Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00702-CR

WILLIAM GARY WARNECKE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 97-CR-0708

O P I N I O N

Appellant, William Gary Warnecke, was charged by indictment with the offense of sexual assault of a child. Pursuant to a plea agreement with the State, appellant pled *nolo contendere* to the reduced charge of indecency with a child by exposure. The trial court assessed punishment at two years in accordance with the plea agreement. Appellant timely filed this appeal, claiming in two points of error: (1) the trial court erred in not withdrawing his plea *sua sponte* when evidence introduced reasonably and fairly raised an issue of his innocence, and (2) his plea was not entered freely and voluntarily. We affirm the decision of the trial court.

FACTUAL BACKGROUND

Appellant pled *nolo contendere* to intentionally and knowingly penetrating the anus of a child with his penis. Appellant entered this plea pursuant to a plea agreement with the State. During the plea hearing, the trial court asked appellant if anyone had forced him to enter that plea. Appellant responded, "*I'm going to say 'No.' It's all right. I'm just going to say 'No.' I'm sorry*." Defense counsel followed up on this response by asking appellant, "*Are you dissatisfied with a plea bargain of two years to a reduced charge*?" Appellant responded, "*I would rather not answer those questions to be honest. I don't feel I'm guilty. I didn't do it. I'm doing this out of - - -*." Appellant did not finish this statement. The trial court accepted appellant's plea and imposed the agreed sentence.

DUTY OF TRIAL COURT TO *SUA SPONTE* WITHDRAW PLEA

In his first point of error, appellant claims the trial court erred in not withdrawing his plea *sua sponte* when evidence introduced reasonably and fairly raised an issue of appellant's innocence. There are two separate rules of law in effect regarding a judge's duty to withdraw pleas in felony cases. In a jury trial, the trial court must *sua sponte* substitute its own opinion for the decision of a criminal defendant to plead guilty when the defendant's innocence is evident or when evidence introduced reasonably and fairly raises an issue as to the innocence of the accused. *See Holland v. State*, 761 S.W.2d 307, 322 (Tex. Crim. App. 1988). In a bench trial, however, the trial court is not required to *sua sponte* substitute its own opinion for the decision of a criminal defendant to plead guilty, even when the defendant's innocence is evident or when the evidence introduced reasonably and fairly raises an issue as to the innocence of the accused. *See Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978); *Hargrave v. State*, 10 S.W.3d 355, 359 (Tex. App.–Houston [1st Dist.] 1999, pet. filed); *Graves v. State*, 803 S.W.2d 342, 346 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd). The trial court has discretion to *sua sponte* withdraw the plea in a bench trial. *See id*.

Appellant asserts that *Moon* can be distinguished from the case at bar because here, the evidence of his innocence was raised before the adjudication of his guilt and not at the punishment hearing. However, an examination of the rationale behind *Moon* dispels this assertion. In *Moon*, the Court of Criminal Appeals reasoned that the judge is the trier of fact in a bench trial; therefore, only the judge considers the evidence submitted. 572 S.W.2d at 682; *Edwards v. State*, 921 S.W.2d 477, 480 (Tex.

App.—Houston [1st Dist.] 1996, no pet.). Based on the facts, the judge may find the appellant guilty of a lesser offense or not guilty. *See Moon*, 572 S.W.2d at 682; *Edwards*, 921 S.W.2d at 480. Because the judge is the only trier of fact in a bench trial, withdrawing the guilty plea and entering a not guilty plea would serve no valid purpose. *See Edwards*, 921 S.W.2d at 480 (citing *Moon*, 572 S.W.2d at 682). In *Edwards*, evidence of the defendant's innocence was raised before the adjudication of his guilt, and the First Court of Appeals held that the trial court was under no obligation to *sua sponte* withdraw appellant's plea of *nolo contendere*. *Id*. We agree with the *Edwards* court and find that the trial court was not required to *sua sponte* withdraw appellant's *nolo contendere* plea merely because the evidence of innocence was raised before the adjudication of guilt rather than at the punishment hearing. The trial court, however, had discretion to do so.

