Affirmed and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00466-CR
NO. 14-00-00467-CR

KEITH O. GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th Judicial District
Harris County, Texas
Trial Court Cause Nos. 804,199 & 804,200

O P I N I O N

Claiming his guilty pleas were involuntary, appellant, Keith O. Green, challenges his convictions for aggravated sexual assault of a child. We affirm.

I. FACTUAL BACKGROUND

This is a consolidated case. Appellant was charged by indictment with two felony offenses of aggravated sexual assault of a child. Appellant waived his right to jury trial and entered a plea of guilt in both cases, without an agreed recommendation.

Appellant was convicted of two of the charged offenses and sentenced to two thirty-

year terms of confinement, to run concurrently, in the Institutional Division of the Texas Department of Criminal Justice. In one point of error, appellant complains that his guilty plea was involuntary.

II. ANALYSIS

To support his claim of involuntariness, appellant claims the trial court misled both appellant and his trial counsel to believe that appellant should elect a bench trial over a jury trial. Specifically, appellant complains that the trial judge, *off the record*, "promised the [a]ppellant's attorney that she would seriously consider deferred adjudication in this case;" and that if appellant did not receive deferred adjudication, he would receive a sentence on the lower side of punishment. Appellant further claims he and his trial attorney were led to believe that deferred adjudication or a low-end sentence "*would* be given to the [a]ppellant." Appellant claims that the discussion off the record and the "continuous references to deferred adjudication" precluded him from making a knowing and voluntary waiver of his right to jury trial.

The Texas Code of Criminal Procedure provides that prior to accepting a plea of guilty or no contest, the trial court shall admonish the defendant as to the range of punishment, as well as to other consequences of his plea. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 2001). The "range of punishment" for purposes of article 26.13 does not include probation, and there is no mandatory duty for the trial court to admonish a defendant as to his eligibility for probation. *Tabora v. State*, 14 S.W.3d 332, 334 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing *Harrison v. State*, 688 S.W.2d 497, 499 (Tex. Crim. App. 1985)). However, if the trial court volunteers an admonishment as to the availability of probation, the court imposes a duty upon itself to accurately admonish the defendant. *Id.* (citing *Ex Parte Williams*, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986)).

A plea is involuntarily induced if it is shown that: (1) the trial court volunteered an admonishment that included information on the availability of probation, thereby creating an affirmative duty on the part of the trial judge to provide accurate information on the

availability of probation; (2) the trial court *provided inaccurate information* on the availability of probation, thereby leaving the defendant unaware of the consequences of his plea; and (3) the defendant was misled or harmed by the inaccurate admonishment. *Id.* (citing *Williams*, 704 S.W.2d at 776–77).

Appellant does not claim that the trial court's admonishments were incorrect; rather, his complaint is that he was promised or led to believe he would *certainly* receive probation. Our examination of the record fails to show where the trial court promised or suggested appellant would be placed on deferred adjudication. To the contrary, the record affirmatively demonstrates that the trial court informed appellant it would not make any promises regarding punishment. The trial court stated it would "keep an open mind to the full range of punishment" but that "[t]here'd be no promise at all on anything" regarding probable punishment. The trial court informed appellant it would base its decision on the pre-sentence investigation ("PSI") report and any testimony at the PSI hearing and that it did not "know anything about these cases."

Before accepting appellant's waiver of jury trial, appellant and his attorney engaged in the following discussion for the record:

> COUNSEL: And I've talked to you about what we're seeing here and you need to be clear that under the nature of the offense that this Judge, if we tried the case to her . . . would not be able to consider a probation, she could consider the rest of the things that's applicable but she couldn't give you probation if we tried the case to her.
>
> APPELLANT: Yes, sir.
>
> COUNSEL: However, if we plead Monday without a recommendation, *the whole range of her power to do whatever she feels is right based on the presentence investigation*, whatever witnesses, you may have letters, etc., she will consider the full range including deferred probation. *Nobody's promising you that but it is open* to her if we plead without a recommendation after the presentence report. You understand?

APPELLANT: Yes.

COUNSEL: You have any question of me or the judge while we're here before she accepts *that waiver that she . . . has gone over with you*?

APPELLANT: No, sir.

In the exchange that followed, the trial court, before accepting appellant's waiver, confirmed appellant's understanding of the options and gave him a final opportunity to rescind his waiver:

COURT: Is it still you request to waive your right to trial by jury?

APPELLANT: Yes, ma'am.

