant was convicted and sentenced to fifty years confinement. By a sole issue, he challenges the sufficiency of the evidence to support his judgment and conviction.

**STANDARD OF REVIEW—SUFFICIENCY OF THE EVIDENCE**

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). We consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017).

We give deference to the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). Each

[8] Neuendorff testified he did not conduct surveillance of the Caldwell address during those early morning hours.

fact need not point directly and independently to the appellant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id.*

We compare the elements of the offense as defined by a hypothetically correct jury charge to the evidence adduced at trial. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). In our review, we must evaluate all of the evidence in the record, both direct and circumstantial and whether properly or improperly admitted. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). When the record supports conflicting inferences, we presume the fact finder resolved the conflicts in favor of the prosecution and defer to that determination. *Jackson*, 443 U.S. at 326.

**APPLICABLE LAW**

A person who has a "reportable conviction" is required to register with the local law enforcement authority in any municipality or county where that person resides or intends to reside for more than seven days. TEX. CODE CRIM. PROC. ANN. art. 62.051(a) (West 2018). One of the required items on the registration form is the address at which the person resides or intends to reside or, if the person does not reside or intend to reside at a physical address, a detailed description of each geographical location at which the person resides or intends to reside. *Id.* at art. 62.051(c). A person required to register pursuant to chapter 62 of the Texas Code Criminal Procedure is also required to periodically verify his registration information as a sex offender. *Id.* at art. 62.058(a). In addition, if a person required to register intends to change his address, he must report to the appropriate authority his anticipated move date and new address. *Id.* at 62.055(a).

Furthermore, if a person required to register changes his address, he must report in person to the appropriate authority in the municipality or county in which his new address is located and provide that authority proof of identity and proof of residence. *Id.*

A person commits an offense if he is required to register under chapter 62 and fails to comply with any requirement of that chapter. *Id.* at art. 62.102(a). *See also Rogers v. State*, No. 10-11-00252-CR, 2012 Tex. App. LEXIS 10384, at *3 (Tex. App.—Waco Dec. 13, 2012, pet. ref'd) (mem. op., not designated for publication). The statute is a generalized "umbrella" statute that criminalizes the failure to comply with any of the registration requirements set out in chapter 62. *Robinson v. State*, 466 S.W.3d 166, 170 (Tex. Crim. App. 2015); *Young v. State*, 341 S.W.3d 417, 425 (Tex. Crim. App. 2011).

**ANALYSIS**

Appellant stipulated to his 2006 conviction for sexual assault. As a result of that conviction, Appellant is a person required to comply with the registration requirements of chapter 62. In challenging the sufficiency of the evidence to support his conviction for failure to comply with those registration requirements, Appellant posits that he is "not required to spend every spare moment and every night at their [sic] registered address." Essentially, he asserts that the evidence fails to establish that he did not "reside" at his registered address, notwithstanding the fact that the residence located at that address had burned down.

Nancy Green, an administrative assistant with the Caldwell Police Department who managed sex offender registrations, testified that she began supervising Appellant's annual verifications in 2012. She explained that the annual verification process required

the offender to initial all stipulations on the verification form to indicate he had read and understood them. She testified that Appellant was aware of the requirements of registration.

On April 7, 2014, Appellant verified his registration. He reported his address as the Caldwell location. He initialed the "status change" section which details how to report, among other information, a change of address.[9] He also initialed the "visiting locations" section which provides how to report if a registrant is going to be visiting a location for more than forty-eight consecutive hours.[10]

On October 29, 2014, the alleged date of the offense, the Caldwell location was listed as Appellant's registered address. It was not until November 24, 2014, after Appellant suspected he was being investigated, that he mentioned to Green his intention to move to Tunis. He was arrested the next day.

