Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00318-CR

STEVEN EVANS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 99CR0776

O P I N I O N

Without entering into a plea agreement, Appellant pled guilty to the offense of theft and true to two enhancement paragraphs alleging prior felony convictions for burglary of a habitation and delivery of a controlled substance. TEX. PEN. CODE ANN. § 31.03 (Vernon Supp. 2001). Subsequently, the court assessed punishment at fourteen (14) years confinement in the Institutional Division of TDCJ. Challenging his conviction, appellant now raises two issues for review. We will affirm.

Background

During the afternoon of April 22, 1999, Appellant entered a Palais Royal department store located in Galveston. Robert Hodges, manager of the store, observed appellant grab cosmetics from a display located near an exit. Hodges then observed appellant proceed to a nearby Taco Cabana restaurant. According to Hodges, appellant was carrying merchandise, contained in red boxes. The manager of Taco Cabana, Sandy Jimenez, was seated in a rear office monitoring security cameras at the time appellant entered the restaurant. When Jimenez noticed a Taco Cabana employee give an empty carry-out bag to a man at the counter, she became suspicious and walked to the front.[1] Jimenez waited near the counter until she saw appellant exit the restroom with the carry-out bag containing red boxes. Apparently, appellant stood outside the restroom area and peered through the restaurant entrance. Jimenez approached appellant and asked if she could help. Appellant responded with a "no," and walked back toward the restrooms. After assisting customers at the register, Jimenez noticed appellant leave the restaurant without the bag. She searched the restrooms and found the same bag containing the two red boxes. Suspecting that the merchandise was taken from Palais Royal, Jimenez called Hodges and informed him regarding appellant's movements. Law enforcement was notified. Subsequently, the police brought appellant back to the store where he was identified by Jimenez and Hodges. Appellant changed his plea from "not guilty" to "guilty" during a jury trial. Thereafter, the trial court heard evidence regarding punishment. Following his conviction and sentencing, Appellant filed an original and amended motion for new trial. After conducting hearings, the trial court denied both motions.

Denial of Motions for New Trial

In his first issue for review, appellant contends his guilty plea was involuntary and the trial court erred by denying his motions for new trial. In considering the denial of a

[1] Jimenez testified that, based on past experience, Taco Cabana patrons would request carry-out bags and take them to stores across the street for shoplifting purposes.

motion for new trial, we review the trial court's decision for abuse of discretion. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). We do not substitute our judgment for that of the trial court; rather, we consider whether the trial court's decision was arbitrary or unreasonable. *Id*.

Article 26.13 of the Code of Criminal Procedure provides, in part: "no plea of guilty or nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary." TEX. CODE CRIM. PROC. ANN. Art. 26.13(b) (Vernon 1989). The voluntariness of a guilty plea is determined by the totality of the circumstances. *Griffin v. State*, 703 S.W.2d 193, 196 (Tex. Crim. App. 1986). There is prima facie proof that a guilty plea was knowing and voluntary when the record shows that a defendant was admonished by the trial judge. *Ex parte Williams*, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986). The burden then shifts to the defendant to show he did not understand the consequences of his plea. *Miller v. State*, 879 S.W.2d 336, 338 (Tex. App.—Houston [14th Dist.] 1994, writ ref'd). Once an accused attests that he understands the nature of his plea and that it is voluntary, he has a heavy appellate burden to prove involuntariness. *Edwards v. State*, 921 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Prior to announcing ready for trial, appellant informed the trial court regarding his intent to change his plea to "guilty." In response to the court's subsequent admonishment, appellant repeatedly informed the court that he was acting voluntarily, not as a result of force or coercion, and solely because of his guilt. In the written plea admonishments, waivers, and stipulations, appellant reaffirmed his voluntary actions. Attempting to rebut this prima facie showing of voluntariness, appellant now advances two arguments. First, he contends that his plea was involuntary because counsel misinformed him that video footage depicted his entire body. Specifically, appellant argues that the video only showed the figure of a man and did not clearly depict appellant's head. However, during the motion for new trial hearing, appellant's counsel testified that his advice regarding a guilty plea was only partially based on the videotape. Specifically, counsel testified that the

videotape served to corroborate Jimenez's testimony that appellant reached across the restaurant counter to request the bag in which he was seen carrying the stolen merchandise. Counsel also testified that the video depicts an individual with a white shirt very similar to the one worn by appellant when he was arrested. Moreover, both Hodges and Jimenez identified appellant at the scene.

Second, appellant argues that trial counsel did not object to the State's questioning during voir dire, thus "tainting the jury to the extent that [he] was forced to give up his right to a jury." Appellant contends he "gave up on the jury after voir dire because of all the talk about his priors to the jury." We do not believe defense counsel's failure to object during voir dire, or the alleged misinformation he provided appellant concerning the videotape, prevented appellant from understanding the consequences of his plea. Experience has shown us that most involuntary plea claims result from circumstances that existed outside the record, such as misunderstandings, erroneous information, impaired judgment, and plea bargains that were not followed or were impossible to perform. *Cooper v. State*, No. 1100-99, slip op. at 10-11, 2001 WL 321579, at *3 (Tex. Crim. App. April 4, 2001). Accordingly, because appellant's plea was voluntarily entered, the trial court's orders denying appellant's motions for new trial were not arbitrary or unreasonable. We find no abuse of discretion and overrule appellant's first issue for review.

Ineffective Assistance of Counsel

Appellant, in his second issue for review, asserts that he received ineffective assistance from trial counsel. Specifically, he complains that counsel: 1) failed to spend an adequate amount of time with appellant preparing for trial; 2) failed to file a motion admitting appellant's prior offenses, thus requiring the State to offer proof during the punishment phase; and, 3) misinformed him that video footage depicted his entire body, thus causing him to enter an involuntary plea of guilty.

The standard for testing claims of ineffective assistance of counsel was enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted for Texas constitutional claims in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex.

Crim. App. 1986). Accordingly, appellant must prove by a preponderance of the evidence that (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). To meet this burden, appellant must prove that his attorney's representation fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for his attorney's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *Tong*, 25 S.W.3d at 712. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Tong*, 25 S.W.3d at 712.

Turning to the facts of appellant's case, we find that the first two grounds offered in support of his ineffective assistance claim, i.e., counsel's failure to spend adequate amounts of time with him in preparation for trial and failure to file a motion admitting his prior offenses, are without merit. Assuming that counsel's performance was deficient in this regard, appellant fails to show how such performance undermined confidence in the trial's outcome. Indeed, the only argument set forth by appellant was that, absent counsel's

performance, he would not have pled guilty. Therefore, we find that appellant has failed to satisfy the second prong of *Strickland* in his first two grounds asserting ineffective assistance of counsel. Finally, having previously determined that appellant's plea was voluntary, the last allegation under his ineffective assistance of counsel issue is without merit. 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 July 12, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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