Dismissed in Part, Affirmed in Part, and Opinion filed March 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00290-CR
NO. 14-99-00291-CR

JOE HECTOR GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause Nos. 735,028 and 781,104

O P I N I O N

Appellant appeals from two convictions, one for engaging in organized criminal activity, the other, delivery of a controlled substance. We dismiss the appeal in part and affirm in part.

I. Background

Appellant was charged with the felony offense of engaging in organized criminal activity, pleaded guilty pursuant to a plea agreement, and was fined $500 and placed on six

years' deferred adjudication probation. The State moved to proceed to adjudication, alleging that appellant had violated the terms and conditions of his probation. Appellant pleaded true to the State's allegations without an agreed recommendation as to punishment. The trial court found the State's allegations to be true, found appellant guilty of the charged offense, revoked appellant's probation, and assessed punishment at fifteen years in prison. Appellant also was charged with the felony offense of delivery of a controlled substance. Appellant pleaded guilty without a plea agreement. The trial court found appellant guilty and assessed punishment at fifteen years in prison. Appellant appeals from both convictions.

II. Discussion

A. Voluntariness of Pleas

In his first two points of error, appellant complains that his plea of "true" was involuntary in violation of the federal and state constitutions. In his third point of error, he complains his plea of "guilty" was involuntary in violation of article 26.13(b) of the Code of Criminal Procedure. We take these complaints to mean that appellant raises the constitutional errors only in connection with the organized criminal activity charge, trial cause No. 735,028 (appellate cause No. 14-99-00290-CR) and the statutory complaint only in connection with the delivery charge, trial cause No. 781,104 (appellate cause No. 14-99-00291-CR).

1. "True" Plea

First, we address points of error one and two, dealing with appellant's "true" plea. A trial court's determination to proceed to adjudication of guilt in connection with deferred adjudication probation is not reviewable by this court on direct appeal. TEX. CODE. CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 2000). Therefore, if a plea of true is part of the trial court's decision to adjudicate guilt, then there can be no appellate review of that issue. In *Hargrave v. State*, the court held that a challenge to the voluntariness of a plea of

true to the allegations in the State's motion to adjudicate guilt is an attempt to appeal the trial court's decision to adjudicate guilt. 10 S.W.3d 355, 360 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (citing *Phynes v. State*, 828 S.W.2d 1, 2 (Tex. Crim. App. 1992) (holding no appeal authorized from trial court's decision to adjudicate guilt, even where claim raised on appeal involves significant constitutional rights)). We must, therefore, dismiss for want of jurisdiction that portion of the appeal dealing with appellant's voluntariness complaint in connection with his "true" plea. We overrule appellant's first two points of error.

2. "Guilty" Plea

In connection with the delivery charge, appellant argues that the trial record does not indicate that the trial court orally admonished appellant regarding the range of punishment. Appellant argues that the list of admonitions had a space for appellant's initials beside each required admonition and that neither appellant nor trial counsel initialed the individual items in the list.

Prior to accepting a guilty plea, the trial court must provide certain statutory warnings. TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (Vernon Supp. 2000). A trial court may provide the required admonitions in writing. Article 26.13(d) (Vernon 1989). If the court admonishes the defendant in writing, the court must receive a statement signed by the defendant and the defendant's attorney that the defendant understands the admonitions and is aware of the consequences of his plea. *Id.* Proper admonition by the trial court creates a prima facie showing that a guilty plea was knowing and voluntary. *Crawford v. State*, 890 S.W.2d 941, 944 (Tex. App.—San Antonio 1994, no pet.). The burden then shifts to the defendant to show that he pleaded guilty without understanding the consequences of this guilty plea and as a result of the plea suffered harm. *Fuentes v. State*, 688 S.W.2d 542, 544 (Tex. Crim. App. 1985). When the record indicates that the defendant at the plea hearing understood the nature of the proceedings and pleaded guilty only because the allegations were true, the defendant has a heavy burden to prove on appeal that his plea was involuntary.

See Crawford, 890 S.W.2d at 944.

Because appellant waived his right to have a court reporter record his plea hearing, we do not have a complete record of the hearing. The record before us does contain a document that includes (1) the admonitions required pursuant to article 26.13(d) and (2) a list of statements and waivers. Among the statements and waivers is an item, with appellant's initials to the side, stating, "I understand the admonishments of the trial court set out herein," in apparent reference to the preceding statutory admonitions. The document containing the admonitions and statements and waivers bears the signatures of both defense counsel and appellant. There is no requirement under Texas law that the accused place his initials beside each item in the list of written admonitions. Because the plea papers and the judgment constitute a prima facie showing that appellant's plea was voluntary, appellant had a heavy burden to show otherwise. He has failed to carry his burden of demonstrating that his open guilty plea was not voluntary. Appellant's third point of error with respect to the delivery charge is overruled.