Statements obtained from Appellant's neighbors and relatives indicated that after the fire, Appellant was not residing at the Caldwell address. One of the witnesses who gave Neuendorff her statement testified at trial that she would arrive at Appellant's neighbor's house every day around eight in the morning and would stay until noon to care

[9] The form tracks article 62.055(a) which provides that a person subject to chapter 62 who intends to change address shall, not later than the seventh day before the intended change, report to the primary registration authority the anticipated move date and new address. TEX. CODE CRIM. PROC. ANN. art. 62.055(a) (West 2018).

[10] The form tracks article 62.059(a) which provides that a person subject to chapter 62 who on at least three occasions during any month spends more than forty-eight consecutive hours away from the registered address shall report that fact. TEX. CODE CRIM. PROC. ANN. art. 62.059(a) (West 2018).

for the elderly neighbor. She testified that she saw Appellant come and go but did not believe he lived at the Caldwell address.

Appellant's sister, who had lived at the Caldwell address with Appellant, but who moved after the fire, testified that Appellant did not move in with her because the Caldwell address was his registered address. Another defense witness, the executive director of the Burleson County Health Resource Center, testified that after Appellant's house burned down, he stayed with his pastor for a few days and was provided some support by the American Red Cross. The director testified that Appellant looked into federal assistance by applying for a housing voucher. However, on cross-examination, he testified the application for a housing voucher was only in Appellant's girlfriend's name.

The jury, as the trier of fact, was the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Thomas*, 444 S.W.3d at 10. Here, the witnesses presented conflicting testimony. The State's witnesses testified that Appellant no longer resided at the Caldwell address after the fire and that he had moved to Tunis to live with his girlfriend without timely reporting a change of address to the proper law enforcement authority. The defense's theory was that Appellant continued to reside at the Caldwell address after the fire, albeit in a vehicle. Ultimately, the jury believed the State's witnesses and resolved any conflict in the testimony against Appellant.

Accordingly, we agree with the State that we need not decide whether sleeping in a vehicle on the registered property can comply as a residence for purposes of the registration requirements because the jury rejected Appellant's claim that property

constituted his "residence." As such, we conclude the evidence is sufficient to support Appellant's conviction. Issue one is overruled.

**PUNISHMENT ERROR**

As we noted in our introductory paragraphs, Appellant was assessed a sentence in excess of the maximum punishment allowed by law. "A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003). An illegal sentence is a void sentence and must be reversed. *Farias v. State*, 426 S.W.3d 198, 200 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citing *Hern v. State*, 892 S.W.2d 894, 896 (Tex. Crim. App. 1994) (finding that a sentence outside the statutory range of punishment for an offense is void and must be reversed)). Within the *Marin*[11] rubric, an accused has an "absolute and non-waivable" right to be sentenced within the proper range of punishment established by the Legislature, the contravention of which can be raised at any time. *Gutierrez v. State*, 380 S.W.3d 167, 175 (Tex. Crim. App. 2012). Also, this court is authorized to review "unassigned error"—a claim that was preserved at trial but was not raised on appeal.[12] *Sanchez v. State*, 209 S.W.3d 117, 120-21 (Tex. Crim. App. 2006). Because the sentence in this case, fifty years confinement, exceeds the maximum punishment allowed by law according to the verdict returned in this case, the sentence is void. Having found the evidence sufficient to support Appellant's conviction, we

[11] *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993). In *Marin,* for the purpose of determining when procedural default rules applied, the Texas Court of Criminal Appeals identified three distinct kinds of error.

[12] During the State's closing argument, when the prosecutor addressed the prior felony convictions, she stated, "[t]hat is not a date that the State has to prove exactly." Defense counsel objected to the comment as a misstatement of law and added, "[t]hey pled it. They have to prove it." In sustaining defense counsel's objection, the trial court announced, "[t]he jury has to follow the charge as given by the Court."

nonetheless reverse his sentence and remand this cause to the trial court for a new punishment hearing.

## CONCLUSION

The trial court's judgment pertaining to Appellant's conviction is affirmed. That portion of the judgment pertaining to punishment is reversed and the cause is remanded to the trial court for a new punishment hearing.

