Affirmed and Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00815-CR

HOWARD KIM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 836,119

O P I N I O N

Howard Kim appeals from an order deferring adjudication of the offense of indecency with a child, placing appellant on 5 years of community supervision, imposing certain conditions of probation, including 180 days in the Harris County Jail, and assessing a fine of $10,000.00. Appellant raises one point of error, claiming the trial court erred in refusing to allow appellant to withdraw his plea of guilty. We affirm.

Appellant entered into a plea bargain for 5 years of deferred adjudication and a $500 fine. Although the court sentenced appellant to 5 years deferred adjudication consistent with the plea bargain, the trial judge advised appellant that the fine would be

set by the judge. According to affidavits filed in connection with appellant's motion for new trial and testimony from the hearing on the motion, appellant was apprised that the court was not going to follow the plea bargain as to the fine and, after conferring with counsel, appellant indicated he wished to go forward with the plea of guilty. The court imposed a fine of $10,000.00 and, as part of the conditions of probation, the court ordered appellant confined for 180 days. After the trial court entered the deferred adjudication community service order, appellant filed a motion for new trial, complaining that he was denied effective assistance of counsel because counsel did not advise appellant that the court might impose a $10,000.00 fine or impose 180 days of jail confinement as a condition of probation. A hearing was held on this motion and the trial court orally overruled the motion.

Appellant first argues that because the court did not follow the plea bargain regarding sentencing, appellant should not be held to his waiver of the right to appeal and that the limitations of Rule 25.2(b)(3) should not apply. Rule 25.2(b)(3) provides that if the appeal is from a judgment rendered on the defendant's plea of guilty or nolo contendere, and the punishment assessed did not exceed that recommended by the prosecutor and agreed to by the defendant, the notice of appeal must specify that the appeal is for a jurisdictional defect, that the substance of appeal was raised by written motion and ruled on before trial, or that the trial court granted permission to appeal. TEX. R. APP. P. 25.2(b)(3). Appellant filed a general notice of appeal not complying with Rule 25.2(b)(3).

We agree with appellant that he was not required to comply with the requirements of Rule 25.2(b)(3). The court assessed punishment exceeding that recommended by the prosecutor and agreed to by the defendant. Thus, appellant's general notice of appeal is sufficient.

Appellant's sole issue on appeal is that the trial court erred in refusing to allow appellant to withdraw his plea. Appellant contends the record does not show that the court

informed appellant about the rejection of the plea bargain fine amount or that the court asked if appellant wanted to withdraw his plea. No record was taken at the plea and sentencing hearing and thus, there is no record supporting appellant's contention. There is a record of the hearing held on appellant's motion for new trial. During that hearing, the prosecutor testified that, at the plea and sentencing hearing, appellant was advised by the trial judge that he would be setting the fine, asked appellant if he wished to proceed further, and that appellant agreed that he wished to go forward with his plea.

In response to appellant's argument, the State claims appellant has not preserved the issue for appeal. Alternatively, the State claims the lack of a record of the plea hearing precludes a finding that appellant was not offered the opportunity to withdraw his plea and that there is no evidence appellant ever asked to withdraw his plea. We turn first to the State's preservation argument.

Appellant contends that he preserved this issue by filing a motion for new trial. When an appellant has no opportunity to object to the trial court's action until after that action has taken place, an objection raised in a motion for new trial sufficiently preserves the error for review. *See Issa v. State*, 826 S.W.2d 159, 161 (Tex. Crim. App. 1992). Appellant claims that his motion for new trial was functionally a motion to withdraw his plea and that he was not required to use any specific words as long as the court was aware of his complaint.

After reviewing the record, we do not find the trial court was apprised of the complaint made on appeal, either in the motion for new trial or during the hearing on the motion. In his motion for new trial, appellant challenged the voluntariness of his plea by arguing that his counsel at the plea hearing was ineffective by failing to advise appellant the court could impose jail time as a condition of probation or impose a fine greater than that agreed to in the plea bargain. Appellant also claimed his counsel was ineffective for failing to discover that the State did not have a witness to testify, a fact which would have led appellant to change his plea. Thus, the issues raised in the motion for new trial

challenged only the actions of appellant's counsel.

During the hearing on the motion, appellant's counsel referred the court to the affidavits for the ineffective assistance complaints concerning the 180 days in jail and the increased fine. As to the lack of a witness, appellant's counsel argued that the documentation available to counsel at the plea hearing indicated the complainant was not available. Thus, the arguments made at the hearing on the motion for new trial by appellant's counsel only addressed the complaints of ineffective assistance of counsel. Nothing in the motion or argument of appellant's counsel indicated to the trial court that appellant was objecting to the court's refusal to allow appellant to withdraw his plea once the trial judge indicated he was not going to follow the sentencing recommendation of a $500 fine. Where the trial objection does not comport with the argument made on appeal, appellant has failed to preserve error. *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996); *Satterwhite v. State*, 858 S.W.2d 412, 430 (Tex. (Tex. Crim. App. 1993).

In sum, appellant's motion for new trial could be viewed as a motion to withdraw his plea, but the entire focus of the motion for new trial was ineffective assistance of counsel, not failure of the trial court to allow appellant to withdraw his plea. These are two separate and distinct issues that must be raised separately. Appellant raised one, but did not raise the other. By failing to raise in the trial court the issue of the failure of the trial court to allow withdrawal of the plea, appellant has waived his right to complain about this issue on appeal.

We affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 9, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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