B. Ineffective Assistance

In his fourth and fifth points of error, appellant complains that his trial counsel provided constitutionally ineffective assistance of counsel in violation of the Fourteenth Amendment and article I, section 10, of the state Constitution. He attacks his representation only in connection with the delivery charge, trial cause No. 781,104.

To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) deficient performance, and (2) prejudice from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. In the context of a guilty plea, the defendant is required to show a reasonable probability that but for defense counsel's errors,

the defendant would not have pleaded guilty but would have insisted on going to trial. *Kober v. State*, 988 S.W.2d 230, 232 (Tex. Crim. App. 1999). We consider the totality of the representation, not isolated acts. *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993). Appellant has the burden of proving by a preponderance of the evidence his claim of ineffective assistance. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

Appellant argues that counsel failed to advise appellant of the punishment range for delivery and of the possibility of deportation. The only evidence appellant cites is the lack of appellant's initials on the written admonition form next to the paragraphs detailing punishment and the possibility of deportation. This evidence does not prove counsel's ineffectiveness. Elsewhere appellant acknowledged in writing that he understood the written admonitions. Appellant has failed to rebut the presumption that the court documents are truthful and has failed to demonstrate that his plea was involuntary due to counsel's deficiencies. We overrule appellant's fourth and fifth points of error.

C. Punishment

In his sixth, seventh, and eighth points of error, appellant complains that the trial court's sentence of fifteen years in prison in connection with the organized criminal activity charge, trial cause No. 735,028, constitutes cruel and unusual punishment in violation of the federal and state constitutions and Code of Criminal Procedure article 1.09.

Where a defendant receives deferred adjudication probation pursuant to a plea agreement, and where that defendant is later adjudicated and sentenced to a term within the statutory punishment range upon a plea of guilty without a plea agreement, a general notice of appeal fails to invest the court of appeals with jurisdiction to review a nonjurisdictional complaint about the punishment TEX. R. APP. P. 25.2(b)(3); *Watson v. State*, 924 S.W.2d 711, 714-15 (Tex. Crim. App. 1994).

The Court of Criminal Appeals in *Watson* determined that when the defendant and the State originally bargained for deferred adjudication probation and the State was silent as to what punishment it would recommend upon a possible subsequent adjudication, a punishment within the statutory range did not violate the plea agreement. *Watson*, 924 S.W.2d at 714. Thus, the notice of appeal was required to comply with appellate rule 40(b)(1), now appellate rule 25.2 (b)(3). *Id.*

Appellant pleaded guilty to engaging in organized criminal activity and was placed on deferred adjudication probation pursuant to a plea agreement. The court subsequently revoked appellant's probation and assessed punishment at fifteen years in prison. After the court proceeded to adjudication, appellant filed a general notice of appeal. Because appellant originally pleaded guilty pursuant to a plea agreement and the complaint about punishment is not a jurisdictional complaint, we have no authority to consider appellant's complaint. We therefore must dismiss for want of jurisdiction that portion of the appeal in connection with his complaints as to punishment.

We note also that even if we were to consider appellant's complaints about punishment, generally a trial court does not violate a defendant's federal or state constitutional rights if the court's sentence falls within the statutory range. *Benjamin v. State*, 874 S.W.2d 132, 135 (Tex. App.—Houston [14th Dist.] 1994, no pet.). Nor would we find fifteen years' imprisonment unconstitutionally severe where appellant's underlying crime was an aggravated assault where he kicked and stomped his victim with a deadly weapon, namely his foot, and hit his victim with a deadly weapon, his hand. *See Stallings v. State*, 476 S.W.2d 679, 681 (Tex. Crim. App. 1972) (holding that fifteen years' confinement for offense of assault with intent to murder not cruel and unusual).

We overrule appellant's sixth, seventh, and eighth points of error.

III. Conclusion

Having overruled all of appellant's points of error, we dismiss the appeal in connection with trial cause No. 735,028, appellate cause No. 14-99-00290-CR, and affirm the judgment in connection with trial cause No. 781,104, appellate cause No. 14-99-00291-CR.

PER CURIAM

Judgment rendered and Opinion filed March 1, 2001.
Panel consists of Justices Anderson, Fowler, and Edelman.
Do Not Publish — TEX. R. APP. P. 47.3(b).