Patrick A. Pirtle
Justice

Do not publish.

# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-18-00173-CR

ORLANDO BELL, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 21st District Court
Burleson County, Texas
Trial Court No. 14,753; Honorable J. D. Langley, Presiding

November 19, 2019

## MEMORANDUM OPINION ON MOTION FOR REHEARING

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Following a plea of not guilty, Appellant, Orlando Bell, was convicted by a jury of failure to comply with the sex offender registration requirements of chapter 62 of the Texas Code of Criminal Procedure.[1] Because Appellant was required to verify his

[1] TEX. CODE CRIM. PROC. ANN. art. 62.102(a) (West 2018).

registration once each year under article 62.058 of the Texas Code of Criminal Procedure, the offense in question was a third degree felony. *Id*. at art. 62.102(b)(2). As such, the offense was punishable by imprisonment for any term of not more than 10 years or less than 2 years. TEX. PENAL CODE ANN. § 12.34 (West 2019). The State attempted to enhance the applicable range of punishment by alleging two prior felony convictions.[2] A double-enhanced felony is punishable by imprisonment for life, or for any term of not more than 99 years or not less than 25 years. *Id.* at § 12.42(d). A proper double-enhanced felony conviction requires the State to prove beyond a reasonable doubt that the second previous felony conviction was both final and "for an offense that occurred subsequent to the first previous felony conviction having become final." *Id*. *See Ex parte Pue*, 552 S.W.3d 226, 230-31 (Tex. Crim. App. 2018); *Jordan v. State*, 256 S.W.3d 286, 291 (Tex. Crim. App. 2008) (finding that "when the State seeks to enhance a defendant's sentence for the primary offense by alleging that a defendant has a prior conviction, and the defendant enters a plea of not true, *the factfinder must decide whether the State has sustained its burden* by entering a finding that the enhancement allegation is true or not true"). (Emphasis added).

In the underlying case, the court's charge failed to require a jury finding that the second prior felony conviction was both final and for an offense that occurred subsequent

[2] The indictment failed to properly allege a double-enhanced felony because it alleged two prior felony convictions that occurred on the same day. *See Myhand v. State*, No. 03-09-00488-CR, 2010 Tex. App. LEXIS 6358, at *4 (Tex. App.—Austin Aug. 4, 2010, pet. ref'd) (mem. op., not designated for publication). The State attempted to remedy this problem by subsequently filing *State's Notice of Intent to Use Prior Convictions for Enhancement of Punishment* alleging the two prior felony convictions offered into evidence during the punishment phase of trial.

to the first prior felony conviction having become final.[3] As such, the State failed to obtain a jury finding as to an essential element of the enhancement allegation. Because the offense was not properly enhanced, the punishment assessed (50 years confinement) exceeded the maximum punishment allowed by law (10 years confinement).

On appeal, this court affirmed Appellant's conviction; however, it reversed the lower court's judgment as to the punishment assessed and remanded the matter for a new punishment hearing. *See Bell v. State,* No. 07-18-00173-CR, 2019 Tex. App. LEXIS 6362 (Tex. App.—Amarillo July 24, 2019, no pet. h.). The State Prosecuting Attorney has now filed a *Motion for Rehearing* alleging this is not a case involving an "illegal" or "void" sentence. Instead, the State asserts this is a case of "charge error" subject to harm analysis. We disagree and deny the State's *Motion for Rehearing.*

**ANALYSIS**

Relying on *Niles v. State*, 555 S.W.3d 562 (Tex. Crim. App. 2018), the State Prosecuting Attorney argues that the failure to obtain a jury finding on an essential element of the offense does not make the sentence imposed illegal or void because such an omission is merely "charge error" subject to a harm analysis. *Niles*, however, is clearly distinguishable from the facts of this case. In *Niles*, the omitted jury finding was an element of the offense itself (whether the victim was a public servant), distinguishing the

[3] The State did obtain a jury finding that (1) prior to the commission of the primary offense, Appellant had been finally convicted of the felony offense of delivery of a controlled substance and (2) after *the commission* of the offense of delivery of a controlled substance, Appellant had been finally convicted of the felony offense of engaging in organized criminal activity. What the State did not obtain was a jury finding that the second previous felony conviction (engaging in organized criminal activity) was for an offense that occurred subsequent to the first previous felony conviction (delivery of a controlled substance) having become *final*.

offense charged (a class A misdemeanor) from the offense supported by the jury's verdict (a class B misdemeanor).