COURT: So at this point then I'm going to accept your waiver of trial by jury, I am finding it was given freely and voluntarily. It's my opinion just based on your appearance here and how you're handling yourself that you are understanding the options at this point to you and either a court trial where the penalty range could be anywhere from five years to 99 years or life if there were a finding of guilt but probation or deferred adjudication is not an option, or you still have the option on pleading to a presentence investigation that would be based on your plea and then at that point on the sentence the penalty range would be five years to 99 years or life and there would be an option to give deferred adjudication, a type of probation on a sentence from five years to ten years. Do you understand that?

APPELLANT: Yes, ma'am.
COURT: Do you have any questions of me?

APPELLANT: No, ma'am.

COURT: Okay, I'm accepting this waiver of trial by jury.

At appellant's plea hearing, less than a week later, the trial court queried appellant about the Judicial Confession and Admonishments he had signed, and again explained the sentencing implications of appellant's plea, stating:

> COURT: [I]s this your signature here on the first page, it's entitled Waiver of Constitutional Rights, Agreement to Stipulation and Judicial Confession. Is that your signature here?
>
> COUNSEL: Yes, ma'am.
>
> COURT: Did you sign that freely and voluntarily?
>
> APPELLANT: Yes, ma'am.
>
> COURT: Behind that are a number of pages that are entitled Plea Admonishments. Did your attorney go through each one of these with you?
>
> APPELLANT: Yes, ma'am.
>
> COURT: Did you understand each one of these before you initialed and signed this page entitled Plea Admonishments?
>
> APPELLANT: Yes, ma'am.
>
> COURT: Did you understand it all before you did the initialing and signing of that?
>
> APPELLANT: Yes.
>
> COURT: One of the things is the penalty range in this case. The penalty range is anywhere from five years to 99 years or life and a fine not to exceed $10,000, and you have apparently signed here – you have filed a sworn Motion for Community Supervision so in your case the penalty range for aggravated sexual assault would range anywhere from five years to 99 years or life and a fine not to exceed $10,000, and also you qualify for deferred adjudication, anywhere from five years up to

10 years deferred adjudication. Is that your understanding of the penalty range?

APPELLANT: Yes, ma'am.

COURT: Okay. You understand what deferred adjudication is?
APPELLANT: Yes, ma'am.

COURT: It's the type of probation if you live it out the case is dismissed or if you violate the terms of that deferred adjudication, you can't have a jury trial on the alleged violation, you can only have hearing from the Court. If I find 51 percent preponderance of the evidence that you did violate the terms and conditions of deferred adjudication you'd be looking for the same penalty range from five years to 99 years or life.

APPELLANT: Yes, ma'am.

Next, after discussing the PSI process, the trial court again discussed the penalty range applicable to appellant if he pled guilty:

COURT: I will read that [PSI] report and listen to any extra testimony and I will sentence you based on that information. You understand that?

APPELLANT: Yes, ma'am.

COURT: *So you could get as little as five years deferred adjudication. There'd be no promise at all of anything like that. You could get as much as life. There'd be no promise at all on anything. You understand that?*
APPELLANT: Yes, ma'am.

COURT: And I told you and I think I spoke with you on Friday or your attorney Friday as well saying I don't know anything about these cases, you understand that?

COUNSEL: Yes, ma'am.

COURT: *So I keep an open mind to the full range of punishment, okay?* You understand all of that?

APPELLANT: Yes, ma'am.

COURT: *You understand there are no promises at all; is that correct?*

APPELLANT: Yes, ma'am.

Finally, the court asked defense counsel about his understanding of whether his client understood the admonishments and consequences of his plea:

COURT: Mr. Pink, did you go over all this paperwork with your client?

COUNSEL: *I went over each and every one of them, ma'am.*

COURT: Is it your feeling that he's competent to stand trial, that he does understand these admonishments and the consequences of his plea?

COUNSEL: I'm very confident in that matter, ma'am.

COURT: I'm making a finding that you are competent to stand trial that you do understand all of these admonishments[.]

Based on this overwhelming record support, we find that appellant's guilty plea was voluntary and informed. Moreover, to the extent appellant alleges that the trial court made promises off the record, regarding sentencing on the "low end" if it did not give probation, we may not consider appellant's assertions on appeal without evidence to support them. *See Janecka v. State*, 937 S.W.2d 456, 476 (Tex. Crim. App. 1996) ("It is a long standing principle that we cannot review contentions which depend upon factual assertions outside of the record.").

Appellant's sole point of error is overruled. The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Edelman, Frost, and Senior Chief Justice Murphy.*

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* Senior Chief Justice Paul C. Murphy sitting by assignment.