Having decided that the trial court was not obliged to *sua sponte* withdraw the *nolo contendere* plea, we now consider whether the trial court abused its discretion by failing to do so. When the accused pleads guilty, "the trial court must look to the totality of the circumstances to determine whether there is sufficient evidence to require a withdrawal of the plea." *Valle v. State*, 963 S.W.2d 904, 909 (Tex. App.—Texarkana 1998, pet. ref'd) (citing *Gates v. State*, 543 S.W.2d 360, 361-62 (Tex. Crim. App. 1976); *Hernandez v. State*, 827 S.W.2d 54, 56 (Tex. App.—Houston [1st Dist.] 1992, no pet.)). Although the trial court is not obligated to withdraw the plea in a bench trial, it is required to take into account the evidence that raised the issue of innocence in determining whether there was sufficient evidence to substantiate the plea. *See id*. at 908-09 (citing *Moon*, 572 S.W.2d at 682). In *Valle*, the appellant did not argue that the trial court failed to weigh the evidence appropriately, and the Texarkana Court of Appeals presumed the trial court found sufficient evidence to support the plea. *Id*. Here, appellant does not argue that the trial court failed to weigh the evidence appropriately. Although we could presume the trial court found sufficient evidence to support the plea, in the interest of thoroughness, we nevertheless will consider whether the evidence is sufficient to support the plea.

On a plea of *nolo contendere*, a conviction may be supported by stipulated evidence where the defendant consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses. *See* TEX. CODE CRIM. PROC. ANN. Art. 1.15 (Vernon Supp. 2000). A stipulation as to the testimony the witnesses would have given had they been present at trial is sufficient to support a

conviction in the context of article 1.15 of the Texas Code of Criminal Procedure. *See Stone v. State*, 919 S.W.2d 424, 426 (Tex. Crim. App. 1996).

In *Scott v. State*, 945 S.W.2d 347 (Tex. App.—Houston [1st Dist.] 1997, no pet.), the First Court of Appeals encountered a situation very similar to the one presented by the record now before us. Charged with aggravated sexual assault, the accused stipulated that the allegations of the indictment itself "constitute the evidence in this case;"[1] by doing so, he agreed the evidence would show (1) he did intentionally and knowingly cause the penetration of the female sexual organ of a child by using his penis and (2) the child was at the time younger than fourteen years of age. *See Scott*, 945 S.W.2d at 348. The *Scott* court found that though the stipulation was certainly no model, it was "the functional equivalent of a stipulation embracing every element of the offense charged" and therefore, was sufficient to support a conviction of aggravated sexual assault. *Id*.[2]

Similarly, in the signed document entitled "*Written Plea Admonishments-Waivers-Stipulations*," appellant stipulated that the elements of the offense alleged in the indictment "constitute the evidence in this case."[3] Therefore, if the indictment embraces the required elements of the offense of

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[1] The appellant entered into the following stipulation:

> I freely and voluntarily plead NOLO CONTENDERE (NO CONTEST) to the indictment . . . by which I have been charged in this cause and agree that the elements of the offense alleged therein constitute the evidence in this case.

Scott, 945 S.W.2d at 348.

[2] As it applies in this case, aggravated sexual assault is defined as occurring when: (1) a person intentionally or knowingly causes the penetration of the anus or female sexual organ of a child by any means, and (2) the victim is younger than fourteen years of age. *See* TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i) & (2)(B) (Vernon Supp. 2000).

