Affirmed and Opinion filed March 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01381-CR

FRANKIE JOE WHITE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 803,381

O P I N I O N

Without entering into a plea bargain, appellant, Frankie Joe White, pled guilty to the offense of aggravated assault. *See* TEX. PEN. CODE ANN. §22.02 (Vernon 1994). After conducting a presentencing investigation, the trial court adjudicated appellant's guilt and assessed punishment at fourteen years in the Institutional Division of TDCJ. Challenging his conviction, appellant now raises four issues for review. For the reasons set forth below, we affirm the trial court's judgment.

Background

In the early morning hours of January 22, 1999, appellant went to the home of his ex-girlfriend, Cindy Springfield. Using a key she had previously given him, he entered her home and proceeded to her bedroom where she was sleeping. After finding her bedroom door locked, appellant knocked and was let in the room by Springfield. The two talked for about twenty minutes when Springfield told appellant that she was going back to sleep. As Springfield began to doze off, she saw appellant standing in the door to her bedroom. A short time later, as Springfield lay in bed suffering from a serious head injury, appellant called 911 for an ambulance. During this call for help, appellant admitted to the operator that he had hit Springfield in the head with a rock that she kept in her room for use as a door stop. Appellant later pled guilty, without entering into a plea agreement, to the offense of aggravated assault. Upon receipt of his guilty plea, the trial court conducted a presentencing investigation. Following a review of the presentencing report, the court then adjudicated appellant's guilt and sentenced him to 14 years imprisonment. Appellant subsequently filed a motion to withdraw his plea of guilty and for a new trial, which the trial court denied. Appellant now brings four issues for review.

Denial of Motion for New Trial

In his first issue, appellant argues that the trial court erred in not granting his Motion to Withdraw Plea and for New Trial. Specifically, appellant asserts that, because his testimony during sentencing was inconsistent with his earlier plea of guilty, the trial court's decision denying his motion was an abuse of discretion.

We review a trial court's denial of a motion for new trial under an abuse of discretion standard, deciding whether the trial court's decision was arbitrary or unreasonable. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). Likewise, the same standard applies to our review of a trial court's denial of a motion to withdraw a guilty plea. A defendant may withdraw his guilty plea as a matter of right any time until judgment has been

pronounced or the case has been taken under advisement. *Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979). Whether to allow withdrawal of a plea pursuant to a motion filed after the judge has taken the case under advisement, though, is within the sound discretion of the trial court. *Id*. Once the trial judge has admonished the defendant, received the plea, and received evidence, the passage of the case for a presentence investigation constitutes "taking the case under advisement." *Id*. Here, appellant sought to withdraw his plea after sentencing; therefore, we will apply an abuse of discretion standard.

Applying these standards to the facts of our case, we conclude that the trial court did not abuse its discretion in denying appellant's Motion to Withdraw Plea and for New Trial. The evidence before the trial court showed that appellant had previously confessed, during both the guilt/innocence and punishment phases, to assaulting Springfield. The evidence to the contrary consisted of appellant's testimony during the punishment phase where he stated that he was unsure as to what happened on the night in question but that he pled guilty "because the evidence showed that I did it." Based on these facts, we find that the trial court's order denying appellant's motion was in no way arbitrary or unreasonable and therefore not an abuse of discretion. Accordingly, we overrule appellant's first issue.

Involuntary Plea

In his second and fourth issues, appellant argues that the trial court abused its discretion by failing to withdraw, *sua sponte*, his guilty plea prior to its adjudication of guilt. In both issues, appellant asserts that his plea was involuntary because his and Springfield's statements in the pre-sentencing investigation report were inconsistent with his plea of guilty as neither was certain if appellant committed the offense. Because we discern no distinction between appellant's argument in either issue, we address both concurrently.

A trial court is not required to *sua sponte* withdraw a guilty plea and enter a plea of not guilty for a defendant when the defendant, having waived a jury, enters a plea of guilty before the court. *Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978). The same

is true even if evidence is adduced that either makes the defendant's innocence evident or reasonably and fairly raises an issue as to guilt. *See id*. Under such circumstances, however, the trial court has discretion to *sua sponte* withdraw the plea. *See id*.

Cognizant of this, appellant attempts to distinguish the present case from *Moon*. In drawing this distinction, appellant reasons that *Moon* dealt with exculpatory evidence raised by the defendant while the present case deals with exculpatory evidence from the complainant. At the outset, we disagree with appellant's characterization of Springfield's testimony as exculpatory. In fact, Springfield's testimony only demonstrated that the last event she recalled on the morning of her assault, prior to regaining consciousness in the emergency room, was seeing appellant standing near her bedroom door as she fell asleep. Such evidence, we feel, cannot be termed "exculpatory" as it does not exonerate appellant but merely fails to identify him as the assailant. Nevertheless, even if we found Springfield's testimony as casting doubt on appellant's guilt, which we do not, we would reach the same result under the holding in *Moon*. Accordingly, we find that the trial court acted within its discretion in failing to *sua sponte* withdraw appellant's plea. Appellant's second and fourth issues are overruled.

Ineffective Assistance of Counsel

In his third issue for review, appellant argues that his plea of guilty was involuntary as his trial counsel rendered him ineffective assistance. In support of this claim, appellant alleges that his trial counsel failed to conduct an investigation into the factual recall of the complainant, and thus failed to learn that she was unaware of who committed the assault, before advising him to plead guilty. Appellant also argues that counsel was ineffective as he failed to inquire into the mental condition of appellant prior to his plea of guilt.

The United States Supreme Court and the Texas Court of Criminal Appeals have promulgated a two-prong procedure to determine whether representation was so inadequate that it violated the defendant's sixth amendment right to counsel. *Strickland v. Washington*,

466 U.S. 668, 687 (1984); *Hernandez v. State*, 726 S.W.2d 53, 54-55 (Tex. Crim. App.1986). Under the first prong, the defendant must show that counsel's performance was deficient to the extent that counsel failed to function as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Under the second prong, the defendant must show that counsel's deficient performance prejudiced the defense. *Id*. To show prejudice, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. Under the *Strickland* test, the defendant bears the burden of proving ineffective assistance. In addition, when reviewing a claim of ineffective assistance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. at 689.

We first turn to appellant's claim alleging that trial counsel's failure to adequately interview the complainant concerning her factual recall of the assault constituted ineffective assistance. Here, the trial record is not developed to the extent that we can determine what the trial counsel may or may not have done. As an appellate court, we may only consider the record evidence and make reasonable inferences from it. Accordingly, we must indulge the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

Appellant's second claim of ineffective assistance of counsel protests trial counsel's failure to inquire into the mental status of appellant at the time of the offense and determine whether an insanity defense was available to him. Again, the record is not sufficiently developed to inquire into trial counsel's effectiveness in this matter. Indulging the presumption that counsel's conduct falls within the wide range of reasonable professional assistance, we overrule appellant's ineffective assistance issues and affirm the judgment of

the trial court.[1]

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed March 15, 2001.

Panel consists of Senior Chief Justice Murphy and Justices Hudson and Amidei.[2]

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

[1] Because our holding on this issue results from an inadequate record, however, appellant may raise this claim again in an application for habeas corpus. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon Supp. 2000); *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998).

[2] Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.