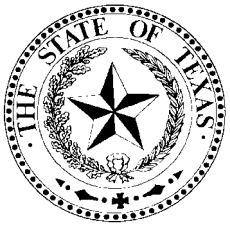
Affirmed and Opinion filed April 13, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01373-CR

DAVID RAY VALENTA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Burleson County, Texas
Trial Court Cause No. 11,809

O P I N I O N

Indicted for the offense of aggravated assault, appellant, David Ray Valenta, entered a plea of not guilty; he later changed his plea to guilty. Before the sentencing hearing, appellant substituted counsel, and on the day before the sentencing hearing, he moved to withdraw his guilty plea. The sentencing judge denied the motion and pursuant to the plea bargain, sentenced appellant to eight years in the Texas Department of Criminal Justice, Institutional Division. Appellant presents two points of error, claiming: (1) the trial court erred in denying appellant's motion to withdraw his guilty plea based on ineffective

assistance of counsel; and (2) the sentencing judge erred in proceeding with sentencing based upon an assumption that another judge had heard sufficient evidence. We overrule both points of error and affirm the judgment of the trial court.

BACKGROUND FACTS[1]

The trial court originally set this case for jury trial on August 10, 1998; however, appellant waived his right to trial by jury and pled guilty to the offense of aggravated assault. At the time appellant entered his guilty plea, he stated that he fully understood what he was doing, that he had been given sufficient time to discuss his plea with his counsel, and that he was satisfied with the way his counsel had represented him. Appellant expressly acknowledged that he was entering his plea of guilty freely and voluntarily. The trial court found appellant guilty and set sentencing for September 29, 1998. The day before the sentencing hearing, appellant moved to withdraw his guilty plea. At sentencing, appellant claimed he had received ineffective assistance of counsel because his attorney failed to investigate whether there was "serious bodily injury" and answer appellant's questions regarding serious bodily injury. Despite his prior acknowledgments, appellant claimed he was forced into his plea of guilty. The sentencing judge refused to allow appellant to withdraw his plea and sentenced appellant in accordance with the plea agreement.

JURISDICTION

Before reaching the merits of this case, we address the State's contention that this court lacks jurisdiction to consider appellant's appeal. Texas Rule of Appellate Procedure 25.2(b)(3) provides:

> [I]f the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere under Code of Criminal Procedure article 1.15, and the

[1] The facts of the underlying offense were not brought into evidence and have no relevance to the appeal. Therefore, we review only the facts surrounding the entry of appellant's guilty plea and subsequent sentencing.

> punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must:
>
> (A) specify that the appeal is for a jurisdictional defect;
>
> (B) specify that the substance of the appeal was raised by written motion and ruled on before trial; or
>
> (C) state that the trial court granted permission to appeal.

TEX. R. APP. P. 25.2(b)(3). Appellant's notice of appeal states that it regards "the denial of this Court of his Pre-Trial Motion requesting that he be allowed to withdraw his plea prior to sentencing." Trial was held August 10, 1998, and appellant did not file the motion until September 28, 1998. The trial court ruled on the motion on September 29, 1998. Clearly, the motion was not filed or ruled on before trial and thus could not form the basis for appeal under Rule 25.2(b)(3)(B). Additionally, appellant's notice of appeal does not comply with any of the other subsections of Rule 25.2(b)(3). Despite appellant's failure to comply with this rule, we nevertheless consider his first point of error because the defendant may always challenge the voluntariness of a plea on appeal. *See Moore v. State*, 4 S.W.3d 269, 272 (Tex. App.—Houston [14th Dist.] 1999, no pet.). However, because no exception to Rule 25.2(b)(3) applies to appellant's second point of error, we cannot consider it. *See Lowe v. State*, 997 S.W.2d 670, 672 (Tex. App.—Dallas 1999, no pet.) (holding only the voluntariness of a defendant's guilty plea could be appealed and not complaints regarding counsel's effectiveness where appellant who pled guilty with an agreed recommendation did not comply with Rule 25.2(b)(3)); *Brunson v. State*, 995 S.W.2d 709, 712 (Tex. App.—San Antonio 1999, no pet.) (holding only jurisdictional defects or the voluntariness of a defendant's guilty plea could be appealed where appellant who pled guilty with an agreed recommendation did not comply with Rule 25.2(b)(3)); *Johnson v. State*, 978 S.W.2d 744, 746 (Tex. App.—Eastland 1998, no pet.) (holding appellant can appeal the voluntariness of his plea but not other non-jurisdictional complaints when he pled guilty pursuant to a plea bargain and did not comply with Rule 25.2(b)(3)). Therefore, we overrule the State's

challenge to this court's jurisdiction with respect to the appeal on the voluntariness of the plea, the first point of error, and sustain the State's challenge to this court's jurisdiction with respect to the appeal of the sufficiency of the evidence, the second point of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first point of error, appellant contends the sentencing court erred in denying his motion to withdraw his guilty plea because it was not made knowingly and voluntarily. To support his argument, appellant claims he received ineffective assistance of counsel because his counsel failed to investigate whether there was "serious bodily injury" and answer appellant's questions regarding serious bodily injury.

Both the federal and state constitutions guarantee the accused the right to have the assistance of counsel. *See* U.S. CONST. Amend. VI; TEX. CONST. ART. I, § 10; TEX. CODE CRIM. PROC. art. 1.05 (Vernon 1977). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). This right extends to the plea bargaining process. *See Ex parte Lafon*, 977 S.W.2d 865, 867 (Tex. App.—Dallas 1998, no pet.) (citing *Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991)).

To prove a plea was involuntary because of ineffective assistance of counsel, appellant must show (1) counsel's representation/advice fell below an objective standard, and (2) this deficient performance prejudiced the accused by causing him to give up his right to a trial. *See Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997), *cert. denied*, 525 U.S. 810 (1998) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Strickland v. Washington*, 466 U.S. 668, 688-92 (1984); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)). Appellant must prove ineffective assistance of counsel by a preponderance of the evidence. *See id*.

In any case analyzing the effective assistance of counsel, we begin with the strong

presumption that counsel was competent. *See Thompson*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id*. The record does not demonstrate that trial counsel failed to investigate "serious bodily injury" or answer appellant's questions regarding "serious bodily injury." Therefore, we cannot find that appellant counsel was ineffective.

Having found that the record does not demonstrate that appellant's counsel's performance was ineffective, there is no evidence appellant's guilty plea was involuntary. Because there is no evidence appellant's guilty plea was involuntary, we cannot find the trial court erred in refusing to allow appellant to withdraw his guilty plea. Therefore, we overrule appellant's first point of error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed April 13, 2000.
Panel consists of Justices Yates, Frost and Draughn.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Joe L. Draughn sitting by assignment.