Here, we are not dealing with an omitted element of the offense. Instead, we are dealing with the omission of a fact finding essential to the determination of the applicable range of punishment. Where the State has failed to request a finding essential to its claimed range of punishment, it waives any right to claim that punishment should be assessed within that range.

Furthermore, assuming for the sake of argument that we were to subject the error in this case to a harm analysis, the Court of Criminal Appeals has ruled that "even if the State's failure to prove the chronological sequence of punishment enhancement allegations as required under Section 12.42(d) is subject to a harm analysis, such a deficiency will never be considered harmless." *Jordan v. State*, 256 S.W.3d 286, 292 (Tex. Crim. App. 2008). This is so because an accused will always be harmed by being subjected to a range of punishment where the minimum sentence under the State's scenario is in excess of the maximum potential sentence otherwise subject to imposition.

**CONCLUSION**

The State Prosecuting Attorney's *Motion for Rehearing* is denied.

Patrick A. Pirtle
Justice

Do not publish.

ORIGINAL

NO. 14,753

| | | |
|---|---|---|
| THE STATE OF TEXAS | )( | IN THE 21ST DISTRICT COURT |
| VS. | )( | OF |
| ORLANDO BELL. | )( | BURLESON COUNTY, TEXAS. |

**CHARGE OF THE COURT - PUNISHMENT**

LADIES AND GENTLEMEN OF THE JURY:

By your verdict returned in this case, you have found the defendant guilty of the offense of Failure to Comply with Registration Requirements as alleged in the indictment. In addition the State alleges that the defendant has previously been finally convicted of two felony offenses. It now becomes your duty to determine whether these allegations are true beyond a reasonable doubt.

In paragraph (2) it is alleged that the defendant was convicted on the 9th day of September, A.D. 1991, in Cause No. 10,560 in the 21st Judicial District Court of Burleson County, Texas, for the felony offense of Delivery of a Controlled Substance Listed in Penalty Group 1 – less than 28 grams, which said conviction had become a final conviction prior to the commission of the offense for which you have just found him to be guilty.

In paragraph (3) it is alleged that the defendant was convicted for the felony offense of Engaging in Organized in Criminal Activity on the 5th day of November, A.D. 1997, in Cause No. 11,724, in the 21st Judicial District Court of Burleson County, Texas, and that such conviction became a final conviction prior to the commission of the offense for which you have found him guilty and after the commission of the offense charged in paragraph (2) of this indictment.

You are instructed that if you find beyond a reasonable doubt that this defendant is the same person who was convicted in paragraphs (2) and (3) of this indictment and that such

conviction occurred as alleged, then you will find that the allegations are true and so state in your verdict and you will assess punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 25 years.

But if you do not find from the evidence beyond a reasonable doubt that the allegations in paragraphs (2) and (3) are true and that this defendant is the same person who was convicted in both such cases, you will next proceed to consider the question whether the defendant has been convicted once before of any felony.