[3] Appellant entered into the following stipulation, which is identical to the stipulation in *Scott*:

> I freely and voluntarily plead NOLO CONTENDERE (NO CONTEST) to the indictment ... by which I have been charged in this cause and agree that the elements of the offense alleged therein constitute the evidence in this case.

sexual assault of a child, there is sufficient evidence to support the plea. A person commits sexual assault of a child if the person intentionally or knowingly causes the anus of a child to contact the sexual organ of another person, including the actor. *See* TEX. PEN. CODE ANN. § 22.011(a)(2)(D) (Vernon Supp. 2000). The indictment alleged that on February 6, 1997, appellant did intentionally and knowingly cause penetration of the anus of a child, J. B., by using appellant's penis. We find the indictment embraces every element of the offense charged, and the stipulation is the functional equivalent of a stipulation embracing every element of the offense charged. Thus, the stipulation is sufficient to support a conviction of sexual assault, and the trial court did not abuse its discretion. Accordingly, we overrule appellant's first point of error.

VOLUNTARINESS OF PLEA

In his second point of error, appellant contends his plea was not entered freely and voluntarily. The trial court cannot accept a plea of guilty or a plea of *nolo contendere* "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). We consider the totality of the circumstances in determining the voluntariness of a plea. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (en banc); *Duncan v. State*, 6 S.W.3d 794, 796 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd) (citing *Edwards*, 921 S.W.2d at 479)); *Hinkle v. State*, 934 S.W.2d 146, 149 (Tex. App.—San Antonio 1996, pet. ref'd).

A *prima facie* showing that a plea was knowing and voluntary is made when the accused received the statutory admonishments as to punishment. *See Martinez*, 981 S.W.2d at 197; *Cantu v. State*, 988 S.W.2d 481, 484 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (citing *Harrison v. State*, 688 S.W.2d 497, 499 (Tex. Crim. App. 1985)). The burden then shifts to the accused to show that he entered his plea without understanding the consequences. *See Martinez*, 981 S.W.2d at 197. Once an accused attests that he understands the nature of his plea and that it was voluntary, he has a heavy burden on appeal to prove that his plea was involuntary. *See Duncan*, 6 S.W.3d at 796.

We find a *prima facie* showing that appellant's plea was knowingly and voluntarily made because appellant received the statutory admonishments as to punishment. Additionally, appellant attested in the written plea agreement that he understood the nature of his plea and that it was voluntary. Consequently,

appellant has a heavy burden to prove that his plea was involuntary. In an effort to do so, appellant focuses on the cryptic statements he made during the plea hearing. When the trial court asked appellant, "[h]as anyone forced you to plead guilty?" Appellant responded, "*I'm going to say 'No.' It's all right. I'm just going to say 'No.' I'm sorry*." Defense counsel, following up on this delphic response, specifically questioned appellant about his plea agreement. When asked, "*Are you dissatisfied with a plea bargain of two years to a reduced charge*?," appellant responded, "*I would rather not answer those questions to be honest. I don't feel I'm guilty. I didn't do it. I'm doing this out of - - -*." Appellant did not finish this statement, nor did he elaborate further. Although these statements, taken alone, might suggest that appellant's plea might not have been voluntary, there is no direct evidence to support that notion. A mere suggestion that a plea is involuntary is insufficient. The record must directly show that the plea was involuntary, such as by testimony at a motion for new trial. *See Brunson v. State*, 995 S.W.2d 709, 713 (Tex. App.—San Antonio 1999, no pet.); *see also Manoy v. State*, 7 S.W.3d 771, 778 (Tex. App.—Tyler 1999, no pet.) (finding plea was voluntary where no direct evidence to the contrary). Appellant had ample opportunity to withdraw his plea but chose not to do so. Appellant's attorney and the trial court both questioned appellant as to whether he was satisfied with the plea bargain, specifically making him aware that he could still withdraw his plea and have a jury trial if he so desired. After this follow up by the court and counsel, appellant reaffirmed that he wished to plead *nolo contendere* to the reduced charge. Appellant's comments merely suggested that the plea might be involuntary. Appellant has pointed to no evidence in the record to overcome the heavy burden to prove his plea was involuntary. Viewing the totality of the circumstances, we do not find that appellant has demonstrated that his plea was not voluntary. Therefore, we overrule his second point of error.

CONCLUSION

Having found that neither of appellant's points of error have any merit, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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