Affirmed and Opinion filed May 17, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01236-CR

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CALVIN McDANIEL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 814,515

O P I N I O N

Without entering into a plea bargain, Appellant, Calvin McDaniel, pled guilty to the offense of aggravated robbery. *See* TEX. PENAL CODE § 29.03(a). After entering its finding of guilt, the court made a deadly weapon finding and assessed punishment at 30 years confinement in the Institutional Division of TDCJ. Challenging the court's judgment, appellant raises two issues for review. We affirm.

Background

On May 25, 1999, complainant Syrisse Rowe pulled into her assigned parking space at

the Leawood Condominiums. At that moment, she noticed appellant walking along the sidewalk in front of her car. He was carrying a white cloth over his hands. Unconcerned, Rowe approached the front door of her unit and began unlocking it. Appellant then grabbed Rowe, placed a thirteen inch knife to her neck, and ordered her to open the door. Rowe responded by throwing her keys in the opposite direction and placing her hand on the knife to prevent any laceration of her throat. After a struggle, appellant took Rowe's purse and fled the scene. Following his arrest, Appellant entered a plea of guilty and filed a motion for community supervision. Upon review of appellant's pre-sentence investigation, the court denied appellant's motion for community supervision and assessed punishment at thirty years confinement.

Involuntary Plea

In his first issue for review, appellant argues that his plea was involuntary due to ineffective assistance of counsel under both the Sixth Amendment to the U.S. Constitution and Article 1 Section 10 of the Texas Constitution. Specifically, appellant contends that trial counsel induced him to enter a plea of guilty by representing that the court would grant his motion for community supervision. Because Texas courts review the adequacy of representation during the guilt-innocence stage of a trial under the same standard, whether based on state or federal law, we address appellant's federal and state claims concurrently. *See Vasquez v. State*, 830 S.W.2d 948, 949 (Tex. Crim. App. 1992).

To reverse a conviction based on ineffective assistance of counsel, the appellate court must find: (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). This standard applies to challenges to guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To satisfy the second prong of the test enunciated in *Strickland*, appellant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty, but would instead have insisted on going to trial. *Id*.

An involuntary guilty plea must be set aside. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975). To determine if a plea is voluntary, we consider the record as a whole. *Williams*, 522 S.W.2d at 485. If counsel conveys erroneous information to a defendant, a plea of guilty based on that misinformation is involuntary. *Ex parte Griffin*, 679 S.W.2d 15, 17 (Tex. Crim. App. 1984). However, 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." *Jackson v. State*, 877 S.W.2d 769, 771 (Tex. Crim. App. 1994).

After review of the record, we find that appellant cannot overcome the presumption that trial counsel rendered reasonable professional assistance. *Id*. Appellant did not file a motion for new trial, and the record is otherwise silent concerning counsel's alleged promise of community supervision. Therefore, we must indulge the strong presumption that trial counsel rendered appellant reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). Accordingly, we overrule appellant's first issue for review.[1]

Cruel and Unusual Punishment

In his second issue for review, appellant argues that his sentence constitutes cruel and unusual punishment in violation of the U.S. and Texas Constitutions. Specifically, appellant contends that his sentence of 30 years and a $500 fine are grossly disproportionate to the crime and inappropriate to the offender.

During his sentencing hearing, appellant raised no objection to the imposition of the sentence. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, specifically stating the grounds for the ruling desired, and obtain a ruling. Tex.R.App.P. 33.1(a). Virtually all constitutional and statutory rights may be waived by failing to object. *See Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986); *Borgen*

[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).

v. State, 672 S.W.2d 456, 460 (Tex. Crim. App. 1984); *Boulware v. State*, 542 S.W.2d 677, 682 (Tex. Crim. App. 1976). A number of courts have found waiver with regard to claims that the punishment assessed by the trial court was grossly disproportionate to the offenses committed and thus constituted cruel and unusual punishment. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Smith v. State*, 10 S.W.3d 48, 49 (Tex. App.—Texarkana 1999, no pet.); *Jackson v. State*, 989 S.W.2d 842, 845-46 (Tex. App.—Texarkana 1999, no pet.); *Keith v. State*, 975 S.W.2d 433, 433-34 (Tex. App.—Beaumont 1998, no pet.); *Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.—Houston[1st Dist] 1997, pet. ref'd); *Rodriguez v. State*, 917 S.W.2d 90, 92 (Tex. App.—Amarillo 1996, pet. ref'd). Appellant has failed to preserve his alleged error for appeal. Accordingly, we overrule appellant's second issue for review and affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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