Affirmed and Opinion filed July 27, 2000.

In The

Fourteenth Court of Appeals

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NOS. 14-99-01302 - CR
14-99-01303 - CR

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ERIC EMANUEL PEÑA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232d District Court
Harris County, Texas
Trial Court Cause Nos. 733,387 & 733,388

O P I N I O N

Appellant Eric Peña pleaded guilty to aggravated robbery and aggravated assault on a public servant. He was sentenced to seven years incarceration in Texas Department of Criminal Justice, Institutional Division. In two points of error, appellant challenges his conviction alleging his trial counsel was ineffective by inadequately informing him about the consequences of his guilty plea and by failing to call defense witnesses in the punishment stage of trial. We affirm.

Analysis

Both of appellant's points of error concern the alleged ineffectiveness of his trial counsel. In his first point of error, appellant claims his counsel's failure to adequately inform him of the consequences of his guilty plea rendered his plea involuntary. In appellant's second point of error, however, he claims his trial counsel was ineffective for failing to call any witnesses in the punishment phase of his trial.

A. Voluntariness of the Plea

In determining the voluntariness of the plea, we consider the entire record. *See Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975). When a defendant enters his plea upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel, the voluntariness of such plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and if not, (2) whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 56 and 59 (1985) (holding the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to challenges to guilty pleas based on ineffective assistance of counsel); *Ex Parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). Additionally, the burden falls on the appellant to show ineffective assistance of counsel by a preponderance of the evidence. *See Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App.1985); *see also Beyince v. State*, 954 S.W.2d 878,879 (Tex.App.—Houston [14th Dist.] 1997, no pet.). Therefore, the question posed in this case is whether appellant has met his burden and proven that: (1) counsel's alleged failure to inform appellant of the consequences of his plea was outside the range of competence demanded of attorneys in criminal cases; and (2) that but for defense counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial. *See Morrow*, 952 S.W.2d at 536.[1]

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[1] The *Morrow* court applied the preponderance of the evidence standard to determine whether (continued...)

We do not reach the merits of this point because the Texas Court of Criminal Appeals has largely undermined the viability of a direct appeal based on ineffective assistance of counsel, noting "[a] substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

The same is true in the instant case. We have no record of counsel's advice or the rationale, if any, underlying that advice, to guide us in our evaluation of his performance. Thus, we can only speculate as to whether appellant's trial counsel discussed the consequences of a guilty plea with him. This we will not do. *See McCoy v. State*, 996 S.W.2d 896, 900 (Tex. App.—Houston [14 Dist.] 1999, pet ref'd) (citing *Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex. Crim. App.1994) for the proposition that an appellate court is not required to speculate on the trial counsel's actions when confronted with a silent record).

Moreover, in two documents signed by appellant and his lawyer and entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," appellant agreed with the following statement: "I am satisfied that the attorney representing me today in court has properly represented me and I have fully discussed this case with him."Appellant also signed two documents dated August 4, 1997, the same date as the "Confession," entitled "Admonishments" which contain the following statements:

> I understand the charge against me, and I understand the nature of these proceedings. I am entering my guilty plea freely and voluntarily.[2]

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[1] (...continued)
appellant had met his burden of proving his plea was involuntary.

[2] *See Enard v. State*, 764 S.W.2d 574, 575 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (holding appellant's guilty plea was not involuntary because it was based on his attorney's erroneous advice where, among other things, appellant's plea papers reflected he entered his guilty plea voluntarily).

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> I have read and I understand the admonishments set out above. I understand the consequences of my plea.

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> I have freely and voluntarily executed this document in open court with the advice of my attorney.

Thus, because we have no record to support his allegations, and he signed multiple papers attesting to the sufficiency of his attorney's representation and the voluntariness of his plea, we are unpersuaded that appellant's guilty plea was involuntary. Therefore, we overrule appellant's point of error challenging the effectiveness of his trial counsel and the voluntariness of his plea.

B. Punishment Stage

As for appellant's second point of error, we also lack the record to adequately address whether appellant was effectively represented during the punishment phase of trial. Without repeating the analysis above, it suffices to say that appellant has not brought forward a record on his direct appeal that rebuts the strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance. *See Thompson*, 9 S.W.3d 808, 813 (citing *Strickland*, 466 U.S. at 668). Because he has not met his burden, we overrule appellant's second point of error.

Accordingly, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 27, 2000.

Panel consists of Justices Amidei, Anderson, and Frost.

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