Now, therefore, if you find from the evidence beyond a reasonable doubt that the defendant is the same person who was convicted on the 9th day of September, A.D. 1991 in Cause No. 10,560, in the 21st Judicial District Court of Burleson County, Texas for the felony offense of Delivery of a Controlled Substance Listed in Penalty Group 1, less than 28 grams, as alleged in paragraph No. (2) and that the allegations in paragraph (2) are true; or that the defendant is the same person who was convicted on the 5th day of November, A.D. 1997, in Cause No. 11,724 in the 21st Judicial District Court of Burleson County, Texas, for the felony offense of Engaging in Organized Criminal Activity, as alleged in paragraph No. (3) and that the allegations in paragraph (3) are true you will specify the felony conviction and assess his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years. In addition you may assess a fine not to exceed $10,000.00

But, if you do not find from the evidence beyond a reasonable doubt that the defendant has ever been convicted of either felony before, as alleged by the State, you will assess his punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for any

term of not more than 10 years or less than 2 years. In addition you may assess a fine not to exceed $10,000.

**I.**

Under the law applicable to 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. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to imprisonment, because the application of these laws will depend upon decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which parole law may be applied to this particular defendant.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-fourth of the sentence imposed without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.

You are further instructed that in fixing the defendant's punishment, which you will show in your verdict, you may take into consideration all the facts shown by the evidence admitted before you in the full trial of this case and the law as submitted to you in this charge.

**II.**

You may consider evidence of an extraneous crime or bad act in assessing punishment even if the Defendant has not yet been charged with or finally convicted of the crime or act. However, you may consider such evidence only if the extraneous crime or bad act has been proven by the State beyond a reasonable doubt to have been committed by the defendant.

Therefore, if you find and believe beyond a reasonable doubt that the defendant committed an extraneous crime or bad act, then you may consider such evidence in assessing the defendant's punishment. However, if you have a reasonable doubt as to whether the defendant committed an extraneous crime or bad act, then you may not consider such evidence in assessing the defendant's punishment.

**III.**

The defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded to a defendant. And in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

**IV.**

The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

In arriving at the amount of punishment it will not be proper for you to fix the same by lot, chance or any other method than by a full, fair and free exercise of the opinion of the individual jurors. Your verdict must be a unanimous vote of all members of the jury.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given to you, and be governed thereby.

You have been permitted to take notes during the testimony in this case. In the event any of you took notes, you may rely on your notes during your deliberations. However, you may not share your notes with the other jurors and you should not permit the other jurors to share their notes with you. You may, however, discuss the contents of your notes with the other jurors. You shall not use your notes as authority to persuade your fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. Your notes are not official transcripts. They are personal memory aids, just like the notes of the judge and the notes of the lawyers. Notes are valuable as a stimulant to your memory.

On the other hand, you might make an error in observing or you might make a mistake in recording what you have seen or heard. Therefore, you are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial.

Occasionally, during jury deliberations, a dispute arises as to the testimony presented. If this should occur in this case, you shall inform the Court and request that the Court read the portion of disputed testimony to you from the official transcript. You shall not rely on your notes to resolve the dispute because those notes, if any, are not official transcripts. The dispute must be settled by

the official transcript, for it is the official transcript, rather than any juror's notes, upon which you must base your determination of the facts and, ultimately, your verdict in this case.

~~You sole duty at this point is to determine whether the defendant has been proved guilty.~~

~~You must restrict your deliberations to this matter.~~

After you have arrived at your verdict, you are to use one of the forms attached to these instructions. You should have your foreperson sign his or her name to the particular form that conforms to your verdict.

After the closing arguments by the attorneys, you will begin your deliberations to decide your verdict.

After the Court reads this charge, you may not separate from each other, nor may you talk with anyone not of your jury. After argument of counsel, you must retire and select one of your members as foreperson. His or her duty is to preside at your deliberations and to vote with you in arriving at a unanimous verdict. After you have arrived at your verdict, you must have your foreperson indicate the jury's verdict by signing the particular form that conforms to your verdict.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with the Court in writing, signed by your foreperson, through the officer who has you in charge. Do not attempt to talk to the officer, the attorneys, or the Court concerning questions you may have.

FILED 2:32PM
DATE 2-28-2018
Dana Fritsche
DISTRICT CLERK, BURLESON COUNTY
By

Presiding Judge
21st Judicial District Court
Burleson County, Texas.